1288

NAGPUR HIGH COURT

1939

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33	1938 N L J	375	107	1939 N L J	13		183 I C	256	260	1939 N L J	391
	180 I C	742		181 I C	616	192	1939 N L J	161		ILR 1939 N	624
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	180 I C	532	121	1939 N L J	140		183 I C	316	269	1939 N L J	504
47	1938 N L J	476		181 I C	915	205	1939 N L J	249	274	1939 N L J	421
	180 I C	792	122	1939 N L J	63		183 I C	465		185 I C	210
50	1938 N L J	327		ILR 1939 N	124		ILR 1939 N	564	277	1939 N L J	472
FB	ILR 1938 N	558		182 I C	970	207	1939 N L J	267		ILR 1939 N	697
	180 I C	271	128	1939 N L J	202		ILR 1939 N	540		185 I C	418
57	1939 N L J	44		183 I C	97		183 I C	172	279	1939 N L J	475
FB	179 I C	933	130	1939 N L J	87	209	1939 N L J	260		186 I C	21
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	180 I C	204		184 I C	719	213	1939 N L J	351		ILR 1939 N	654
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	171 I C	121		181 I C	895		184 I C	102	295	1939 N L J	442
	ILR 1938 N	21	141	1939 N L J	124	215	1939 N L J	369		184 I C	274
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	180 I C	118	145	1939 N L J	153	217	1939 N L J	366	301	1939 N L J	427
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	1938 N L J	448	147	1939 N L J	82		ILR 1939 N	690		185 I C	780
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	180 I C	443	149	1939 N L J	198	221	1939 N L J	329		185 I C	727
	ILR 1939 N	160		183 I C	176		ILR 1939 N	510	309	1939 N L J	469
81	1939 N L J	40	150	ILR 1939 N	185		183 I C	492		184 I C	258
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1	1938	N	335	185	1939	N	150	312	1938	N	499	432	1938	N	377	559	1939	N	245
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59	1939	"	83	206	"	"	415	330	"	"	466	457	"	"	87	574	1939	"	213
64	"	"	57	216	"	"	455	338	"	"	487	460	"	"	106	580	"	"	197
79	1938	"	288	221	"	"	314	347	"	"	77	463	1937	"	226	592	1938	"	65
81	"	"	497	226	"	"	365	350	"	"	326	465	1938	"	7	600	"	"	512
85	"	"	76	229	"	"	461	355	1939	"	3	478	1939	"	103	601	1936	"	260
88	"	"	423	235	1939	"	156	357	"	"	179	484	1938	"	247	607	1939	"	233
104	"	"	273	241	1938	"	235	367	1938	"	191	488	1939	"	95	624	"	"	260
109	1939	"	13	246	"	"	459	371	"	"	75	492	"	"	101	631	1938	"	126
116	1938	"	106	250	1939	"	186	373	"	"	183	497	1937	"	269	632	1937	"	379
119	"	"	502	261	1938	"	237	377	"	"	454	498	1939	"	177	636	1939	"	210
124	1939	"	122	266	1937	"	143	380	1937	"	396	503	"	"	227	641	1937	"	334
137	1 38	"	266	274	"	"	201	383	1938	"	97	510	"	"	221	644	1939	"	263
139	"	"	529	276	1938	"	259	393	"	"	334	515	"	"	242	648	1938	"	186
143	1939	"	44	285	"	"	14	396	"	"	182	521	1938	"	193	652	"	"	253
157	1938	"	272	290	1937	"	211	398	"	"	281	526	"	"	298	654	1939	"	282
158	"	"	448	293	1938	"	143	403	1937	"	160	530	"	"	408	665	"	"	305
160	1939	"	78	297	1937	"	188	405	1938	"	465	534	"	"	444	674	1938	"	251
165	"	"	147	300	1938	"	149	408	"	"	188	536	"	"	148	679	"	"	269
170	1938	"	420	306	1939	"	42	413	"	"	173	540	1939	"	207	686	"	"	283
175	"	"	413	310	1937	"	196	419	1937	"	293	548	"	"	183	690	1939	"	217
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1	1939	N	97	140	1939	N	121	256	1939	N	224	373	1939	N	263	512	1940	N	74
7	"	"	87	142	"	"	136	257	"	"	267	375	"	"	233	514	"	"	104
9	"	"	83	150	1938	"	413	260	"	"	209	387	"	"	245	520	"	"	13
13	"	"	107	153	1939	"	145	262	"	"	171	391	"	"	260	525	"	"	8
18	"	"	89	157	"	"	110	265	"	"	195	409	"	"	249	534	"	"	79
21	"	"	23	160	"	"	120	267	"	"	207	421	"	"	274	535	"	"	47
27	"	"	65	161	"	"	192	270	"	"	183	427	"	"	301	537	"	"	75
33	"	"	20	173	"	"	150	275	"	"	159	429	"	"	287	539	"	"	1
40	"	"	81	184	"	"	154	283	"	"	282	442	"	"	295	544	"	"	84
44	"	"	57	186	"	"	203	297	"	"	197	451	1940	"	42	548	"	"	108
58	"	"	4	190	"	"	177	305	"	"	225	455	1939	"	281	551	"	"	46
63	"	"	122	193	"	"	101	308	"	"	166	458	1940	"	38	553	"	"	88
73	"	"	17	196	"	"	175	315	"	"	173	461	"	"	110	562	"	"	72
76	"	"	140	198	"	"	149	319	"	"	258	465	"	"	4	563	"	"	65
80	"	"	31	202	"	"	128	324	"	"	265	469	1939	"	309	564	"	"	117
82	"	"	147	205	"	"	156	327	"	"	247	472	"	"	277	567	"	"	81
87	"	"	130	210	"	"	226	329	"	"	221	475	"	"	279	573	"	"	70
90	"	"	106	211	"	"	191	333	"	"	242	477	"	"	302	577	"	"	99
96	"	"	103	215	"	"	232	338	"	"	256	483	1940	"	45	583	"	"	78
101	"	"	95	216	1940	"	113	341	"	"	220	486	1939	"	312	585	"	"	66
109	"	"	113	218	1939	"	227	344	"	"	241	487	"	"	305	591	"	"	94
118	"	"	19	228	"	"	186	347	"	"	230	493	1940	"	73	594	"	"	80
121	"	"	118	238	"	"	179	351	"	"	213	496	"	"	7	596	"	"	87
124	"	"	141	246	"	"	193	366	"	"	217	497	"	"	77	601	"	"	97
129	"	"	132	249	"	"	205	369	"	"	215	500	"	"	92	604	"	"	91
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THE

ALL INDIA REPORTER

1939

Nagpur High Court

A. I. R. 1939 Nagpur 1

VIVIAN BOSE J.

Trivenibai w/o Balkrishna — Plaintiff — Appellant.

v.

Deorao Govind Deshpande — Defendant — Respondent.

Second Appeal No. 207 of 1936, Decided on 17th August 1938, from appellate decree of Addl. District Judge, Chanda, D/- 9th January 1936.

(a) Hindu Law — Widow — Maintenance— Agreement executed in favour of widow agreeing to pay her certain amount annually as maintenance — Charge created on portion of family property in respect of maintenance— Widow obtaining decree for arrears of maintenance and getting property sold in execution —Property not sold subject to charge—Charge for subsequent years is extinguished, so far as property sold is concerned.

Where the members of a joint Hindu family execute an agreement in favour of a Hindu widow entitled to maintenance from the family property, agreeing to pay to her certain amount every year for her maintenance, at the same time creating charge on a portion of the family property in respect of the maintenance, and the widow after arrears of maintenance have accrued, obtains a decree and brings a portion of the property which has been charged to sale in execution of the decree and the property is not sold subject to the charge, the charge for the subsequent years is extinguished so far as the property sold is concerned by reason of the execution sale, and the auction purchaser is not liable to pay out of the property in his hands the maintenance allowance subsequent to the period covered by the decree. [P 3 C 2]

(b) Hindu Law — Widow — Maintenance — Nature of widow's right to maintenance explained—Ways in which her right can be satisfied enumerated.

There are many ways in which a right to maintenance to which a Hindu widow is entitled and which is charged on the family property may be satisfied. The widow can, if she so chooses, live with her husband's family and be supported by them, and in that case her rights, so far as the property is concerned, are no higher than those given by S. 39, T. P. Act. Her right is not to the property itself but to the profits arising out of it. Another way in which the family can discharge its obligations towards her is by assigning a portion of the property to her in lieu of her maintenance. Here again her rights are to look to the profits and not to the property, but she can, if she so chooses, alienate her right to the enjoyment and possession of that property or any portion of it for the period of her life, and if she chooses to do so, she cannot turn round afterwards and demand that she be maintained out of it. It is also open to the widow to agree upon a definite sum for her maintenance and agree that it shall be a charge upon a definite and specified portion of the family property. The charge holder has two remedies, open to her. She can, if she so chooses, ask for a receiver or she can bring the property or portion of it to sale on obtaining a decree. When the decree-holder with a choice of remedies deliberately selects the one which involves sale of a portion of the property, she must be taken to have given up her right to the charge as she has a right to do, unless she expressly reserves it at the sale : *A I R 1932 All 662 ; A I R 1925 P C 176 and 26 Cal 341, Ref.* [P 2 C 2; P 3 C 1, 2]

T. J. Kedar and R. G. Rau — *for Appellant.*

R. N. Padhye — *for Respondent.*

Judgment. — On 23rd January 1923 defendants 1 and 2 executed an agreement, Ex. P-10, in favour of the plaintiff-appellant agreeing to pay her during her life-time Rs. 100 a year for her maintenance, and at the same time a charge was created on the family property mentioned in the deed, namely a malguzari share and four fields, in the following words,

and the incumbrance of your maintenance shall remain on the above property. In case I do not pay you the amount, you may recover the same from the above property.

Arrears accrued and so the plaintiff sued the executants of the deed in Civil Suit

No. 245 of 1930 and obtained a decree on 9th December 1930. The plaint in that suit is Ex. 3, D-2 and the decree Ex. P-4. The decree directed that in default of payment of Rs. 219 and Rs. 29-12-0 as costs, certain property (which I am given to understand by counsel on both sides is the same as the property covered by Ex. P-10, the numbers of the fields having been changed in the meanwhile) be sold. The money was not paid and so, a part of the property charged, namely the malguzari share, (but not the fields), was brought to sale and purchased by defendant 3. Ex. 3, D-4 dated 31st October 1933 is the sale certificate.

The plaintiff's maintenance again fell into arrears and so the present suit was instituted for the arrears due for the three years from 5th May 1930 to 5th May 1933. This time defendant 3 was also joined because, according to the plaintiff, she still has a charge upon the property purchased by him on 31st October 1933, and the question which I have to decide is whether the charge for the subsequent years was extinguished so far as the malguzari share is concerned by reason of defendant 3's purchase or not. The first Court held that it was not, while the lower Appellate Court holds that it was. The plaintiff appeals and defendant 3 is the only respondent before me.

There can be no doubt that in the ordinary way a charge upon property is extinguished by sale of that property in satisfaction of a claim giving rise to the charge. But the learned counsel for the plaintiff-appellant contends that the sale in this case was not in satisfaction of the whole of the right which gave rise to the charge but of a portion only. He argued that the right conferred by Ex. P-10 was to receive Rs. 100 a year for maintenance during the whole of the plaintiff's life. The right dealt with by the decree related only to a small fraction of this, namely to the arrears due for two years. Therefore, if any portion of the charge was extinguished by the sale, it was only that portion of it which related to those two years; the remainder of the charge was left intact. Consequently, since defendant 3 purchased with his eyes open—even if he did not know what the suit was about, Ex. P-10 is a registered document sufficient to fasten him with notice—the charge is still there.

I think this is pressing the doctrine too far. Unfortunately, I have not been able to find any case in point and so must fall back on first principles. The charge created by Ex. P-10 was in respect of a claim which a Hindu widow (the plaintiff) was making for her maintenance. Now there are many ways in which such a right to maintenance can be satisfied. The widow can, if she so chooses, live with her husband's family and be supported by them and in that case her rights, so far as the property is concerned, are no higher than those given by S. 39, T. P. Act. It will be observed that the right contemplated there is the right to receive maintenance "from the profits of immovable property"; and this of course is all that the Hindu law contemplates. Her right is not to the property itself but to the profits which arise out of it.

Another way in which the family can discharge its obligations towards her is by assigning a portion of the property to her in lieu of her maintenance. Here again her rights are to look to the profits and not to the property, but she can, if she so chooses, alienate her right to the enjoyment and possession of that property or any portion of it for the period of her life, and if she chooses to do so, she cannot turn round afterwards and demand that she be maintained out of it. Her right to make an alienation of this kind has been upheld in 54 All 366;[1] and even in 47 All 385[2] where the right was conferred expressly "without power of transfer" their Lordships of the Privy Council allowed a receiver to be appointed. Therefore it is clear that she has this limited right of alienation, and if she has that when the property is in her own hands, she equally has the right to consent to an alienation by some male member of the family when it is not.

If then these two points are conceded, I cannot see how the position can alter when the parties concerned adopt still another course which is also open to them, namely to agree upon a definite sum for maintenance and agree that it shall be a charge upon a definite and specified portion of the family property. The basic right to maintenance has not in any way altered, nor yet the idea that the widow is to look to the profits arising out of the property and not to the property itself. All that has

1. Dhup Nath v. Ram Charitra, (1932) 19 A I R All 662=143 I C 65=54 All 366.
2. Rajendra Narain Singh v. Mt. Sundar Bibi, (1925) 12 A I R P C 176=87 I C 295=47 All 385=52 I A 262 (P C).

happened is that, that which was vague and indefinite before has now become concrete: the amount has been specified and also the property to which alone she is now entitled to look. It is a position mid-way between the other two.

Now let us see how the widow can enforce these rights. As I have said the primary idea in these cases is that the widow is to look to the profits arising out of the property and not to the property itself. I have already pointed out that in every case where the widow has a right to maintenance, she has a floating charge over the whole of the property under Sec. 39, T. P. Act, and that if she chooses to agree to or sanction a voluntary alienation of some portion of the profits, whether for her maintenance or for any other reason, the charge disappears. It would, in my opinion, equally disappear if instead of agreeing to a voluntary alienation she brought the property to sale in execution of a decree for arrears of maintenance. How then can the position differ simply because the floating charge has now assumed definite shape both as regards the amount and as regards the property against which it is to be enforced?

The charge holder has two remedies in all such cases. She can, if she so chooses, ask for a receiver. This was done in 26 Cal 441[3] under the terms of the charge decree itself and in 47 All 385,[2] which I have already cited, their Lordships of the Privy Council allowed the creditors of a person in possesion in lieu of maintenance and without powers of alienation, even during his lifetime, to obtain a receiver. It follows that when the charge decree does not itself make provision for the appointment of a receiver in default of punctual payment, the Court can sanction it in execution at a later stage. This is the proper course when the widow wants to maintain her security intact and is content with such profits as the property may yield.

But of course she is not bound down to that. She can also bring the property or a portion of it to sale as she did in this case. But if she does that, then the principles which I have outlined above must apply. Any other view would make a sale impossible, or at any rate very difficult. Here we have a malguzari share and four fields made the subject-matter of a charge to secure a sum of Rs. 100 a year. Presumably they together were considered sufficient to yield an income of about Rs. 100 a year. We find that only a small portion of this property is sold, and the unfortunate purchaser is now expected to supply the entire Rs. 100 a year out of this fraction of the whole. Who would buy in such circumstances? It would be unjust in the extreme to interpret the law in this way, unless of course the property was expressly sold subject to the charge, which is not the case here; all that the plaintiff contends is that the charge is implied. It would be unjust not only to the purchaser but to future decree-holders as well.

On the other hand, when a decree-holder with a choice of remedies deliberately selects the one which involves sale of a portion of the property, I can see no reason in principle why the usual rules should not prevail. She must be taken in such cases to have given up her right to the charge, as she has a right to do, unless she expressly reserves it at the sale. I therefore uphold the decree of the lower Appellate Court and dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

3. Hemangines Dassee v. Kumode Chunder Dass, (1899) 26 Cal 441=3 C W N 189.

A. I. R. 1939 Nagpur 3

NIYOGI J.

Shaligram Shriram Dangra — Decree-holder — Appellant.

v.

Sheopratap Wallabhadas and another — Judgment-debtors — Respondents.

Misc. Appeal No. 4 of 1936, Decided on 26th August 1938, from order of Dist. Judge, Akola, D/- 26th November 1935.

(a) Civil P. C. (1908), S. 60—Motor tractor is not "implement of husbandry," more so when not used for agriculture but for driving flour-mill.

A motor-tractor cannot be said to be an "implement of husbandry" within the meaning of S. 60, more particularly so when at the time of attachment it is not being used for agriculture but for driving a flour-mill. It is not therefore exempt from attachment. It is not indispensable for agriculture and therefore it cannot be regarded as being essential to it. [P 4 C 1, 2]

(b) Civil P. C. (1908), S. 60—Term "implement"—Meaning of.

It would be erroneous to extend the meaning of the word "implement" occurring in S. 60, beyond what it was understood to signify in 1908. [P 4 C 2]

W. B. Pendharkar — *for Appellant.*

V. K. Rajwade — *for Respondent 1.*

Order. — In execution of a decree in Civil Suit No. 80 of 1932 the appellant attached a motor-tractor belonging to the respondents (judgment-debtors). At the time of attachment it was not being used for agriculture but for driving a flour-mill. Both the Courts below have agreed in the view that the motor-tractor was an implement of husbandry and therefore exempt from attachment. I have taken some time to consider the question and I find it difficult to persuade myself that a motor-tractor can be classed with the implements of husbandry. The motor-tractor is an internal combustion machine which performs the work of bullocks and is used for its power. It is not indispensable for agriculture and therefore it cannot be regarded as being essential to it. The expression "implements of husbandry' occurring in S. 60, Civil P. C., read with reference to its context appears to negative the view taken by the Courts below. That expression is preceded by "tools of artisans" and followed by "cattle." That indicates a class of husbandmen who are of the same status as artisans and who perform their agricultural operations with the help of animate beings and not inanimate machinery. The "implements" of the husbandman correspond to the "tools" of artisans.

Artisan is a person who is trained to manual dexterity in some mechanic art or trade. He is a handicraftsman or a mechanic. Tools mean such instruments as hammer, saw, plane, file and the like used in the manual arts to facilitate mechanical operations. Implement also means an instrument used in work especially manual work (*see* Funk and Wagnalls New Standard Dictionary in 4 volumes). Implements would mean such instruments as the agriculturist handles in the course of his agricultural work or work connected with agriculture. Driving a motor-tractor cannot be said to be manual work and it cannot therefore be regarded as an implement. S. 60, Civil P. C., speaks of implements and cattle which term applies to bullocks as well. It would be absurd to say that bullocks are implements. Then how can a motor-tractor which is a substitute for bullocks be regarded as an implement? The Civil Procedure Code was enacted in 1908 when the automobile was just making its appearance in big cities in India and the possibilities of its penetrating into the countryside for agricultural purposes was presumably not contemplated by the Legislature. It would therefore be erroneous to extend the meaning of the word implement occurring in S. 60 beyond what it was understood to signify in 1908. In any case the motor-tractor, as has been found by the lower Appellate Court, was, at the time it was attached, being used for driving a flour-mill, i. e. for an industrial purpose. The evidence shows that it had been so used for at least two years. It could not then be treated as an agricultural implement. The order releasing the motor-tractor from attachment is set aside. The appeal succeeds with costs in all Courts. Counsel's fee Rs. 20.

R.M./R.K. *Appeal allowed.*

A. I. R. 1939 Nagpur 4

VIVIAN BOSE J.

Amergir Ramgir Gosai — Appellant.

v.

Rambhajan Ram Sewak — Respondent.

Second Appeal No. 551 of 1935, Decided on 3rd December 1937, from appellate decree of Addl. Dist. Judge, Bilaspur, D/- 20th August 1935.

Landlord and Tenant—Occupancy holding—Joint tenants—One joint tenant dying without any heirs—No division of tenancy by metes and bounds — Lambardar is not entitled to sue for joint possession of undivided half share of deceased tenant.

Certain fields originally formed an occupancy holding of two persons. One of them died without leaving any person who could be his heir under the Tenancy Act. The lambardar of the village in which the fields were situated sued for joint possession of the deceased tenant's undivided half share, as the ultimate reversioner under the law. There had never been any division of tenancy by metes and bounds :

Held that the lambardar was not entitled to joint possession of the undivided half share of the deceased tenant until the rights of both the tenants had determined. That the law applicable was the same whether the two tenants were originally let into possession at one and the same time or whether they came to acquire their rights one after the other : *A I R 1934 Nag 237 and A I R 1927 Nag 351, Ref.* [P 5 C 1]

V. V. Kelkar — *for Appellant.*

R. N. Padhye — *for Respondent.*

Judgment.—The plaintiff who is a lambardar of the village in which the property in suit is situate sues for joint possession of an undivided half share in the plaint fields. It is admitted that these fields originally formed an occupancy holding of two persons

Gurudin and the defendant Rambhajan. Gurudin died in April 1934 without leaving any person who could be his heir under the Tenancy Act. Therefore the plaintiff sues for joint possession of Gurudin's undivided half share as the ultimate reversioner under the law. It is admitted that there has never been any division of the tenancy by metes and bounds. There is a dispute about the manner in which these tenancy rights are acquired. The defendant's case is that they were jointly acquired, while the plaintiff states that Gurudin acquired the entire holding first and that Rambhajan was admitted as a co-sharer on a later date. I cannot see that this makes any difference to the question now at issue. The new tenant could only have been introduced with the consent of all concerned. That means that there was a fresh contract in place of the old one. The old tenancy was determined by consent of the parties and a new letting of the two together took its place. The law applicable will therefore be the same whether the two were originally let into possession at one and the same time or whether they came to acquire their rights one after the other as D. W. 1 indicates. It is argued that S. 11, Tenancy Act, shows that there can be no survivorship and that under S. 13 a landlord is the ultimate reversioner. Therefore, it is stated that Gurudin's undivided half share could not pass to his co-tenant Rambhajan and that the landlord is entitled to possession, but this, in my opinion, misconceives the real position.

When an owner of property carves a lesser interest, such as a tenancy, out of his rights, the reversion of course remains in him, but when the reversion falls in, there is no transfer of title from the tenant to himself. He has retained to himself his title intact all the time but his right to possession and to the exercise of certain other acts of ownership remains in abeyance until the lesser right which he has created in the land is determined. If then he chooses to place two persons on the land giving each a right to uninterrupted possession of the whole upon their paying him jointly the whole rent his reversion cannot fall in until the rights of both have determined. It is not a question of survivorship as ordinarily understood, and is certainly not a question of the landlord succeeding to the deceased tenant as his heir. The rule, as I have said, is not one of succession or of a transfer of title, but that the reversion falls in when the lesser interests carved out of the estate have determined. It is on this principle that one co-tenant is not allowed to surrender his undivided share in a holding which has not been divided by metes and bounds : 31 N L R 62.[1] Any other view would bring about this absurd and anomalous legal position. A man who is the landlord of the whole would be entitled to demand the entire and undivided rent of the whole holding jointly from his own tenant and himself, and in the event of it being not paid be entitled to evict his co-tenant and himself. He would be his own tenant—a position which is legally untenable. This is also the view in A I R 1927 Nag 351,[2] a case which is not unlike the present except that it is the other way round. The view taken by the Courts below is therefore correct and the appeal is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

1. Annasa v. Shankar Balaji, (1934) 21 A I R Nag 237=151 I C 505=31 N L R 62 (S B).
2. Nago Rao v. Mt. Alookhi, (1927) 14 A I R Nag 351=104 I C 584.

A. I. R. 1939 Nagpur 5

STONE C. J. AND CLARKE J.

Lakhandhar Bholadhar and others — Defendants — Appellants.

v.

Harlalpuri Shankerpuri Gosai and others — Plaintiffs — Respondents.

Letters Patent Appeal No. 3 of 1936, Decided on 14th September 1938, from order of Vivian Bose J., *Reported in A I R 1937 Nagpur 163.*

C. P. Land Revenue Code (2 of 1917), Sec. 220 (n), (o) — *A* and *R* cosharers in village assigned shares in imperfect partition—*A* alleging that partition was subsequently modified by arbitration—Parties in dispute as to basis on which perfect partition should proceed — Revenue member finally deciding that it was to be made in accordance with imperfect partition as modified by subsequent arbitration—*R* filing suit for declaration that shares in village were as they were fixed at imperfect partition and not as modified by arbitration — Held that suit was maintainable — That jurisdiction of Civil Court was not barred for purpose of declaring title of parties.

A and *R* were cosharers in a village. In 1913-1914 there was an imperfect partition of the village, the parties being assigned certain shares. *A* alleged that the partition was subsequently modified by arbitration in 1917. When, subsequently, at the time of settlement proceedings, the

perfect partition of the village came before the Settlement Officer for consideration, the parties were in dispute as to the basis on which the partition should proceed, *R* saying that it should be made in accordance with the imperfect partition of 1913 while *A* contended that it should be in accordance with the 1917 award. The Revenue member finally ordered that the perfect partition should be made in accordance with the imperfect partition of 1913 as modified by the award. *R* thereupon filed a suit for a declaration that the shares in the village were as they were fixed at the time of the imperfect partition and not as modified by the award :

Held that the suit was maintainable ; whether the decision of the Revenue Court was intra vires or ultra vires, the jurisdiction of the Civil Court was not barred for the purpose of declaring the titles of the parties, although such Court has no power to interfere with the partition made by the Revenue Officer. [P 7 C 2]

M. R. Bobde — *for Appellants.*

D. T. Mangalmurti and N. T. Mangalmurti — *for Respondents.*

Judgment.—The parties to this appeal are cosharers in the village of Pandhi in the Bilaspur District. In 1913-14 there was an imperfect partition of the village, the parties being assigned certain shares. The appellants-defendants alleged that this partition was subsequently modified by arbitration in 1917. When thereafter settlement proceedings commenced in Bilaspur, the perfect partition of this village came before the Settlement Officer for consideration and the parties were in dispute as to the basis on which the partition should proceed. The respondents-plaintiffs said that the partition should be made in accordance with the imperfect partition of 1913 while the appellants-defendants said that it should be made in accordance with the 1917 award. The contest was carried up to the Revenue Member who ordered that the perfect partition should be made in accordance with the imperfect partition of 1913 as modified by the award. The plaintiffs have now filed this suit for a declaration that the shares in the village are as they were fixed at the time of the imperfect partition and not as modified by the award. The question for determination before us is whether such a suit lies in view of the provisions of S. 220 (n) and (o), Land Revenue Act.

There is no doubt that if the Revenue Courts have authority to decide the question whether the imperfect partition without the award or imperfect partition cum the award was to be the basis of the perfect partition, then the Civil Courts are barred by Section 220 from entertaining the same question. Therefore the question resolves itself into one as to whether the Revenue Courts have such authority. It is a self-evident fact that the Revenue Court have decided that question and have made the partition in accordance with that decision, and, as pointed out by Bose J., the Civil Courts have no power to interfere with the partition. But if the determination of that question was not within the province of the Revenue Courts, then S. 220 will not operate to bar the jurisdiction of the Civil Courts to decide it. What the effect of such a decision would be is another matter supposing that plaintiffs were successful in the suit. The Revenue Courts are under no obligation to alter the partition which they have made as a result of anything which the Civil Courts might decide on this question, and even if successful the plaintiffs might have nothing more than a paper decree. They say however that they are willing to take their chance as to whether the decree will be of any material value to them or not. S. 220, Land Revenue Act, lays down, 'omitting the words which are irrelevant for the purposes of the case before us,

> except as otherwise provided in this Act or in any other enactment for the time being in force, no Civil Court shall entertain any suit instituted to obtain a decision or an order on any matter which any Revenue Officer is by this Act empowered to determine, decide or dispose of and in particular and without prejudice to the generality of this provision no Civil Court shall exercise jurisdiction over any of the following matters: (n) the partition or union of mahals or pattis ; and (o) the distribution of the land by partition.

The Chapter of the Act which deals with partition is Chap. 11. Sec. 161 begins by explaining partition to be of two kinds: perfect and imperfect. Ss. 162 to 183 deal with imperfect partition, with which we are not at present concerned. Although there are detailed provisions occupying 22 Sections of the Act as to how imperfect partition is to be carried out, there are only three Sections, 184 to 186, devoted to perfect partition, and of these only one, S. 185, is of importance to us here. From S. 184 we find that an application for perfect partition is to show that the share which it is desired to form into a separate mahal is already held in severalty, except such portion of it as may be impartible. S. 185 then goes on to provide that, subject to rules made under S. 227, the Settlement Officer may, after making with the consent of the

parties such modifications in the pattis as he thinks necessary, declare the pattis to be separate mahals, provided that no patti shall be declared to be a separate mahal until the proprietors of other pattis in the mahal have been given an opportunity of objecting. The rules framed under S. 227 commence with the form in which an application for partition is to be made and there is a foot-note to the effect that:

It is immaterial whether the shares are held in severalty as the result of an imperfect partition made by the Deputy Commissioner or by a private arrangement among the co-sharers.

Rule 3 then provides for summonses to issue to the other co-sharers and it is then laid down that the Settlement Officer is to record their objections if any. Nothing is said as to what action he is to take after he has recorded them. Rule 5 then provides that if the Settlement Officer considers it expedient with the consent of the parties to make any modifications in the existing pattis he shall record the modifications he makes in a certain form. This rule is evidently the result of the clause in Sec. 185, "after making with the consent of the parties such modifications in the pattis as he thinks necessary." Then Section 186 says what is to happen if the Settlement Officer decided to unite mahals or pattis instead of separating them, and it is significant that in that case he is specially given power to consider the objections if any of the proprietor. Thus when we consider the elaborate provisions that are provided for settling disputes at the time of an imperfect partition and even when the Settlement Officer decides to unite the mahals or pattis instead of separating them, the absence of any provision for settling disputes at the time of the division of the mahals or pattis in a perfect partition must be intentional. This is especially so when we consider the circumstances of a settlement. The Settlement Officer at the time of a settlement has to record the particulars of all the villages in the area under settlement. If it were necessary for him to go into and decide the disputes in each village at such a time and in particular about the perfect partition of the village or if he had to wait until those disputes had been resolved in the Civil Court, the settlement would be almost interminable. For these practical reasons therefore it appears that the Settlement Officer has not been given the power to decide disputes which arise at the time of a perfect partition.

It is true that in the present instance he has, or rather the ultimate Revenue Court of Appeal has, decided the dispute and has made the partition in accordance with the manner in which that decision has been given. It is not for us to say whether in doing so the Revenue Court has acted ultra vires or not. We agree however with the learned Judge in his view that whether the decision of the Revenue Court is intra vires or ultra vires the Civil Court's jurisdiction has not been barred for the purpose of declaring the titles of the parties. We also agree with the learned Judge that the other provisions of the Land Revenue Act point to the same conclusion. Thus under S. 69 at the time of settlement the Settlement Officer has been directed to ascertain and determine the extent of all land held as khudkast and record it as such. The second declaration which the plaintiffs seek in the present case challenges the Settlement Officer's decision on this point, and whereas the Settlement Officer has been empowered by S. 72 summarily to decide the question, S. 80 preserves the right of the aggrieved party to go to the Civil Court and have the question decided definitely. We are therefore in agreement with the learned Judge in the view he has taken of the case, and the result is that the appeal must be dismissed. Costs of the Letters Patent appeal will be paid by the appellants; other costs will abide the result as already ordered.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1939 Nagpur 7

VIVIAN BOSE J.

Meherban Lalli Pinjara — Plaintiff— Appellant.

v.

Yusufkhan Kallu Pinjara — Defendant — Respondent.

Second Appeal No. 360 of 1936, Decided on 13th September 1938, from appellate decree of Second Additional Dist. Judge, Hoshangabad, D/- 30th April 1936.

(a) Adverse possession—Burden of proof—Suit for possession of property—Plaintiff's title as well as defendant's possession for more than 12 years before suit established—Plaintiff's plea that he has let in defendant as tenant not established—Defendant pleading adverse possession—Burden of proof is on him—If he does not discharge it, plaintiff is entitled to decree.

Where in a suit for possession of property, the title of the plaintiff, as well as the possession of

the defendant for more than 12 years before suit are established and the plaintiff pleads that he has let the defendant in possession as a tenant but that has not been proved and the defendant pleads adverse possession, the burden of proof, in such a case, is on the defendant, and if he does not establish adverse possession, the plaintiff is entitled to a decree for possession : *25 All 256 (F B); 25 All 498 (F B) and A I R 1935 Mad 754, Rel. on.* [P 9 C 1]

(b) Limitation Act (1908), Arts. 142, 144—Applicability — Before Art. 142 can apply, it must be shown either that plaintiff was dispossessed or that he discontinued possession — Unless that is done case cannot come under Art. 142 and Art. 144 will apply.

In a case which falls under Art. 142, the plaintiff must prove not only title but also possession within 12 years of suit. But before that Article can apply, it must be shown, either that the plaintiff was dispossessed, or that he discontinued the possession. This can be established either by the facts admitted in the plaint or pleadings, or if not admitted there, then by the facts actually found. But unless that is done the case cannot come under Art. 142 and so the residuary Art. 144 would apply. [P 9 C 1, 2]

(c) Limitation Act (1908), Art. 142—Terms 'dispossession' and 'discontinuance' explained—Wrongful possession cannot be assumed against true owner when he himself handed over possession and was not deprived of it by other side.

The term 'dispossession' applies when a person comes in and drives out others from the possession. It imports ouster, a driving out of possession against the will of the person in actual possession. This driving out cannot be said to have occurred when according to the case of both sides the transfer of possession was voluntary, not against the will of the person in possession but in accordance with his wishes and active consent. The term "discontinuance" however implies a voluntary act, an abandonment of possession followed by the actual possession of another. It implies that the person discontinuing has given up the land and left it to be possessed by any one choosing to come in. There must be an intention to abandon title before there can be said to be a discontinuance in possession. But this cannot be assumed. It must be either admitted or proved. So strong in fact is the position of the rightful owner that even when he has been dispossessed by a trespasser and that trespasser abandons possession either voluntarily or by *vis major*, for however short a time, before he has actually perfected his title by 12 years' adverse possession, the possession of the true owner is deemed to revive and he gets a fresh starting point for limitation. Wrongful possession cannot be assumed against the true owner when the facts disclose that he himself voluntarily handed over possession and was not deprived of it by the other side : *35 Bom 79; A I R 1923 Cal 1; (1881) 14 Ch D 537; 29 Cal 518 (P C); 6 Cal 311 and 9 Cal 698, Rel. on.* [P 9 C 2; P 10 C 1]

(d) Evidence Act (1872), S. 115 — Person building on land belonging to another has no equitable right to possession of land on ground that owner stood by and allowed construction to proceed, unless it is shown that he supposed land to be his own.

Before a person building on the land of another can be said to have an equitable right to possession of the land, on the ground that the true owner stood by and allowed the construction to proceed, it is necessary, first, that the stranger must have supposed it to be his own, and in the second place, there must have been a standing by : *2 N L R 4, Rel. on.* [P 10 C 2]

M. Adhikari and J. Sen — *for Appellant.*

K. B. Tare — *for Respondent.*

Judgment.—The plaintiff's case is that he purchased the house in suit from one Sakharam for Rs. 100 on 4th May 1914 under the sale deed, Ex. P-5. He thereupon rented it to the defendant in the year 1918 at a rental of Re. 1 a month. The rent was duly paid till May 1934 and was thereafter defaulted. When the plaintiff demanded the rent for the months of June to October 1934 inclusive, the defendant repudiated the plaintiff's title and set up one in himself. Therefore the plaintiff served the defendant with a notice on 26th November 1934 calling upon him to quit by 1st January 1935 at the conclusion of the month of December 1934 and also to pay the rent due for the months of June to October 1934. The defendant has not complied, so the plaintiff sues for possession and for arrears of rent for seven months. The defendant sets up a title in himself. He admits the plaintiff's purchase from Sakharam and also Sakharam's right to sell but he says the plaintiff himself sold the house to him in 1914 for a sum of Rs. 50. He denied the lease and set forth various acts of ownership which he said he had exercised to the plaintiff's knowledge for a number of years. The first Court upheld the plaintiff's claim but the lower Appellate Court dismissed it after coming to the following findings. The learned Judge accepted, as of course he had to accept because the defendant himself had admitted it, the title of the plaintiff under his sale deed of 4th May 1914. But he held that the lease which he had pleaded was not proved. He also held that the sale which the defendant had pleaded was not proved either but he accepted the defendant's story that he had rebuilt the house in 1926. Then he came to the following curious and inconsistent findings. First of all he stated :

> The facts on record clearly show that the appellant (defendant) has been exercising acts of absolute ownership over the house at least since about 1926 and evidently to the knowledge of the respondent (plaintiff).

Then in the very next sentence he said:

> I believe the appellant (defendant) has not done these things by way of asserting a title adverse to

that of the respondent after entering into the possession of the house as a tenant. Because the respondent would have in that case got him ejected immediately.

It is admitted by both sides that the title originally resided in the plaintiff. It is also admitted that the defendant was let into possession by the plaintiff. There was therefore no way in which the title which admittedly had originally resided in the plaintiff could have passed to the defendant except by the sale pleaded, or by adverse possession. The sale has been negatived and an assertion of a hostile title has also been negatived. It follows, the plaintiff is entitled to possession. Even if it be accepted that the lower Appellate Court has found that acts of absolute ownership were exercised by the defendant to the knowledge of the plaintiff and that there was therefore a clear assertion of a hostile title, this was only from September 1926 when the house was rebuilt after the flood and that is within 12 years of suit. Therefore even on that finding the plaintiff's title was not displaced before suit and so he is entitled to possession. Cases of this nature have twice been considered by a Full Bench of the Allahabad High Court. In both, the title of the plaintiff was established as well as possession of the defendant for more than 12 years before suit. In both, the plaintiff had pleaded that he had let the defendant in possession as a tenant and the Courts found that that was not proved. In both, the defendant pleaded adverse possession. The High Court held that in those circumstances the burden was on the defendant, and since he had not established it in either case, the plaintiff was entitled to a decree for possession. These decisions are to be found in 25 All 256[1] and 25 All 498.[2] A similar view was taken in A I R 1935 Mad 754.[3] It is also my view.

There can be no doubt that in a case which falls under Art. 142, Limitation Act, the plaintiff must prove not only title but also possession within 12 years of suit. But before that Article can apply, it must be shown either that the plaintiff was dispossessed or that he discontinued the possession. This can be established either by the facts admitted in the plaint or pleadings, or if not admitted there, then by the facts actually found. But unless that is done, the case cannot come under Art. 142 and so the residuary Art. 144 would apply. The meaning of the term dispossession has been considered in 35 Bom 79[4] at p. 89. It is pointed out there on the authority of an English case that the term applies when "a person comes in and drives out the others from possession." It imports ouster, a driving out from possession against the will of the person in actual possession. This is also the view in 50 Cal 49[5] at p. 63. It is impossible to hold that this driving out occurs when, according to the case of both sides, the transfer of possession was voluntary: not against the will of the plaintiff but in accordance with his wishes and with his active consent. Turning now to the question of discontinuance, that implies a voluntary act, an abandonment of possession followed by the actual possession of another. The words "dispossession" and "discontinuance of possession" are taken from the English Statute of Limitation (Sec. 3 of 3 & 4 William IV, Ch. 7) and have been defined by Fry J. in (1881) 14 Ch D 537[6] as follows:

> In my view the difference between dispossession and discontinuance of possession might be expressed in this way: the one is where a person comes in and drives out the others from possession, the other case is when the person in possession goes out and is followed into possession by others.

This definition has been applied in India in 35 Bom 79[4] at p. 90 where Chandavarkar J. states that discontinuance implies

> that the person discontinuing has given up the land and left it to be possessed by anyone choosing to come in.

It is obvious then that there must be an intention to abandon title before there can be said to a discontinuance of possession. But this cannot be assumed. It must be either admitted or proved. So strong in fact is the position of the rightful owner that even when he has been dispossessed by a trespasser and that trespasser abandons possession either voluntarily or by *vis major*, for however short a time, before he has actually perfected his title by 12 years' adverse possession, the possession of the

1. Abdul Ghani v. Mt. Babni, (1903) 25 All 256 =1903 A W N 18 (F B).
2. Balmakund v. Dalu, (1903) 25 All 498 = 1903 A W N 112 (F B).
3. Sulaiman Rowther v. Dawood Khan Sahib, (1935) 22 A I R Mad 754=156 I C 581.
4. Vasudeo Atmaram Joshi v. Eknath Balkrishna Thite, (1911) 35 Bom 79 = 8 I C 639 = 12 Bom L R 956.
5. Charu Chandra Pramanik v. Nahush Chandra Kundu, (1923) 10 A I R Cal 1 = 74 I C 630= 50 Cal 49=36 C L J 35.
6. Rains v. Buxton, (1881) 14 Ch D 537 = 49 L J Ch 473=43 L T 88=28 W R 954.

true owner is deemed to revive and he gets a fresh starting point for limitation. This is what happened in 6 C W N 617[7] and their Lordships of the Privy Council held at pp. 622 and 623 that when land is inundated by floods "the constructive possession is (if anywhere) with the true owners" and that therefore they obtain a fresh starting point of limitation. So also in 6 Cal 311[8] at p. 314 where an owner of property placed some of his relations in possession as an act of charity and allowed them to remain there for more than 12 years, it was held that this did not constitute "discontinuance of possession" within the meaning of Art. 144 because no intention to abandon title could or ought to be presumed in such circumstances. As the Calcutta High Court observed in 9 Cal 698[9] at page 702 :

> You cannot say that an owner is out of possession unless you can say that a third party is in wrongful possession.

Of course that must be read in conjunction with the facts of that case, otherwise it would be too widely stated. There would be discontinuance of possession for example in the case of an invalid gift or in any other case where an unequivocal intention to abandon title can be deduced. But when no such circumstances are present, as here, then those observations apply ; you cannot assume wrongful possession against the true owner when the facts disclose that he himself voluntarily handed over possession and was not deprived of it by the other side. In these circumstances the fundamental right of which the Judicial Committee speak in 39 Mad 617[10] at pages 631 and 633 must prevail. There is also another reason why the plaintiff must succeed. The defendant admits that he did not obtain possession till 1920 though the plaintiff puts it at 1918. He also admits that the house was washed away by floods in 1926. He had not perfected his title by then, even assuming his possession to have been adverse ; therefore according to the decision of the Privy Council in 6 C W N 617[7] the title of the plaintiff revived during the period when occupation was rendered impossible by reason of the floods. The suit has been brought within 12 years of 1926 and so is within time.

I have been referred to Ex. D-1 but it does not contain any unequivocal admission of the defendant's title. Of course, it is relevant as a piece of evidence and has been so used by the lower Appellate Court. But, it is no higher than that. It does not establish the fact of sale either in 1918 or in 1920, nor does it establish adverse possession for more than 12 years, nor does it establish "dispossession" or "discontinuance of possession." It was argued on behalf of the defendant that in that event he has an equitable right to possession because the plaintiff stood by and allowed him to reconstruct the house in September 1926. The law as regards this is enunciated in 2 N L R 4[11] at p. 6. First of all, the stranger building on the land must have supposed it to be his own. If the defendant's sale is not proved, then no explanation has been forthcoming as to how the defendant could have supposed the land to have been his own. In the second place, there must have been a standing by and none has been pleaded. On the contrary, the plaintiff asserted that he gave the defendant notice not to build and that it was ignored. This case has been set up for the first time in second appeal and since it involves questions of fact which have not been pleaded and which have not been investigated, I cannot allow it to be raised now at this late stage. The appeal is allowed. The decree of the lower Appellate Court is set aside in so far as it dismisses the claim for possession, and that of the first Court, in so far as it decrees the claim for possession, is restored.

R.M./R.K. *Appeal allowed.*

7. Secy. of State v. Krishnamoni Gupta, (1902) 29 Cal 518=29 I A 104=8 Sar 269=6 C W N 617 (P C).
8. Gobind Lall Seal v. Debendronath Mullick, (1881) 6 Cal 311=7 C L R 181.
9. Lutchmeeput Singh v. Sadaulla Nushyo, (1883) 9 Cal 698=12 C L R 382.
10. Secretary of State v. Chellikani Rama Rao, (1916) 3 A I R P C 21=35 I C 902=39 Mad 617=43 I A 192 (P C).
11. Mohan Lal v. Chunni Lal, (1906) 2 N L R 4.

A. I. R. 1939 Nagpur 10

VIVIAN BOSE J.

Mt. Jasodabai, w/o Ramkishan Gujarathi Mod — Objector — Appellant.

v.

Firm Shrikishan Radhakishan — Creditors — Respondents.

Second Appeal No. 325 of 1935, Decided on 15th August 1938, from appellate order of Dist. Judge, Nimar, D/- 19th March 1935.

(a) Provincial Insolvency Act (1920), Ss. 21 (2), 28 (2) and 56 (3)—Position and powers of insolvency Court before and after adjudication explained.

There is a wide difference between the position and powers of the Insolvency Court before and after adjudication. Before adjudication the debtor continues in possession of the property and is subject to the provisions of the Act, entitled to deal with it like any other owner. Therefore in order to prevent alienations and waste, the Insolvency Court is empowered under Sec. 21 (2) to order attachment by actul seizure of the whole or any part of the property "in the possession or under the control of the debtor," provided the conditions laid down in the Proviso obtain. But these powers of attachment are limited to the position before adjudication and they are not as wide as powers of attachment conferred upon a Civil Court under the Code of Civil Procedure. After adjudication the position changes entirely. Under S. 28 (2) the whole of the insolvent's property immediately vests in the Court or the receiver, and when there is no receiver, the Court is invested with all the rights and is authorized to exercise all the powers conferred on a receiver by the Act under S. 58. One of these rights is the right to actual physical possession of the insolvent's property by the receiver, and in order to enforce that right the Court is empowered under S. 56 (3) to remove any person who is in possession or custody of the insolvent's property from such possession or custody subject to the Proviso of that Section. [P 11 C 2; P 12 C 1]

(b) Provincial Insolvency Act (1920), Ss. 56 and 4 — Powers of Insolvency Court after adjudication when insolvent's property is in custody of third person and he sets up title —Procedure for recovering possession of such property — Creditor proceeding with Court's permission is Court's agent — Property, if recovered, passes to Court — To third party's proceedings for recovering back possession all creditors are not necessary parties.

Court has no power under S. 56 summarily to direct a third person to deliver up possession of property of which he is in possession if he sets up a title, however flimsy, to it. The only power the Court has in such circumstances is to try the issue whether the insolvent is entitled to the property or not under S. 4. But, before that can be done, a proper application has to be presented by the receiver, when there is one, or by such one of the creditors or other person interested in preserving the insolvent's estate as the Court authorizes to act when there is not. But, the person who proceeds is either the Court or the receiver and not a creditor. Even when a creditor is authorized to act he is acting as an agent of the Court and has no right or title to the property itself, not even a right to possession. If he succeeds, the property passes to the Court and not to the creditor who conducted the proceedings. In such cases, if the third party is not present or does not object when the receiver or such creditor takes possession and he is therefore obliged to institute proceedings against the receiver or the creditor acting for the Court, for recovering back the possession of such property, the whole body of creditors need not be joined in such proceedings : *A I R 1923 Mad 363, Rel. on.* [P 12 C 1, 2]

(c) Practice — Party should not suffer for error of Court.

It is a cardinal rule of justice that no party should suffer for an error or omission of the Court when a duty is cast on the Court itself for acting or refraining from acting. [P 13 C 1]

A. V. Wazalwar — *for Appellant.*

R. Kaushalendra Rao—*for Respondents.*

Judgment. — This appeal arises out of an insolvency petition in which one Ramkishan was adjudged insolvent. The facts are as follows: After the adjudication, the firm of Shrikishan Radhakishan, the respondent here, applied for the attachment of certain properties alleging that they belonged to the insolvent. The appellant objected claiming that the property was her own property and that she was in possession of it and her objection was overruled. She appealed to the lower Appellate Court and joined in her appeal as respondent not only the firm of Shrikishan Radhakrishan which had applied for the attachment but also the other scheduled creditors. The lower Appellate Court threw out the appeal on the ground that the objection petition in the Insolvency Court was incompetent because it was directed against only one of the creditors, namely the firm of Shrikishan Radhakrishan, and that the other creditors had not been joined though they ought to have been. The learned Judge, however, added that it would be open to the objector to file a fresh petition impleading all the necessary parties "if the property has not already been brought to sale." It is against this decision that the objector has appealed here.

In my opinion the position has been misconceived throughout. The provisions of S. 28 (2), Provincial Insolvency Act, have been overlooked. It has been forgotten that on the making of the order of adjudication the whole of the insolvent's property vests in the Court, or in the Receiver when there is one under S. 28 (2), and that thereafter, except as provided by the Act, no creditor to whom the insolvent is indebted in respect of any debt provable under the Act has during the pendency of the insolvency proceedings, any remedy against the property of the insolvent in respect of the debt or can commence any legal proceeding except with the consent of the Court and on such terms as the Court may impose. It follows that the creditors have no locus standi whatever in these matters except in so far as the Court permits.

There is a wide difference between the position and powers of the Insolvency Court

before and after adjudication. Before adjudication the debtor continues in possession of the property and is, subject to the provisions of the Act, entitled to deal with it like any other owner. Therefore, in order to prevent alienations and waste, the Insolvency Court is empowered under S. 21 (2) to order attachment by actual seizure of the whole or any part of the property "in the possession or under the control of the debtor", provided the conditions laid down in the Proviso obtain. But, these powers of attachment are limited to the position before adjudication and it will be observed that they are not as wide as the power of attachment conferred upon a Civil Court under the Civil Procedure Code, nor is it possible to resort to the wider powers of the Civil Courts under S. 5, because that Section applies the procedure of the Civil Courts "subject to the provisions of the Act." After adjudication the position changes entirely. As I have said under Sec. 28 (2) the whole of the insolvent's property immediately vests in the Court or the receiver and when there is no receiver, the Court is invested with all the rights and is authorized to exercise all the powers conferred on a receiver by the Act under S. 58. One of these rights is the right to actual physical possession of the insolvent's property by the receiver and in order to enforce that right the Court is empowered under S. 56 (3) to remove any person who is in possession or custody of the insolvent's property from such possession or custody, subject however to this important Proviso :

> Provided that nothing in this Section shall be deemed to authorize the Court to remove from the possession or custody of property any person whom the insolvent has not a present right so to remove.

It will be observed that these provisions are the same as those to be found in O. 40, R. 1 (d) and R. 2, Civil P. C. The receiver's rights, and therefore the Court's when there is no receiver, are exactly the same as those of a receiver under O. 40, Rule 1, when the property is in the hands of a third party. It is clear then that the Court has no power under Sec. 56 summarily to direct a third person to deliver up possession of property of which he is in possession if he sets up a title however flimsy to it. The only power the Court has in such circumstances is to try the issue whether the insolvent is entitled to the property or not under Sec. 4. But before that can be done a proper application has to be presented by the receiver, when there is one, or by such one of the creditors or other person interested in preserving the insolvent's estate as the Court authorizes to act when there is not : *see* 50 M L J 180[1] at pages 181 and 182.

If the insolvent is in possession no question of attachment arises. An inventory of the property will already have been furnished either under S. 22 or under Sec. 13 and all the property mentioned therein will automatically vest in the Court. If any item of property is omitted then all that the Court has to do is to order the insolvent to produce it and to hand over possession. Trouble can only arise when the property is in the possession or control of a third person. In that event the proper course is to proceed against such person under S. 4 using the powers of attachment before judgment conferred by the Civil Procedure Code read with S. 5 if necessary. But the person who proceeds is either the Court or the receiver and not a creditor. Even when a creditor is authorized to act, he is acting as an agent of the Court and has no right or title to the property itself, not even a right to possession. If he succeeds the property passes to the Court and not to the creditor who conducted the proceedings. Cases may arise in which the Court or the receiver enters into possession without obstruction because the person claiming the right to the property is not present to object or because for some other reason he has omitted to do so, and then he is obliged to institute proceedings for the recovery of possession. What these proceedings should be, whether by application or by separate suit, need not be considered here, but, in either case they will be under S. 4, and in either case they will have to be directed against the person or authority in whom the property has vested. In no conceivable circumstances can this be either against an individual creditor or the whole body of creditors taken together. Therefore to direct the appellant in this appeal to file fresh objections in which the whole body of creditors is impleaded is both unnecessary and wrong.

The true position is this. It is clear from the fact that attachment was asked for that the property was neither in the possession or in the control of the insolvent. Therefore

1. Chittammal v. Ponnuswami Naicker, (1926) 13 A I R Mad 363=92 I C 573=49 Mad 762 =50 M L J 180.

in the absence of a receiver it was the duty of the Court to institute proceedings under S. 4 against the appellants who were in actual possession and, if necessary, to attach the property before judgment. But as this would lead to complications, the more convenient course was clearly to authorize one of the creditors to conduct the proceedings on its behalf under Sec. 28 (2). Now, this is what should have been done and in substance what has been done, though it is clear that neither of the Courts below has applied its mind to these facts or issued any express order of authority to the respondent firm of Shrikishan Radhakrishan to act on behalf of the Court. But defects or irregularities of procedure which do not affect the merits can be cured or waived under S. 99, Civil P. C., and in any case it is a cardinal rule of justice that no party should suffer for an error or omission of the Court when a duty is cast on the Court itself for acting or refraining from acting. Therefore, what I now have to see is whether prejudice has been caused to any party or whether there has been a miscarriage of justice.

It appears from the proceedings that the firm of Shrikishan Radhakrishan is the principal creditor. It also appears that this firm is the only creditor who has been attending the hearings with any attempt at regularity and who has been taking any real interest in the insolvency. In the circumstances had the law been present to the mind of the learned trial Judge, there is no other creditor whom he could more suitably have selected for conducting the proceedings on behalf of the Court. I am satisfied that the rights of the remaining creditors were safe in this firm's hands. In the circumstances since this firm has actually been conducting the proceedings its actions must be deemed to have been with the requisite authority and permission. That being so, when the case reached the stage of appeal the only person who need have been joined as a party to the appeal was the creditor who has been permitted to conduct the proceedings in the lower Court and who in the eye of law was only an agent of the Court itself. The other creditors had no locus standi and were unnecessary parties to the appeal. The appeal is allowed and the order of the lower Appellate Court set aside. It will now proceed to hear and determine the appeal before it and decide it according to law. In view of the fact that the appeal here was not opposed and that all that both sides wanted was a clear pronouncement as to the correct procedure, and also in view of the fact that the respondent firm was acting on behalf of the Court in place of a receiver, I direct that the appellant's costs of this appeal be paid from the insolvent's estate. Counsel's fee Rs. 30.

N.S./R.K. *Appeal allowed.*

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NIYOGI AND GRUER JJ.

Muktawandas Ajabdas and others
Appellants.
v.
Emperor.

Criminal Appeal No. 64 of 1938, Decided on 19th May 1938, from order of Sess. Judge, Raipur, D/- 18th February 1938.

(a) Criminal Trial—Duty of prosecution to call witnesses—Eye witnesses when not numerous must all be examined.

Witnesses essential to the unfolding of a narrative on which the prosecution is based must be called by the prosecution whether in the result the effect of their testimony is for or against the case for the prosecution. [P 16 C 1]

Where there are not numerous eye-witnesses all of them must be examined by the prosecution and none of them can be treated as redundant because being eye-witnesses each of them is likely to throw some light on the facts of the case : *A I R 1936 P C 289, Rel. on; A I R 1915 Cal 545 ; A I R 1934 All 908 ; A I R 1923 Pat 413 ; A I R 1922 Cal 461 and A I R 1922 Cal 382, Ref.* [P 16 C 1]

(b) Evidence Act (1872), Ss. 155 (3) and 145—Oral statements made to witnesses by others — Questions to witnesses about those statements are legally admissible.

Section 145 does not control S. 155. Hence questions proposed to be put to prosecution witnesses about oral statements made to them by other witnesses are legally admissible, although the Court may refuse to place any reliance on them on the ground that they had not been put to these witnesses for explanation. To disallow such questions may therefore be prejudicial to the accused: *A I R, 1934 Sind 100, Not foll.; A I R 1928 P C 2, Ref.* [P 16 C 1, 2]

Dr. B. R. Ambedkar and T. G. Chobles — *for Accused No. 1.*

T. J. Kedar, R. K. Rau, R. G. Rau, S. W. A. Rizwi and W. C. Dutt — *for Appellants Nos. 2 to 14.*

W. R. Puranik, Advocate-General — *for the Crown.*

Order.—The fourteen appellants have all been convicted of rioting and sentenced to four months' rigorous imprisonment.

Appellant 1, Muktawandas, has also been sentenced to transportation for life under S. 302, I. P. C. The decision is attacked on the merits, and it is also argued that it is vitiated, firstly, because of the failure of the prosecution to examine certain eye-witnesses and secondly, because certain questions which it was proposed to put to court witnesses 1 and 2, Ghoundul and Asaram, have been wrongly ruled out as inadmissible by the Sessions Judge, thereby causing prejudice to the appellants. In this order we shall deal with these points of law, but first we propose to consider the merits of the conviction for rioting.

The conviction under S. 147, I. P. C., is said to be wrong, firstly, because the rice crop in that field belonged to and was in the possession of Muktawandas and his bataidar Hiraman, so that its removal by Muktawandas and his servants was justified, and secondly, because the prosecution has not made out that the assembly of the accused was guided by any common unlawful object or did any unlawful act. The transactions which resulted in the exchange of this field [No. 1564/2 (c)] for other land out of Muktawandas's block of 55 acres is not disputed. It is also common ground that through the mediation of the Chakbandhi Inspector accused Muktawandas agreed to pay Rs. 11-4-0 to Firanta as compensation for 30 cartloads of manure which he had spread on this field. This sum was not paid. Muktawandas says that the reason was that Firanta had removed the manure himself while Firanta denied that. This point has not been cleared up. The Consolidation Officer, Mr. Mishra (P. W. 1), has stated that the point as to who should be in possession in case the price of the manure was not paid was neither raised nor decided. According to law, the exchange scheme would come into effect on 1st June 1938, but the tenants voluntarily agreed that they would start their possession from the date of the scheme according to the allotments made. Bodhrai (P. W. 3) has admitted that he cultivated all the land allotted to him in the Chakbandhi, which he got in exchange. He also admits that accused Muktawandas had given this Munshi Newar field on adhia to Hiraman. He says that there was a quarrel between him and Hiraman over the sowing of this field. He also says: "All the tenants know that I had sown Munshi Newar field and that I did all the other operations."

The case of the prosecution is that in spite of taking the field in exchange Firanta determined to retain possession of this field for that year and appropriate the crop in lieu of the sum of Rs. 11-4-0, which had not been paid to him. We need not discuss whether Firanta was right or wrong in taking up this attitude. The question is how far the prosecution has made out that the rice crop which Firanta and his son were reaping that day was in their possession and belonged to them. The evidence on the point seems to us to be of somewhat inconclusive nature. Ex. P-17 is a copy of the roznamcha embodying a complaint made to the police station by Firanta on 2nd July 1937. This report is admissible under S. 32 (3), Evidence Act, so far as it contains a statement against the pecuniary or proprietary interest of Firanta. Such a statement is the one that Muktawandas had rooted out the dhan sown by Firanta and sowed other dhan in its place. There being no allegation or proof that this sowing of Muktawandas was again uprooted and replaced by Firanta it would seem that the crop which was reaped that day had been sown by Muktawandas. Apart from Bodhrai's statement there is no good evidence about who looked after the crop between sowing and reaping times. It is said that the bataidar Hiraman at least has not come forward, and he may have decided to leave this field alone. Mr. Mishra (P. W. 1) stated that the said field was found recorded in the jamabandi in the name of Firanta so far as he remembers, but as the jamabandi has not been produced nor has the patwari been questioned about it, this statement is useless as evidence. That Firanta was by no means sure about his rights over this dhan is, according to the defence, to be deduced from the fact that he arranged to reap it when it was barely ripe. His son Bodhrai says that it was ready for cutting being an early variety, although dhan in other fields was not ready. But Hirabai admits that it was a little unripe so that it does look as if the reaping was begun hastily in order to checkmate the other side.

It would therefore appear that this crop was sown by or on behalf of Muktawandas and it is uncertain how it was looked after when it was growing. The prosecution then has not made out satisfactorily that this crop belonged to and was in the possession of Firanta. We are inclined to hold that it was in the possession of Muktawandas. It

follows that it would be unsafe to conclude that Muktawandas's party would be committing a wrongful act in removing it. That being so they should not have been convicted of rioting. On the second point urged our decision must also be in favour of appellants 2 to 14. Even taking it that the crop belonged to Firanta, had these servants good reason for thinking that their master had not a bona fide claim to it? They knew that the land had been given to him in exchange and that possession had been taken all round in accordance with that exchange. They may also have known that he had succeeded in making the final sowing of the land. It would not then be obvious to them that they would be committing theft in removing the crop. Then too their attitude as a whole was not violent. The first batch of them which came with the kotwar did nothing against Firanta, who was merely advised to stop the reaping. They quietly sat down on the boundary of the field. Then according to the prosecution, the rest of the appellants who were ploughing in a neighbouring field were brought up by Muktawandas. Unless they knew definitely that they were to be ordered to commit an offence were they not bound as servants to follow their master, and when they got there what illegal act did they do? According to the prosecution, two of them, Ghendram and Fundwa, caught hold of Firanta's arms when ordered to do so. Unless this was done in pursuance of a common object it would not turn the others into rioters. At the most, Ghendram and Fundwa could be convicted of simple assault.

It is said however that after Muktawandas had attacked Firanta he was surrounded by all the appellants. Bodhrai says so, but he does not say that even then these appellants did anything against Firanta, while his wife Hirabai does not mention this surrounding of Firanta at all. The preparations to remove the dhan were also not continued, and it was left where it was. It thus appears that the body of the appellants took up a passive attitude and are at least entitled to the benefit of the doubt on the question of their being animated by a common illegal object. We conclude then that the charge of rioting has not been satisfactorily made out. It may be said that Ghendram and Fundwa were guilty of assault, but we think that they have already been sufficiently punished, and there is no need to record a conviction against them under a different Section. We set aside the conviction of all the appellants under Sec. 147, I. P. C., and direct the release of all of them except Muktawandas in whose case alone the appeal has yet to be determined on the charge of murder.

We now turn to the points of law which were said to undermine the whole prosecution case. Undoubtedly, according to the prosecution, both the wives of the chief witness Bodhrai were present in the field when Bodhrai's father Firanta was attacked. One wife, Hirabai, is examined as P. W. 4; the other, Ruhi, is not examined. Her name does not even appear in the police challan and there is no explanation why she was not called. It is now suggested by the learned Advocate-General that the prosecution may have thought her evidence redundant. The other two alleged eyewitnesses are Mawa, daughter of Bodhrai, and a boy Bhunesar. It is not clear from the record how much, if any, of the marpit they saw. According to Mt. Hirabai (P. W. 4) they were grazing cattle about 200 yards away. Still they may have seen something or might be able to state who came to the spot. Certain cases have been quoted to us about the duty of the prosecution to examine eyewitnesses. In 42 Cal 422[1] it was held that all available eyewitnesses, even though they give different accounts, should be brought before the Court. In 57 All 267[2] the Court went even further in holding that a witness who had given evidence supporting a plea of alibi taken by one of the accused ought, beyond all doubt, to be produced by the prosecution. On the other hand, in 2 Pat 309,[3] it was ruled that the police are not bound to send up as a witness a person whose statement they believed to be false or whose evidence they believed to be unnecessary. Rulings to the same effect are to be found in 49 Cal 277[4] and 49 Cal 358.[5] The point has recently been considered by their Lordships of the Privy

1. Ram Ranjan Roy v. Emperor, (1915) 2 A I R Cal 545=27 I C 554=42 Cal 422=19 C W N 28=16 Cr L J 170.
2. Emperor v. Nem Singh, (1934) 21 A I R All 908=1934 Cr C 1167=152 I C 741=57 All 267=36 Cr L J 152.
3. Ramjit Ahir v. Emperor, (1923) 10 A I R Pat 413=74 I C 705=24 Cr L J 801=2 Pat 309.
4. Emperor v. Reed, (1922) 9 A I R Cal 461=69 I C 630=49 Cal 277=23 Cr L J 742.
5. Emperor v. Balaram Das, (1922) 9 A I R Cal 382=71 I C 685=49 Cal 358=24 Cr L J 221.

Council in a case in 164 I C 545.[6] Their Lordships, observing that no rule can be laid down to fetter the discretion of the prosecution to call witnesses which is dependent on the particular circumstances of each case, go on to say that they do not in general approve of the idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, but that witnesses essential to the unfolding of a narrative on which the prosecution is based must of course be called by the prosecution whether in the result the effect of their testimony is for or against the case for the prosecution.

Applying these principles to the present case we observe that the eyewitnesses are certainly not numerous. Mt. Ruhi should not have been treated as a redundant witness. There is also nothing to show that she is unreliable, although possibly the prosecution may be afraid that she has been influenced by her father Ghoudul (C. W. 1). We think that the evidence of this Ruhi should certainly have been taken. The two children were probably not examined as it was thought they were not eyewitnesses, but it appears that they too may be able to throw some light on the facts. We are of opinion that the evidence of these three witnesses should now be recorded so that we may have it before us in deciding the case on the merits.

It was proposed to question the two court witnesses about certain statements said to have been made to them by Bodhrai, Hirabai and Ruhi. These questions were disallowed as the questions had not been put to these three persons themselves. So far as Ruhi is concerned, we think that the objection is sound. As she is not a witness no question of contradicting her arose and to repeat what she said would be merely hearsay. The questions would not be admissible under S. 32, Evidence Act, as there was nothing to prevent Ruhi from being called. We must also hold S. 6 inapplicable including Illus. (a) to that Section, as the questions were not with regard to what these witnesses said so shortly before or after the marpit as to form part of the same transaction.

The admissibility of the statements made by Bodhrai and Hirabai depends on whether S. 155 (3), Evidence Act, is governed by S. 145 of the same Act. Prima facie it does not appear to be so, as S. 145 speaks only of previous statements in writing whereas the statement with which we are concerned was an oral one. There are some cases in which it is said that there can be no distinction in principle on this point between a statement in writing and an oral statement, and hence a witness cannot be contradicted by his previous oral statement if his attention has not been drawn to it as required by S. 145, Evidence Act. In Sarkar's Evidence Act, Edn. 5, page 1141, the analogy of the English Statute, 28 & 29 Vic., Ch. 18, S. 3, is quoted. In A I R 1934 Sind 100[7] such a statement was ruled to be not admissible but no reasons were given. We agree with the learned counsel for the appellants that the question is not one of admissibility but of the weight to be attached to such a statement if it is not put to the witness to whom it is ascribed. In a very recent Privy Council case reported in 55 I A 18[8] at p. 23 their Lordships dealing with the construction of Indian Statutes said that it was the duty of the Court

> to examine the language of the statute and to ascertain its proper meaning, uninfluenced by any consideration derived from the previous state of the law or of the English law upon which it may be founded.

We must take S. 145 as we find it. It makes no mention of oral statements. It therefore cannot control S. 155. Hence the proposed questions about statements made by Bodhrai and Hirabai were legally admissible, although the Court might have refused to place any reliance on them on the ground that they had not been put to these two witnesses for explanation. We agree that the procedure adopted may have been prejudicial to the accused. For instance, if Bodhrai had admitted making a statement inconsistent with what he now states in the witness-box, the accused might argue that he is unreliable. For these reasons also we consider that the record should be sent back to the lower Court to have these gaps in the case filled up. The two court witnesses be recalled and the defence be permitted to put the disallowed questions to them with reference to statements made by Bodhrai and Hirabai. As Ruhi is also to be examined similar questions about her may

6. Ceylon Stephen Seneviratne v. The King, (1936) 23 A I R P C 289=1936 Cr C 900=164 I C 545 = 37Cr L J 963 (P C).

7. Mt. Misri v. Emperor, (1934) 21 A I R Sind 100=1934 Cr C 825=151 I C 437=35 Cr L J 1332.

8. Ramanandi Kuer v. Kalawati Kuer, (1928) 15 A I R P C 2=107 I C 14=7 Pat 221=55 I A 18 (P C).

now be put. The defence will also be given an opportunity to cross-examine Bodhrai, Hirabai and Ruhi on the answers to these questions, and if they fail to do so an inference may be drawn against them. The record with this extra evidence be returned to this Court within two months when a fresh date will be fixed for further hearing of the appeal of Muktawandas against his conviction under S. 302, I. P. C.

N.S./R.K. *Appeal partly allowed.*

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VIVIAN BOSE J.

Gowardhan Shewaram Marwari — Appellant.

v.

Hargovind Sitaram Marwari and another — Respondents.

Misc. Appeal No. 92 of 1937, Decided on 15th September 1938, from order of Addl. Dist. Judge, Amraoti, D/- 17th February 1937.

*** Civil P. C. (1908), O. 21, R. 53—For attachment of decree to be effective notices to judgment-debtor and decree-holder are imperative.**

When a decree-holder seeks to execute his decree by attachment of another decree, in order that the attachment may be effective notices to the decree-holder and judgment-debtor of the attached decree are imperative and the mere order communicating the fact of attachment to the Court passing the decree is not enough: *A I R 1927 Mad 728, Disting.* [P 18 C 2]

V. V. Kelkar and M. R. Bobde — *for Appellant.*

E. M. Joshi — *for Respondent No. 1.*

Judgment. — The appellant Gowardhan Shewaram, who opposes the recording of an adjustment in these proceedings, obtained a decree against respondent 1, Hargovind, in Civil Suit No. 20-B of 1934, for something over Rs. 6000. In Civil Suit No. 89 of 1931, Hargovind obtained a decree against respondent 2, Gowardhan Hajarimal, for Rs. 1600 and it was attached in execution of the appellant's decree. The order of attachment was made on 22nd November 1935 and notice was issued to the Court which passed the decree on 2nd December 1935. It was received on 4th December 1935. Notices were also issued to the two respondents to this appeal, the order being passed on 4th January 1936. The notice to respondent 1 was served on him on 27th February 1936 but he refused to accept it. Respondent 2 was out when the process server arrived and the notice was affixed to his house on 3rd March 1936. A second notice was then issued and was served on him personally on 9th April 1936. In the meanwhile, namely on 27th December 1935, the decree in Civil Suit No. 89 of 1931 was, according to the two respondents, adjusted and they applied on 2nd January 1936 to have the adjustment certified and satisfaction recorded. They filed Ex. A-1 which embodies the terms of the adjustment. Its genuineness was attacked in the lower Courts by the appellant but both Courts hold it was genuine and made in good faith. There is evidence on which the finding can be based and so that question is now concluded.

We are left then with a question of law, namely whether the attachment becomes effective the moment the order is communicated to the Court passing the decree or whether notices to the decree-holder and judgment-debtor are also necessary. It will be observed that the order was served on the Court on 4th December 1935, that is to say before the adjustment, whereas notice of the attachment was not received by the parties to the decree till later, namely on 27th February 1936 in the one case, and on 9th April 1936 in the other. Both the lower Courts hold that notices to the parties are necessary and therefore hold that the adjustment can be certified and satisfaction of the decree recorded. O. 21, R. 53, Civil P. C., governs this case. It states (omitting the local amendment which does not apply) that the attachment in such cases shall be made by

> the issue to such other Court of a notice by the Court which passed the decree sought to be executed, requesting such other Court to stay the execution of its decree unless and until, etc.

Sub-rule (6) then states:

> On the application of the holder of a decree sought to be executed by the attachment of another decree, the Court making an order of attachment under this rule shall give notice of such order to the judgment-debtor bound by the decree attached; and no payment or adjustment of the attached decree made by the judgment-debtor in contravention of such order after receipt of notice thereof, either through the Court or otherwise, shall be recognized by any Court so long as the attachment remains in force.

It is clear that the order must be read as a whole and that sub-r. (6) cannot be ignored. It makes the issue of notice to the

judgment-debtor of the decree attached imperative and states that no adjustment after the receipt of notice either through the Court or otherwise shall be recognized. It follows that until the receipt of notice is proved, any adjustment made in ignorance of it is not effective, at any rate against the person entitled to notice under the rule, that is to say against the judgment-debtor.

The whole scheme of attachment under the Code is this: to devise a set of rules under which property which judgment-creditors have a right to pursue is not placed beyond their reach and beyond the reach of the Court. When the property can actually be seized by the Court, that is to say when it takes the shape of moveables (other than agricultural produce) and is in the possession of a person over whom the Court has direct control and authority, namely the judgment-debtor, (or in a case of attachment before judgment, the defendant), and also in the case of negotiable instruments the attachment is effected by actual seizure: O. 21, Rr. 43 and 51. In every other case notice to the person or body which has effective control is made essential, that is to say notice to the person in whose power it lies to place the property beyond the reach of the Court or to prevent it from being so placed. Thus in the case of agricultural produce, a copy of the warrant is affixed to the place where the produce is bodily situate and also on the outer door or on some other conspicuous part of the house in which the judgment-debtor ordinarily resides, etc.: O. 21, R. 44. The produce is thereupon "deemed to have passed into the possession of the Court." Then follow cases of other kinds of property (except immovable) which is not in the possession of the judgment-debtor: O. 21, Rule 46. In the case of a debt not secured by a negotiable instrument notice of the prohibitory order to the debtor is made essential, that is to say notice to the person in whose control the disposal of the debt lies. In the case of a share in the capital of a corporation, to the proper officer of the corporation, that is to the authority which can effectively prevent both a disposal of the share as well as payment of the dividends. In the case of other kinds of moveable property, to the person in possession, that is to say to the person who is in an effective position to prevent the property from being placed beyond the reach of the Court. The same underlying principle is observed in O. 21, Rr. 48 and 49, cases of attachments of salaries and allowances of public officer, and of partnership property.

In the case of immovable property, direct service upon the judgment-debtor has been made unnecessary but elaborate precautions are taken to ensure wide publicity of the fact of attachment, and it is necessary for a copy of the order to be affixed upon some conspicuous part of the property. Ordinarily persons do not purchase immovable property without going down to the place where it is situate and looking it over, and if they omit to do so in the face of this rule, they have only themselves to thank if they lose it; and so far as the Court is concerned, the important fact is that the property cannot disappear and be placed physically beyond its reach. When therefore we find a similar principle in Order 21, R. 53 it seems to me impossible to say that sub-r. (6) can be ignored and treated as a superfluity. The learned counsel for the appellant relied on a Full Bench decision of the Madras High Court in 50 Mad 677,[1] but it does not support him. What is stated there is that attachment is effective without service of notice but that an adjustment made in good faith by a judgment-debtor who had no notice must be recorded notwithstanding the effective attachment: *see* page 686. Sub-rule (6) states that:

> No payment or adjustment of the attached decree made by the judgment-debtor in contravention of such order after receipt of notice thereof, either through the Court or otherwise shall be recognized, etc.

The rule therefore clearly recognizes cases in which the attachment is effective even though notice has not been served on the judgment-debtor through the usual processes of the Court. But that is not the question at issue here. I am not called upon to decide when the attachment is effective but whether it is effective against the judgment-debtor when he has no notice either through the agency of the Court "or otherwise". On that I agree with the Madras decision. Since both the lower Courts find on the evidence that the adjustment was made in good faith and since the only notice alleged here is the notice served through the agency of the Court and that it was served after the adjustment, it fol-

1. Lakshminarasimham v. Lakshminarasimham, (1927) 14 A I R Mad 728=103 I C 502=50 Mad 677=53 M L J 150 (F B).

lows the lower Courts were right in recording the adjustment. The appeal is dismissed with costs. Counsel's fee Rs. 15.

N.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Nagpur 19

GRUER J.

Dr. Baretto — Applicant.

v.

T. R. Pruce — Opposite Party.

Civil Revn. No. 540 of 1937, Decided on 13th July 1938.

(a) Sale of Goods Act (1930), S. 4—Contract to make and deliver set of false teeth is contract for sale of goods.

Where a contract is for a chattel to be made and delivered, it is clearly a contract for the sale of goods. A contract to make and deliver a set of false teeth is therefore contract for the sale of goods and the principles of the Sale of Goods Act apply to such a contract : *(1861) 121 E R 716, Foll.*

[P 19 C 2]

(b) Revision—Revision application from Small Cause Court decision—Findings of fact are to be accepted, unless they are perverse or unreasonable.

In a revision application against a Small Cause Court decision, the findings of fact are to be accepted, unless they are perverse or unreasonable and it has also to be remembered that the depositions of the witnesses are not taken down in full.

[P 19 C 2]

(c) Sale of Goods Act (1930), S. 16 (1)—Purchaser finding goods to be not reasonably fit for purpose for which they are required is entitled to reject them.

According to S. 16 (1), there is an implied condition that the goods should be reasonably fit for the particular purpose for which they are required and a purchaser, if he does not find the goods to be reasonably fit for the purpose for which they are required, is legally entitled to reject them.

[P 20 C 1]

M. R. Bobde and Mandlekar — *for Applicant.*

R. Kaushalendrarao — *for Opposite Party.*

Order. — This small cause case was brought by Dr. Baretto, a dental surgeon, for the recovery of Rs. 175, the price of a set of artificial teeth made by him for the defendant, T. R. Pruce. The defendant contended that no definite price was fixed for the teeth, that after fitting on 25th they were found to be unsatisfactory and so he took them for a trial of two days at the plaintiff's request, that he found them to be so defective for various reasons specified by him, that he returned them with the letter (Ex. D-1) dated 27th May 1935 and again with a letter on the following day (Ex. D-3) but that the plaintiff sent them back on both the occasions. The trial Court has found that the price was not fixed at Rs. 175, that the set was given on trial and that it was found not fit (which evidently means unsatisfactory and defective). The suit was therefore dismissed and plaintiff comes up in revision.

The chief point urged is that the transaction was not one of sale of goods but one of work and labour and hence the Sale of Goods Act is not applicable. Counsel for the applicant was not able to cite a case in point, while for the non-applicant an English case which is on all fours with the present case was brought to my notice. This is *Lee* v. *Griffin*[1], a report of which is to be found in English Reports 121 E R 716.[1] The learned Judges there said that where a contract is for a chattel to be made and delivered it is clearly a contract for the sale of goods. The supplying of a set of false teeth was said to bear strong resemblance to that of a tailor supplying a coat, the measurement of the mouth and fitting of the teeth being analogous to the measurement and fitting of the garment. I have no hesitation in following this case and holding that the principles of the Sale of Goods Act should be applied. Applicant further contends that if there were defects in the set he should have been given an opportunity to remedy them; they were such as could have been put right and the plaintiff was even prepared to make a new set as he said in his letter. That party, it is said, is in the wrong who does not give facility to the other to perform the contract. The finding that the set was given on trial or approval is also said to be erroneous.

It must be kept in mind that this is a revision application against a Small Cause Court decision. Hence the findings of fact are to be accepted unless they are perverse or unreasonable, and it has also to be remembered that the depositions of the witnesses are not taken down in full. Applicant would also question the finding about the price settled saying that in the letter of 28th the non-applicant speaks of paying 25 per cent. of the price fixed. The fact appears to be that Rs. 175 was the price fixed by the applicant but the non-applicant

1. (1861) 1 B & S 272=121 E R 716.

did not definitely say that he accepted it. The point is not of much importance. The finding that the dentures were defective will have to be accepted. Dr. Baretto himself in his reply to the defendant's letter detailing them did not deny them but said: "I am prepared to rectify all defects you are experimenting (experiencing?) with the new set" (Ex. D-2). And again in Ex. D-3, "I shall do my very best to satisfy you even by making a new set if necessary". The appearance of the teeth could be judged by the Court including the statement in the pleadings that the enamelled surface of the teeth had been filed down so as to be hard and gritty. The Court was also entitled to believe the defendant's deposition about the discomfort he felt when using the teeth. I must also accept the finding that the set was given on trial. Such an arrangement might be unusual, but according to defendant, who has been believed, the plaintiff spent two or three hours on the 25th in trying to adapt the set but defendant was not satisfied and rejected them when plaintiff persuaded him to give them a trial from Saturday to the following Monday. Plaintiff himself in his pleading says that delivery of the set is given when the purchaser certifies that it is satisfactory and that defendant took delivery on the 25th after he was satisfied completely with the workmanship. This last assertion has not been believed.

Plaintiff was certainly inaccurate in stating that the set was not returned to him by the defendant. It may well be that when he gave the teeth on trial for two days the plaintiff did not anticipate that the defendant would reject them, but the question is whether in law he was not entitled to do so. According to S. 16 (1), Sale of Goods Act, there is an implied condition that the goods should be reasonably fit for the particular purpose for which they are required. It was found that they were not so reasonably fit. The plaintiff had an opportunity on the 25th to make them fit but had not succeeded. Even if some of the defects could have been removed if defendant had been more patient and allowed plaintiff a further opportunity it cannot be said that they could all have been put right. The applicant's offer to make a new set confirms this. In law the defendant was not obliged to give any more opportunities. His offer to pay 25 per cent. compensation leads one to think that he honestly believed the set would never be suitable, and it is hardly fair to suggest that he merely wanted to go back on his bargain. In my opinion, the plaintiff would have been well advised to accept the offer made to him by the defendant reflecting that his failure to give satisfaction in one case does not necessarily mean that his work as a whole is not up to standard. I can find no valid ground for interference and dismiss this application. Pleader's fee will be Rs. 30.

R.M./R.K. *Application dismissed.*

Acc. No 177227

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* A. I. R. 1939 Nagpur 20

VIVIAN BOSE J.

Pandurang Ganpatrao Tidke — *Defendant* — Appellant.

v.

Vishwanath Pandurang — *Plaintiff* — Respondent.

Second Appeal No. 362 of 1936, Decided on 15th September 1938, from appellate decree of Third Addl. Dist. Judge, Amraoti, D/- 23rd March 1936.

(a) Contract—Right of third party to sue.

The person beneficially entitled under the agreement can sue even though not a party to the agreement itself: *32 All 410 (P C), Rel. on.* [P 21 C 1]

(b) Evidence Act (1872), S. 92, Proviso 1—Illustrations are not exhaustive.

The Illustrations to Proviso 1 to S. 92 are not meant to be exhaustive: *A I R 1917 Cal 186, Rel. on.* [P 22 C 1]

*** (c) Evidence Act (1872), S. 92, Proviso 1—One party to sale deed showing that he did not receive consideration — Other party can show that consideration was paid in full not in cash but in kind by proving contemporaneous oral agreement to that effect.**

If one party to a document shows that he did not receive the consideration specified though the document recites that he did, the other party can show that the consideration was paid in full, not in cash, but in kind. The two are ejusdem generis. It is true that a contemporaneous oral agreement to be paid in kind may not be enforceable because that would be varying the contract, but once the consideration is actually paid and accepted in kind in full discharge of an obligation expressed as payable in cash, then that can be proved because a discharge of the obligation "entitles a party to a decree." It would not matter whether this other transaction preceded the written contract or was contemporaneous with it or succeeded it. The test is whether the consideration is still executory or has been executed: *A I R 1921 Nag 51; 30 Mad 231; A I R 1914 P C 27; 12 M I A 157 (P C); 11 Cal*

486 (P C); 18 All 168; A I R 1914 All 298; 3 Bom 159; 11 Mad 213 and A I R 1926 Mad 35, Rel. on. [P 22 C 1, 2]

D. T. Mangalmurti — *for Appellant.*

M. B. Kinkhede and A. R. Kulkarni — *for Respondent.*

Judgment.—The plaintiff sues for possession on the basis of a sale deed Ex. P-1 dated 7th January 1931. According to its terms the defendant purported to sell to the plaintiff the plaint property for a sum of Rs. 2000, but possession was not to be given till 1st March 1934. Till then the defendant was to remain in possession and was to take the crops for the intervening years 1931-32, 1932-33 and 1933-34. When the date for delivery of possession arrived, the defendant refused to put the plaintiff in possession. Hence the suit. The principal defence to the action, at any rate so far as this Court is concerned, is that no part of the consideration passed and so the defendant states that delivery of possession must be made subject to the payment of the Rs. 2000 due to him under the deed of sale. The plaintiff's reply is that full consideration passed though not in cash. It appears that one Bajirao had sued the defendant for possession of the fields now in suit and that the claim was compromised. Under it the defendant was to hand over possession to Bajirao at the expiry of three years after enjoying the crops for the years 1931-32, 1932-33 and 1933-34. Bajirao was then indebted to the plaintiff in the sum of Rs. 3000. Bajirao therefore agreed with the plaintiff to get those fields sold to him provided he (the plaintiff) would defer taking possession for three years and provided the plaintiff would agree to relieve Bajirao from Rs. 2000 of his debt.

At the same time Bajirao agreed with the defendant that he would get his suit against him dismissed if the defendant would agree to sell the fields to the plaintiff instead of to him (Bajirao), there being the same condition about delivery of possession three years hence with the defendant's right to enjoy the crops in the meanwhile. The plaintiff and the defendant were both agreeable and accordingly Bajirao, instead of obtaining a decree for possession (with delivery at the end of three years) as he would have been entitled to under his compromise, allowed his suit to be dismissed. Therefore, reduced to its simplest terms, the contract in essence was this: the defendant said to Bajirao if you will agree to get your suit against me dismissed, I will sell these fields to the plaintiff and will undertake to deliver possession to him at the end of three years.

Bajirao agreed and got the suit dismissed and the defendant duly executed the promised sale deed. Of course, the negotiations were more complicated than this and the initiative must have proceeded either from Bajirao or the plaintiff but all that is irrelevant in considering the validity of the contract ; all that we require for that is the essence of its terms reduced to a legal formula. It will be seen thus that the consideration which the parties valued at Rs. 2000 moved from Bajirao and that of course is permissible under S. 2 (d), Contract Act. Their Lordships of the Privy Council have decided that in such cases the person beneficially entitled under the agreement can sue even though not a party to the agreement itself : 32 All 410[1] at p. 413. The law in India is different from the English law on this point and the definition of consideration has been drafted accordingly in Sec. 2 (d). But here the sale deed was in the plaintiff's favour and he was a consenting party to the agreement. In these circumstances it is immaterial whether the plaintiff really owed Bajirao Rs. 3000 or not. That is a matter between Bajirao and himself and his right of suit is unchallengeable. As the learned trial Judge remarks even if Bajirao owed nothing, it would make no difference so long as Bajirao and he are both satisfied with the arrangement.

The contention of the learned counsel for the defendant, who is the appellant here, is that this amounts to an oral variation of the contract and so cannot be proved. He relies on Ss. 91 and 92, Evidence Act. There can be no doubt about the two fundamental propositions which these Sections embody, namely (1) that the terms of a contract or disposition of property which have been reduced to the form of a document can only be proved by the document itself unless one of the exceptions specified in S. 91, which are not in point here, apply; and (2) that once that is done, no oral evidence which contradicts or varies the document can be admitted. But these rules are subject to exceptions and one of them is contained in Proviso 1 to S. 92. It runs as follows :

1. Muhammad Khan v. Husaini Begam, (1910) 32 All 410=7 I C 237=37 I A 152=7 A L J 871 (P C).

Any fact may be proved which would . . . . entitle any person to any decree or order relating thereto such as . . . .

and then a number of Illustrations are given. The present case does not fall exactly within the purview of any of the Illustrations, but the wording of the Proviso and especially the use of the words "such as" show clearly that the Illustrations are not meant to be exhaustive, and this was so held in 20 C W N 1067.[2] What is significant is that matters relating to consideration have also been expressly included, namely the want or failure of consideration. What then does that mean? At least this: that though the document says there was consideration and states exactly what it was, a party may contradict that and show that there was none or that it has failed; that though the document sets forth that the consideration has fully passed and though a party to the document admit that by signing it, nevertheless he can turn round afterwards and contradict the document and show that he did not receive a pie: Illus. (i). If then one party to a document can show that he did not receive the consideration specified though the document recites that he did, I can see no reason why the other party should not be allowed to show that the consideration was paid in full, not in cash but in kind. The two are *ejusdem generis*. That fact would, in the language of the Proviso, "entitle him to a decree or order."

It has to be remembered that a person is not bound to receive payment in cash even though his bond entitles him to it. He can, if he so chooses and the other side agrees, be paid in kind. A contemporaneous oral agreement to be paid in kind may not be enforceable because that would be varying the contract, but once the consideration is actually paid and accepted in kind in full discharge of an obligation expressed as payable in cash, then that can be proved because a discharge of the obligation "entitles a party to a decree." If I may express this as a formula, it is this: *X* sells his house to *Y* for Rs. 500 by a written and registered sale deed. A contemporaneous oral agreement to the effect that *X* had agreed to accept a horse in lieu of the Rs. 500 cannot be proved so long as the consideration remains executory. *X* cannot be compelled to receive the horse. *Y* cannot be compelled to deliver it. That is 38 Mad 514[3] at p. 517. But once the horse is delivered by *Y* and accepted by *X* in full satisfaction of *Y's* undertaking under the agreement to pay Rs. 500 to *X*, it can be proved because that establishes a discharge of the obligation which *Y* owes *X* and thus entitles *Y* to a decree. It would not matter in the view I take whether this other transaction preceded the written contract or was contemporaneous with it or succeeded it. The test is whether the consideration is still executory or has been executed. This was the view in 17 N L R 111[4] at p. 113, in 30 Mad 231[5] at p. 232 and in 42 Cal 801.[6] I fully agree. The underlying principle has been broadly stated by their Lordships of the Privy Council in 12 M I A 157[7] at p. 185:

> The rules of evidence, and the law of estoppel, forbid any addition to, or variation from, deeds or written contracts. The law however furnishes exceptions to its own salutary protection; one of which is, when one party, for the advancement of justice, is permitted to remove the blind which hides the real transaction . . . . In such cases the maxim applies, that a man cannot both affirm and disaffirm the same transaction, show its true nature for his own relief, and insist on its apparent character to prejudice his adversary. This principle, so just and reasonable in itself, and often expressed in the terms, that you cannot both approbate and reprobate the same transaction, has been applied by their Lordships in this Committee to the consideration of Indian appeals, as one applicable also in the Courts of that country, which are to administer justice according to equity and good conscience. The maxim is founded, not so much on any positive law, as on the broad and universally applicable principles of justice.

The principle has also been stated in a narrower form, more appropriate to the present case, in this way, namely that it is open to a party to a transaction to show that the true and real consideration was, even if that means contradiction, other than that stated in the deed: 11 Cal 486[8]

2. Nadir Chand v. Birendra Nath, (1917) 4 A I R Cal 186=37 I C 126=20 C W N 1067.

3. Adityam Iyer v. Ramakrishna Iyer, (1915) 2 A I R Mad 868=21 I C 458=38 Mad 514=25 M L J 602.

4. Sambhu v. Tikaram, (1921) 8 A I R Nag 51=59 I C 240=17 N L R 111.

5. K. Bapanamma v. K. Kristnamma, (1907) 30 Mad 231=17 M L J 30.

6. Mahomed Fusa v. Aghore Kumar Ganguli, (1914) 1 A I R P C 27=28 I C 930=42 Cal 801=42 I A 1 (P C).

7. Mukhun Lall v. Sree Kishen Singh, (1867-69) 12 M I A 157=11 W R 19=2 Beng L R 44=2 Suther 190=2 Sar 403=20 E R 299 (P C).

8. Lala Himmat Sahai Singh v. Llewhellen, (1885) 11 Cal 486 (P C).

at p. 490, 18 All 168[9] at p. 171, 36 All 537[10] at p. 539, 3 Bom 159[11] at p. 160 and 11 Mad 213[12] at p. 215. In 49 M L J 414[13] at p. 417 the rule was put in still another way :

> What the first party tries to prove in such a case is failure of consideration and that brings it under Proviso (1) ; the second party can then clearly prove in rebuttal of the first party's case that there was in truth no failure of consideration and for that purpose show what the real consideration was.

But, it does not much matter how the rule is viewed. The proposition itself is in my opinion beyond doubt. It is significant that both Ameer Ali and Sarkar reproduce the rule in the words given by me without comment : *see* Ameer Ali's Evidence Edn. 9th, p. 660 and Sarkar's Evidence, Edn. 7, pp. 680 and 681. In 22 All 370[14] at pp. 375 and 376, the Judicial Committee allowed a collateral agreement under which the purchase price of a sale was to remain in the vendee's hands to be proved notwithstanding the fact that the sale deed recited that the consideration of Rs. 30,000 had been fully paid. The decision affords yet another illustration of the general rule. The appeal is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

9. Indarjit v. Lal Chand, (1896) 18 All 168=1896 A W N 16.
10. Chunni Bibi v. Basanti Bibi, (1914) 1 A I R All 298=24 I C 661=36 All 537=12 A L J 969.
11. Hukumchand v. Hiralal, (1878) 3 Bom 159.
12. Kumara v. Srinivasa, (1888) 11 Mad 213.
13. Ramaswami Chettiar v. Lodd Govindoss Krishnadoss, (1926) 13 A I R Mad 35=91 I C 612=49 M L J 414.
14. Sah Lal Chand v. Indarjit, (1900) 22 All 370=27 I A 93=7 Sar 702=4 C W N 485 (P C).

* A. I. R. 1939 Nagpur 23

VIVIAN BOSE J.

Ramnath Hajarimal Marwadi — Appellant.

v.

Mohanlal Radhakisan Marwadi — Respondent.

Second Appeal No. 250 of 1936, Decided on 1st September 1938, from appellate decree of 3rd Addl. Dist. Judge, Amraoti, D/- 17th February 1936.

***(a) Civil P. C. (1908), S. 2 (12), O. 21, R. 63 —Plaintiff in claim suit establishing his title to property — Possession of auction-purchaser becomes wrongful so far as mesne profits are concerned—Plaintiff is entitled to claim mesne profits from him.**

The essence of a claim to mesne profits is the wrongful possession of the defendant. Where the plaintiff in a claim suit establishes his title to the property claimed by him, the possession of the auction-purchaser purchasing the property in execution of the decree becomes wrongful so far as mesne profits are concerned; the plaintiff is therefore entitled to claim mesne profits from the auction-purchaser. Possession which may be rightful for certain limited purposes as against the judgment-debtor may be wrongful as against third parties, and the mere fact that the possession was obtained through the instrumentality of the Courts will not avail either the decree-holder or the auction-purchaser as against persons who were not parties to the decree. The ordinary rule is that an owner of property who is wrongfully kept out of possession is entitled to mesne profits and however rightful the auction-purchaser's possession may be as against parties to the suit, if it can avail him nothing as against third parties in regard to the right to possession, it cannot avail him in respect of other matters which directly flow out of these rights : *10 All 166 (P C) ; 14 Cal 18 (P C) ; 18 Cal 164 (P C) and 17 Mad 251, Ref.; 27 Cal 951 (P C) and 21 Cal 142 (P C), Expl.; A I R 1921 Nag 132 and 18 W R 318, Disting.* [P 25 C 2 ; P 26 C 1]

(b) Civil P. C. (1908), S. 2 (12) — Term "wrongful" is used in special sense — Meaning of term explained.

The term "wrongful" in S. 2 (12) is used in a special sense. It does not mean possession which is wrongful for all purposes. It only means that the person who has no right to possession as against the party claiming it, is in wrongful possession as against that party for certain purposes including mesne profits, but not wrongful for all purposes. Thus he is not liable for all losses, which the party kept out of possession may have sustained, but only for such profits as he actually received or which with due diligence he might have received. [P 26 C 2]

(c) Hindu Law — Debts — Father — Decree passed against father in joint Hindu family — It can be executed against son's share although father is sued in personal capacity.

Where a decree is passed against the father in a joint Hindu family, it can be executed against the son's share in the family, even though the father is sued in his personal capacity and not as manager or as representing the family : *A I R 1934 Nag 88, Foll.* [P 25 C 1]

(d) Civil P. C. (1908), O. 21, R. 63—Plaintiff in claim suit basing his claim on mortgage decree obtained against member of joint Hindu family, alleging that member was sued in representative capacity—Whether burden of proving so, which lies on him, is discharged, when he establishes that father and son were joint and that suit was against father *(Quære).*

Where the plaintiff in a claim suit, who bases his claim on a mortgage decree, obtained against a member of a joint Hindu family alleges that the member was sued in a representative capacity as manager of the joint family, the burden of proving

his allegation is primarily on him. But the question is whether that burden is discharged the moment the plaintiff establishes that the father and son were joint and that the suit was against the father : *6 I A 233 (P C) ; A I R 1935 Nag 14 and AIR 1934 Nag 88, Ref.* [P 24 C 2 ; P 25 C 2]

(e) Pleadings — Amendment — Limitation — Amended plaint filed when suit is barred by limitation, merely furnishing particulars and introducing no new cause of action — No question of limitation arises.

Where an amended plaint, which is filed at a time when the suit is barred by limitation, does no more than furnish particulars and introduces no new cause of action, no question of limitation arises. [P 25 C 1, 2]

J. R. Mudholkar—*for Appellant.*

N. T. Mangalmurti—*for Respondent.*

Judgment.—This is an appeal by defendant 1 Ramnath. Originally he was defendant 2, but the person who then figured as defendant 1 was struck out during the course of the proceedings and Ramnath has stepped up into his place in the array of defendants and has become defendant 1. The suit is a claim suit seeking the usual declaration and is also for possession of two fields, Survey Nos. 66 and 129 of Mouza Dahigaon and for mesne profits. The plaintiff claims to derive his title under a mortgage from the following three persons: (1) Bhagwan, defendant 2 ; (2) Hari, the father of defendant 3, Nathu, and (3) Ganpat, the husband of defendant 4, Saru. (I am giving the numbers as they now exist. Originally these defendants had different numbers for the reasons given above.) This mortgage was foreclosed in due course in the plaintiff's favour and he was given possession on 26th November 1929. Two persons, Bansilal and Asaram, who originally figured as defendants 1 and 3 but who were later struck out, obtained simple money decrees against Bhagwan, Nathu, Saru and Narayan who now figure as defendants 2 to 5. They attached the properties now in suit in execution and had them brought to sale. They were purchased at the auction by defendant 1 who, as I have said, is the appellant here, on 22nd February 1930. The plaintiff objected, but his objection was disallowed on 22nd March 1930 and so he now brings this claim suit. He succeeded in the Courts below and so defendant 1 appeals.

The first question raised in appeal relates to defendant 5, Narayan's interest in the property. He is a son of defendant 2 Bhagwan but was not a party either to the mortgage or to the mortgage decree. It is urged that since it has not been shown that defendant 2 was sued in a representative capacity, the rights of the son were not affected by the mortgage and consequently the plaintiff obtained no rights to his interest in the property. The extent of this interest is 1/6 and so it is claimed that the plaintiff's suit is bound to fail at least to the extent of that share. It is to be observed that this plea was not taken by defendant 1 in either of the lower Courts nor is it among the grounds of appeal here. Defendant 5 raised it but made no attempt to substantiate it ; in fact the case proceeded ex parte against all the defendants after the stage of pleadings. The plaintiff pleaded that defendant 2 Bhagwan was described as the manager of the family consisting of the mortgagors and Bhagwan's son Narayan and that the decree was obtained against him in that capacity. But here again no attempt has been made to substantiate this plea. Defendant 5 admitted that he was joint with his father but denied that the father was the manager. He claimed to be the manager himself. The question then resolves itself to this : Where does the burden of proof lie ? It may be conceded at the outset that the suit being a claim suit in which the plaintiff has failed at the objection stage, the primary burden is on him. But the question is whether that burden is discharged the moment the plaintiff establishes that the father and son were joint and that the suit was against the father. Their Lordships of the Privy Council appear to have stated unequivocally in 5 C L R 477[1] at p. 479 that that is all a creditor need prove. This is what they say :

> It appears to their Lordships that, acting on the principle which follows from their finding that this family was joint, it must be assumed that Mosaheb Dass is sued as a representative of the family, and that it must further be assumed that Nath Daso, in taking the lease of the mouzah, here referred to Ramnugger, in respect of which the rent was due, must be assumed to have taken it on behalf of the family, and that the debt must be deemed to be a debt from the family. . . . .Their Lordships have, therefore, come to the conclusion that, although there may have been some irregularity in drawing up these decrees, they are substantially decrees in respect of a joint debt of the family and against the representative of the family, and may be properly executed against the joint family property.

1. Bissessur Lall Sahoo v. Luchmessur Singh, (1881) 6 I A 233=5 C L R 477=4 Sar 76=3 Suther 686 (P C).

But I pointed out in 31 N L R 352[2] at p. 356 that this appears to conflict with the ratio decidendi in 30 N L R 248[3] and so the question will have to be considered afresh some day. But, the difficulty disappears in this case because defendant 5 is the son. Staples A. J. C. holds in 30 N L R 248[3] that when the decree is against the father

> it will be executed against the son's share of the family property even though the father is sued in his personal capacity and not as manager or as representing the family.

Following that ruling, I hold that defendant 5's share also passed to the plaintiff under his foreclosure decree. The next question is about non-joinder. The decree-holders Bansilal and Asaram who originally figured as defendants 1 and 3 were given up by the plaintiff when they stated that they claimed no interest in the property and so they were discharged. It is argued that they were necessary parties and so the suit is bad for non-joinder. O. 1, Rule 9, Civil P. C., states that no suit shall be defeated by reason of non-joinder and that the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. O. 1, R. 13 states that

> all objections to non-joinder must be taken at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

The earliest possible opportunity was on 21st September 1931 when these persons were discharged. The latest time for objections was on 29th April 1932 when the issues were settled. As a matter of fact, the question was again raised on 24th October 1933 and even then no objection was taken. It is clear then that this objection must fail. Another objection is on the score of limitation. An amended plaint was filed on 20th July 1931 at a time when the suit was barred by limitation and it is argued that the suit must date from the filing of this plaint. A perusal of the two plaints however will show that the amended plaint does no more than furnish particulars. It introduces no new cause of action. The amendment ought really to have been made in the original plaint itself or alternatively furnished separately as particulars. No question of limitation therefore arises.

The real question for decision is whether the plaintiff is entitled to mesne profits. Defendant 1 contends that he took possession under the process of the Civil Courts: that he did nothing to initiate the proceedings: and that he purchased in good faith. Therefore he contends that his possession was not wrongful, at any rate till it was declared to be so by a Court of competent jurisdiction. There can be no doubt that the essence of a claim to mesne profits is the wrongful possession of the defendant. It is not necessary to travel beyond the definition in S. 2 (12), Civil P. C., to determine that. Therefore, what we have to see is whether the possession of an auction purchaser is wrongful. I do not see what else it can be, for, otherwise the plaintiff would have no right to immediate possession. But it is argued, their Lordships of the Privy Council have decided in 27 Cal 951[4] at p. 967 that mesne profits are "in the nature of damages which the Court may mould according to the nature of the case," and in another case, 21 Cal 142[5] at p. 148, their Lordships laid great stress upon the question of good faith and based their decision upon justice, equity and good conscience. They also held that the plaintiff who was in possession under a decree of the Court was in rightful possession so long as the decree stood. Therefore, it is urged the matter is concluded. But their Lordships also pointed out that as he had been wrongfully obstructed the balance of accounts was against him. In those circumstances their Lordships held that since there was no rule to prevent the plaintiff from recovering the loss he had suffered, the rules of justice, equity and good conscience should apply. But they also made it clear that though the plaintiff's possession was rightful in one sense of the term it was wrongful so far as mesne profits were concerned. It is true, they were not deciding this question there, and it is equally true that the plaintiff had conceded his liability to account but their Lordships' observations cannot be altogether ignored. Then again it must be remembered that

2. Madhodas v. Gangabai, (1935) 22 A I R Nag 14=154 I C 333=31 N L R 352.
3. Bhagwan v. Ramdayal, (1934) 21 A I R Nag 88=148 I C 768=30 N L R 248.
4. Grish Chunder Lahiri v. Shoshi Shikhareswar Roy, (1900) 27 Cal 951 = 27 I A 110 = 7 Sar 687=4 C W N 631 (P C).
5. Dakhina Mohan Roy v. Saroda Mohan Roy, (1894) 21 Cal 142=20 I A 160=6 Sar 366 (P C).

those observations were made with reference to parties to the suit. The contest there was between the same set of parties in both suits. The situation changes the moment the rights of strangers intervene. Possession which may be rightful for certain limited purposes as against the judgment-debtor may be wrongful as against third parties, and the mere fact that the possession was obtained through the instrumentality of the Courts will not avail either the decree-holder or the auction-purchaser as against persons who were not parties to the decree.

This clear cut distinction between parties and strangers is seen in an extreme form in the case of stranger auction-purchasers. Even if the decree under which the sale was held is afterwards reversed, the title of a stranger auction-purchaser is not affected as against a party to the suit : *see* 10 All 166[6] at page 172 and 14 Cal 18[7] at p. 25. But it avails him nothing as against persons who are not parties to the suit. So far as they are concerned, the rule of caveat-emptor applies and so the auction-purchaser, even though a stranger to the decree under which he purchased, would have to yield up possession to the true owner provided he also was not a party to the decree : *see* 18 Cal 164.[8] That being so, I cannot see how the rule about mesne profits can be any different. The ordinary rule is that an owner of property who is wrongfully kept out of possession is entitled to mesne profits and however rightful the auction-purchaser's possession may be as against parties to the suit, if it can avail him nothing as against third parties in regard to the right to possession, I do not see how it can avail him in respect of other matters which directly flow out of those rights.

In 17 Mad 251,[9] a purchaser who entered into possession on the strength of a sale under the Madras Recovery Act of 1864 was held to be in rightful possession until the decree was set aside but was nevertheless held to be accountable for mesne profits for the entire period of occupation. Here again the use of the words rightful and wrongful require explanation. The truth of the matter is that the word wrongful in S. 2 (12), Civil P. C., is used in a special sense. It does not mean possession which is wrongful for all purposes. It only means that the person who has no right to possession as against the party claiming it is in wrongful possession as against that party for certain purposes including mesne profits but not wrongful for all purposes. Thus he is not liable for all losses which the party kept out of possession may have sustained but only for such profits as he actually received or which with due diligence he might have received.

As regards the rulings cited, A I R 1921 Nag 132[10] related to a case of a purchaser from a Hindu widow with a limited estate. There is of course no difficulty there because the purchaser has a title good against all the world including the reversioner up till the moment the reversioner chooses to set aside the alienation. Possession of that kind is of course not wrongful. In 18 W R 318[11] the defendant was prevented by virtue of a decree obtained by the plaintiff himself from realizing the profits and it was held that that did not give rise to the right because the wrongful possession contemplated in cases of mesne profits means a possession in which the party has power and control over the property. I need not refer to the other rulings cited, nor need I say much about the passages cited in Mayne on Damages, Edn. 10, p. 434. The position contemplated there is much the same, having regard to the differences between the Hindu and the English law, as the position in A I R 1921 Nag 132,[10] referred to above. It is not in point here. The appeal fails and is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

6. Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan, (1888) 10 All 166 = 15 I A 12 = 5 Sar 129 (P C).
7. Rewa Mahton v. Ramkishen Singh, (1887) 14 Cal 18=13 I A 106=4 Sar 746 (P C).
8. Umes Chunder Sircar v. Zahur Fatima, (1891) 18 Cal 164=17 I A 201=5 Sar 507 (P C).
9. Perumal Udayar v. Krishnama Chettiyar, (1894) 17 Mad 251.
10. Maroti v. Abhiman, (1921) 8 A I R Nag 132= 61 I C 543.
11. Ram Pershad Dass v. Shah Wajid Ali, (1872) 18 W R 318.

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STONE C. J. AND CLARKE J.

Gulam Husain and another—Plaintiffs — Appellants.

v.

Mir Jakirali and another—Defendants — Respondents.

First Appeal No. 119 of 1935, Decided on 5th September 1938, from decree of Addl. Dist. Judge, Raipur, D/- 6-8-1935.

(a) Mahomedan Law—Minor — Guardian — De facto guardian cannot alienate minor's immovable property without Court's permission.

A de facto guardian has no power to transfer any right or interest in the immovable property of the minor. Such a transfer is not merely voidable but void and cannot be ratified. If the de facto guardian thinks that alienation of property is necessary for the wants of the minor he has to get the permission of the Court for the alienation : *A I R 1918 P C 11, Expl.; A I R 1932 P C 76 ; 34 All 213; A I R 1936 All 837 and A I R 1937 Pesh 74, Ref.; A I R 1932 Bom 23, Dissent.* [P 27 C 2; P 28 C 2; P 29 C 2]

(b) Contract Act (1872), S. 65 — Transfer void under law — Suit to recover consideration —Time runs from date of agreement.

When a transfer is void owing to a provision of law, so that a cause of action to recover the consideration under S. 65, Contract Act, arises, time runs, in the absence of special circumstances, from the date of the agreement : *A I R 1923 P C 189 and A I R 1933 P C 63, Rel. on; A I R 1922 P C 403 and 30 Cal 539 (P C), Ref.* [P 31 C 1]

Fida Husain — *for Appellants.*

J. Sen — *for Respondent 2.*

Judgment. — This is an appeal by the plaintiffs who have brought against two defendants a suit on a mortgage which suit has been dismissed. The circumstances are very hard for the plaintiffs. The difficulty in their way is a legal difficulty. There is no question of their good faith. There is no dispute about the consideration. The mortgage in question is attacked because it was made by a lady, the mother of defendant 1, a Mahomedan, purporting to act as guardian for defendant 1, then a minor. It is said that she had no power to bind the estate. The circumstances of the loan are said to be as follows :

Defendant 1 Jakirali is the son of one Rehmat Bi. A question was raised as to whether he is legitimate or illegitimate and that depended upon whether Rehmat Bi was the wife or the mistress of Abbas Ali. That question was raised by defendant 2, Mt. Sugrabi, who was the sister of Abbas Ali, in a suit for apportionment of shares of the estate left by Abbas Ali. Clearly Sugrabi's share would be much larger if Jakirali was not a shareholder, i. e. illegitimate. So it was part of her case that she was entitled to a large share because Jakirali was entitled to no share. His mother in that case acted as his guardian ad litem and, as it is alleged in this case, in order to obtain money to fight that case, borrowed money on the suit mortgage. It should be made clear that she was guardian ad litem appointed by the Court but that she did not, as she could have done and should have done, apply to the Court as guardian ad litem for the leave of the Court to alienate part of the property of the minor for the purpose of obtaining the necessary finances proper to conduct the litigation. Had that been done, doubtless, different considerations would have arisen to those pertinent to this case. Instead of acting as guardian ad litem she, as guardian de facto, made this mortgage. Before us there has been no dispute as to the wide difference that exists in Mahomedan law between the powers of a de jure and a de facto guardian. It is not disputed that she executed this mortgage acting as a de facto guardian. Nor is it contested by Mr. Fida Hussain before us that the powers of a de facto guardian with regard to the alienation of immovable property are different from, and less than, the powers of a de jure guardian. But he argues, on the authority in 45 Cal 878[1] at p. 897 that the matter is expressed too broadly when it is said, as it is said in the late Sir Dinshah Mulla's work on the Principles of Mahomedan Law (Edn. 11), para. 265, that

> a de facto guardian has no power to transfer any right or interest in the immovable property of the minor. Such a transfer is not merely voidable but void.

He says that that proposition is wrong in both its branches : it is too wide in its first branch because in certain cases a de facto guardian has power to alienate or encumber; it is wrong in its second part because such an act is not void but voidable. The latter is important here because there is some evidence of ratification by defendant 1, the minor, after he came of age. That criticizm of a broad proposition on the alienation of immovable property by the de facto guardian of a Mahomedan minor is founded upon one of the Mahomedan books of authority known as the Hedaya. The passage that is relied on is to be found quoted in 45 Cal 878[1] at p. 895.

1. Imambandi v. Mutsaddi, (1918) 5 A I R P C 11=47 I C 518=45 Cal 878=45 I A 73 (P C).

The argument runs as follows. Admittedly a de facto guardian has only a limited power of alienation. This power of alienation only arises in certain circumstances. For the purpose of this case one looks at the second proposition from the Hedaya cited in 45 Cal 878[1] at p. 895 and one finds that even a de facto guardian has power to alienate where it is necessary to do so owing to the wants of an infant. There is no difference—if the wants of the infant demand the alienation—between the alienation of immovable property and moveable. Here the want of the infant was of a nature within the principle contained in that proposition. His whole estate was being challenged, nay even his status was being attacked. He ran the risk of leaving the Court a bastard without property. To save him from that fate it was necessary to defend the case. To enable that to be done, it was imperative to raise money. Thus, here you have got a case where, in order to save the whole estate of the minor, money must be obtained and therefore the second proposition applies and therefore one is within the narrow range of cases where even a de facto guardian can raise money by alienating not merely moveable but also immovable property.

As we read 45 Cal 878[1] at pp. 896 to 898, their Lordships considered the proposition referred to from the Hedaya and sharply distinguished between the alienation of moveables and immovables. The main paragraph on page 896 referring to the second proposition ends up with the observation :

> Under such circumstances, power is given to the lawful guardian to incur debts or to raise money on the pledge of the minor's goods and chattels . . . . and this power, in the absence of a de jure guardian, the law extends to the person who happens to have charge of the child and of the child's property, though not a constituted or authorized guardian.

Then they observe :

> There is no reference to the pledge or sale of immovable property, as the power of dealing with that class of property is confined to the de jure guardians.

We apprehend that what their Lordships were saying is this: that even in the cases which we have been examining and which are mentioned in the Hedaya (proposition 2) so far as immovable property is concerned the de facto guardian has no power of alienation though even a de facto guardian in such a case may pledge or sell the minor's goods or chattels. That is how we read the Privy Council decision on this point and that being our conclusion it directly follows that we are in agreement with the way the matter is expressed in Mulla's Principles of Mahomedan law. We desire to add however that it is manifest that cases could arise when for the mere sustenance of a Mahomedan minor it would be necessary to sell his land and we apprehend that this practical difficulty is overcome by the fact that a de facto guardian has power in such circumstances to sell the land with the authority of the Court. It is only necessary to go to the Court and get authority and then the matter falls within para. 264 of Mulla. In this case there really is no practical difficulty because here the mother was guardian ad litem and had only to apply to the Court for leave to realize to make the resulting alienation perfectly good. 7 Luck 1,[2] another decision of the Privy Council, is distinguishable on its facts from the present, but so far as it goes it is in the same direction.

The next major point is whether Ex. P-2, which purports to be a ratification of this transaction by defendant 1 when he came of age, is effective for any purpose. As a transfer, it has no effect not being registered. It is necessary to link it up with the original mortgage, Ex. P-1, by ratification in order to give it any effect. Their Lordships of the Privy Council in 45 Cal 878[1] at page 897 have, in our opinion, made the matter quite clear at page 901. They had been considering whether a transaction such as the present by a guardian de facto is void or voidable, suspended or dependent, and they expressed the view that the word "suspended" as used by Mr. Baillie in his Mahomedan Law of Sale really means dependent upon ratification, but they observe that the question of ratification is only applicable where you are dealing with an act done on behalf of another who is an adult, i. e. sui juris, and capable of himself acting. In such a case as that the person sui juris can ratify the act of the person purporting to act as his agent, whereas if he is not an adult, not sui juris, there is no question of agency and there can be no question of ratification. They observe:

> The Hanafi doctrine about fazuli sales appears clearly to be based on the analogy of an agent who

2. Mohammad Biaz Husain v. Mohammad Iftikhar Hussain, (1932) 19 A I R P C 76 = 136 I C 97=7 Luck 1=59 I A 92 (P C).

acts in a particular matter without authority, but whose act is subsequently adopted or ratified by the principal which has the effect of validating it from its inception. The idea of agency in relation to an infant is as foreign, their Lordships conceive, to Mahomedan law as to every other system.

This was relied on by a Full Bench of the Allahabad High Court in I·L R (1937) All 195,[3] where the conclusion was arrived at that a transaction of this kind is void ab initio, but we would prefer to put it in the way that their Lordships of the Privy Council put it though it may well be that the practical effect in the case of infants is the same. Reliance is placed by counsel for the appellants on a passage in the judgment reported in 33 Bom L R 603[4] at the bottom of p. 606 and the top of p. 607. With respect, we are unable to agree with the view there expressed that a transaction of this kind might be justified by cases of extreme necessity. We do not read the Privy Council decision in 45 Cal 878[1] at p. 897 as expressing that view, though their Lordships do say that so far as moveable property is concerned, alienation could be justified in the case of the necessity referred to in the Hedaya. As regards the case referred to in A I R 1937 Pesh 74[5] and relied on by counsel for the appellants, that is a decision to the effect, relying upon two Privy Council decisions, 34 All 213[6] and 45 Cal 878,[1] that a transfer made by a de facto guardian of a Mahomedan minor is not wholly void because it is the minor who can avoid it. In 34 All 213[6] their Lordships held that a mortgage by a de facto guardian was, under Mahomedan law, in precisely the same case as a mortgage by a totally unauthorized person. Their Lordships in 45 Cal 878[1] indicate a sort of case where the act of the mother might not be without effect, for example, if believing she is vested with authority as her husband's executrix she alienates not as guardian de facto but as executrix and the purchaser is let into possession and the minor when he comes of age does not deny the authority, then in such a case the alienation would be effective. But we apprehend that that turns on the fact that the mother is not purporting to act as a guardian de facto, nor as a guardian at all, but as an executrix. Such a case would not be helpful in determining what the position is when she purports to act as a guardian and it turns out that she is merely a guardian de facto. In 34 All 213[6] it was indicated that acquiescence or an act working an estoppel might prevent the minor from taking up the position that the act was by an unauthorized person but that in the case there under consideration he was not estopped and was not debarred from redeeming, apparently no question of avoiding the mortgage arose. It follows from the above, in our opinion, that the transaction could not be ratified, that Ex. P-2 has no effect and, accordingly, that the mortgage is not binding on defendant 1.

Next it is said that although this be so, the plaintiffs have an equity against defendant 2 to get a money decree on the ground of total failure of consideration. Apart from the difficulties which we later examine when considering defendant 1's position, there is a fatal and simple difficulty in the way of any such relief against defendant 2. Defendant 2, though she happens to be the aunt of defendant 1, is at the present moment the owner of this property not because she is his aunt, not because she is in any way connected by relationship but because defendant 1 having been sued and a decree having been given against him in a money suit this particular item of property in execution of that decree was brought to sale and bought by defendant 2. The learned Judge, in our opinion, is wrong when he says in para. 14 of his judgment that defendant 2 represents defendant 1. She in no way represents defendant 1. Her title is entirely distinct from that of defendant 1 except that she is a purchaser from him. Although defendant 1 or rather his guardian de facto may have received from the plaintiffs money and the plaintiffs have got in return for those moneys no security, that does not in any way work an equity against defendant 2, a purchaser at court auction. Incidentally, we observe that she is the person to fight whom the money was borrowed. Therefore we are unable to give the plaintiffs any relief as against defendant 2. Whether such a relief can be given against defendant 1 we consider later.

There remains another point. It is said that Rehmat Bi being the wife of Abbas

3. Mt. Anto v. Reoti Kuer, (1936) 23 A I R All 337=166 I C 61=I L R (1937) All 195=1936 A L J 1099 (F B).

4. Shidlingava v. Rajava, (1932) 19 A I R Bom 23 =134 I C 366=33 Bom L R 603.

5. Jawahir Singh Mahtab Singh Saran Singh v. Kohat Municipality, (1937) 24 A I R Pesh 74 =170 I C 63.

6. Mata Din v. Ahmadalli, (1912) 34 All 213= 18 I C 976=39 I A 49=9 A L J 215=15 O C 49 (P C).

Ali was entitled to a widow's share when Abbas Ali died. In point of fact although she was the guardian ad litem in the litigation launched by Sugrabi against Jakirali and his grandmother Asabi, she did not make any claim to any share and accordingly the estate was parcelled out between Jakirali, Sugrabi and Asabi. Now it is said that in truth Rehmat Bi was entitled to Re. 0-1-8¼ share and if this mortgage fails against the minor it should at least succeed against the person who purported to make it. That argument is founded on the wording of the mortgage, Ex. P-1. It is founded upon that part of the mortgage relating to the property alienated which is stated to be Rupee 0-8-4 share in the estate. In point of fact we are told the minor's share, according to Mahomedan law, is Re. 0-6-3¾. The position after the suit brought by Sugrabi was as follows: There were three persons amongst whom the estate was divided, Sugrabi, Asabi and Jakirali. Sugrabi got Re. 0-4-8, Asabi Re. 0-2-8 leaving Re. 0-8-8 to Jakirali. In point of fact this mortgage is dealing with Re. 0-8-4, but it is said that Re. 0-8-8 was not Jakirali's proper share because Rahmat Bi was entitled to a share and she was entitled to Re. 0-1-8¼ and Jakirali was entitled to Re. 0-6-3¾ which totals Re. 0-8-0 and not Re. 0-8-8. We have not pursued the eight pies to find out what becomes of that.

In our opinion, for the present argument to succeed, it would be necessary to infer from the fact that the mortgage purported to be for Re. 0-8-4 share, which was more than Jakirali's proper share, that Rahmat Bi must have been also mortgaging her own share. In other words, one would have to read into this mortgage an implied term, the implied term being that the mother was mortgaging her own interest. Such an implied term, in our opinion, is impossible where there is an express term which denies it. There is an express term. In fact the whole tenor of the mortgage, the language used, the fact that the verbs used are masculine and singular show that the mortgagor was the minor son and that what was being mortgaged was his share. The fact that that share was over-stated, at a time, it may be observed, when Sugrabi's right to a share was being challenged, does not make it possible, in face of the express words of the document, to say that the guardian was not mortgaging as a guardian solely but partly personally and was not mortgaging her minor son's property only but she was also mortgaging some of her own property. Therefore this point also, in our opinion, fails. The result is that with some regret, because unquestionably the plaintiffs have suffered the loss of their money through perhaps no fault of their own, the appeal fails as against defendant 2.

We are asked to give, in any event, a personal decree against defendant 1 to the extent of the money advanced, this relief being sought either because there has been an advance of money on a total failure of consideration or on equitable grounds. This alternative claim has not been argued by counsel for the appellants at any length possibly because owing to the present circumstances of defendant 1 any decree given against him would be infructuous. But we have had the advantage of the valuable argument from Mr. Sen as amicus curiae, defendant 1 not being represented before us, and in our opinion that argument shows that this is not a case in which any such decree can be given. At p. 549 of 30 Cal 539[7] their Lordships of the Privy Council cite with approval an observation of Romer L. J. at page 13 of (1902) 1 Ch 1[8] (*see* on appeal (1903) A C 6[9] to the following effect:

> The short answer is that a Court of equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the Legislature has declared to be void.

That was a case of a contract purporting to be made on behalf of an infant. It was not a case under the Mahomedan law and it does not raise the nice distinction which might posssibly apply here between a void contract and a contract made by a person not authorized to act. But we think the same considerations apply to this case as to that.

It was indicated in argument before us that the only possible grounds under which money could be ordered to be returned would be under S. 65 or S. 68, Contract Act, or S. 38 or S. 41, Specific Relief Act. As to the latter two Sections the return would only be ordered as a term imposed upon a person seeking equitable relief. But here

7. Mohori Bibee v. Dharmodas Ghose, (1903) 30 Cal 539=7 C W N 441=30 I A 114=8 Sar 374 (P C).
8. Thurstan v. Nottingham Permanent Benefit Building Society, (1902) 1 Ch 1=71 L J Ch 83.
9. Nottingham Permanent Benefit Building Society v. Thurstan, (1903) A C 6=72 L J Ch 134=87 L T 529=51 W R 273=67 J P 129.

there is no question of a person seeking equitable relief. This is not a case in which defendant 1 is seeking the cancellation of the mortgage but a case in which the mortgagees are seeking to enforce a mortgage. As to S. 68, Contract Act, assuming that the loan was used for the infant's necessaries (and there is a finding to the contrary) the proper remedy would be to sue for the return of the money under the powers conferred by S. 68, Contract Act. The time for doing that would be within three years of the advance. The advance was in 1918 and this suit is in 1933. As to S. 65, Contract Act, and generally, we have considered whether it would be possible to regard this as a case falling within the observations in 45 All 179.[10] That was a case where it was not known until the result of certain litigation was ascertained (to which the purchaser was not a party) whether the vendor had or had not title. It then appeared, as a result of that litigation, that the vendor had no title and the Judicial Committee in a suit claiming alternatively the return of the money paid by way of price held that limitation dated from the date it was known that title was defective, not from the date the money was paid. But, in our opinion, that mode of approach fails in consequence of the decisions of the Judicial Committee in 50 Cal 929[11] and 54 All 1067[12] to the effect that when a transfer is void owing to a provision of law, so that a cause of action to recover the consideration under S. 65, Contract Act, arises, time runs, in the absence of special circumstances, from the date of the agreement. At the date of the agreement the parties thereto presumably knew the Mahomedan law, knew that his mother was incapable of making an effective mortgage on behalf of her minor son and must be deemed in law to have known that they were advancing their money without any effective security. They accordingly should have sued within three years from the date of the advance. Those cases together with 30 Cal 539[7] appear to us to make it now impossible to pass a personal decree against defendant 1 based either on equitable grounds or on the view that he has received for his necessities a certain sum of money. The result, is the appeal is dismissed with costs.

N.S./R.K. *Appeal dismissed.*

10. Harnath Kuar v. Indar Bahadur Singh, (1922) 9 A I R P C 403=71 I C 629=45 All 179=50 I A 69=26 O C 223 (P C).
11. Ananda Mohan Roy v. Gour Mohan Mullick, (1923) 10 A I R P C 189=74 I C 499=50 Cal 929=50 I A 289 (P C).
12. Hansraj Gupta v. Dehra Dun Mussoorie Electric Tramway Co. Ltd., (1933) 20 A I R P C 63=142 I C 7=54 All 1067=60 I A 13 (P C).

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* A. I. R. 1939 Nagpur 31

GRUER J.

Suwalal Vemichand — Plaintiff — Applicant.

v.

Fazle Hussain Rajabali Bohra and another — Defendants — Opposite Party.

Civil Revn. No. 847 of 1937, Decided on 19th October 1938.

(a) Partnership Act (1932), Ss. 22 and 25 — Surety executed by partner held on behalf of firm and hence binding on other partners.

A managing partner of a firm gave surety, and the letter under which the surety was given read as follows: "Please accept the salutations of Rajab Ali Muhammadali. This is to write to you that please keep a khata of the goods of Rupees 200, in words two hundred rupees, of Adam Ali Nazar Ali of mouza Sirpur. The responsibility for Rs. 200 is ours. Sambat 1985, miti Kartak Sudi 3, Thursday, dated 15th November 1928. Rajab Ali Muhammad Ali by the pen of Fajli Hussain" :

Held that the executant clearly purported to act on behalf of the firm. The act had been done so as to bind the firm in the manner mentioned in Sec. 22, Partnership Act. The other partners were therefore liable under Sec. 25 of the Act. [P 32 C 1]

(b) Surety—Continuing guarantee for limited amount for supply of goods on credit — Goods worth more than amount mentioned in bond supplied on credit — Surety is liable to extent mentioned in bond.

Where a surety has given a continuing guarantee for a limited amount for the supply of goods on credit to the principal debtor it does not prohibit the advancing of goods beyond that sum and if the goods are supplied to the debtor exceeding that amount the surety would not be discharged but would be liable to the extent mentioned in the bond : *A I R 1937 Mad 360, Rel. on.* [P 32 C 1]

*** (c) Surety — Continuing guarantee — Acknowledgment by principal debtor does not save limitation against surety.**

An acknowledgment by the principal debtor does not save limitation against the surety, unless it is shown that the latter allowed himself to be represented by the person who made the payment. This principle will apply to the continuing guarantee also : *28 Bom 248 ; A I R 1924 Nag 411 ; A I R 1917 Mad 895 and A I R 1931 Lah 691, Applied; 14 M I A 86 (PC), Disting.* [P 32 C 2]

R. N. Padhye — *for Applicant.*

N. T. Mangalmurti — *for Opposite Party.*

Order. — Two points emerge in this application. The first is, whether the surety given by non-applicant 1, Fajli Hussain, is binding against his partner Hasanali in the

firm of Rajabali Muhammadali, and the second is whether the acknowledgment (kabuli hisab) dated 18th June 1933 which kept the debt alive against the principal debtor does so against the surety. The first point is not difficult to answer. Ex. P-3, the letter under which the surety was given, clearly purports to be on behalf of the firm. It reads as follows:

Please accept the salutations of Rajab Ali Muhammadali. This is to write to you that please keep a khata of the goods of Rs. 200, in words two hundred rupees, of Adam Ali Nazar Ali of Mauza Sirpur. The responsibility for Rs. 200 is ours. Sambat 1985, miti Kartak Sudi 3, Thursday, dated 15th November 1928. Rajab Ali Muhammad Ali by the pen of Fajli Hussain.

The executant clearly purports to act on behalf of the firm. He is said to be the managing partner. The act has been done so as to bind the firm in the manner mentioned in S. 22, Partnership Act. The other partners are therefore liable under S. 25 of the Act. On the second point the plea is first taken that the undertaking in Ex. P-3 ceased to be binding as soon as goods more than Rs. 200 in value were given on credit. There is no suggestion of such a plea on the record. Fajli Hussain himself does not suggest such an interpretation of the suretyship, either in his pleadings or in the witness-box. The letter is of course not artistically worded, but it seems to give a continuing guarantee for a limited amount of Rs. 200. It does not prohibit the advancing of goods beyond that amount. The position is similar to what it was in A I R 1937 Mad 360[1] and the result would be that the surety would be liable to the extent mentioned in the bond.

The main point is the effect of the acknowledgment. It is admitted that but for this acknowledgment the debt in suit would have been time-barred. There is good authority for holding that a payment by a principal debtor does not give a fresh starting point against the surety: 28 Bom 248,[2] A I R 1924 Nag 411[3] and 32 I C 608.[4] The same reasoning would apply to an acknowledgment and it was held in 13 Lah 240[5] that an acknowledgment by the principal debtor does not save limitation against the surety, unless it is shown that the latter allowed himself to be represented by the person who made the payment. These cases may not refer to continuing guarantees, but does that alter the position? The learned counsel for the applicant maintains that when such a guarantee extending to a series of transactions is given, no question of limitation arises so far as the surety is concerned. He even goes to the length of saying that even if the creditor had allowed the items to become finally barred against himself the surety would still be liable. He says that as the debt has been kept in time by virtue of the acknowledgment it cannot be said to be not due against the principal debtor.

According to Sec. 128, Contract Act, the liability of the surety is co-extensive with that of the principal debtor, but this implies that the liability of the surety must not be extended to his detriment. Now if the debtor and the creditor had not agreed between themselves to take this acknowledgment the debt would have been time-barred and the surety would have been released. I cannot accede to the proposition that the surety could be called on to pay a time-barred debt. The surety was entitled to expect that the creditor would recover payment within time and not that he should be called upon to make good items taken years previously. I find that the principle in the above cases will apply to the continuing guarantee also. Counsel refers me to 14 M I A 86,[6] but that case is distinguishable as it dealt with a "contract of indemnity" (*see* S. 124, Contract Act) there being surety bonds against embezzlement which were renewed at different periods. These bonds remained in force and were not given up and further they were in favour of Government; so no question of limitation was raised. I hold then that the lower Court was correct in saying that the acknowledgment did not save limitation against defendant 3 or defendant 4. The application is dismissed with costs. Counsel's fee Rs. 20.

D.S./R.K. *Application dismissed.*

1. Hajee Moosa v. Abdul Kareem, (1937) 24 A I R Mad 360=167 I C 1006=(1937) 1 M L J 143.
2. Gopal Daji v. Gopal, (1904) 28 Bom 248 = 5 Bom L R 1020.
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A. I. R. 1939 Nagpur 33

STONE C. J. AND CLARKE J.

Garamlal Punaji Lodhi —
Defendant No. 2 — Appellant.

v.

Tularam Amritlal Lodhi —
Plaintiff — Respondent.

Second Appeal No. 478 of 1935, Decided on 16th August 1938, from appellate decree of Dist. Judge, Chindwara, D/- 2nd July 1935.

Hindu Law—Minor and guardian—Guardian as manager can bind minor's estate—Where guardian is not manager, minor is not liable for debts contracted by guardian.

A guardian as manager can in a proper case bind, charge, incumber and/or alienate the estate, but the estate cannot be reached simply because the guardian purports to bind the minor because it is as manager that he binds the estate. If the estate is to be bound there must be something which causes the estate to be bound, generally there must be some document binding the estate though sometimes the estate may be reached because it has been enriched as a consequence of the transaction in question. But where the guardian of the minor is not the manager of the estate and does not purport to bind the estate by his acts, the minor is not liable for debts contracted by the guardian on behalf of the minor : *Case law discussed.* [P 34 C 1; P 35 C 1]

M. R. Bobde — *for Appellant.*

Abdul Razak Khan — *for Respondent.*

Judgment.—This appeal, in which defendant 2 is the appellant, raises the question whether an infant can be made liable in contract by his mother and guardian. The case raises the opposing views which have been expressed on this point by various Courts in India in an unusually clear way because the alleged liability is created by a bond which the guardian executed purporting to act on behalf of her minor sons, defendants 1 and 2. The bond was given to raise money to pay off debts incurred by the father of the sons and which debts were due to the payee under the bond. The plaintiff's case was that both the sons at the time were minors but the lower Appellate Court has found as a fact (by which finding this Court in second appeal is admittedly bound) that at the time the bond was executed, defendant 1 was a major. Being a major he was at that date the managing coparcener and his mother, it is said, had no power to bind the estate and, in any case, had no power to contract on behalf of her minor son. In the result if the judgment of the lower Appellate Court is upheld the elder son is not liable for anything, for his mother could not contract on his behalf he being a major and she not appearing to be his agent but purporting to act as guardian which she could not be. On the other hand, the lower Appellate Court has held the younger son liable for the whole because his mother and guardian can bind him contractually and the contractual liability is several as well as joint and is for the whole amount of the bond and not for half.

In our opinion, there is nothing ambiguous about the decision of the Board in 11 Bom 551[1] at p. 561. That case does not turn upon any difference between a contractual liability arising from a covenant in a conveyance and any other contractual liability. Their Lordships say that there is not in Indian law any rule which gives a guardian and manager greater power to bind the infant ward by a personal covenant than exists in English law. That proposition was admitted by a very accomplished lawyer, Mr. Mayne, who had a long experience not only before their Lordships' Board but in Madras and was the author of one of the most highly regarded works on Hindu law. Their Lordships accepted it. They add :

> Their Lordships . . . conceive that it would be a very improper thing to allow the guardian to make covenants in the name of his ward, so as to impose a personal liability upon the ward . . . .

It is indeed difficult to see how a guardian can make contractually bound a minor who cannot by his contract bind himself, though clearly a manager can bind the minor's estate not qua agent or guardian of the minor but as manager of the minor's estate. It is true that a minor can be made liable in certain cases which fall within S. 68, Contract Act. But, this liability is a statutory liability springing out of the fact that the person claiming has supplied the minor with necessaries suited to his condition in life. As Pollock A. J. C. observed in A I R 1933 Nag 285[2] if money is supplied and expended on necessaries it can be recovered back whether a bond is given or not. Thus it does not matter, in such a case, whether the guardian or minor or neither executes the bond. The liability springs from the advance and the use, not from the bond. Difficult questions can arise as to what cases fall within S. 68. In 18

1. Waghela Rajasanji v. Shekh Masludin, (1887) 11 Bom 551 (P C).
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The main point is the effect of the acknowledgment. It is admitted that but for this acknowledgment the debt in suit would have been time-barred. There is good authority for holding that a payment by a principal debtor does not give a fresh starting point against the surety: 28 Bom 248,[2] A I R 1924 Nag 411[3] and 32 I C 608.[4] The same reasoning would apply to an acknowledgment and it was held in 13 Lah 240[5] that an acknowledgment by the principal debtor does not save limitation against the surety, unless it is shown that the latter allowed himself to be represented by the person who made the payment. These cases may not refer to continuing guarantees, but does that alter the position? The learned counsel for the applicant maintains that when such a guarantee extending to a series of transactions is given, no question of limitation arises so far as the surety is concerned. He even goes to the length of saying that even if the creditor had allowed the items to become finally barred against himself the surety would still be liable. He says that as the debt has been kept in time by virtue of the acknowledgment it cannot be said to be not due against the principal debtor.

According to Sec. 128, Contract Act, the liability of the surety is co-extensive with that of the principal debtor, but this implies that the liability of the surety must not be extended to his detriment. Now if the debtor and the creditor had not agreed between themselves to take this acknowledgment the debt would have been time-barred and the surety would have been released. I cannot accede to the proposition that the surety could be called on to pay a time-barred debt. The surety was entitled to expect that the creditor would recover payment within time and not that he should be called upon to make good items taken years previously. I find that the principle in the above cases will apply to the continuing guarantee also. Counsel refers me to 14 M I A 86,[6] but that case is distinguishable as it dealt with a "contract of indemnity" (*see* S. 124, Contract Act) there being surety bonds against embezzlement which were renewed at different periods. These bonds remained in force and were not given up and further they were in favour of Government; so no question of limitation was raised. I hold then that the lower Court was correct in saying that the acknowledgment did not save limitation against defendant 3 or defendant 4. The application is dismissed with costs. Counsel's fee Rs. 20.

D.S./R.K. *Application dismissed.*

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A. I. R. 1939 Nagpur 33

STONE C. J. AND CLARKE J.

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Defendant No. 2 — Appellant.

v.

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M. R. Bobde — *for Appellant.*

Abdul Razak Khan — *for Respondent.*

Judgment.—This appeal, in which defendant 2 is the appellant, raises the question whether an infant can be made liable in contract by his mother and guardian. The case raises the opposing views which have been expressed on this point by various Courts in India in an unusually clear way because the alleged liability is created by a bond which the guardian executed purporting to act on behalf of her minor sons, defendants 1 and 2. The bond was given to raise money to pay off debts incurred by the father of the sons and which debts were due to the payee under the bond. The plaintiff's case was that both the sons at the time were minors but the lower Appellate Court has found as a fact (by which finding this Court in second appeal is admittedly bound) that at the time the bond was executed, defendant 1 was a major. Being a major he was at that date the managing coparcener and his mother, it is said, had no power to bind the estate and, in any case, had no power to contract on behalf of her minor son. In the result if the judgment of the lower Appellate Court is upheld the elder son is not liable for anything, for his mother could not contract on his behalf he being a major and she not appearing to be his agent but purporting to act as guardian which she could not be. On the other hand, the lower Appellate Court has held the younger son liable for the whole because his mother and guardian can bind him contractually and the contractual liability is several as well as joint and is for the whole amount of the bond and not for half.

In our opinion, there is nothing ambiguous about the decision of the Board in 11 Bom 551[1] at p. 561. That case does not turn upon any difference between a contractual liability arising from a covenant in a conveyance and any other contractual liability. Their Lordships say that there is not in Indian law any rule which gives a guardian and manager greater power to bind the infant ward by a personal covenant than exists in English law. That proposition was admitted by a very accomplished lawyer, Mr. Mayne, who had a long experience not only before their Lordships' Board but in Madras and was the author of one of the most highly regarded works on Hindu law. Their Lordships accepted it. They add :

> Their Lordships . . . conceive that it would be a very improper thing to allow the guardian to make covenants in the name of his ward, so as to impose a personal liability upon the ward . . . .

It is indeed difficult to see how a guardian can make contractually bound a minor who cannot by his contract bind himself, though clearly a manager can bind the minor's estate not qua agent or guardian of the minor but as manager of the minor's estate. It is true that a minor can be made liable in certain cases which fall within S. 68, Contract Act. But, this liability is a statutory liability springing out of the fact that the person claiming has supplied the minor with necessaries suited to his condition in life. As Pollock A. J. C. observed in A I R 1933 Nag 285[2] if money is supplied and expended on necessaries it can be recovered back whether a bond is given or not. Thus it does not matter, in such a case, whether the guardian or minor or neither executes the bond. The liability springs from the advance and the use, not from the bond. Difficult questions can arise as to what cases fall within S. 68. In 18

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N L R 119[3] moneys borrowed to satisfy a decree passed against the minor in respect of his liability under the pious obligation rule to pay his father's debts were held not to be necessaries. In 24 N L R 54,[4] on the other hand it was held, following the majority view expressed in 42 Mad 185,[5] that a minor's estate was liable in respect of the contractual liability springing out of a simple money bond executed by the guardian to pay off the father's debts. This view was not concurred in by Pollock A. J. C. in the case above mentioned who founded the liability, if any, upon S. 68: *see also* 2 N L R 25.[6]

If the estate is to be bound there must be something which causes the estate to be bound, generally there must be some document binding the estate though sometimes the estate may be reached because it has been enriched as a consequence of the transaction in question. *See* as to this 13 N L R 109[7] and 32 All 325.[8] In 13 N L R 109[7] following the single Judge decision in 20 Bom 767[9] and the Full Bench case in 26 Bom 206,[10] (*see also* 34 Bom 72[11]) the liability of an ancestral business the ownership of which was, by survivorship, in a minor and the management in his guardian was put as a special case, the obligation being imposed on the family estate because, in such a case the manager, the guardian, is deemed, as such, empowered to bind the estate. On the other hand in 35 Cal 320[12] the broad proposition enunciated by the Privy Council was made subject to a modification. The guardian may bind the minor personally to pay if the promise to pay is made "merely to keep alive a debt for which the ward's property was liable." There is a considerable number of Madras cases to the same effect. The most recent one is to be found in A I R 1937 Mad 1,[13] a single Judge decision which contains a reference to most of the cases. The matter, so far as Madras is concerned, can be expressed (on this point) in the words of Curgenven J. in 54 Mad 163[14] at p. 183, quoted by Ramesam J. in 58 Mad 735[15] and by Venkataramana Rao J. in A I R 1937 Mad 1,[13] when speaking of the minor's liability under the personal law (i. e. Hindu law); *see also* 42 Mad 185[5]:

> Its effect is that any liability to which the minor would be subject under the Hindu law is not the less a liability because it was incurred by his guardian on his behalf.

As we understand this proposition, it means that if the minor's estate could be reached had the guardian done nothing it can still be reached though the guardian has purported to act and by his act has, for example, turned a debt by a father into a debt by the son. We incline to the view that this proposition must be subject to several restrictions. In the first place it is not immaterial to consider what action is being brought. Is it an action based on the pious obligation rule (to which a variety of defences are open) or is it an action on a bond given on behalf not of a father but a son, not of a major but a minor? If the former, certain considerations arise; if the latter, other and different ingredients must be present if the action is to be well founded. In both cases the liability, if any, fastens on the estate, not the minor. In the first case it so fastens because the father has incurred a liability for which the estate even when in his son's hands is, subject to certain exceptions, liable. In the second case it so fastens because, and if, the person giving the bond is able to, and does in fact, bind the estate. It appears to be reasonably plain that a person may be a guardian of a minor without being manager of the estate. The present is a case in point. But if a manager (the elder brother in this case) holds out a younger brother's guardian as the manager doubtless then the estate could be reached by the law of estoppel. But the liability would then be on the

3. Nilkanth v. Chandrabhan, (1922) 9 A I R Nag 247=64 I C 851=18 N L R 119.
4. Lalchand v. Narhar, (1926) 13 A I R Nag 31 =89 I C 896=24 N L R 54.
5. Ramajogayya v. Jagannadham, (1919) 6 A I R Mad 641=49 I C 872=42 Mad 185=36 M L J 29 (F B).
6. Tukaram Manaji v. Ramchandra Hari, (1906) 2 N L R 25.
7. Jhitibai v. Tejmal, (1916) 3 A I R Nag 11=41 I C 35=13 N L R 109.
8. Nandan Prasad v. Ajudhia Prasad, (1910) 32 All 325=5 I C 413=7 A L J 236.
9. Rampartab Samrathrai v. Foolibai, (1896) 20 Bom 767.
10. Sakrabhai Nathubhai v. Maganlal Mulchand, (1902) 26 Bom 206=3 Bom L R 738 (F B).
11. Raghunathji Tarachand v. Bank of Bombay, (1910) 34 Bom 72=2 I C 173 = 11 Bom L R 255.
12. Bhawal Sahu v. Baijnath Pertab Narain Singh, (1908) 35 Cal 320=12 C W N 256.
13. Muthuswami v. Annamalai, (1937) 24 A I R Mad 1=169 I C 261.
14. Zamindar of Polavaram v. Maharaja of Pittapuram, (1931) 18 A I R Mad 140=135 I C 17 =54 Mad 163=60 M L J 56.
15. Satyanarayana v. Mallayya, (1935) 22 A I R Mad 447 = 155 I C 581 = 58 Mad 735 = 68 M L J 540 (F B).

estate because (as in the Hindu trading family cases above cited) a person acting as, or held out as, the manager had, as such, and within his powers as such, bound the estate. If he has not bound the estate, the estate is not bound. The estate cannot, we think, be reached simply because the guardian purports to bind the minor. It is as manager that he binds the estate and this, we think, is implicit in 1 N L R 66.[16]

We accordingly are unable to accept the proposition in the broad terms used (relying on authority derived from Bengal, viz. 35 Cal 320[12] and Madras) by Trevelyan in his 'Law Relating to Minors' (Edn. 6), p. 169. Cases such as 13 Lah 399[17] (incumbrance) and 57 Bom 40[18] (alienation) do not help. It is not disputed that a guardian as manager can in a proper case bind, charge, incumber and/or alienate the estate. The difficulty here is that the guardian was not the manager, or, even if one waives all rules of pleading and regards the guardian as held out as manager and capable of binding the estate as such, she did not purport to bind the estate. Her act amounted to the entering into a contract whereby money was lent. For that contract her minor son is not liable. This case has not been fought as one where the estate in the hands of the son is sought to be made liable under the pious obligation rule. It is a simple suit on a bond : *see* para. 8 of the plaint. The money advanced is not stated to have been utilized to pay a father's debt but to have been used to repay a loan (to whom, as distinct from by whom, made is not stated) advanced for the marriage of the minor and the management of the estate. In our opinion the appeal succeeds and the suit must be dismissed against defendant 2. As the case is a hard one we fix the costs at Rs. 5.

N.S./R.K. *Appeal allowed.*

16. Seth Ghasiram v. Mt. Binia, (1905) 1 N L R 66.
17. Kundan Lal v. Beni Pershad, (1932) 19 A I R Lah 293 = 137 I C 115 = 13 Lah 399 = 32 P L R 861.
18. Tulsidas Vaghela v. Raisingji (1933) 20 A I R Bom 15 = 141 I C 17=57 Bom 40=34 Bom L R 1483 (F B).

A. I. R. 1939 Nagpur 35

VIVIAN BOSE J.

Jainarayan Ramgopal Marwadi — Defendant 4 — Appellant.

v.

Balwant Maroti Shingore and another, Plaintiffs 1 and 2 and others, Defendants 1, 2 and 3 — Respondents.

Second Appeal No. 141 of 1936, Decided on 15th August 1938, from appellate decree of Addl. Dist. Judge, Ellichpur, D/- 21st January 1936.

(a) Berar Land Revenue Code (1928), Ss. 174, 176 — Oral sale which is ineffective as sale under Transfer of Property Act may operate to transfer some portion of vendor's interest in holding within the meaning of S. 176 and may amount to sale giving rise to right of pre-emption — Intention of parties is determining factor.

The word 'sale' as used in S. 176, Berar Land Revenue Code, must not be construed in the narrow sense in which it is used in the Transfer of Property Act. An oral sale which is ineffective as a sale under the Transfer of Property Act for want of writing and registration, may nevertheless operate to transfer some portion of the vendor's interest in the holding within the meaning of S. 176, Berar Land Revenue Code, and may amount to a sale. [P 38 C 2 ; P 39 C 1]

In each case the intention of the parties must form the determining factor. Where the intention was to 'sell', to transfer all the interest which the 'vendor' had to the 'vendee' and possession was given and the price was paid and the only reason why a registered sale deed was not executed was to try and frustrate the cosharer's right of pre-emption, interest contemplated by Ss. 174 and 176 passes, so as to give rise to a right of pre-emption : *16 All 344 (F B) ; A I R 1923 P C 41 ; 7 All 482 (F B) ; A I R 1922 All 46 ; A I R 1922 Bom 124 and 35 Cal 575, Rel. on.* [P 39 C 1]

(b) Berar Land Revenue Code (1928), S. 174 (1) — All questions of pre-emptions in Berar must be governed by the Code—Reference may be made to Mahomedan law to elucidate matters upon which Code is silent.

All questions of pre-emption in Berar must be governed by the Berar Land Revenue Code and not by Mahomedan law on which the Code is, in part, based. S. 174 (1) itself indicates that; but reference may be made to Mahomedan law to elucidate matters upon which the Code is silent : *A I R 1938 Nag 59 and A I R 1936 Nag 278, Rel. on.* [P 37 C 1]

(c) Transfer of Property Act (1882), S. 54— Mere contract of sale does not of itself create interest in or charge upon property when Transfer of Property Act applies.

An unregistered contract of sale of property is an agreement to sell and so gives rise to a right to enforce specific performance, but unlike the English law where an equitable estate is created by a mere agreement to sell, in India a mere contract of sale does not of itself create any interest in or charge upon the property when the Transfer of

Property Act applies: *A I R 1916 P C 139, Rel. on.* [P 37 C 1]

(d) Berar Land Revenue Code (1928), S. 174 —Pre-emption rights conferred by Code can be interpreted in sense in which they are used in S. 7, Para. vi, Court-fees Act, and in Art. 10, Limitation Act.

When considering the rights of pre-emption conferred by the Berar Land Revenue Code, it is legitimate to interpret them in the sense in which they are used in Para. (vi) of S. 7, Court-fees Act and in Art. 10, Sch. 1, Limitation Act. [P 37 C 2]

(e) Limitation Act (1908), Art. 10 —'Sale' in Art. 10 is to be understood in sense in which it is used in Mahomedan law.

The word 'sale' in Art. 10 is to be understood in the sense in which it is used under the Mahomedan law of pre-emption and not in the limited sense in which it is referred to in the Transfer of Property Act : *A I R 1932 P C 41, Rel. on.* [P 38 C 1]

(f) Interpretation of Statutes — Codified law —Construction of.

It is a recognized canon of construction that when a law is merely being codified, and especially when it is being transferred almost bodily from one Code to another, departure is not to be presumed unless it is made in express terms. [P 38 C 1]

(g) Pre-emption—Suit for—Word 'sale' when used in connexion with pre-emption must be construed in wider sense in which it is used in Art. 10, Limitation Act and S. 7 (vi), Court-fees Act.

The word 'sale' when used in connexion with the general law of pre-emption in India, is not to be construed in the narrow sense in which it is used in the Transfer of Property Act. It must be used in that wider sense in Art. 10, Limitation Act and S. 7 (vi), Court-fees Act. [P 38 C 2]

Dr. D. W. Kathalay and K. V. Brahma — *for Appellant.*

R. N. Padhye and S. P. Kotval — *for Respondents.*

Judgment. — This is a suit for pre-emption. Survey No 64/1 had two sets of cosharers each owning 8 annas in it. One-half belonged to Jainarain, defendant 4, and the other to Gulabchand and Madangopal, defendants 2 and 3. On 10th May 1933, defendants 2 and 3 orally sold their half of the field to defendant 1, Surajkaran, for Rs. 1700. This is the sale which the plaintiff seeks to pre-empt. After this, on 13th March 1934, defendant 1 is said to have sold, again orally, the half share he had purchased as above to defendant 4 who thus got the entire pot-hissa. This sale has been challenged by the plaintiff who says that the transaction was a fraudulent one and that it did not take place till after the institution of his suit and was then antedated. On 15th June 1934, the plaintiff instituted this suit for pre-emption. On 22nd August 1934 the plaint was amended and defendant 4, Jainarayan, who was not originally a party, was added. Both the lower Courts find that the sale to defendant 4 did not take place on 13th March 1934 but after the institution of the suit and that it was a fraudulent device to defeat the plaintiff's claim. They were particularly impressed with the evidence which established that on 16th June 1934, three months after the alleged sale to defendant 4, defendant 1 appeared before the patwari and asked for mutation in his name in respect of the sale of 10th May 1933 and said nothing about the subsequent sale to defendant 4. If the defendant's story about the sale to defendant 4 on 13th March 1934 is true, it is obvious that defendant 1 had then no interest left in the property. They also took into consideration the fact that defendants 1 and 4 are brothers. In the circumstances there is ample evidence to support these findings which are purely one of fact.

It is argued however that the presumption arising from the correctness of the Record of Rights entry in Ex. 4 D-1 has been ignored, but, I do not think that that is of much consequence in this case. The burden of proof has been placed aright and the decisions of the lower Courts are based on the positive evidence of the patwari. The only question of importance which arises here is not what the entry says but when it was made. It is clear from Ex. 4 D-8 that it was not made till 29th August 1934, that is to say more than two months after the present suit had been filed and at a time when both sides to the mutation had ample motive for giving the Revenue Officers false information. The fact that neither Court has referred to this document though they have referred to other documents seems to indicate that it was not relied on by the defendants during their arguments. But however that may be, I am satisfied that the omission, if omission it is, has not affected the findings. They would have been just the same even if this document had been expressly mentioned in the judgments. That, of course, means that defendant 4's rights can be ignored because apart from all else they accrued during the pendency of the *lis*. The real difficulty in the case is one of law. The sale which the plaintiff seeks to pre-empt is one which according to the defendant had no binding force because it was oral, and it is contended

that the word 'transfer' in S. 183, Berar Land Revenue Code, must be strictly construed to mean one of the transfers contemplated by Ss. 176, 177 and 178, and that the word 'sale' in S. 176 must be construed in the sense in which it is used in the Transfer of Property Act.

Now there can be no doubt that all questions of pre-emption must be governed by the Code and not by the Mahomedan law on which the Code is in part based : S. 174 (1) itself indicates that ; but it is equally true that reference may be made to the Mahomedan law to elucidate matters upon which the Code is silent. Both these propositions are to be found in I L R (1937) Nag 469[1] and I L R (1937) Nag 108[2] at p. 109. Turning now to S. 183 (1) we find that when no notice of transfer has been given, a right of pre-emption is conferred

when an occupant . . . . transfers his interest, or any portion thereof by any of the transfers contemplated in Ss. 176 etc. . . .

Section 176 which is the relevant Section here, deals with a case in which an occupant in a survey number "proposes to sell the whole or any portion of his interest", and it requires the intending vendor to intimate, among other things, "the extent of the interest to be sold." What I have to determine therefore is whether an oral sale which is ineffective as a sale for want of writing and registration nevertheless operates to transfer some portion of the vendor's interest in the holding. So far as the Transfer of Property Act is concerned I am clear that it does not.

Section 54 states that a sale of immovable property of the value of one hundred rupees and upwards can only be effected by a registered instrument and in no other way. Therefore, an oral sale of immovable property worth more than Rs. 100 does not transfer any interest in it : *see* 19 Cal 623.[3] Of course an unregistered contract of sale of property is an agreement to sell and so gives rise to a right to enforce specific performance, but unlike the English law where an equitable estate is created by a mere agreement to sell, in India a mere contract of sale does not of itself create any interest in or charge upon the property when the Transfer of Property Act applies : 44 Cal 542[4] at p. 552. So also the protection afforded by part performance does not apply because S. 53-A requires an instrument in writing signed by the vendor or by some one on his behalf, and here we have no writing at all but only an oral sale. Therefore there can be little doubt that if the word "sale" mentioned in Sec. 176 of the Berar Land Revenue Code is to be given the interpretation which it bears in the Transfer of Property Act, no right of pre-emption can arise. But the learned counsel for the plaintiffs-respondents argues that as the Code is silent on this point, no definition of sale having been given, we are entitled to look to the Mahomedan law on which this part of the Code is based to gather what was meant by the word 'sale', and if we do that, then it will be found that the word includes an oral as well as a registered transaction. There is, I think, considerable force in this contention. Sec. 174 (1) of the Code states that :

The rights conferred by this Chapter upon the occupants in a survey number in respect of transfers of interests in that survey number shall be deemed to be rights of pre-emption within the meaning of Para. (vi) of S. 7, Court-fees Act 1870, and of Art. 10, Sch. 1 Limitation Act 1908.

The Section then continues "and they shall be enforceable only in the manner and to the extent provided by this chapter." There is thus a clear-cut distinction between the rights conferred and the manner in which they can be enforced. In the former case we are referred to the Court-fees and the Limitation Acts, in the latter to the Code itself. It seems to me therefore that when considering the rights of pre-emption conferred by the Code it is legitimate to interpret them in the sense in which they are used in the provisions referred to above of the Court-fees and the Limitation Acts. S. 7 (vi), Court-fees Act, speaks of pre-emption generally and not merely of statutory pre-emption. Art. 10 is even more general :

To enforce a right of pre-emption whether the right is founded on law or general usage or on special contract.

Column 3 then states :

When the purchaser takes under the sale sought to be impeached physical possession of the property sold, or where the subject of the sale does not admit of physical possession when the instrument of sale is registered.

1. Namdeo v. Kesheo, (1938) 25 A I R Nag 59=172 I C 701=I L R (1937) Nag 469.
2. Kisen v. Gangabai, (1936) 23 A I R Nag 278=167 I C 592=I L R (1937) Nag 108.
3. Makhan Lal Pal v. Bunku Behari Ghose, (1892) 19 Cal 623 (F B).
4. Maung Shwe Goh v. Maung Inn, (1916) 3 A I R P C 139=38 I C 938=44 Cal 542=44 I A 15 (P C).

Now the word 'sale' has not been used here in the strict technical sense in which it is construed in the Transfer of Property Act. Though there is a difference of opinion among the High Courts on this point, there are cases in which it has been held that the word 'sale' is to be understood in the sense in which it is used under the Mahomedan law of pre-emption and not in the limited sense in which it is referred to in the Transfer of Property Act, and this view has now been endorsed by their Lordships of the Privy Council in 45 Bom 1056.[5]

It must be remembered that the Mahomedan law of pre-emption existed and was acted on for centuries before the passing of the Transfer of Property Act and also that the law of pre-emption all over India is largely traceable to and based upon it : *see* Agarwala's Law of Pre-emption, p. 56. Even where it has now found statutory expression, the Legislature has done no more than codify, after such modifications as it saw fit, the already existing practice, and that is certainly true of the Berar Land Revenue Code as the cases which I have already cited show. It must also be borne in mind that the Berar Land Revenue Code of 1896 which first codified the law of pre-emption for Berar was passed long before the Transfer of Property Act had been applied there and at a time when oral sales were permissible. Therefore, it is clear that the expressions "transfer of an interest," "sale" and the like which we find in Ss. 205 and 206 of the old Code could not have been used in the sense in which the Transfer of Property Act uses them. That Act was not applied to Berar till 1907, that is to say not till 11 years later. Of course, the Act was in force in Berar when the new Land Revenue Code of 1928 was passed, but since the chapter on pre-emption incorporates the old law with hardly any change so far as the points now under consideration are concerned, it is legitimate to assume that the expressions "transfer of an interest" and "sale" which have been incorporated bodily from the one Act into the other were used in the same sense in both the Codes. It is a recognized canon of construction that when a law is merely being codified and especially when it is being transferred almost bodily from one Code to another, departure is not to be presumed unless it is made in express terms. That is not the case here and so I can only presume that the expressions we are considering were not used in the sense in which they are used in the Transfer of Property Act. In the Allahabad Full Bench case, 16 All 344,[6] Edge C. J. said at page 351:

> To import into the Mahomedan law of pre-emption the definition of the word 'sale' coupled with the restriction of the transfer of ownership contained in S. 54 of Act 4 of 1882, would be materially to alter the Mahomedan law of pre-emption and to afford to fraudulent persons a means of avoiding successfully the obligation of that law, the object of which was to enable cosharers and near neighbours, if they so desired, to exclude strangers from the enjoyment of immovable property to which the Mahomedan law of pre-emption applied . . . . I cannot think that it was the intention of the Legislature in passing Act 4 of 1882 to alter directly or indirectly the Mahomedan law of pre-emption as it existed and was understood for centuries prior to the passing of Act 4 of 1882, by substituting for the sale referred to in that law, the "sale" coupled with the restriction of Sec. 54 of Act 4 of 1882.

These remarks are, in my opinion, peculiarly apposite here if we substitute the words "Berar Land Revenue Code of 1896" for the words "Mahomedan law", and if we remember that the Code is based on the Mahomedan law and that the Transfer of Property Act was not in force there when the Code was made law. The latter portion of the extract which I have quoted was quoted with approval by their Lordships of the Privy Council in 45 Bom 1056[5] at page 1063 and so that ought to conclude the matter. In addition there are the following cases: 7 All 482,[7] 44 All 239[8] at p. 241 and 46 Bom 302.[9] It is true there are decisions to the contrary : they have been collected by Dr. Kathalay in his learned treatise on the Law of Pre-emption at pp. 61 and 62 and at pp. 135-37 ; but the position that the word "sale" when used in connexion with the general law of pre-emption in India is not to be construed in the narrow sense in which it is used in the Transfer of Property Act, has now, I think, been placed beyond the realm of controversy by the Judicial Committee. That being so, it must be used in that wider sense in Art. 10, Limitation Act and in S. 7 (vi), Court-fees Act and since

5. Sitaram Bhaurao v. Jiaul Hasan Sirajul Khan, (1923) 10 A I R P C 41=64 I C 826=45 Bom 1056=48 I A 475 (P C).

6. Begam v. Muhammad Yakub, (1894) 16 All 344=1894 A W N 101 (F B).

7. Janki v. Girijadat, (1885) 7 All 482 = 1885 A W N 97 (F B).

8. Ramsukh v. Mrs. L. E. O'Neal, (1922) 9 A I R All 46=65 I C 103=44 All 239=20 A L J 59.

9. Abdulla Avjal Momin v. Ismail Mugal Foda, (1922) 9 A I R Bom 124=64 I C 913=46 Bom 302=23 Bom L R 1079.

Sec. 174 (1), Berar Land Revenue Code expressly states that the rights conferred by Ch. 14 of the Code in respect of transfers of interest in a survey number shall be deemed to be rights of pre-emption within the meaning of those provisions, there is no escape from the position that the word "sale" as used in S. 176 must not be construed in the narrow sense for which the learned counsel for the appellant contends.

The next question therefore is whether the transaction in this case amounts to a sale within the meaning of the wider definition now given to it. Here also, their Lordships of the Privy Council have laid down an important test, though it is possibly not the only test. They state that in each case the intention of the parties must form the determining factor : *see* 45 Bom 1056[5] at p. 1063 upholding 35 Cal 575.[10] In the present case, there can be no doubt whatever that the intention was to "sell", to transfer all the interests which the "vendor" had to the "vendee". Possession was given and the price was paid; and the only reason why a registered sale deed was not executed was to try and frustrate the cosharers' rights of pre-emption. These are the findings of the Courts below and being ones of fact are binding here. I need not dilate upon the question whether an intention to frustrate is necessary and whether the interest contemplated by Ss. 174 and 176 would pass even when there is no transfer of possession. It is enough to state that both these elements are present in this case and that when they are there, the rule applies. The decisions of the lower Courts are upheld and the appeal is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

10. Jadu Lal Sahu v. Janki Koer, (1908) 35 Cal 575.

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STONE C. J. AND CLARKE J.

Purushottamdas Sakalchand — Appellant.

v.

Devkaran Kesheoji and others — Respondents.

Misc. Appeal No. 32-B of 1935, Decided on 31st August 1938, from order of Fourth Addl. Dist. Judge, Akola, D/- 25th April 1935.

(a) Civil P. C. (1908), Sec. 2 (2), 104 and O. 43 — Order that appeal or cross-objection abates is appealable.

An order that a suit abates is appealable as a decree : *Case law relied on.* [P 40 C 1]

On the same principles it can be held that an order directing that an appeal or cross-objection abates is also appealable : *A I R 1914 P C 66 and A I R 1937 Pat 349, Disting.* [P 40 C 1]

(b) Civil P. C. (1908), O. 41, Rule 22 (4) — Cross-objection cannot be heard when appeal abates.

A cross-objection is part of an appeal and if an appeal goes out for any extraneous reasons the cross-objection must ordinarily go out with it. Therefore a respondent has no right to be heard on his cross-objection when the appeal in which he took the cross objection has abated : *Case law discussed ; A I R 1931 Rang 38, Rel. on.* [P 41 C 1, 2]

V. K. Rajwade — *for Appellant.*

M. D. Khandekar — *for Respondent 1.*

Order.—Purushottamdas brought a suit for accounts against four defendants in the Court of the Third Subordinate Judge, Second Class, Akola. That Court passed a decree to the effect that defendant 1, Kesho, should pay Rs. 415 odd to the plaintiff. Kesho appealed and during the pendency of his appeal he died. The present respondent, Deokaran, is his son. After Kesho had filed his appeal the plaintiff put in cross-objections. Kesho's legal representatives failed to make any application for the substitution of their names in place of the deceased Kesho and so the Court held that the appeal abated. Purushottamdas claimed that in spite of the abatement of the appeal his cross-objections should still be heard and decided, but the Subordinate Judge, by his order dated 25th April 1935, held that the appeal having abated the cross-objections must be held to have abated also and he therefore dismissed them. Purushottamdas has therefore come up in appeal against the order dismissing his cross-objections. The respondent Deokaran has taken a preliminary objection that no appeal lies as the order is not a decree and has not been made appealable as an order under S. 104 or O. 43, Civil P. C. He is certainly correct in saying that the order has not been made appealable as an order. The question is whether it amounts to a decree under the definition in Sec. 2 (2), Civil P. C. That Section defines a decree as follows :

"Decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include

the rejection of a plaint and the determination of any question within S. 47 or S. 144, but shall not include

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

There is ample authority for the view that an order that a suit abates is appealable as a decree: *vide* 18 Mad 496,[1] 10 Bom 220,[2] A I R 1916 Lah 245,[3] A I R 1916 Mad 1068,[4] A I R 1917 Mad 285,[5] A I R 1920 Mad 580,[6] 1 Lah 493,[7] 1 Lah 582,[8] A I R 1921 Cal 551,[9] A I R 1925 Lah 456,[10] 9 Lah 526[11] and 10 Pat 471.[12] That being so, it would seem that an order that an appeal abates is also appealable as a decree and if so there is no reason why an order that the cross-objection abates should not be held to be a decree for the same reasons. There is no doubt that the order has conclusively determined the rights of the plaintiff on his cross-objections. In fact the Additional District Judge has said in his order that the cross-objection is dismissed. The respondent relies on 36 All 350[13] and A I R 1937 Pat 349.[14] 36 All 350[13] was not a case of abatement; it was a case where an appeal had been dismissed for want of prosecution. Such a case is easily distinguished from this. The order dismissing a suit for want for prosecution stands on quite a different footing from an order dismissing a suit or an appeal or a cross-objection because the case is held to have abated. Similarly, A I R 1937 Pat 349[14] is a case of dismissal for default of appearance under O. 41, R. 11, Civil P. C. That case moreover draws a distinction between a dismissal under O. 41, R. 11 (1) and O. 41, Rule 11 (2) and says that an order of dismissal under O. 41, R. 11 (1) is appealable as a decree. We hold therefore that an appeal lies.

Next on the merits. The question is whether a respondent has a right to be heard on his cross-objection even though the appeal in which he took the cross-objection has abated. The decision of this question turns on the interpretation of O. 41, R. 22 (4). That rule is to the following effect:

22 (4). Where, in any case in which any respondent has under this Rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

On the face of it, the Rule only applies to cases where an appeal is withdrawn or dismissed for default. The appellant however contends that the Rule is not exhaustive, but covers cases *ejusdem generis* where for some reason the appeal cannot be heard. The learned counsel for the appellant has conceded that the weight of the case law is against him on this point, but he urges that the cases which hold the opposite view to that to which he is submitting are distinguishable on their facts. The lower Appellate Court has relied on 44 Mad 828,[15] 10 Lah 208[16] and 28 N L R 25.[17] 44 Mad 828[15] decides that:

Where a person sued for damages for malicious prosecution and obtained a decree but preferred an appeal claiming more damages than he had been awarded and died pending the appeal, the appeal abates. After such abatement any memorandum of objections filed by the respondent cannot be heard.

The appellant distinguishes that case by saying that a claim for damages for malicious prosecution is a personal claim which dies with the plaintiff. We cannot see however in what way that makes any difference to the point of law which we are

1. Subbayya v. Saminadayyer, (1895) 18 Mad 496 =5 M L J 63.
2. Bhikaji Ramchandra v. Purshotam, (1886) 10 Bom 220.
3. Niranjan Nath v. Afzal Hussain, (1916) 3 A I R Lah 245=34 I C 822=128 P R 1916 =146 P L R 1916 (F B).
4. Subramania Iyer v. Venkataramier, (1916) 3 A I R Mad 1068=31 I C 4.
5. Suppu Nayaken v. Perumal, (1917) 4 A I R Mad 285=34 I C 372=30 M L J 486.
6. Rahimunnissa v. Srinivasa Ayyangar, (1920) 7 A I R Mad 580=54 I C 565=38 M L J 266.
7. Ram Sarup v. Moti Ram, (1920) 7 A I R Lah 8 =57 I C 137=1 Lah 493.
8. Udmi v. Hira, (1920) 7 A I R Lah 338=60 I C 111=1 Lah 582.
9. Bhutnath Jana v. Tara Chand Jana, (1921) 8 A I R Cal 551=59 I C 177=33 C L J 115= 25 C W N 595.
10. Raghbir Saran v. Mt. Sohan Debi, (1925) 12 A I R Lah 456=86 I C 104=26 P L R 32.
11. Roop Chand v. Sardar Khan, (1928) 15 A I R Lah 359=110 I C 281=9 Lah 526=29 P L R 626.
12. Barju Biswal v. Kunja Behari Mahapatra, (1931) 18 A I R Pat 353=133 I C 767=10 Pat 471=12 P L T 909.
13. Abdul Majid v. Jawahir Lal, (1914) 1 A I R P C 66=23 I C 649=36 All 350 (P C).
14. Jamuna Prasad Rai v. Rajballam Rai, (1937) 24 A I R Pat 349=169 I C 359=18 P L T 321.
15. Murugappa Chettiar v. Ponnusami Pillai, (1921) 8 A I R Mad 405=62 I C 757=44 Mad 828=41 M L J 304.
16. Mul Chand Ganga Bishen v. R. M. Downie & Co. Ltd., (1928) 15 A I R Lah 596 = 110 I C 910=10 Lah 208.
17. Ajmersingh v. Ramsingh, (1932) 19 A I R Nag 41=137 I C 156=28 N L R 25.

called upon to decide. The decision in 44 Mad 828[15] is based on an earlier Full Bench decision of the same High Court in 41 Mad 904.[18] 10 Lah 208[16] is to the same effect as 44 Mad 828.[15] In 28 N L R 25,[17] it was held that where a memorandum of appeal is rejected as insufficiently stamped, no cross-objection can be entertained or heard. It was there pointed out by Subhedar A. J. C. that the provisions of R. 22 (4) of O. 41 must be interpreted strictly and not extended beyond their obvious scope. We would add to the cases mentioned by the Additional District Judge 8 Rang 538,[19] which has been referred in 28 N L R 25.[17] The appellant relies on 34 All 140[20] which holds:

> A respondent may file cross-objections and the Appellate Court may act upon them notwithstanding that the appeal in which such objections are filed is not maintainable.

That case has been discussed in 8 Rang 538[19] at p.543, and we fully agree with what Ottar J. has there said. Another case relied on by the appellant is A I R 1925 Mad 725,[21] but that is a case of an appeal being dismissed in default, a position which has been specifically mentioned in O. 41, R. 22 (4) as giving the respondent a right to be heard on the cross-objection. The third case relied on by the appellant is A I R 1931 Mad 133.[22] There it was held that the word "default" occurring in the Rule [O. 41, R. 22 (4)] includes any default made by the appellant which would amount to non-prosecution of the appeal and consequently includes the non-payment of deficit court-fee by the appellant in spite of the express order of the Court directing him to pay it and entailing the dismissal of the appeal and in such a case the respondent is entitled to have his memorandum of objections heard. The case to which we have already referred in 8 Rang 538[19] was on the same point but decides it in the contrary sense. We think that the correct view is that held in the latter case.

It seems to us clear that a cross-objection is part of an appeal and that if an appeal goes out for any extraneous reasons the cross-objection must ordinarily go out with it: the only exceptions are those mentioned in sub-r. (4) of O. 41, R. 22. The reason for those exceptions being made is evident. It would be grossly unfair if the appellant having appealed and the respondent having filed cross-objections the appellant should be allowed to resile from his appeal after the period of limitation for the respondent to file an appeal had expired and thereby prevent the respondent from appealing. It is argued on behalf of the appellant before us that it does not make much difference whether it was the appellant or his legal representatives that allowed the appeal to go out. Although the distinction may be small we think it is clear. Obviously the appellant did not die deliberately in order to defeat the respondent and until he died his legal representatives were nowhere.

After his death they were quite at liberty to consider whether the appeal was worth pressing or not; and if they considered that it was not, it cannot be considered that they refused to press it merely in order to defeat the respondent's cross-objection. Ordinarily, an appellant in the lower Appellate Court has 30 days in which to appeal. If his opponent appeals, he obtains under O. 41, R. 22 (1), 30 days from the date of service on him of the notice of appeal in which to file a cross-objection. He thus obtains an extended right of appeal. If X is the length of time that it takes his opponent to serve him with notice of appeal then, whereas he has only 30 days to appeal himself, he has 30 plus X days to file his cross-objection. Now, if notice of appeal had been served on him after the period for appealing himself had expired there would obviously be no equitable reason for keeping alive his cross-objection when for any reasons other than those mentioned in Rule 22 (4) his adversary's appeal went out. In such a case, as he does not appeal himself within the period of limitation, he is clearly satisfied with the decree as it stood and it was only because of his adversary's appeal that he comes forward to urge cross-objection. The position is different however where he has been served with notice of appeal before his right of appeal has expired. He may quite justifiably say to himself then:

> Although I was going to file an appeal I do not need to do so now. I can file a cross-objection and will obtain additional time.

18. Alagappa Chettiar v. Chockalingam Chetti, (1919) 6 A I R Mad 784=48 I C 203=41 Mad 904=35 M L J 236 (F B).
19. U Shin v. Maung Tha Gywe, (1931) 18 A I R Rang 38=129 I C 500=8 Rang 538.
20. Shankar Lal v. Sarup Lal, (1912) 34 All 140=13 I C 19=8 A L J 1297.
21. Bhimasena Row v. Venugopal, (1925) 12 A I R Mad 725=88 I C 443=48 Mad 631=48 M L J 384.
22. Ayilu Reddi v. Venkata Reddi, (1931) 18 A I R Mad 133=130 I C 657.

Which position arises here we do not know and it is outside the scope of this appeal. This will be a matter for consideration by the lower Appellate Court if and when the respondent files an appeal together with an application for extension of time under S. 5 and / or S. 14, Limitation Act. The result is that the appeal fails and is dismissed with costs. We allow Rs. 45 for counsel's fee.

N.S./R.K. *Appeal dismissed.*

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NIYOGI J.

Gulabchand Kanhayalal — Plaintiff— Appellant.

v.

Kishanlal Kanhayalal Teli—Defendant — Respondent.

Misc. Appeal No. 111 of 1937 Decided on 22nd September 1938, from order of Addl. Dist. Judge, Akola, D/- 8th March 1937.

Central Provinces Courts Act (1 of 1917), Sec. 26 — Presentation of appeal in Additional District Judge's Court must be regarded as appeal filed in District Court.

The Additional Judge is clearly a Judge of the District Court although his power to exercise the jurisdiction of the District Court is restricted. Whenever the Additional Judge hears and determines an appeal, the appeal would be deemed to be heard and determined by the District Court to which he is an Additional Judge. [P 43 C 2]

A decree which had been passed by the Subordinate Judge, First Class, Khamgaon, was transferred for execution to the Subordinate Judge, Second Class, Khamgaon. The Court disposed of certain matters under Section 47, Civil P. C. The decree-holder who was aggrieved by that order presented an appeal in the Court of the Additional District Judge. The Additional District Judge, Khamgaon, finding that the order having been passed in execution of a decree in a suit tried by the Subordinate Judge, First Class, involving the claim exceeding Rs. 1000 returned the appeal to the decree-holder for proper presentation. The decree-holder pursuant to that order presented it in the Court of the Additional District Judge, Akola :

Held that the appeal filed in the office of the Additional District Judge, Khamgaon, must be regarded as having been presented to the District Court, West Berar, Akola, and hence to the proper Court. Although the presiding officer of that section of the District Court which had its venue at Khamgaon had himself no jurisdiction to hear the appeal, it could not be held to have been presented to an improper Court. All that the Additional District Judge had to do was to submit the appeal to the District Judge who was the Chief Judicial Officer in charge of the District Court of Akola, and to have it transferred to a Judge of that Court competent to hear and determine the appeal. Instead of doing so he returned the appeal to the appellant for being presented to the Additional District Judge, Akola, but that returning of the appeal and its representation at Akola could not impair the validity of the original presentation of the appeal. The appeal was merely transferred from one section of the District Court to another and not from one Court to another Court : *A I R 1928 Nag 199 and A I R 1937 Nag 80, Rel. on.* [P 43 C 1, 2]

A. V. Wazalwar — *for Appellant.*

D. N. Choudhary — *for Respondent.*

Order.—This is an appeal from an order dated 8th March 1937 passed by the Additional District Judge, Akola, in Civil Appeal No. 42-B of 1936, dismissing the appeal as barred by time. The facts are that a decree which has been passed by the Subordinate Judge, First Class, Khamgaon, in Civil Suit No. 35 of 1932, decided on 31st October 1934, was transferred for execution to the Subordinate Judge, Second Class, Khamgaon, for the reason that the decree was for Rs. 537-8-0 that is less than Rs. 1000 in value. That Court disposed of certain matters under S. 47, Civil P. C. The decree-holder who was aggrieved by that order presented an appeal in the Court of the Additional District Judge, Khamgaon, on 29th June 1936. Under an office order issued by the District and Sessions Judge, West Berar, Akola, on 23rd September 1933, the Additional District Judge, Khamgaon, was empowered to hear civil appeals not over Rs. 1000 in value. The Additional District Judge, Khamgaon, found that the order having been passed in execution of a decree in a suit tried by the Subordinate Judge, First Class, involving a claim exceeding Rs. 1000 it rightly returned the appeal to the decree-holder for proper presentation on 25th September 1936. The decree-holder pursuant to that order presented it in the Court of the Additional District Judge, Akola, on 26th September 1936. The lower Appellate Court found that the appeal was barred by time as it was presented beyond time and no explanation was given to account for the mistake on the part of the senior pleader who had first presented the appeal in the Additional District Judge's Court at Khamgaon, on 29th June 1936. The lower Appellate Court was unable to persuade itself that the error was the outcome of any bona fide mistake on the part of the appellant's counsel and therefore declined to condone the delay by giving the appellant benefit of Section 5 or Section 14, Limitation Act.

It appears to me that, before any question of bona fide mistake can arise, it has first to be determined whether the presentation of an appeal in the Court of the Additional District Judge, Khamgaon, was not a presentation of appeal to the proper Court which in this case was the District Court. In my opinion the presentation of appeal in the Additional District Judge's Court at Khamgaon, was a presentation of appeal to the District Court, West Berar, Akola. In A I R 1928 Nag 199,[1] and I L R (1937) Nag 219[2] appeal was presented to the District Judge, whereas it ought to have been presented to the Additional District Judge and in both these cases it was held that the presentation of the appeal was made to the proper Court and that when the District Judge transferred the appeal to the Judge who was empowered to hear and determine the appeal, the District Judge was merely transferring the appeal from one section of the Court to another. In this case it is urged by the learned counsel for the respondent that presentation of an appeal to the Additional District Judge's Court cannot be deemed to be presentation of appeal to the District Court. I am unable to assent to this argument in view of the plain provisions of the Central Provinces Courts Act. Sec. 14 of that Act, enumerates three classes of Subordinate Civil Courts, (a) the District Court, (b) the Court of the Subordinate Judge of the First Class, and (c) the Court of the Subordinate Judge of the Second Class. It is clear that there are only three Courts as opposed to the Judges who are the presiding officers thereof. Now the District Court may be presided over by one Judge or by more than one. When the District Court is presided over by more than one Judge the Chief Judge of that Court is called the District Judge and the others are called Additional District Judges who are appointed by the Local Government under Section 26, C. P. Courts Act. The wording of that Section is significant :

> Whenever it is considered necessary or expedient so to do, the Local Government may appoint an Additional Judge or Judges to any District Court and the High Court may appoint an Additional Judge or Judges to the Court of a Subordinate Judge (of either Class); and any such Additional Judge shall exercise the jurisdiction of the Court to which he is appointed and the powers of a Judge thereof, subject to any general or special orders of the authority by which he is appointed as the class or value of suits and appeals which he may try, hear and determine and subject also in respect of the distribution of the business of the Court to the control of the Judge thereof.

Now that Section makes a distinction between the District Court and the jurisdiction of the Additional Judge to that Court. The Additional Judge is clearly a Judge of the District Court although his power to exercise the jurisdiction of the District Court is restricted. Whenever the Additional Judge hears and determines an appeal, the appeal would be deemed to be heard and determined by the District Court to which he is an Additional Judge and from his decision, as being the decision of a District Court, an appeal lies to the High Court under Sec. 20 (c) of that Act. That clearly shows that the Judge must be contradistinguished from the Court. Suits or appeals are presented not to the Judges but to the Courts and therefore when the appeal in this case was first presented on 29th June 1936, in the office of the Additional District Judge, Khamgaon, it must be regarded as having been presented to the District Court, West Berar, Akola. Although the presiding officer of that section of the District Court which had its venue at Khamgaon, had himself no jurisdiction to hear the appeal, it could not be held to have been presented to an improper Court. All that the Additional District Judge had to do was to submit the appeal to the District Judge who was the Chief Judicial Officer in charge of the District Court of Akola, and to have it transferred to a Judge of that Court competent to hear and determine the appeal. Instead of doing so, he returned the appeal to the appellant for being presented to the Additional District Judge, Akola, but that returning of the appeal and its representation at Akola, could not impair the validity of the original presentation of the appeal on 29th June 1936. The appeal was merely transferred from one section of the District Court to another and not from one Court to another Court. Therefore the appeal must be regarded as having been presented on 29th June 1936 which was done within time and must be deemed to be pending in the District Court since that day. It would therefore appear that no question of limitation in reality arises in the case. If there was any mistake in presenting the appeal at

1. Sirajuddin v. Sonilal, (1928) 15 A I R Nag 199 =109 I C 79.
2. Zumbarlal Chhotelal v. Sitaram, (1937) 24 A I R Nag 80=171 I C 871=I L R (1937) Nag 219.

Khamgaon, instead of at Akola, it was not a fatal mistake; an entry by a wrongdoer will not make the entry any the less an entry into the right Court. It was a mistake of procedure and not of jurisdiction. It is unnecessary therefore to go into the question whether that mistake was bona fide or not.

The result is that the lower Appellate Court's order is set aside and the case is sent back to that Court for being heard on merits. The costs of this appeal will abide the issue. Counsel's fees Rs. 20.

D.S./R.K. *Case remanded.*

A. I. R. 1939 Nagpur 44

NIYOGI AND GRUER JJ.

Madhao Gopal Shirsalkar — Plaintiff — Appellant.

v.

Secretary of State — Defendant — Respondent.

Letters Patent Appeal No. 16 of 1936, Decided on 29th August 1938, from appellate decree of Stone C. J., in S. A. No. 111-B of 1933, D/- 17th April 1936.

(a) Berar Land Revenue Code (1896), Secs. 178, 38—Rules for disposal of Government building site made by Chief Commissioner in 1906, were valid and operative although not published in Gazette as required by S. 178—Plaintiff acquiring occupancy rights in land on condition that rent fixed at future settlements should be 33 per cent. of letting value of land—Town survey officer assessing rent accordingly in 1928—Assessment challenged by plaintiff—Assessment officer held to have jurisdiction to revise assessment—Plaintiff held to be bound by his agreement.

The rules for the disposal of Government building sites made by the Chief Commissioner in 1906 were valid and operative, notwithstanding that they had not been published in the Gazette as required by Sec. 178. The general rules contemplated in S. 38 took effect by virtue of their having been sanctioned by the Chief Commissioner and became operative *de hors* their publication in the Gazette under Sec. 218. They were valid because they were sanctioned by a competent authority in accordance with law and not because they had the force of law. Publication was a condition subsequent to the making of the rules and therefore directory. The non-observance of that condition would not prevent the rules from taking effect. [P 45 C 1; P 46 C 1]

The plaintiff by an agreement executed by him in accordance with R. 37 of the rules for the disposal of Government building sites made by the Chief Commissioner in 1906, acquired occupancy rights in a plot, rental Rs. 3-8-0, on condition that the rent fixed at the future settlements should ordinarily be 33 per cent. of the letting value of the land. In the town survey made in 1928, the Town Survey Officer assessed the plot to Rs. 24 per annum. That was varied to some extent by the Commissioner whose order was affirmed by the Governor in Council. It was contended by the plaintiff that the rules of 1906 had no force of law for want of publication in the C. P. Gazette as required by Sec. 178 and that the revision of the assessment could only be made under Rule 8 of the rules of 1894 :

Held that the rules of 1906 were valid and operative. The plaintiff when he accepted the certificate of grant of occupancy rights and executed an agreement under Rules of 1906 must be deemed to have waived that objection to the validity of the rules. Even supposing that the plaintiff had entered into the agreement under the mistaken notion that the rules had force of law, when they had not, that mistake of law could not invalidate the contract (S. 21, Contract Act). The plaintiff, having by his free will, chosen to accept the terms, could not legally repudiate the agreement, and the Settlement Officer had jurisdiction to revise the assessment : *(1901) 1 K B 673, Rel. on.* [P 46 C 2; P 47 C 1]

(b) Berar Land Revenue Code (1928), Sections 41 (3), 192 (1), Proviso—Person acquiring occupancy right under rules for disposal of Government sites in 1906, disputing right of Government to enhance assessment of the land—Dispute decided against him by Revenue Officer—He is entitled to sue under S. 41 (3) to establish his right—Suit also comes under S. 192 (1), Proviso—Civil Court has jurisdiction to try it.

The question whether or not a Civil Court has jurisdiction to try a particular suit must be determined by averments made in the plaint. Where a person, who has acquired occupany right in land by an agreement executed by him in accordance with R. 37 of the rules for disposal of Government building site made by the Chief Commissioner in 1906, disputes the right of the Government to enhance the assessment on his land and that dispute is decided by the Revenue Officer against him, he is entitled to sue for establishing his right under Section 41 (3) of the Code. Such suit involves the interpretation of the certificate granted to the plaintiff and his agreement and the determination of their legal effect and as such falls under Proviso to S. 192 (1) as also under S. 41 (3). The Civil Court has jurisdiction to try such a suit. [P 47 C 2]

(c) Interpretation of Statutes—Construction.

It is an elementary rule of construction that nothing is to be added to or taken from a statute : *(1910) A C 409, Rel. on.* [P 45 C 2]

V. K. Rajwade — *for Appellant.*

W. R. Puranik, Advocate-General — *for Respondent.*

Judgment.—This is an appeal under the Letters Patent by the plaintiff, arising out of his suit instituted for obtaining a declaration that the revised assessment of land revenue made on his land was ultra vires and void. In 1909 the plaintiff, by an agreement executed by him in accordance with R. 37 of the rules for the disposal of Government building sites made by the

Chief Commissioner in 1906, acquired occupancy rights in plot No. 23, area 28 gunthas, rental Rs. 3-8-0, situate in Akola Town, on condition that the rent fixed at future settlements should ordinarily be 33 per cent. of the letting value of the land. Town Survey of Akola was ordered under Notification No. 234-XVI, dated 5th April 1926 issued under Section 83, Berar Land Revenue Code, 1896. It was completed after the amended Berar Land Revenue Code was passed in 1928. The Town Settlement Officer, by an order passed on 7th February 1929, held that the old assessment was due for revision in pursuance of the aforesaid Rules of 1906 and assessed the plot to Rs. 24 per annum. That was varied to some extent by the Commissioner whose order was affirmed by the Governor in Council. The contention raised by the plaintiff was twofold : (i) That the Akola town survey ordered by the Notification in 1926 was not a fresh revenue survey within the meaning of Sec. 93 (1), Berar Land Revenue Code, 1896, and that it could not invest the Settlement Officer with jurisdiction to revise the old assessment. (ii) That the Rules of 1906 had no force of law for want of publication in the Central Provinces Gazette as required by S. 178 of the Code of 1896 and that the revision of the assessment could be made only under R. 8 of the Rules of 1894 (Resident's Book Circular 20 of 1894).

The primary question which arises upon this appeal is whether the Rules of 1906 could not take effect for want of publication in the Central Provinces Gazette. In our opinion they were valid and operative notwithstanding that they had not been published in the Gazette as required by Sec. 178, Berar Land Revenue Code, 1896, for the reasons which follow. The appellant does not deny that the occupancy rights were granted to him in 1906 under the provisions of S. 38 of the Code of 1896. The material part of that Section runs as follows :

And the Deputy Commissioner may subject to the orders of the Commissioner, dispose of them in such manner as he may deem fit or as may be authorized by general rules sanctioned by the Resident.

N. B.—In accordance with the Government of India Foreign Department Notification No. 4246-I-B, dated 11th September 1903, the terms, Berar, the Chief Commissioner and the Central Provinces Gazette, were substituted for the terms, the Hyderabad Assigned Districts, the Resident and the Hyderabad Residency orders, respectively, which occur in the edition of the Code of 1896 issued in 1906.

The Rules of 1906 governing the disposal of buliding sites were appended to the Code of 1896 in its first edition issued in 1906. They purport to be rules made under S. 38 of the Code of 1896 : *see* p. 92, Berar Land Revenue Code 1896, edition 1906. The appellant contends that these rules not having been published in the Central Provinces Gazette did not acquire the force of law. The appellant's contention assumes that the general rules mentioned in Sec. 38 refer to those made under Sec. 178 of the Code of 1896 but that assumption is unfounded. There are no bonds in the Section which attribute to S. 178. It is an elementary rule of construction that nothing is to be added to or be taken from a statute. As observed by Lord Mersey in (1910) 79 L J K B 905[1] at p. 911 :

It is a strong thing to read into an Act of Parliament words which are not there and in the absence of clear necessity, it is a wrong thing to do.

In S. 38 of the Code of 1896 the words used are "as may be authorized by general rules sanctioned by the Resident" (i. e. the Chief Commissioner). It is not denied that the Rules of 1906 were sanctioned by the Chief Commissioner, (and it may be noted that the plea that the Rules of 1906 were void for want of sanction of the Government of India was withdrawn), but what is urged is that they ought to have been published in the Gazette as required by Sec. 178 of that Code. It is impossible to assent to this argument without following a course reprobated by the recognized principle stated above. Nor does it appear that the author of the Code while enacting that Section inadvertently omitted to make express reference to Sec. 178. The words "general rules sanctioned" are important. S. 178 contemplates rules "made" by the Chief Commissioner and not those "sanctioned" and it does not describe the rules "made" under it as "general rules." A similar expression occurs in Ss. 40, 121 (2) and 154 (2) where the word "sanctioned" is used. Examining the several Sections of the Code it is evident that when the Code intends that the rules or instructions referred to in particular Sections of it should mean those made under S. 178 or S. 216, it expressly says so. Reference may be made to Ss. 179, 180, 181, 183, 186, 187, 188, 191 and 193 in each of which one finds the expression

1. Tompson v. Goold and Co., (1910) A C 409=79 L J K B 905=103 L T 81=26 T L R 526.

"subject to any rules made under S. 178." Turning one's attention to Ss. 20, 32, 52 (b), 56, 59 (b), 63 (3), 64 and 83 (2) one finds the expression "subject to any instructions given under S. 216" or words to that effect. The absence of such words in S. 38 gives a clear indication that the Section has no reference to Sec. 178 or Sec. 216. The words "general rules sanctioned" must be read with their context "subject to the orders of the Commissioner" and so read clearly indicate that they were intended to be administrative rules for guidance of the Revenue Officers. It is true that the rules of 1906 happen to be published along with others under a common caption "Rules under the Berar Land Revenue Code 1896" (p. 85 of Edition 1906). But that heading is misleading as will be apparent by reference to pp. 128, 129 where the "orders" of the Chief Commissioner referred to in S. 115 and S. 117 and to p. 130 where the declaration referred to in S. 126 are printed. Manifestly they could not be regarded as rules made under S. 178 simply because they are there under the heading "Rules." S. 178 occurs in Ch. 16 which speaks of Procedure of Revenue Officers, and the Chief Commissioner is empowered to make rules :

for regulating the procedure of Revenue Officers under this law in cases in which a procedure is not prescribed by the law and for otherwise carrying into effect the objects of the law.

"General Rules" contemplated in S. 38 are not rules of procedure but rules to guide the Revenue Officers in the disposal of Government lands. Since the power to "sanction" such rules is given by S. 38 itself, it is unnecessary to invoke the general power conferred by S. 178 in the last clause of the passage extracted above. It is thus clear that the general rules contemplated in S. 38 took effect by virtue of their having been sanctioned by the Chief Commissioner and became operative *de hors* their publication in the Gazette under S. 218. They were valid because they were sanctioned by a competent authority in accordance with law and not because they had the force of law. Publication was a condition subsequent to the making of the rules and was therefore directory. The non-observance of that condition would not prevent the rules from taking effect : *see* (1901) 1 K B 673.[2]

2. Jones v. Robson, (1901) 1 K B 673=70 L J K B 419=84 L T 230=65 J P 278=19 Cox C C 651.

It is however urged that the rules of 1894 having had the force of law, their authority could not be impaired by the general rules under S. 38 which had not the force of law. S. 38 does not refer to the rules of 1894 and it makes only those rules effective which are sanctioned by the Chief Commissioner. It does not restrict the power of the Chief Commissioner in making assessment of building sites, as the Proviso to R. 8 of the Circular of 1894 did. When the Chief Commissioner sanctioned the rules under S. 38, the old rules of 1894 must be deemed to have been impliedly repealed. It may be conceded that the Rules of 1894 would remain operative until the Chief Commissioner sanctioned the rules under S. 38 but when he sanctioned the latter in 1906, the former cannot hold the field. It is pertinent to notice here that Part 1 of the 1894 Circular was reproduced as Rr. 30 to 45 in the new Rules of 1906 with the most important variation regarding the enhancement of the annual ground rent from 20 per cent. of the letting value of the land to 22 per cent. The old rules were in reality adopted with this modification. If the Rules of 1894 had the force of law, their authority was exhausted by their fresh promulgation, not by publication in the Gazette, which was redundant, but by their incorporation in the 1906 edition of the Code. It is contended that the modification was ultra vires of the Chief Commissioner. It cannot be so because he was invested with power to enhance the ground rent from 20 per cent. to 33 per cent. by S. 38 of the Code of 1896. That was not a matter of procedure and consequently S. 178 and S. 218 could not come into play.

Granting for the nonce that the Chief Commissioner was not competent to do so except by making a rule under S. 178 and publishing it in the Central Provinces Gazette, it must be observed that he had inherent power (conferred by S. 178) to make such a rule and he must be presumed to have made the rule under S. 178 (rather than under S. 38), and the publication of the rule by incorporating it in the 1906 edition of the Code of 1896 instead of doing so in the Gazette was but a formal irregularity. The plaintiff was fully aware of this irregularity when he accepted the certificate of grant of occupancy rights and he executed an agreement under the Rules of 1906. He must therefore be deemed to have waived that objection to the validity of the

rules. The present case is not, strictly speaking, one of ultra vires action as the Chief Commissioner's competency is not contested, but even if it were, that would not help the plaintiff in shaking off his obligation which he has incurred under the rules. It is true that an ultra vires statute cannot be validated by acquiescence but it is equally true that an acquiescing party may be estopped from questioning it : *see* The Doctrine of Ultra Vires, Street, p. 436, Edition 1930.

Now the important question is : Can the plaintiff resile from his own agreement of 1909? Even supposing that he entered into it under the mistaken notion that the rules had the force of law when they had not, that mistake of law cannot invalidate the contract : *see* S. 21, Contract Act. The parties dealt with each other at arms length. The plaintiff, who is himself a legal practitioner, must be presumed to have read the rules of 1906 as incorporated in the authorized edition of the Code of 1906 and he does not deny that he read them before he entered into the transaction. The land was owned by the Government and the Revenue Officer concerned offered the occupancy rights to him on the conditions embodied in the Rules of 1906 which the Chief Commissioner as head of the Government had full power to sanction. The plaintiff was free to accept or to reject the terms so offered. He by his free will chose to purchase the occupancy rights on those terms. He could not legally repudiate that agreement as he accepted the Rules of 1906 without protest. The next question is whether or not the Settlement Officer had jurisdiction to revise the assessment. If the Rules of 1906 were valid, as we have held already, the plaintiff must be held bound by R. 35 of those rules That says that the rent was assessed for the unexpired portion of the current settlement subject to the condition that at future settlements it would be 33 per cent. of the letting value of the land. The Notification issued in 1926 would be deemed to have been issued under the Code of 1928 by virtue of S. 195 of the Code of 1928. It was open to the Settlement Officer to enhance the assessment even up to 50 per cent of the estimated letting value of the land disregarding the appellant's claim to hold land on privileged terms. The Government was however bound by the terms of the plaintiff's agreement made in 1909 and recognizing this obligation, ordered revised assessment to be made on the basis of the old contract (*see* Ex. D-2) with the result that the appellant was substantially benefited.

On behalf of the respondent, it was urged that the suit being one which in effect contested the amount of assessment was not triable by the Civil Court. It must be observed that the Revenue Member in his order referred the plaintiff to the Civil Court and he had manifestly good reason to do so. The plaintiff's case was that the Government had no right, under the terms of the grant made in 1909 which were void, to revise the assessment. That involved interpretation of the terms of the certificate (Ex. P-2) and the plaintiff's agreement (Ex. D-1) and determination of their legal effect. The question whether or not the Civil Court has jurisdiction must be determined by the averments made in the plaint. They leave no room for doubt that the case falls under the Proviso to S. 192 (1) as also sub-sec. 3 of S. 41 of the Code of 1928. Sub-s. 1 of S. 41 does not merely contemplate questions of title but of rights as well, i.e. rights in respect of any property of the Government. The plaintiff disputed the right of the Government to enhance the assessment on his land and that dispute was decided by the Revenue Officer against the plaintiff. He was therefore clearly entitled to sue for establishing his right under sub-s. 3 of S. 41 of that Code. The appeal stands dismissed with costs. Counsel's fee Rs. 200. The costs of the Courts below and of appeal before the Hon'ble the Chief Justice, will be borne by the parties.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1939 Nagpur 47

VIVIAN BOSE J.

Bapuji Ramji Patil — Appellant.

v.

Gangaram Madhorao Deshpande and others — Respondents.

Second Appeal No. 373 of 1936, Decided on 7th October 1938, from appellate decree of Addl. Dist. Judge, Amraoti, D/- 27th April 1936.

(a) Hindu law—Adoption—In Berar, Bombay rules about adoption apply.

In Berar, the Bombay rules about adoption apply; that is to say a widow has authority to adopt in the absence of express permission from the husband. [P 48 C 1]

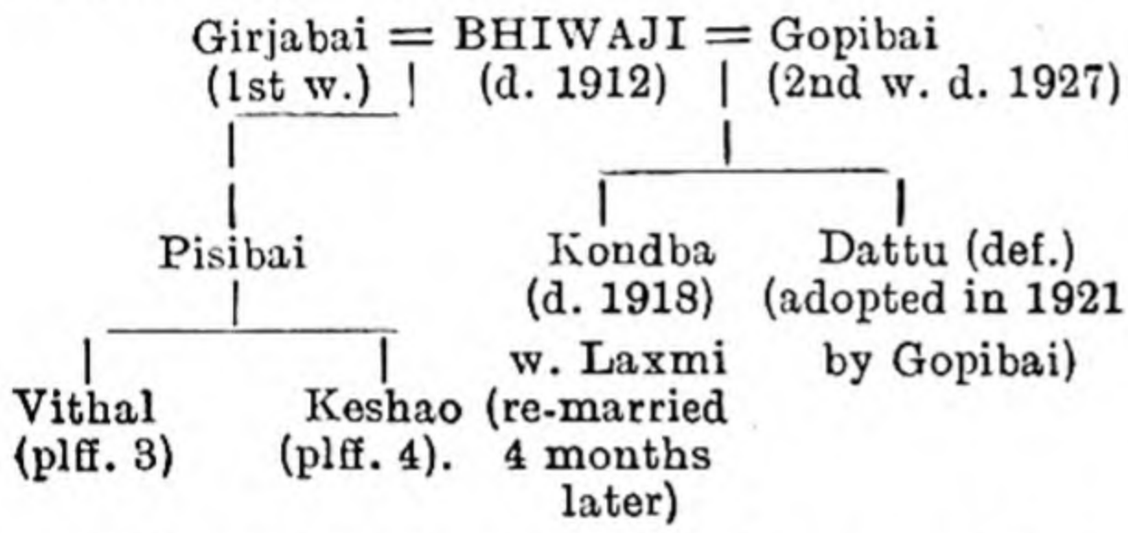
(b) Hindu Law—Adoption—Mother's power to adopt terminates when her son dies leaving widow.

Mother's power to adopt is completely extinguished the moment her son dies leaving a widow, and it is immaterial whether that widow attained the age of full legal competence or not : *A I R 1934 Nag 183 and A I R 1938 Bom 20, Foll.; A I R 1929 Nag 98 (F B) ; A I R 1936 Nag 65 and A I R 1938 Nag 423, Expl.* [P 50 C 1]

M. B. Kinkhede and V. R. Dhoke — *for Appellant.*

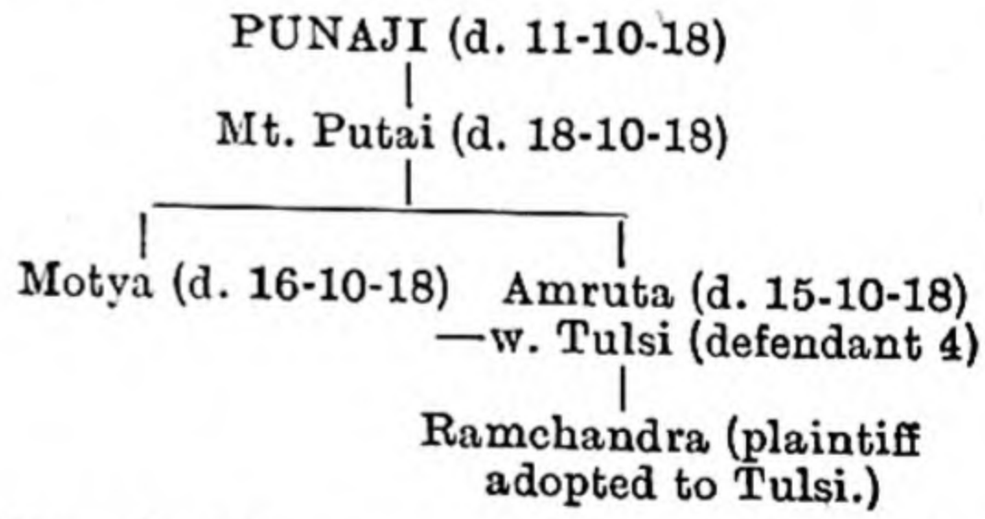
B. R. Mandlekar — *for Respondent 2.*

Judgment.—This is a case from Berar where the Bombay rules about adoption apply, that is to say, a widow has authority to adopt in the absence of express permission from the husband. The relationship between the parties is shown in the following genealogical tree.



Bhiwaji died in 1912 leaving two widows Girjabai and Gopibai, and a son Kondba and a daughter Pisibai. Kondba died in 1918 and four months later his widow Mt. Laxmi remarried. Thereupon his mother Gopibai adopted the first defendant Dattu. This was in the year 1921, and the only question here is whether such an adoption is legally valid. Plaintiffs 1 and 2 are transferees from plaintiffs 3 and 4 who are the sons of Pisibai, and who but for the adoption would be entitled to succeed. The remaining defendants are transferees from defendant 1. All these facts are either admitted or proved. There are four Nagpur decisions which deal with this matter. In 17 N L J 57[1] at p. 59 Pollock A. J. C. held that such an adoption was invalid. He interpreted the decision of their Lordships of the Privy Council in 59 Bom 360[2] to mean that the mother's power of adoption ceases for all time the moment the son dies leaving a widow. It is a decision on all fours with the present case. The other rulings are two Full Bench decisions of the Judicial Commissioner's Court. The earlier of the two, namely 25 N L R 144[3] came to the same conclusion though for different reasons, but the later one, 31 N L R Sup 180,[4] overruled it on the ground that the Privy Council in 59 Bom 360[2] had impliedly overruled the old view. Pollock A. J. C. was an assenting member of this Bench but no reference was made to his earlier decision. The fourth ruling is that of a Division Bench of this Court which takes the same view as the later of the two Full Bench decisions. It is (1938) N L J 237.[5]

We have therefore a Full Bench decision of the Judicial Commissioner's Court and that of a single Judge holding that the mother has no power. We also have a second Full Bench of the Judicial Commissioner's Court overruling the first and we have a Division Bench of this Court following the second Full Bench. If these two later rulings had been exactly in point, there would have been an end of the matter, but the facts are slightly different in both, and it is argued on behalf of the defendant-respondent that that makes the observations on this point obiter. What I have to see therefore is whether the principle enunciated in the two later rulings applied equally to the facts there as well as to those here or whether there is any point of differentiation. Dealing first with 31 N L R Sup 180[4] it will be convenient to set out the family tree of the parties there. It was as follows :



The family was unfortunate and all except Tulsi died within a few days of each other as shown above. They were all joint and Motya was the last male survivor. After him the property devolved on his mother Mt. Putai and after her to Tulsi,

1. Vithoba v. Amrita, (1934) 21 A I R Nag 183=150 I C 1032=17 N L J 57.
2. Vijaysinghji v. Shivsangji, (1935) 22 A I R P C 95=155 I C 493=59 Bom 360= 62 I A 161 (P C).
3. Uttamrao v. Daulat, (1929) 16 A I R Nag 98 =116 I C 499=25 N L R 144 (F B).
4. Ramchandra v. Mt. Yamuna Bai, (1936) 23 A I R Nag 65=162 I C 571=31 N L R Sup 180 (F B).
5. Mt. Draupadi v. Vikram, (1938) 25 A I R Nag 423=1938 N L J 237.

the widow of a predeceased male co-parcener. She adopted Ramchandra, who was the plaintiff there, after the property had vested in her and the question was whether she could do so. It was held that she could. The learned Judicial Commissioners interpreted the Privy Council ruling in 12 Pat 642[6] to mean that the restriction on adoption was imposed on the mother and not on the widow of a gotraja sapinda, and even as regards the mother the restriction applied only when the son died leaving a widow or a son. This is what they say :

> Their Lordships pointed out that in all those cases it was the existence of the son's widow that stood in the way of adoption and that in none of them was there any suggestion that the same rule would apply if the heir in whom the property had vested were someone other than her.

In the case before them it was not the mother who adopted but the son's widow —the exact converse of the position before their Lordships. They held therefore that the prohibition contained in the Privy Council decision did not extend to the case before them. It is true, they overruled the earlier Full Bench decision in 25 N L R 144[3] but not on this point. The facts in the earlier decision were as follows. Again, I append a tree.

Krishnaji=Mt. Sitabai.
|
Zaboo
(Mt. Bainabai).

Krishnaji and his son Zaboo were members of a joint Hindu family. Zaboo died and Krishnaji succeeded by survivorship. On Krishnaji's death, his widow Sitabai succeeded and after her Bainabai. Bainabai then adopted a son and the question was whether such an adoption could be made. The Full Bench proceeding upon the theory that the power of adoption was dependent upon the vesting of the estate held that she could not. It decided that unless the widow succeeds directly to the estate of her husband no adoption can be made. This, the later Full Bench held was wrong. It pointed out that under the Privy Council decisions, and also under the Hindu law texts, the power of adoption was not dependent upon the vesting of the estate and held that the only restrictions which the Privy Council imposed was upon the mother when the son leaves a widow. In neither of these cases was the adoption by the mother. The decision of Pollock A. J. C. was a case of a mother and is exactly in point. It has not been overruled. In the Division Bench decision of this Court the facts were as follows. I reproduce for convenience the tree given in that judgment. The material dates are also to be found there.

LAXMAN (d. 1896)
|
Ramji (d. 12-1-1906) W. Draupadi — Krishnaji (d. 27-4-1906) W. Tulsai.
|
Sakharam (d. 1912) (adopted by Draupadi on 28-6-1907) — Vikram (plaintiff) (adopted by Tulsai on 3-6-1930)

As will be seen there were two adoptions and the last male holder before these adoptions was Krishnaji. He succeeded by survivorship. When he died the only members of the joint family left were the two widows, Draupadi and Tulsai. Draupadi adopted Sakharam in 1912 and when he died Tulsai adopted the plaintiff. The suit was against Draupadi, and the question was whether these two adoptions were valid. It was held that both were valid and it was again pointed out at p. 244 that "the limit indicated in 12 Pat 642[1] may be regarded as the only limit."

It will thus be seen that of the four Nagpur decisions only that of Pollock A. J. C. is exactly in point and that the later Full Bench and the Division Bench take the same view of the Privy Council in 12 Pat 642,[1] as he did. It is true, their observations are in a sense obiter but it was necessary in both cases to examine the true meaning and extent of the Privy Council decisions, and I fully agree with them that whatever else their Lordships may have meant they clearly decided that the mother cannot adopt when the son dies leaving a widow who can. It was argued however that their Lordships have left at large the question whether the rule would apply when the son's widow has not attained "full legal capacity" and that as Laxmi was at the outside 15 years and 3½ months at the date of Kondbha's death, she had no power to adopt and consequently the mother's power revived when Laxmi remarried. These arguments are based on two passages from their Lordships' judgment. The one which is said to deal with the age of "full legal capacity" states that "the test is to be whether these conditions exist at the time of the son's death." And the other relating to the capacity of the son's widow states :

6. Amarendra Mansingh v. Sanatan Singh, (1933) 20 A I R P C 155=143 I C 441=12 Pat 642=60 I A 242 (P C).

Whether in order to bring this principle into play it is essential that the son's widow should herself be clothed *with the power of adoption* (the italicized is mine) is left open.

So far as the latter passage is concerned I agree with 39 Bom L R 599[7] at page 604 that it does not relate to the question of "full legal capacity" but to another matter. There are parts of India, the Central Provinces among them, where a widow cannot adopt unless she has been given the necessary permission to do so by her husband. When that has not been done, she is not "clothed with the power of adoption". I agree that that is what their Lordships had in mind. The change in language between this passage and the other passages where their Lordships deal with "full legal capacity" and "ceremonial competence" is in my opinion significant. When dealing with the latter they were interpreting words used in the former judgments of the Board and I can hardly think that they would have altered their phraseology in this way if they had been dealing with the same matter here. It is to be observed also that whereas their Lordships have dealt at page 658 with two cases in which the mother's power to adopt comes to an end, namely where there is a grandson or a son's widow they have left only one of these two positions at large at page 659. It would hardly be likely that their Lordships meant to indicate that the power would be at an end when there is a grandson whether he has attained full legal competence or not but might not be so when there is a son's widow. Clearly what applies in the one case must apply in the other. Therefore the interpretation which the Bombay High Court places upon this decision seems to me to be right.

As regards the other passage it does not relate to the son's widow but to the son himself. Their Lordships decide that when the son dies before attaining full legal competence and does not leave either a widow or a son or an adopted son, then the power of the mother which was in abeyance during the son's lifetime revives, but the moment he hands the torch on to another the mother can no longer retake it. Whether he has handed it on or not is of course a matter which must be determined with respect to the state of affairs existing at the date of his death. But whether the person to whom it has been handed on is of full legal competence or not is immaterial. Therefore, following 39 Bom L R 599,[7] I hold that Gopibai's power to adopt was completely extinguished the moment her son Kondbha died leaving a widow, and that it is immaterial whether that widow had attained the age of full legal competence or not. The decision appealed from is upheld and the appeal is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

7. Ramchandra Narayan v. Murlidhar Yeshwant, (1938) 25 A I R Bom 20=173 IC 36=39 Bom L R 599.

*** * A. I. R. 1939 Nagpur 50**

FULL BENCH

STONE C. J., VIVIAN BOSE AND CLARKE JJ.

Motiram and others — Defendants Nos. 2 to 5 — Applicants.

v.

Daulat, Plaintiff and another — Defendant No. 1 — Non-Applicants.

Civil Revn. No. 542 of 1937, Decided on 5th September 1938, against order of Sub-Judge, Second Class, Katol, D/- 22nd July 1937.

(a) Court-fees Act (1870), S. 7 (iv) (c)—Suit for declaration that plaintiff is reversioner and for injunction and appointment of receiver comes under S. 7 (iv) (c) (Per *Niyogi J.*)

Where in a suit it is prayed that it should be declared that plaintiff is the next reversioner, and that a permanent injunction be granted restraining defendant from committing acts of waste and that a receiver be appointed to manage the property, the reliefs of injunction or the appointment of receiver are consequential reliefs and the suit therefore comes within the purview of S. 7 (iv)(c): *A I R 1937 Nag 14, Foll.; A I R 1932 All 114 and A I R 1930 Cal 686, Expl.* [P 51 C 2]

(b) Court-fees Act (1870), S. 7 (iv) (c)—In considering meaning of S. 7 (iv) (c) it is necessary to consider Suits Valuation Act, S. 8 and Civil P. C., O. 7, R. 11.

In construing a statute, one should endeavour to give it a meaning, in all cases of ambiguity, which will make it consonant to, rather than in disagreement with, other Acts. Hence in considering the meaning of S. 7 (iv) (c) it is necessary to consider S. 8, Suits Valuation Act and O. 7, R. 11, Civil Procedure Code. [P 52 C 2; P 53 C 1]

(c) Suits Valuation Act (1887), S. 8—Suits coming under S. 7 (iv) (c), Court-fees Act valued at different figures for purposes of jurisdiction and court-fees—Court can challenge one of those values.

The value for court-fee purposes and the value for jurisdiction must be the same, and if the plaintiff values the suit at one figure for the purposes of jurisdiction and at another figure for court-fee purposes in a suit coming under Sec. 7 (iv) (c),

Court-fees Act, the Court is at liberty to challenge one of those values at any rate : *A I R 1920 Nag 243 ; 7 N L R 190 and A I R 1932 Lah 132, Rel. on.* [P 54 C 2]

*** * (d) Court-fees Act (1870), S. 7 (iv) (c) —In valuing suits coming under S. 7 (iv) (c) principle that value of suit is value of property affected by relief asked for cannot be adopted as test.**

The principle that where the subject-matter is so related to things which have a real money value that the relief asked for will affect these, then the value of the suit for the purpose of jurisdiction is to be taken as the market value of the property affected, cannot be adopted as the test for valuing suits of the type coming under S. 7 (iv) (c), because it is not the value of the thing affected that settles the value of the relief sought. It is the value of the relief sought which has to be determined : *A I R 1927 Mad 563, Ref.* [P 55 C 2]

*** * (e) Court-fees Act (1870), S. 7 (iv) (c) —Valuation put by plaintiff, if arbitrary and unreasonable, Court can interfere and exercise its powers under O. 7, R. 11, Civil P. C.—***A I R 1937 Nag 14=165 I C 106, Overruled.*

It is true that under S. 7 (iv) (c), the plaintiff may put any valuation on the relief but such value is not binding on Court and it can refuse to accept that figure. There is nothing in the Court-fees Act which shows that in cases coming under S. 7 (iv) (c), the power which the Court is given by O. 7, R. 11, Civil P, C., is taken away. If the valuation put by the plaintiff is arbitrary and unreasonable, in other words if the disparity is so great as to show that the plaintiff has not endeavoured to fix a fair value at all but has simply set down a figure which is unreasonable and bears no relation to the value of the right litigated, the Court can interfere and exercise its powers under O. 7, R. 11, Civil P. C. : *A I R 1937 Nag 14=165 I C 106,* **Overruled ;** *A I R 1918 P C 135, Expl. ; 7 N L R 190 ; A I R 1928 Nag 243 ; A I R 1924 Nag 295 and (1938) N L J 130, Approved; Case law referred.* [P 52 C 2; P 56 C 1; P 57 C 2]

J. R. Mudholkar — *for Applicants.*
M. R. Rajkarne and K. B. Tare — *for Non-Applicant No. 1.*

ORDER OF REFERENCE

Niyogi J.—This is a defendants' application in revision against an interlocutory order passed on 22nd July 1937 in Civil Suit No. 124-A of 1937, by the Subordinate Judge, Second Class, Katol. The plaintiff instituted the suit seeking relief as follows :

(a) It be declared that the plaintiff is the next reversioner and a permanent injunction restraining defendant 1 from committing any acts of waste in future be granted ;

(b) it be declared that the acts complained of are waste and not binding on the plaintiff next reversioner after the death of defendant 1 ;

(c) a receiver be appointed to manage the estate;

(d) costs of this suit be decreed against the defendants ;

(e) any other relief the Court deems fit be also granted.

These reliefs can be summarized into three : (i) It be declared that the plaintiff is the next reversioner. (ii) That permanent injunction be granted to restrain defendant 1 from committing acts of waste. (iii) That a receiver be appointed to manage the property.

The defendants raised the objection that it was not open to the plaintiff to put his own valuation on the several reliefs claimed by him. The lower Court overruled the contention which is again pressed here in revision by the defendants. It is urged on behalf of the defendants that the relief of injunction or the appointment of receiver was an independent and substantive relief and that it should be paid for separately. On that basis it is urged that the suit for the purposes of court-fees does not fall under S. 7 (iv) (c), Court-fees Act. Reliance is placed on 54 All 232[1] and 58 Cal 281.[2] In the first mentioned case the plea such as is raised here was in fact overruled. It was held that the relief with respect to the appointment of a receiver was a relief consequential on the granting of the plaintiff's relief for a declaration of the plaintiff's title. The suit which was one for a declaration of title and appointment of a receiver was treated as one falling under S. 7 (iv) (c), Court-fees Act. It was further held that it was open to the plaintiff to put his own valuation upon the relief sought by him. In 58 Cal 281[2] the plaintiff had paid separate court-fees for the relief of declaration and for the relief of injunction, exactly as is contended for by the defendants in this case, but their Lordships of the Calcutta High Court held that the relief of injunction was consequential on the relief of declaration and held that the suit fell under S. 7 (iv) (c), Court-fees Act. It was also pointed out that it was at the option of the plaintiff to fix any value he likes on the reliefs that he claims in the suit.

I have no doubt as I held in A I R 1937 Nag 14,[3] that the reliefs of injunction or the appointment of receiver are consequential reliefs and that the case comes within the purview of S. 7 (iv) (c), Court-fees Act. In respect of such suits there has been

1. Mt. Chhatarpati v. Mt. Kalap Dei, (1932) 19 A I R All 114=135 I C 237=54 All 232=1931 A L J 837.
2. In re Kalipada Mukherji, (1930) 17 A I R Cal 686=131 I C 587=58 Cal 281=34 C W N 870.
3. Secy. of State v. Dadoo Ghanshyam Singh, (1937) 24 A I R Nag 14=165 I C 106.

much divergence of opinion as to whether the plaintiff is entitled to put arbitrarily low valuation on the consequential relief or not. In A I R 1937 Nag 14[3] I had occasion to deal with this point and I expressed my opinion that the Court is not authorized until proper rules are framed under S. 9, Suits Valuation Act, to interfere with the valuation put by the plaintiff even though it may appear to be capricious and unreasonable. In that case my view was expressed in these terms :

There was formerly some divergence of judicial opinion on the question whether Sec. 7 (iv) (c), Court-fees Act, authorizes a plaintiff to value his relief in an arbitrary manner, but lately the opinion of all the High Courts appears to converge on the view that it leaves it open to the plaintiff to attach his own value to the relief claimed by him and that the Courts have no power to revise the plaintiff's valuation even though it may appear to be capricious. The Calcutta High Court had held in 40 Cal 245[4] and 11 C W N 705[5] which was followed by the Judicial Commissioner's Court at Nagpur in 7 N L R 190[6] that a plaintiff was not at liberty to assign an arbitrary value to the relief sought by him. The Calcutta view did not find favour in Bombay (*see* 33 Bom 307[7] and 45 Bom 567[8]), and was departed from by the Calcutta High Court itself in later cases : *see* 58 Cal 281[2] and 61 Cal 796.[9] The cases in 13 Lah 788,[10] 38 Mad 922,[11] 4 All 320[12] and 10 Pat 432[13] took the same view as the later Calcutta cases.

In the sequel I observed :

It may well be that in certain cases the plaintiff may deliberately undervalue the relief in order to save court-fees, but this can be remedied by framing appropriate rules under S. 9, Suits Valuation Act, as suggested by Mukerji J. in A I R 1930 Cal 473.[14] To deprive the plaintiff of his right to state his own valuation, however arbitrary or unreasonable it may be, would result in nullifying the words of the Section.

In another case of this Court reported in A I R 1937 Nag 316,[15] Pollock J. expressed his opinion to the contrary saying that it was, no doubt, not open to the plaintiff to put an arbitrary value on his claim. On a question of fiscal importance and frequent occurrence, such as the present, it is desirable that there should be no divergence of opinion in our Court. It is therefore expedient that the question formulated below should be referred to a Bench of this Court for its opinion.

"Whether the Court is authorized to interfere with any value put on a relief sought by the plaintiff in a suit which falls under S. 7 (iv) (c), Court-fees Act, if the valuation so put by the plaintiff appears to be arbitrary and unreasonable."

OPINION

Stone C. J.—The following question has been referred to a Bench for its opinion :

Whether the Court is authorized to interfere with any value put on a relief sought by the plaintiff in a suit which falls under S. 7 (iv) (c), Court-fees Act, if the valuation so put by the plaintiff appears to be arbitrary and unreasonable.

Owing to the practical importance of the question and the divergence of opinion in this and the other High Courts in India it was considered desirable to place this matter before a Full Bench. The difficulty arises owing to the wording of S. 7 (iv) (c), Court-fees Act. That Section provides inter alia as follows :

The amount of fee payable under this Act in the suits next hereinafter mentioned shall be as follows :

(iv) In suits . . . . . .

(c) To obtain a declaratory decree or order, where consequential relief is prayed . . . . . according to the amount at which the relief sought is valued in the plaint or memorandum of appeal [with a minimum fee of Rs. 5 in the case of suits falling under Cl. (c)] . . . . . In all such suits the plaintiff shall state the amount at which he values the relief sought.

In considering the meaning of the above provisions it is necessary to consider two other Acts because in construing a statute one should endeavour to give it a meaning, in all cases of ambiguity, which will make it consonant to, rather than in disagreement

4. Raj Krishna Dey v. Bipin Behari Dey, (1913) 40 Cal 245=17 I C 162=16 C L J 194=17 C W N 591.
5. Mt. Bibi Umatul v. Mt. Nanji Koer, (1907) 11 C W N 705=6 C L J 427.
6. Devidas v. Ramlal, (1911) 7 N L R 190=13 I C 864.
7. Vachhani Keshabhai v. Vachhani Nanbha, (1909) 33 Bom 307=1 I C 108=11 Bom L R 30.
8. Govind Krishna v. Hanmaya Lingaya, (1921) 8 A I R Bom 65=59 I C 777=45 Bom 567=22 Bom L R 1450.
9. Narayan Ganj Central Co-operative Sale and Supply Society, Ltd. v. Mafijuddin Ahmad, (1934) 21 A I R Cal 448=149 I C 3=61 Cal 796=59 C L J 233=38 C W N 589 (F B).
10. Jhanda Singh v. Gulab Mal-Bhagwan Das, (1933) 20 A I R Lah 246=137 I C 240=13 Lah 788=33 P L R 488.
11. Arunachalam Chetty v. Rangaswamy Pillai, (1915) 2 A I R Mad 948=28 I C 79=38 Mad 922=28 M L J 118 (F B).
12. Jogal Kishore v. Tale Singh, (1882) 4 All 320 =1882 A W N 44 (F B).
13. Kamala Prasad v. Jagarnath Prasad, (1931) 18 A I R Pat 78=130 I C 46=10 Pat 432=13 P L T 155.
14. Pannalal v. Abdul Gani, (1930) 17 A I R Cal 473=127 I C 665=34 C W N 321.
15. Sadasheorao v. Vasantrao, (1937) 24 A I R Nag 316=174 I C 90=ILR (1938) Nag 302.

with, other Acts. The first of the other Acts is the Suits Valuation Act, S. 8 of which provides inter alia as follows :

> Where in suits [within the above sub-section] .... court-fees are payable ad valorem under the Court-fees Act, 1870, the value as determinable for the computation of court-fees and the value for purposes of jurisdiction shall be the same.

The second is the Civil Procedure Code (O. 7, R. 11), Sch. 1 to which provides inter alia as follows :

> The plaint shall be rejected in the following cases :
>
> . . . . . .
>
> (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so.

The question assumes that the suit in question is of the above type and that the valuation appears to be arbitrary and unreasonable. It is argued on the one hand that Sec. 7 (iv) (c) gives to the plaintiff the right to put what value he likes upon a suit of this nature and if he values it at a trifling figure that valuation cannot be challenged and the consequence will be that that value will be taken to be the value under the provisions of Sec. 8 Suits Valuation Act, as the value for jurisdiction purposes, it being assumed in the argument that the value for purposes of court-fee and jurisdiction must be the same. On the other hand, it is said that if one traces this Act back to its beginning one finds that originally after the words "in all such suits the plaintiff shall state the relief sought" there appeared words which preserved the Court's powers now conferred by Order 7, Rule 11 (b) and therefore it is argued that although the plaintiff is required to state the amount at which he values the relief sought and although that value prima facie controls the amount of court-fee and also will control the jurisdiction still it is not a value that is binding on the Court and, when the plaint comes before the Court, if the Court is of opinion that it is a clearly unreasonable valuation, the Court can reject the plaint and leave the plaintiff to correct the valuation or have the suit rejected.

Which of the above is the correct view has perhaps been the subject of as much dispute as any subject relating to the construction of a statute. On the view that the valuation is whatever the plaintiff cares to make, arbitrary or otherwise, reasonable or unreasonable, are the following decisions : 111 P R 1913,[16] 13 Lah 788,[10] 38 Mad 922,[11] 4 All 320,[12] 45 Bom 567,[8] 118 I C 357,[17] A I R 1930 Cal 686,[2] 50 Mad 646[18] A I R 1937 Mad 449[19] and A I R 1937 Nag 14.[3] On the other hand for the view that the plaintiff cannot fix whatever value he likes but the Court has power of supervision there are : 7 N L R 190,[6] A I R 1924 Nag 295,[20] A I R 1928 Nag 243,[21] A I R 1937 Nag 316,[15] A I R 1934 Pat 234,[22] 13 Lah 391,[23] 1938 N L J 130,[24] 11 Pat 161,[25] 42 C W N 504,[26] 39 C W N 250,[27] 11 C W N 705,[5] 31 Sind L R 442[28] and 2 Pat 198.[29] One important case, 61 Cal 796,[9] has been relied on by both sides.

As the foundation of many of the decisions which say that the plaintiff can fix an arbitrary figure is the Privy Council decision in 43 Bom 376[30] and it is obvious that if that decides the point in question that is the end of the discussion. It is therefore necessary to see whether that case does so decide. 43 Bom 376[30] was concerned with a question of limitation. The point here under consideration was touched upon at page 382 in the following words :

> From that decree the defendants appealed to the High Court at Bombay. For the necessary purpose of that appeal they applied for copies of the judgment of the trial Judge, but did not obtain them

16. Barru v. Lachhman, (1914) 1 A I R Lah 214=22 I C 503=111 P R 1913=23 P L R 1914 (F B).
17. Official Trustee of Bengal v. Gobardhan Guchait, (1929) 118 I C 357=33 C W N 231.
18. Vasireddi Veeramma v. Butchayya, (1927) 14 A I R Mad 563=101 I C 379=50 Mad 646=52 M L J 381.
19. Vallabhacharyulu v. Rangacharyulu, (1937) 24 A I R Mad 449=171 I C 889.
20. Kalicharanlal v. Shivshankar Sahai, (1924) 11 A I R Nag 295=79 I C 113.
21. Pratab Singh v. Nanhelal, (1928) 15 A I R Nag 243=110 I C 163.
22. Krityanand Singh v. Dinu Manjhi, (1934) 21 A I R Pat 234=149 I C 109.
23. Sri Kishan Das v. Sat Narain, (1932) 19 A I R Lah 132=13 Lah 391=32 P L R 729.
24. Mt. Thamabai v. Lalsingh, (1938) N L J 130.
25. Ramcharitar Panday v. Basgit Rai, (1932) 19 A I R Pat 9=133 I C 687=11 Pat 161=12 P L T 656.
26. Anath Nath v. Kalimata, (1938) 25 A I R Cal 865=I L R (1938) 2 Cal 64=42 C W N 504.
27. Radha Sundar Roy v. Saktipada Roy, (1935) 62 Cal 479=39 C W N 250.
28. Lakhomal Deepchand v. Deepchand Tolaram, (1937) 24 A I R Sind 241=171 I C 420=31 S L R 442 (F B).
29. Ram Sekhar Prasad Singh v. Sheonandan Dubey, (1923) 10 A I R Pat 137=68 I C 316=2 Pat 198=4 P L T 71.
30. Sunderbai v. Collector of Belgaum, (1918) 5 A I R P C 135=52 I C 897=43 Bom 376=46 I A 15 (P C).

until 11th June 1910. They presented their appeal to the High Court on 19th July 1910, which if the appeal lay to the High Court was well within the 90 days allowed for an appeal to the High Court. On objection taken on behalf of the defendants, the High Court on 11th March 1912, rightly decided that the appeal lay to the Court of the District Judge of Belgaum and not to the High Court, and affirmed a principle, which had been previously applied by the High Court at Bombay, that—'Where a plaintiff sues for a declaratory decree and asks for consequential relief, and puts his own valuation upon that consequential relief, then for the purposes of court-fee, and also for the purposes of jurisdiction, it is the value that the plaintiff puts upon the plaint that determines both.' The High Court directed that the memorandum of appeal should be returned to the defendants for presentation to the District Judge of Belgaum, and the learned Judges intimated in this judgment that the appeal would be removed into the High Court.

In our opinion that means that the High Court was right in deciding that appeal lay to the Court of the District Judge. The question whether the appeal lay to the Court of the District Judge or to the High Court depended upon what was the true value for purposes of jurisdiction. The true value for purposes of jurisdiction is the value, as we have seen from S. 8, Suits Valuation Act, at which the suit is valued (in a suit of this character) for the purpose of court-fee. The plaintiff had valued it at so much, therefore the jurisdictional limit was that amount and therefore appeal lay to a particular Court. That is the chain of reasoning which their Lordships approved. That, in our opinion, does not decide what is the position if, at the time of presentation, a plaint containing such a valuation is rejected by a Judge on the ground that the valuation is unreasonable. No one disputes that in the first place the plaintiff can value his plaint. No one contests that if he does value his plaint for court-fee purposes that will be the value for jurisdictional purposes. Nor does anyone contest that that value will control the matter if when that plaint is presented it is accepted not only as regards court-fees but also as regards jurisdiction. We therefore are of the opinion that their Lordships of the Privy Council were not considering the position that arises when a plaintiff unreasonably undervalues his plaint and the Court rejects it as improperly valued. Thus we are not relieved by the binding nature of that decision of the duty to come to our own conclusion.

Unfortunately, owing to the conflict of judicial opinion in considering this question, precedent and authority are of very little assistance, for the cases disclose admirable reasons leading to conflicting results. It can hardly be doubted however that it is not desirable to permit a litigant to place fanciful values on his suit and thereby not merely deprive Government of revenue but also get an important action in a Court of limited jurisdiction with the consequential result that the powers of appeal, however important the matter may be, will be strictly limited. On the other hand, undoubtedly, one is here construing a statute which imposes a pecuniary obligation upon a subject and which should therefore be construed strictly, and one is concerned with a type of suit the value of which is uncertain and consequently about which opinions can differ.

In our opinion, it is desirable that where opinions can differ one should delimit the scope of dispute as to value as far as practicable and the purpose of the Court-fees Act would appear to be to give to the plaintiff the right to fix the value, subject, in our opinion, to the right of a Court to prevent an abuse of its processes by declining to accept an unreasonable value. There are possibly many cases in which it would be impossible for anybody to say, however small the value assigned was, that it was unreasonable because although the subject-matter might be substantial the plaintiff's interest therein or the relief that the plaintiff sought in relation thereto might be of a very small value. At the same time there are other cases that arise in which, however the matter is regarded, it is clear that the value of the suit to the plaintiff is substantial. The question we have to consider is whether in such a case it is still open to the plaintiff to put a nominal value, say Re. 1, as the value of the suit. If the plaintiff so values a suit can he say, when the Court, on presentation of the plaint, says it is undervalued : "The Court has no power to consider this question. The law gives me the right to say what the value is. I have said the value is Re. 1 and that concludes the matter."

There can at least be no doubt that the value for court-fee purposes and the value for jurisdiction must be the same, and if the plaintiff values the suit at one figure for the purposes of jurisdiction and at another figure for court-fee purposes in a suit of this type the Court is at liberty to challenge one of those values at any rate :

see 16 N L R 84,[31] 7 N L R 190[6] and 13 Lah 391.[23] Particular stress has been laid on a recent Full Bench decision of the Calcutta High Court, in 61 Cal 796.[9] That case decided that the Court under O. 7, R. 11 (b) has power to require the plaintiff to correct the valuation, but the answer to that question proceeds as follows :

> . . . . But, so long as there are no rules framed under S. 9, Suits Valuation Act (7 of 1887), the Court would have no standard before it, on which it may regard the plaintiff's valuation as an undervaluation, and its powers of correction would have to be exercised on that footing.

Costello J. in agreeing generally, expressed the view that it was never intended to give the plaintiff liberty to assign any arbitrary value he chose to the suit, that it was intended that the Court should be in a position to exercise control but he saw practical difficulties in the way of the Court interfering unless and until appropriate rules were made under the powers conferred by S. 9, Suits Valuation Act. Jack J. agreed with the view expressed by Costello J., and Mallik and Ghose JJ. agreed with the opinion expressed by Mukerjee J. whose judgment in that case is the main judgment. Not unnaturally that case has been cited on behalf of both parties before us. We apprehend that the meaning of that judgment is this : that the Court has the right to challenge the valuation but, it cannot usefully do so in a case where the value is uncertain because in such a case it would not be within the power of anybody, the value being uncertain, to say that the value assigned is too low. In Bengal, there is a local amendment to the Court-fees Act, and the added Section (S. 80) was the one under which the Court acted in 42 C W N 504.[26] It seems difficult to see how that Section adds substantially to the powers conferred on the Court by the Civil Procedure Code. If the Court cannot say, there is an undervalue when exercising the powers given it by O. 7, R. 11, it presumably cannot say there is an undervalue when exercising the powers conferred by S. 80, Court-fees Act. Rules have been made in this province under S. 9, Suits Valuation Act, but they do not touch S. 7 (iv) (c) and therefore do not advance the matter any further. In 50 Mad 646[18] the following general principle was expressed :

> The general principles deducible for valuation for purposes of jurisdiction where no special method of valuation has been provided by statute . . . . .
>
> (1) . . . where the subject-matter of a suit is wholly unrelated to anything which can be readily stated in definite money terms, then the plaintiff, having to put some money value for the purpose of jurisdiction, must put a more or less arbitrary value, and there being no factors in the case from which the Court can say his valuation is wrong, or dishonest, the Court will accept that valuation . . . . . .
>
> (2) . . . where the subject-matter is so related to things which have a real money value that the relief asked for will affect these, then the value of the suit for the purpose of jurisdiction is to be taken as the market value of the property affected, such, for example, as a suit for a declaration of fishery rights . . . .

We are not prepared to adopt the latter as the test for valuing suits of the type under discussion. It is not, in our opinion, the value of the thing affected that settles the value of the relief sought. It is the value of the relief sought which has to be determined. Clearly, if it is impossible to state what that value is, the value must be a notional one settled by somebody's caprice, and the Act, in our opinion, enables the plaintiff to fix it, but it does not, in our opinion, follow that in a case where though the value is uncertain it is manifestly great, the plaintiff is at liberty, not merely to fix what value he likes but to maintain that value when a Court says it is unreasonable. We wish it to be clearly understood that a Court should not endeavour to correct the plaintiff's valuation except in a clear case where the disparity is so great as to show that the plaintiff has not endeavoured to fix a fair value at all but has simply set down a figure which is unreasonable and bears no relation to the value of the right litigated. In our opinion on the true construction of the Act the matter can be expressed as follows :

The amount of fee is computed ad valorem according to the value fixed in the plaint and the plaintiff is required to state that value. That value controls the value for court-fee purposes and controls the jurisdiction. That value (like any other of the values which should appear in a plaint) is not necessarily final. If another of the sub-sections of S. 7, for example sub-s. (iii), be looked at it will be seen that in suits for moveable properties the value is the market value at the date of presenting the plaint. That market value may be stated by the plaintiff as Rs. X. The Court may consider, on objection taken by the other side, that it exceeds Rs. X and can reject the plaint as undervalued.

31. Baldeoprasad v. Ghasiram, (1920) 7 A I R Nag 248=56 I C 360=16 N L R 84.

In a case under S. 7 (iv) (c) though the plaintiff values it at a certain figure the Court can refuse to accept that figure. The difference between the two cases lies in this: that in the first case the Court has something definite to go on, whereas in a suit to obtain a declaration it is difficult to determine what the true value of the relief sought is. Therefore a Court in such a case, even where objection is taken (*see* A I R 1934 Pat 234[22]) should not lightly disturb the plaintiff's valuation and should only do so if it is apparent that that valuation could not have been given by any reasonable man as the valuation of the relief sought. In other words, unless the relief sought can be given some sort of a value and unless that value which any reasonable man would give is altogether disparate from the value that the plaintiff has given the plaintiff's valuation stands. In other words we do not understand S. 7 (iv) (c) to demand a construction which would be appropriate if the relevant part of the Act above quoted ended with the words "and such value shall be binding on the Court." There is nothing in the Court-fees Act which shows that in this type of case the power which the Court is given by the Civil Procedure Code to challenge an undervaluation is taken away. The only difficulty is the practical difficulty of saying what is an undervalue. In many cases, it would be impossible to say what is an undervalue for the relief sought might be of such a nature that no one could say with any definiteness whether the value is great or small. But, although there are such cases, and in such cases the plaintiff's value must be accepted, there are other cases we apprehend (otherwise the question put is meaningless) in which it would be possible to say that the value assigned is unreasonable though it might be impossible to say with precision what the true value is, for a value can be great or a value can be small without one being able to say with certainty exactly how many rupees are involved. In such a case, if the Court thought that the value assigned was unreasonable we see no reason why it could not treat that unreasonable valuation as an undervaluation and exercise its powers under O. 7, R. 11.

But, in our opinion, that is the only power which the Court has, and if it accepts the plaint that is an end of the matter and thereafter all the proceedings must be controlled by the valuation fixed by the plaintiff. This, we understand, is what their Lordships intended to express approval of in 43 Bom 376.[30]

The majority of the decisions in this High Court tend in the direction we have indicated. On the other hand there is the decision of the referring Judge reported in A I R 1937 Nag 14[3] to the effect that:

> Section 7 (iv) (c) leaves it open to the plaintiff to attach his own value to the relief claimed by him and the Courts have no power to revise the plaintiff's valuation, even though it may appear to be capricious.

In that case the case-law was reviewed. On the other hand, the same learned Judge in 1938 N L J 130[24] decided that in a suit under Sec. 7 (iv) (c) the plaintiff cannot be allowed to put an arbitrary value on his claim but that case turns on the fact that the suit was of such a nature that a value could be assigned and therefore the plaintiff could not give an arbitrary value. In I L R (1938) Nag 302,[15] Pollock J. decided that where a plaintiff sues for a declaratory decree and asks for a consequential relief and puts his own valuation upon that consequential relief, it is the value that the plaintiff puts upon the plaint that determines the value both for court-fees and for jurisdiction, provided that the value put by the plaintiff is not arbitrary. Unfortunately, the important restriction on the general power of the plaintiff that he must not put an arbitrary value occurs in a single sentence of the judgment and is not supported by any authority. His general proposition is founded upon Privy Council decision above-mentioned. In 7 N L R 190[6] it was decided that when a suit is brought by a minor for a declaration that a mortgage deed executed in his name by the plaintiff's mother is not binding on the plaintiff and for consequential relief of cancellation and injunction the valuation of the suit for purposes of jurisdiction depends on the amount of the plaintiff's liability under the deed as stated in the plaint and the plaintiff cannot be allowed to assign an arbitrary value for purposes of jurisdiction. We think that it is clear that as above stated, the Court must be able to challenge a valuation for court-fee purposes if that valuation disagrees with the valuations given in the plaint for other purposes. But we do not limit the power of the Court in this way.

We take A I R 1928 Nag 243[21] as an example to show what we think can and

cannot be done. That was a suit by the next heir to an inalienable estate for a declaration which would have the effect of preventing a threatened alienation of the estate for Rs. 40,000. A Division Bench of the Judicial Commissioner's Court held that the court-fee was an ad valorem fee on Rs. 40,000. The plaintiff had valued it at a figure which made the court-fee payable Rs. 10. We think with respect that it was clearly wrong to hold that the value of the relief sought in that case was Rs. 40,000. It was, in our opinion, manifestly very much less. As the learned Judges appear to indicate if the estate was inalienable whether it was or was not alienated would not affect the next heir when he came into the estate. The next heir (the plaintiff) might never come into the estate, he might die before he entered upon his inheritance. The plaintiff was thus, even if successful, getting something that was very much less in value to him than Rs. 40,000. On the other hand, it might be — but we express no view as to that — that he was litigating a matter which had greater value than that on which Rs. 10 court-fee was properly payable. That would be a matter for the Court to consider. If it thought that the reasonable value and the stated value were not greatly disparate, it would not regard the plaint as undervalued even though the proposed alienation was for a large sum of money. In A I R 1924 Nag 316,[32] it was held on the authority of 45 Bom 567,[8] which was treated as following 43 Bom 376[30] which case was regarded as concluding the matter, that the plaintiff has a right to put what value he likes on the relief claimed and the Court is bound to accept that value. As above stated, we are of opinion that the Privy Council did not lay down any such rule. In A I R 1924 Nag 295,[20] a Judge who was a member of the Bench which decided A I R 1924 Nag 316[32] held, following 7 N L R 190,[6] that the valuation cannot be an arbitrary valuation but has to accord with the value of the subject-matter of the suit and in case of dispute is to be determined by the Court. The learned Judge had before him 43 Bom 376[30] and he observed:

> That question itself does not appear to have been before their Lordships, and no specific finding on the correctness of the principle referred to is to be found in the judgment of the case.

With that observation we agree. We answer the question in affirmative. Referred back for disposal accordingly.

D.S./R.K. *Answered in affirmative.*

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32. Krishnarao v. Mt. Chandrabagabhai, (1924) 11 A I R Nag 316=79 I C 668.

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* A. I. R. 1939 Nagpur 57

FULL BENCH

STONE C. J., VIVIAN BOSE AND CLARKE JJ.

Jageshwarprasad Onkar Prasad and others — Plaintiffs — Appellants.

v.

Mulchand and others — Defendants — Respondents.

First Appeal No. 4 of 1935, Decided on 18th October 1938, from decree of Addl. Sub-Judge, First Class, Jubbulpore, D/- 22nd October 1934.

(a) Estoppel — Evidence — Plot of land in another district included in mortgage to enable registration in such district—Mortgagor intending to work fraud not on registration law but upon mortgagee — Mortgagor estopped from contending that transfer of plot was not intended.

If a mortgagor puts in the mortgage bond a plot of land situated in another district in order to work a fraud, not on the registration law but upon the mortgagee, by persuading the mortgagee to accept so small an item to register the mortgage in the district in which the item is found, he is estopped from giving evidence that he did not intend the document to relate to the plot. [P 61 C 1]

*** (b) Registration Act (1908), S. 28—Fraud on registration law—Piece of land not intended to be transferred but included in mortgage to give jurisdiction to Registrar amounts to fraud on registration law — If property so included found not to exist within jurisdiction of Registrar, registration is invalid.**

When a small portion of land is included in a mortgage only with the intention of getting it registered at one place rather than at the other, fraud will not be inferred if as a matter of fact there was a mistake made and the party who seeks to rely on the registration really intended that the mortgage should relate to the item even though there was no item if he honestly thought there was and intended it to be transferred : *A I R 1914 P C 67, Rel. on.* [P 61 C 1, 2]

But once it is established that the motive for the inclusion is to give jurisdiction then that is a fraud on the registration law and no intention to transfer can be inferred. And, if in such a case the portion of land so included to give jurisdiction to the registrar is afterwards found not to be existing within his jurisdiction, then whatever may be the intention of the parties, the Registrar has no jurisdiction to register the document and the registration is therefore invalid : *A I R 1914 P C 67; A I R 1921 P C 8; A I R 1934 P C 157 and AIR 1936 P C 91, Explained and Relied on.* [P 61 C 2 ; P 63 C 2]

(c) Registration Act (1908), Ss. 28 and 29— To see whether document falls under S. 28 or S. 29 it must be regarded as a whole — Mortgage bond falling under Sec. 28, but registered in wrong office cannot be treated as registered bond falling under S. 29.

In considering what class a document falls within, one has to regard it as a whole. The Court cannot reform it by notionally cutting out most of the clauses which the parties let in and then say that thus altered this has ceased to be a mortgage and become a bond. [P 63 C 2]

Where a mortgage bond began and ended as a mortgage, it is compulsorily registrable under Sec. 28. It cannot be treated only as a registered bond and as such optionally registrable under S. 29 simply because it was registered in a wrong office : *A I R 1928 Nag 1, Foll.; A I R 1937 Cal 347, Ref.; A I R 1923 Mad 447, Not foll.* [P 63 C 2]

M. B. Kinkhede and A. R. Kulkarni — *for Appellants.*

J. Sen and M. Adhikari — *for Respondents 1 to 5.*

Judgment. — This appeal raises two points both of which have been the subject of conflict in the various Courts of British India though the first point may now be regarded as settled by the Judicial Committee, the only difficulty being as regards that part of the case, the application of the law to the facts. The two points are as follows : (1) Does the mortgage deed in question in this suit relate to a small piece of land referred to as a *dih* so as to give jurisdiction to the Sub-Registrar of the Seoni District ? (2) If the document is incapable of being proved as a mortgage owing to the registration being in a registry the officer in charge of which had no power to register, can it be sued on as a registered bond so as to make the period of limitation six years ?

As to the first point the Judicial Committee has considered cases of this kind on four occasions at least and the conclusions arrived at are to be found in 41 Cal 972,[1] 48 Cal 509,[2] 56 All 468[3] and 59 Mad 539.[4] In order to see exactly what those cases decide, it is desirable to consider the facts and conclusions somewhat carefully. 41 Cal 972[1] was a case in which the plaintiff's claim was based on a mortgage decree. That decree had been made by the High Court of Calcutta on its Original Side on a mortgage. The Court had no jurisdiction unless a part of the property mortgaged was situate in Calcutta and the mortgage which was registered in Calcutta was not properly registered unless a portion of the property was situate in Calcutta. Thus both mortgage and decree depended upon whether a part of the property mortgaged was situate in Calcutta. The item in question was parcel No. 28 in the schedule and that was described as 25, Guru Das Street. It appeared that in point of fact there was no such place as 25, Guru Das Street, and that being pointed out in the mortgage suit the Court directed an amendment and the description was altered to No. 25, Ashutosh Dey Lane which was in Calcutta and was comprised within the same boundaries as parcel 28 of the schedule to the mortgage deed. In the suit which their Lordships of the Privy Council were considering, i. e. the suit based on the mortgage decree, no evidence was given either by the mortgagor or by the mortgagee to show that there had been any mistake. It was proved on the other hand by the defendants that the property contained within the boundaries of parcel 28 did not and never did belong to the mortgagor. The Courts below like the High Court in the suit on the mortgage found without any evidence that there had been a mistake in the entry and held that part of the property being in Calcutta the deed had been properly registered there and that the decree in the mortgage suit had been rightly made and within jurisdiction.

One difficulty in their Lordships' way was the fact that there was a concurrent finding that there was a mistake and that it was binding on them. That was brushed on one side on the ground that the finding was based on no evidence at all and that the decision that there is no evidence to support a finding is a decision of law. They therefore considered themselves free to decide whether there was a mistake and the conclusion arrived at was that there was no mistake at all, that the entry was a fictitious one, that the mortgagee knew it was fictitious and that it was therefore a fraud on the registration law the fictitious item having been included simply to enable the mortgage to be registered in Calcutta where it could not have been registered had

1. Harendra Lal v. Haridasi Debi, (1914) 1 A I R P C 67 = 23 I C 637=41 Cal 972=41 I A 110 (P C).
2. Biswanath Prasad v. Chandra Narayan, (1921) 8 A I R P C 8=60 I C 833=48 Cal 509 = 48 I A 127 (P C).
3. Collector of Gorakhpur v. Ram Sundar Mal, (1934) 21 A I R P C 157=150 I C 545=56 All 468=61 I A 286 (P C).
4. Venkatarama Rao v. Sobhanadri Appa Rao, (1936) 23 A I R P C 91=161 I C 29=59 Mad 539=63 I A 169 (P C).

it not been for the fictitious entry. Their Lordships made it quite clear that had the mistake been proved, different considerations would have arisen. Their Lordships observe at page 986 as follows :

> It may well be that the above is sufficient to preclude any rectification of the mortgage bond. If the mortgagor intended it to stand, as it appears in the deed, there is no question of mutual mistake.

Again :

> Considering that he (the mortgagee's agent) was acting on behalf of the mortgagee, the fact that he took no steps to ascertain whether the mortgagor had any title in this property points strongly to the knowledge of the mortgagee that the entry was a fictitious one. Coupling this with the fact that neither this witness nor the plaintiff gave any evidence as to there being any mistake or as to their knowledge and belief as to the existence of the property at the date of the mortgage (although these issues were plainly raised in the pleadings of both the defendants), their Lordships decline to accept the suggestion that there was a mistake on the part of the mortgagee any more than that there was a mistake on the part of the mortgagor. The fact that neither the mortgagee nor the mortgagor gave evidence in support of the suggestion of a mistake has great weight with their Lordships. The defendants having proved that the house which purported to be mortgaged did not exist, and that the property contained in the metes and bounds mentioned in parcel 28 was property of strangers in which the mortgagor had not and never had any interest had proved all that was necessary to throw upon the plaintiff the burden of showing that the entry of this parcel was not a fictitious entry. He might have done this by showing mistake or otherwise, but he did not do so.

From that we infer that even though there be an entry of a parcel which does not belong to the mortgagor and even if it, under its misdescription, does not exist, though if correctly described it would exist within the jurisdiction, then if the mortgagee can prove that it was entered under a mistake — even unilateral — he thinking that it did exist as described and did belong to the mortgagor and was being mortgaged, then the entry would not, so far as he was concerned, be a fictitious entry but so far as he was concerned would relate to a property to which the mortgage deed related because he intended the property as correctly described to be mortgaged. But the burden according to 41 Cal 972[1] at p. 987 would be on the mortgagee to prove that the entry was not fictitious :

> He might have done this by showing mistake or otherwise, but he did not do so, but abstained from giving any evidence whatever on the subject.

48 Cal 509[2] is also a mortgage case. The subject-matter was a seven annas share in a village in one district and one kauri share in another district. The kauri share was of small value the allegation being that it was bought for Rs. 50. It is in this case that the question of possession passing first comes into prominence and it comes in the following way : At the time of the mortgage negotiations the mortgagor admittedly did not own this kauri share and he acquired it only in order to have some property, which he could put in the mortgage, in the district which it was desired to register the mortgage instrument in. He accordingly, it was said, had acquired by purchase the kauri share for Rs. 50. The instrument of transfer was not registered. It need not have been registered because the subject-matter was under Rs. 100. But under S. 54, T. P. Act, even in the case of immovable property of less than Rs. 100 in value the transfer is ineffective unless either the instrument of transfer was registered or possession of the subject-matter of the transfer was delivered. In point of fact delivery of possession was not made. Therefore as their Lordships of the Judicial Committee pointed out, there was no effective transfer, and the mortgagor had no title. The inference drawn from this fact was (page 515) :

> There was neither registration nor delivery. Why? Only one reason can be given. There was no intention really to acquire this kauri share in the Kolhua property. All that was wanted was the use of its name for the purposes of registration, and it was for this use that the sum of Rs. 50 was paid.

Their Lordships concluded that neither the mortgagor nor the mortgagee intended the property to pass to the mortgagor (*see* p. 516, and the use of the word 'parties' in the judgment of Cox J. referred to); nor did they intend that the kauri share should be mortgaged. The so-called sale was a mere device. Their Lordships observe at page 516 :

> This case differs *toto cælo* from the case suggested in argument of a mere failure to make a good title to property dealt with by the instrument, and which both parties had intended should form part of the security.

Again at page 517 :

> . . . . . the mortgagor had no interest in it, and the parties to the mortgage never intended that it should form part of the security.

That case differs from this in that here the transfer of the *dih* was by registered deed; possession was therefore a matter of no conveyancing importance, the title would pass to the mortgagor assuming, of course, that the vendor had title. 56 All 468[3] is

concerned with a number of points the discussion of the one at present under consideration commencing at p. 491. Their Lordships observe at page 492 :

The facts raising the question (similar to the question here present) are clear enough. The inferences to be drawn from them are not so clear. The deed purports to transfer as one parcel four villages of the Majhauli estate, and, as a separate item of property, a one-third share in a sitting-room in a garden appertaining to the Majhauli kothi in Mohalla Dandpar, Gorakhpur. As compared with the value of the four villages this property is insignificant, almost derisory.

Having considered the facts and the evidence their Lordships at p. 495 observe :

. . . . . one of two inferences alone is possible : either that it was never intended by either party that the sitting-room should, for any purpose other than that of registration, be subject of sale at all, or that the vendor only included it because he knew that it never could become an effective subject of enjoyment or occupation by the purchasers. The word 'fictitious' used in 41 Cal 972[1] is not confined to non-existing properties. It is satisfied if the deed does not 'relate' to a specified property for any effective purpose of enjoyment or use.

The case there was not one of mortgage but of sale and their Lordships concluded that this was at least as strong a case as 41 Cal 972[1] or 48 Cal 509[2] (p. 495 bottom):

. . . paraphrasing the words used in the latter case, the circumstances here leave in their minds no doubt that the parties never intended that this undivided share of this sitting-room should really be sold. The so-called sale was a mere device to evade the Registration Act.

It should be observed that in that case there was a concurrent finding in the lower Courts. The finding was that this insignificant item of property was never contemplated as really forming a part of the consideration and was entered in the sale deed presumably for the only object of getting the deed registered. Despite that finding however both the Courts had held that the registration was good because the item in fact existed and being the property of the vendor its inclusion in the sale deed was not a fictitious entry so as to bring the case within 41 Cal 972[1] or 48 Cal 509.[2] It was this conclusion which their Lordships reversed.

In 59 Mad 539[3] the facts were that the registration was in a district in which no item of the sale transaction existed excepting a square yard of land. That square yard did exist and did belong to the vendor though the title of the vendor to it was doubtful. It was not proved to what use it was to be put. No use was made of it in fact and their Lordships came to the conclusion from all the circumstances that it was not intended that ownership to it should pass and therefore that the sale deed did not relate to it. At p. 544 their Lordships observe :

Before their Lordships it is asserted on the one side that the deed was a real conveyance of one yard of land in Vundoor (as the High Court held), and that although the motive of its inclusion was no doubt to allow of registration in a place convenient to the vendor, this did not affect the validity of the transaction. It is on the other hand, contended for the appellant that the Vundoor land was a fictitious item which was never intended by either party to the transaction to pass under the deed and (translating this into the language of the Act) that the document did not in reality 'relate' to any land in the Godavari registration area.

The question put in 59 Mad 539[3] is found at p. 546 and is as follows :

Whether, upon the facts established by the evidence, the parties intended this one yard of land to pass under the deed. The motive may be immaterial as the respondent contends, if the requirements of the law have been complied with ; but of this the intention is critical. They are satisfied that in the present case no such intention existed.

Their Lordships there considered as material in arriving at this conclusion as to intention the following points: (1) The document as originally prepared contained no reference to the item ; (2) when it was brought in no value was placed upon it; (3) no part of the consideration was assigned to it ; (4) the purchaser neither lived in Vundoor nor did he own any property in Vundoor, and what possible use he could have had for a single yard of land in that village is unexplained ; (5) it is doubtful if the parcel belonged to the vendor ; (6) it is doubtful whether it is in fact identifiable; (7) the purchaser never made any attempt to take possession of it ; (8) in a subsequent partition no notice was taken of it ; (9) it was shortly afterwards built over by another person with whom the vendor was living. Their Lordships regarded the inevitable conclusion from those facts to be that the vendor did not intend to sell and the purchaser did not intend to buy. Their Lordships in that case had further to consider whether the consideration money should not be returned. They did not examine this point at any length because it appeared on the facts of that case that the consideration money had not got into the hands of the appellants and both Courts below had found against him on that point.

We are not clear how far the Judicial Committee's decisions go. Our impression is that these cases turn very largely on the facts and that all one has to determine is

whether on the facts the proper inference is that the document related to the transaction. If it related to the transaction then of course the registration is good. Whether it related to the transaction or not is a question of intention assuming the property exists within the jurisdiction. The difficulty is to be clear as to whose intention is involved and what facts it is necessary to establish to prove intention. Is it sufficient if the mortgagee alone intended while the mortgagor did not intend? In other words, if the mortgagor put this in order to work a fraud, not on the registration law but upon the mortgagee, by persuading the mortgagee to accept so small an item to register the mortgage in the district in which the item is found and then turned round, as he has done here, and said that the Registering Officer had no jurisdiction because we find in fact the item in question did not belong to him or the item in question was wrongly described or that it was never intended by him to mortgage the item, what is the position? We are of opinion that the mortgagor would be estopped from taking up any such position. This is not estoppel against statute. The estoppel is against giving evidence that he did not intend the document to relate to the plot. If this be so, and placing pleading difficulties on one side, it would suffice if the mortgagee, while fully intending that this item should be included and relying on the mortgagor's representation, included an item which in point of fact did not belong to the mortgagor. In other words the mortgagee's or the transferee's intention is the vital intention and there is no intention to defraud the registration law, but on the contrary an intention to take a transfer of the item, if in point of fact the mortgagee did intend that the item should form part of the security.

We observe that here there is no evidence whatever that there was any fraudulent intention on the part of the mortgagor. It is perfectly clear that all concerned—vendor, purchaser, mortgagor and mortgagee—put this item in wholly and solely with a view to enabling registration to be made at Seoni. But we apprehend from 56 All 468[3] that the motive, the reason for the inclusion, does not matter so long as there was an intention to transfer, and we gather from 41 Cal 972[1] that a fraud will not be inferred if as a matter of fact there was a mistake made and the party who seeks to rely on the registration really intended that the mortgage should relate to the item even though there was no item if he honestly thought there was and intended it to be transferred. It may be however that we are wrong in regarding unilateral error as sufficient and that it would be necessary for both parties to intend the document to relate so that there could be rectification and, if necessary, re-registration of the rectified instrument. But it is clear that either both parties do so intend or one is committing a fraud on the other. Here there is no suggestion of fraud and we can only infer that either both and indeed all put this item in merely as a device to defraud the registration law knowing that it was not intended either to sell it or mortgage it, or they all intended to convey it though their motive was to enable registration to take place in a particular district.

We desire to observe that the motive in such a case is often considerable. In a country like India with its long distances and, in places, paucity of communications, with its months of wet or hot weather when movement about is not easy, with its occasional attacks of epidemic diseases restricting movement, its ceremonies of great social and religious significance, it frequently happens that persons would give a considerable sum of money to be relieved of the onerous burden of travelling hundreds of miles. The journey involved in the present case is not one of any especial difficulty; it would involve a journey by road of some 80 miles and then a train journey of 40 miles. It would involve being away about two days and would cost probably Rs. 40 to Rs. 50, though there is evidence to the effect that it cost much more. But the principle applicable would be the same whether the journey was easy or difficult, short or long, trifling in cost or burdensome if that principle be that once it is established that the motive for the inclusion is to give jurisdiction then that is a fraud on the registration law and no intention to transfer can be inferred. There are many places in the Central Provinces apparently near together which involve great difficulties if one would get from the one to the other. Many roads are impassable, many bridges covered to a depth of 20 feet in the rains. There are thousands of square miles of jungle. Often a reasonable man would willingly give away a small piece of land rather than

undertake an arduous, if not actually dangerous, journey in order to register the transfer. It is true that their registration can be effected by agents suitably authorized. It is not everybody however who has a trustworthy agent available.

We observe that no ill results from registration in one place rather than another. If the deed relates to several items of property in several districts the routine of the Registration Officer's work requires that the particulars will be sent by the Registering Officer to every sub-registry concerned with the result that the transaction will appear in the registers of each sub-registry and, if registration sub-districts A, B, C are involved, it makes no practical difference whether the document is taken to A or B or C by the parties. Whichever be chosen the books of all three will show the transaction. It is clear from counsel's argument in the above cases that this was present to the minds of their Lordships and it can never have been their intention to nullify a transaction because the parties choose a mode which harmed nobody. Their decisions proceeded rather on the basis that in all these cases there was a deliberate intention to work a fraud on the registration law. We are not prepared to infer any such fraud, any more than any other fraud, unless the facts compel us to do so.

The broad facts here can be very shortly stated. *A* is the vendor, *B* the vendee-mortgagor, *C* the mortgagee. *A* and *B* are related, *C* is a stranger. *A* is at Seoni, *B* at Sihora, *C* nearer Sihora than Seoni. The property originally agreed to be sold and mortgaged is at Sihora. *A* says that he cannot come to Sihora but that to enable the transaction to go through he is prepared to add to the subject-matter of the sale a small site in Seoni. That will avoid the necessity of his going to Sihora to register because then the deed can be registered in Seoni. To this the purchaser is agreeable. But the purchaser is not in a position to pay cash and so there is proceeding, side by side with the sale discussions, negotiation for a mortgage. Both the mortgagor and mortgagee would find it more convenient to register at Sihora but the mortgagor explains the difficulty raised by the vendor and how that is being overcome whereupon the mortgagee agrees to come to Seoni if the mortgagor includes in the mortgage the property which the vendor has included in the sale in order to give jurisdiction to the Seoni Sub-Registrar. Obviously in such circumstances something of the kind had to be done or the whole thing would have gone off. Clearly the mortgagee would have to be present at the registration of the sale deed, for it was his money that was buying the property to a very large extent. He could not have thought that the vendor was putting in an imaginary piece of property because that was useless. 41 Cal 972[1] and 48 Cal 509[2] had been reported fourteen and four years respectively before this transaction. It is true the mortgagee says: "I did not know before that Seoni property could not be registered for mortgage at Sihora;" but it is clear from his evidence that everybody understood that in order to register these deeds at Seoni it was necessary to include in them a property at Seoni. The only question is: Did the mortgagee understand and believe that there was this Seoni property and did he intend it to be conveyed? His motive doubtless was to enable the deed to be registered at the same place and time as the sale deed.

The vendor is P. W. 2. He has been treated throughout as a man of position and respectability. His evidence is to the effect that the original arrangement necessitated the registration of the sale deed at Sihora but he, the vendor, said he could not go because he had to attend a marriage party. It was then said that if some land of Seoni was included the sale deed could be registered at Seoni and then a small plot of land at Seoni was included. This land was worth about Rs. 50 or Rs. 60. He was then shown the sale deed which he identified. He then identified the *dih*, the item in question. He says that its boundaries are not known to him and that it belonged to one Dada Ramlal and that he, the witness, got it by inheritance. He says that he has seen it but cannot give evidence about it. It was in a low quarter of the town: "This *dih* was in a mohalla where I did not go and no good man goes." He says that it is situated in Seoni town and is recorded in the Town Nazul; he cannot swear whether the boundaries in the sale deed are correct or not. He also gives evidence to the effect that it is still in his possession, that it came into his possession some 15 or 20 years ago, that there are houses around it and that a patwari has included a part of this *dih*

according to the report of his agent, in his house. The plaintiff's evidence is quite frank. He did not see the *dih*. No valuation of it was made. It was included in order to get the mortgage deed registered at Seoni. He considered the two villages, the subject-matter of the mortgage, along with the *dih*, as sufficient security. There was clearly no talk about the *dih* until after the failure to come to Sihora. He did not ask what its value was. He did not ask whether there was any *dih* in existence. He trusted the vendor P. W. 2's word. P. W. 3 says that this *dih* near the mosque was included. He did not go to see it. He did not inquire on which part of the mosque it was and he does not know near which mosque this *dih* was. He does not know in whose possession it now is. The Nazul Surveyor and the Patwari, D. Ws. 1 and 2, are not helpful. They are persons who must rely to a large extent upon their records. They failed to bring their records. The Patwari's evidence as to the settlement number of Seoni village (khas) which he says is 441 and that there is no abadi (resident side), let alone a mosque, in the village is relevant. If settlement No. 441 is in Seoni village it is reasonably plain that this *dih* which is described as in settlement No. 441 is not in the town of Seoni. It is in the village of Seoni which is a different place and in the village of Seoni if there is no abadi it is highly improbable that there is any mosque, and if there is no mosque then the boundaries of this *dih* as stated in the mortgage deed are imaginary. In order to clear up this matter we sent for the records of Seoni town and village. It appears that settlement No. 441 relates to Seoni village in which there is no site for habitation and no mosque. As a consequence we find great difficulty in differing from the conclusions which the learned trial Judge has arrived at, that there is in fact no such item of property.

It will be noticed that the original security did not include this item, that no portion of the consideration has been allocated to the item, that no value has been assigned to the item, that no possession or use has been taken or made of it, that no inquiry was made into the existence of the item. It is therefore, in our opinion, exceedingly difficult to differentiate this case from 59 Mad 539[4] though we are satisfied (1) that the plaintiff relied on the representations of P. W. 2, a respectable and responsible man who was not the mortgagor but the vendor to the mortgagor, (2) relying on those representations the plaintiff was entitled to believe and did believe that the *dih* existed and was a property of the vendor and was included in the sale deed and would pass under the sale deed and was so included wholly and solely in order that the sale deed might relate to an item of property in Seoni District, (3) that he made no inquiry and assigned no consideration because he was not including this item for any other purpose than to enable registration to be effected in Seoni. As however the item did not exist we are unable to distinguish this from the above cases. Whatever the intention if the property is non-existent it would seem that the Registrar has no jurisdiction.

It has been urged that even if the deed is a nullity as a mortgage owing to non-registration it is good as a registered bond. That depends on which of the conflicting views expressed respectively in 23 N L R 143[5] (*see also* A I R 1937 Cal 347[6]) and 46 Mad 435,[7] is correct. Having considered the provisions of the Act and the case-law thereunder we have no doubt that 23 N L R 143[5] was rightly decided. Sec. 18 deals with the documents compulsorily and Sec. 19 with those optionally, registrable. Sec. 29 only applies to documents "other than a document referred to in S. 28." The document here is clearly one which falls under Sec. 28. It cannot change to another class simply by being registered in the wrong office. It began and ended as a mortgage. As such it is compulsorily registrable document, registrable under S. 28; it cannot be treatad as an optionally registrable document falling within S. 29. In considering what class a document falls within, one has to regard it as a whole. The Court cannot reform it by notionally cutting out most of the clauses which the parties let in and then say: Thus altered this has ceased to be a mortgage and become a bond, has ceased to fall within Sec. 17 and falls within Sec. 18, has ceased to be subject to S. 28 and become subject to S. 29.

There remains the question of equitable relief. Their Lordships in 59 Mad 539[4]

5. Vyankatesh v. Annasa, (1928) 15 A I R Nag 1 =107 I C 517=23 N L R 143.
6. Sailendra Nath v. Keshab Chandra, (1937) 24 A I R Cal 347=171 I C 965=41 C W N 783.
7. Rama Rao v. Vedayya, (1923) 10 A I R Mad 447=73 I C 188=46 Mad 435=44 M L J 373.

indicated that such relief might lie (they did not decide that it would) had it been shown that the respondents had received any part of the consideration. Here the facts are that Ramgopal was the mortgagor, that he borrowed Rs. 6250 (out of Rs. 6700) expressly for the purpose of paying the purchase price of 8 annas share in the villages Kumhi and Hardi. Defendants 1 and 2 are his sons. The other defendants would appear to be members of the joint Hindu family. Some or all of the defendants have thus been directly enriched by the money advanced by the plaintiffs. It is not until it appeared, in the course of this case, that contrary to the representations made by or on behalf of the mortgagor, that there is no such item that the mortgagees could be aware that anything was wrong. There is however a difficulty in the way of following the course indicated as possible in 59 Mad 539.[4] This is not a case of putting a person seeking relief upon terms. It would be necessary here for the plaintiff to found his claim upon some ground that would attract the relief sought. An example of such a ground would be fraud. That is not alleged in this case. Another possible remedy would be rectification based on mistake. Whether or not either of these remedies or any other is available we do not consider it desirable to say. That is a matter for the plaintiff and his advisers. As the case stands at present and without amendment of the pleadings such remedies do not arise. We are however prepared to consider any application for amendment that the plaintiff may, on consideration, think fit to make and for that purpose give liberty to apply to the first Division Bench in this suit within one month.

Subject to any such application, which we are not to be taken as advising, the appeal is dismissed. In the circumstances we are not prepared to award any costs.

N.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Nagpur 64

GRUER J.

Jagannath Tarachand Marwadi — Plaintiff — Applicant.

v.

Surajmal Punamchand Marwadi and another — Defendants — Non-applicants.

Civil Revn. No. 841 of 1937, Decided on 21st September 1938.

(a) Jurisdiction—Small Cause Court—Suit is not one for accounts, merely because some accounts have to be gone into.

The suit is not one for accounts and so not cognizable by a Small Cause Court, merely because some accounting has to be gone into : *A I R 1930 Nag 82, Ref.* [P 65 C 1]

(b) Provincial Small Cause Courts Act (1887), Sch. 2, Art. 41 — Suit by co-sharer against others for contribution in respect of payment made under joint decree falls under Art. 41.

Where a co-sharer sues his other co-sharers for contribution in respect of the payment made by him under a decree passed against all the co-sharers, the suit falls under Art. 41 and is not therefore cognizable by Small Cause Courts : *A I R 1918 All 167; A I R 1915 Cal 278 and A I R 1920 Cal 995, Disting.; A I R 1918 All 9, Not foll.* [P 65 C 1]

(c) Practice—Revision—Incorrect view of law — High Court will interfere only when law is well-known.

It is the practice of the Nagpur High Court to interfere in revision against an incorrect view of the law only when the law is well-known. [P 65 C 2]

V. K. Rajwade — *for Applicant.*

W. B. Pendharkar — *for Non-applicant No. 1.*

Order.—The Judge, Small Cause Court, has held that the suit of the plaintiff-applicant as framed is not maintainable and also that it is not cognizable by a Small Cause Court. The plaint was therefore returned for presentation to the proper Court. The suit as framed is one for contribution. Plaintiff and the two defendants had a decree against three persons, Yeshwant Tukaram, Narayan Tukaram and Pandhri Kashinath, transferred to them jointly, obtained substitution of their names as decree-holders and attached a motor car of the three judgment-debtors in execution. The purchaser of a share in that car, one Sukhdeo, put in an objection and then filed a regular suit which was finally decided in his favour in second appeal and the three decree-holders were ordered to pay all his costs. Plaintiff says that he alone paid costs to the extent of Rs. 209-15-0, and he claims equal contribution from the defendants. Now the view taken by the lower Court upholding the objections of the defendants is that a number of points would have to be decided before the plaintiff could get any decree, for instance, the amount of consideration paid by each party for the transfer deed of the decree and all the realizations and expenditure in the course of execution and in the litigation with Sukhdeo. Plaintiff, it is held, ought to have disclosed what realizations had been made by him before

he could claim contribution, and secondly the transaction of the transfer of the decree is a partnership transaction and the suit is excluded from small cause jurisdiction by Art. 29, sub-cl. (b), Provincial Small Cause Courts Act.

Plaintiff's learned counsel now contends that this decision is wrong in law. Plaintiff is entitled to frame the suit for contribution as he likes. The cause of action stated by him is complete. It is not necessary that previous transactions leading up to the contribution should be gone into. The suit is not one for accounts merely because accounts have to be to some extent gone into: 29 N L R 115.[1] The relationship between the plaintiff and the defendants is not of partnership; they are merely co-owners. On the other hand, the argument for the non-applicants is that the whole transaction is one, and the Court was right in saying that complete accounts have to be taken. At any rate, it will have to be found what share each party holds in the decree and that would raise the question of the amount contributed. Even if the parties are regarded as co-owners, justice could not be done to all parties except by taking an account and so the suit should not be disposed of in the Small Cause Court : 6 Cal 551.[2]

I agree that the plaintiff and the defendants are not properly described as partners, and the suit should not be treated as one for the taking of partnership accounts. I am also not prepared to say that because some accounting might have to be gone into the suit on that ground is not cognizable by the Small Cause Court. However, it appears to me that Art. 41, Sch. 2 would be applicable. It has been held in a number of cases that when one co-sharer sues his other co-sharers for contribution the suit falls under this Article even though the payment was made under a decree. The other view is that in such a case the rights of the co-sharers merge into their rights and liabilities as co-judgment-debtors, and so Art. 41 does not apply. Cases in support of either view will be found at pp. 208, 209 and 211, Mitra's Provincial Small Cause Courts Act, Edn. 7, Art. 41. Mitra seems to prefer the first view. The cases quoted are mostly unreported. There are two reported cases of the Allahabad High Court. 40 All 135[3] is distinguishable on the facts as there the brother who brought the suit was alone liable to make the payment under the terms of the decree and so the suit could not be treated as one for contribution. 41 All 51[4] is no doubt in point but the learned Judges who decided it give no grounds for their opinion. 18 C W N 1308[5] is similarly distinguishable on the facts. Plaintiff there denied his liability to contribute. In 62 I C 504[6] the parties were simply joint tortfeasors, but not co-sharers in the land — one being tenant and the other landlord. I think the present suit as brought is decidedly one for contribution based on the fact that the parties are sharers in the decree. Plaintiff refers to the 2/3 share and says that they are equally responsible for the payment of the amount. Their position as co-judgment-debtors liable for costs cannot therefore be divorced from their position as co-sharers which resulted in this liability.

I should hold that the decision is correct because Art. 41 applies. At any rate, it is the practice of this Court to interfere in revision against an incorrect view of the law only when the law is well known. Here no prejudice can be caused to the parties by a trial of their suit in a regular Court. I therefore dismiss the application with costs. Counsel's fee Rs. 20.

N.S./R.K. *Application dismissed.*

1. Radhakisen v. Motilal, (1933) 20 A I R Nag 82=147 I C 1103=29 N L R 115.
2. Ramtonu Acharjee v. Pearymohun Acharjee, (1881) 6 Cal 551=7 C L R 557.
3. Ant Ram v. Mithan Lal, (1918) 5 A I R All 167=45 I C 560=40 All 135=16 A L J 44.
4. Mahmud Ali v. Tamizunnissa Bibi, (1918) 5 A I R All 9=47 I C 842=41 All 51=16 A L J 787.
5. Satya Bhusan v. Krishna Kali, (1915) 2 A I R Cal 278=24 I C 259=20 C L J 196=18 C W N 1308.
6. Govinda Sunder Singh v. Mohesh Chandra Gope, (1920) 7 A I R Cal 995=62 I C 504.

* A. I. R. 1939 Nagpur 65

NIYOGI J.

Anjuman Mufiddul Islam—Plaintiff— Appellant.

v.

Zal Rustomji Madan and others — Defendants — Respondents.

Second Appeal No. 315 of 1936, Decided on 21st September 1938, from appellate decree of Addl. Dist. Judge, Khamgaon, D/- 4th March 1936.

*** Easement — Landowner granting right of easement over his land — Grant reserving right of revocation — Land subject to easement subsequently sold — Right to revoke easement reserved in the grant passes to purchaser — Right of easement can be enjoyed against the purchaser only to the extent of condition in grant.**

The right of easement cannot be isolated from the land; so far as the dominant tenement is concerned, it is a privilege and as affecting the servient tenement it is an obligation. That privilege or obligation is never personal but is always attached to the land. When a right of easement originates in grant the extent and duration of the rights are determined by the terms of the grant. The assignment may be a grant in perpetuity or for a limited length of time with or without conditions. If any conditions are attached to the enjoyment of the right of easement the right to that extent becomes diminished or restricted. The conditions which clog the enjoyment of the right either in point of extent or duration can no more be dissociated from the land than the right of easement itself. When an owner of land parts with a portion of his right to enjoy his own land by creating an easement in favour of another he does not part with his interest in the property and if he makes any contract entitling him to revoke his grant that contract would be made in his capacity as the owner of the land and not merely in his personal capacity. Any reservation made by him while granting the right of easement is made for the beneficial enjoyment of his land. Consequently, the right which he reserves in his own favour would be a right in the land (not merely in respect of the land) and that right forms part of the totality of his rights which are compendiously known as ownership.

It must therefore follow that when the owner of a servient tenement disposes his right of ownership in the tenement the right reserved by him while granting the right of easement in respect of that tenement would also pass to the purchaser unless of course he had expressly excluded it out of the scope of the conveyance. The right of easement is to be exercised against the purchaser only to the extent and subject to the conditions imposed by the original grant. The dominant owner cannot improve his right by the mere fact that the servient tenement has been transferred and cannot be freed from the conditions imposed by the grant unless he was in some way released from them: *Case law referred.* [P 68 C 1, 2]

V. K. Rajwade — *for Appellant.*

N. V. Gadgil — *for Respondents.*

Judgment. — This is a plaintiff's appeal from the concurring judgment of the Additional District Judge, Khamgaon, in Civil Appeal No. 35-A of 1935 decided on 4th March 1936. One Ahemadali Bohara, father of defendants 4 to 8 who are not parties to this appeal, sold his field No. 101, P. H. 2, area 13 acres 14 gunthas, at mouza Khamgaon, to the appellant by a registered conveyance executed on 12th May 1930. On 26th July 1929, Ahemadali had granted to Rustomji, the father of respondents 1 to 3, a right of passage across the abovementioned field for a consideration of Rs. 400. The registered document, by means of which the right had been granted, contained a clause whereby Ahemadali reserved to himself the right to revoke the grant in the event of his getting a vendee of the entire field within a period of five years. In the sale deed dated 12th May 1930, which Ahemadali executed in the appellant's favour there is no recital expressly assigning to the vendee the right to revoke the grant of the right of passage. The appellant however tendered the amount of Rs. 500 on 22nd April 1934 to the respondents and asked them to release the right of easement which they had acquired under the deed dated 26th July 1929. As they refused to accede to the appellant's demand they filed a suit out of which this appeal arises for specifically enforcing that agreement. They deposited Rs. 500 in Court.

Two issues arose out of the pleadings of the parties: (1) whether Ahemadali sold to the appellant the entire land which he owned at the time when he granted the right of way to Rustomji, and (2) whether the appellant acquired as a result of the conveyance in his favour dated 12th May 1930 the right to revoke the grant of the right of way. On both the issues, the two Courts have found against the appellant. The case has been argued at some length in this Court. The points which arise for determination are, (1) whether the right reserved by Ahemadali in the deed of assignment dated 26th July 1929 made in favour of Rustomji was a purely personal contract or one that was appurtenant to the land, (2) whether it was a right which was capable of being assigned to the appellant, and (3) whether it was in fact assigned. Before examining the authorities, it would be necessary to refer to the terms of the deed of assignment dated 26th July 1929, Ex. P-1 and the sale deed dated 12th May 1930, Ex. P-12. Ex. P-1 recites that the right of way as described there is granted to Rustomji and in para. 3 embodied the following stipulation :

If in five years from this date I get one purchaser of the entire field I will be entitled to take back the above right of way given to you by paying you Rs. 500. After five years you will become the full owner of the entire right in respect of the way from generation to generation as mentioned in para. 2 above.

In Ex. P-12 reference is made in para. 5 to the right of way already granted to Rustomji in these terms :

A way for passing to and fro has been given to Rustomji Yadalji Madan, Parsi, resident of Khamgaon, and the way has been given for taking the carts. So he has a right of way according to the deed executed in his favour in respect thereof.

The question is what was the nature of the right which Ahemadali reserved to himself in respect of the easement that he had granted to Rustomji. It is urged on behalf of the appellant that it was a covenant running with the land and that it was not a mere personal contract. It may be conceded that a right of easement is a right in rem as was pointed out by Lord Watson in (1881) 6 A C 740[1]:

In one sense every easement may be regarded as a right of property in the owner of the dominant tenement, not a full or absolute right but a limited right or interest in the land which belongs to another, whose plenum dominium is diminished to the extent to which his estate is affected by the easement.

That means that the person in whose favour easement is granted is entitled to exercise certain rights on the land belonging to another by virtue of his being the owner or occupier of a certain building or land; but that does not serve to explain the nature of the right reserved by the grantor. Can it be said that the right of revocation which the grantor had reserved was for his own benefit and not for the benefit of the land to which the right of way so granted was appurtenant. On this crucial point the authorities cited in the course of the argument presented in this Court do not lend any direct assistance. All the decisions referred to here relate to cases of re-conveyance which though they do not bear directly on the point serve by analogy to throw light on the principle. In A I R 1927 Cal 41[2] a proprietor of the land created a putni lease and it was provided that if the proprietor required certain of the lands leased out these would be reconveyed or assigned to him by the putnidar so that the lands in the hands of the putnidar were subject to that obligation. The putnidar in his turn leased out the lands with the same condition about reconveyance as in the putni lease. The successor in interest of the proprietor wanted back some of the lands for the purpose of a market and a college and he sued the lessees for a reconveyance of the lands which he required. It was held that the reservation of the right in favour of the proprietor was not a covenant running with the land, as it was a positive covenant and not restrictive of the user of the lands. In that view it followed a decision of the Judicial Committee in 6 Pat L J 163.[3]

In 49 Mad 387[4] the vendee, on the same day on which a sale deed of certain lands was executed in his favour, agreed, by a document, to convey the same to the vendor on the latter wishing to have them on his paying the specified price, in a certain month of the 30th year from the date of the agreement. The vendor having died, his son assigned the rights under the document to a stranger who tendered the full amount to the vendee within the agreed time. On the latter refusing to execute a conveyance, the assignee sued the vendee for specific performance of the agreement; the latter pleaded that his undertaking was not a contract but only a standing offer and was not assignable. It was held that the undertaking by the vendee was an executory contract giving a right to the vendor to get the conveyance from the vendee and was assignable by the vendor. Spencer J., referred to S. 23 (b), Specific Relief Act and held that there was no personal element in that transaction which would make the contract incapable of being specifically enforced under Sec. 21 (b), Specific Relief Act. Ramesam J. adverted to S. 54, T. P. Act and expressed his opinion that even as a right *ex contractu* it was assignable and that it did not create any interest in the land. That case went up to the Privy Council and the decision of the Madras High Court was affirmed on the ground that the option reserved by the vendor was a contract which was assignable and that it was enforceable by the assignee of the vendor against the purchaser.

In A I R 1930 All 101,[5] it was held that a right to repurchase reserved by the vendor was not a right which was appurtenant to the land but was only a personal right and that it was not assignable. In 35 Bom 258[6] the same view was taken. In 42 Bom

1. Dalton v. Angus, (1881) 6 A C 740=50 L J Q B 689=44 L T 844=30 W R 196.
2. Jogesh Chandra Roy v. Asaba Khatun, (1927) 14 A I R Cal 41=98 I C 46=44 C L J 220.
3. Maharaj Bahadur Singh v. Bal Chand, (1922) 9 A I R P C 165=61 I C 702 = 48 I A 376= 6 Pat L J 163 (P C).
4. Munuswami Nayudu v. Sagalaguna Nayudu, (1926) 13 A I R Mad 699 = 100 I C 339=49 Mad 337=51 M L J 229.
5. Gobardhan v. Raghubir Singh, (1930) 17 A I R All 101=124 I C 405=1930 A L J 799.
6. Gurunath Balaji v. Yamanava Nalarao, (1911) 35 Bom 258=10 I C 814=13 Bom L R 240.

344[7] it was held on the construction of the terms of the agreement that the vendor and his descendants alone had the privilege of re-purchasing of the land on the conditions stipulated between the parties and the assignee outside the family could not enforce the contract specifically. In A I R 1934 Bom 171[8] Shingne J., on examination of the previous authorities deduced the conclusion that where a person sells his land or house to another person and the latter enters into a contract to convey the property back to the vendor or his heirs, the right to obtain a reconveyance from the vendee or his heirs is ordinarily assignable even to a stranger who can enforce it by a suit, but that where the intention of the parties is that the vendor or his heirs alone should be given the right of re-purchasing the property, the assignee outside the family cannot enforce the contract specifically. Thus, it appears from the authorities reviewed above that there is no hard and fast rule as to the option of repurchase being invariably a personal right. If it is a completed contract, the contract is assignable unless the terms of the agreement indicate that the agreement was founded on certain personal considerations between the parties.

There appears to me material difference between a case of option to repurchase and a case such as the present. The right of easement is never enjoyed in gross but always as appurtenant to land. When an owner of a land grants in favour of owner or occupier of any land or building a right of way over his own land he parts with a right which is incidental to his ownership of the land. The right of easement cannot be isolated from the land; so far as the dominant tenement is concerned, it is a privilege and as affecting the servient tenement it is an obligation. That privilege or obligation is never personal but always attached to the land. Now when a right of easement originates in grant the extent and duration of the rights are determined by the terms of the grant. The assignment may be a grant in perpetuity or for a limited length of time with or without conditions. If any conditions are attached to the enjoyment of the right of easement the right to that extent becomes diminished or restricted. The conditions which clog the enjoyment of the right either in point of extent or duration can no more be dissociated from the land than the right of easement itself. That being the nature of the right of easement it must differ from the nature of the rights and interests which are conveyed by a sale. When a man sells his land outright he ceases to have any interest in the land and when he sells with the reservation of the option of repurchase he reserves to himself by virtue of a contract with the purchaser a personal right which being of a contractual nature is assignable. When however an owner of land parts with a portion of his right to enjoy his own land by creating an easement in favour of another he does not part with his interest in the property and if he makes any contract entitling him to revoke his grant that contract would be made in his capacity as the owner of the land and not merely in his personal capacity. Any reservation made by him while granting the right of easement is made for the beneficial enjoyment of his land. Consequently the right which he reserves in his own favour would be a right in the land (not merely in respect of the land) and that right forms part of the totality of his rights which are compendiously known as ownership.

It must therefore follow that when the owner of a servient tenement disposes of his right of ownership in that tenement the right reserved by him while granting the right of easement in respect of that tenement would also pass to the purchaser unless of course he had expressly excluded it out of the scope of the conveyance. In para. 5 of the sale deed dated 15th May 1930 the vendor Ahemadali merely indicates that a right of way had been granted by him by a deed but does not expressly say that the right was unconditional. The fact that he refers to the right as a right of way according to the deed would indicate that it was such right as was clogged with the conditions specified in the deed. The right of way was to be exercised against the purchaser and it could only be exercised to the extent and subject to the conditions imposed by the original grant. The dominant owner could not improve his right by the mere fact that the servient tenement had been transferred and cannot be freed from the conditions imposed by the grant unless he was in some way released from them. It therefore

7. Vithoba Madhav v. Madhav Damodar, (1918) 5 A I R Bom 158=46 I C 734=42 Bom 344=20 Bom L R 654.

8. Harkisandas v. Bai Dhanee, (1934) 21 A I R Bom 171=151 I C 536=36 Bom L R 290.

appears to me that the right reserved by Ahemadali to revoke the grant within five years was of the nature of a covenant running with the land and that it must be deemed to have been assigned to the purchaser along with the right of ownership.

The right of revocation which Ahemadali reserved to himself when he granted the easement was one capable of assignment. It is urged that he did not assign it to the appellant in the conveyance executed in his favour for the reason that he excluded the piece of land over which he had granted the right of way from the land conveyed. This contention is no doubt countenanced by the words used in the sale deed dated 12th May 1930, viz. "After excluding the sites as mentioned in paras. 1 to 6, the remaining site has been sold to you", but they have to be read in conjunction with the recital which follows: "The entire site within the said boundaries has been sold to you along with stones, etc." The land in dispute falls within these boundaries and as the vendor had no use left for this strip of land after he transferred the entire land, it cannot reasonably be assumed that he intended to reserve his ownership of it. On the other hand, the reference to the right of easement which he had granted already in para. 5 of the sale deed as a "right of way according to the deed" indicates that the vendor gave notice to his vendees of the restricted nature of the easement. It is true that the vendor did not expressly assign the right of revocation. But as I have held that the right was attached to the land, it must be deemed to have passed to the vendees. The lower Appellate Court's decree is set aside and the appellant's suit is decreed in terms of para. 10 of the plaint providing a month's time, with costs. Pleader's fees Rs. 30.

N.S./R.K. *Appeal allowed.*

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STONE C. J.

Nathuram — Appellant.

v.

Kalu and others — Respondents.

Second Appeal No. 119 of 1934, Decided on 18th August 1936, from appellate decree of District Judge, Nimar, D/- 2nd January 1934.

Easements Act (1882), S. 15—Law presumes that user is as of right if it is proved that user was open and notorious.

A plaintiff has to establish user for the statutory period. He has to establish that the user is as of right, but the law presumes that it is as of right, that is to say that it has a lawful origin, if the plaintiff proves open and notorious user. That presumption however is rebuttable and the defendant may show, if he can, that the facts are such that the user was not as of right, e. g. he can show that the user was under license not amounting to a grant, or he can show fraud in the sense it is used in relation to this subject or he can show force, or he can show secrecy. These latter would go to destroy the effectiveness of the user; the former would go to show that it was not as of right: *Case law relied on.* [P 71 C 1]

S. B. Gokhale — *for Appellant.*

R. Kaushalendra Rao—*for Respondents.*

Judgment. — Counsel for the appellant has in my opinion said everything that could possibly have been said in support of this appeal which nevertheless fails. It is urged that according to the Easements Act it is not sufficient to show user to establish a right of easement, but it is necessary to show, in the words of Sec. 15, that a right of way or other easement has been peaceably and openly enjoyed by the person claiming title thereto as an easement and "as of right" without interruption and for 20 years. It is said that that is stressed in para. 2 of the plaint and that it is necessary for a person alleging user "as of right" to lay the foundation of fact by alleging the facts on which the legal conclusion is to be based that it was as of right. That has not been done in this case and the learned Appellate Judge has made no findings as to it. It is quite true (and I wish it were better appreciated in these Provinces) that the purpose of a pleading is to allege facts. It is also true that it is not necessary to allege law. It is true again that if the allegations of fact made by one side are embarrassing as being too vague, it is the duty of the other side to ask for further particulars and if the other side goes into Court without knowing what case is going to be made against him, that is his mistake. But here, in my opinion, if there be a defective pleading at all, it is one that had no substance in the course of the trial. The material issue raised was:

> Whether the plaintiffs have acquired the right of easement to flow their nistar and rain water through the drain at X as shown in the map over the defendant's land as shown in the map.

I understand "nistar" in this connexion to mean that water which, if it remained,

would be contrary to good management. On that issue the contest raged as to along what channel the water which went from the plaintiff's land flowed : Did it go along the line the defendant said ? Did it go along the line the plaintiffs said ? Both Judges have concurred in taking the view that it went along the line the plaintiffs said. That question of fact once having been established, nobody seems to have imagined that there could be any other conclusion but that the answer to Issue 1 was in the affirmative. Now however I am pressed with 56 Cal 927[1] at p. 930 where a Bench of the Calcutta High Court observe :

The contention of Mr. Mukherji that the finding of the lower Appellate Court, that there had been user for a very long time, was sufficient for an easement by prescription is untenable on another ground. For the creation of a right of easement by prescription, there must not only be a peaceable and open enjoyment without interruption for 20 years, but that enjoyment must be an enjoyment as of right. In the present case, there is no finding that the enjoyment was of that character. It was contended on behalf of the Pal defendants that long user was sufficient for a finding of an enjoyment as of right. This is a proposition of law to which I am unable to accede. Whether an enjoyment is as of right or not is, in my opinion, a pure question of fact, and enjoyment as of right cannot be inferred as a matter of course from a finding of user only.

It is pointed out however that the proposition abovementioned was obiter as in that case there was no peaceful enjoyment for 20 years. The question as to what precise meaning is to be given to the words "as of right" has agitated the Courts both in England and in India. Perhaps the fullest consideration of these words is to be found in the judgment in 43 R R 358[2] at p. 362 where Lord Denman examined the various possible alternatives. He has been considering the various possibilities and rejecting a variety. His conclusion is as follows :

It seems therefore that the 'enjoyment as of right' must mean an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time, on each occasion or even on many occasions of using it ; but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use it without danger of being treated as a trespasser, as a matter of right, whether strictly legal by prescription and adverse user or by deed conferring the right, or though not strictly legal, yet lawful to the extent of excusing a trespass, as by a consent or agreement in writing not under seal, in case of a plea for forty years, or by such writing or parol consent or agreement, contract or license, in case of a plea for twenty years.

In (1880) 12 Ch D 261[3] at p. 265 Fry J. (as he then was) observes :

Where there has been a long enjoyment of property in a particular manner it is the habit, and, in my view, the duty of the Court, so far as it lawfully can, to clothe the fact with right.

In 23 W R 52[4] Markby J. considers the difference between the English and the Indian Acts. He observes :

The Moonsif seems to think that the words 'as of right' in S. 27 of that Act, mean user without trespass. I think those words do not mean that, and that they mean user in the assertion of a right. There is ground, no doubt, for the Moonsif's opinion in the view that has been taken of the same words under the English Prescription Act, but after much consideration I think that the words in the Indian Act mean what I have above stated. If the observations of Lord Wensleydale in the judgment in (1834) 1 Cr M & R 211[5] at p. 219 be compared with the observations of the same learned Judge in (1840) 11 A & E 688[6] at page 693 it will be seen what were the difficulties which arose upon that interpretation of those words in English Act. I think we ought to do our utmost to prevent the introduction of those difficulties here. And giving to the words "as of right" what I consider to be their true meaning, and also their accustomed meaning (for they are a well known legal expression) I think they signify no more than (as I have said) that the enjoyment must be by a person in the assertion of a right.

In 38 Mad 1[7] at page 3 it is observed :

The enjoyment is required to possess two properties, viz. that it must be as of right without interruption and it must be as an easement. The first quality is intended to show that enjoyment by license or under a contract which would not amount to a grant of an easement, would be ineffectual to create a right by prescription.

In 45 Mad 633[8] it was held that there is a presumption that the user was of right where long user is proved. The same view was taken in A I R 1926 Lah 522[9] where it was decided that

an open user continued without interruption for a long time and not shown to be attributable to any

1. Siti Kanta Pal v. Radha Govinda Sen, (1929) 16 A I R Cal 542=119 I C 293=56 Cal 927=33 C W N 517.
2. Tickle v. Brown, (1836) 4 A & E 369 = 6 N & M 230=1 H & W 769=5 L J (N S) K B 119=43 R R 358.
3. Moody v. Steggles, (1880) 12 Ch D 261 = 48 L J Ch 639=41 L T 25.
4. Alimooddeen v. Wazeer Ali, (1875) 23 W R 52.
5. Bright v. Walker, (1834) 1 Cr M & R 211=4 Tyr 502=3 L J (N S) Ex 250=40 R R 536.
6. Flight v. Thomas, (1840) 11 A & E 688=3 P & D 442=52 R R 468.
7. Konda v. Ramaswami, (1916) 3 A I R Mad 718=17 I C 112=38 Mad 1.
8. Kunjammal v. Rathnam Pillai, (1922) 9 A I R Mad 5=66 I C 11=45 Mad 633=42 M L J 417.
9. Piare Lal v. Ishaq Lal, (1926) 13 A I R Lah 522=95 I C 269.

permission on the owner's part is prima facie evidence of enjoyment as of right,

and the presumption is that the user is as of right. So also in A I R 1926 Pat 460[10] it was held that the plaintiff claiming a right of way must prove enjoyment for the statutory period, and that he has done so as of right. The view expressed by Banerji J. in 8 C W N 359[11] which is not dissimilar to that expressed in 56 Cal 927[1] was not followed for although the learned Judges agreed with the citation they made, they observed that

that learned and distinguished Judge proceeded to say that although no case of permissive user may be set up by the defendant, still it is for the plaintiff to establish that the user has been of right. The question is really one of fact and in my opinion it is not possible, to the extent to which Banerji J. did go in that case. The rule is well established in England that a party enjoying an easement acted under a claim of right until the contrary is shown : *see* Gale on Easements, Edn. 10, p. 227. Now the rule under what circumstances an easement can be acquired is the same in England as here. In order to establish a right of way in England it must be proved that the claimant has enjoyed it for the full period of 20 years and that he has done so as of right; but if it should be the case of the defendant that the enjoyment was by violence or by stealth or by leave asked from time to time, it is for the defendant to allege that case and establish that case. In A I R 1934 Pat 11[12] it was held that where there is evidence of long enjoyment in a particular way, it is the habit and duty of the Court, so far as it lawfully can, to clothe the fact with right.

That directly follows the above citation from the judgment of Fry J. in the well-known case in (1880) 12 Ch D 261.[3] Bearing in mind the above cases, it appears to me that the following represents the law in India. A plaintiff has to establish user for the statutory period. He has to establish that the user is as of right, but the law presumes that it is as of right, that is to say that it has a lawful origin, if the plaintiff proves open and notorious user. That presumption however is rebuttable and the defendant may show, if he can, that the facts are such that the user was not as of right, e. g. he can show that the user was under license not amounting to a grant, or he can show fraud in the sense it is used in relation to this subject, or he can show force, or he can show secrecy. These latter would go to destroy the effectiveness of the user; the former would go to show that it was not as of right. In the old case in (1803) 3 East 294[13] it was held that where there was no evidence to show that the way over another's land had been used by permission such user over 20 years exercised adversely and under a claim of right was sufficient to enable the jury to raise the presumption of a grant. In 4 M L W 128,[14] Sir John Wallis, the then Chief Justice of the Madras High Court, observed in a passage quoted in 45 Mad 633[8] :

On the other hand the user of the plaintiffs may be presumed to be as of right and to have a lawful origin, and if a lawful origin of the plaintiff's right can be suggested such an origin can be presumed.

In my opinion, therefore, on the facts here found it follows that as a matter of law the presumption applies that there was not merely a user for the requisite period, but a user as of right. I arrive at that conclusion while respectfully agreeing with the remarks of Markby J. in 23 W R 52[4] whose conclusion as to the meaning of the term "as of right" I prefer to that part in 43 R R 358[2] which appears to suggest that for the person to be using as of right, he must be using in some capacity that removes him from the danger of being treated as a trespasser. I find it difficult to see how during the period before the statutory period has expired any person using a way over another's land or exercising an easement over another's land without any grant could be free from the danger of being treated as a trespasser. The attitude of the law, as I apprehend it, is to raise after a certain period, that is to say the period prescribed in the Limitation Act, an irrebuttable presumption that the person exercising the easement for that period has been granted a right. But, until that period has come to an end, there is no such presumption, and in the great majority of cases it would be open to the owner of the servient tenement, in the absence of the statutory presumption, to show that there was no such grant and to show in effect that the acts of the person claiming a dominance amounted to a trespass. The appeal accordingly fails and is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

10. Nazir Husain v. Aulad Haider, (1926) 13 A I R Pat 460=96 I C 1010.
11. Shaikh Khoda Buksha v. Shaikh Tajuddin, (1904) 8 C W N 359.
12. Radha Kishun v. Sunder Mal, (1934) 21 A I R Pat 11=148 I C 215.
13. Campbell v. Wilson, (1803) 3 East 294=7 R R 462.
14. Saminatha Mudaly v. Velu Mudaly, (1917) 4 A I R Mad 386=35 I C 749=4 M L W 128.

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STONE C. J. AND CLARKE J.

Maroti Laxman Koshti and others—Defendants—Appellants.

v.

Jagannathdas Lachhmandas Gadewal and another — Plaintiffs — Respondents.

Letters Patent Appeal No. 5 of 1936, Decided on 19th September 1938, from Judgment of Vivian Bose J. in S. A. No. 264 of 1934, Decided on 10th July 1936.

Evidence Act (1872), S. 43—Right of party concluded by previous judgment can be proved by production of the judgment.

A judgment is not admissible to prove the truth of the fact which it states, much less is any fact, stated as part of the reasoning in arriving at the fact in issue, evidence of the truth of that fact. Where, however, the right of a party has already been concluded by a previous judgment, the fact can be proved by production of the judgment since in such circumstances the existence of the judgment itself is relevant : *Case law discussed.*

[P 74 C 2]

A. R. Kulkarni — *for Appellants.*

R. N. Padhye — *for Respondents.*

Judgment.—This is a Letters Patent appeal from the judgment of Bose J. dated 10th July 1936 in Second Appeal No. 264 of 1934 in which he upheld the lower Appellate Court's judgment which itself upheld the trial Court's judgment giving the plaintiffs a decree for possession of a piece of land. The plaintiffs claim title to this land under a sale deed dated 22nd May 1931 from one Premdas. The defendants deny the plaintiffs' title and claim title themselves by adverse possession. Admittedly the defendants are in possession of the land since 15th November 1933 if not earlier and therefore the onus was on the plaintiffs to prove their title. They admitted that the land originally belonged to the defendants' family, but they alleged that the defendants lost the land in 1901 when it was sold by court auction in Civil Suit No. 1210 of 1900 to Maroti Ramchandra who held a decree against defendant 1 and his brother Suknia. Defendant 1 is the father of the other defendants before us. This link in the plaintiffs' title is now concluded by concurrent findings of the Courts below. It is the next link which forms the crux of this appeal as also of the appeal before Bose J. The plaintiffs say that Maroti Ramchandra and one Sitaram formed a joint Hindu family and that there was a partition in the family as a result of which this piece of land was allotted to the share of Sitaram. Subsequent links in the chain from Sitaram to the plaintiffs are not now in dispute. The difficulty in connexion with Sitaram's title is because the evidence of it consists of two judgments in a case to which the defendants-appellants were not parties. These judgments originated as follows. Two persons, Baktawarchand and Jagannathdas, had obtained decrees against this same Sitaram and attached this piece of land. Sitaram's brothers and father unsuccessfully objected to the attachment and therefore they brought Civil Suit No. 135 of 1928 against Baktawarchand, Jagannathdas and Sitaram for a declaration of their title to the land. Ex. P-7 is the judgment in the lower Court in the suit and Ex. P-8 is the judgment of the Appellate Court. Both Courts dismissed the plaintiffs' suit holding that Sitaram held possession by virtue of a partition. If these judgments can be used as evidence of the exclusive title of Sitaram to the property, then the appeal must fail. In the trial Court the admissibility of these judgments as evidence of a partition appears to have been taken as a matter of course. It was only in the lower Appellate Court for the first time that this point of law was taken and decided against the defendants. It has now become the important point of law which has been held to justify permission being granted to file a Letters Patent appeal. The law relating to the admissibility of judgments in evidence is to be found in Ss. 40 to 43, Evidence Act ; of these Sections only S. 43 is to the point:

43. Judgments, orders or decrees, other than those mentioned in Ss. 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provision of this Act.

The respondents claim that the other provision of the Act which makes these judgments relevant under S. 43 is S. 13 of the same Act :

13. Where the question is as to the existence of any right or custom, the following facts are relevant :

(a) any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence ;

(b) particular instances in which the right or custom was claimed, recognized or exercised, or in which its exercise was disputed, asserted or departed from.

The appellants rely on 6 Cal 171,[1] 16 Pat 258,[2] 58 Cal 1187[3] and 26 N L R 33.[4] 6 Cal 171,[1] if it were still good law, would appear to support the appellants' contention. It was followed by another Full Bench of the Calcutta High Court in 13 Cal 352.[5] That view has however been modified by 22 Cal 533.[6] The Privy Council decision shows that in certain circumstances a previous judgment may be admissible. That the view held in 6 Cal 171[1] and 13 Cal 352[5] has been modified by the Privy Council decision is admitted by a later Full Bench decision of the Calcutta High Court itself in 25 Cal 522.[7] Of the cases cited by the appellants the most difficult for us to get over, if we are to support the judgment of Bose J., is 26 N L R 33,[4] a Full Bench ruling of the Judicial Commissioner's Court, because of the wide terms in which the reference was made and answered. The question referred therein was:

> A judgment was not in rem, nor relating to matters of public nature, nor between the parties to a subsequent suit. Is the fact that the Court by that judgment decided a point in a particular way relevant for the purpose of the decision of the same point in a subsequent suit ?

and the unanimous decision of the Bench was that the question should be answered in the negative. If that decision is taken at its face value, it would necessitate our deciding the point now before us in the appellants' favour. It seems to us however that the question was referred in terms which were wider than was necessary for the decision of the question then before the Court. Pro tanto the decision is obiter. From the reasoning of Macnair O. J. C. given at p. 36 it seems clear that all that the Judges intended to decide therein was that the previous judgment was not evidence of the truth of the facts which it decided. This passage was as follows:

> Again it is surely a fundamental principle of law that the opinion of any person however eminent regarding the validity of a claim is irrelevant for the purpose of a decision whether or not that claim is valid. A judgment is a judicial opinion rendered on the claims of the parties. The fact that the case has been heard and finally decided may render the question res judicata in a subsequent suit : but if it does not, surely this fundamental principle must apply.

In 24 Bom 591[8] it is laid down that judgments are admissible in evidence to show the conduct of the parties or particular instances of the exercise of a right or admissions made by ancestors or to show how the property was dealt with previously. The case before us falls into the last mentioned category. In 12 All 1[9] Straight J. pointed out at p. 25 that although S. 43, Evidence Act, declared judgments, orders and decrees other than those mentioned in Ss. 40, 41 and 42 irrelevant, qua judgments, orders and decrees, it did not make them absolutely inadmissible when they were the best evidence of something that might be proved aliunde. That case went up to the Privy Council in 15 All 261[10] and their Lordships did not say anything to suggest that the opinion of the Full Bench as to the admissibility of previous judgments in the circumstances of that case was wrong. Here the fact that there had been a partition could probably have been proved aliunde, but the respondents preferred to put in the judgments as the best evidence and we think that they were right. In 15 Mad 12[11] in a suit to establish the plaintiff's title to certain land, he put in evidence (1) a conveyance in favour of his father, (2) a sale certificate issued to his father's vendor, (3) an order made in certain execution proceedings in which was recited a petition by his father asserting his title, (4) a judgment obtained by his father in which his title was recognized. Neither the defendants nor their predecessors were parties to any of these instruments or proceedings: it was held that all these documents were relevant.

The other two cases cited by the appellants were the Privy Council cases in

1. Gujju Lall v. Fatteh Lall, (1881) 6 Cal 171=6 C L R 439.
2. Kesho Prasad Singh v. Mt. Bhagjogna Kuer, (1937) 24 A I R P C 69=167 I C 329=16 Pat 258=31 S L R 242 (P C).
3. Gobindanarayan Singh v. Shyamlal Singh, (1931) 18 A I R P C 89=131 I C 753=58 Cal 1187=58 I A 125 (P C).
4. Shankar v. Kesheo, (1930) 17 A I R Nag 1 = 121 I C 644=26 N L R 33 (F B).
5. Surender Nath Pal v. Brojo Nath Pal, (1886) 13 Cal 352 (F B).
6. Ram Ranjan Chakerbati v. Ram Narain Singh, (1895) 22 Cal 533=22 I A 60 = 6 Sar 530 (P C).
7. Pepu Khan v. Rajani Mohun Das, (1898) 25 Cal 522=2 C W N 501.
8. Lakshman v. Amrit, (1900) 24 Bom 591=2 Bom L R 386.
9. Collector of Gorakhpur v. Palakhdhari Singh, (1890) 12 All 1 (F B).
10. Palakdhari Singh v. Collector of Gorakhpur, (1883) 15 All 261=6 Sar 378 (P C).
11. Venkatasami v. Venkatreddi, (1892) 15 Mad 12.

16 Pat 258[2] and 58 Cal 1187.[3] 16 Pat 258[2] was a case in which the question was as to whether certain land formed part of Naubarar or Gangbarar. The owner of Naubarar had previously brought a suit against a large number of cosharers of Gangabarar claiming a tract of land as belonging to Naubarar. His opponents in the later suit were not parties to the earlier suit. A map was drawn in the earlier suit showing the boundaries between Naubarar and Gangbarar and the decree was based on that map. In the subsequent suit the trial Court, relying on the map and decree in the previous suit, held that the land was in Naubarar. The Second Appellate Court however held that the owner of Naubarar had not proved his title. Before the Privy Council it was argued for the owner of Naubarar that the decree in the previous suit and the map though not binding on his opponents were evidence against them under Ss. 11 and 13, Evidence Act. Their Lordships said that it was an accepted principle of English law that a judgment (or decree) is not admissible in evidence against a stranger to a suit of the truth of the matter decided but that there were exceptions and that the same rule applied in India. They held that the previous judgment in the case before them together with the plaint were evidence of an assertion of a title by the owner of Naubarar and thus were admissible in evidence of the right. But the fact that a person not now in possession had previously claimed title was not serious evidence of his right especially since there was no lack of assertion on the other side also. That case therefore does not carry us any further.

In 58 Cal 1187[3] the question for decision was as to the coal-mining rights of the village named Dendua which formed part of the Achra estate which was itself part of the Pandra zamindari. The plaintiffs were the zamindars and the defendants the Thakurs of the Achra estate. As subsoil rights are assumed to be with the zamindar, any other claimant must prove the express inclusion of such rights in a grant from the zamindar to him. If nothing were proved except that the Achra estate formed part of the Pandra zamindari and had been held by a branch of the Pandra family subject to the annual payment to the zamindar, it would have to be held that the subsoil rights were with the zamindar. How the Achra estate originated was not known. The Thakurs said that they had come into it through a partition in the zamindari family. If that partition were proved, it would have to be held that the subsoil rights passed in the partition. The only way in which the Thakurs tried to prove the partition was by proceedings in a suit filed in 1793, to which the Thakurs were not parties, when the zamindar's nephews had claimed partition successfully, half of the zamindari going to each branch represented by the appellants before their Lordships. In order to prove that the estate was partible in the previous suit the Achra estate was mentioned as an instance where partition had taken place and the Court, as part of its reasoning for holding the estate to be partible, said that the Achra estate had come to the Thakurs by partition. That judgment was sought to be used as evidence of the partition of the Achra estate. Their Lordships said that this could not be done and that a judgment was only admissible under Ss. 13 and 43 to prove the particular transaction in which the partibility of the Pandra estate was asserted and recognized, namely the partition in the 1793 suit. This pronouncement supports the contention of the respondents in the case before us. As their Lordships stated in that case, the reasons upon which a judgment is founded are no part of the transaction and it was therefore no evidence that the Thakurs got Achra by partition. It is at most evidence that they might have done so which is not enough.

Accordingly, the conclusion to be reached from the case law on the subject would seem to be that a judgment is certainly not admissible to prove the truth of the fact which it states, much less is any fact, stated as part of the reasoning in arriving at the fact in issue, evidence of the truth of that fact. Where however as here, the right of a party has already been concluded by a previous judgment, that fact can be proved by production of the judgment since in these circumstances the existence of the judgment itself is relevant. In the present case if Sitaram's father and brothers were to allege in a suit that they still had a share in the property the judgments (Exs. P-7 and P-8) would be relevant against them. If they cannot now set up a title for themselves, it should be clear that third persons like the appellants cannot set up a case for them. We therefore hold that

in the circumstances of this case the judgments in question are admissible in evidence, and, that being so, the appeal was rightly decided by Bose J.

In the event of our finding, as we have done, that the judgments in question are admissible we have been invited to remand the case to the lower Court for consideration of the judgments alongside of the oral evidence on the subject of the partition. In the circumstances of this case we see no necessity for taking up further time in remanding the case. The oral evidence consists of one witness for the plaintiffs and three for the defendants. The plaintiffs' witness is Tukaram, the brother of Sitaram, on whom the appellants particularly rely. It is true that he, like the defendants' witnesses, Madhorao (D. W. 1), Soma (D. W. 2) and Govinda (D. W. 3), have said that there was no partition. Tukaram was himself one of the contesting parties in the litigation, of which Exs. P-7 and P-8 are the judgments, and in that case he took up the position that there had been no partition. It is only natural that in this Court in the present case he would say the same thing. He is therefore highly interested in denying the partition and very little value can be given to his testimony. As regards the three defence witnesses, their testimony also will not carry much weight in the face of the judgments themselves, Exs. P-7 and P-8. We think therefore that it would be waste of time to remand the case for consideration of the oral evidence. Another argument was addressed before us, although somewhat half-heartedly, that another link in the plaintiffs' title should be held unsound, namely the alleged oral sale by Pandu in favour of Maroti Ramchandra. It is argued that the value of the property being over Rs. 100 no transfer can orally be made, a registered document being necessary to effect it. This argument has no force in view of the finding that there was no oral sale but that Pandu purchased benami for Maroti Ramchandra. The appeal accordingly fails and is dismissed with costs.

N.S./R.K. *Appeal dismissed.*

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STONE C. J. AND VIVIAN BOSE J.

Mahadeo Nilkanth Patil — Defendant — Appellant.

v.

Janardan Harbaji and another — Plaintiffs — Respondents.

Second Appeal No. 403 of 1935, Decided on 7th April 1938, from appellate decree of First Addl. Dist. Judge, Nagpur, D/- 23rd April 1935.

C. P. Land Revenue Act (2 of 1917), S. 192 — Suit for village profits — Lambardar or mukaddam can claim remuneration for services even for period preceding its fixation under S. 192.

In a suit for village profits, a lambardar or mukaddam is entitled to claim, whether as a plaintiff or as a defendant, remuneration for his services for such years prior to the year in which his remuneration has been fixed by the Deputy Commissioner under the provisions of S. 192, Land Revenue Act, as are within the period of limitation : *A I R 1937 Nag 411, Approved ; Case law discussed.* [P 78 C 2]

V. V. Kelkar and B. R. Mandlekar — *for Appellant.*

M. D. Khandekar — *for Respondents.*

ORDER OF REFERENCE

Grille J. — This second appeal by the defendant arises out of a suit for the share of village profits filed by the plaintiffs, two brothers, who are eight annas share-holders, against the lambardar, the remaining eight annas share-holder. The lambardar presented a statement of accounts, and several items were disputed. There was an appeal and a cross-objection in the lower Appellate Court, and there is an appeal and cross-objection here. The appeal and the cross-objection cover all the items in dispute, but in the cross-objection the only point that was pressed, and that half-heartedly, is the contention that the lambardar was not entitled to deduct Rs. 18 per annum on account of rent unrecovered on a share of *sir* land which had since become occupancy land of exproprietary tenant. This was but faintly pressed. The only point actually taken in the appeal was that the concurrent finding of both Courts below that the lambardar was not entitled to charge for lambardar and mukaddam dues is incorrect.

The remunerations of the lambardar and the mukaddam in this village were fixed by the Deputy Commissioner in the year

1934. The suit was for profits of years previous to this, and following the Divisional Bench decision of the Judicial Commissioner's Court in 22 N L R 37,[1] both the lower Courts have come to the conclusion that the defendant is not entitled to charge these sums, which have been determined by the Deputy Commissioner, in respect of the years previous to the year in which they were fixed. In second appeal Mr. Mandlekar has drawn my attention to a recent decision of Niyogi J. in A I R 1937 Nag 411[2] in which it is laid down that a mukaddam is entitled to recover his remuneration for a period prior to the order of the Deputy Commissioner fixing his remuneration under S. 192, Land Revenue Act. It is true that this case deals with the remuneration of a mukaddam, and 22 N L R 37[1] has been followed in 27 N L R 262[3] and also by Kinkhede A. J. C. in A I R 1928 Nag 68,[4] where the learned Additional Judicial Commissioner held that, as a lambardar is precluded from recovering by a suit his remuneration for services in that post unless fixed by a Revenue Officer so he is similarly precluded from retaining to himself a portion of the village income for that purpose by way of defence in a suit for village profits, which deals with the remuneration of a lambardar; but the law is the same for both. The point is one of considerable importance and one which will frequently arise. The decision of the Bench of Judicial Commissioner's Court which has been followed is now doubted in the recent decision which has not so far been published in the authorized reports, and I consider it desirable that the question should be determined by a Divisional Bench of this Court. I therefore forward the case to my Lord the Chief Justice with a view to forming a Bench to decide the following question:

In a suit for village profits, is a lambardar or mukaddam entitled to claim, either as a plaintiff or a defendant, remuneration for his services for years prior to the year in which his remuneration has been fixed by the Deputy Commissioner under the provisions of S. 192, Land Revenue Act?

1. Anandrao v. Daulat, (1926) 13 A I R Nag 274 = 92 I C 909 = 22 N L R 37.
2. Shankar Rao Sadasheo v. Madho Narayanrao, (1937) 24 A I R Nag 411 = 173 I C 7.
3. Kesho v. Raoji, (1931) 18 A I R Nag 120 = 134 I C 264 = 27 N L R 262.
4. Harprasad v. Chhadami, (1928) 15 A I R Nag 68 = 105 I C 567.

OPINION

Stone C. J. and Bose J.—In this reference the following question is raised at page 28-C of the paper-book:

In a suit for village profits, is a lambardar or mukaddam entitled to claim, either as a plaintiff or a defendant, remuneration for his services for years prior to the year in which his remuneration has been fixed by the Deputy Commissioner under the provisions of S. 192, Land Revenue Act?

The facts are that a suit has been brought for village profits and by way of defence the lambardar claims to be allowed his remuneration for his services. The remuneration for those services has been fixed by the Revenue Officer but was so fixed after the date of the written statement. The claim for village profits does not exceed a period of three years before the date of the written statement. The learned referring Judge felt some difficulty owing to the various cases that were considered or decided in regard to this matter, but, in our opinion, there is no case which is in conflict with the latest decision reported in A I R 1937 Nag 411.[2] The position will be clarified by stating what the decisions are. The first case in point is A I R 1923 Nag 164.[5] In that case Hallifax A. J. C. held that if S. 192, Central Provinces Land Revenue Act, does not entitle a lambardar to get 5 per cent. of the revenue payable as costs of collection in the absence of any order by the Deputy Commissioner, he is entitled to get it on general principles of equity or under S. 70, Contract Act. In 20 N L R 142[6] Kinkhede A. J. C. decided that although S. 192 (1), Central Provinces Land Revenue Act, conferred exclusive jurisdiction on a Revenue Officer to fix the remuneration payable to a lambardar, it did not make such a fixing a condition precedent to his maintaining a suit for its recovery in a Civil Court. Accordingly, a lambardar who before the commencement of the Act had acted as lambardar and was receiving the lambardari dues, has a right to continue to receive those dues which right is expressly prescribed by S. 229 of the Act of 1917, and accordingly he can recover those dues. In other words, S. 192 applies to cases of lambardars who had no rights (usually because they were not then appointed) to receive dues at the time of the passing of

5. Shankergir Guru Motigir v. Chinnuji, (1923) 10 A I R Nag 164=71 I C 140.
6. Janrao v. Baliram, (1925) 12 A I R Nag 129= 83 I C 172=20 N L R 142.

the Act of 1917. Kinkhede A. J. C. also held that the Civil Court could entertain a claim by a lambardar for the recovery of arrears of remuneration. His judgment was based on the assumption set out at p. 144 that the lambardar claiming his dues on the old scale continues his duties as before: "if he must continue doing his duties as before, his remuneration must also continue as before." What the learned Additional Judicial Commissioner overlooked was that in the case before him the plaintiff who claimed the lambardari dues on the old scale was not performing the same duties as before. He was the sadar lambardar at that time and there was no such office under the old Act-when his remuneration was fixed. Also under the old Act there was only one lambardar for each mahal and so his remuneration was fixed on the assumption that he would perform the lambardari duties for the entire village.

When the new Act came into force other lambardars were also appointed (the very fact that the plaintiff was the sadar lambardar shows that) and therefore the plaintiff's duties were to that extent curtailed and so he could hardly claim the right to be remunerated at a rate fixed on the assumption that he would do the whole work himself. Moreover this in itself indicates that the old office was abolished and a new set of appointments made, not of one lambardar as before but of several with a division of labour between them. In these circumstances a fresh order fixing a new scale of remuneration would clearly be called for. This was pointed out in 22 N L R 37[1] by a Bench of the Judicial Commissioner's Court and the previous decision was overruled to that extent. They held there in the case of a sadar lambardar that he cannot maintain his claim for remuneration until it has been fixed by the revenue authorities. It was pointed out that under the old Act there was no such office as sadar lambardar. The view was expressed that it could not be assumed that the sadar lambardar was entitled to the whole of the lambardar's remuneration. It may be observed that a sadar lambardar is only found where there is more than one lambardar. If the sadar lambardar is not entitled to the whole of the lambardar's remuneration, it is clearly necessary to determine what share he is entitled to and the only way to do that is the mode prescribed by S. 192. That being the view taken, it was not necessary for the Bench to consider the effect of S. 229 on existing rights. It may be however desirable to state that, in our opinion, as at present advised, Sec. 229 would have an important bearing if the lambardar in question had been lambardar immediately before the coming into effect of the Act of 1917 and continued to be the sole lambardar. Here however there is nothing to show that this lambardar held his lambardarship under the old Act. 22 N L R 37[1] at p. 42 concludes as follows:

> The plaintiff (the sadar lambardar) therefore cannot maintain his claim for remuneration until he gets it fixed by the revenue authorities.

That leaves it at large whether or not he could maintain retrospectively a claim for remuneration when he had got it fixed by the revenue authorities. In A I R 1928 Nag 68[4] the last-mentioned case was followed and Kinkhede A. J. C. stated as follows :

> I think the matter must be considered as concluded by the decision of the Bench of this Court in 22 N·L R 37[1] which lays down that in all appointments of lambardars the remuneration of that post, unless fixed by the revenue officer, is not recoverable by suit.

In our opinion 22 N L R 37[1] does not lay down a proposition in so broad a form. A difference might arise according as the appointment of the lambardar in question was before or after the Act of 1917 came into operation. In A I R 1937 Nag 411[2] Niyogi J. held that where a mukaddam of a village, who is not a lambardar, gets his remuneration fixed under S. 192, Central Provinces Land Revenue Act, then subject to the Limitation Act, he may recover arrears and he is not restricted to recovering his remuneration from the date of the fixation.

It may be desirable to point out that before the Act of 1917 was passed, a variety of persons, including the lambardars, were entitled to remuneration. The lambardar's remuneration was fixed at a percentage that is to say, 5 per cent. That Act was repealed by the Act of 1917, S. 229 of which preserves inter alia all rights acquired; such rights would include, in our opinion, a right to receive that percentage. But in the case of the lambardars appointed after the passing of the Act of 1917 or in the case of sadar lambardars, an office newly created by the Act of 1917, their right to claim is made, in our opinion conditional upon their remuneration being fixed in the

mode prescribed by S. 192 (1) which provides that the remuneration of the lambardar, lambardar-gumashta and mukaddam shall be fixed by the Deputy Commissioner and shall be recoverable by the lambardar from the proprietors of the mahal or patti for which he is appointed.

When, however, a lambardar has got his remuneration fixed by the Deputy Commissioner, he is entitled to recover not merely the remuneration from that date but from the date when he entered upon his office subject to limitation. We agree with Niyogi J.'s views as to this. A difficulty may arise if Sec. 197, Land Revenue Act came into operation owing to the Deputy Commissioner directing a lambardar to recover his dues as land revenue as provided by that Section, because in such a case it might well be that the period of limitation prescribed by S. 160 for land revenue suits would not apply because, where S. 197 is invoked, the question of a suit does not arise, the machinery of the recovery being not through a Court. Presumably, however, a Deputy Commissioner would only in very rare circumstances give such permission to resort to such exceptional machinery and it would be for the Deputy Commissioner to give his authority in a reasonable mode so as not to allow either (a) a double claim to be made or (b) the recovery of arrears for the period beyond that of limitation.

Were it held that arrears could not be recovered it would have the unjust result that a lambardar appointed immediately after the passing of the Act of 1917 or a sadar lambardar could not recover anything for his service unless and until his remuneration was fixed by the Deputy Commissioner. It would always take some months to obtain the Deputy Commissioner's directions and we can see no reason why such lambardars, who are presumably doing their work during those months, are to be left without remuneration for that period. This, it seems to us, is a consideration that mainly affected the judgment of Niyogi J. An officer having been appointed is entitled to be paid for the work and the payment is to be fixed as from the date when he entered upon his office. The quantum of the payment has to be fixed in a certain way. When fixed it relates back to the date of entry upon the office. In our opinion, it makes no difference whether this claim is being made by him as a plaintiff or whether it is being urged by him as a defendant by way of defence in a suit for accounts. It is an item which he is entitled to take into account if he is entitled to claim for it. In our opinion therefore the answer to the question is as follows :

In a suit for village profits a lambardar or mukaddam is entitled to claim, whether as a plaintiff or as a defendant, remuneration for his services for such years prior to the year in which his remuneration has been fixed by the Deputy Commissioner under the provisions of Sec. 192, Land Revenue Act, as are within the period of limitation.

D.S./R.K. *Answered in affirmative.*

A. I. R. 1939 Nagpur 78

VIVIAN BOSE J.

Udebhan Zangoji Patil — Plaintiff — Appellant.

v.

Vithoba Ukandaji Dhangar — Defendant — Respondent.

Second Appeal No. 375 of 1936, Decided on 22nd September 1938, from appellate decree of Addl. District Judge, Amraoti, D/- 16th April 1936.

(a) Burden of Proof—Question of onus if regarded as final factor in the case cannot be ignored.

When a Court examines only the case of one side and disbelieves his evidence and then dismisses his claim on the ground that he has not proved his assertions, it is clear that the case is being decided solely on the question of onus and no amount of lip service to a rule which is ignored in the letter and in the spirit will serve to turn what is then a question of law into one of fact. [P 79 C 1, 2]

(b) Evidence Act (1872), S. 114—Presumption — Document executed by ignorant and illiterate person — Usual presumption under S. 114 cannot be drawn.

In cases of documents executed by ignorant and illiterate persons who are likely to be dominated by the will of others, the usual presumption arising under Sec. 114 cannot be drawn : *A I R 1937 P C 274, Rel. on.* [P 80 C 1]

(c) Bond — Consideration — Executant may discharge onus of proving consideration by showing that presumption under S. 114, Evidence Act, does not arise—Question whether onus is discharged is one of fact.

Once the execution of a bond is proved the burden of proving consideration is shifted on to the executant of the bond. He can discharge that burden by proving that the circumstances of the case were such that the usual presumption under S. 114, Evidence Act, cannot arise. But the question whether he has succeeded in discharging this burden is one of fact and not of law : *A I R 1938 Nag 152, Ref.* [P 80 C 2]

M. R. Bobde and V. K. Rajwade — *for Appellant.*

M. B. Kinkhede and A. R. Kulkarni — *for Respondent.*

Judgment.—This is a suit for money due on a bond Ex. P-2 dated 28th May 1933 for Rs. 1700 executed by the defendant in favour of the plaintiff. This Rs. 1700 was said to be due on a promissory note dated 20th June 1931 for Rs. 1800 also executed by the defendant in favour of the plaintiff. There were certain repayments, according to the plaintiff's case, and the balance due on 28th May 1933 is said to be the Rs. 1700 which forms the consideration for the bond in suit. Both documents bear the defendant's thumb impression and he admits this fact, but he pleads that they were obtained from him by fraud. Both the lower Courts, throwing the burden on the plaintiff, have held that he has not proved execution and consideration and so have dismissed his suit. He appeals here. The lower Appellate Court stated at the outset of its judgment that the question of burden was not of much consequence because there is evidence on both sides and the matter turns largely upon the credibility of the witnesses. But having done lip service to the rule the learned Judge proceeded to consider the plaintiff's evidence alone, disbelieved his witnesses, and then stated :

> I feel no hesitation in arriving at the conclusion that the appellant (plaintiff) failed to prove that he advanced Rs. 1850 to the respondent and that the latter had executed the document Ex. P-1 knowing it to be a promissory note.

Now that is nothing more nor less than deciding the case on the question of onus. Had the learned Judge believed a single witness for the defendant or had he stated clearly in his judgment that such and such facts (setting them forth or indicating them) establish the fraud pleaded, there would have been an end of the matter. There would then have been a positive finding based on positive evidence and it would not have mattered where the burden lay. But when a Court examines only the case of one side and disbelieves his evidence and then dismisses his claim on the ground that he has not proved his assertions, it is clear that the case is being decided solely on the question of onus and no amount of lip service to a rule which is ignored in the letter and in the spirit will serve to turn what is then a question of law into one of fact. I have therefore to determine where the burden of proof lay. The learned counsel for the appellant relied on a decision of a Division Bench of this Court to which I was a party for the proposition that once it is established that a document bears the defendant's thumb impression or signature then the plaintiff is relieved of proving execution and consideration. The burden shifts to the defendant : I L R (1938) Nag 333.[1]

That is perfectly true of all ordinary cases but is not universally so. The rule given there is based on Sec. 114, Evidence Act, that is to say on a rebuttable presumption of fact. Consequently, it can only apply in circumstances where the presumption itself arises. We have explained at p. 337 that "the circumstances of the case may negative such an inference," and again that these facts constitute the deciding factor in a case only when "nothing else is known" beyond the fact that the document bears the thumb mark or signature in question and that it comes from proper custody. But here a lot more is known. We know that the defendant is ignorant and illiterate, an ordinary cultivator in an obscure village who has been described as "a simple minded fool likely to come under the influence of anybody" by the learned Judge who saw him in the witness-box. We know that the ordinary course of business was not followed because the promissory note which is said to have formed the consideration of the bond in suit was not torn or otherwise cancelled and was not handed back to the debtor but has been produced intact by the plaintiff himself. There may have been good reason for this, but it is not the usual course of business and the presumption we are discussing only applies when that has been observed. Moreover, there is another point. Ordinarily the law pays no heed to those who act at arms length and are able to look after themselves. If they make a sorry bargain, that is their affair. But as regards the weak and the helpless, those in a position of disadvantage, that is a very different matter. The law guards them with a special protective care and is jealous of those who bring claims against them. It then scrutinizes the transaction with a minuteness which it does not otherwise employ and throws the

1. Dalchand v. Mt. Hasanbi, (1938) 25 A I R Nag 152=176 I C 315=I L R (1938) Nag 333.

burden on the other side. Minors, pardanashin women, expectant heirs, those in a position of special disadvantage such as wards and others so situated as likely to be dominated by another's will, all are examples of that general rule; and to them can be added the ignorant and the illiterate when the circumstances are such that the usual presumption arising under Sec. 114, Evidence Act, cannot be drawn : *see* A I R 1937 P C 274.[2]

But I am referred to the remarks at p. 339 of the ruling cited above where we have dissented from 20 N L R 7.[3] It is pointed out that that was also a case in which only a thumb-mark was taken and therefore one in which prima facie the defendant was illiterate and yet we have held that the burden was wrongly thrown on the plaintiff. But mere illiteracy standing by itself is not the point. In this country many men who cannot read and write conduct important businesses and manage large estates. They are not foolish, ignorant rustics but are usually shrewd men of the world liberally endowed with business instincts and acumen. They work through agents and take meticulous care to see that they are loyal to their employers. Men of that type do not affix their marks to documents without taking special precautions to ensure that they have a true and accurate knowledge of their contents. It would be ridiculous to wrap them up in a cloak of special tenderness. As I see it the decision in 20 N L R 7[3] did not turn on the fact that the executant of the document was ignorant and illiterate and that therefore because of his helplessness he had to be treated with special protective care. We know nothing about the defendant there except that he was in a position to employ at least one agent and actually did so. The decision turned solely on what was laid down as a general rule of law of universal application and it was that with which we were respectfully unable to agree in the later ruling.

As I have said before, everything depends on the circumstances, and this particular matter will not always amount to a question of law because the presumption in question is not an irrebuttable presumption of law but a rebuttable presumption of fact. The matter can only be one of law when the question of burden is used as the final deciding factor in the case, as it has been here, and when the presumption under Sec. 114 (when it can fairly arise) is altogether ignored. There can be no doubt that the primary burden is on the plaintiff. He must prove execution and consideration. But once he proves, or it is admitted, that the signature or thumb mark (it does not matter which, for I do not read the Privy Council as laying down a different rule) is the defendant's,then the presumption arises and the burden shifts to the defendant. He can discharge it either by showing that in spite of signing, the circumstances are such that he cannot be charged (fraud, undue influence, mistake, want or failure of consideration, etc.) or he can prove that the circumstances are such that the presumption under Sec. 114 cannot fairly arise. (This appears to have been the case before their Lordships : an illiterate Omanhene of the Australian bush.) If he succeeds in doing that, then the burden shifts back to the plaintiff. To that extent the matter is one of law. But whether he has succeeded on the evidence, or on the admitted facts, in discharging this burden is a question of fact and not of law.

In the present case the facts found by both the lower Courts (and of course they must be accepted as final here) show that the presumption under S. 114 cannot fairly arise in this case. That being so, the burden was rightly laid on the plaintiff, and once that is accepted then the remaining question, namely whether the plaintiff's evidence should be believed or not, becomes one of fact. The appeal fails and is dismissed with costs.

N.S./R.K. *Appeal dismissed.*

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2. Omanhene Kwamin Bassayin v. Omanhene Bendentu II, (1937) 24 A I R P C 274 = 170 I C 423 (P C).
3. Devidas v. Mamooji, (1924) 11 A I R Nag 103 =78 I C 104=20 N L R 7.

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STONE C. J. AND CLARKE J.

Shankarrao and others — Appellants.

v.

Hazarimal Nathuramji Agarwala — Respondent.

First Appeal No. 134 of 1935, Decided on 15th September 1938, from order of Addl. District Judge, Bhandara, D/- 30th September 1935.

Limitation Act (1908), Sec. 15—Stay of execution — Decree-holder obtaining stay of execution in previous suit against him by offering security of decree obtained by him against judgment-debtor whose estate was under management of Court of Wards — Court obtaining from decree-holder undertaking not to accept payment direct from Court of Wards— Order held did not amount to stay by injunction within meaning of S. 15.

A decree-holder was a judgment-debtor under the decree passed in a previous case which decree he was challenging in appeal. He applied to the Court for stay pending the disposal of the appeal. The Court ordered stay on terms as to security. There the judgment-debtor (decree-holder in subsequent decree) was offering as security a subsequent decree which he had by that date obtained. It was a decree for a sum and it was against a judgment-debtor whose estate had recently been taken under the management of the Court of Wards. The Judge considered the security proper and ordered that the officer in charge of the Court of Wards should be written to deposit the amount in Court. The order contained the following sentence : "the judgment-debtor undertakes not to accept any payment direct from the Court of Wards towards the satisfaction of his decree" :

Held that the order was not tantamount to a stay by an injunction or order within the meaning of S. 15 : *17 All 198 (P C); A I R 1933 P C 52; A I R 1932 P C 165 and A I R 1933 Mad 418 (F B), Rel. on.* [P 82 C 1]

P. P. Deo — *for Appellants.*

W. B. Pendharkar — *for Respondent.*

Judgment.—This is a most unfortunate case. We find ourselves compelled to allow the appeal with the result that the unfortunate decree-holder loses a decree for a very substantial sum of money, we are satisfied, owing and only owing to a misapprehension of the obligations cast upon him by an order passed in another case on 15th September 1930. The point for determination is whether the present application for the execution of a decree obtained in C. S. No. 44 of 1924 is or is not within time. The Article is 182 of Schedule to the Limitation Act and the period is three years from the last order. The last order in C. S. No. 44 of 1924 was on 13th April 1928 and the application for execution was on 2nd April 1932. So quite clearly the application is out of time unless it is saved by Sec. 15, Limitation Act. In the course of argument we suggested that possibly S. 5 also would apply but when the proceedings are looked into and the Section is examined it is seen that Sec. 5 has no application to a matter of this nature and that that has already been so decided. S. 15 can only be used if the execution "has been stayed by injunction or order."

The decree-holder therefore endeavours to show that there exists here such an order. The order relied on is the one passed in C. S. No. 24 of 1919 in the following circumstances : The present decree-holder was a judgment-debtor under the decree passed in that case which decree he was challenging in appeal. He applied to the Judicial Commissioner's Court for stay pending the disposal of the appeal. The Judicial Commissioner's Court ordered stay on terms as to security. The matter was referred back to the trial Court for the trial Court to go into the question of security and on that matter coming before the trial Court the order (Ex. C-6) dated 15th September 1930 was passed. There the then judgment-debtor, now the decree-holder, was offering as security the present decree which he had by that date obtained. It was a decree for a sum of over Rs. 10,000 and it was against a judgment-debtor whose estate had recently been taken under the management of the Court of Wards. The learned Judge considered the security proper and seems to have ordered that the officer in charge of the Court of Wards should be written to deposit the amount in Court. The order contains the following sentence :

> The judgment-debtor undertakes not to accept any payment direct from the Court of Wards towards the satisfaction of his decree.

The judgment-debtor (the present decree-holder) in that suit seems up to that date to have been actively pursuing his remedies as decree-holder but from the moment that that order was passed he took no action at all to execute his decree in this suit, C. S. No. 44 of 1924, and we have no doubt whatever that the reason why he suddenly became supine was that he thought that he was ordered not to take any steps and that the Court was going to get the money by writing to the officer of the Court of Wards. As a result he made no application whatever until he thought that the estate had ceased to be under the management of the

Court of Wards, and on 2nd April 1932 this application was made. In point of fact the estate did not cease to be under the management of the Court of Wards till some 14 days after the application. On those facts the learned Judge has come to the conclusion that although it is clear that the order in question contained no express prohibition against the executing of the decree still the Court did, as a matter of fact, prevent the decree-holder from executing the decree and its action was such as to amount to a stay of execution, for the decree-holder was obviously prevented from executing the decree in question unconditionally as he was otherwise entitled to. In other words he holds that the fact that in the previous matter the Court had taken an undertaking from the judgment-debtor not to accept any payment direct from the Court of Wards was tantamount to a stay by an injunction or order within the meaning of S. 15.

We think that that conclusion is probably an equitable one and would have the result of avoiding a serious loss to the decree-holder owing to a bona fide mistake. But in our opinion the authorities are too powerful to make it possible for us to uphold the judgment appealed from. The Privy Council has three times considered this kind of point: 17 All 198[1] at pp. 210 & 211, 12 Pat 195[2] at p. 201 and 60 Cal 1[3] at p. 7. This last decision was followed in a Full Bench case by the Madras High Court, 56 Mad 490.[4] Of these 12 Pat 195[2] is the nearest on the facts. Their Lordships observe at pages 200 and 201 :

> The point made by the appellant is this. They say that on 16th September 1922, the Judge in the Raj suit, ordered, according to the note in the order paper, their Lordships have not the order before them, that the decree-holders were to wait for some time for payment. That order was set aside on 16th April 1923. Therefore, there was an interval of seven months during which the order of 16th September 1922, was in operation. The appellants say that was a stay, and those seven months saved the situation for them, because if those seven months are not counted the present application was in time.

> Now the first thing to be observed is that at the time when that order was made, there was in fact no application for execution pending at all. [In the present case there was an execution pending.] It was an order, again made in the Raj suit and not in the rent suits; it was an order made on an application by the decree-holders seeking leave to proceed against property in the hands of the receiver, in the Raj suit. It was an order which did not stay execution at all, but simply said that so far as that application in that suit was concerned, the appellants were to wait. That seems to their Lordships not to be in any sense within the meaning of the Section a stay of the execution by injunction or order. This point also fails.

In 17 All 198,[1] (*see* pp. 210 and 211) the facts were that an order was passed which had the effect of restraining the defendant from receiving payment and the person liable to him from making payment to him or to anybody. Their Lordships observe :

> An order in those terms is not an order staying the institution of a suit. There would be no violation of it until the restrained creditor came to receive his debt from the restrained debtor. And the institution of a suit might for more than one reason be a very proper proceeding on the part of the restrained creditor, as for example in this case, to avoid the bar by time, though it might also be prudent to let the Court which had issued the order know what he was about.

In 60 Cal 1[3] their Lordships observe in relation to one of the Articles of the Limitation Act that equitable considerations are out of place in construing such Articles and what one is concerned with is the grammatical meaning of the words. In 56 Mad 490[4] a Full Bench of the Madras High Court had to consider whether those observations were applicable to Sec. 15. The matter is put very shortly by Mockett J., at p. 507 :

> The injunction or order must be express in its terms and I find no room for the suggestion that an application can be stayed by implication. The trend of the Privy Council decisions seems to be to this effect, and in the recent case in 60 Cal 1[3] their Lordships explicitly lay down that 'in construing questions of limitation equitable considerations are out of place'.

I am therefore constrained to join in expressing respectful dissent, if any of the Indian cases cited lend colour to the doctrine that although an injunction or order does not in its terms effect a stay, nevertheless it can be said to do so 'equitably' or 'by implication'.

It follows therefore that the appeal succeeds. No costs.

D.S./R.K. *Appeal allowed.*

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1. Beti Maharani v. Collector of Etawah, (1895) 17 All 198=22 I A 31=6 Sar 551 (P C).
2. Kirtyanand Singh v. Prithi Chand Lal, (1933) 20 A I R P C 52=141 I C 760=12 Pat 195=60 I A 43 (P C).
3. Nagendranath De v. Sureshchandra De, (1932) 19 A I R P C 165 = 137 I C 529=60 Cal 1=59 I A 283 (P C).
4. Tripura Sundaramma v. Abdul Kadir, (1933) 20 A I R Mad 418=143 I C 1=56 Mad 490=64 M L J 664 (F B).

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NIYOGI AND GRUER JJ.

Dukhuram and others—Appellants.

v.

Khanderao and another—Respondents.

Misc. Appeal No. 198 of 1936, Decided on 31st August 1938.

C. P. Land Revenue Act (2 of 1917), Section 203 (8)—Proprietor mortgaging his village share and house in abadi — After mortgage is foreclosed he cannot claim to retain possession of house.

If a proprietor mortgages his village share (without cultivating rights in *sir*) and his house in the abadi, he cannot after the mortgage has been foreclosed and he has become an exproprietary tenant, claim to retain possession of the house on the ground that under S. 203 he is entitled to a house-site in the abadi : *A I R 1918 P C 84 and S. A. No. 452 of 1935, Expl.; A I R 1938 Nag 544, Rel. on.* [P 83 C 2 : 85 C 1]

V. V. Kelkar — *for Appellants.*

J. Sen and B. L. Gupta — *for Respondents.*

ORDER OF REFERENCE

Pollock J. — The respondents Khande Rao and Ganpat Rao and their father mortgaged mahal No. 2 in mauza Chichirda, of which they were the proprietors, and a house in the abadi and certain khudkasht land. The mortgage was foreclosed and the decree-holder was placed in possession of the mortgaged property including the house. The mortgagors contend that when they lost their proprietary interest in the village, they became occupancy tenants of what had formerly been their *sir* land and that as tenants they are entitled to retain possession of the house. In a somewhat similar case in 14 N L R 165[1] at page 174, it was remarked :

> As regards houses in the abadi, the rights of the judgment-debtors now rest on the wajib-ul-arz, and the decree-holder, though undoubtedly owner of the soil and possibly, by operation of the law of mortgage, owner also of the houses standing on the soil, cannot evict them while they remain occupancy tenants.

In a recent case, Second Appeal No. 452 of 1935,[2] which appears to be indistinguishable from the present case, it was held that under Sec. 203, C. P. Land Revenue Act of 1917, the judgment-debtor as a tenant was entitled to a house-site of reasonable dimensions in the abadi free of rent and that until the site had been allotted and accepted or, if refused, the dispute had been settled by a Revenue Officer, the judgment-debtor had not got what he was entitled to and until then he could not be thrust out.

When 14 N L R 165[1] was decided, the C. P. Land Revenue Act of 1881 was in force which contained no provision similar to S. 203 of the present Act, and the decision in that case was based on the wajib-ul-arz. A proprietor is entitled to sell or mortgage his entire proprietary rights in the village including the abadi, excepting only the cultivating rights in *sir* which requires special permission. It is to me a somewhat surprising proposition that a proprietor can sell or mortgage his house in the abadi and then claim that he is still entitled to retain possession of it. The Legislature has accorded no such protection to houses as it has to cultivating rights in *sir*. Sub-s. (8) of S. 203 provides that nothing in this Section shall affect the terms of any contract between the proprietor and the holder of a site in the abadi, and it is, I think, arguable that this sub-section covers the present case and disentitles the judgment-debtor from relying on the other provisions of Sec. 203. The point is one of considerable importance and should, in my opinion, be decided by a Division Bench. I frame the question as follows :

"If a proprietor mortgages his village share (without cultivating rights in *sir*) and his house in the abadi, can he, after the mortgage has been foreclosed and he has become an ex-proprietary tenant, claim to retain possession of the house on the ground that under Section 203, C. P. Land Revenue Act, he is entitled to a house-site in the abadi?"

Let the case be laid before the Hon'ble the Chief Justice.

OPINION

The following question has been referred to a Division Bench by Pollock J. :

> If a proprietor mortgages his village share (without cultivating rights in *sir*) and his house in the abadi, can he, after the mortgage has been foreclosed and he has become an exproprietary tenant claim to retain possession of the house on the ground that under S. 203, C. P. Land Revenue Act, he is entitled to a house-site in the abadi ?

The decree-holders, mortgagees in the case, had obtained possession of the house along with other property mortgaged when they foreclosed against their mortgagors,

1. Narayan Ganesh Ghatate v. Baliram, (1918) 5 A I R P C 84=48 I C 141=46 Cal 76=45 I A 179=14 N L R 165 (P C).
2. Udho Mahara v. Pandit Sadasukh, Second Appeal No. 452 of 1935.

who were proprietors of the village. The mortgagors then claimed to get the house back on the ground that they had become expropriatory tenants of the *sir* land mortgaged, and as tenants were entitled to such a house. The lower Appellate Court following 14 N L R 165[1] at pp. 173 and 174 held that the accrual of the tenant right gave them a right to obtain the house. Pollock J. has pointed that when 14 N L R 165[1] was decided, the old Land Revenue Act of 1881 was in force, which contained no provision similar to S. 203 of the present Act, and the decision in that case was based on the wajib-ul-arz. He recognized that there is a recent case on all fours, Second Appeal No. 452 of 1935,[2] which supports the mortgagors, but he doubts whether the proprietor should be allowed to retain his mortgaged house in such conditions and thinks that on the analogy of S. 203 (8), Land Revenue Act, the terms of the contract between the parties should be given effect to.

The reported decision in 14 N L R 165[1] incorporates the judgment of the Privy Council but in that judgment their Lordships decided only whether the mortgagor had divested himself of his right as an occupancy tenant. They did not consider the question of the house mortgaged. The learned Additional Judicial Commissioners say that the order appealed against is silent as regards this and that it appears advisable to point out the law. Their view is that as regards houses in the abadi the rights of the judgment-debtors now rest on the wajib-ul-arz, and the decree-holder, though undoubtedly owner of the soil and possibly by operation of the law of mortgage owner also of the houses standing on the soil, cannot evict them while they remain occupancy tenants. These remarks are obiter, and with due respect we do not think that such a result can be upheld in law or equity. When a proprietor deliberately raises money by mortgaging his dwelling house how can he be allowed to turn round and say that that house is sacrosanct? In Second Appeal No. 452 of 1935[2] the learned Chief Justice was of opinion that until a site has been allotted to an ex-proprietor and accepted, or if refused the dispute has been settled by a Revenue Officer, the judgment-debtor has not got what he is entitled to, and until then he cannot be thrust out. He goes on to say:

> If the Revenue Officer allots this site, then again the judgment-debtor cannot be evicted, nor can the house be pulled down.

With all respect we think that in any case the mortgagor is entitled to the materials of the house mortgaged. What the mortgagor can claim under S. 203, Land Revenue Act, is simply a house site of reasonable dimensions in the abadi free of rent. Sub-s. (3) provides that the materials of any house erected shall be transferable. Then again how does it follow that because he is entitled to a house site he can claim to retain this particular house site? From an economic point of view, it would generally be desirable that the new proprietor of the village should take over also a house in keeping with his new status. When the exproprietor has contracted to mortgage his house also it is only just that he should be held to his contract the consequences of which he must have foreseen. His remedy is to arrange with the new proprietor for a new site or for the acquisition of a new house in the village as soon as he feels that foreclosure is inevitable. S. 49, Central Provinces Tenancy Act, preserves only rights as an occupancy tenant and does not deal with abadi sites and so cannot help the mortgagor. The rights of the mortgagee to this particular house and site are statutory, and S. 203, Land Revenue Act, cannot derogate from them. By O. 34, R. 3, Civil P. C., the mortgagee on obtaining his final decree is entitled to be put in possession of the property, and his debtor cannot claim to retain it simply because owing to his own improvidence or lack of foresight he finds himself for the time being homeless.

This question also arose recently before Bose J., in Mis. App. No. 204 of 1935,[3] and his view coincides with what we are now expressing. Bose J., also distinguishes 14 Nag L R 165,[1] and points out that S. 203, Land Revenue Act, relates to the house site and not to the materials of the house itself, and S. 203 (8) expressly exempts the terms of any contract between the proprietor and the holder of a site in the abadi. In the present case the proprietor and the holder of the site was the same person at the time of the contract, but the same principle would apply. He was empowered to contract himself out of any right to retain this site and superstructure in the event of foreclosure, and he must be held to his

3. Ramadhin v. Sheodutt Rai, *Reported in* (1938) 25 A I R Nag 544.

contract. For the above reasons we answer in the negative the question which has been put to us.

D.S./R.K. *Answered in negative.*

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STONE C. J. AND CLARKE J.

Abdul Rahim Khan — Applicant.

v.

Mt. Pusia Bai, w/o Nanhu Patel and others — Non-Applicants.

Civil Revn. No. 199 of 1937, Decided on 16th August 1938, from order of Sub-Judge, First Class, Balaghat, D/- 23rd December 1936.

Criminal P. C. (1898), Ss. 476 and 195 (1) (c)— Courts mentioned in Sec. 476 can make complaint in respect of offence of forgery against persons, who are not parties to proceedings before it.

Section 476 does not inhibit the classes of Courts mentioned therein from making a complaint in respect of any of the offences specified in Sec. 195 (1) (c) against persons not parties to a proceeding before it, in which or in relation to which the offence was committed : *Case law discussed; Allahabad, Madras and Calcutta view not approved.* [P 85 C 1; P 87 C 1]

Fida Hussain and W. C. Dutt — *for Applicant.*

P. N. Rudra; G. R. Pradhan and W. B. Pendharkar and K. K. Gandhe — *for Non-Applicants 1; 4, 6 and 7, and 8 respectively.*

Order. — The question submitted for decision by this Bench by Niyogi J., is :

Whether S. 476, Criminal P. C., inhibits the classes of Courts mentioned therein from making a complaint in respect of any of the offences specified in S. 195 (1) (c) against persons not parties to a proceeding before it, in which or in relation to which the offence was committed ?

As Niyogi J. has pointed out, there is a a conflict of opinion between the various High Courts in this country on this point. The High Courts of Allahabad, Madras, Calcutta and Rangoon are in favour of an affirmative answer to the question, whereas the High Courts of Bombay, Lahore, Patna and the Judicial Commissioner's Court of this Province are in favour of a negative answer. The question turns upon the interpretation of the wording of Sec. 195 (1) (c) and S. 476 (1), Criminal P. C. S. 195 (1) (c) lays down that :

No Court shall take cognizance of any offence described in S. 463 or punishable under S. 471, S. 475 or Sec. 476 of the same Code (Penal Code) when such offence is alleged to have been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except on the complaint in writing of such Court, etc.

The Sections of the Penal Code here concerned, are all connected with the offence of forgery or counterfeiting marks on documents. For the sake of clarity, instead of enumerating them again, whenever we have occasion to refer to them, we shall use the term "forgery". The plain meaning then of Sec. 195 (1) (c) is that when an offence of forgery of a document produced in Court is alleged to have been committed by a party to a proceeding in that Court a complaint by the Court itself is necessary before another Court can inquire into it. The Section does not say what is to happen when such offence is committed by a person other than a party to the proceeding. Omitting the portions of the Section which are unnecessary for our purpose, Sec. 476 provides that when any Court is of opinion that an inquiry should be made into any offence referred to in Sec. 195 (1) (b) or (c) which appears to have been committed in or in relation to a proceeding in that Court, such Court may make a complaint, etc. The question then which arises out of this Section is what is the offence referred to in S. 195 (1) (c). Is it forgery or is it forgery by a party ? If the former, then no doubt the question which has been referred to us should be answered in the negative ; if the latter, it should be answered in the affirmative. The Patna High Court in 37 I C 487[1] states that the reference to S. 195 in S. 476 is only for the purpose of avoiding the enumeration of the Sections mentioned in S. 195. In S. 195 (1) (b) and (c) there are 18 Sections of the Penal Code mentioned and it is certainly a compendious method of enumerating them, if that is all the wording of S. 476 means. The reasoning of Addison J. in 9 Lah 678[2] at page 686 commends itself to us as sound and lucid :

It seems to me that unless the Legislature has specifically enacted that Courts should not take action against persons who are not parties, though they alone can take action against parties, it would not be proper to read such an intention into the Act especially as it gives rise to such inconvenient consequences. I am unable to discover anything in the Act definitely forbidding the presiding officer of a Court to make a complaint about an offence committed in connexion with a document produced in his Court when the person complained of is not a party. All that has been enacted is that

1. Rajkumar Singh v. Emperor, (1916) 3 A I R Pat 97=37 I C 487=18 Cr L J 135=1 Pat L J 298.
2. Emperor v. Balmokand, (1928) 15 A I R Lah 510=110 I C 108=29 Cr L J 652=9 Lah 678.

he alone can do so if the alleged offender is a party to the proceeding.

The inconvenient consequences to which Addison J. draws attention in the above passage are pointed out at p. 686 : firstly since it is desirable that where a party to a proceeding in a Court has committed an offence and the offence has been abetted by persons who are not parties, all the persons concerned in the offence should be tried and not only those who are parties to the proceedings in which the offence was committed; secondly, since it would be possible for a private complainant to make a complaint against the persons who are not parties while the Court could make a complaint against the party, an anomalous state of affairs would arise, in that two different cases about the same transaction would have to be heard at the same time. It is also pointed out that although the Magistrate to whom the complainant of the Court goes might be able to take cognizance, under Sec. 190 (c), Criminal P. C., of the offence against the persons who were not parties, nevertheless the accused would have the option of asking that the case be sent to another Magistrate. Prideaux, Additional Judicial Commissioner also says in A I R 1927 Nag 14[3]:

It seems to me that an offence like forgery, committed in reference and to support any party in civil or criminal proceedings, is really an offence against public justice. It is fabricating false evidence and would, in any case, be punishable under S. 193, I. P. C., and the Court can proceed against the person responsible, under Sec. 476. But I do not think that the Legislature can have intended to prevent a Court from proceeding for an offence of forgery against the person committing it merely because he is not a party to the proceeding. It seems to me undesirable that proceedings for this class of offence should be restricted to those started by private persons.

It is to be noted that Sec. 476 uses the expression "offence referred to in Sec. 195, sub-sec. (1), Cl. (b) or Cl. (c)." The offence referred to in S. 195 (1) (c) is forgery. We agree with what Murphy J. says in 55 Bom 461[4] at page 472 :

In other words, in my view, by the words "offences referred to" the Section meant what it said, and not offences covered by the Section and committed in the qualifying circumstances mentioned in Sec. 195 (c), that is by a party to the proceeding.

Then again if the enumeration of offences in S. 195 (1) (c) is meant to be qualified for the purposes of S. 476 by the words: "when such offence is alleged to have been committed by a party to any proceeding in any Court," it must also be qualified by the next clause "in respect of a document produced or given in evidence in such proceeding," and if all these qualifying words be meant to be read with the Sections of the Penal Code for the purpose of interpreting S. 476, then it was unnecessary to add in Sec. 476 the words "which appears to have been committed in or in relation to a proceeding in that Court." It seems clear therefore to us that the High Court of Patna is right in thinking that reference in S. 476 to S. 195 was merely a compendious method of avoiding enumeration of the Sections of the Penal Code which have been enumerated in S. 195 (1) (b) and (c).

As regards the High Courts which hold the opposite view, there is a Full Bench decision of the Allahabad High Court on the subject in 53 All 804.[5] The decision there was that the Legislature did not intend that the Courts should file complaints before Magistrates other than under S. 476, Criminal P. C., for the very good reason that the person prosecuted has no redress when such prosecutor is a Court of law. But we cannot see why that should be a good reason for holding that Sec. 476 is governed by S. 195 (1) (c). The inconvenience of coming to the conclusion their Lordships did was not considered at all. The argument also, which they put forward about there being no appeal if the contrary view to theirs is taken, does not commend itself to us since we fail to see how a right of appeal can be taken away from the persons who were not parties to the proceedings in which the forgery took place if an inquiry is made against them under S. 476. The decisions prior to 1923, of which there are several, are not so weighty because of the alterations in the wording of Sec. 476 which took place in that year. As matters stood before 1923, there was considerable force in the observations of Abdur Rahim J. in 40 Mad 100[6] to the effect that it might be possible for the offence of forgery to be committed without the forged document being intended to be used in connexion

3. Josaballi v. Ayub Karim, (1927) 14 A I R Nag 14=100 I C 529=28 Cr L J 305.
4. Emperor v. Balgaunda Ramgaunda Patil, (1931) 18 A I R Bom 305=1931 Cr C 561=133 I C 269=32 Cr L J 1017=55 Bom 461=33 Bom L R 296.
5. Emperor v. Kushal Pal Singh, (1931) 18 A I R All 443=1931 Cr C 715=134 I C 225=32 Cr L J 1105=53 All 804=1931 A L J 697 (S B).
6. In re Ramalingam, (1915) 2 A I R Mad 1033=31 I C 653=40 Mad 100=16 Cr L J 797.

with any proceeding in the Court which held the inquiry under Sec. 476, since the Court would have the right to make the inquiry if it was merely brought to its notice that an offence of that nature had been committed. But since the alteration of the wording of Sec. 476 that situation cannot arise. Therefore, a great deal of the force of the resaoning in 40 Mad 100[6] has disappeared. The Full Bench ruling in 42 Mad 540[7] was also before the alteration of 1923 in the Code of Criminal Procedure. 57 Mad 682,[8] it is true, is a decision after 1923, but it is based on earlier decisions which are said to be summarized in 28 M L W 769.[9] That is a ruling to which unfortunately we have not access. It is impossible therefore to say what was the *ratio decidendi* of that case. It is likely however that it is founded upon the Full Bench ruling already referred to: 42 Mad 540.[7] In 58 Cal 727[10] the conclusion was arrived at contrary to that to which we have come for the reason that under Sec. 195 (1) (c) it is not necessary where the persons concerned are not parties, for the Court to take action under Sec. 476. But that does not mean that the Court cannot do so if it wishes, as was pointed out in 9 Lah 678.[2] 58 Cal 727[10] gives one reason for thinking it undesirable that a Court should be able to file a complaint in such a case, namely that if it does so, an appeal might be brought, and whatever the result of those proceedings, it would be open to the Public Prosecutor or to any other member of the public to ignore the result altogether and file a complaint before a Magistrate, upon which the Magistrate would be obliged to take proceedings. This situation does not however seem very likely to arise and in any event it applies as much to parties as to persons who are not parties. The Public Prosecutor would never commence independent proceedings, when he knew that a Court of law was also seised of the matter, and a private person would also wait until the conclusion of the proceedings commenced in that Court, and if those proceedings failed he would be laying himself open to a charge of malicious prosecution if he proceeded to institute a fresh proceeding before a Magistrate.

For the above reasons we think that the view taken in this Province heretofore is right and we answer the question which has been referred to us in the negative.

N.S./R.K. *Answered in negative.*

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7. Govind Iyer v. Emperor, (1919) 6 A I R Mad 7=50 I C 824=20 Cr L J 344=42 Mad 540 36 M L J 448 (F B).
8. Tulasi Ammal v. Danalakshmi, (1934) 21 A I R Mad 316=1934 Cr C 606=148 I C 851 =35 Cr L J 780=57 Mad 682=66 M L J 471.
9. Ponnuswami Udayar v. Emperor, (1929) 16 A I R Mad 115=115 I C 481=30 Cr L J 469 =28 M L W 769.
10. Provatranjan Barat v. Umashankar Chatterji, (1931) 18 A I R Cal 438=1931 Cr C 590=132 I C 241=32 Cr L J 883=58 Cal 727=35 C W N 98.

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GRILLE J.

Munna — Accused — Applicant.

v.

Emperor.

Criminal Revn. No. 401 of 1938, Decided on 30th November 1938.

(a) Criminal Trial—Summary trial—Object of—Warrant case—Accused, after his examination is entitled to re-call prosecution witnesses for cross-examination.

The object of Chap. 22, Criminal P. C., is to shorten the record and the work of the Magistrate in making the record: it is not intended to deprive the accused person of any of the rights under Ch. 20 or 21, Criminal P. C. Hence in a warrant case tried summarily, an accused, after he is examined, is entitled to re-call prosecution witnesses for further cross-examination: *A I R 1927 Mad 78, Foll.; A I R 1932 Oudh 242 and A I R 1926 Bom 226, Dissent.* [P 88 C 2]

(b) Criminal Trial—Procedure—Warrant case—Prosecution including evidence given on commission in other presidencies—Case should not be tried summarily *(Obiter).*

Warrant cases in which the prosecution includes evidence given on commission in other presidencies should not be conducted as a summary trial as the evidence so recorded militates in its very nature against the object of a trial by summary procedure. [P 88 C 1]

J. P. Dwivedi — *for Applicant.*

W. R. Puranik, Advocate-General — *for the Crown.*

Order.—The applicant, in the course of a trial by summary procedure, after he had been examined by the Magistrate in regular form by question and answer recorded, asked that he should be allowed to cross-examine all the prosecution witnesses after the charge. The Magistrate recorded the following order:

In summary cases no final charge being framed the accused has no right to call witnesses for further cross-examination. The application is therefore rejected.

Against this order the accused preferred an application to the Sessions Judge, Nagpur, asking that a reference should be made to this Court to have the trying Magistrate's order set aside. The learned Sessions Judge held that there was a conflict of view among the High Courts in the matter, the High Court of Bombay in A I R 1926 Bom 226[1] and the Oudh Chief Court in 7 Luck 699[2] holding that the accused had no right in a summary trial to recall the prosecution witnesses, and the Madras High Court in 50 Mad 740[3] holding that the accused had such a right. As the Bombay and Oudh decisions were made by a Division Bench the learned Sessions Judge held that they were of greater authority than that of a single Judge in the Madras High Court and declined to make a reference. The result is an application in revision by the accused to this Court.

In my view the application must succeed and with all respect the view of Jackson J. in the Madras case is preferable. The Lucknow and Bombay decisions are based on the proposition that, as in summary trials it is not necessary to frame a charge, the procedure laid down in Sec. 256, Criminal P. C., for warrant cases (and the case now under consideration is a case of theft which must be tried as a warrant case) does not apply. I am unable to see however that the absence of a formal charge necessarily involves the absence of a plea. The plain wording of S. 262 leads, in my opinion, to the conclusion that the accused in this case was entitled to have the prosecution witnesses re-called. I may incidentally say that it should have been obvious that the trial of this case should not have been conducted as a summary trial where the prosecution included evidence given on commission in the Madras Presidency, Bombay and the Punjab. Evidence so recorded militates in its very nature against the object of a trial by summary procedure. S. 262, Criminal P. C., says :

(1) In trials under this Chapter, the procedure prescribed for summons cases, shall be followed in summons cases, and the procedure prescribed for warrant cases shall be followed in warrant cases, except as hereinafter mentioned.

The exceptions of course occur in S. 263 and no where else. One of the exceptions, so far as a warrant case is concerned, is that it is not necessary to frame a formal charge ; but that does not mean that the accused does not have the circumstances of offence complained of explained to him. In a summons case (*vide* S. 242, Criminal P. C.) when the accused appears or is brought before a Magistrate, the particulars of the offence of which he is accused shall be stated to him and he shall be asked, if he has any cause to show why he should not be convicted ; but it shall not be necessary to frame a formal charge. Now Sec. 263, Criminal P. C., also lays down that it is not necessary to frame a formal charge and also that it is not necessary to record the evidence of the witnesses, but it does not state that the particulars of the offence of which the accused person is accused shall be stated to him when he appears before a Magistrate, and thus the distinction between the procedure in a summons case and warrant case as to the time when the particulars of the offence are to be explained to the accused is maintained. In a summons case this is done directly the accused appears ; in a warrant case it is not ; and I find nothing in Ch. 22, Criminal P. C., which authorizes a demand from the accused to show cause why he should not be convicted immediately he is produced. The object of Ch. 22 is to shorten the record and the work of the Magistrate in making the record ; it is not intended to deprive the accused person of any of the rights under Ch. 20 or 21. In a warrant case tried by summary procedure, the accused is entitled to a discharge if the prosecution evidence appearing against him is insufficient to sustain a conviction without any explanation on the part of the accused, just as much as, in a case tried by the full and regular procedure. In a summary trial the accused is entitled, both in summons and warrant cases (in the former only if the Court thinks fit), to have processes to summon his witnesses ; he is equally entitled to have the prosecution witnesses re-called after the explanation, which takes the place of a formal charge, is made and that, in accordance with the procedure prescribed in warrant cases, does not take place until the prosecution has called its witnesses and satisfied the Court that there is sufficient material on which to charge the

1. Umaji Krishnaji v. Emperor, (1926) 13 A I R Bom 226=93 I C 159=27 Cr L J 431=28 Bom L R 95.

2. Gokaran v. Emperor, (1932) 19 A I R Oudh 242=1932 Cr C 405=137 I C 684=33 Cr L J 506=7 Luck 699=9 O W N 334.

3. In re Raju Achari, (1927) 14 A I R Mad 78=99 I C 44=28 Cr L J 12=50 Mad 740=51 M L J 687.

accused, or, in the case of a summary trial, to ask him to show cause why he should not be convicted on the evidence appearing against him. The order of the Magistrate in the present case would result in the accused being deprived of a valuable right which the law by S. 256, Criminal P. C., allows him, and the right cannot be abrogated by the assumption that in a warrant case tried by summary procedure the accused is to account for his actions to show cause why he should not be convicted before any of the evidence against him as heard.

The result is that the order of the Magistrate is set aside and the application made by the accused to have the prosecution witnesses resummoned must be granted.

N.S./R.K. *Order set aside.*

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STONE C. J. AND CLARKE J.

Commissioner of Income-tax, Central and United Provinces, Lucknow — Applicant.

v.

Central India Spinning, Weaving and Manufacturing Co. Ltd. (Empress Mills) — Opposite Party.

Misc. Civil Case No. 118 of 1937, Decided on 18th October 1938.

Income-tax Act (1922, as amended in 1929), S. 58-K (2)—Meaning of the words "his share" explained.

The scheme of the Act is that the employer is to have the advantage of deductions in respect of money which he has contributed to the provident fund together with the increase to the fund which his money has earned prior to the time of the transfer of the fund to the trustees. He is not to have any benefit in respect of employee's contributions or interest thereon up to that time and he is not to have the benefit in respect of any interest that is earned by the fund after transfer. The words "his share" therefore mean the employer's contributions and interest thereon up to the date of transfer. [P 90 C 2]

D. N. Chowdhary — *for Applicant.*

A. V. Khare — *for Opposite Party.*

Order.—This matter comes before the Bench by way of a case stated by the Commissioner of Income-tax on the petition of the assessee. It raises a point of construction of S. 58-K (2), Income-tax Act, and as one takes this view or that will depend whether the assessee is entitled to a deduction of Rs. 46,675-12-4 or not. The facts can be shortly stated.

Section 58-K, together with a number of other Sections, substantially altered the income-tax law relating to deductions that were permissible in respect of transfers of provident funds. Prior to the amending Act of 1929, where there had been established by an employer a provident fund not vested in any trustees but remaining in substance the employer's fund, if the employer constituted a trust fund and transferred that fund to trustees he was in effect transferring money from himself to trustees, and the sum so transferred was permitted to be treated as an expenditure that could be set against income in the year of transfer. After the amendments effected in 1929, of which S. 58-K is one, where there was such a transfer the employer (transferor) was not permitted so to deduct the amount of the fund transferred. In other words, the principle enunciated by the House of Lords in (1926) 10 Tax Cas 155[1] was given statutory effect in India. At the same time, although the employer was not permitted to make that deduction in arriving at his net income whenever out of that fund there was paid to members of the provident fund sums, those sums could with certain deductions be allowed as deductions from the employer's income. The question is: What deductions has one to make? Does one deduct the proportion of the sums so paid out referable to the employers's contributions prior to transfer, or does one deduct the proportion of the sums so paid out referable to the employer's contributions plus interest thereon earned up to the time of transfer? Put into figures, on the facts here present, that can be expressed: Is the correct deduction Rs. 72,534-2-11 or that sum plus Rupees 46,675-12-4? The relevant provisions of the Act are as follows [S. 58-K (2)]:

> When an employee participating in such fund is paid the accumulated balance due to him therefrom, any portion of such balance as represents his share in the amount so transferred to the trustee (without addition of interest, and exclusive of the employee's contributions and interest thereon) shall be deemed to be an expenditure by the employer within the meaning of Cl. (ix) of sub-sec. (2) of Sec. 10, incurred in the year in which the accumulated balance due to the employee is paid.

It is said on behalf of the Commissioner that the words

> any portion of such balance as represents his share in the amount so transferred to the trustee (without addition of interest. . . .) . . .

1. British Insulated and Helsby Cables v. Atherton, (1926) A C 205=95 L J K B 336=134 L T 289=10 Tax Cas 155=42 T L R 187.

mean that you have to deduct in arriving at the employer's "share" the interest that has been earned by the employer's contributions. On the other hand it is said that the true construction is that when you transfer the fund to trustees you transfer a fund composed of two things: the employer's share and the employee's share. After that fund is so transferred the trustees would invest it and the fund would grow by interest on the invested fund so that in time one would have a fund comprising the old fund made up of employer's share and employee's share, interest on that fund, and new contributions to that fund. The new contributions do not enter into the story. The interest on that fund has not to be taken into account, but the employer is entitled to a deduction dependent upon the amount of his share in the old fund and that share comprises two things: his contributions and interest thereon up to the date of transfer.

The order of the Income-tax Officer, Nagpur, dated 27th November 1934, considers this question and it is apparent that the conclusion he arrived at is due to the fact that he considered that the words "without addition of interest" were words of exclusion shutting out not the interest added to the fund but the interest earned by the employer's contributions up to the date of transfer. His order uses, however, language, towards the end, which seems to point the other way, for, after setting out the interpretation now urged by the non-applicants, he observes:

> Such an interpretation is clearly untenable as the words accumulated balance in the provision mean the balance to the credit of an employee and the word interest therefore must refer to the interest on the amount transferred to the trustees. This interpretation is further supported by the fact that such interest is not taxable in the hands of the employee in the year of receipt.

It is the argument of the non-applicants that the words "without interest" mean "without taking into account the interest earned on the fund after it has been transferred to the trustees." We think that that is the proper construction, because, had it been intended to exclude the interest earned on the employer's contributions up to the time of the transfer the language would have been different in many particulars.

The Commissioner of Income-tax, Central and United Provinces, commences his opinion in the following way:

> The accumulated balance due to an employee consists of the following 4 items:
>
> (a) employer's contribution,
> (b) interest on the above,
> (c) employee's contribution,
> (d) interest on the same.

We stop to observe that those four items, in our opinion, correctly represent not the accumulated balance but the transferred fund. To arrive at the accumulated balance one has to add a fifth ingredient, viz. the interest earned on the transferred fund. But apart from that criticizm we think that the Commissioner correctly breaks up the fund into those four parts. Of two of those parts the sub-section speaks when it excludes the employee's contributions and the interest thereon. It seems to be the scheme of the Act that the employer is to have the advantage of deductions in respect of money which he has contributed to the fund together with the increase to the fund which his money has earned prior to the time of the transfer of the fund to the trustees. He is not to have any benefit in respect of employee's contributions or interest thereon up to that time and he is not to have the benefit in respect of any interest that is earned by the fund after transfer. The words "his share" cannot be given the meaning "his contributions" without doing violence to the language of the sub-section. No reason can be given for using "his share" in the earlier part and "employee's contributions" later on in the same sub-section. If the Legislature was thinking in terms of contributions they would have said "his contributions." "His share" in our opinion means the first two of the four items which the Commissioner has mentioned, that is to say, the employer's contributions and interest thereon up to the date of transfer. That means that here this assessee was entitled to have taken into account not only the Rupees 72,534-2-11 but also Rs. 46,675-12-4.

The question raised in the case stated is answered as follows: The interpretation of Sec. 58-K (2) is as above indicated and the petitioners are entitled to allowance in respect of Rs. 46,675-12-4 in the year of account. The Rs. 100 deposited with the Commissioner will now be returned. Costs to be paid to the non-applicants Rs. 60.

N.S./R.K. *Answer accordingly.*

A. I. R. 1939 Nagpur 91

STONE C. J. AND CLARKE J.

Daryaosingh Bhagwansing Chhatri — Plaintiff — Appellant.

v.

Col. Krishnarao Vishnupant Kukde — Defendant—Respondent.

Letters Patent Appeal No. 8 of 1936, Decided on 21st September 1938, from appellate decree of Niyogi J., in S. A. No. 340 of 1934, D/- 12th August 1936.

(a) Landlord and Tenant — Principles of English feudal law are inapplicable to malguzar.

The principles of English feudal law are clearly inapplicable to a Hindu zamindar and the same can be said of a malguzar : *1 Cal 391 (P C), Rel. on.* [P 92 C 2]

(b) Landlord and Tenant — Absolute occupancy tenancy — On death of tenant without heirs tenancy does not revert to landlord but Crown takes it by escheat.

The estate cannot revert as though a term had determined when it is an heritable estate, however commencing whether by contract, gift, or statute, for an estate to a man and his heirs is as large an estate as there can be so far as duration is concerned. The absolute tenancy is of a special kind, heritable and assignable. It springs out of Settlement and Statute. It does not amount to proprietorship, because it is subject to several fetters imposed by statute. On death of occupancy tenant without heirs the tenancy does not revert to landlord but Crown takes it by escheat : *Case law referred.* [P 93 C 1]

(c) Landlord and Tenant — Absolute occupancy tenant dying without heirs and leaving estate burdened with mortgage — Mortgage whether would be extinguished *(Quære).*

Whether, when an absolute occupancy tenant dies without any heirs but leaving the estate burdened with mortgage which the landlord could not avoid, the mortgage is extinguished : *3 N L R 185, Ref.* [P 93 C 1]

(d) C. P. Tenancy Act (11 of 1898), S. 41 — Mortgage of tenancy made without notice to landlord is voidable—Landlord, if in possession, can treat alienation as nullity—Fact that decree for sale was obtained in mortgage suit to which landlord was not party cannot affect landlord's position.

On the true construction, Sec. 41 (7) appears to require notice to be given before a transfer is made to enable the landlord to decide what he will do. If that notice is not given and the transfer, for instance mortgage, is completed, then it is made in contravention of the provisions and is voidable. It is made in contravention for it is made without notice given and the Section requires that the transfer shall not be made until after a month from the date of the notice. The landlord if in possession can treat the alienation as a nullity as against him. If the mortgagee got possession then of course the landlord would have to take some active step to avoid otherwise the mortgagee would get title when the right to sue for possession was lost. The fact that a decree for sale was obtained in a mortgage suit to which the landlord was not a party cannot affect the landlord's position one way or the other. The fact that that decree was obtained against persons who appear to have had no interest also does not affect the matter : *34 Cal 329 (P C), Rel. on.* [P 95 C 1, 2]

D. T. Mangalmurti — *for Appellant.*

R. N. Padhye and D. R. Baxi — *for Respondent.*

Judgment.—This appeal raised an interesting and unusual point of law. It also raises other points of more frequent occurrence. The plaintiff is a mortgagee under a mortgage granted by one Mt. Parvatibai. There has been a good deal of discussion before us as to Mt. Parvatibai's position, but owing to the way in which the case has been put in the lower Courts we think it clear that the matter has proceeded throughout on the basis that Mt. Parvatibai was in the position of an absolute occupancy tenant. We proceed on that basis. Mt. Parvatibai died without heirs. There was however living with her one Mt. Funda and a boy called Bisen. They were proceeded against by the malguzar and also by the mortgagee; the malguzar sued for possession; the mortgagee sued them as legal representatives. They were in fact intermeddlers and therefore legal representatives of the deceased within the meaning given to that term by S. 2 (11), Civil P. C. The plaintiff in each suit was successful with the result that the present defendant got a decree for possession and took possession, the plaintiff got a sale decree, purchased at court auction, sought to obtain possession, was resisted by the defendant, and now sues the defendant for possession. The defence takes several lines : (1) The mortgage was of a tenancy which came to an end with the death of the tenant without heirs ; (2) even if it still exists it is not binding on the defendant because it was effected while the Act of 1898 was in force and S. 41 (2) (7) enables the landlord to avoid the mortgage if made without notice and no notice was given here; (3) even if the mortgage has merged in the decree that does not affect the defendant who was not a party and does not prevent his avoiding now the mortgage as against him ; (4) the decree is of no effect against anybody having been obtained against persons who were not the legal representatives of the deceased.

The first point has raised an interesting discussion about the law of escheat. It is said, by the plaintiff, that an absolute occupancy tenancy, which is an heritable

estate, can never come to an end for a Hindu can never be without heirs because, failing all others the Crown is the heir: Mitakshara II, VII, S. 6. Alternatively, if it be held that the Crown takes not as heir but by escheat then there is an escheat to the Crown, not to the landlord, (1 Cal 391),[1] and even if to the landlord, then the landlord would be burdened with the mortgage: 1 Cal 391.[1] The learned Judge, from whose judgment this appeal is brought, has examined at length the English law relating to escheat and has come to the conclusion that as absolute occupancy tenure is founded in contract, the law of escheat can have no reference to the matter despite suggestions to the contrary in 15 C P L R 89[2] and 15 C P L R 175.[3]

It is notoriously difficult to apply to one jurisdiction legal ideas foreign to that jurisdiction and derived from the history of another jurisdiction. It must however be observed that in the days when the law of escheat was being developed it would hardly have occurred to a lawyer to deny that a tenancy in fee simple arose out of contract any more than it would have occurred to him that a tenancy for a term of years did not arise out of contract. In the days of Glanvill (who was writing in low Latin in England a little after the Mitakshara was being compiled in India) the word "escheat" meant a falling in (excadere) when there were no heirs. In those days it was said "Only God makes heirs" and so the lord was not the heir in strict sense though Glanvill writes "*Ultima hoeredes aliquoram sunt eorum domini*," that is, the last heir of a feeholder is his lord. Before the statute of *Quia Emptores*, in the normal case, the "lord" was not the Crown but a subject who had bargained with another subject to grant to that subject, the tenant for a consideration and in return for certain undertakings, which generally related to services, a tenancy which would last as long as the tenant or his heirs existed. There was no question of such a tenancy reverting to the lord in the way that a limited estate falls in when the limited estate ends. A limited estate only falls in because it has been carved out of a larger estate and ends when it determines. The lawyers of mediæval England did not imagine the possibility of a tenure held by a man and his heirs being regarded as shorter than another estate in fee, simply because the heirs of the latter tenant happened to outlive the heirs of the former. Both estates were deemed equal in length and accordingly if the tenant's heirs failed one was faced with that impossibility—undisposed of property. The question was "To whom does it go?" The answer to that question was "To the lord of the tenant." If that lord were a subject (i. e. if granted by subinfeudation before *Quia Emptores*) then it went to the landlord; if the lord were the king, then it went to the king. In either case it went by escheat. In both cases the Crown or lord took it subject to burdens, e. g. mortgages, properly binding on the estate i. e. binding on the deceased tenant and his heirs. We have put the above propositions in the form of dogmatic statements because we believe them to be well established and to be inapplicable to this case so that our observations are merely obiter.

As their Lordships of the Judicial Committee pointed out in 1 Cal 391,[1] "the principles of English feudal law are clearly inapplicable to a Hindu zemindar," we are of opinion that the same can be said of a malguzar. In that case, as in 8 M I A 500[4] and 11 M I A 619,[5] the "escheat" that was being considered was that which arises in consequence of the fact (which arises whether one looks with the eyes of the writer of the Mitakshara II, VII, Sec. 6, or with modern eyes) that where a man possessed of an absolute estate dies without heirs the property has got to go to someone and the question is: To whom does it go? The Judicial Committee decided in 1 Cal 391[1] that a mookarrari tenancy was an absolute estate and on the death of the tenant without heirs it did not revert to the zamindar (landlord). It followed from that that it did not go to the landlord. Therefore there was no reverter to the lord on failure of heirs to the tenant and that (page 401)

where there is a failure of heirs, the Crown, by the general prerogative, will take the property by escheat, but will take it subject to any trusts or charges affecting it.

1. Sonet Kooer v. Himmut Bahadoor, (1875) 1 Cal 391=3 I A 92 = 25 W R 239=3 Sar 608 (P C).
2. Sheoshankarpuri v. Mt. Rukhma, (1902) 15 C P L R 89.
3. Ganpat v. Bhangi, (1902) 15 C P L R 175.
4. Collector of Masulipatam v. Cavaly Vencata Narrainapah, (1859-61) 8 M I A 500=2 W R P C 61=1 Suther 476=1 Sar 820 (P C).
5. Cavaly Vencata Narrainapah v. The Collector of Masulipatam, (1866-67) 11 M I A 619=10 W R 47=2 Suth 103=2 Sar 338 (P C).

Thus, in the present case there is either a reverter or the Crown takes by escheat. This case is distinguishable from 1 Cal 391,[1] in that no one suggests that an absolute occupancy tenancy is a proprietary estate. But though it is not a proprietary estate it is a heritable estate and it is manifestly undesirable that persons who bona fide lend money on or purchase an heritable estate, giving notice to the landlord and generally complying with all the requirements of the law, should find their security or the subject-matter of their purchase wholly destroyed because (owing, it may be, to a cholera epidemic which kills all the people in a village) the original tenant and all his heirs die off. We accordingly desire to reserve for consideration when it arises what would be the position if the heirs of the tenant at the time of the first settlement fail leaving the estate burdened by a mortgage which the landlord could not avoid. Would the mortgage go because the subject-matter, the tenancy, has determined the landlord getting by reverter? We are not in agreement at any rate, with the reason given by Stanyon A. J. C. in 3 N L R 185[6] for the view that the estate determines and reverts to the landlord. The reason there assigned was that the tenancy was created originally by contract. As above observed many absolute estates originate in contract followed by grant. There is nothing in 1 Cal 391[1] to show that the grant there did not originate in contract. What their Lordships appear to have considered and set aside in that case, on the ground that the estate was an absolute one, was the argument that the tenancy escheated to the lord. We apprehend that the estate cannot revert as though a term had determined when it is an heritable estate, however commencing whether by contract, gift or statute, for an estate to a man and his heirs is as large an estate as there can be so far as duration is concerned. The following position has to be kept in mind :

Suppose at the first settlement the tenant is *A*. Suppose in 1865 *A* sells to *B* with the landlord's consent. Suppose in 1930 *A's* heirs fail but *B's* heirs are still continuing. Is there a reverter? There is if the estate ends with the heirs of *A* for the heirs of *A* have failed. The fact that the landlord consented does not make the estate larger and does not therefore make it last for the heirs of *A* and the heirs of *B*. We do not think it was ever the intention to make such an estate determine with the heirs of *A*. The underlying idea appears to make the original grant (always provided the statutory restrictions have been complied with) equivalent to a grant to *A*, his heirs and assigns. In this connexion it would be necessary to bear in mind the following cases : 30 N L R 25[7] at page 28 which follows, on this point, 28 N L R 93.[8] That was a case relating to an occupancy tenancy and decides that either a mortgage or sub-lease determines with the tenant right. 28 N L R 93[8] in turn follows 10 C P L R 65.[9] In 28 N L R 93[8] after the mortgage with consent the mortgagor-tenant surrendered and so determined the tenancy but it was held that the tenancy must be deemed to continue : *see* 11 C P L R 5[10] and 12 C P L R 158[11] in order to work out the rights. This rule is as old, at least, as Coke upon Littleton. The view expressed by Ismay J. C. in 10 C P L R 65[9] (a case of absolute occupancy tenure) that

> it is perfectly clear that (the absolute occupancy tenant) could mortgage nothing beyond his tenant rights and that those rights are extinguished

(if his heirs fail), is not supported by any authority or argument but carries the weight of the *ipse dixit* of a distinguished Judge. Cases (e.g. 6 C P L R 109[12]), which decide that a mortgage of an occupancy, as distinct from an absolute occupancy, tenancy comes to an end when the tenant dies without heirs are distinguishable. Even in such a case however it is a matter for consideration whether the mortgage does not subsist, if with the consent of the landlord, as being carved out of an estate equivalent to an estate to *A*, his heirs and assigns (subject to certain statutory restrictions) which would in equity subsist as long as the mortgagee or his heirs lasted. A mortgage is only a special kind of alienation. The distinguishing feature between such a tenancy and an absolute occupancy tenancy

6. Wasudeo Gharpure v. Ganu Kunbi, (1907) 3 N L R 185.

7. Shivlal v. Abdul Husain, (1933) 20 A I R Nag 255=148 I C 257=30 N L R 25.

8. Baldeoprasad v. Premnarain, (1932) 19 A I R Nag 107=139 I C 369=28 N L R 93.

9. Vithal Narain v. Ganpat Rao, (1897) 10 C P L R 65.

10. Diwan Maharajsha v. Abheram Gujar, (1898) 11 C P L R 5.

11. Saiyad Noor v. Ramji Patil, (1899) 12 C P L R 158.

12. Joharuddin v. Kesheorao, (1893) 6 C P L R 109.

is that assignability is much more restricted. We observe that so learned and experienced a Judge as B. K. Bose A. J. C., observed in 6 N L R 6[13] that (see page 10),

> the title of the absolute occupancy tenant and that of his landlord rest on the same basis, namely a grant from the Government

and again

> when the final decision to confer proprietary right was arrived at it was declared in the clearest terms that it was a 'free gift,' a 'creation' of the Government. The papers collected in the Settlement Code issued by Sir Richard Temple place the whole question beyond doubt or controversy.

It is urged that if this be so the absolute occupancy tenant is virtually in the same position as the malik makbuza. The answer is simple: he is subject to a variety of differences owing to the scheme of the settlement and the provisions of the various Tenancy Acts. Vis-a-vis the Crown the malguzar is what he always was as regards those lands—the person responsible for getting in the revenue. As Mr. Barway observes in his work on the Tenancy Law (Edn. 2), p. 148 "the absolute occupancy tenure is the creation of the settlement of the sixties." It may be remarked that the person later known as an "absolute occupancy tenant" was originally, in the Settlement and in the village papers (his rights were incorporated in the wajib-ul-arz), referred to as "absolute occupancy ryot." The conception of tenancy and landlord's rights did not enter into the matter. He could not be got rid of whether he did or did not pay rent; he could alienate his holding. It was heritable and assignable but between him and Government, doubtless for the better security of revenue, the malguzar, the quondam farmer of revenue, stood. The absolute occupancy tenant was not a proprietor because his landlord possessed a variety of rights, e. g. the right to pre-empt and the right, in some cases, to interfere with, or avoid, transfers or incumbrances.

The learned Judge attaches weight to the fact that an absolute occupancy tenant, under Sec. 89 of the present Tenancy Act (1920) [*see* S. 35 (1) of the Act of 1898 for the corresponding Section], surrenders his holding to the landlord and not to the Crown. Unquestionably the term "surrender" is a term well known in the English law and suggests the normal relationship of landlord and tenant; so also the definition of "tenant" and "landlord" suggests that the former holds land of the latter. The absolute occupancy tenant is a "tenant": S. 3. But equally clearly the "tenancy" is of a special kind, heritable and assignable. It springs out of Settlement and Statute. It does not amount to proprietorship, because it is subject to several fetters imposed by statute. One such fetter is that it cannot be mortgaged, so as to make the mortgage binding on the landlord, in certain circumstances here present, unless notice in writing has been given to the landlord: I L R (1937) Nag 208.[14] It is urged however that the right to avoid ended six years after the fact of the mortgage was known to the landlord or his predecessor-in-interest: 5 N L R 28.[15] Alternatively it is said that when the mortgage merged in the decree the right to avoid was lost, alternatively that thereafter the landlord's rights were controlled by the Act of 1920 (which was in force when the decree was passed) and not by the Act of 1898 (which was in force when the mortgage was made). Further it is said that S. 41 (7), which gives the right to avoid, only applies to a limited class of cases and the real remedy open to the landlord is to pre-empt. Sec. 41 is a Section that is very hard to construe. In the present Act it takes a very different form and sub-s. (7) finds no place. See Act of 1920, Sec. 6.

The scheme of the Section (we do not refer to sub-s. (1) which is logically unconnected with (2) to (8) and now forms a separate Section, (S. 5 in a very much modified form) so far as mortgages are concerned is to require mortgages above a certain figure, varying with rent, to be notified in writing to the landlord. The transfer is not to be completed until a month after notice given. The purpose of the notice is to enable the landlord to consider whether he will or will not pre-empt. If he decides to pre-empt then (sub-s. 4) he may "claim to purchase the absolute occupancy right at such value as a Revenue Officer, may on application made . . . . . fix." The Revenue Officer values on the basis of a property free from incumbrances. The landlord, if he buys at that price, gets the land free from incumbrance; the mortgagee gets a charge on the purchase money to the extent of the mortgage debt. The tenant is left with no land, but with a

13. Ragho v. Sadoo, (1910) 6 N L R 6=5 I C 428.

14. Ramkaran v. Kanhaiyalal, (1937) 24 A I R Nag 189=170 I C 71=I L R (1937) Nag 208.

15. Lukhmichand v. Ganpat, (1909) 5 N L R 28=1 I C 906.

right to receive the purchase price subject to the mortgage debt. But "any transfer" (which includes sale, gift, or mortgage) "made in contravention of this Section," is voidable by the landlord (sub-sec. 7). If a tenant transfers possession to a third person in contravention of the provisions of the Section, and the landlord ejects the third person the tenant can apply to be reinstated on paying the costs incurred by the landlord. If the tenant does not apply or fails to pay within a limited time "his tenancy shall be deemed to have lapsed" (sub-s. 8). If a tenant-right has been mortgaged and is foreclosed the landlord has the right of pre-emption (S. 41 (5)).

All through the scheme appears to keep the land in the occupation of the tenant or failing him to give the landlord the right to acquire it at a fair market price. If that option is not exercised then the transfer is good. But into this scheme is imported the provision about avoiding. We can only say that on its true construction the Section appears to require notice to be given before a transfer is made to enable the landlord to decide what he will do. If that notice is not given and the transfer is completed then it is made in contravention of the provisions and is voidable. It is made in contravention for it is made without notice given and the Section requires that the transfer shall not be made until after a month from the date of the notice. It is argued that it is one thing to say that a landlord may avoid, another to say that a transfer is void against a landlord. In the first case the landlord must do something. Such a case would seem to fall under Art. 91 and not Art. 120 (though 5 N L R 28,[15] is against this) if the intervention of a Court is necessary. We think that here the landlord if in possession, as here, can treat the alienation as a nullity as against him: *See* 34 Cal 329.[16] If the mortgagee got possession then of course the landlord would have to take some active step to avoid, otherwise the mortgagee would get title when the right to sue for possession was lost. As to the argument that the provisions of the 1920 Act apply we are of the opinion that the fact that a decree for sale was obtained in a mortgage suit to which the landlord was not a party cannot affect the landlord's position one way or the other. The fact that that decree was obtained against persons who appear to have had no interest also does not in our opinion affect the matter. They were claiming to be heirs, they were intermeddlers and any rights the mortgagee had against the estate of the deceased he pursued by suing those intermeddlers to the same extent as if they had been the true representatives of the estate. There is no question of absence of good faith or collusion and we think that the resulting decree is binding on whoever gets the estate of the deceased. *See* A I R 1929 Mad 482[17] and 14 Lah 696[18] where the authorities are collected.

It follows from the above whatever may be the position if there be an escheat (which would be to the Crown) the landlord has the right to treat the mortgage as null as against him. That he has in effect done. He is in possession and can resist ejectment founded on the mortgage rights. It follows that we arrive at the same conclusion as the learned Judge though for different reasons. We agree with the view expressed that if the plaintiff wished to proceed on the basis that the mortgage bound the landlord and if he wanted to eject the landlord (who is in possession following upon a suit for possession) he should have impleaded the landlord in the mortgage suit and thus have given him, in any event, an opportunity to redeem. The appeal is accordingly dismissed with costs.

D.S./R.K. *Appeal dismissed.*

16. Bijoy Gopal v. Krishna Mahishi, (1907) 34 Cal 329=34 I A 87=5 C L J 334=11 C W N 424 (P C).

17. Govappa v. Govappa, (1929) 16 A I R Mad 482 =120 I C 65.

18. Mt. Karam Kaur v. Matwal Chand, (1933) 20 A I R Lah 380=141 I C 580=14 Lah 696= 34 P L R 511.

A. I. R. 1939 Nagpur 95

GRILLE J.

Maroti Bansi Teli — Accused Applicant

v.

Emperor

Criminal Revn. No. 427 of 1938, Decided on 10th December 1938, from order of Addl. Dist. Magistrate, Khamgaon, D/- 1st October 1938.

(a) Police Act (1861), S. 34 — Scope — Offence under S. 34 is cognizable offence.

If the power to arrest without a warrant is limited to any particular class of police officers, that does not prevent the offence being regarded as a cognizable one: *27 Cal 144 and A I R 1926 Bom 195, Rel. on.; 24 Cal 691, Ref.* [P 97 C 1]

The phrase "it shall be lawful for any police officer to take into custody, without a warrant, any person who in his view commits any of such offences" is not to be construed as a conditional power : rather it limits the power to certain police officers, not by any category or class, but by the conditions existing at the time of the commission of the offence, and any police officer witnessing the offence has an unfettered power of arrest. Therefore an offence under S. 34 can be regarded as a cognizable offence. [P 97 C 1]

(b) Criminal P. C. (1898), S. 56—Constable directed by station officer to arrest without warrant — Arrest cannot be effected without authority in writing required by S. 56.

Where a police constable is not acting independently but is acting on definite instructions from his station-house officer and is required by that officer to arrest a certain person without a warrant, the police constable cannot effect the arrest unless he has in his possession an authority in writing as required by S. 56 : *A I R 1936 Rang 119, Foll.* [P 97 C 1]

(c) Criminal Trial — Practice — Accused assaulting police in uniform and declaring that he does not care for latter's authority—Matter should not be dealt with lightly.

To assault a constable in uniform, purporting to act in the execution of his duty with due moderation, and to declare that he (person assaulting) does not care for the authority of the police constable is a matter which should not be treated lightly. [P 97 C 2]

T. J. Kedar — *for Applicant.*

W. R. Puranik, Advocate-General — *for the Crown.*

Order.—The facts found by the Appellate Court agreeing with the trial Court are as follows. In Malkapur town Abdulla, a police constable found one Subhan, a servant of the present applicant Maroti, causing obstruction on the road by unyoking a cart, an offence punishable under Sec. 34, Police Act. Abdulla attempted to take Subhan to the police station, but the latter declined to go and pointed out to Abdulla that he was in plain clothes and was not entitled to arrest him. Abdulla accepted this contention (whether he was right or wrong in so doing is immaterial) and went alone to the police station and reported what had occurred. The station-house officer then directed Abdul Samad, a constable in uniform, to accompany Abdulla and to effect the arrest. They waited for some time for the appearance of Subhan, who came with a laden cart and then Abdul Samad professed to arrest Subhan and explained that he could be released if he furnished bail. Subhan said that his master would furnish bail and called to Maroti, who came and instead of furnishing security abused the police and caught the uniformed constable Abdul Samad by the neck and struck him once or twice on the chest. Maroti has been convicted of offences punishable under Ss. 225 and 353, I. P. C., and has been sentenced to pay a fine of Rs. 100 on each count, making a total of Rs. 200, with four months rigorous' imprisonment in default. It is contended in revision that no offence has been committed as the action of Abdul Samad was illegal, in the first place because the offence complained of was not a cognizable offence and secondly, that as Abdul Samad had been deputed to effect the arrest by the station-house officer, he should, in accordance with S. 56, Criminal P. C., have been furnished with written authority to effect the arrest, an authority which admittedly he had not got. The Magisterial Courts below have held that the offence was a cognizable offence, and the learned Additional District Magistrate held that Sec. 54, Criminal P. C., is not governed by S. 56 and that, although there was no written authority, the inherent right under S. 54 to arrest for a cognizable offence remained, and that Abdul Samad was aware of the commission of the offence by Subhan and that he was justified under Cl. 1 to S. 54 (1), Criminal P. C., in making the arrest.

The learned Additional District Magistrate has held that the offence is a cognizable one, although he has given no reasons for that view. It is contended on behalf of the applicant that the offence was not cognizable as under Sec. 34, Police Act, a police officer can only take a person into his custody without a warrant if any of the offences specified in S. 34 is committed within his view, and reliance is placed on the analogy of the decision in 24 Cal 691.[1] A cognizable offence is defined in S. 4 (f), Criminal P. C., as an offence for which a police officer may, in accordance with the Sch. 2 or under any law for the time being in force, arrest without warrant. We are not concerned here with the Sch. 2, Criminal P. C. In 24 Cal 691[1] it was held that, where any condition is attached to the power to arrest without warrant, the offence is not a cognizable offence, and that where, as under the Opium Act, the right of arresting without a warrant existed only in the event of the accused not furnishing the security required, a police officer could not lawfully arrest without a warrant and the offence is

1. Bahabal Shah v. Tarak Nath, (1897) 24 Cal 691.

non-cognizable. It has been held in 27 Cal 144[2] and 50 Bom 344[3] that if the power to arrest without a warrant is limited to any particular class of police officers, that does not prevent the offence being regarded as a cognizable one; and it appears to me that the power which is given by Sec. 34, Police Act, falls within the latter category rather than the former. I do not consider that the phrase "it shall be lawful for any police officer to take into custody, without a warrant, any person who within his view commits any of such offences" is to be construed as a conditional power: rather it limits the power to certain police officers, not by any category or class, but by the conditions existing at the time of the commission of the offence, and any police officer witnessing the offence has an unfettered power of arrest.

On the second point however, the application is based on firmer ground, and the finding of the learned Additional District Magistrate that in this case the power to arrest existed independently of S. 56, Criminal P. C., cannot be upheld. The matter has been clearly set forth by Mosely J. in 13 Rang 754,[4] and I am in respectful agreement with the reasoning there advanced. Abdul Samad was in no way acting independently; no complaint had been made to him and no credible information had been received by him independently, but he was acting on definite instructions from his station-house officer to whom another constable had complained that he had been unable to effect the arrest. As he was acting under the orders of an officer in chrage of a police station and was required by that officer to arrest without a warrant, he should have been in possession of an order in writing. He was not in possession of such an order, and accordingly he had no authority to arrest Subhan. The argument advanced by the learned Advocate-General that the arrest was virtually one by Abdulla as he was present, cannot be maintained. Abdulla himself had considered that he had no authority to make the arrest, and it appears that his superior officer who was in charge of the station-house concurred in this view. Abdulla made no attempt to participate in the arrest, and he accompanied Abdul Samad for the purpose of pointing out the man to be arrested by the latter.

These facts however do not absolve the applicant. Although he is not guilty under Ss. 225 and 353, I. P. C., he is undoubtedly guilty of an assault and of causing hurt. The question of private defence does not arise as it has been found that no assault was made on him by Abdul Samad and he assaulted the uniformed constable without any provocation from him. Even if the activities of Abdul Samad had been directed against him personally, there would have been no right of private defence, since such right would have been debarred by the provisions of Sec. 99, I. P. C., as Abdul Samad was certainly acting as a public servant in good faith under colour of his office. The applicant was obviously aware that a constable in uniform was a public servant, and it may safely be postulated that he was quite unaware that Abdul Samad had technically no authority to make the arrest. Abdul Samad has stated that the applicant accompanied the assault with the remark that he would not recognise Government work and would not give security. This may be interpreted as meaning that he had no regard for what Government cared to do or ordered in respect of the arrest of his servant, and of the request that he should stand security for him. I consider that the applicant has been dealt with leniently. To assault a constable in uniform, purporting to act in the execution of his duty with due moderation, and to declare that he did not care for the authority of the police constable is not a matter which should be treated lightly. The conviction under Secs. 225 and 353 is altered to one under S. 323, I. P. C., as the blows to the constable must have caused bodily pain. The applicant is fortunate that he was not sentenced to a term of imprisonment. The fine of Rs. 200 will be maintained.

N.S./R.K. *Conviction altered.*

2. Empress v. Deodhar, (1900) 27 Cal 144.
3. Emperor v. Abasbhai, (1926) 13 A I R Bom 195=93 I C 967 = 27 Cr L J 503 = 50 Bom 344=28 Bom L R 272.
4. Mohamed Ismail v. Emperor, (1936) 23 A I R Rang 119=1936 Cr C 194= 161 I C 459=13 Rang 754=37 Cr L J 462.

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STONE C. J. AND CLARKE J.

Jagannath Ramkisan — Appellant.

v.

Jamnavallabh — Respondent.

Letters Patent Appeal No. 7 of 1936, Decided on 26th September 1938, from appellate decree of Vivian Bose J., *Reported in A I R 1936 Nag 218.*

Transfer of Property Act (1882), S. 6 (e) — Right to sue—Profits not due when attached becoming due and actually ascertained after attachment—Attached profits held mere right to sue and could not be transferred.

If what was attached had not accrued due at the date of the attachment, then what is later sold in virtue of that attachment is a mere right to sue. [P 98 C 1]

The profits in a certain village were attached on 12th May 1927. The profits became due on 1st June 1927 and were actually ascertained and paid by the lambardar to the cosharers on 25th January 1928. The profits attached were sold on 8th August 1928:

Held that as the subject-matter of the sale was a mere right to sue it could not be transferred: *Case law discussed.* [P 100 C 1]

K. B. Tare — *for Appellant.*

J. Sen and W. B. Pendharkar — *for Respondent.*

Judgment. — This is an appeal from the judgment of Bose J., and the only grounds of appeal arise out of para. 7 of his judgment which is very short and can be put in extenso:

The last point urged, so far as this matter is concerned, is that even if the right to the profits had not accrued at the date of the attachment, it had certainly accrued at the date of the sale, and at the date of the suit, and therefore the present suit would lie. I do not agree. A Court cannot sell what has not been attached. If what was attached had not accrued due at the date of the attachment, then what is later sold in virtue of that attachment is a mere right to sue. That, as I have pointed out, is not allowed by law. Therefore the entire right has to be decided, with reference to the rights of the plaintiffs or their predecessors, as they existed at the date of the attachment.

Of that the critical sentence is: "A Court cannot sell what has not been attached." According to the argument of counsel for the appellants there is doubt as to the accuracy of this observation bearing in mind the decision in A I R 1926 Mad 211[1] and the case there cited. But we do not stay to consider that point because, in our opinion, there is no question here of a Court selling what has not been attached. There was an attachment and the question really is whether what was attached can be transferred.

Before we come to examine that question we set on one side an interesting argument that has been urged before us founded on the view that profits in a village share dissociated from the share are immovable property while yet unascertained. The argument is founded upon the General Clauses Act, Section 3 (25), which says that for purposes of that or other Acts immovable property means and includes "benefits to arise out of land." Therefore it is said that profits which arise out of land are immovable property and are attachable. In support of this argument Ss. 2 (13) and 60, Civil P. C., are referred to. Therefore, it is said that as these are benefits to arise out of land they cannot be regarded as "a mere right to sue" which cannot be transferred under Sec. 6 (e), T. P. Act. That is an entirely new point which clearly was never made in the Court below because Bose J., who is scrupulously careful to deal with every point that has been raised before him, has not mentioned this at all, and it is a point of such novelty that had it been raised any Judge would have adverted to it if only to set it on one side. We are therefore of the opinion that it is not open to the appellant in this Court in Letters Patent Appeal to take that point.

That leaves the question as to whether this was a property of such a kind that it can be transferred. It is conceded by counsel for the respondents that as in A I R 1926 Nag 396[2] (imperfectly reported in 22 N L R 108), the share-holder's right to recover from the lambardar his (the share-holder's) share of the profits collected by the lambardar is not a mere right to sue: 56 Bom 403.[3] There, there was a lambardar of a certain village and in that village he had as cosharer a malguzar owning a 4 anna share. The lambardar failed to render account. The 4 annas share-holder transferred his share to the plaintiff-appellant by a registered sale deed which comprised amongst other property also the vendor's right to recover his share of profits for the aforesaid years. The plaintiff subsequently sued. The defence taken was that the assignment of the right to recover the profits was void in view of Sec. 6 (e), T. P. Act. On those facts, it is conceded by counsel for the respondent that there you had not a mere right to sue; you had a right to sue linked up with the rights of a share-holder, and therefore the basis of the English rule that a mere right to sue is not transferable disappears. In (1920) 1 K B 399,[4] Warrington L. J., quoting Parker J., at p. 409 observes:

1. Subramania Ayyar v. Krishna Aiyar, (1926) 13 A I R Mad 211=92 I C 833=51 M L J 172.

2. Lachmi Narayan v. Dharamchand, (1926) 13 A I R Nag 396=97 I C 189.

3. Shankarappa v. Khatumbi, (1932) 19 A I R Bom 478=141 I C 488=56 Bom 403=34 Bom L R 991.

4. Ellis v. Torrington, (1920) 1 K B 399=89 L J K B 369=122 L T 361=36 T L R 82.

I have looked at a good many authorities on that point, and I am satisfied that the real reason why equity did not allow the assignment of a bare right of action, whether legal or equitable, was on the ground that it savoured of or was likely to lead to maintenance. . . . . The question was whether the subject-matter of the assignment was, in the view of the Court, property with an incidental remedy for its recovery, or was a bare right to bring an action either at law or in equity.

Again, (this time the learned Judge quotes Stirling L. J.):

An assignment of a mere right of litigation is bad, (1835) 1 Y & C Ex 481,[5] but an assignment of property is valid.

Scrutton L. J. observes at page 410:

On a careful consideration of the authorities, which have been cited to us, I find no principle of law to countenance the objection taken to this assignment. The objection is this: The appellant's lessor has assigned to the present owner of the property the right to sue on the appellant's covenant to keep the premises in repair or pay damages; it is said that this assignment is impossible because it contravenes the law of champerty and maintenance. It is elementary knowledge that for a long time Courts of common law and Courts of equity differed as to how far choses in action, and particularly causes of action, could be assigned. The common law treated debts as personal obligations and assignments of debts merely as assignments of the right to bring an action at law against the debtor and, except in a strictly limited number of cases, did not recognize any such assignments. Courts of equity always took a different view. They treated debts as property, and the necessity of an action at law to reduce the property into possession they regarded merely as an incident which followed on the assignment of the property. I am stating the effect of the judgment of Cozens-Hardy L. J. in (1905) 2 K B 364.[6] But there came a point on which both Courts would have agreed; to assign a bare right of action, a bare power to bring an action was not permitted in either Court; and the reason was as pointed out by Warrington L. J. that both Courts treated such an assignment as offending against the law of maintenance or champerty or both. But early in the development of the law the Courts of equity and perhaps the Courts of common law also took the view that where the right of action was not a bare right, but was incident or subsidiary to a right in property, an assignment of the right of action was permissible, and did not savour of champerty or maintenance.

It is true that in India there is no law against maintenance and the ratio decidendi of the long line of cases which restricts the assignability of bare rights of action in England is non-existent. But the Legislature in S. 6, T. P. Act, has enacted as follows:

Property of any kind may be transferred, except as otherwise provided by this Act, or by any other law for the time being in force. . . . . (e) A mere right to sue cannot be transferred.

A mere right to sue and a bare cause of action are, in our opinion, substantially the same things. Therefore a mere right to proceed against the lambardar for an account of profits and payment of the sum found due by a person who is otherwise uninterested in the estate from which those profits arise would appear to be non-transferable. That is what in fact was sold. It is to be noticed that this action by the purchaser founded on that transfer is against the lambardar for a decree for profits as may be found due on taking accounts. Of course, different considerations would arise had the sale been after the profits had become due and after they had been ascertained. Then this case would have fallen into the class of cases where a debt is assignable, it may be. However that may be here we are dealing with the following facts: The attachment of the profits was on 12th May 1927. The profits became due on 1st June 1927. They were actually ascertained and paid by the lambardar to the co-sharers on 25th January 1928. The profits attached were sold on 8th August 1928, and the suit was brought on 19th July 1929. It will be seen therefore that the sale was after the profits had become due and had been ascertained. The difficulty in the purchaser's way however is due to the fact that what was sold was what was attached. At least that would seem to be the case. But a clarification of that point is not easy owing to the fact that neither the sale certificate nor the warrant of attachment is in the paper book. We have had an informal translation made of them both and the warrant of attachment contains the following list of properties to be attached:

Rs. 300 is due by lambardar Radhaballabh, son of Jagannath, by caste a Brahmin, resident of Barakhadkala, Tahsil Seoni, on account of Samvat 1983. Profits of 7 annas 4 pies share of Mauza Barakhadkala belonging to the judgment-debtor may therefore be attached. It be not redelivered to the judgment-debtor or to anybody else until further orders of the Court.

It is that which, according to the certificate of sale, was sold:

Rs. 300 is due by the lambardar Radhaballabh, son of Jagannath, Brahmin of Barakhadkala, Tahsil Seoni-Malwa, on account of Samvat 1983 (1926-27 A.D.). Profits of 7 annas 4 pies share of Mauza Barakhadkala belonging to the judgment-debtor has therefore been sold by auction.

In 41 Cal 590[7] at p. 598 their Lordships of the Privy Council were considering whe-

5. Prosser v. Edmonds, (1835) 1 Y & C Ex 481 = 160 E R 196=41 R R 322.
6. Fitzroy v. Cave, (1905) 2 K B 364=74 L J K B 829=93 L T 499=54 W R 17=21 T L R 612.
7. Thakur Barmha v. Jiban Ram Marwari, (1913) 41 Cal 590 = 21 I C 936 = 41 I A 38 (P C).

ther a certain property was sold unencumbered or encumbered. It had been sold under a decree. It was described in the schedule to the application for execution and in the proclamation of sale as a 6 anna share subject to an existing mortgage. After the sale had been confirmed, the auction-purchaser applied for a certificate of sale alleging that a mistake had been made in the schedule by the omission of the word "not", and asked to have the purchased property declared to be a 6 anna share not encumbered by a mortgage. The alleged mistake was stated to have been corrected before the sale by an advertisement in the Calcutta Gazette. Their Lordships observed at page 598 :

> . . . this is a very plain case. That which is sold in a judicial sale of this kind can be nothing but the property attached, and that property is conclusively described in and by the Schedule to which the attachment refers. In the present case that property was six annas subject to an existing mortgage. The effect of the certificate of sale granted by the order of the Subordinate Judge is to make the sale that of a property not attached, namely, the six unencumbered annas, a property which could not be sold in such proceedings inasmuch as it was not the property attached.
>
> An attempt was made to treat the matter as a case of misdescription, which could be treated as a mere irregularity. But in this case we have to deal with identity and not description.

Applying that reasoning to this case here what was attached was the profits (which are stated wrongly to be Rs. 300 and which were found to be not Rs. 300 but some Rs. 190). The purchase price was Rs. 80. As we have above observed the subject-matter so described was "a mere right to sue." Therefore it could not be transferred. That makes it, in our opinion, unnecessary to refer to the very numerous cases that have been cited before us on this small but intricate matter in which the following points have been argued :

A sale without previous attachment is not wholly void : 21 All 311[8] at page 313, 18 Cal 188[9] and A I R 1926 Mad 211.[1] A distinction between assignable and non-assignable claims may depend in certain cases on whether the claim is for a liquidated sum, for a sum due *in præsenti* or *in futuro*, but will never include what is a mere claim for an account : 30 All 246,[10] 50 All 507,[11] 3 Rang 235,[12] A I R 1929 Cal 352,[13] 3 Pat 575,[14] 11 Pat 266,[15] 19 N L J 16,[16] 51 Cal 972,[17] 31 N L R 142,[18] 31 N L R 235[19] and 62 Cal 510.[20] Thus, for example, it was held by Niyogi J. in 31 N L R 142[18] that :

> The right to recover damages arising out of a breach of contract is a mere right to sue and is incapable of being assigned under law unless the amount of damages recoverable is in the nature of a debt being a liquidated sum or beneficial interest in any moveable property;

and again in 31 N L R 235[19] :

> A mortgagee's failure to discharge his liability under an agreement to pay part of the consideration of the mortgage to the mortgagor's creditor does not entitle the mortgagor to recover the amount as a debt but gives a right to the mortgagor to claim damages, which is a mere right to sue and is not property capable of assignment or of attachment and sale in execution of a decree against the mortgagor.

If the subject-matter of the sale is, as the Judicial Committee observed in the case above cited, 41 Cal 590[7] at p. 598, of necessity the subject-matter of the attachment where the sale is a judicial sale following upon attachment, the crucial date for determining what is so is the date of the attachment : 51 Cal 548[21] at page 555. The various cases cited in reply by the appellants do not, in our opinion, assist the matter because they were all cases where what was assigned was not a mere right to sue but are of the same order as that dealt with in A I R 1926 Nag 396.[2] Thus, in A I R 1933 Mad 710[22] the claim was by a cosharer against another co-

8. Sheodhyan v. Bholanath, (1899) 21 All 311=1899 A W N 84.
9. Kishory Mohan Roy v. Mahomed Mujaffar Hossein, (1891) 18 Cal 188.
10. Sher Singh v. Sri Ram, (1908) 30 All 246=1908 A W N 101=5 A L J 251.
11. Lachman v. Jarbandhan, (1928) 15 A I R All 193=108 I C 229=50 All 507=26 A L J 253.
12. Maung Thein Zan v. S. A. S. Firm, (1925) 12 A I R Rang 318=89 I C 794=3 Rang 235.
13. Habibulla v. Jogendra Nath, (1929) 16 A I R Cal 352=121 I C 751=33 C W N 282.
14. Jai Narayan Pande v. Kishnu Dutta Misra, (1924) 11 A I R Pat 551=78 I C 705=3 Pat 575=5 P L T 581.
15. Manmatha Nath v. Hedait Ali, (1932) 19 A I R P C 32=135 I C 635=11 Pat 266 = 59 I A 41 (P C).
16. Bapu Sakharam v. Shrinandanlal, (1935) 19 N L J 16=167 I C 843.
17. Khetra Mohan Das v. Biswa Nath, (1924) 11 A I R Cal 1047=82 I C 411=51 Cal 972=40 C L J 79=28 C W N 894.
18. Mt. Powri v. Shiwa, (1935) 22 A I R Nag 2=156 I C 487=31 N L R 142.
19. Mohanlal v. Motilal, (1935) 22 A I R Nag 135=157 I C 587=31 N L R 235.
20. Ghisulal Ganeshilal v. Gambhirmal Pandya, (1935) 62 Cal 510=39 C W N 606.
21. Najimunnessa Bibi v. Nacharuddin Sardar, (1924) 11 A I R Cal 744=83 I C 233=51 Cal 548=39 C L J 418.
22. Vallavaraya v. Ramaswami Naidu, (1933) 20 A I R Mad 710=145 I C 228.

sharer in possession. In 5 Rang 145[23] the assignment was by a beneficiary of his interest in income and it was held that his interest being vested he had an estate which was not a mere right to sue. A I R 1933 Cal 461[24] advances the matter no further because that was a claim for money had and received and no such difficulty as here present arose. A claim for money had and received is very different from the sort of claim that was assigned in this case. It follows therefore in our opinion that the appeal fails and is dismissed with costs.

N.S./R.K. *Appeal dismissed.*

23. Ma Yait v. Mahomed Ebrahim, (1927) 14 A I R Rang 165 = 102 I C 690 = 5 Rang 145.
24. Rajeshwar v. Yadali, (1933) 20 A I R Cal 461 = 145 I C 123=57 C L J 46.

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NIYOGI J.

W. R. Pandit — Appellant.

v.

S. R. Pandit — Respondent.

Misc. Appeal No. 119 of 1937, Decided on 31st October 1938.

*** Civil P. C. (1908), Ss. 144, 151 and 47 — Suit remanded—Meanwhile in application for execution defendant depositing sum which plaintiff withdrew — On remand fresh decree passed for lesser amount than that deposited — Defendant applying for refund of surplus —Refund held could be granted under S. 151 upon principle of S. 144—Right to claim refund held accrued on date of fresh decree and not from order of remand—S. 47 held also applied.**

Restitution in a case not strictly falling within the terms of S. 144 should be made upon the equitable principle underlying S. 144 and in exercise of the inherent power of the Court to prevent abuse of its process : *A I R 1922 P C 269; A I R 1919 Bom 175; A I R 1931 Cal 42 and A I R 1937 Mad 150, Rel. on ; A I R 1929 Cal 814, Not foll.* [P 102 C 1]

A decree passed against a defendant was set aside in appeal preferred by him and the case was remanded for trial on 23rd November 1931. In the meantime, plaintiff applied for execution of the decree and the defendant deposited a certain amount which was subsequently withdrawn by the plaintiff. On remand, the Court passed a decree on 25th March 1933 for an amount lesser than what defendant had deposited. So, on 16th March 1936, defendant applied for refund of so much of the amount as was received by the plaintiff in excess of what was due to him under the fresh decree :

Held that although Sec. 144 did not in terms apply, Court could grant refund upon the principle of S. 144 under its inherent powers. [P 102 C 1]

Held further that defendant's application was in time as the right to claim refund accrued to him only when the fresh decree was passed after remand and not from the order of Appellate Court remanding the suit: *A I R 1923 Nag 101, Rel. on.* [P 102 C 2]

Held also that S. 47 also applied to the facts of the case, as the defendant was claiming only the surplus left after satisfying the decree and as such the matter related to execution, discharge and satisfaction of the decree : *A I R 1930 P C 86; 27 All 485; A I R 1920 Bom 12 and A I R 1923 All 394 (F B), Rel. on.* [P 102 C 2]

P. S. Chiney — *for Appellant.*

R. G. Rau — *for Respondent.*

Judgment. — This is a decree-holder's appeal from an order passed on 20th February 1937 by the Subordinate Judge, First Class, in execution proceedings arising out of Civil Suit No. 8 of 1932.

The appellant filed his suit on 30th April 1928 against the respondents claiming Rs. 5862-6-0 on account of village profits. His claim for Rs. 4713 with interest and costs amounting to Rs. 529-6-3 was decreed on 20th March 1930. On appeal by the respondent to the Judicial Commissioner's Court, that decree was set aside and the suit was remitted to the lower Court for further trial on 23rd November 1931. In the meantime, the appellant applied for execution of his decree and the respondent deposited Rs. 5787-5-3 on 24th July 1930, which amount the appellant withdrew on 28th July 1930. After remand the Court passed a fresh decree on 25th March 1933 for Rs. 4292-15-3 with interest and costs amounting to Rs. 485-12-0, overlooking the payment already made by the respondent. On 16th March 1936, the respondent applied for refund of Rs. 1008-8-0 which according to him the appellant had received in excess of what was due to him under the fresh decree. In the course of the proceedings which followed this application, the decree passed on 25th March 1933 was amended on 2nd December 1936. The appellant contested the application on the grounds that it was not maintainable under S. 144, Civil P. C., that it was barred by time and lastly that he was entitled to interest up to the date of the fresh decree, i. e. 25th March 1933. The lower Court negatived these contentions and held that the respondent's application was maintainable under S. 151, Civil P. C., if not under S. 144, Civil P. C., that the appellant was entitled to charge interest only upto 28th July 1930 on which date he withdrew the amount deposited in Court and further that the respondent was entitled to interest on the balance due to him from 28th July 1930 to 20th February 1937. It thus ordered the appellant to pay back Rs. 433-6-0 with interest Rs. 170-10-0, total Rs. 604.

The correctness of this order is questioned in this appeal. There is divergence of judicial opinion on the question whether S. 144, Civil P. C., applies to cases such as the present. In 57 Cal 226,[1] it was held that it strictly applies to cases where the decree of the Court of first instance is varied or reversed on appeal. A different view was taken in 43 Bom 235[2] and 34 C W N 746[3] (Mukerji J. dissenting). In A I R 1937 Mad 150[4] it was held that restitution in a case not strictly falling within the terms of S. 144, Civil P. C., should be made upon the equitable principle underlying S. 144 and in exercise of the inherent power of the Court to prevent abuse of its process. This view appears to be sound in view of the observations of their Lordships of the Privy Council made in A I R 1922 P C 269[5] which will repay quotation :

> It is the duty of the Court under Sec. 144, Civil P. C., to place the parties in the position which they would have occupied but for such or such part thereof as has been varied or reversed. Nor indeed does this duty or jurisdiction arise merely under the said Section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved. As was said by Cairns L. C. in (1871) L R 3 P C 465[6] at page 475 one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors and when the expression 'act of the Court' is used, it does not mean merely the act of the primary Court, or of an intermediate Court of appeal, but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case.

In the present case the decree of the original Court was revised but the suit was not dismissed ; it was remanded for further trial and decision. Although Sec. 144, Civil P. C., does not in terms apply, its principle must apply to the present case. The Court in that case would be exercising its inherent power under S. 151, Civil P. C., to do that justice between the parties which the circumstances and the necessities of the case demand. The only question is as to the date from which the period of limitation under Art. 182, Limitation Act, should be computed. Regard being had to the fact that the respondent disputed not the appellant's right to recover his share of profits but only the amount that he was entitled to, it would be clear that the appellate order remanding the suit did not give him a right to claim restitution. That right would accrue to him only after a fresh decree was passed after remand on 25th March 1933. The period of limitation must therefore be computed from that date as was done in 18 N L R 200.[7] The view taken by the lower Court was therefore correct and must be upheld. Apart from S. 144 and S. 151, Civil P. C., I am disposed to think that this case is amply covered by S. 47, Civil P. C. That Section has been held to apply to cases where a decree-holder wrongly takes property in execution (*see* 34 C W N 425[8]), or takes it in execution of a decree which is subsequently amended : *see* 27 All 483,[9] *see also* 44 Bom 702[10] and 45 All 369.[11] In the present case the respondent did not claim a refund of the whole amount paid by him but only the surplus that was left after satisfying the decree. That is a matter which relates to execution, discharge and satisfaction of the decree and arises between the parties to the suit. The respondent complained that the appellant had been overpaid and that he had no legal right to appropriate anything in excess of his decree. There can be no doubt that Sec. 47, Civil P. C., governs the case.

The question which survives for consideration is whether interest was rightly granted to the appellant. Whether the case is governed by the equitable principle underlying Sec. 144, Civil P. C., or Sec. 47, Civil P. C., the Court had full power to grant interest in the circumstances of the case. The appellant himself was awarded

1. Ashutosh Nandi v. Kundalkamini Dasi, (1929) 16 A I R Cal 814=125 I C 645=57 Cal 226=33 C W N 908.
2. Shivbai v. Yesoo, (1919) 6 A I R Bom 175=48 I C 130=43 Bom 235=20 Bom L R 925.
3. Ramanath Karmakar v. Asanulla, (1931) 18 A I R Cal 42=130 I C 236=52 C L J 505=34 C W N 746.
4. Kandaswami Mudali v. Annamalai Reddi, (1937) 24 A I R Mad 150=167 I C 258=71 M L J 795.
5. Jai Berham v. Kedar Nath, (1922) 9 A I R P C 269=69 I C 278=2 Pat 10=49 I A 351 (P C).
6. Rodger v. Comptoir d'Escompte de Paris, (1871) L R 3 P C 465=7 Moore P C (N S) 314=40 L J P C 1=24 L T 111=19 W R 449.
7. Sonba v. Parashram, (1923) 10 A I R Nag 101=76 I C 255=18 N L R 200.
8. Julien Marret v. Mahomed Khaleel Shirazi & Sons, (1930) 17 A I R P C 86=122 I C 11=34 C W N 425 (P C).
9. Harnam Chandar v. Muhammad Yar Khan, (1905) 27 All 485=2 ALJ 169=1905 AWN 63.
10. Swamirao v. Valentine, (1920) 7 A I R Bom 12=57 I C 125=44 Bom 702=22 Bom L R 403.
11. Bindeshri Prasad Tiwari v. Badal Singh, (1923) 10 A I R All 394=74 I C 873=45 All 369=21 A L J 228 (F B).

interest on the amount decreed in his favour from the date of the suit to the date of realization, and if he was entitled to claim interest on the amount due to him, in equity it must follow that his opponent also was entitled to claim it. The lower Court was therefore right in awarding interest to the respondent. The result is that the appeal stands dismissed with costs. Counsel's fee rupees nil.

N.S./R.K. *Appeal dismissed.*

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* A. I. R. 1939 Nagpur 103

NIYOGI J.

Bisham Chand Jagannath Sao Lakhura — Appellant.

v.

Kisanlal Sheosing Agarwal — Respondent.

Misc. Appeal No. 202 of 1937, Decided on 28th November 1938.

*** (a) Provincial Insolvency Act (1920), Ss. 27 (2) and 43 (1)— Court has power to extend time to apply for discharge — Lapse of time originally fixed does not automatically bring about annulment of adjudication.**

In view of S. 27 (2), Provincial Insolvency Act, and S. 5 of that Act read with S. 148, Civil P. C., the Insolvency Court has power to extend time under S. 43 (1) and the mere lapse of time originally fixed by the Court without an application for discharge having been made by the insolvent cannot automatically bring about the annulment of the order of adjudication : *A I R 1930 Rang 166, Dissent.; A I R 1928 Pat 338 ; A I R 1924 Cal 777 ; A I R 1930 Mad 389 ; A I R 1933 All 230 and A I R 1929 Nag 11, Rel. on.* [P 104 C 2]

(b) Provincial Insolvency Act (1920), S. 30 — Failure of publication of order of adjudication in Gazette is mere irregularity and does not vitiate validity of order.

Neither the validity of the order of adjudication nor of the proceedings subsequent to it depend on the publication of the notice of the order of adjudication in the local Official Gazette. The object of the publication is to provide conclusive evidence in all legal proceedings of an order of adjudication having been duly made and its date. Want of notice is a mere irregularity and cannot vitiate the proceedings : *19 P R 1900 and A I R 1930 Oudh 53, Rel. on.* [P 104 C 2]

(c) Provincial Insolvency Act (1920), Sec. 41 (1) — Omission to give notice of application for discharge is not irregularity if no creditor had proved his debt.

Omission to give notice of the application for discharge as required by Sec. 41 (1) is no irregularity if none of the creditors had proved his debt. The notice is only required to be given to those creditors who prove their debts : *(1877) 6 Ch D 57, Ref.* [P 105 C 1]

(d) Provincial Insolvency Act (1920), Secs. 28 (2) and 44 (2)—Order of discharge does not terminate insolvency proceedings—After order of discharge, insolvent's property does not become available to his creditors to be proceeded against in ordinary Civil Court.

Until the insolvency proceedings are terminated by a formal order or the order of adjudication is annulled, the property which is vested in the insolvency Court under S. 28 (1), Provincial Insolvency Act, cannot revert to the insolvent. Since the insolvency proceedings do not terminate with the order of discharge of the insolvent, his creditor would be precluded by S. 28 (2) from enforcing his remedy in any other Court or in any other manner, except in the Insolvency Court and in the manner provided in the Insolvency Act. Hence after the order of discharge the insolvent's property cannot become available to his creditors to be proceeded against in the ordinary Civil Court : *A I R 1937 Nag 171, Disting.; A I R 1918 Sind 38 and A I R 1926 Rang 2, Expl. ; A I R 1931 Lah 725 and A I R 1927 Mad 919, Rel. on.* [P 105 C 2]

(e) Provincial Insolvency Act (1920), Secs. 34 (2) and 44 — Order of discharge — Subsequent application for execution by decree-holder who had no notice of insolvency proceedings — To recover his debt decree-holder would have to seek recourse to insolvency Court.

Where after the order of discharge of the insolvent, the decree-holder who had no notice of the insolvency proceedings applies for execution of his decree, he would have to seek recourse to the insolvency Court for recovering his debt even if he had no notice of the insolvency proceedings and was not represented in it : *A I R 1933 All 340, Rel. on.* [P 106 C 1]

V. V. Kelkar — *for Appellant.*

C. B. Parakh — *for Respondent.*

Judgment. — This is a decree-holder's appeal from an order passed on 19th July 1937 in Misc. Appeal No. B-9 of 1936, decided in the Court of the Additional District Judge, Balaghat. A decree was jointly obtained by the appellant and his uncle Ramnath in Civil Suit No. 380 of 1936 against the respondent for Rs. 652-8-0 and costs. The respondent was adjudged an insolvent on 13th July 1933 and he was ordered to apply for his discharge within six months. Ramnath, the appellant's uncle, had received notice of the insolvency proceedings and his name was brought on the schedule of creditors on the basis of the judgment debt. The Insolvency Court had on 5th October 1933 directed the respondent insolvent to deposit fees for the publication of the order of adjudication in the Local Government Gazette, but it was not published as he failed to deposit them. On 17th April 1934 the insolvent applied for extension of time for his discharge and the Insolvency Court granted him retrospective extension up to that date, and the insolvent applied for discharge on the same day whereon the Court passed an order granting him discharge. The Court remarked that as no creditor proved his debt it was unnecessary to give to the creditors notice

of the application for discharge. On 31st January 1935 the appellant applied for execution of his decree in Civil Suit No. 380 of 1936 in the Court in which it was passed. He recovered Rs. 20 from the respondent under a warrant of attachment. The respondent applied to the Court stating that he had been granted an absolute discharge on 17th April 1934 by the Insolvency Court and that the appellant had no right to execute the decree against him and prayed for an order of refund of Rs. 20. His application succeeded in both the Courts below.

On behalf of the appellant several contentions are raised which I shall deal with seriatim. In the first instance, it is urged that the insolvent having failed to apply for his discharge within the period of six months specified in the order of adjudication the Insolvency Court had no jurisdiction to extend the time and further that the adjudication must be deemed to have been annulled. There is no doubt authority for the view presented here. In 8 Rang 187[1] it was held that the provisions of S. 43 (1), Provincial Insolvency Act, are mandatory so that if an insolvent does not apply for his discharge within the period officially specified, the adjudication must necessarily be annulled. The authority of this ruling was however considerably shaken by a contrary view taken by the same Court in 8 Rang 506[2] and by 11 Rang 287[3] where the correctness of that view was doubted. The weight of the authority is decidedly against the view taken in the first named case. In 7 Pat 375[4] it was held that the Insolvency Court had power under Sec. 27 (2), Insolvency Act, and also under Sec. 148, Civil P. C., to extend the period for giving an opportunity to the insolvent to apply for discharge under Sec. 43, Provincial Insolvency Act. It was also held that the order of adjudication does not ipso facto come into operation by the expiry of the period fixed, but has to be determined by the Court which has seisin of the case until it is so determined and has power to extend the time under S. 27 regardless of the period originally fixed. The same view was taken in 51 Cal 337.[5] In 53 Mad 288[6] the question whether a Court has jurisdiction to extend the time originally fixed under S. 27 for an application by the debtor for discharge, after the expiry of that time but before an order of annulment is passed under S. 43, either under S. 5, Insolvency Act, read with S. 148, Civil P. C., or otherwise, was referred to a Full Bench of the Madras High Court and the Full Bench gave its opinion that a Court has jurisdiction to extend the time originally fixed under S. 27, Provincial Insolvency Act, for an application by the debtor for discharge after the expiry of that time but before an order of annulment is passed under S. 43 of the Act. It was held in 55 All 241[7] that the failure of the insolvent to apply for discharge during the period specified by the Court did not automatically lead to the annulment of adjudication. This was also the view of the late Judicial Commissioner's Court, Nagpur, as is clear from the decision reported in A I R 1929 Nag 11.[8] In view of S. 27 (2), Provincial Insolvency Act, and S. 5 of that Act read with Sec. 148, Civil P. C., I have no doubt in my mind that the Insolvency Court has power to extend time under S. 43 (1) and that the mere lapse of time originally fixed by the Court without an application for discharge having been made by the insolvent cannot automatically bring about the annulment of the order of adjudication.

The next contention is that the insolvency proceedings were void and illegal in consequence of the order of adjudication not having been published in the Gazette as required by S. 30 of that Act. In my opinion neither the validity of the order of adjudication nor of the proceedings subsequent to it depend on the publication of the notice of the order of adjudication in the local official Gazette. The object of the publication is to provide conclusive evidence in all legal proceedings of an order of adjudication having been duly made and its date. Want of notice is a mere irregularity and cannot vitiate the proceeding : *see* 19

1. Bindraban Dinanath v. Official Receiver to C. T. A. R. A. Firm, (1930) 17 A I R Rang 166=125 I C 346=8 Rang 187.
2. R. M. K. R. M. Chettyar v. Ko Po Thit, (1931) 18 A I R Rang 27=128 I C 841=8 Rang 506.
3. Jaing Bir Singh v. R. K. Banerjee, (1933) 20 A I R Rang 223=145 I C 320 = 11 Rang 287 (F B).
4. Gopal Ram v. Magni Ram, (1928) 15 A I R Pat 338=107 I C 830=7 Pat 375 = 9 P L T 329 (F B).
5. Abraham v. Sookias, (1924) 11 A I R Cal 777 = 81 I C 584=51 Cal 337.
6. Palani Goundan v. Official Receiver, Coimbatore, (1930) 17 A I R Mad 389 = 124 I C 61= 53 Mad 288=58 M L J 369 (F B).
7. Madho Prasad Vyas v. Madho Prasad, (1933) 20 A I R All 230=145 I C 668=55 All 241= 1933 A L J 117.
8. Ganpat v. Harigir, (1929) 16 A I R Nag 11= 113 I C 357.

P R 1900[9] and A I R 1930 Oudh 53.[10] It is next urged that the order of discharge was invalidated in consequence of the omission to give notice of the application for discharge as required by S. 41 (1), Provincial Insolvency Act. There was no irregularity inasmuch as none of the creditors had proved his debt. The notice is only required to be given to those creditors who prove their debts: *see* (1877) 6 Ch D 57.[11]

It is vigorously argued that although the order of discharge of the insolvent would absolve the insolvent personally from payment of the debt it would not exempt his property from liability to pay the debt. Reference is made to I L R (1937) Nag 380;[12] but that was a case which arose on an application made by the creditor in the Insolvency Court. It is no doubt open to the creditor as pointed by the lower Court to prove his debt in the Insolvency Court but the question is whether it is open to a creditor to enforce his debt in the Court of ordinary civil jurisdiction. The learned counsel for the appellant argues on the authority in 47 I C 771[13] and 3 Rang 492[14] that after the order of discharge the adjudication order is automatically vacated with the result that the insolvent's property becomes available to his creditors to be proceeded against in the ordinary Civil Court. The first mentioned case does not appear to have any bearing on the present issue. In that case the insolvent had not appeared to claim discharge and the Court ordered the proceedings to be struck off the file and sent to the record-room. The creditor filed a suit subsequent to that order and it was held that the insolvency proceedings would be deemed to be pending until the receiver and the insolvent were discharged. If the proceedings would pend until the receiver is discharged and as this event may well in the majority of cases be conceived to happen subsequent to the insolvent's discharge, the inevitable inference is that the insolvency proceedings remain pending despite an order discharging the insolvent. This case therefore lends no assistance to the appellant's argument. On the other hand, in A I R 1931 Lah 725[15] it was pointed out that the discharge of the insolvent does not necessarily end the insolvency proceedings and that the insolvency Court's power is not taken away on account of the insolvent's discharge. In 3 Rang 492[14] the view was indeed taken that when the Court under S. 42, Provincial Insolvency Act, refused to discharge an insolvent, the proceedings must be taken to have been terminated so as to leave the way open to a judgment-creditor to execute his decree in the Civil Court. This case is not directly relevant and does not call for examination, but it may be observed that it was dissented from in 6 Rang 27[16] and a different view was taken in 53 M L J 422.[17] It appears to me clear that until the insolvency proceedings terminated by a formal order or the order of adjudication is annulled, the property which is vested in the Insolvency Court under S. 28 (1), Provincial Insolvency Act, cannot revert to the insolvent. The effect of the discharge order is to enable the bankrupt to contract freely and to acquire property without being hampered by any statutory restrictions. Under Sec. 44 (2), the order of discharge has the effect of releasing the bankrupt from all debts provable in bankruptcy. Now, if the debts are deemed to be discharged and the insolvent is exonerated from any personal liability to pay, and the insolvent's property remains vested in the Insolvency Court, I fail to see how a creditor whose debt is scheduled in the Insolvency Court can claim to recover the debt otherwise than by moving the Insolvency Court. Since the insolvency proceedings do not terminate with the order of discharge of the insolvent, his creditor would be precluded by S. 28 (2) from enforcing his remedy in any other Court or in any other manner, except in the Insolvency Court and in the manner provided in the Insolvency Act.

Next it is urged that there was an irregularity in not bringing the legal representatives of Ramnath on the record of the insolvency proceedings and that this circumstance vitiated the proceedings includ-

9. Gillmore v. Bulaki Mal, (1900) 19 P R 1900.
10. Har Kishore v. Masum Ali Khan, (1930) 17 A I R Oudh 53 = 124 I C 368=5 Luck 479= 6 O W N 1093.
11. Ex parte Rylands ; In re Chesters, (1877) 6 Ch D 57.
12. Suka v. Ramchandra, (1937) 24 A I R Nag 171 =170 I C 161=I L R (1937) Nag 380.
13. Jivanji Mamooji v. Ghulam Hussain, (1918) 5 A I R Sind 88=47 I C 771=12 S L R 20.
14. Maung Po Toke v. Maung Po Gyi, (1926) 13 A I R Rang 2=92 I C 142=3 Rang 492.
15. Ram Chand v. Mohra Shah, (1931) 18 A I R Lah 725=135 I C 511=33 P L R 524.
16. Tan Seik Ke v. C. A. M. C. T. Firm, (1928) 15 A I R Rang 109=109 I C 769=6 Rang 27.
17. Alamelu Ammal v. Venkatarama Aiyar, (1927) 14 A I R Mad 919=105 I C 165=50 Mad 977 =53 M L J 422.

ing the order of discharge. I do not think that the appellant can have any grievance inasmuch as he is not the legal representative but an original creditor along with the deceased Ramnath. Ramnath himself did not care to prove his debt and presumably his legal representatives would be bound by the legal result of that omission. In fine, one point remains to be noticed. It is urged that the appellant had no notice of insolvency proceedings and that consequently the insolvency proceedings should, so far as he was concerned, be deemed to have no effect. It has been already pointed out that his elder brother who was the manager had received notice and that he did not care to prove the debt. The appellant was therefore fully represented in the insolvency proceedings. Assuming that he was not, he would nevertheless have to seek recourse to the Insolvency Court for recovering his debt : *see* A I R 1933 All 340.[18] The result is that the appeal is dismissed with costs. Counsel's fees Rs. 25.

D.S./R.K. *Appeal dismissed.*

18. Pirthi Raj v. Vishnu Das, (1933) 20 A I R All 340=144 I C 888.

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NIYOGI J.

Mt. Bhagwati and another—Appellants.

v.

G. I. P. Railway — Respondent.

Misc. Appeal No. 177 of 1937, Decided on 21st November 1938, from order of Commissioner for Workmen's Compensation and District Judge, Jubbulpore, D/- 14th June 1937.

(a) Workmen's Compensation Act (1923), Sec. 10 (1) —Interpretation — Sec. 10 does not lay down period of limitation regarding proceedings for recovery of compensation before Commissioner.

The word 'institute' in Section 10 (1) does not refer to the proceedings before the Commissioner but only to the workman's claim for compensation against the employer. Hence Sec. 10 cannot be interpreted as laying down a period of limitation in respect of proceedings for the recovery of compensation before the Commissioner : *English law compared; A I R 1934 Cal 460, Rel. on; (1900) A C 366 and 1930 AC 599, Ref.* [P 106 C 2 ;P 107 C 1]

(b) Workmen's Compensation Act (1923), S. 30 (1)—Substantial question of law — Claim disallowed in full—Appeal lies.

Where a claim has been disallowed in full, the claimant is entitled to appeal under S. 30 (1) (a) as it cannot be disputed that the appeal involves a substantial question of law : *A I R 1933 Nag 272, Ref.* [P 107 C 1]

K. C. Jain — *for Appellants.*

S. T. Bhave — *for Respondent.*

Judgment. — This is an appeal under S. 30 (1) (a) of the Workmen's Compensation Act of 1923 from an order of the District Judge, Jubbulpore, passed on 14th June 1937 in the Workmen's Compensation Case No. 1-B of 1937.

Applicants 1 and 2 are respectively mother and widow of one Kunjbehari who was a workman in the workshop of the non-applicant company. He sustained a severe injury in the course of his employment on 31st August 1936 in consequence of which he died on 3rd September 1936. The appellants served a notice on the Agent of the G. I. P. Railway, Bombay, intimating to him Kunjbehari's death and claiming compensation amounting to Rs. 600. This was done on 15th October 1936. The case was under consideration till 12th March 1937 on which date their claim was rejected. On 16th April 1937, the appellants applied to the District Judge under Sec. 22, Workmen's Compensation Act, to recover compensation of Rs. 600. The learned District Judge rejected the application on the ground that it was not made within six months from the date of the workman's death.

In view of the case reported in 61 Cal 508,[1] with which I respectfully agree, this appeal must succeed. It was held there by a Special Bench of three Judges that the word "institute" in S. 10 (1) does not refer to the proceedings before the Commissioner but only to the workman's claim for compensation against the employer. Sec. 10 of the Indian Act is based on S. 14, Workmen's Compensation Act 1897, in England. The phraseology of S. 10 of the Indian Act is substantially the same as that of S. 14 of the English Act. The question which arises here was considered in (1900) A C 366.[2] It was held that the claim for compensation occurring in S. 14 of the English Act means not the initiation of proceedings before the tribunal by which the compensation is to be assessed but a notice of a claim for compensation sent to the workman's employer. In (1930) A C 599[3] at

1. Abdul Karim v. Eastern Bengal Ry., (1934) 21 A I R Cal 460=1934 Cr C 613=149 I C 169 =61 Cal 508=38 C W N 613 (S B).

2. Powell v. Main Colliery Co., (1900) A C 366= 69 L J Q B 758=83 L T 85=49 W R 49=65 J P 100=16 T L R 466.

3. M'Cafferty v. MacAndrews and Co., (1930) A C 599=99 L J P C 145=1930 W C & I Rep 251 =1930 S C L T 521=46 T L R 559=37 Ll L Rep 183.

page 627 Lord Thankerton observed that S. 14 of the English Act did not limit the time within which the proceedings under the Act are to be brought but it laid down two conditions precedent to such proceedings in regard to notice of the accident as soon as practicable and a claim for compensation within six months. The proceedings before the Commissioner are dealt with under Chap. 3, Workmen's Compensation Act, 8 of 1923, whereas the matters relating to workmen's compensation are dealt with in Chap. 2. Sec. 10 which occurs in Chap. 2 cannot be interpreted as laying down a period of limitation in respect of proceedings for the recovery of compensation before the Commissioner. All that S. 10 (1) says is that no proceedings for the recovery of compensation shall be maintainable before a Commissioner unless two conditions are satisfied: (1) that notice of accident has been given, and (2) claim for compensation with respect to such accident has been instituted within six months. If the institution of the claim for compensation is a condition precedent to initiation of proceedings before the Commissioner, it is obvious that the expression 'claim for compensation' cannot mean the proceedings for the recovery of compensation. The proceedings before the Commissioner are in reality for the settlement of any matter which could not be settled by the agreement of the claimant and the employer, as is clear from the wording of S. 19 and S. 22 of the Act. This consideration also indicates that the words 'claim for compensation' used in Sec. 10 do not relate to proceedings before the Commissioner but to the claim lodged with the employer. The learned District Judge fell into an error when he dismissed the application on the ground of limitation.

It is urged for the respondent that the Commissioner's order is not appealable. Reference is made to 16 N L J 63.[4] All that is laid down there is that under S. 30 of the Act no appeal lies unless a substantial question of law involves. Since the claim has been disallowed in full, the claimant is entitled to appeal under S. 30 (1) (a) and it cannot be disputed that the appeal involves a substantial question of law. The result is that the appeal succeeds with costs. The case will now go back to the Commissioner (District Judge, Jubbulpore) for enquiry into merits. Pleader's fees Rs. 15.

N.S./R.K. *Appeal allowed.*

4. Abdul Rahman and Co. v. Narayan Fitter, (1933) 20 A I R Nag 272=1933 Cr C 1004=145 I C 402=16 N L J 63.

A. I. R. 1939 Nagpur 107

VIVIAN BOSE J.

Keshav Yeshwant Koli — Appellant.

v.

Krishna Balaji Mahar and others — Respondents.

Misc. Appeal No. 318 of 1937, Decided on 21st October 1938, from order of Addl. Dist. Judge, Daryapur, D/- 30th August 1937.

(a) Civil P. C. (1908), O. 20, R. 14 — Pre-emption—Suit for — Person exercising right of pre-emption must strictly comply with conditions imposed on him—Plaintiff failing to make payment within period fixed by Court — His right of pre-emption is lost — Mere fact that plaintiff files appeal and executes security bond does not extend time — Nor is there any question of adjustment between parties.

The right of pre-emption is a very special right. It displaces ordinary legal rights and places restrictions upon normal rights of conveyance. Consequently, a person who wishes to avail himself of such a right must exercise the utmost vigilance and take care to see that he complies strictly with all the conditions imposed upon him. O. 20, R. 14 is very precise and means that the decree which is conditionally in plaintiff's favour ceases to be so the moment the due date passes without payment. After that it becomes a decree in the defendant's favour. It is immaterial whether a second order dismissing the suit is necessary or not because under the mandatory provisions of O. 20, R. 14, the words used being "shall be dismissed," the plaintiff's action is dead, the moment the day fixed passes. There is no difference between the expressions "shall be dismissed" and "shall stand dismissed." Both mean that the effect of the order is to dismiss the suit unless the pre-emptive price is paid within the specified time. The mere filing of an appeal does not have the effect of extending time. The stay order is automatically vacated the moment appeal is dismissed. The execution of the security bond and its terms cannot be construed as an adjustment or satisfaction of the decree or any part of it nor can execution of the bond be regarded as tantamount to payment and therefore to satisfaction: *A I R 1938 Cal 353; 18 All 223; A I R 1923 Nag 210; A I R 1925 Lah 380; 31 Mad 28 and A I R 1927 Pat 345, Rel. on.* [P 108 C 2; P 109 C 1; P 110 C 1, 2]

(b) Decree—Variation of.

A decree once passed cannot be varied by consent: *A I R 1937 Cal 222, Rel. on.* [P 109 C 2]

(c) Appeal—Stay order — Stay order passed by Appellate Court is vacated the moment the appeal is dismissed.

A stay order passed by an Appellate Court is automatically vacated the moment the appeal is dismissed and ceases to have effect from that date. [P 109 C 1]

Dr. D. W. Kathalay — *for Appellant.*

K. K. Gandhe — *for Respondents.*

Order. — This appeal arises out of an application under Sec. 144, Civil P. C., for possession of a field and for mesne profits. The decree-holder is the appellant. On 19th April 1934 he obtained a decree for pre-emption. The price fixed was Rupees 200. This was paid into Court less a sum of Rs. 40-10-0 awarded him for costs, and possession was delivered on 4th May 1934. The judgment-debtor appealed from that decree and on 29th October 1934 the lower Appellate Court allowed the appeal and increased the price of pre-emption by Rs. 100. It granted three months' time for payment and this period expired on 11th January 1935. In addition to this Rs. 100, another item of Rs. 83-14-0 was also included and so the total increased amount payable on the date fixed was Rs. 183-14-0. The decree-holder did not deposit this further sum in Court as he contemplated an appeal to the High Court. Therefore, on 3rd November 1934, the judgment-debtor applied for restoration of the field to his possession on the ground that the decree-holder had no right to retain possession till he had paid the pre-emptive price in full. Soon after, the decree-holder filed his appeal to the High Court and there obtained an order for stay of execution on 20th December 1934.

The question in this appeal is whether, and if so, how far, this order has the effect of extending the time fixed for payment in the decree of 29th October 1934. It will be observed that the order for stay does not extend the time fixed by the decree and that it has nothing to do with the decree except incidentally. It merely stays the proceedings arising out of the application for restoration to possession, that is to say, the restitution proceedings. It does not stay execution of the decree as such. In pursuance of this application for stay, the decree-holder furnished security on 11th January 1935, the last day fixed for payment under the decree, and executed a surety bond on the same date. A translation of this bond has been supplied by the learned counsel for the appellant-decree-holder and has been accepted by the other side. It is in these terms:

> I have therefore stood security and executed this security bond to the effect that if the decision in the appeal filed by the plaintiff is against him, I would pay the amount of Rs. 183-10-0 as settled by the Court with interest as stated above. I would pay whatever amount would be found due at the time when the Court would order me to pay the amount.

The executant of the bond is one Shrawan son of Ananda Koshti. It is contended that this bond, coupled with the order of the first Court, has the effect of extending time. It is urged that it contemplates the fixing of a fresh date for payment, and the learned counsel for the appellant-decree-holder argues that since this date has not yet been fixed the time for payment has not yet accrued. Therefore the payment which he made on 12th November 1936 was well within time.

But before dealing with this, it is necessary to state that the appeal to the High Court was dismissed on 11th September 1936 and that the price fixed under the decree which was confirmed was paid, as stated above, on 12th November 1936. Both the lower Courts hold that the price was not paid within the time fixed and so have ordered restoration of possession to the judgment-debtor in accordance with his application. The decree-holder appeals. The right of pre-emption is a very special right. It displaces ordinary legal rights and places restrictions upon normal rights of conveyance. Consequently, a person who wishes to avail himself of such a right must exercise the utmost vigilance and take care to see that he complies strictly with all the conditions imposed on him. O. 20, Rule 14, Civil P. C., is very precise. It states clearly that in cases of pre-emption the Court "shall specify a day on or before which the purchase money shall be so paid" and it then continues that "if the purchase money and the costs (if any) are not so paid, the suit shall be dismissed with costs." This means that the decree which is conditionally in the plaintiff's favour ceases to be so the moment the due date passes without payment. After that it becomes a decree in the defendant's favour. It is immaterial whether a second order dismissing the suit is necessary or not because under the mandatory provisions of O. 20, R. 14, the words used being "shall be dismissed," the plaintiff's action is dead the moment the day fixed passes. I agree with Lort-Williams J. in I L R (1938) 2 Cal 14[1] at p. 20 that there is no difference between the expressions "shall be dismissed" and "shall stand dismissed." As he says:

> Both mean that the effect of the order is to dismiss the suit unless something be done within a specified time.

1. Gulraj Shroff v. Kaniram Sureka, (1938) 25 A I R Cal 353=178 I C 734=I L R (1938) 2 Cal 14=42 C W N 457.

The something in this case is payment of the pre-emptive price. 18 All 223[2] at page 226 which was a suit for pre-emption, and which was decided by three Judges, is to the same effect. This decision also holds that the mere filing of an appeal does not have the effect of extending time. The Judicial Commissioner's Court at Nagpur takes the same view. In 19 N L R 8[3] Prideaux A. J. C. held that S. 148, Civil P. C., does not apply to a pre-emption decree and so a Court has no power to extend time under that Section once the period fixed for payment has expired. The Lahore High Court takes the same view in 6 Lah 316.[4] The Madras and Patna High Courts also agree on more general grounds. Their cases were not of pre-emption but both agree that an appellate decree which merely confirms the decree appealed from does not have the effect of extending the time fixed under the decree of the lower Court. These decisions are to be found in 31 Mad 28[5] and 7 Pat 76.[6] There cannot therefore be much doubt about the correctness of the decision under appeal on general principles.

But, it is argued, the application for stay and the proceedings which followed make all the difference. I find it impossible to agree. I have already pointed out that the application for stay did not apply directly to the decree under appeal. The prayer was to stay collateral proceedings for restitution. It is true that this also meant that the decree-holder was not bound to pay the amount into Court till the decision of the appeal and that therefore it had the indirect effect of enlarging time in that sense. But that carried the matter no further than the date of the appellate decision. A stay order is automatically vacated the moment the appeal is dismissed and therefore it ceases to have effect from that date. Consequently, the protection afforded by the stay order in this case, which did not alter the time fixed by the decree or in any way profess to touch or alter the decree but merely provided a *locus penitentiae* by reason of its own weight which enured only so long as it was itself in being, came to an end the moment the order itself ceased to function.

That is so on general principles. The force of the order spends itself the moment the appeal is dismissed unless the Court otherwise directs. O. 41, R. 5 states that:

> An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order. . . . .

All that the Appellate Court ordered here was that: "Execution will be stayed if the appellant furnishes security for the decretal amount."

It did not fix any period for the duration of the stay and consequently the usual term, namely the duration of the appeal, was meant. If any doubt existed it was removed by the order which the lower Court made consequent on this order of the Additional Judicial Commissioner. It states that:

> According to the stay order he (the decree-holder) should furnish security for the balance . . from to-day till the decision of the second appeal.

It was then urged that even if all these contentions failed it was nevertheless open to the parties to adjust the decree by mutual agreement and A I R 1938 Rang 202[7] and A I R 1937 Cal 222[8] were relied on. It was contended that the security bond contained the following clause

> I would pay whatever amount would be found due at the time when the Court would order me to pay the amount;

and that the judgment-debtor accepted this. Consequently, it was argued that he had agreed to an enlargement of time till a fresh date was fixed by the Court. I have no doubt that a decree may be adjusted or satisfied by the making of an agreement between the judgment-debtor and the decree-holder but I agree with Ameer Ali J. in the Calcutta case cited above that

> a decree once passed is immutable subject of course to review or to any subsequent order or decree which my be passed on appeal and subject only . . . . . to one specific provision, O. 21, Rule 11 (2).

The decree once passed cannot be varied by consent. There is, in my opinion, no question of adjustment here. Adjustment means satisfaction wholly or in part. The execution of the security bond was in no sense a satisfaction of the decree. It was only a fulfilment of the conditions on which

2. Jaggar Nath v. Jokhu Tewari, (1896) 18 All 223=1896 A W N 43.
3. Ambadas v. Laxman, (1923) 10 A I R Nag 210 =71 I C 401=19 N L R 8.
4. Sukram Das v. Nazar Muhammad, (1925) 12 A I R Lah 880=89 I C 163=6 Lah 316=26 P L R 183.
5. Ramaswami Kone v. Sundara Kone, (1908) 31 Mad 28=17 M L J 495=3 M L T 26.
6. Panchu Sahu v. Muhammad Yakub, (1927) 14 A I R Pat 845=104 I C 730=7 Pat 76=8 P L T 597.
7. Arunachallam Chettyar v. V. M. R. P. Firm, (1938) 25 A I R Rang 202=175 I C 498=1938 R L R 385 (F B).
8. Surput Singh v. Maharaj Bahadur Singh, (1937) 24 A I R Cal 222=172 I C 282=42 C W N 519.

alone stay had been granted. The order of the Court was, as explained above, that the proceedings were to be stayed during the pendency of the appeal. The parties to that order could not vary it by consent even if the execution of this bond and its acceptance can be construed to mean that. The Court alone could do so. But I am clear that the judgment-debtor consented to no such variation. The stay order was not passed with his consent. On the contrary, it was imposed upon him by the Court without even hearing him. He submitted to it, it is true, but by no stretch of imagination can that be construed as consent to an agreement to which he was a party. Once the order was passed and submitted to, all that the judgment-debtor had to do was to state whether the security offered was adequate. He had not to look to anything else, and it is important to note that all that the judgment-debtor stated was that "the security is accepted," not that he accepted the variation of the Court's order which the surety (not even the decree-holder) by unilateral action attempted to insert in his bond.

It is important to note that the security bond is executed not by the decree-holder but by the surety. Therefore such agreement as is contained there is an agreement between the surety and the judgment-debtor and not between the decree-holder and the judgment-debtor. Consequently, by no stretch of reasoning can this bond and its terms be construed as an adjustment or satisfaction of the decree or any part of it. Of course, if the judgment-debtor had attempted to enforce that bond it would have been valueless until a fresh date had been fixed by the Court, but the judgment-debtor did not care about that. His real security was the property. It was that what he wanted and not the money. If the decree-holder did not choose to pay the money nothing would have pleased the judgment-debtor better and the last thing he would have wanted would have been the enforcement of this bond. In the circumstances it would be a travesty of the real facts to construe this as an adjustment and consequent satisfaction of the decree by consent. It was then argued that the execution of this bond had the same effect as payment of the money and that if the decree-holder had been expected to pay the money as well within the three months allowed by the decree then under appeal he would in reality have been paying twice over. I have already pointed out that the effect of the order was to enlarge the time for payment till the decision of the appeal. Therefore the decree-holder was neither expected to, nor compelled to, pay until that date. Also, in no case can the execution of the security bond be regarded as tantamount to payment and therefore to satisfaction. The difference is this, and it a very real difference. When the money is paid into Court and held in deposit there, the other side becomes entitled to it the moment the appeal is dismissed. But when there is merely a security bond he gets nothing on that date. He has, on the contrary, to institute proceedings to enforce his bond. Therefore in no sense can the execution of the bond be looked upon as tantamount to payment. The order of the lower Courts is right and the appeal is dismissed with costs. Counsel's fee Rs. 12.

R.M./R.K. *Appeal dismissed.*

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NIYOGI J.

Baliram Pamaji and others — Appellants.

v.

Uttam Chand Motilal Agarwal — Respondent.

Misc. Appeal No. 166 of 1937, Decided on 8th December 1938, from order of First Addl. Dist. Judge, Akola, D/- 15th January 1937.

(a) Berar Land Revenue Code (1928), S. 112 (2)—Dismissal of suit under Sec. 112 (2) is decree and hence appealable.

The dismissal of the suit under S. 112 (2), must be regarded as a decree within the meaning of that term as defined in S. 2 (2). Civil P. C., and under S. 96, Civil P. C., the plaintiff is entitled to file an appeal. [P 111 C 2]

(b) Second Appeal — Exercise of discretion by trial Court and Appellate Court — High Court can see which discretion is proper.

The discretion given to the trying Court is not one to be exercised arbitrarily but with due regard to the facts of the case and general principles of justice. High Court in second appeal has power to see which of the two Courts exercised discretion properly in accordance with the judicial principles. [P 112 C 1]

(c) Berar Land Revenue Code (1928), S. 112(1)—Expression "first hearing"—Meaning explained.

The expression "first hearing" of a suit in S. 112 (1) means the hearing at which the Court examines the pleadings of the parties with a view to understand their contention and to frame issues: *A I R 1926 Mad 347 ; A I R 1919 Cal 70 and 12 C W N 312, Rel. on.* [P 112 C 2]

(d) Berar Land Revenue Code (1928), S. 112 (2)—Granting of time means granting it after lapse of first hearing.

The granting of time by the Court contemplated in sub-s. (2) of S. 112 must be interpreted in the sense of granting time after the lapse of first hearing and not before it. [P 112 C 2]

T. L. Sheode and M. B. Mahajan — *for Appellants.*

A. L. Halwe — *for Respondent.*

Order. — This is a defendants' appeal from an order passed in Miscellaneous Appeal No. 92 of 1935 on 15th January 1937 by the First Additional District Judge, Akola. The respondent, Uttamchand, instituted his suit on 2nd April 1935 by presenting his plaint. On 10th April 1935, the plaint was admitted and ordered to be registered. Summonses to defendants for settlement of issues were also ordered and the plaintiff was called upon to file certified copies of the Record of Rights relating to fields in dispute within a fortnight. The suit was taken up on 2nd July 1935 not for the purpose of hearing parties but to see whether the summonses were served on the defendants or not. On that date the plaintiff not having produced the certified copies of the Record of Rights parchas he was asked to file them on or before 3rd September 1935. On that date all the defendants except defendant 38 were served and fresh summons was ordered to be served on him. Defendants 36 and 37 were minors but as the plaintiff did not apply for appointment of guardian ad litem for them he was asked to file one. On that day also the Court did not look into the case. The plaintiff failed to produce certified copies of the parchas but applied through his agent for extension of time to enable him to obtain the copies. An affidavit verifying the material allegations made in that application to account for the inability of the plaintiff to carry out the Court's order was also filed with that application. The Court however dismissed the plaintiff's suit in so far as it was directed against certain fields under Sec. 112 (2), Berar Land Revenue Code, 1928. The plaintiff preferred an appeal in the Court of the First Additional District Judge, Akola, and that Court reversed the trial Court's order dismissing the suit and this appeal is directed against that order.

It is urged in the first instance that the original Court's order dismissing the suit under Sec. 112 (2), Berar Land Revenue Code, had not the force of a decree so as to entitle the respondent in this Court to appeal from it. In other words, it is said that the lower Appellate Court had no jurisdiction to entertain the appeal. The material words of sub-s. (2) of S. 112, Berar Land Revenue Code, 1928, are these, "and if such certified copy is not so produced the suit or application shall be dismissed." Construing the words in their ordinary and natural sense there must be no doubt that the dismissal of the suit means the termination of the suit so far as that Court is concerned. That sub-section no doubt says further,

> but the dismissal thereof shall not of its own force preclude the presentation of a fresh plaint in respect of the same cause of action.

But that is a different matter. The question is whether the dismissal of a suit under S. 112 (2) does not amount to a decree. Sub-s. (4) of Sec. 112 defines the word "suit" as a suit to which the provisions of the Code of Civil Procedure apply. Now, if the suit is a suit of this nature it must logically follow that the dismissal of the suit must be deemed to be a decree within the meaning of S. 2 (2), Civil P. C. It may be conceded that there is no adjudication on matters in controversy but it cannot be denied that there is an adjudication on the question whether or not the plaintiff had a sufficient cause for his failure to file the certified copies of the parchas along with his plaint or within the time allowed by the Court. It must therefore be regarded as a decree within the meaning of that term as defined in S. 2 (2), Civil P. C., and under S. 96 of the Code the plaintiff was entitled to file an appeal.

It is urged that inasmuch as sub-s. (2) of S. 112 of the Berar Land Revenue Code permits the presentation of a fresh plaint the order dismissing the suit could not have the force of a decree so as to give the aggrieved party the right to file an appeal therefrom. The contention does not appear to be sound in view of the fact that if the rejection of the plaint is treated as a decree and is made appealable the rejection does not preclude the plaintiff from presenting a fresh claim in respect of the same cause of action : *see* O. 7, R. 13, Civil P. C. The plaintiff in such predicament has been given two remedies. If the statutory period of limitation prescribed for his suit has not expired he may file a fresh plaint; but if the period of limitation has expired the law leaves it open to him to file an appeal. In the result there is no difference between

the dismissal of the suit on the ground of limitation and dismissal of a suit under S. 112 (2) of the Berar Land Revenue Code. In either case the plaintiff's right to prosecute the suit is extinguished. It is but reasonable that the law should confer on him the right of appeal. It is true that there is no express provision in the Berar Land Revenue Code providing for an appeal but there was no need for any such provision in view of the definition of "suit" given in S. 112 (4) of that enactment. The contention must therefore fail.

On the merits of the case it is argued that the lower Appellate Court was wrong in interfering with the discretion exercised by the Court of first instance. The discretion given to the trying Court is not one to be exercised arbitrarily but with due regard to the facts of the case and general principles of justice. If the plaintiff was entitled to appeal and the lower Appellate Court had jurisdiction to hear the appeal, it is futile to say that the lower Appellate Court should not have dissented from the view taken by the Court of first instance. On this view the discretion exercised by the lower Appellate Court is of a superior Court and is not open to question here. The argument would in effect be suicidal to the appellants themselves. This Court in second appeal has also power to see which of the two Courts exercised discretion properly in accordance with the judicial principles. After having heard the parties I feel no doubt that the lower Appellate Court was right. The affidavit filed by the plaintiff on 3rd September 1935 contained an allegation that an application for certified copies had been made on 10th August 1935. If that was so, it would be a good ground for giving him some more time to file them.

It is however urged that it was imperative on the plaintiff to file the certified copies within the time fixed by the Court and that the Court had no option but to dismiss the suit. I cannot endorse this contention. Sub-s. (1) of S. 112 of the Berar Land Revenue Code directs that a certified copy should be filed on or before the date of the first hearing. Now the expression "first hearing" of a suit does not mean the day on which the Court goes into the pleadings in order to understand the contention of the parties. O. 10, R. 1 says that at the first hearing of the suit the Court should ascertain from the plaintiff's pleader whether he admits or denies such allegations of facts as are made in the plaint or written statement. O. 13, R. 1 says that the parties or their pleaders shall produce, at the first hearing of the suit, all documentary evidence of every description. Terms of these provisions of the Civil Procedure Code manifestly suggest that the first hearing is the hearing at which the Court examines the pleadings of the parties with a view to understand their contention and to frame issues. This is also clear from the terms of R. 1 of O. 15, Civil P. C. The view that I take is fortified by a number of judicial decisions of which I may mention A I R 1926 Mad 347,[1] 50 I C 296[2] and 12 C W N 312.[3]

On 3rd September 1935 the original Court was not looking into the case to examine their contentions with a view to formulate the issues and it could not therefore be regarded as the first hearing. If the law allows the plaintiff to file certified copies at any time before the first hearing that right could not be taken away or impaired by any act of the Court. In fact on that day the case was not ripe for hearing inasmuch as one of the defendants was not served and no guardian ad litem was appointed for other two defendants. The granting of time by the Court contemplated in sub-s. (2) of S. 112 of the Berar Land Revenue Code must be interpreted in the sense of granting time after the lapse of first hearing and not before it. The plaintiff had thus time enough under sub-s. (1) of S. 112 to file certified copies. The appellants' contention that he should have filed certified copies before the date appointed for the return of process is unsound for the reason that it has reference not to the word "plaintiff" or "suit" but to the words "applicant" and "application." In case of suits there is no date fixed for return of process but a date fixed under O. 5, Rr. 1 and 5 for settlement of issues and the process issued in the present suit itself was in this form. The appeal is dismissed with costs. Counsel's fees Rs. 15.

D.S./R.K. *Appeal dismissed.*

1. Chidambaram v. Parvathi, (1926) 13 A I R Mad 347=93 I C 16.
2. Taran Mandal v. Raj Chandra Mandal, (1919) 6 A I R Cal 70=50 I C 296.
3. Talewar Singh v. Bhagwan Das, (1908) 12 C W N 312=8 C L J 147.

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STONE C. J. AND CLARKE J.

Mt. Tapibai w/o Mulchand, and another — *Plaintiffs* — Appellants.

v.

Shankar Lal Sobharam — Respondent.

Second Appeal No. 585 of 1935, Decided on 18th October 1938, from appellate decree of District Judge, Nimar, D/- 3rd September 1935.

Limitation Act (1908), Art. 85—Mutual, open and current account—Nature explained.

Mutual accounts are such as consist of reciprocity of dealings between the parties and do not embrace those having items on one side only, though made up of debts and credits. The absence of a shifting balance is not fatal to the conception of mutuality. The phrase "reciprocal demands" in Art. 85 does not import that either party has made an actual demand in fact. But the dealings must be of such a nature that they might lead to reciprocal demands. Once a mutual, open and current account is started and there are reciprocal demands that account continues to be mutual so long as the account remains open and current. If the account is closed then that account is finished and turned into a settled account. Also if the account ceases to be current then from that moment any other account between the parties would have to depend for its nature on its own qualities and not on the qualities of the old account. The fact that after a certain date the account was one sided cannot turn mutual, open and current account into a non-mutual open and current account. The mutuality results from the reciprocal claims which can spring out of the transactions which once made the account mutual : *Case law discussed.* [P 114 C 2; P 115 C 1; P 117 C 1, 2]

M. B. Kinkhede, R. N. Padhye and A. R. Kulkarni — *for Appellants.*

M. R. Bobde and J. Sen — *for Respondent.*

Judgment. — This appeal raises inter alia a question under Article 65, Limitation Act. The term "mutual," in relation to accounts, is found in at least four different collocations : (1) The mutual accounts of merchants and traders, (2) the mutual accounts which gave jurisdiction to the Chancery Division before the Judicature Act, (3) the mutual dealings which give certain rights under the Bankruptcy law (*see* the English Bankruptcy Act, 1914, S. 31), (4) the mutual, open and current account referred to in Art. 85, Limitation Act. The first kind of mutual account was made a special case in the Statute of Limitations as the Lord Chancellor (the Earl of Hardwicke) observed in 28 E R 255[1] at page 256 :

> . . . it was to prevent dividing the account between merchants, where it was a running account, when perhaps part might have begun long before and the account never settled, and perhaps there might have been dealings and transactions within the time of the statute.

This provision of the Statute of Limitations was brought into India in a modified form and was operative here long after it had been repealed in England. In origin it was clearly the law merchant as it applied only to merchants and traders, i. e., merchants to whom the *Lex Mercatoria* applied. In India however it was applied to a much wider class. It is found, in its Indian form, in Sec. 8 of Act 14 of 1859 which relates to

> suits for balances of accounts current between merchants and traders who have had mutual dealings.

That Section was considered by the Privy Council in 1 I A 346[2] at pp. 357-360 and was applied to a case where *A*, *B*, *C* (holders of forest permits) received advances from *X*, *Y*, *Z* (merchants) and to assure the sum due (Rs. 44,000) and any future advances, *A*, *B*, *C* appointed *X*, *Y*, *Z* their sole agents with right to receive timber and realize, charge commission and brokerage and account. Cl. 9 of the basic contract provided inter alia that

> upon an adjustment of accounts . . . . *A*, *B*, *C* agree to pay . . . . such balances as may be found due.

Their Lordships observed (page 359) :

> They are of opinion that the account was one continuous account between principal and agent, with debits and credits on each side of it, and that the contract was to pay the balance of that account when it should be struck : and that the case therefore falls within S. 8 of Act 14 of 1859, there being several items which bring the mutual dealings down to March or May 1868.

The suit was commenced on 28th February 1871. It was held the statute was no bar. There the agreement was dated May 1867 and the Rs. 44,000 had already been advanced. The entries since the close of 1867 were (with one exception) entries of payments which *X*, *Y*, *Z* were bound to make without recourse to *A*, *B*, *C*. The Recorder of Rangoon (*see* at p. 353) accordingly held that they did not keep the account open as against the defendants. The one exception was Rs. 7658 nett proceeds of sale of timber sold on 17th February 1868 more than 3 years before the suit. That entry was made in March 1868. The Privy Council however reversed that judgment.

1. Welford v. Liddel, (1751) 2 Ves Sen 400 = 28 E R 255.

2. Watson v. Aga Mahedee Sherazee, (1873-74) 1 I A 346=3 Sar 384 (P C).

Examples of cases relating to Class(2) which have often been relied on in Indian decisions are (1854) 52 E R 225[3] at p. 227 and (1852) 68 E R 596,[4] the former case following the latter. If these cases are compared with the Privy Council decision above cited it will be seen that the kind of account which falls within the first and the second class need not be the same. What the Courts were there considering was whether the account was of such a nature as made it proper to take the account on the chancery instead of on the Common law side, a kind of dispute that does not now arise owing to the provisions of the Judicature Act. The question turned on whether rights of set-off (that is equitable, not necessarily legal, set-off) were involved. Class (3) has a very wide application and is of great importance especially in the law of banking. It is considered by Mr. Hart in his work on Banking (Edn. 4) at p. 305. It is based on set-off as, indeed, are Classes (1) and (2), but the set-off here allowed is wider than in case (2) and probably equal to that in case (1): *see* (1895) 2 Q B 618.[5] Class (4) brings us to the main point in issue. We have merely mentioned the above because it is desirable to bear in mind that all cases concerned with "mutual dealing" or "mutual accounts" are not necessarily safe guides when considering what constitutes Class (4).

Article 85 provides as follows:

For the balance due on a mutual, open and current account where there have been reciprocal demands between the parties.	Three years.	The close of the year in which the last item admitted or proved is entered in the account, such year to be computed as in the account.

What amounts to a settled account has been considered by the Privy Council in 56 All 376[6] where a number of Indian cases were disapproved. That case is concerned with Art. 64 but the reasoning makes the case applicable not only to the question what constitutes a settled account but also to this question. There, Lord Wright observes at p. 388:

. . . . . there can in law be a settlement of account as between banker and customer . . . . . but in such cases the dealings are purely financial on each side and consist of money credits and debits, in the course of which one side may never be able to sue the other . . . . . because he is always in debt to the other, though, if sued for the whole debt, he could avail himself of payments he has made in partial reduction of the debt on running account, though merely by way of set-off or counter-claim.

Again, quoting Baron Alderson, at page 386:

Here the striking of a balance between the parties is evidence of an agreement that the items of the defendant's account should be set off against the earlier items of the plaintiffs, leaving the case unaffected either by the statute of limitations or the set-off.

Lord Wright adds:

This rule does not depend on the character or the origin of the debits or credits on either side as, for instance, whether on the one side the consideration for the items is work and labour and on the other, goods supplied . . . . . (page 387). Nor can it be material, as it seems, in determining whether there can be an account stated, whether the balance of indebtedness is throughout, as it must be at the end, in favour of one side. Equally it seems irrelevant whether the debt in favour of the final creditor was created at the outset by one large payment or consisted of several sums . . . . . nor can it matter, in this connexion, whether the only payments made on the other side were simply payments in reduction of such indebtedness or were payments made in respect of other dealings.

It is true that we find a difference when we come to mutual accounts attracting Art. 85. It is not enough to have *A* indebted to *B*, with the result that *B's* books show debits against *A*, and to have *A* paying off part with the result that *B's* books show credits in favour of *A*. That creates a right of set-off, for, were *A* sued for the whole, he could, by way of defence, set off his payments. But such an account, even if it could be treated as mutual (and there are many decisions to the contrary) would not involve the conception of reciprocal demands. But though there are no reciprocal demands there can be disputes as to the amount owing and if *A* says to *B* "I agree that I owe X rupees," and if *B* says to *A*, "I agree you do not owe more than X rupees," each is fixing himself with a liability that supports the settled account. That agreement founds a new cause of action and from that moment *B* can sue *A* for X rupees and Art. 64 begins to operate. That, as we understand it, is what 56 All 376[6] decides. But granted that an account is once a mutual, open and current account and that there can be reciprocal demands when does it cease to be mutual? We consider, despite Mookerjee J.'s observations in

3. Padwick v. Hurst, (1854) 23 L J Ch 657=18 Jur 763=18 Beav 575=52 E R 225.
4. Phillips v. Phillips, (1852) 9 Hare 471 = 68 E R 596.
5. Palmer v. Day and sons, (1895) 2 Q B 618=64 L J Q B 807=15 R 523=44 W R 14=2 Manson 386.
6. Bishun Chand v. Girdhari Lal, (1934) 21 A I R P C 147=150 I C 6=56 All 376=61 I A 273 (P C).

6 C L J 158[7] at p. 161 that it so continues so long as the account remains open and current. Any other conclusion would provide a trap for the creditor. He would not know when to sue. He would be unable to decide when the quality of mutuality had ceased to exist. On the other hand if the account is closed then that account is finished and turned into a settled account or as the case may be. Also if the account ceases to be current, clearly from that moment, any other account between the parties would have to depend for its nature on its own qualities not on the qualities of the old account. The fact that after a certain date the account was one sided cannot, in our opinion, turn a mutual, open and current account into a non-mutual, open and current account. The mutuality results from the reciprocal claims which can spring out of the transactions which once made the account mutual. To make unilateral dealings, thereafter, alter the nature of the account would be to destroy the very protection which the statute gives, and which the old statute gave to persons who are doing business with one another on terms that each shall recover, not item by item from the other, but only the balance due after counting all items of debit and credit. Here it is said by the respondent that those transactions were not conducted on any such basis. This, it is urged, is not a case where *A* owes *B* items M N O and *B* owes *A* items P Q R leaving a balance S due to *B* from *A*. This is a case where *A* borrows from *B*, where *A* deposits money with *B* on terms that *B* is not to use that money, or any part of it, to pay himself what *A* owes him and accordingly if *B* sued *A*, *A* could not set off that sum. Thus, this is a case like (1902) 1 Ir R 439[8] (though, it is true, that case was not referred to in argument). There is thus, it is urged, no element of mutuality. In order to see whether this is so it is desirable to examine somewhat closely the facts.

We have available only the accounts of the plaintiff's father with whom the defendant, (a pleader's clerk who does, according to his own evidence, petty moneylending), commenced to do business in 1921 or 1922 and continued to do business until 1933. There is some dispute what the nature of the business was. For the plaintiff it is said it consisted of loans by one to the other, alternatively of loans by plaintiff's father to defendant and of deposits by defendant with plaintiff's father who was not only a money-lender but also a banker and payments to defendant's order by plaintiff's father out of such deposits. For the defendant it is said that the plaintiff's father lent money to the defendant, that the defendant deposited money with the plaintiff's father for a specific purpose, viz. to keep and return as required by defendant for the building of defendant's house. It is further urged that this is not a case of an account starting in 1921 or 1922 and continuing mutual, open and current until 1933 because on two occasions the account was settled and it is therefore said even if mutual at one time it ceased to be mutual after it was settled. On the other hand, for the plaintiff-appellant, it is urged that the accounts were never settled so as to be closed; what happened was that on two occasions the parties met and agreed the balance and that balance was then carried forward as an item in the old account there being a balancing credit. According to the defendant's evidence he commenced depositing money with the plaintiff's father, who was a banker, in 1921 when he deposited Rupees 200 "on the understanding that I would take back the money for preparing ornaments for my son's marriage." This presumably belongs to the old account referred to at the beginning of Ex. P-6 though it is difficult to follow this as witness goes on to say: "I withdrew the amount for the said purpose." His son's marriage occurred, according to the defendant, in 1922-23 but we cannot find in Ex. P-6 any withdrawing of Rs. 200 for that or any purpose. The deposit is apparently reflected in sheet 4 (paper-book, page 178). In 1923-24 according to the defendant he borrowed from plaintiff's father Rs. 700 partly to lend to a third party, partly to pay for a field.

In 1923-24 again, according to the defendant, he deposited Rs. 1500 "for repairs of my house." We find this (p. 186, paper-book) as a credit. No special purpose is noted and it appears simply as a credit in the books. The repairs appear to have failed in their object for the house fell down according to the defendant and he then deposited "about Rs. 2000 with him in small sums from time to time for the purpose of erecting a house." There is no dispute that he deposited in 1924 substantial sums. They

7. Ram Pershad v. Harbans Singh, (1907) 6 C L J 158.

8. In re Johnson & Co. Ltd., (1902) 1 Ir R 439.

are reflected in the plaintiff's father's accounts. They are not shown as made for any particular purpose. During the same period there were loans being made by plaintiff's father to defendant, and on 6th February 1925 the two appear to have agreed how the account stood and a so-called "ticket-ruju," which we understand to mean acknowledgment of liability, Ex. P-7, came into existence. The relevant part of that is

Rs. 2500, Rs. 500 found due this day on making all the previous accounts and Rs. 2000 taken in cash to be paid (to *X*), total Rs. 2500, and the amount is admitted to be paid.

The last word "paid" admittedly should be "due." Later a further Rs. 4000 and Rs. 3000 were deposited by defendant on 16th April 1925 and 10th June 1925 respectively and further loans were taken. After the deposit, dated 10th June 1925, the credit entries are not very important, but between 7th November 1925 and 18th October 1926 Rs. 1771 are credited. It is not necessary to trace all these items, two, 125 (1st February 1926) and 125 (7th March 1926) are entered in the books as "In cash through self." Another 625 (5th April 1926) is shown as "paid and credited this day." They would appear all to be credits of payments. On 26th January 1928 a thing now called a "ticket bahi" which we also understand to be an acknowledgment of liability came into existence (Ex. P-7, sheet 2). As a consequence we find a debit entry in the following form :

Rs. 2757 debited on making account of the previous ticket ruju, dated 6th February 1925, as well as of the current account two thousand seven hundred and fifty seven rupees are found due and the amount is admitted to be paid.

Again the last word should be "due." On sheet No. 26 (paper-book 223) we find the following in the accounts for 1926-27 : "Rs. 2500 of khata ruju 6th February 1925. Besides this account of interest on other amounts also is to be taken separately." Then we find a balance of Rs. 2345 due as on 9th October 1927 which grows to Rs. 2757 by 1918. That sum (Rs. 2757) includes Rs. 445-8-0 in respect of interest on the Rs. 2500 and Rs. 11-8-0 interest on the current account. Thus, we have a separation, so far as interest is concerned between the current account and the item of Rs. 2500. Then we have the second settlement above-mentioned resulting in Rs. 2757 being agreed as due on 26th January 1928. Next on p. 232 of the paper-book (sheet No. 31) we find under date 27th September 1929 a balance of Rs. 2777-7-6 made up of Rs. 2757 (ruju) further borrowings of Rs. 20-7-6. There are other items, a new loan and repayments which balance. It is very difficult to find what interest, if any, was charged on either the Rs. 2757 or the further borrowings. The year 1929-30 starts with the balance of Rs. 2777-7-6. There is a credit of Rs. 1515, Rs. 3-8-0 and Rs. 75, in all Rs. 1593-8-0. Of these (*see* p. 238) Rs. 1500 represent a payment made on account of the so-called khata ruju by the defendant in cash, Rs. 15 represent a credit on account of interest but is balanced by an entry of Rs. 18-8-0 (Rs. 15 + 3-8-0) on account of interest on Rs. 1500 "out of which Rs. 3-8-0 are still to be recovered." That Rs. 3-8-0 is then credited. Rs. 75 seems to have been paid in cash. The year 1930-31 starts with a balance of Rupees 2781-7-6 made up of Rs. 2757 + 20 borrowed "two or three years back." Rs. 0-7-6 "borrowed last year" and Rs. 4 "borrowed current year." Interest, though mentioned (*see* p. 240) does not appear to be counted in on 23rd February 1931, Rs. 15 and on 1st March 1931, Rs. 2 are advanced in cash, the first for a criminal case, the second to buy wood. On 22nd March 1931 Rs. 25 and Rs. 15 are advanced for wood and to buy a bicycle (*see* pp. 240-241). The result is Rs. 2838-7-6. This is summarized in the accounts (p. 241) as made up as follows : "Ruju Rs. 2757 + Rs. 20 loan + Rs. 0-7-6 loan and Rs. 4 loan + Rs. 57 loans."

Thus, the year 1931-32 (p. 242) starts with a debit balance of Rs. 2838-7-6 made up as above. There are small repayments in cash, cloth, or a stamp amounting to Rs. 13-4-0 and some small debit items, the plaintiff's father having apparently made some small payments on behalf of defendant, e. g. Rs. 8-11-0 to an astrologer and Rs. 2 for inspecting records. The net result was a debit of Rs. 2860-3-6 and a credit of Rs. 13-4-0 leaving a balance of Rupees 2846-15-6. The last year, 1932-33, starts with a balance of Rs. 2846-15-6. There are two credits of Rs. 2 and Rs. 10 and two debits of As. 4 and Rs. 10. The Rs. 2 credit is "on account of statement and vakalatnama in the case of Dhanalal Bharud" which looks as though defendant did a service for plaintiff's father worth Rs. 2 and was accordingly credited with that sum. The Rs. 10 credit represents a cash repayment. The debits appear to be payments made on defendant's behalf. It will

thus be seen that after the acknowledgment of liability for Rs. 2757 and indeed after the acknowledgment of liability for Rs. 2500 there was no question of reciprocal demands. Before, there were reciprocal demands, for we do not find it established that the deposits were for any specific purpose known to, and binding upon the plaintiff's father. The position up to the time of the first acknowledgment was substantially that of banker and customer, the customer usually, but not always, having overdrawn. Was that position (which we conceive involves a mutual, open and current account) altered by the acknowledgment? The learned Judge in para. 33 (4) of his judgment observes as follows :

(4) But once the balance of a mutual, open and current account has been clearly ascertained and acknowledged then it will be a question of fact and law in a particular case whether on a view of the subsequent transactions and on taking into consideration the intentions of the parties as they stood at the time of the ascertainment, the subsequent account is in fact and law either a continuance of a mutual, open and current account or a fresh mutual, open and current account or nothing but an account showing repayments towards an ascertained balance and further advances.

We take it to be clear, on the authorities there was here at one time a mutual, open and current account. The meaning of that term was examined at length in 6 C L J 158.[7] The following observation therein was relied on in 50 All 645[9] at p. 650 :

Mutual accounts are such as consist of reciprocity of dealings between the parties and do not embrace those having items on one side only, though made up of debits and credits.

That definition is reflected in numerous judgments as is the observation that the absence of a shifting balance is not fatal to the conception of mutuality : *see* 44 P R 1886,[10] 15 Lah 652[11] at page 661, 7 Pat 238,[12] A I R 1923 Nag 108,[13] 47 Bom 128,[14] 58 Cal 649[15] at p. 667, A I R 1924 Pat 107[16] and 23 Bom L R 540.[17] The phrase "reciprocal demands" in Art. 85 does not import that either party has made an actual demand in fact : 58 Cal 649,[15] 47 Bom 128[14] and A I R 1924 Pat 107.[16] But the dealings must be of such a nature that they might lead to reciprocal demands : 58 Cal 649[15] and 29 N L R 20.[18] Viewed as an account stretching from 1921-33 we have no doubt that this was a mutual, open and current account. The mutuality was quite as obvious as in 1 I A 346[2] where the balance was always heavily against one side. The real question is : Are we here concerned with one account or with an account which was closed and replaced by another account which in 1933 was open but which was not mutual? If the ruju or acknowledgment of 1928 or of 1925 closed the old account then the old account ceased to be a mutual, open and current account. The quality of mutuality it could never lose, in our opinion, but it could cease to be open, and it could cease to be current. With the end of either of those characteristics would end the applicability of Art. 85.

In the case reported in 62 I C 898[19] a Bench of the Lahore High Court upheld in a Letters Patent Appeal the judgment of Scott-Smith J. The facts were that defendants borrowed from plaintiffs a sum of money between November 1912 and May 1913 and paid back a substantial amount by October 1913 when (according to the judgment) "the account was closed" and the defendants agreed to pay interest on that balance. Later, there was a payment and interest was debited. Side by side with this, the defendants were dealing with the plaintiffs by sending to them grain for sale on commission. It was urged that the striking of the balance evidenced a new contract. It was held that it did not, 23 All 502[20] being followed. That case decided that a mere acknowledgment signed by a debtor in the account book of his creditor showing a balance standing against the debtor on an account, which is not a mutual account, is neither an account stated nor evidence

9. Dau Dayal v. Piari Lal, (1928) 15 A I R All 236=108 I C 694=50 All 645=26 A L J 353.
10. Sewa Ram v. Mohan Singh, (1886) 44 P R 1886.
11. Punjab United Bank, Ltd. v. Muhammad Hussain, (1934) 21 A I R Lah 358 = 152 I C 626=15 Lah 652=36 P L R 325.
12. Joharmal Muthuradas Firm v. Hira Lal Shewchand Roy, (1928) 15 A I R Pat 221 = 107 I C 588=7 Pat 238.
13. Pandurang v. Kalludas, (1923) 10 A I R Nag 108=65 I C 881.
14. Satappa v. Annappa, (1923) 10 A I R Bom 82 = 76 I C 115 = 47 Bom 128 = 24 Bom L R 1284.
15. Tea Financing Syndicate, Ltd. v. Chandrakamal, (1931) 18 A I R Cal 359=133 I C 801= 58 Cal 649=52 C L J 314=34 C W N 1175.
16. Fyzabad Bank, Ltd. v. Ramdayal, (1924) 11 A I R Pat 107=74 I C 831=4 P L T 571.
17. Madhav Motiram v. Jairam Sakharam, (1921) 8 A I R Bom 451=63 I C 950=23 Bom L R 540.
18. Goculdas v. Radhakishan, (1933) 20 A I R Nag 50=142 I C 123=29 N L R 20.
19. Ratan Chand-Jawala Das v. Asa Singh-Bogha Singh, (1922) 9 A I R Lah 188=62 I C 898.
20. Ganga Prasad v. Ram Dayal, (1901) 23 All 502=1901 A W N 150.

of a new contract which can be the basis of a suit. This case, 23 All 502,[20] was not cited by counsel for the appellant although 62 I C 898[19] was. Naturally 23 All 502,[20] cannot now be relied upon having been overruled by the Privy Council in 56 All 376.[6] With it goes 62 I C 898[19] and cases of a like nature. In our opinion, it follows that the settlement of account closed the old account and after it a new one started. That new one was not mutual.

It follows therefore that on this branch of the case we arrive at the same conclusion as the learned lower Appellate Judge though for somewhat different reasons. It is next said that S. 19, Limitation Act, can be prayed in aid there being here an acknowledgment in writing. The acknowledgment in question is Ex. P-3, a "list of reliance" a local term meaning a list filed in a suit of the documents which the party relies on. The suit in question was a maintenance suit against this defendant by a widow. He was trying to avoid or reduce liability by showing poverty. The list of reliance contains the following papers:

(i) All the account books and "ticket-ruju" from 1909 to this day (24th July 1930) of the shop (of plaintiff's father) relating to the defendant's money-lending.

It is sought to read that with Ex. P-2 which is his written statement in that suit and which says he is indebted. The date of that is 16th July 1930. This plaint is dated 24th July 1933. The acknowledgment must be within three years. It is to be noticed that not only is the entry in the list of reliance not an acknowledgment (which as the Privy Council pointed out in 2 N L R 130[21] is not in this collocation a word of art) but it is not addressed to anybody juristically connected with the plaintiff. The plaintiff there unlike the plaintiff in 2 N L R 130[21] had nothing to do with the plaintiff here. Secondly the above excerpt can only be turned into an acknowledgment by linking it to something else. That something else is out of time. We are clearly of opinion that S. 19, Limitation Act, has no application.

A third point was raised founded on some remarks in 42 Cal 1043[22] in turn purporting to be based on (1856) 18 C B 325[23] at p. 333. That case seems to have been much misunderstood : *see* Rustomji's Law of Limition, Edn. 5, page 719, where what was decided in that case is misstated. What was decided related to costs. The conclusion was arrived at as a matter of convenience (*see* at p. 335) and depended on the construction of the phrase "cause of action" in a particular English statute relating to County Court jurisdiction. We do not consider there is anything in this point. In the result the appeal fails and is dismissed with costs.

N.S./R.K. *Appeal dismissed.*

21. Maniram v. Seth Rupchand, (1906) 2 N L R 130=33 I A 165=33 Cal 1047 (P C).
22. Kedar Nath v. Dinabandhu Saha, (1916) 3 A I R Cal 580=42 Cal 1043=19 C W N 724.
23. Bonsey v. Wordsworth, (1856) 18 C B 325=25 L J C P 205=2 Jur (N S) 494 = 4 W R 566= 107 R R 318.

A. I. R. 1939 Nagpur 118

NIYOGI J.

Ganga Prasad Laljee and another — Judgment-debtors—Appellants.

v.

Ratan Chand Moorat Lal and another — Decree-holders — Respondents.

Misc. Appeal No. 219 of 1937, Decided on 28th November 1938, from order of Addl. Dist. Judge, Jubbulpore, D/- 29th January 1937.

(a) Charge — Creation of — Requirement — Decree providing payment by instalment and directing defendant not to alienate property till satisfaction of decree—Decree held created charge on property.

No particular form of words is necessary for the creation of a charge. It is sufficient to indicate the property that is set apart as a security for the payment of the debt. The creditor has in such a case a right to look to the property for satisfaction of his debts but does not acquire any interest in the property as he would in the case of a mortgage : *32 Bom 386 ; A I R 1931 All 62 and A I R 1914 All 187, Rel. on.* [P 119 C 2]

Where a decree provided for the payment of the decretal amount in certain instalments and further directed that the defendant should not alienate certain property belonging to him till the satisfaction of the decree :

Held that the decree created a charge on the defendant's property as the prohibitory order against defendant amounted to an injunction or attachment : *25 Cal 179 (P C) and A I R 1914 P C 129, Rel. on; 35 Cal 837 and A I R 1922 Pat 529, Ref.* [P 119 C 1, 2]

(b) Civil P. C. (1908), Sec. 7 — Small Cause Court has no power to create charge on immovable property.

Small Cause Court has no power to declare a charge on immovable property and if it creates one, then the decree in so far as it seeks to create a charge must be regarded as void and inoperative : *A I R 1937 All 194, Dissent.; A I R 1917 Nag 55 and A I R 1925 Cal 1, Ref.* [P 120 C 1]

W. B. Pendharkar — *for Appellants.*

R. S. Dabir — *for Respondents.*

Judgment.—This is a judgment-debtors' appeal from the order passed by the Additional District Judge, Jubbulpore, on 29th January 1937 in Miscellaneous Appeal No. 5 of 1936. The respondents sued the appellants in the Court of Small Causes, Jubbulpore, to recover Rs. 500. They compromised their dispute whereby the respondents agreed to receive Rs. 400 and costs which were made payable in five instalments on condition that the appellants did not alienate some specified Malik Makbuza fields. In accordance with this agreement the Court passed a decree in these terms :

> Rs. 400 and Rs. 59-6-0 as costs on defendants payable by five annual instalments of Rs. 92 . . . the defendants shall not alienate their Malik Makbuza fields Nos. 648, 649, 650, 671 and 686 of mouza Patan till satisfaction of this decree. In default or on failure to pay any instalment whole sum shall be payable at once.

The decree-holders had the decree transferred to the Court of the Subordinate Judge, Second Class, Jubbulpore, and got the fields attached. The appellants applied to the Debt Conciliation Board for Settlement of their debts including the judgment-debt under consideration. As the respondents did not accept a fair offer of settlement, the Debt Conciliation Board granted a certificate under Sec. 15 (1), Debt Conciliation Act. The appellants thereon applied to the executing Court for suspending the execution of the decree under Sec. 15 (3) of that Act. Both the Courts below concurred in the view that the decree under execution created a charge on the immovable property and that the debt being a secured debt was not covered by S. 15 (3) or the proviso to Sec. 21, Debt Conciliation Act. The main question for determination is whether the decree of the Small Cause Court created a charge on the immovable property. The decree in fact contains a prohibitory order against the defendants. It may be interpreted as an injunction or as an attachment inasmuch as the effect of the attachment is to prevent alienation : *see* 25 Cal 179[1] at page 179 and 42 Cal 72.[2] Under Sec. 7, Civil P. C., the Small Cause Court is precluded from either issuing an injunction or attaching immovable property. It is however a well recognized rule of construction of decrees as of private agreements that every effort should be made to uphold them. From this point of view, it would be indeed necessary to see if the terms used in the decree can reasonably bear the interpretation that they intended to create a charge. No particular form of words is necessary for the creation of a charge. So far as private agreements are concerned, it has been held that if having regard to all the circumstances of the transaction the document shows an intention to make the land a security for payment of the money mentioned therein that is sufficient to create the charge : *see* 32 Bom 386,[3] 52 All 985[4] and 36 All 201.[5] In the last mentioned case the words used in the written agreement of the parties were :

> I will not transfer this property by way of sale, mortgage or gift etc., so long as I do not repay this loan and if I do, the transfer shall be void.

Both the learned Judges who decided the case concurred in holding that the words created a charge, although one of them went further in holding that they created a mortgage. The distinction between a mortgage and a charge is that in a charge there is no transfer of interest in the property but only the creation of a right of payment out of the property specified : *see* 35 Cal 837[6] and 1 Pat 387.[7] For the creation of a charge, it is sufficient to indicate the property that is set apart as a security for the payment of the debt. The creditor has in such a case a right to look to the property for satisfaction of his debts but does not acquire any interest in the property as he would in the case of a mortgage. The decree in question may therefore be well understood as creating a charge on the immovable property.

The next question is whether the Small Cause Court had jurisdiction to create a charge on immovable property. By Sch. 2 (11) appended to the Small Cause Courts Act, the Small Cause Court is precluded from trying a suit to enforce a charge and regard being had to S. 7, Civil P. C., which withholds the power to attach immovable

1. Motilal v. Karrabuldin, (1898) 25 Cal 179=24 I A 170=7 Sar 222=1 C W N 639 (P C).
2. Raghunath Das v. Sundar Das, (1914) 1 A I R P C 129=24 I C 804=42 Cal 72=41 I A 251 (P C).
3. Janardan v. Anant, (1908) 32 Bom 386=10 Bom L R 575.
4. Nathan Lal v. Durga Das, (1931) 18 A I R All 62=130 I C 489=52 All 985=1930 A L J 1267.
5. Jawahir Mall v. Indomati, (1914) 1 A I R All 187=22 I C 973=36 All 201=12 A L J 290.
6. Gobinda Chandra Pal v. Dwarka Nath Pal, (1908) 35 Cal 837 = 7 C L J 492= 12 C W N 849.
7. Shiva Prasad Singh v. Beni Madhab, (1922) 9 A I R Pat 529=70 I C 24=1 Pat 387=4 P L T 6.

property and to issue injunctions or to appoint a receiver of immovable property it could not have contemplated conferring power on that Court to pass a decree creating a charge on immovable property. My attention is invited to I L R (1937) All 418[8] wherein it is held that the Small Cause Court has power to pass a decree charging immovable property. With due respect to the learned Judge, I feel great difficulty in accepting this view regard being had to the considerations already stated above. It may be pertinent to notice here that there were conflicting decisions on the question whether a Provincial Small Cause Court had jurisdiction to order an attachment of immovable property before judgment. In 14 N L R 1,[9] it was held that the Small Cause Court had such jurisdiction. The whole question came to be considered by a Full Bench of the Calcutta High Court in 52 Cal 275[10] and the majority of the learned Judges were of the opinion that a Court of Small Causes had such jurisdiction, but expressed a doubt as to the intention of the Legislature in the matter when the Civil Procedure Code was passed in 1908. To resolve that doubt S. 7 was amended and a new Rule, viz. R. 13, was added to O. 38 by Act 1 of 1926. I am therefore of opinion that the Small Cause Court had no power to declare a charge on immovable property and that therefore the decree in so far as it seeks to create a charge must be regarded as void and inoperative.

It is urged that the agreement creating a charge which was reduced to writing by being incorporated in the decree was inadmissible in evidence for want of registration of the decree. This contention is raised for the first time in this Court and can well be barred as it involves inquiry into facts. It must however fail on the ground that the Court's directions about the charge contained in the decree cannot by themselves be regarded as constituting an agreement between the parties. The directions were based on the admissions made by the parties as an agreement concluded already out of Court. The admissions recorded by the Court and the directions contained in the decree may at best only serve to supply evidence of the antecedent agreement. As the actual agreement is not before the Court, the question of registration does not arise. On the view I have taken of the Small Cause Court decree, it would take effect as a simple money decree and S. 15 (3) and proviso to S. 21, Debt Conciliation Act, will operate to debar the decree-holders' right to proceed in execution. It may be open to the decree-holders to file a separate suit to enforce the charge independently of the decree on the basis of the agreement, but that aspect of the case is not material here. The result is that the appeal succeeds with costs in all the Courts. Counsel's fee Rs. 15.

N.S./R.K. *Appeal allowed.*

8. Brindaban v. Chhotey Lal, (1937) 24 A I R All 194=167 I C 784=I L R (1937) All 418=1937 A L J 93.
9. Kanchedi v. Kanchedi, (1917) 4 A I R Nag 55 =43 I C 123=14 N L R 1.
10. Barada Kanta v. Maijuddi, (1925) 12 A I R Cal 1=82 I C 109=52 Cal 275=40 C L J 199 =28 C W N 1056 (F B).

A. I. R. 1939 Nagpur 120

POLLOCK J.

Laxman Ramchandra Dalal — Appellant.

v.

Wasudeo Vithal Chimote—Respondent.

Second Appeal No. 503 of 1936, Decided on 25th November 1938, from appellate decree of 3rd Addl. District Judge, Amraoti, D/- 30th July 1936.

Pre-emption—Decree for pre-emption directing plaintiff to deposit purchase money within certain time and failing this his suit to stand dismissed—Deposit not made within time fixed —Plaintiff can appeal from decree made against him.

In a suit for pre-emption a decree was passed directing plaintiff to deposit purchase money less costs within certain period and providing that in default of making this deposit, his suit would stand dismissed. The plaintiff never made the deposit required :

Held that in such a case the plaintiff could appeal against the decree made against him : *13 All 376 (F B), Foll. ; 16 All 126 and A I R 1923 All 516, Rel. on ; A I R 1933 All 113, Disting.* [P 121 C 1]

N. T. Mangalmurti — *for Appellant.*

K. V. Brahma — *for Respondent.*

Judgment.—The plaintiff sued for pre-emption on 19th February 1936, and a decree was passed directing him to deposit Rs. 700 less costs within three months ; in default of making this deposit, his suit to stand dismissed with costs. On 18th April 1936, an application for an extension of the time fixed for payment was rejected by the lower Appellate Court. The plaintiff never made the deposit required, and his appeal was dismissed on the ground that it was

not open to him to question the decree passed against him as he had not complied with it. In 13 All 376[1] it was held that in such a case the plaintiff could appeal after the period prescribed in the decree had elapsed without his paying in the pre-emptive price fixed thereby. That case has been followed in 16 All 126[2] and 45 All 456.[3] No case has been cited to me in which the correctness of that view has been challenged. The question whether the original Court or the Appellate Court has power to give an extension of time under Sec. 148, Civil P. C., or under any other provision is a different question. On general principles I can see no reason why in a case of this sort the plaintiff should not appeal against the decree that has been passed against him. If the decree of the first Court is upheld in its entirety, then it may be that his right to pre-empt has gone because he had failed to deposit the pre-emptive price fixed within the required time. But, if the Appellate Court varies the price fixed by the first Court, I do not see why it should not have power to vary also the period allowed for payment. Following the decision in 13 All 376[1] I hold that the appeal lies. The decision in A I R 1933 All 113[4] was on a different point and there was no reference there to the previous Full Bench decision.

The appeal is therefore allowed and the case is remanded to the lower Appellate Court for decision on the merits. Costs will abide the event. Counsel's fee in this Court Rupees 15.

D.S./R.K. *Appeal allowed.*

1. Kodai Singh v. Jaisri Singh, (1891) 13 All 376 (F B).
2. Wazir Khan v. Kale Khan, (1894) 16 All 126 =1894 A W N 3.
3. Girdhari Singh v. Bhupal Singh, (1923) 10 A I R All 516=74 I C 745=45 All 456.
4. Umrao Singh v. Kanwal, (1933) 20 A I R All 113=141 I C 15.

A. I. R. 1939 Nagpur 121

POLLOCK J.

Dhundiraj Madhao Dharaskar — Appellant.

v.

Ganpat Vithal Vichore and another — Respondents.

Second Appeal No. 512 of 1936, Decided on 1st December 1938, from appellate decree of Addl. District Judge, Wardha, D/- 14th August 1936.

(a) Land Acquisition—Acquisition of malik makbuza—Landlord is not entitled to compensation *(Obiter).*

The landlord is entitled to no compensation on account of the acquisition of the malik makbuza land as he is not interested as landlord therein, his commission being merely payment for the trouble of collecting the land revenue: *A I R 1933 Nag 114, Rel. on.* [P 122 C 1]

(b) C. P. Land Revenue Act (2 of 1917), S. 192 (1)—Lambardar's commission for collecting land revenue from malik makbuzas—Lambardar's co-sharers have no right of share.

The lambardar receives one commission on the land revenue assessed on a mahal and another commission on the land revenue assessed on the malik makbuzas, and this commission is given to him not as proprietor of the village but to compensate him for the trouble he has in collecting the money. Neither forms part of the village assets and in neither have the co-sharers any right. [P 122 C 1]

(c) Co-sharers—Village profits—Where it is not necessary for lambardar to send to his co-sharers their share of profits by money order, he is not entitled to money order charges.

If the co-sharers live neither in the village itself nor in the same place as the lambardar who is one of the co-sharers, it is reasonable that the lambardar should send them their share of the profits by money order and that the money order charges should be paid by the cosharers; but where there is no evidence to show that it was necessary to send money by money-order, the lambardar is not entitled to money-order charges. [P 122 C 2]

S. R. Mangrulkar — *for Appellant.*

Judgment.—This appeal arises out of a suit for a share of village profits. The plaintiffs own a four-anna share in the villages of Kandhli and Dalpatpur, of which the defendant is the lambardar. For the four years in suit the defendant admitted the plaintiffs' claim to the extent of Rupees 340-8-1 while the plaintiffs claimed Rs. 1437-1-0. Their claim was decreed to the extent of Rs. 481-11-0 in the first Court and to the extent of Rs. 451-3-0 in the lower Appellate Court. Against that decision the defendant has appealed. The first item in dispute is the defendant's commission for collecting the land revenue from malik makbuzas. The land revenue assessed on the malik makbuzas in these villages is Rs. 126-8-0 and the land revenue payable on this account by the lambardar is Rs. 111. The cosharers contend that they are entitled to a share of this commission of Rs. 15-8-0, amounting to Rs. 62 for the four years in suit. Under S. 123, C. P. Land Revenue Act, all land revenue payable under the Act shall be paid through the sadar-lambardar, lambardar or patel, as the case may be, and in this case it is the lambardar. S. 84 (3) provides that the

Settlement Officer shall declare the assessment of any separately assessed plots of land included in a mahal and allow the proprietor of the mahal to deduct from the land revenue payable through him a drawback not exceeding 20 per cent. thereon to compensate him for his responsibility in respect of such land revenue.

As was pointed out in 29 N L R 31,[1] the landlord is entitled to no compensation on account of the acquisition of the malik makbuza land as he is not interested as landlord therein, his commission being merely payment for the trouble of collecting the land revenue. Under Sec. 188 (1), it is the duty of every lambardar to collect and pay into the Government Treasury so much of the land revenue as may be payable through him, and under S. 192 (1) he receives remuneration fixed by the Deputy Commissioner and recoverable from the proprietors, usually not exceeding 5 per cent. on the land revenue. The lambardar therefore receives one commission on the land revenue assessed on a mahal and another commission on the land revenue assessed on the malik makbuzas, and this commission is given to him not as proprietor of the village but to compensate him for the trouble he has in collecting the money. Neither forms part of the village assets and in neither have the cosharers any right. The plaintiffs' claim must therefore be reduced by Rs. 15-8-0.

The second item in dispute arises out of a surrender of occupancy land from one Mahadeo to the defendant for Rs. 1000. On the same day the defendant granted the occupancy rights in this field to one Jago for Rs. 1100, thereby making a profit of Rs. 100. Mahadeo's sons however put in an application under S. 13, Tenancy Act, and in order to meet this application the defendant induced Jago to surrender the holding for Rs. 1100. Then after advertisement the defendant accepted Rs. 900 for the occupancy rights in this field which was the best offer he could get. There was thus ultimately a loss of Rs. 100. Throughout these proceedings he acted as the agent of the co-sharers, and there is no reason to suppose that he acted in bad faith or improperly in any way. The cosharers are therefore bound by the act and a further sum of Rs. 50 must be deducted from the plaintiff's claim. The next objection is to the writing fee of Rs. 5 included in the plaintiffs' costs in the first Court. No objection was taken to this in the lower appellate Court. The objection must therefore be now overruled. The defendant has been disallowed certain money-order and registration charges. If the cosharers live neither in the village itself nor in the same place as the lambardar, it is reasonable that the lambardar should send them their share of the profits by money order and that the money-order charges should be paid by the cosharers; but here, there is no evidence to show that it was necessary to send money by money-order, and that item must therefore be disallowed.

The last item in dispute is the costs incurred in litigation over the banjar land in the village. The learned Additional District Judge stated that the proprietary body could not be held responsible for loss incurred by him in the litigation without the consent of the proprietary body, but the lambardar had given notice to the cosharers and they raised no objection. Owing however to the lambardar's failure to file the decrees showing what the costs were in the trial Court, it was impossible to say what loss was actually incurred. The decrees have since been filed, but it was for the defendant to make out his case in the trial Court and not to supplement it in this way in appeal. The defendant therefore cannot claim credit for this item. The appeal therefore partially succeeds, and there will be a decree for the plaintiffs for Rs. 385-11-0. The plaintiffs will get costs proportionate to that amount throughout, and the defendant will get costs proportionate to his success throughout.

D.S./R.K. *Appeal partly allowed.*

1. Sadashiv v. Collector, Nagpur, (1933) 20 A I R Nag 114=145 I C 447=29 N L R 31.

A. I. R. 1939 Nagpur 122

STONE C. J. AND VIVIAN BOSE J.

Secretary of State — Appellant.

v.

Mt. Geeta w/o Imam Musalman, and others — Respondents.

Letters Patent Appeal No. 12 of 1937, Decided on 5th January 1939, from order of Niyogi J., *Reported in A. I. R. 1938 Nag. 91.*

(a) Letters Patent (Nagpur) — Letters Patent appeal should be filed within 30 days—Whether time during which Court is closed should be excluded *(Quære).*

It is desirable (so was the warning issued by their Lordships to the legal profession) to file Letters Patent appeals within 30 days. Such appeals may well be held to be out of time if not filed within 30 days. [P 123 C 2]

[In this particular case however their Lordships admitted the appeal, even though out of time, under their discretion to admit for good cause shown.] [P 123 C 2]

***(Quære)*—Whether Court in computing 30 days would be justified in excluding time during which Court is closed.** [P 123 C 2]

(b) Letters Patent (Nagpur), Cl. 10—Decision of High Court Judge disposing of appeal under S. 30, Workmen's Compensation Act, is not judgment—Letters Patent appeal does not lie.

Where an award made by a special tribunal comes to the High Court in appeal under S. 30, Workmen's Compensation Act, and a Judge of the High Court disposes of that matter, the resulting decision is not a judgment within the meaning of Cl. 10 of the Letters Patent. There is only an award made pursuant to the provisions of the Workmen's Compensation Act, and hence Letters Patent appeal does not lie. However, though appeal does not lie under the Letters Patent, the Judge who has to deal with either an appeal or a reference under the Workmen's Compensation Act, might well be justified in any case of difficulty or raising a point of importance, in referring the matter to a Bench : *40 Cal 21 (P C) and 17 C W N 421, Applied; Case law discussed.* [P 128 C 1, 2]

A. V. Khare and W. B. Pendharkar — *for Appellant.*

Y. S. Tambe — *for Respondents.*

Judgment.—To this appeal two preliminary objections are taken : (1) Does a Letters Patent appeal lie? (2) If so, is it barred by time? The latter point is a short one and is taken first. The judgment was delivered on 2nd April 1937. Leave was granted on the same day. Thirty days is allowed in which to appeal. The appeal was filed on 21st June 1937, and quite clearly if S. 4, Limitation Act, applies it was within time because the Court was closed from 12th April until 20th June 1937 so that it was filed on the opening day. It has been argued however on the authority of A I R 1921 Lah 237[1] and A I R 1934 Pat 353[2] that so far as Letters Patent appeals are concerned one is dealing with a procedure which is governed exclusively by the rules made by the High Court under the Letters Patent, that one cannot pray in aid any statutory provisions, and therefore one has to reject these appeals unless filed within 30 days from judgment because no provision is made in the rules excluding the time during which the Court is closed. We do not consider it necessary or desirable in this case to adjudicate on that point because we think that this is a case (even were we rigorously to limit the time for appealing to 30 days even though the Courts were closed) in which we should admit this appeal, though out of time. For this reason we stopped counsel for the appellant on the question of limitation.

We note the change that has been made in the law by S. 29, Limitation Act, and the argument that the rules of the High Court under the Letters Patent are not included in the expression "special or local law," that the Letters Patent constitutes neither a special nor a local law. We think that it is desirable to warn the profession that such appeals may well be held to be out of time if not filed within 30 days in future. We decide this preliminary point in this case under our discretion to admit for good cause shown. We note the fact that the point has never been raised here and that Letters Patent appeals had, at the time when this appeal was filed, only been in existence for 18 months in this Province, the rules were new and there was no past experience to go upon. We reserve for consideration hereafter whether one would be justified in excluding time during which the Court is closed. We issue a warning that it may well be that such time cannot be excluded in Letters Patent appeals. That leaves the more difficult question whether a Letters Patent appeal lies at all in this matter. That in turn turns upon the nature of the adjudication and upon the meaning of the word "judgment" in Cl. 10 of the Letters Patent. The matter arose in the following way : An order was made by the Commissioner under the Workmen's Compensation Act. Sec. 22-A, Workmen's Compensation Act, relates to what is there called an award and what is elsewhere referred to as an order. It is quite plain, looking at the Act as a whole, that, as in England, these disputes are settled in a different way from civil cases and in a way that approximates very closely to, if not exactly the same as an arbitration. The rules of procedure are not those laid down in the Civil Procedure Code which is applicable only as regards certain matters. For example under S. 23 the Commissioner has all the powers of a Civil Court under the Code of Civil Procedure, 1908, for the purpose of taking evidence on oath . . . . and of enforcing the

1. Fatteh Muhammad v. Chothu Ram, (1921) 8 A I R Lah 237=60 I C 787.
2. Mukund v. Niranjan, (1934) 21 A I R Pat 353 =151 I C 107=15 P L T 801.

attendance of witnesses and compelling the production of documents and material objects.

The powers of appeal are provided by S. 30 which provides that from certain orders (of which this is one) an appeal shall lie to the High Court. Nothing is said apart from that as to the right to appeal. No provision is made for example for an appeal from the High Court to the Privy Council. The position is not unlike that which arose under the Land Acquisition Act, before its amendment. In 40 Cal 21[3] it was held that

no appeal lies to His Majesty in Council from a decision of the Chief Court of Lower Burma on a reference to that Court by the Collector of Rangoon, in proceedings under the Land Acquisition Act, on an award made by him as to the value of land acquired.

It was there laid down following a line of cases which established the principle (now well-recognized) that a right of appeal must be given by express enactment and cannot be implied. At p. 27 their Lordships observe:

A special and limited appeal is given by the Land Acquisition Act, from the award of 'the Court' to the High Court. No further right of appeal is given. Nor can any such right be implied. The learned counsel for the appellants relied both on S. 53 and S. 54 of the Act. S. 53 enacts that, "save in so far as they may be inconsistent with anything contained in this Act, the provisions of the Code of Civil Procedure shall apply to all proceedings before the Court under this Act." That enactment applies to an earlier stage in the proceedings, and seems to have nothing to do with an appeal from the High Court. S. 54 is in the following terms:

54. Subject to the provisions of the Code of Civil Procedure applicable to appeals from original decrees, an appeal shall lie to the High Court from the award or from any part of the award of the Court in any proceedings under this Act.

That Section seems to carry the appellants no further. It only applies to proceedings in the course of an appeal to the High Court. Its force is exhausted when the appeal to the High Court is heard. Their Lordships cannot accept the argument or suggestion, that when once the claimant is admitted to the High Court, he has all the rights of an ordinary suitor, including the right to carry an award made in an arbitration as to the value of land taken for public purposes up to this Board as if it were a decree of the High Court made in the course of its ordinary jurisdiction.

That of course has been changed by the amendment of the Land Acquisition Act, but the amendment of that Act leaves the reason why the preliminary objection in that case succeeded untouched. Here we are concerned with an order which is called in one place in the Workmen's Compensation Act an award and which in truth and in fact would appear to be an award as was observed in 42 C W N 516.[4] It is an award made by a special tribunal called a Commissioner or in some places 'the Court' from which tribunal a special and limited right of appeal lies to the High Court. When it comes to the High Court and a Judge of the High Court disposes of that matter, is the resulting decision a judgment within the meaning of Cl. 10 of the Letters Patent?

In 17 C W N 421[5] their Lordships of the Privy Council had under consideration a land acquisition case on appeal from a decision of the Bombay High Court reported in 37 Bom 506.[6] The application was for special leave to appeal. The difficulty in the way was 40 Cal 21[3] referred to in the Calcutta Weekly Notes Reports as 16 C W N 961.[3] The Privy Council immediately took the point that it had already decided in 40 Cal 21[3] that no appeal from a High Court in a land acquisition case lay. Then a discussion between counsel, Sir Erle Richards, and various members of the Privy Council occurred which ran along the following lines: Sir Erle Richards endeavoured to show that the gap in the chain which existed in the Burma case was closed in this Bombay case because the Letters Patent gave a right of appeal. The Letters Patent clause that was there being considered was Cl. 39 of the Bombay Letters Patent. Cl. 39 of the Bombay Letters Patent is similar in terms to Cl. 29 of our Letters Patent. That gives a right of appeal from the High Court to the Privy Council "in any matter not being of criminal jurisdiction, from any final judgment, decree or order." It was said that when the High Court of Burma had disposed of an appeal under the Land Acquisition Act the conclusion was either a final decree or order. Lord Macnaghten observed at p. 424: "I do not think so. It is an award." The argument continued, Lord Moulton at page 425 saying:

If you read the words of the decision in the Rangoon case it is based on its not being a decree in its ordinary jurisdiction but a mere question of an award.

3. Rangoon Botatoung Co. Ltd. v. Collector, Rangoon, (1913) 40 Cal 21=16 I C 188=39 A 197=16 C L J 245=16 C W N 961 (P C).

4. Khulna Electric Supply Corporation Ltd. v. Bahadur Sardar, (1938) 68 C L J 467=42 C W N 516.

5. Special Officer, Salsette Building Sites v. Dosabhai Bezanji Motiwala, (1913) 17 C W N 421=20 I C 763 (P C).

6. Special Officer, Salsette Buildings Sites v. Dosabhai Bezanji, (1913) 37 Bom 506=17 I C 952=14 Bom L R 1194.

Counsel said :

Yes. Your Lordships were dealing there with the Code of Civil Procedure.

Lord Macnaghten : We were only dealing with the Act.

Lord Moulton : I can understand your point that because an appeal was not given by the Land Acquisition Act that might be remedied by the Patent, but when the ground of the decision is that it is an award, and not an ordinary decree of the Court, then its whole existence, its nature, is defined by the Land Acquisition Act, and I cannot see how the Patent can apply to it.

Lord Macnaghten observed :

It was supposed that they were appealing from a decision or decree of the High Court, but they were not.

Again at p. 426, Lord Moulton observed:

The decision in the Rangoon case was an award. It is not a decree under its ordinary jurisdiction. That is conclusive, is it not ?

Counsel replied to that :

I venture to think not. I submit not because your Lordship sees in the Rangoon case the Court there were acting as the first Court, which made the award. They were not acting in appeal in the Rangoon case.

Lord Macnaghten :—Yes, they were. No objection was taken on that ground. It was very fully argued, I am sure.

In the result there was no express decision on the point, but merely an interplay of thought between Bar and Bench, and the special leave was refused. That case, because there is no express decision, is not binding on us, but we have of course to take notice of their Lordships' mind as disclosed in the discussion that is very fully reported in the Calcutta Weekly Notes. It seems to us to be clear that what their Lordships were there regarding as a conclusive answer to a right of appeal in a land acquisition case was that appeal does not lie at all unless it is given in some way, that it was not given by statute, and so far as the Letters Patent was concerned appeals were limited to judgments, decrees or orders and what the High Court was doing in a land acquisition case was not passing a judgment, giving a decree or making an order; it was making an award which did not fall within the "judgment, decree or order" and consequently there was no right of appeal provided either in the Act or in the Letters Patent.

In 41 Mad 943[7] it was held by a Full Bench of the Madras High Court, following the Rangoon case (therein referred to as 40 Cal 21[3]) and 17 C W N 421[5] that the decision of the High Court in a land acquisition appeal is not a judgment within Cl. 15 of the Letters Patent so as to enable a party to file a further appeal to the High Court under that Article. 17 C W N 421[5] was relied on. In that case the point was the same as in the present case, that is to say the Court was not concerned with an appeal to the Privy Council but an appeal under the Letters Patent. The only difference between the two lies in the fact that there the dispute was one under the Land Acquisition Act and here the dispute is one under the Workmen's Compensation Act. The argument was that such an appeal only lies from a judgment and that such a decision is not a judgment but an award. Seshagiri Ayyar J. (p. 953) makes it quite clear that if the matter were res integra he would have come to the conclusion that the decision arrived at in a land acquisition case by the High Court is a judgment and not an award. He points out that tripartite disputes are frequently under consideration in land acquisition disputes and that difficult questions relating to title and to the mode of valuation arise. "But," he adds,

speculation is not possible on a question of this kind. The Judicial Committee of the Privy Council have said the last, if not the final, word on the subject. In 40 Cal 21[3] they first propounded the view that the conclusion come to by the Appellate Court under S. 54, Land Acquisition Act, is not a judgment, but partakes the character of an award. In a later case, 17 C W N 421,[5] there are observations of the members constituting the Board which undoubtedly point to the conclusion that in the opinion of their Lordships the decision on appeal in a land acquisition case is not a judgment. It is true, as Mr. Ramchandra Ayyar argued, that the report of the observations is not authentic in the sense that they appear in a publication sanctioned by the Judicial Committee. But there is no reason for supposing that these observations were invented. Moreover, if we bear in mind that the application for special leave was made to the Judicial Committee after the refusal of the learned Judges who heard the case to grant a certificate under the Code of Civil Procedure . . . there can be no doubt that the Judicial Committee did intend to lay down the proposition contended for by the learned Government Pleader.

A I R 1936 Cal 688[8] does not carry the matter any further. There the point was taken that even after the amendment of the Land Acquisition Act, though an appeal was given by that amendment to the Privy Council, though an award under the Land Acquisition Act was declared to be deemed to be a decree and the statements of the

7. Manavikraman Tirumalpad v. Collector of Nilgiris, (1919) 6 A I R Mad 626=49 I C 27=41 Mad 943=35 M L J 110 (F B).

8. Collector of Dacca v. Ghulam Kuddus Choudhury, (1936) 23 A I R Cal 688=168 I C 352=I L R (1937) 1 Cal 699=64 C L J 503=40 C W N 1143.

grounds of such awards are judgments, still the Act has not provided for an appeal from one Judge to a Bench. As was there observed however since land acquisition cases went in many instances to a single Judge of the High Court, and as under S. 111, Civil P. C., there cannot be an appeal from a single Judge to His Majesty in Council, if there was no power to appeal under the Letters Patent from a single Judge to a Bench in those cases that went before a single Judge, then despite the power of appeal to Privy Council given by the amendment of the Land Acquisition Act the provision in the Code of Civil Procedure would prevent an appeal to the Privy Council. It was held therefore that it was implicit in the amendment of the Land Acquisition Act that such decisions should be deemed to be judgments within the meaning of Cl. 15 of the Calcutta Letters Patent and that a Letters Patent Appeal lay. 3 Lah 420[9] raises a similar point and the same conclusion was arrived at for the same reasons.

In A I R 1925 P C 155[10] their Lordships were concerned with an order passed relating to a scheme in a scheme suit. A scheme suit had been launched and had gone as far as His Majesty's Privy Council who confirmed the scheme with some alterations and an Order in Council was made accordingly. That scheme so confirmed provided for the appointment of a Temple Committee and provided that the scheme "may be altered, modified or added to by an application to His Majesty's High Court of Judicature at Bombay." The Temple Committee was appointed, rules were framed and came before the District Judge for sanction. He made certain alterations and sanctioned the rules. Later, certain members of the caste interested presented to the High Court an application under Cl. 20 for modification of the rules sanctioned by the District Judge. The rules sanctioned by the District Judge were considered by the High Court to be an order under S. 47, Civil P. C., and appeals were made to the High Court. On 22nd September the matter was considered in the High Court. No objection was taken to the jurisdiction of the District Judge to make such rules, and accordingly those rules were considered. As those rules were considered no order was considered necessary on the application under Cl. 20. Their Lordships of the Privy Council observed that the District Judge had no power, that the High Court, even though no objection was taken as to jurisdiction of the District Judge, should not have considered those rules, that the High Court had power to consider the application under Cl. 20, that no appeal lay from the District Judge to the High Court, that the High Court should have taken notice of the absence of jurisdiction and should not have entertained those appeals but that under Cl. 20 it had power to modify the rules made by the District Judge but it had not exercised that power and that it could exercise it on a suitable application made thereafter. Their Lordships held that there was no right of appeal to His Majesty in Council from the decree drawn up except on the sole ground that the judgment or decree is incompetent, and that the term 'judgment' in the Letters Patent means in civil cases a decree and not a judgment in the ordinary sense. The appeal was allowed and the judgment or decree was set aside as incompetent though it was observed that the appeal should not have been admitted.

A I R 1925 P C 155[10] was considered in two cases: A I R 1933 All 262[11] and 10 Lah 132.[12] In 10 Lah 132,[12] A I R 1925 P C 155[10] is referred to as 49 M L J 25.[10] In both the above cases the Court found some little difficulty in restricting the term "judgment" to "decree" and in 10 Lah 132[12] difficulty was also found in understanding how after the Privy Council held that no appeal was competent their Lordships heard the appeal and disposed of it. We do not find it necessary to enter into a consideration of whether from a sentence in A I R 1925 P C 155[10] one is bound to hold that not only under Cl. 29, but also under Cl. 10 the term "judgment" is restricted to decree because our decision is not in any way based on any such conclusion. The question, in our opinion, is not whether the term "judgment" in Cl. 10 is to be so restricted but as to whether a Judge disposing of an appeal under S. 30,

9. Har Dial Shah v. Secretary of State, (1923) 10 A I R Lah 275=69 I C 428=3 Lah 420.

10. Sevak Jeranchod P[illegible]lal v. Dakore Temple Committee, (192[illegible]) 12 A I R P C 155 = 87 I C 313=49 M L J 25 (P C).

11. Sital Din v. Anant Ram, (1933) 20 A I R All 262=142 I C 331=55 All 326 = 1933 A L J 127 (F B).

12. Shibba Mal v. Rup Narain, (1928) 15 A I R Lah 904 = 111 I C 274 = 10 Lah 132 = 29 P L R 571.

Workmen's Compensation Act, is passing a judgment or whether he is doing what the Commissioner certainly is doing, i. e. making an award; in other words whether this is a case similar to the above-mentioned cases under the Land Acquisition Act. In both A I R 1933 All 262[11] and 10 Lah 132[12] what the Court was considering was a dispute arising in a proceeding which fell within the Civil Procedure Code. The Calcutta view as to the meaning of the term "judgment" has been regarded as settled by the observation of Couch C. J. in 8 Beng L R 433,[13] though there is a tendency now apparently to treat that definition as good so far as it goes but not necessarily exhaustive : *see* 56 Cal 135[14] at page 140. Rankin C. J. at that page observes as follows :

> The correct technical use of the word "judgment" as distinct from "order" was considered in England in (1884) 12 Q B D 342[15] and (1890) 25 Q B D 465.[16] According to these decisions a "judgment" is a decision obtained in an action and every other decision is an "order". These cases were referred to with approval by the Judicial Committee and applied to the construction of the Letters Patent of the Bombay High Court in 47 Bom 724.[17] In view of the use of the word "order" in Cl. 15 of our Letters Patent, as they now stand, it may be doubted whether for the present purpose the correct technical use of the word "judgment" in England is a safe guide to the meaning of the clause. It was apparently upon some such principle however that the case in 33 Cal 1323[18] was decided. In that case the senior Judge of a Division Bench had refused to extend the time for presenting an appeal under Sec. 5, Limitation Act, and it was held upon Letters Patent appeal that no appeal lay from this refusal. The reasoning was "it may no doubt be said that an order which terminates a proceeding is a "judgment" within the meaning of Cl. 15, but it must be a proceeding, as we understand it, in the course of a suit or in relation thereto, and in which some question or other as to the right or liability of any party is raised, and not a proceeding in respect of a matter which has already come to a termination by the operation of law or otherwise." This view was objected to by Mookerjee J. in 43 Cal 857[19] as going beyond the definition of the term "judgment" given by Couch C. J. In 48 Bom 442[20] the High Court of Bombay dissented from the reasoning in *Gobinda's case*[18] holding that an appeal lay under the Letters Patent from a refusal to extend time under Cl. (sic) (5), Limitation Act. There is much force in the objections which have been taken to the decision in *Gobinda's case*[18] and were the order appealed against before us, an order refusing to extend time, and thereby putting an end to the litigation between these parties we might well have thought it necessary to refer the question of the correctness of that decision to a Full Bench.

This however was another case of an adjudication made in the course of a suit. It does not in our opinion touch the question that is before us now. The same may be said in 35 Mad 1[21] where it was held that :

> An order of a single Judge on the Original Side, refusing to frame an issue asked for by one of the parties is not a judgment within Cl. 15 of the Letters Patent.

In that case the observation of Sir Arnold White, the then Chief Justice that "an adjudication is a judgment within the meaning of the clause if its effect, whatever its form may be and whatever may be the nature of the application in which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned or if its effect, if not complied with, is to put an end to the suit or proceeding" would appear to be in conflict with the decision of the Privy Council in 40 Cal 21[3] if the learned Chief Justice intended to include proceedings outside the Civil Procedure Code whatever their nature. In 45 Cal 502[22] the question was whether the decision of the Judge refusing to set aside an award filed under the provisions of S. 11 (2), Arbitration Act, was a judgment from which appeal lay under the Letters Patent and it was held that it was. That decision was arrived at without reference to either 40 Cal 21[3] or 17 C W N 421.[5] No decisions are cited in the judgment which appear to proceed solely on the view that

13. Justices of the Peace for Calcutta v. The Oriental Gas Co., (1872) 8 Beng L R 433=17 W R 364.
14. Brojogopal Roy v. Amarchandra, (1929) 16 A I R Cal 214=114 I C 88=56 Cal 135 = 32 C W N 935 (F B).
15. Ex parte Chinery, (1884) 12 Q B D 342 = 53 L J Ch 662=50 L T 342 = 32 W R 469 = 1 Morrell 31.
16. Onslow v. Commissioners of Inland Revenue, (1890) 25 Q B D 465 = 59 L J Q B 556 = 63 L T 513=38 W R 728.
17. Tata Iron and Steel Co. Ltd. v. Chief Revenue Authority of Bombay, (1923) 10 A I R P C 148=74 I C 469 = 47 Bom 724 = 50 I A 212 (P C).
18. Gobinda Lal Das v. Shiba Das Chatterjee, (1906) 33 Cal 1323=3 C L J 545=10 C W N 986.
19. Mathura Sundari Dasi v. Haran Chandra Saha, (1916) 3 A I R Cal 361 = 34 I C 634= 43 Cal 857=23 C L J 443=20 C W N 594.
20. Nagindas Motilal v. Nilaji Moroba, (1924) 11 A I R Bom 399=80 I C 862 = 48 Bom 442= 26 Bom L R 395.
21. Tuljaram Row v. Alagappa Chettiar, (1912) 35 Mad 1 = 8 I C 340 = 21 M L J 1 = (1910) M W N 697.
22. Campbell & Co. v. Jeshraj Giridhari Lall, (1918) 5 A I R Cal 191=46 I C 687 = 45 Cal 502.

when the Judge refused to take the award off the file it was a judgment within the meaning of Cl. 15 because it decided the rights between the parties,

because by refusing to take the award off the file, the learned Judge in effect made the appellant liable for the amount of the award, for, if the award is put upon the file and remains upon the file, then, as pointed out by the learned counsel for the appellant, it is enforceable as if it were a decree of the Court under S. 15, Arbitration Act.

8 Beng L R 433[13] which contains the well-known definition of Couch C. J., is another case of proceedings falling within the ordinary jurisdiction of the Court. It was expressly held that the proceeding there under consideration (which was a proceeding by way of mandamus) was a proceeding in a civil case. That at once distinguishes that case from cases such as land acquisition cases or rather matters where the dispute is determined by a special tribunal set up under statutory authority. So also in 10 I A 4[23] one is concerned with an ordinary suit the only question being as to whether the particular decision arrived at was a judgment or whether the Court was acting in a ministerial capacity. What was there under consideration was the decision of a Judge of the High Court pronounced on an application in execution of a Privy Council decree. The point was as to whether the Court was acting in a ministerial or judicial capacity. Their Lordships of the Judicial Committee held that the Court was acting in a judicial capacity, that the decision was arrived at in a suit which had the effect of finally adjudicating upon a matter of very great importance and that it was a judgment from which an appeal lay.

We are accordingly of opinion that this case falls within the decision of the Privy Council in 40 Cal 21[3] and the observations of their Lordships in 17 C W N 421[5] and that no appeal lies. There is, in our opinion, no judgment within the meaning of Cl. 10 of the Letters Patent from which to appeal. There is only an award made pursuant to the provisions of the Workmen's Compensation Act. It may be that the result is unfortunate, but that can be set right by legislation. We are not convinced that the result necessarily is unfortunate because in workmen's compensation proceedings one has, from the very nature of the case, on the one hand persons unable to sustain (unless supported by a Trades Union) a long continued and expensive litigation and it may well be for aught we know to the contrary that it was the intention of the Legislature to restrict the number of Courts which can consider the comparatively simple points that arise under the Workmen's Compensation Act. If a Letters Patent Appeal lay it could only lie for reasons which would make appeal possible not only to a Division Bench from a Single Judge but also from the Division Bench to the Privy Council. That may or may not be desirable. In England three Courts can, and frequently do, consider these workmen's compensation awards : the County Court, the Court of Appeal and the House of Lords. If we are right, as the law at present stands only two tribunals can consider these matters in India : (1) the Commissioner, and (2) the High Court. We observe that although we have arrived at the conclusion that appeal does not lie under the Letters Patent, the Judge who has to deal with either an appeal or a reference under the Workmen's Compensation Act might well be justified in any case of difficulty or raising a point of importance, in referring the matter to a Bench. The preliminary objection is therefore upheld and the appeal is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

23. Hurish Chunder Chowdhry v. Kali Sundar Debi, (1885) 9 Cal 482=10 I A 4=4 Sar 407 =12 C L R 511 (P C).

A. I. R. 1939 Nagpur 128

POLLOCK J.

Indian Cotton Co. Ltd. (in insolvency) — Appellant.

v.

Ramcharanlal Chunnilal — Receiver— Respondent.

Second Appeal No. 211 of 1936, Decided on 5th December 1938, from appellate decree of Dist. Judge, Nimar, D/- 30th March 1936.

(a) Transfer of Property Act (1882), S. 52— Owner of property filing insolvency application and on his insolvency his property vesting in receiver—Owner cannot be said to have transferred it.

When owner of property files an insolvency application and is adjudged insolvent so that his property vests in the Court or the receiver appointed by the Court, it cannot be said that the owner of the property has transferred it or otherwise dealt with it. His whole estate has devolved on the receiver just as, in case of his death, it would devolve on his heir : *25 Mad 406 and A I R 1922 Mad 335, Rel. on.* [P 129 C 2]

(b) Insolvency — Mortgagor adjudged insolvent—Preliminary decree for sale obtained by mortgagee made final and property sold in execution — Proceeding is not binding on receiver if not impleaded in it.

When a mortgagor is adjudged insolvent, his estate vests in the Court with effect from the presentation of the insolvency application. Where therefore in a suit brought by a mortgagee, a preliminary decree is obtained after the mortgagor has applied in insolvency but before he is adjudged an insolvent and that decree is made final and insolvent's property is sold in execution, the proceedings are not binding on the receiver if he was not impleaded in those proceedings : *A I R 1914 P C 129 and A I R 1927 P C 108, Rel. on.*

[P 130 C 1]

W. R. Puranik and R. Kaushalendra Rao —*for Appellant.*

A. V. Khare and W. B. Pendharkar — *for Respondent.*

Judgment. —On 6th August 1928, Ganpatsa and Rambhausa effected a mortgage of certain property in the Khandwa district by deposit of their title deeds with the Indian Cotton Trading Company in Bombay. In 1929 this company sued to enforce its mortgage in the High Court of Bombay and obtained a preliminary decree for sale on 15th January 1930. One Daulat had applied to have Ganpatsa and Rambhausa adjudged insolvent and an interim receiver was appointed, but that insolvency application was dismissed in default on 8th November 1929. The interim receiver was made a party to the suit on the mortgage. On 18th December 1929, Ganpatsa and Rambhausa applied to be adjudged insolvents and they were so adjudged on 25th April 1930 when their estate vested in the receiver appointed by the Insolvency Court. On 25th August 1930, the preliminary decree for sale was made final. On 17th December 1930 the decree-holder applied to the High Court to alter the decree so as to include a certain malik makbuza field which was mentioned in the mortgage and the plaint but had been omitted from the decree, and on 15th January 1931 the decree was amended. Subsequently, the mortgaged property was sold at Bombay and the Indian Cotton Trading Company was placed in possession on 5th December 1931. The present suit has been brought by the receiver appointed by the insolvency Court to recover possession of the malik makbuza field from the Indian Cotton Trading Company. The lower Courts have held that the High Court of Bombay had no jurisdiction to deal with property situated in this Province and that the decree was therefore void. This was the view taken in 31 N L R Sup 43[1] and 31 N L R Sup 57[2] and the case cited therein, but since then Act 5 of 1936 has been passed which enacts that no decree passed or order made by the High Court of Judicature at Bombay, in the exercise of its ordinary original civil jurisdiction under Cl. 12 of its Letters Patent, shall be called in question in any proceedings before any other Court on the ground that it had no jurisdiction to pass or make the decree or order. The decree in the mortgage suit therefore cannot be challenged on the ground that the High Court of Bombay had no jurisdiction to make it.

The preliminary decree for sale was passed on 15th January 1930. On 25th April 1930 Ganpatsa and Rambhausa were adjudged insolvent and their estate vested in the Court with effect from the presentation of the insolvency application which was made on 18th December 1929. On 29th July 1930 the plaintiff was appointed receiver and their estate then vested in him. On 25th August 1930, the preliminary decree for sale was made final, and subsequently the property was sold in execution. It is admitted that the receiver was not impleaded in these proceedings. The question therefore arises whether he is bound by them. If the receiver stands in the same position as a transferee pendente lite, he will be bound, for it is not obligatory on a plaintiff to implead a transferee pendente lite. S. 52, T. P. Act, provides that during the pendency of any suit in which the right to immovable property is in question the property cannot be transferred or otherwise dealt with by any party to the suit so as to affect the rights of any other party thereto. The question is whether property can be said "transferred or otherwise dealt with" when its owner files an insolvency application and is adjudged insolvent so that his property vests in the Court or the receiver appointed by the Court. In such a case it cannot, in my opinion, be said that the former owner of the property has transferred it or otherwise dealt with it. His whole estate has devolved on the receiver just as, in case of

1. Gangaram Tekchand v. Dharamsi Jetha Co., (1935) 22 A I R Nag 250=159 I C 739=31 N L R Sup 43 (F B).
2. Murlidhar v. Gorakhram Sadhuram, (1936) 23 A I R Nag 1=161 I C 877=31 N L R Sup 57 (F B).

his death, it would devolve on his heir. This is the view taken by Sir Dinshah Mulla in his Transfer of Property Act, Edn. 2, at p. 234, and in 25 Mad 406[3] and 42 M L J 426;[4] no case to the contrary has been cited.

The position then is, as in 42 Cal 72,[5] that no proper steps were taken to bring the receiver before the Court and obtain an order binding on him; accordingly he was not bound by anything which was done, and further the judgment-debtors had at the time of the sale no right, title or interest which could be sold or vested in a purchaser and consequently the respondents acquired no title to the property. In 54 Cal 595,[6] it was suggested that the Section which corresponds to S. 28 (6), Provincial Insolvency Act, entitled a secured creditor to deal with the security as though there had been no vesting in the Court or the receiver. Their Lordships repelled that suggestion and stated that an action against the insolvent could not proceed in the absence of the person to whom the equity of redemption has been assigned by the operation of law and that the latter alone had the sole interest in the subject-matter of the suit, so that any decree passed in proceedings to which he was not a party would be a nullity. I therefore hold that the receiver is not bound by the proceedings which resulted in the passing of the malik makbuza field to the Indian Cotton Trading Company and that this company therefore has no right to retain possession of this field as against the receiver. The plaintiff's claim for possession must therefore be upheld and the appeal is dismissed with costs. Counsel's fee Rs. 25.

D.S./R.K. *Appeal dismissed.*

3. Puninthavelu Mudaliar v. Bhashyam Ayyangar, (1902) 25 Mad 406=12 M L J 282.
4. Subramania Aiyar v. Ramakrishna Aiyar, (1922) 9 A I R Mad 335=70 I C 357=42 M L J 426.
5. Raghunath Das v. Sundar Das, (1914) 1 A I R P C 129=24 I C 304=42 Cal 72=41 I A 251 (P C).
6. Kala Chand Banerjee v. Jagannath Marwari, (1927) 14 A I R P C 108=101 I C 442=54 Cal 595=54 I A 190 (P C).

A. I. R. 1939 Nagpur 130

POLLOCK J.

Krishnaji Ganuji Dhangar and another — Appellants.

v.

Anusaya Bai w/o Sadasheo Dhangar — Respondent.

Second Appeal No. 2 of 1937, Decided on 23rd November 1938, from appellate decree of Second Addl. Dist. Judge, Amraoti, D/- 30th September 1936.

(a) Hindu Law — Widow — Maintenance — Amount of — Unproductive ornaments should not be taken into account when fixing rate of maintenance.

Unproductive stridhan such as clothes and ornaments of small value ought not to be taken into consideration when fixing the rate of maintenance for a Hindu widow : *A I R 1937 Bom 135, Rel. on.* [P 131 C 2]

(b) Hindu Law—Stridhan—Ornaments given to daughter-in-law at her marriage are her stridhan.

Ornaments given to a daughter-in-law by her father-in-law at the time of her marriage are her stridhan. [P 132 C 1]

(c) Hindu Law — Widow — Maintenance — Even minor widow, to whom no guardian is appointed, cannot be deprived of right of maintenance merely because she refuses to live in husband's family, more so, when financial condition of family allows of granting of separate maintenance.

A widow is not bound to live in the house of her husband's family provided she does not leave it for any improper purpose. Even in the case of a minor widow, although her husband's relations as her natural guardians might have a prior claim to be appointed her guardians, still in the absence of any such appointment, the ordinary principle that a Hindu widow is not necessarily to be deprived of her right of separate maintenance merely because she refuses to live in the family house, applies more especially so, when the financial condition of her husband's family allows of the granting of a separate allowance. [P 132 C 1]

(d) Hindu Law — Widow — Maintenance — Court has wide discretion in matter of granting or withholding arrears of maintenance.

The Court has a wide discretion in the matter of granting or withholding arrears of maintenance granted to a Hindu widow. If it can be shown that the widow was in want at the time at which she was entitled to maintenance, the Court may give her arrears for that period : *A I R 1918 Bom 122, Rel. on.* [P 132 C 1]

(e) Res judicata — Bar of — Previous suit between same parties instituted in Small Cause Court and subsequent suit on regular side — Decision in previous suit does not operate as res judicata, although same Judge presides over both Courts.

Where the previous suit between the same parties is instituted in a Court of Small Causes and

the subsequent suit, on the regular side, the decision in the previous suit does not operate as res judicata although the same Judge presides over both the Courts, and the evidence in one suit is read as evidence in the other, inasmuch as the Small Cause Court is not competent to try the subsequent suit in which the issue is again raised. [P 131 C 1]

J. R. Mudholkar — *for Appellants.*

P. Y. Deshpande — *for Respondent.*

Judgment. — This appeal arises out of a suit brought by the plaintiff-respondent Anusaya Bai, a minor widow, against her father-in-law Krishnaji and brother-in-law Pandu for the return of certain ornaments which she alleged to be her stridhan and for maintenance. The lower Appellate Court held that the ornaments were the plaintiff's stridhan but were already in her possession. It gave the plaintiff a decree for maintenance at the rate of Rs. 30 per annum and for Rs. 60 as arrears of maintenance, the whole to be a charge on part of the family estate. A cross-objection has been filed by the plaintiff objecting to the finding that the ornaments are in her possession. While the suit was proceeding in the trial Court, another suit filed by the defendant Krishnaji against Anusaya Bai and her father for the recovery of the ornaments, which in that suit were alleged to be in the possession of Anusaya Bai's father, was proceeding in the Small Cause Court. The same Judge presided over each Court and the cases were tried together, it being agreed that the evidence in one suit should be read as evidence in the other. Each case was decided by a separate judgment on the same day, and in each case it was held that the ornaments were Anusaya Bai's stridhan and were in the possession of Krishnaji. Krishnaji appealed against the decision in the regular suit and it was held that the ornaments were in Anusaya Bai's possession. It is now contended that the decision in the Small Cause Court suit operated as res judicata and that therefore it was not open to the lower Appellate Court to come to a different conclusion. S. 11, Civil P. C., which states the rule of res judicata, requires that the Court which tried the issue in the former suit must be competent to try the subsequent suit in which the issue is again raised. The Small Cause Court was not competent to try the suit for maintenance and therefore there is no res judicata. The findings of the lower Appellate Court that the ornaments are in Anusaya Bai's possession is a finding of fact that cannot be challenged in second appeal.

I now turn to the appeal. The first point taken is that, as Anusaya Bai has ornaments which have been valued by the trial Court at Rs. 374-13-0, she ought not to be given maintenance until she has exhausted these ornaments. As Broomfield J. has pointed out in I L R (1937) Bom 113[1] at p. 116 the commentators on Hindu law are unanimous that unproductive stridhan, such as clothes and jewels, ought not to be taken into consideration when fixing the rate of maintenance for a Hindu widow. Broomfield J. remarked :

> I think it must be taken to be good law that as an ordinary rule stridhan ornaments are not to be taken into account in assessing maintenance. It need not be laid down as an invariable rule. If the widow were in possession of ornaments of great value which she would not ordinarily wear or use, and which she would be likely to dispose of, that might be a different matter.

Wassoodew J. at page 125 stated :

> Speaking entirely for myself, it seems illogical that in the consideration of the circumstances of her position as well as the estimated income of the property sought to be made liable for her maintenance, the potentiality of the widow's income from stridhan ornaments upon conversion should not be taken into account in fixing the amount of her maintenance.

Here the value of the ornaments is not large and the case falls, in my opinion, within the ordinary rule that unproductive ornaments are not to be taken into account. It has been contended that the ornaments are not stridhan. There are findings of fact that the ornaments were given to Anusaya Bai by her father-in-law at the time of her marriage. At p. 126 of Mulla's Hindu Law, Edn. 8, it is stated that property given or bequeathed to a Hindu female, whether during maidenhood, coverture, or widowhood, by her parents and their relations, or by her husband and his relations is stridhan according to all the schools. I have been referred to p. 143 of that edition where stridhan is divided into four classes, the second being yautaka, that is gifts made to a woman at the time of her marriage, whilst seated with her husband on one seat, the word being derived from yuta, that is, 'joined together'. The argument is that there is no evidence to show that the gift was made to her whilst she was seated with her husband on one seat. In Sarkar Sastri's Hindu Law, Edn. 7, p. 715, stri-

1. Gurushiddappa v. Parwatewwa, (1937) 24 A I R Bom 135=167 I C 973=I L R (1937) Bom 113=38 Bom L R 1293.

dhan is defined as including gifts at the time of marriage or yautuka which may either be (1) before the nuptial fire or at the actual ceremony of marriage or (2) those received in her father's or father-in-law's house either before or after the actual ceremony, but at a time when various other rites appurtenant to marriage are performed. It was assumed in the lower Courts that if it was proved that the ornaments were given to her at the time of her marriage, as opposed to being put on her person merely for the time being, they would be her stridhan and I think that point was rightly decided.

The next point urged is that Anusaya Bai ought to live with the defendants who, as her husband's relations, are her natural guardians and that she is not entitled to maintenance if she chooses to live elsewhere. It is well settled that a widow is not bound to live in the house of her husband's family provided that she does not leave it for any improper purpose. According to the Vyavastha Chandrika separate maintenance is to be allowed to that member of the family who for a just cause could not live in, and mess with, the family. The question is how far that applies to a minor widow. Her husband's relations as her natural guardians might have a prior claim to be appointed her guardian, but in the absence of any such appointment I think that the ordinary principle, that a Hindu widow is not necessarily to be deprived of her right of separate maintenance merely because she refuses to live in the family house, would apply. The lower Appellate Court has remarked that it would be impossible for the plaintiff to live with the defendants after this litigation and that she cannot be forced to live with them when the financial condition allows of the granting of a separate allowance. With this I agree and I hold that the plaintiff should not be deprived of maintenance for this reason.

The plaintiff has been granted arrears for two years. The Court has a very large discretion in granting or withholding arrears; if it can be shown that the widow was in want at the time at which she was entitled to maintenance the Court may give her arrears for that period: 43 Bom 66.[2] The claim to arrears was not specifically challenged, and I do not think that any case has been made out for modifying this part of the decree. Lastly it has been urged that the decretal amount should not have been made a charge on the entire estate. Actually it does not appear to have been made a charge on the entire estate, and this objection has not been taken in the grounds of appeal. The appeal therefore fails and is dismissed with costs. Counsel's fee Rs. 20. The cross-objection is also dismissed with costs.

R.M./R.K. *Appeal dismissed.*

2. Karbasappa v. Kallappa, (1918) 5 A I R Bom 122=47 I C 623=43 Bom 66=20 Bom L R 823.

A. I. R. 1939 Nagpur 132

VIVIAN BOSE J.

Mt. Renukabai w/o Sitaramji Wankhade — Appellant.

v.

Bheosan Hapsaji Junghare and others — Respondents.

Second Appeal No. 332 of 1936, Decided on 10th October 1938, from appellate decree of Addl. Dist. Judge, Amraoti, D/- 30th March 1936.

(a) Transfer of Property Act (1882), S. 100 —Agreement which creates a charge cannot be invalid simply because its provisions offend against the procedural law in latter part of Sec. 100.

The first part of S. 100 deals with substantive rights and the second with the manner in which they are to be enforced, i. e. with the adjective or procedural law. The latter portion of S. 100 does not govern the former and hence an agreement which clearly falls within the definition of charge cannot be invalidated altogether simply because it contains provisions which offend against the procedural law as laid down in the latter portion of the Section. [P 134 C 1]

(b) Transfer of Property Act (1882), S. 100 —Charge, how created.

An agreement which provides that in default of a certain payment for maintenance by one party to the other the latter will be at liberty to cultivate a field and maintain herself clearly creates a charge, the intention being that she is to look to the profits from the land for maintenance for a particular period. But such a charge cannot be enforced by sale of the land : *A I R 1922 P C 107, Foll.; 11 M I A 517 (P C), Ref.* [P 134 C 1, 2]

(c) Transfer of Property Act (1882), Ss. 100 and 91 — Mortgagee with notice of charge on property mortgaged is bound by it as mortgagor himself.

The possession of a mortgagee who has constructive notice of a charge on the property mortgaged resembles that of a trustee under S. 91 and hence he is as much bound to fulfil the obligation which attaches to the property mortgaged as the mortgagor himself, there being an equitable lien

under the law : *19 Cal 584 (P C) and 9 M I A 307 (P C), Foll.* [P 134 C 2]

(d) Transfer of Property Act (1882), S. 53— The burden of proving that a transfer was for value and without notice is on the transferee.

Either under S. 100 or under more general rule of law the burden is on the transferee to establish that he is a bona fide transferee for value without notice : *A I R 1934 P C 68, Foll.* [P 135 C 1]

(e) Transfer of Property Act (1882), S. 3— Notice — Conduct which can be regarded as wilful abstention stated.

Where a mortgagee knows about the law of registration and also that it is necessary for him to search the registers to make himself sure that the property mortgaged to him was free from encumbrance and yet while causing a search to be made refrains from making the same, such conduct can only be regarded as wilful abstention : *(1874) 7 H L C 135, Ref.* [P 135 C 2]

(f) Transfer of Property Act (1882), S. 3 — Notice to agent is constructive notice to principal.

Where the registers of the Registrar did contain a reference to a particular agreement which created a charge on a certain land on the date on which they were examined on behalf of the mortgagee by his agent who omitted to look at the entries against the property and to look into them carefully :

Held that the mortgagee could be charged with the negligence or bad faith of his agent and that he would be deemed to have had constructive notice of the charge : *30 Cal 539 (P C), Foll.; 4 Cal 897 (P C), Ref.* [P 136 C 1]

(g) Transfer of Property Act (1882), S. 100 Charge—Enforcement of.

Where an agreement which created a charge of maintenance on a certain land of a mortgagor provided that in default of a certain sum the chargeholder was entitled to possession of the land and on default the charge was sought to be enforced against the mortgagee :

Held that the decree should approximate as near as might be to a decree for foreclosure and that the mortgagee should be given a chance to redeem it if he desired to keep the property in possession as the relief was an equitable one and could be moulded to suit the requirements of the case. [P 136 C 1, 2]

K. V. Brahma — *for Appellant.*

M. R. Bobde — *for Respondents 2 to 4.*

Judgment.—The plaintiff sues for possession of a field to the extent of a one-third share and for arrears of maintenance. The field originally belonged to a joint Hindu family of which the plaintiff was a member. On a partition between the male members this field was assigned to the share of the plaintiff's grandson Ramrao. He undertook to pay the plaintiff a maintenance allowance of Rs. 300 a year and agreed in default to hand over the field to the plaintiff for her cultivation and enjoyment during her lifetime. This agreement is embodied in a registered document, Ex. P 1, dated 8th February 1926. On 28th March 1926 Ramrao mortgaged the field to one Lalji, the father of defendants 2 to 4 for Rs. 8000 (Ex. D-9).

After this, on 29th November 1926 he sold the field to one Ramchandra Suryabhan. Defendant 1, who was a co-sharer, thereupon brought a suit for pre-emption, obtained a decree on 23rd June 1928 and obtained possession. He also agreed at the same time, since, according to the plaintiff, the responsibility for paying the plaintiff her maintenance allowance had now devolved on him, to pay the plaintiff her Rs. 300 a year. The plaintiff says he did so up to 1st January 1932, but as he stopped payments after that date she sued him and obtained a decree on 30th April 1934 in Civil Suit No. 577 of 1933. In the meanwhile defendants 2 to 4 had sued on their mortgage (C. S. 32/32). They obtained a final decree for foreclosure and took possession on 4th November 1933. Defendant 1 was thus dispossessed. The plaintiff's case is that defendants 2 to 4 are now liable for the maintenance allowance and since they have refused to pay it on demand the plaintiff is entitled to possession. Hence this suit. The principal defence to the action in the lower Courts was that defendants 2 to 4 are bona fide transferees for value without notice and so are not bound by the charge. The lower Courts have upheld this plea and have dismissed the plaintiff's claim. She appeals here. The main point taken here on behalf of defendants 2 to 4 is that the document in question Ex. P-1 does not create a charge at all and that therefore no question of notice arises. The document is in the following terms :

> You are my grand-mother and you are entitled to maintenance from me. Hence I shall give you Rs. 300 on account of maintenance each year in the month of January and shall obtain your receipt. In default to pay the aforesaid maintenance allowance at the stipulated time I shall pay interest thereon . . . . . I shall pay you this amount each year as stipulated. In case of default in the payment of the maintenance amount, I agree in writing to let you cultivate the following fields and thereby let you maintain yourself.

The last sentence is taken from the translation given me by the learned counsel for the defendants-respondents. I agree it is a more correct rendering of the original than the official translation. It will be seen that the agreement was that the plaintiff was to enter upon possession and cultivate herself in the event of default and not that

the property should be brought to sale in the manner contemplated by S. 100, T. P. Act. This, it is argued, differentiates the agreement in question from a charge and therefore it is argued, considerations which apply to charges cannot be applied here. S. 100, T. P. Act, defines a charge in the following words :

> Where immovable property of one person is, by act of parties . . . . . made security for the payment of money to another and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property.

This part of the Section has not been touched by the amendment. Then, having defined a charge the Section continues to deal with the manner of its enforcement. Before the amendment it ran thus,

> and all the provisions hereinbefore contained as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of Secs. 81 and 82, shall, so far as may be, apply to the person having such a charge.

After amendment it reads as follows,

> and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such a charge.

It will be seen that the first part of the Section deals with substantive rights and the second with the manner in which they are to be enforced, that is to say, with the adjective or procedural law. That being so, I do not think the latter portion of the Section can be said to govern the former. It may be relevant in considering whether a charge was really intended to be created but I do not think that an agreement which clearly falls within the definition can be invalidated altogether simply because it contains provisions which offend against the procedural law. Therefore what we primarily have to see is whether the agreement here falls within the ambit of the definition. That resolves itself into two questions : (1) Was the intention to make the property security for payment of the money, and (2) Does it not amount to a mortgage ?

I have no doubt about the first point. The agreement was that in default of payment, the plaintiff was to be at liberty to cultivate the fields. The intention therefore was that the plaintiff was to look to the profits from this land for her maintenance. That clearly creates a charge : *see* 49 Cal 820[1] at p. 836. It does not amount to a mortgage, for there is no transfer of any interest in the property charged. Therefore the conditions of the definition are fulfilled.

But I also agree that the charge here cannot be enforced by sale. When the parties themselves expressly contract that the remedy for default in payment shall be delivery of possession for a particular period, namely during the lifetime of the charge holder and not sale, I do not think the Courts would be justified in substituting a totally different contract for the one made. The difference is a material one, for if sale is the remedy, then the owner stands a chance of losing his property for all time, whereas if possession is all that can be claimed, then his proprietary interest in the property is unaffected and his right to possession revives on the death of the charge holder. It is to be observed that Sec. 100 contemplates other methods of enforcement, for the words relating to sale are "so far as may be," and their Lordships of the Privy Council observe in 11 M I A 517[2] at page 548,

> that unless some authority is cited to show that the transaction is invalid, effect should have been given to the manifest intention of the parties.

The trouble arises here because in India the one word "charge" is used to embrace not only charges properly so called, which arise by act of parties, but also liens which arise by operation of law. In the one case, namely of charge proper, remedy by sale is of the essence, but not necessarily so in the case of a lien.

As between the immediate parties to the agreement it does not much matter what the transaction is called, for, it could clearly be specifically enforced. If Ramrao had failed to pay, the plaintiff could have compelled him to perform his bargain and place her in possession. In those circumstances the possession of the defendant, who, as I shall show later, took with constructive notice of the charge, was that of a trustee, or to be more accurate, resembled that of a trustee under Sec. 91, Trusts Act. Consequently, he is as much bound to fulfil the obligation which attaches to this property as Ramrao was. An equitable lien arises under the law. Cases of analogous liens under the English law are to be found in Coote on Mortgages, Vol. 1, page 80 and Vol. 2, page 387. The Privy Council also envisage the possibility of equitable charges

1. Suleman Quadir v. Salimullah Bahadur, (1922) 9 A I R P C 107=69 I C 138=49 Cal 820=49 I A 153 (P C).

2. Nawab Umjad Ally Khan v. Mt. Mohumdee Begam, (1866-67) 11 M I A 517=10 W R 25 =2 Sar 315=2 Suther 98 (P C).

in India in 19 Cal 584[3] at page 593 and 9 M I A 307[4] at page 326. *See* also Ghose's Law of Mortgage in India, Edn. 4, Vol. 1 page 130 *et seq.*

That brings me to the question of notice. There is not much difficulty there. Whether the matter falls squarely within S. 100 or whether it comes under a more general rule of law, the burden is on the transferee to establish that he is a bona fide transferee for value without notice. This has been settled by their Lordships of the Privy Council in 13 Pat 242[5] at page 251 where they quote a passage from an earlier ruling of the Board in 9 M I A 307.[4] Their Lordships stated there that it does not matter whether the charge is an equitable or a legal one for the principle is the same and continued :

> As one who owns property subject to a charge can, in general, convey no title higher or more free than his own, it lies always on a succeeding owner to make out a case to defeat such prior charge.

That settles the question. The lower Appellate Court has placed the burden on the plaintiff and so has the first Court, but that according to their Lordships' decision is wrong. It may be conceded that registration does not operate as constructive notice here because the amendment to S. 3, T. P. Act, had not been made at the date of the mortgage but the definition of notice was the same.

> A person is said to have notice of a fact when .... but for wilful abstention from an enquiry or search which he ought to have made or gross negligence he would have known it.

This makes the matter as variable as the proverbial Chancellor's foot. What would be gross negligence in one case would not be so in another; what would amount to wilful abstention in one man would not necessarily be so in another. The type and kind of search expected of one person would not be the same as that required of another. It all depends upon the man's knowledge and the means of information which lay to his hand.

> It is merely the course which a man dealing bona fide in the proper and usual manner for his own interest ought, by himself or his solicitor, to follow with a view to his own title and his own security : (1874) 7 H L 135[6] at page 157.

In the present case there can be no doubt that the defendant knew about the law of registration. He knew that if he wanted to make sure that the property mortgaged to him was free from encumbrances it would be necessary for him to search the registers. I say he knew this because he actually did institute a search, or rather caused one to be made. That being so, armed with that knowledge, if he had refrained from making a search, it could only have been regarded as wilful abstention in his case.

It is not a matter of law; it is not that the law requires a search in every case. It is a question of fact, pure and simple. Would a man possessed of the knowledge which the defendant possesses, or rather possessed at the relevant date, knowing all he did acting honestly, anxious to take a mortgage free from encumbrances, have searched the registration registers ? If yes, then an omission to do so would either be wilful abstention or gross negligence. I stress this because the lower Courts, and especially the lower Appellate Court seem to think that the matter is one of law and have decided the case accordingly. I refer in particular to the following sentence : "No duty is cast by the law to take an inspection of the registry."

In the present case I can only come to one conclusion on the facts. The defendant did cause a search to be made. He must have done that for some reason. The only reason possible was to see whether the property was free from encumbrances and whether the title sought to be conveyed resided in the mortgagor. That being so, he was aware of the value and necessity of a search when taking a mortgage of property and if he was aware of that, then it was incumbent on him, possessed of that knowledge, to make the necessary search or cause it to be made on his behalf.

It is necessary to come to this finding before one passes on to the next step, because if it was not necessary for him to make a search, then the fact that he made, or caused to be made, a very cursory one, would not tell against him. On the other hand, if it was necessary, then a cursory glance through the registers and an omission to look at the entries relating to this property could only have been due to wilful abstention or to gross negligence. No other conclusion is possible. Now we know that the registers did contain a reference to this particular agreement on the

3. Omrao Begum v. Secy. of State, (1892) 19 Cal 584=19 I A 95=6 Sar 192 (P C).
4. Varden Seth Sam v. Luckpathy Royjee Lallah, (1861-63) 9 M I A 307 = 1 Sar 857= 1 Suther 480=19 E R 756 (P C).
5. Bhup Narain Singh v. Gokul Chand, (1934) 21 A I R P C 68 = 147 I C 1134=61 I A 115 = 13 Pat 242 (P C).
6. Agra Band v. Barry, (1874) 7 H L 135.

date on which they were examined on behalf of the defendant. I have also held that it was incumbent on the defendant, armed with the knowledge he had, to inspect or cause these registers to be inspected. That being so, an omission to look at the entries against this property and to look into them carefully must in the circumstances of this case have been due either to wilful abstention or to gross negligence.

The next question is whether the defendant can be charged with the negligence or bad faith of his agent. It is now settled that he can. The matter is dealt with in Mulla's Transfer of Property Act, 1933 Edn., p. 33. In spite of a Calcutta decision to the contrary, their Lordships of the Privy Council decided in 30 Cal 539[7] at p. 545 that the acts and knowledge of the agent were the acts and knowledge of his principal, and this, as Sir Dinshaw Mulla points out, accords with the principle that "he who acts through another is deemed to act in person." Were it otherwise "notice would be avoided in every case by employing agents." This principle has now been embodied in Expl. 3 to S. 3, T. P. Act, but the amendment introduces no new law. It merely gives effect to the Privy Council decision as against the earlier Calcutta ruling in 4 Cal 897[8] at page 910. In these circumstances not only has the defendant not proved that he is a bona fide transferee without notice but he is in equity deemed to have had constructive notice of the charge. Consequently, it can be enforced against him.

The next question then is, to what extent can this be done? The claim includes a prayer for arrears of maintenance and also for possession. It is clear that no personal decree can be passed against the defendant because he was not a contracting party. He did not agree to pay the plaintiff anything. It is equally clear under the terms of Ex. P-1 that if there is default in payment of the allowance, then the plaintiff is entitled to possession. There has been default and so under a strict interpretation of the bond possession would have to be handed over. But even a foreclosure mortgage is not enforced like that, and so a mere charge, which is a lesser right, cannot be placed upon a higher footing. The decree will therefore have to approximate as near as may be to a decree for foreclosure; that is to say the defendant must be given the chance of what I might term redemption if he desires to keep the property in his possession.

That resort may be had to foreclosure in suitable cases is evident from 13 Halsbury 93. The relief is an equitable one and so can be moulded to suit the requirements of the case. The decree will therefore be that if the defendants pay into Court the sum of Rs. 347-4-0 and future interest thereon from 6th July 1936 (the date of the appeal in this Court) to 6th March 1939 (the date hereby fixed for payment) at the rate of 6 per cent. per annum simple together with the costs on or before 6th March 1939, then the plaint property will stand free from the charge created by reason of the said sum (but not free from a charge for future maintenance). But if they do not, then the defendants will place the plaintiff in possession of the plaint property for the period of her life in lieu of her right to maintenance. I have not allowed future interest from the date of suit to the date of the appeal because it was not claimed and no court-fees were paid for such a relief. The appeal is allowed and the decrees of the lower Courts are reversed. Costs in all three Courts will be paid by the defendants-respondents.

S.G./R.K. *Appeal allowed.*

7. Mohori Bibee v. Dharmodhas Ghose, (1903) 30 Cal 539=30 I A 114=8 Sar 374=7 C W N 441 (P C).
8. Greender Chunder Ghose v. Makintosh, (1879) 4 Cal 897=4 C L R 193.

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STONE C. J. AND VIVIAN BOSE J.

Sadasheo Rao Shamrao and others — Defendants — Appellants.

v.

Roopchand Gorelal and another — Plaintiffs — Respondents.

First Appeal No. 135 of 1935, Decided on 12th December 1938, from decree of the Sub-Judge, First Class, Seoni, D/- 4th October 1935.

(a) Transfer of Property Act (1882), S. 60—Mortgage is one and indivisible and co-mortgagees hold as tenants-in-common.

Where the consideration of a mortgage proceeds from different sources but one lump sum is saddled on the entire estate, the mortgage is a joint and indivisible one in which the mortgagees hold as tenants-in-common : *A I R 1919 P C 24, Foll.* [P 137 C 2]

(b) C. P. Debt Conciliation Act (2 of 1933), Ss. 7-A and 12 (1)—S. 7-A is not retrospective — Prior to S. 7-A, Civil Courts have right to decide whether facts necessary to constitute 40 per cent. rule are present or not.

Section 7-A has no retrospective effect and when it does not apply the Civil Courts have the right to decide whether the facts necessary to constitute 40 per cent. rule mentioned in Sec. 12 (1) are present or not: *A I R 1938 Nag 373; A I R 1937 Nag 259 and 20 N L J 203, Foll.* [P 138 C 2]

(c) C. P. Debt Conciliation Act (2 of 1933), Ss. 12 (1) and 15 — Certificates under S. 15 when debts due to creditors accepting award are less than 40 per cent. are without jurisdiction.

Where the debts due to the creditors who accepted the award do not come to the necessary 40 per cent., Debt Conciliation Board acts without jurisdiction in issuing certificates under S. 15 and the creditors are entitled to pursue their remedy in a Civil Court in the usual way. [P 138 C 2]

(d) Interest — Compound interest—Meaning of.

Interest on interest means compound interest; *A I R 1931 Nag 25, Dissent.; A I R 1928 P C 35, Expl. and Disting.* [P 138 C 2]

(e) Transfer of Property Act (1882), Ss. 60, 67 (d) — One of three mortgagees acquiring share in mortgaged property without consent of others — Mortgage is not split up and co-mortgagees are entitled to proceed against entire property.

Where only one of the three mortgagees acquires in part a share in the property mortgaged without the consent of the other mortgagees, the mortgage is not split up so far as the other mortgagees are concerned and they are entitled to proceed against the entire property. Such a mortgagee cannot be placed in a better position than the innocent purchaser of property burdened with a mortgage about which he knew nothing and the fact that he expended money to the full value of the property does not save him: *A I R 1921 P C 125 and A I R 1925 Oudh 609, Foll.* [P 139 C 2; P 140 C 1]

(f) Transfer of Property Act (1882), S. 67 (d) —Severance of interest in a mortgage requires consent of all parties concerned.

Severance of interest as provided by S. 67 (d) is nothing but a special application of the ordinary law of novation and requires as a pre-requisite the consent of all parties concerned and unless a co-mortgagee consents to such severance or does some act which under the law effects a severance, the usual rule about the integrity of the mortgage must be observed: *A I R 1926 Pat 94; A I R 1935 All 391 and A I R 1927 Cal 425, Foll.; A I R 1919 All 275 and A I R 1915 Mad 344, Ref.; A I R 1937 Nag 262, Expl.* [P 139 C 2]

(g) Transfer of Property Act (1882), Sec. 67 (d)—Consent—What does not amount to.

Omission to reply to a notice does not amount to consent. [P 140 C 1]

P. D. Jatar — *for Appellants.*

J. Sen and Girijanandan — *for Respondents.*

Judgment.— This appeal arises out of a suit for foreclosure of a mortgage, dated 23rd December 1926 for Rs. 6000 executed by defendant 1, Sadasheo, in favour of three persons, (1) Gorelal, father of plaintiff 1, (2) Roopchand, plaintiff 1, and (3) Venkatrao, defendant 4. Of these, Gorelal and Roopchand (plaintiff 1) advanced Rs. 4000 of the consideration jointly and Venkatrao (defendant 4) the remaining Rs. 2000. But though the consideration thus proceeded from two different sources, the liability created under the deed was for one lump sum of Rs. 6000 which was saddled on the entire 16 annas of the village mortgaged.

The relevant portion of the deed, Ex. P-1, is in these terms:

We took this day loans, in cash of Rs. 4000, four thousand rupees, from the Musammiyan Gorelal, son of Nanda Sao, and Rupchand, son of Gorelal Sao Lakhera, by occupation contractors, residents of Khunti, Tahsil and District Seoni and Rs. 2000, two thousand rupees, from Pandit Venkat Rao son of Pandit Vinayakrao Brahmin Malguzar resident of Bori Khurd, Tahsil and District Seoni. After executing this deed for the total sum of Rs. 6000, in words six thousand rupees, in favour of the aforesaid mahajans (creditors), (we) hereby agreed that after paying interest (thereon) at the rate of Re. 1, one rupee, per cent. per mensem, we will satisfy the same as below. We will pay interest on the entire amount each year from this day up to five years without raising any objection, and (we) will satisfy the entire amount together with interest in the fifth year from this day. If we fail to pay interest for two years continuously, on default of payment of interest for the second year, (we) will pay the entire amount together with interest thereon in a lump. Further, so long as the debt is not satisfied, (we) will pay interest on interest, each year, with annual rests, as mentioned above, at the same rate and according to the Hindi Miti (calendar).

It was argued that this had the effect of splitting up the liability and that in fact and in law it created two independent mortgages in one deed of the kind contemplated by their Lordships of the Privy Council in 47 Cal 175.[1] But that very ruling negatives this contention. It is clear from their Lordships' observations that in a mortgage of this kind where, though the consideration proceeds from different sources, one lump sum is saddled on the entire estate, the mortgage is a joint and indivisible one in which the mortgagees held as tenants-in-common. Some time later, either late in 1932 or early in 1933, Venkatrao (defendant 4) settled his claim with the mortgagor and took a four annas four pies share in the property in full satisfaction and gave up his right to a one anna share. This was on the assumption that his in-

1. Sunitibala Debi v. Dhara Sundari Debi, (1919) 6 A I R P C 24=53 I C 131=47 Cal 175=46 I A 272 (P C).

terest in the transaction was one-third and that he would on foreclosure be entitled to obtain one-third of the property. The plaintiffs claim that in spite of this their right to enforce their share of the mortgage, that is the Rs. 4000 advanced by Gorelal and Roopchand, subsists against the entire 16 annas of the village mortgaged. The defendants resist this and state that the mortgage has been split up by the action of the plaintiff's co-mortgagee in acquiring part of the property and that the plaintiffs can now proceed only against a two-third share.

Before we deal with these contentions, it is necessary to consider another matter which, if rightly urged, goes to the root of this appeal. After this suit had been filed on 12th July 1933, the defendants went to the Debt Conciliation Board and thereupon the Civil Court suspended its proceedings on 14th September 1933 when a certificate from the Board was produced. On 8th December 1933, the Board disposed of the defendants' application and registered an agreement under S. 12 of the Act. But the plaintiff declined to accept the conciliation and so the Board issued the usual certificate under Sec. 15. The plaintiff then applied to the Board for a review of its order but the application was rejected on 13th January 1934. The plaintiff then applied to the Civil Court for a revival of this suit and contended that the order of the Board and the certificate granted by it under Sec. 15 was ultra vires, because the debts owed to the creditors who were prepared to come to an amicable settlement with the defendants did not constitute the 40 per cent. of the total liability as required by S. 12 (1) of the Act.

It is clear from the application filed before the Board (a translation of which was supplied to us by the learned counsel for the defendants and accepted as correct by the other side) that if the debt owing to the plaintiffs is the Rs. 8272-7-6 stated in the application, then the amounts due to the rest of the creditors are less than 40 per cent. of the total. But what the Debt Conciliation Officer did was to construe the terms of Ex. P-1 and conclude that on a true construction of the document, of which the relevant portion has already been reproduced, no compound interest was due, and that therefore the plaintiff's claim made on the assumption that it was, was exaggerated. The Board then decided that on a true construction of the document a lesser figure was due to the plaintiff and when his claim was reduced to that figure the debts owing to the rest reached the requisite 40 per cent. The question is whether we have power to question this finding. It is argued on behalf of the appellant that we have none, while the learned counsel for the respondents contends that we have.

Section 7-A, Debt Conciliation Act, does not apply here because it has been held that it has no retrospective operation: 1938 N L J 17,[2] 20 N L J 57[3] at p. 62 and 20 N L J 203.[4] It is argued that it makes no difference whether this Section applies or not, but we need not enter into that here because it is clear on the strength of those rulings that S. 7-A does not apply.

The same decisions hold that when Sec. 7-A does not apply, then the Civil Courts have the right to determine whether the special tribunal constituted to oust the jurisdiction of the Courts is acting within the ambit of its powers or not. That in this case means that the Civil Courts must decide whether the facts necessary to constitute the 40 per cent. rule mentioned in S. 12 (1) are present or not. That in its turn depends upon the true construction of Ex. P-1. It is argued on the strength of A I R 1931 Nag 25[5] that interest upon interest does not mean compound interest. With all due deference we are unable to agree. That decision purports to be based upon a decision of the Privy Council in A I R 1928 P C 35.[6] The facts there were as follows: A document provided for interest at 1/2 per cent per mensem and also stipulated that if default was made in the payment of interest in the manner provided, that is to say on the 10th of each month, then the rate of interest was to be doubled. The exact sentence in which this provision occurred was as follows: "If he fails to pay in that manner he shall pay 'interest on interest' at the rate of 1 per cent."

2. Tikaram v. Ganpat Sahai, (1938) 25 A I R Nag 373=1938 N L J 17.
3. Shivdin v. Ram Ratan, (1937) 24 A I R Nag 259=170 I C 905=20 N L J 57=I L R (1938) Nag 489.
4. Lachmansingh v. Durgaprasad, (1937) 20 N L J 203.
5. Bhadu v. Ganpati, (1931) 18 A I R Nag 25=130 I C 103.
6. Muthu v. Meenakshisundaram, (1928) 15 A I R P C 35=107 I C 1 (P C).

Their Lordships held that the enhanced rate applied only to sums in arrears which were payable as interest, that is to say they held that interest on the principal sum was to run at the original rate of 1/2 per cent per mensem simple and that the enhanced rate was claimable only on such sums as were in arrears as arrears of interest. When the rates of interest are different, then of course a provision of this kind makes a very considerable difference, as also when there are repayments. But when as here the rates are the same and there have been no repayments, then the result is precisely the same whether the calculation is made as compound interest in the ordinary way or whether simple interest is calculated on the principal and then interest allowed on that interest separately as was done by their Lordships. It follows that the figures originally given by the defendants in their application to the Debt Conciliation Board were right and if that is so, then the debts due to the creditors who accepted the award did not come to the necessary 40 per cent. That being so, the Debt Conciliation Board acted without jurisdiction. It had no power to make the conciliation it did and consequently the plaintiff is entitled to pursue his remedies in this suit in the usual way.

Turning now to the merits, there are, we conceive, only three ways in which a mortgage can be split up. One is by act of parties at the time of the contract. This we have shown was not done in the present case. The second is by operation of law, and the third by act of parties subsequent to the execution of the deed by way of novation. As regards severance by operation of law, this can, in our opinion, arise in India only under S. 60, T. P. Act, that is to say, only when the mortgagee or, where there are more mortgagees than one, all the mortgagees acquire in whole or in part the share of a mortgagor. That position has not arisen here. Only one of the three mortgagees has done that and therefore as we view the law, there was no splitting up of the mortgage so far as the other mortgagees are concerned. They are entitled to proceed against the entire property. This also follows from Ss. 43 and 44, Contract Act. Their Lordships of the Privy Council have stressed the indivisible character of a mortgage in 16 N L R 154[7] at page 160 and the exact question here has been decided along the lines we take in A I R 1925 Oudh 609.[8] So far as severance by act of parties subsequent to the deed is concerned, that is dealt with in S. 67 (d), T. P. Act. It is, we think, nothing but a special application of the ordinary law of novation and requires as a pre-requisite the consent of all the parties concerned. This is what has been laid down in A I R 1926 Pat 94[9] at page 100, A I R 1935 All 391[10] and A I R 1927 Cal 425.[11]

As regards the other rulings cited, 41 All 631[12] was a case in which there was a severance in interest with the consent of all concerned, and 39 Mad 17[13] is also another application of the same rule, the only difference in the Madras case being that the requisite consent was imposed upon the parties by a decree of a Court. Naturally that can make no difference to the principle involved, namely the necessity for establishing a consent from which neither side can resile. A I R 1937 Nag 262[14] was also a case of consent, the only question there being whether the necessary consent could be inferred from the facts present in that case. No question of law was involved so far as this point is concerned, and in fact, the necessity for establishing the requisite consent was accepted, and the only question with which the learned Judge concerned himself was whether this could be established substantially by the facts present in that case.

We can see no reason why a mortgagee who acts behind the back of his co-mortgagees who have entered into a joint and several contract with a third party along with him should be placed in a better position than an innocent purchaser of property which happens to be burdened with a mortgage about which he knew nothing. The facts that he purchased and expended

7. Yadali Beg v. Tukaram, (1921) 8 A I R P C 125=16 N L R 154 = 48 Cal 22 (P C).

8. Jagmohan v. Harbans Singh, (1925) 12 A I R Oudh 609=85 I C 621=27 O C 360.

9. Sripat Singh v. Naresh Chandra, (1926) 13 A I R Pat 94.

10. Lachhmi Narain v. Babu Ram, (1935) 22 A I R All 391=154 I C 437=1935 A L J 749.

11. Satindra Nath v. Jatindra Nath, (1927) 14 A I R Cal 425=101 I C 530=31 C W N 374.

12. Jauhari Singh v. Ganga Sahai, (1919) 6 A I R All 275=51 I C 107=41 All 631 = 17 A L J 731.

13. Vijayabhushanammal v. Evalappa Mudaliar, (1915) 2 A I R Mad 344=25 I C 91=39 Mad 17.

14. Narayanasao v. Mt. Chattibai, (1937) 24 A I R Nag 262=171 I C 978=I L R (1937) Nag 503.

money to the full value of the property does not save him nor does it operate to the prejudice of the mortgagees. We see no reason why a co-mortgagee who purchased the property with his eyes open and did not trouble to obtain the previous consent of his co-mortgagees should be placed in any better position. Action of this kind, if permitted, would quite easily operate to the detriment of the other mortgagee who contributed on the assumption that his rights and liabilities would be one and indivisible. Unless therefore he consents to a severance or does some act which under the law effects a severance, the usual rule about the integrity of a mortgage must be observed and that, as we see it, is what their Lordships of the Privy Council stated in 16 N L R 154[7] at page 160.

It was then argued that the consent of the plaintiff to the severance can and indeed must be presumed in this case because he omitted to reply to a notice in which he was informed about the impending severance. The notice in question, Ex. P-2, has not been included in the paper-book, nor has it been translated, and the only reference to it in the pleadings is to be found in para. 5 (b) of the plaint which is in the following terms :

Defendant 4, the co-mortgagee on 4th January 1933 gave a notice to the plaintiff's father that he had obtained full satisfaction of his portion of the mortgage money and that the latter should treat his share of the same as separate.

The learned counsel for the respondents supplied us with a translation of the notice and the other side accepted it as correct. It is to the following effect :

My debt as well as the other debt relating to Saobhundi is settled for Rs. 7000. You have got your separate rights.

We can find in this nothing to which a reply was needed. It does not pretend to inform the plaintiff that his co-mortgagee is intending to settle his part in the mortgage by accepting a part of the property in satisfaction nor does it give him any indication that his consent to severance of their rights was being sought. It merely recites a settled and accomplished fact and tells the other party that he has now got his own rights which he can enforce. This is the only proof to which our attention was drawn suggesting that the plaintiff had consented to the transaction into which his co-mortgagees entered with the mortgagors. We are clear that the omission to reply to the notice does not import consent. That being so, the plaintiff is entitled to proceed against the entire mortgaged property for the money due to him. The extent of the liability on this assumption is not challenged and therefore we uphold the judgment and decree of the lower Court and dismiss the appeal with costs.

S.G./R.K. *Appeal dismissed.*

A. I. R. 1939 Nagpur 140

POLLOCK J.

Sarjabai w/o Sakharam Patil — Appellant.

v.

Bhagwanji Nagoji Dhangar and another — Respondents.

Second Appeal No. 507 of 1936, Decided on 29th November 1938, from appellate decree of Addl. Dist. Judge, Yeotmal, D/- 31st July 1936.

Pre-emption—Suit for—Decree in favour of plaintiff in terms of O. 20, R. 14, Civil P. C.—Plaintiff can appeal within period of limitation allowed for appeal whether or not he has made payment within period fixed by Court—Appellate Court has power to vary both price and time for payment—It should fix fresh date for payment.

A plaintiff in a pre-emption suit, who has obtained a decree under O. 20, R. 14, can appeal within the period prescribed by the Limitation Act for his appeal whether or not he has paid the pre-emptive price within the period fixed by the Court. The plaintiff is entitled to challenge by way of appeal both the price of pre-emption fixed and the time allowed for payment and the Appellate Court has power both to vary the price and the period of payment. The Appellate Court has power to extend the time fixed for payment and unless there is some valid reason for adhering to the time fixed in the first Court, it should itself fix a fresh date for payment. It is not however bound to do so ; it may do so : *13 All 376 (F B) and 18 All 223, Rel. on ; A I R 1926 P C 93 and A I R 1933 Nag 236, Ref.* [P 141 C 1, 2]

V. V. Kelkar — *for Appellant.*

K. V. Bramha — *for Respondent 2.*

Judgment. — The plaintiff sued to pre-empt a field that had been sold for an ostensible consideration of Rs. 3000. The lower Courts have held that that was not a fair consideration and that the plaintiff is entitled to pre-empt it at the market value, which has been found to be Rupees 2000. The plaintiff, who pleaded that the market value was Rs. 1500, has appealed against that decision, but the finding is purely one of fact and that must be accepted in second appeal. The decree of the first Court, which was in the form prescribed in O. 20, R. 14, Civil P. C., directed that

the plaintiff should deposit Rs. 2000 in Court on or before 29th April 1935, and that in default of making such deposit his suit should stand dismissed. No deposit was made. The lower Appellate Court dismissed the plaintiff's appeal on 31st July 1936. It did not consider, and the question was apparently not raised, whether the plaintiff should be granted further time in which to make the required deposit. It has been argued that when the lower Appellate Court decided the appeal, there was no subsisting decree from which an appeal could be preferred because in the absence of any deposit the plaintiff's suit then stood dismissed. That argument has been dealt with in 13 All 376,[1] where Straight J. said :

> Strictly speaking, the exact decree which stood at the date of the plaintiff's filing his appeal was that of dismissal of his suit by reason of his having failed to deposit the Rs. 799 within 15 days, and had he appealed against it on that footing he might have raised questions as to the propriety of the first Court's finding on the matter of price and the time allowed him within which to pay the amount into Court. I think therefore in this case it must be taken that there was a decree from which an appeal could be entertained, and that the plaintiff was entitled to get a determination of the question of price, which when decided might properly guide the Judge's conclusions upon the further point as to whether the time allowed by the first Court was reasonable.

The point was further considered in 18 All 223[2] where it was remarked :

> There is no doubt that a plaintiff who has obtained a decree under S. 214 (now O. 20, R. 14) can appeal within the period prescribed by the Limitation Act, 1877, for his appeal, whether or not he has made the payment on or before the day fixed, and on his appeal the Appellate Court, if it sees fit so to do, may extend the time within which the pre-emptive price is to be paid and fix a day itself.

Where a decree has been passed against the plaintiff I can see no reason on principle why the plaintiff should not challenge both the price of pre-emption fixed and the time allowed for payment and why an Appellate Court should not have power to vary both the price and the period. In 18 All 223,[2] it was however remarked that a plaintiff in a pre-emption suit could not have the power of his own accord to effect the stay of the execution of a decree which by reason of the pre-emptive price not having been paid on or before the day fixed, had become a decree in favour of the defendant, and that an appeal by itself would not extend the time fixed for payment. Their Lordships of the Privy Council pointed out in 6 Pat 24[3] that when an appeal is preferred the final decree is a decree of the Appellate Court, and in accordance with that decision MacNair J. C. held in 29 N L R 130[4] that when an appeal from a preliminary mortgage decree is preferred and dismissed, the Appellate Court must pass a fresh decree fixing a fresh date for payment. There is perhaps no very close analogy between suits for pre-emption and suits on mortgages, but it seems to me that the Appellate Court in suits for pre-emption has power to extend the time fixed for payment and that unless there is some valid reason for adhering to the time fixed in the first, Court the Appellate Court should itself fix a fresh date for payment. I do not say that it is bound to do so, but I think that it may do so. Here the point was never considered at all and I do not think that the lower Appellate Court intended to pass a decree that was in effect a decree dismissing the plaintiff's suit. The appeal therefore succeeds to this extent, that the plaintiff is allowed until 23rd December 1938 in which to make the required deposit of Rs. 2000; otherwise the appeal will stand dismissed. Cost of both parties in this appeal will be paid by the appellant. Counsel's fee Rs. 15.

R.M./R.K. *Appeal partly allowed.*

1. Kodai Singh v. Jaisri Singh, (1891) 13 All 376 (F B).
2. Jaggar Nath Pande v. Jokhu Tiwari, (1896) 18 All 223=1896 A W N 43.
3. Jowad Hussain v. Gendan Singh, (1926) 13 A I R P C 93 = 98 I C 499 = 6 Pat 24 = 53 I A 197 (P C).
4. Parshram v. Umrao Prashad, (1933) 20 A I R Nag 236=147 I C 699=29 N L R 130.

A. I. R. 1939 Nagpur 141

GRUER J.

Meghji Hirjee & Co. — Plaintiff — Applicant.

v.

Bengal Nagpur Railway Co. Ltd. — Defendant — Opposite Party.

Civil Revn. No. 764 of 1937, Decided on 20th October 1938, from decree of Small Cause Court, Nagpur, D/- 15th September 1937.

(a) Railways Act (1890), S. 77—Claim for overcharges— Sec. 77 does not provide remedy but it cuts down one.

Section 77 assumes the possibility of claims for over-charges, but where such claim lies in law, then it cannot succeed unless notice within six months has been given. It does not provide a

remedy but cuts down one in cases where claim would lie according to general law. [P 143 C 1]

(b) Railways Act (1890), S. 77—Over-charge —Meaning of.

An over-charge is simply a charge of more than is permitted by law and should be interpreted in a wide sense: *A I R 1927 Nag 77, Foll.* [P 143 C 1]

(c) Railways Act (1890), Ss. 41, 28 and 30 —Civil Courts have no jurisdiction to investigate into the liability of Railway Company, created by statute and the litigant is confined to the remedy specifically provided.

Chapter 5 of the Act gives a particular remedy against a Railway Company for a liability created by statute itself and S. 41 excludes the jurisdiction of the Civil Courts, and the litigant is confined to the remedy specifically provided: *5 N L R 176, Foll.; (1890) 25 Q B D 146 and (1885) 14 Q B D 209, Ref.* [P 143 C 2]

(d) Railways Act (1890), S. 77—S. 77 does not contemplate that notice should be given in anticipation.

A notice claiming over-charges up to a certain date would not operate as a notice for similar future claims: *A I R 1928 Lah 438 and A I R 1930 Cal 332, Disting.* [P 144 C 1]

(e) Railways Act (1890), S. 77—Scope of.

The object of S. 77 is to prevent stale and dishonest claims for loss and not as means to enable the Railway authorities to deprive their customers of their just dues, but the Railway authorities are entitled to have due notice of the total extent of the claim preferred against them. [P 144 C 1]

(f) Limitation Act (1908), S. 14—Court—Governor-General is not a Court.

The Governor-General is no doubt a supreme executive authority in India but there is no statute constituting him a Court: *29 All 519 (P C); 26 All 382 and A I R 1918 Bom 82, Foll.* [P 144 C 2]

(g) Limitation Act (1908), Art. 62—Art. 62 applies to suit for over-charge against a Railway Company.

A suit for over-charges against a Railway Company must be brought within three years under Art. 62. [P 144 C 1]

(h) Limitation Act (1908), S. 14—Proceedings carried on before Railway Board do not extend time under S. 14.

For S. 14 to apply, an enquiry instituted by the plaintiff must be prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature was unable to entertain it. But the plaintiff who had recourse to the Advisory Board which is not a Court, instead of to the Railway Commissioners, cannot be said to have prosecuted his claim in good faith and hence S. 14 cannot extend time. [P 144 C 1, 2]

J. M. Thakar — *for Applicant.*

P. N. Rudra — *for Opposite Party.*

Order.—In this case before the Small Cause Court, Nagpur, the plaintiff-applicant Meghji Hirji and Co., forest contractor and fire-wood merchant, unsuccessfully sued the Bengal-Nagpur Ry. Co. for a sum of Rs. 1000 excess charges on wagons of fire-wood sent from time to time to Motibagh, Itwari and Nagpur Railway Stations from Talodhi Station on the Gondia-Chanda Section of the Railway. The plaintiff had first of all complained to the Governor-General in Council on 16th January 1933 that the rates charged by the company were unfair and gave undue preference to his competitors at other stations. The Governor-General in Council referred the question for enquiry to the Railway Rates Advisory Committee whose printed report is Ex. P-1 on the record. The plaintiff's application is to be found at pp. 52 to 54. It complains that the railway administration has been giving unreasonable preference in contravention of Sec. 42 (2), Railways Act. The applicants prayed that their complaint be referred under Sec. 28, of the Railways Act, to the Railway Rates Advisory Committee for decision about the rates and that the applicants be awarded damages of Rs. 7795 on account of overcharges paid by them under protest from 10th December 1929 to 10th December 1932. The Committee found (p. 18 of the report) that undue preference had been given and undue prejudice caused to the applicant and that he was entitled to have the rates reduced. They indicated the ways by which this could be done. With regard to the applicant's claim for damages the Commissioners said (p. 2 of the report):

> It was explained to him that we are an advisory body and not a judicial body with legal powers, that our powers and rules of procedure were laid down in Government of India (Railway Department), Resolution No. 606-T, dated 25th September 1930, and that, as such, apart from other legal difficulties, we had no power to award damages, to grant injunctions, or to make recommendations to the Government in those respects. We should like to add, in this connexion, that there is no provision in Ch. 5, Indian Railways Act 9 of 1890 for the awarding of damages by the Railway Commissioners.

The recommendations of the Committee were accepted by the Governor-General in Council on 9th January 1935 and the Railway Company reduced its rates for the timber booked from this station. Plaintiff's present claim is for overcharges on 75 wagons from 22nd April 1932 to 1st April 1933 and on 112 wagons from 1st April 1933 to 1st April 1934. The claim has been dismissed on these grounds: first, it is barred under S. 41, Indian Railways Act; secondly, it is unmaintainable for want of valid notice; and thirdly, it is time-barred. It is contended in revision that the decision on all these three points is erroneous.

Plaintiff admits that by Sec. 41, Railways Act, he could not have brought this suit "except as provided in this Act," but he says that Sec. 77 provides for the launching of his claim. Now S. 77 says that nobody shall be entitled to a refund of an overcharge unless his claim has been preferred in writing to the railway administration within six months from the date of the delivery of the goods. The Section certainly assumes the possibility of claims for overcharge, but all it means is that where such a claim lies in law then it cannot succeed unless notice within six months has been given. It does not provide a remedy under the Act; it only cuts down the remedy in cases where claims would lie according to the general law. It may be mentioned incidentally that the lower Court is not satisfied that the claim related to an overcharge as contemplated by the Section. That point is not pressed by defendant's counsel, and I see no force in it. An overcharge is simply a charge of more than is permitted by law: A I R 1927 Nag 77.[1] The word should be interpreted in a wide sense.

To return to S. 41, where there has been an omission by a railway administration in violation of Ch. 5 the remedy provided for in this Act is laid down in S. 28. When complaint is made to the Governor-General in Council he may refer the case to the Commissioners for decision, and in hearing such a case the Railway Commission shall have the powers which may be exercised in the hearing of an original civil suit by the High Court: (S. 30). Now the plaintiff did not follow this remedy. He applied for reference of his complaint to the Railway Rates Advisory Committee, not to the Railway Commissioners. The request was acceded to. This Advisory Committee could only express an opinion; it could not make an award or allow damages. If the matter had been referred to the Commissioners the result might have been different. Analogous cases have arisen in England under the Railway and Canal Traffic Act, 1854 (17 & 18 Vict., C. 31). S. 6 of that Act reads:

> No proceeding shall be taken for any violation or contravention of the above enactments, except in the manner herein provided; but nothing herein contained shall take away or diminish any rights, remedies or privileges of any person or company against any railway or canal or railway and canal company under the existing law.

Section 3 of the same Act provides the remedy of application to the Railway and Canal Commission which can issue injunction against the Railway Company for contravention of the Act. S. 6 means that that remedy must be followed although at the same time it says that the remedies under the existing law are not taken away. Although the Section is differently worded, it corresponds in principle to S. 41, Railways Act. If no claim for past damages can be brought in an ordinary civil suit under S. 6 of the English Act, I am unable to see how Sec. 41, Indian Railways Act allows any greater latitude. In the case of (1890) 25 Q B D 146[2] their Lordships followed (1885) 14 Q B D 209[3] and held that the only remedy where it is alleged that there has been a breach of S. 2, Railway and Canal Traffic Act 1854, is by application to the Railway Commissioners under S. 3, and the only remedy they can give has regard to the future, not the past, and therefore that past payments alleged to be overcharges by reason of being contrary to the Act could not be recovered by action. In the Indian Act, Ch. 5 provides the detailed remedies under Ss. 72 to 82. Ch. 5 of the Act gives a particular remedy against the railway company for a liability created by the statute itself, and S. 41 excludes the jurisdiction of the Civil Court. It is to be inferred that the litigant is confined to this remedy which has been specially provided: *see* 5 N L R 176[4] at pages 178-179. On this ground therefore I agree with the lower Court that the suit is not maintainable.

The next question is about notice. Plaintiff admittedly gave notices on 8th May 1932 and 27th September 1932, and the lower Court holds that these are valid in respect of consignments up to 27th September 1932. A further notice was given on 9th August 1935 (Ex. P-3) after the Advisory Board had given their findings, but it is beyond six months from the date of delivery of the goods and so does not comply with S. 77. Plaintiff's contention is that it is a case of a continuing wrong, and secondly that as the agent had knowledge

1. Harakchand v. G. I. P. Ry. Co., (1927) 14 A I R Nag 77=100 I C 406.

2. Rhymney Railway Co. v. Rhymney Iron Co. Ltd., (1890) 25 Q B D 146 = 59 L J Q B 414 =63 L T 407=38 W R 764.

3. Manchester, Sheffield and Lincolnshire Ry. Co. v. Denaby Main Colliery Co., (1885) 14 Q B D 209=54 L J Q B 103.

4. Jagannath v. Khuba, (1909) 5 N L R 176 = 4 I C 795.

and notice of his claim with regard to previous consignments it was unnecessary to give a separate notice for the later consignments. I should say that there was a recurring wrong, no doubt, but it did not occur independently of plaintiff's volition. It only occurred because plaintiff continued to send the various consignments. Nor from the fact that overcharges up to a certain date were claimed would the agent know that overcharges in future would also be claimed. S. 77 is mandatory and does not contemplate that a notice should be given in anticipation. I think that the claim for items subsequent to 27th September 1932 would fail on this ground also.

Plaintiff relies on A I R 1928 Lah 438[5] which does not cover the point. It held that when notice was given to one railway and the other railway concern had taken notice of plaintiff's claim, made inquiries and replied to him, no separate notice was necessary. That was with regard to a claim which had accrued before that time: so too in 57 Cal 1286.[6] No doubt the object of S. 77, Railways Act, is to prevent stale and dishonest claims for loss and not as a means to enable the railway authorities to deprive their customers of just dues; but the railway authorities are entitled to have due notice of the total extent of the claim preferred against him.

The third point is whether the claim is time-barred. I should first of all remark that as plaintiff bases his cause of action on the finding of the Advisory Committee, and as that Committee in para. 49 of its report says that

> nothing in this report should be taken as bearing on the applicant's contention that the rates in force prior to that date causes undue prejudice to him,

it seems to follow that there is no cause of action for transactions prior to 1st April 1933. For deliveries subsequent to that date the suit had to be brought within three years under Art. 62, Limitation Act, unless Sec. 14, Limitation Act, applied to exclude the period of inquiry before the Advisory Committee. If S. 14 is to apply this inquiry must have been prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature was unable to entertain it. The lower Court points out that the Advisory Committee had no judicial powers and so could not be a Court. It is now argued that the Governor-General in Council was a Court. But even if he were, the inquiry was conducted not by him but by the Advisory Board. Taking it however that as the inquiry was made under his orders, it and his acceptance of it formed one proceeding, is the Governor-General in Council a Court constituted by law? The word "Court" has not been defined in the Civil Procedure Code, but in 30 Mad 326[7] at p. 327 it has been held to mean "a place where justice is judicially ministered." In 29 All 519[8] it is pointed out that administrative officers are not Courts within the meaning of this Section: *see also* 26 All 382[9] and 43 Bom 201.[10] The Governor-General in Council is no doubt the supreme executive authority in India, but there is no statute constituting him a Court, nor has any ruling been brought to my notice which treats him as such.

It is said that by Ch. 5 of the Act the Governor-General in Council is invested with all the powers of a High Court. In my view that is not so. It is the Commissioners appointed by the Governor-General in Council that are given powers of a High Court under S. 30. It does not follow that the authority appointing a Court or appointing Commissioners having the powers of a Court is itself a Court. I need not go on to consider whether by having recourse to the Advisory Board instead of the Railway Commissioners the plaintiff can be said to have prosecuted his claim in good faith according to S. 14 or not. I hold that S. 14 did not come in to extend time in the case.

The application for revision therefore fails and is dismissed with costs. Counsel's fee will be Rs. 30.

S.G./R.K. *Application dismissed.*

5. Dhanpat Mal v. B. B. & C. I. Ry. Co., (1928) 15 A I R Lah 438=110 I C 718.
6. Shamsul Huq v. Secretary of State, (1930) 17 A I R Cal 332=128 I C 248=57 Cal 1286=52 C L J 260.
7. Manavala Goundan v. Kumarappa Reddy, (1907) 30 Mad 326=17 M L J 313.
8. Har Shankar Pratab Singh v. Raghuraj Singh, (1907) 29 All 519=34 I A 125 = 4 A L J 497 (P C).
9. Muhammad Subhan-Ullah v. Secretary of State, (1904) 26 All 382=1904 A W N 54.
10. Laxman Ganesh v. Keshav Govind, (1918) 5 A I R Bom 82=48 I C 467=43 Bom 201=20 Bom L R 918.

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VIVIAN BOSE J.

J. H. S. Evangelical German Mission, Superintendent Leprosy Asylum, Chandkhuri — Appellant.

v.

Mahant Ramsahaigir Chela Sunsergir Gosawi — Respondent.

Misc. Appeal No. 292 of 1937, Decided on 17th October 1938, from order of Dist. Judge, Raipur, D/- 24th September 1937.

(a) Civil P. C. (1908), O. 9, R. 9—Complete usurpation of possession and consequent dispossession of owner is not continuing trespass within meaning of Sec. 23, Limitation Act—Previous suits alleging forcible and wrongful possession of certain land and praying for ejectment dismissed under O. 9, R. 8—Subsequent suit alleging forcible and illegal possession and praying for possession is barred being based on same cause of action and not continuing one.

It is true that dispossession is a trespass and in one sense a continuance of possession thereafter is a continuance of the original wrong, but that is not the meaning of S. 23, Lim. Act. The Limitation Act must be read as a whole and due regard paid to its different provisions. It must clearly be construed in such manner that there is no conflict between S. 23 and Arts. 142 and 144. Complete usurpation of possession and occupation and consequent dispossession of the owner of the land is a wrong which is complete from the moment of the dispossession. It is not a continuing trespass of the character contemplated by S. 23. Hence where a plaintiff's suit alleging that defendant had forcibly and illegally taken possession of certain land and tank, that defendant's possession constituted a trespass and praying that the defendant be ejected from the land and tank is dismissed under O. 9, R. 8, a subsequent suit alleging forcible and wrongful possession and praying for possession of same land is barred because the cause of action is the same and not a continuing one : *A I R 1926 All 34, Disting.* [P 146 C 1, 2]

(b) Limitation Act (1908), S. 23 and Arts. 142 and 144 — Taking exclusive possession of land whether communal or not is not continuing trespass within meaning of S. 23 but is dispossession under Arts. 142 and 144.

Whether the land belongs to a community or not, if one person takes sole and exclusive possession of it, or some portion of it, and excludes all others who have a right to occupation from possession, then the trespass is not a continuing trespass of the kind contemplated by S. 23 but the dispossession of the character dealt with in Arts. 142 and 144. [P 146 C 2]

(c) Abadi—Village abadi is not communal land.

Expressions like "common land" and "communal land" which are used in connexion with the C. P. Land Revenue Act refer to land in which no person has a right to sole and exclusive occupation of any particular portion of it. Every member of the community to which the land belongs, or in which they have an interest, has an equal right to the use of every square inch of it. That is certainly not the case in the abadi. Persons entitled to plots of land in the abadi are entitled, when they receive possession of it, to exclusive possession and are entitled to exclude every other member of the community from occupation. Therefore it is not communal land nor is it so dealt with in any portion of the Central Provinces Land Revenue Act. [P 146 C 2]

D. N. Chaudhury — *for Appellant.*

R. N. Padhye — *for Respondent.*

Order. — The question in this appeal is whether the plaintiff's suit is barred under O. 9, R. 9, Civil P. C. He is the malguzar of the village in which the two portions of land in suit belong. They both form part of the abadi. In the year 1935 the plaintiff sued for possession of these two pieces of land under two different suits. The plaint in respect of the first portion is Ex. D-1 and the relevant passages are as follows :

2. The defendant has, without being entitled thereto, forcibly and illegally taken possession of a plot of land . . . . in the month of March 1935 for the purpose of building a house and has since constructed a house. The defendant has no right to take possession of any part of the plaintiff's abadi land in this manner nor had he any right previously. The defendant's possession of the land in suit constitutes a trespass.

3. At the time when the defendant took the possession in the plaintiff's abadi land, the plaintiff prohibited him not to, orally, but he refused to listen. Then the plaintiff served a notice in writing on the defendant on 17th April 1935 forbidding him not to proceed with building the house. But even then the defendant did not stop and having completed the house . . . . . he established his possession there. Even after the notice the defendant was asked to quit but he refused.

4. In spite of repeated demands, the defendant refused to quit the possession of the plaintiff's abadi land.

The prayer clause is that the defendant be ejected from the land and be ordered to remove the materials of the house which he has constructed there and to make over possession to the plaintiff. Ex. D-2 is the plaint in the other suit relating to the other plot of land. The relevant passages are as follows :

2. The defendant without any right took forcible and wrongful possession of plaintiff's tank . . . and having filled up the Dabri tank which belonged to the plaintiff in the month of March 1935, he has taken possession of the land thereof. The defendant has no right to fill up the plaintiff's abadi tank nor had he any previously. With the intention of causing damage to the plaintiff, the defendant has filled up the tank with earth and taken possession of the land . . . . and his possession of the land in suit constitutes a trespass.

3. At the time of filling up the tank in the month of March 1935 the plaintiff made a protest to the defendant orally but the latter did not listen. Then the plaintiff served a notice in writing on the defendant on 17th April 1935 forbidding him not to fill up the tank and take wrongful

possession. But even then the defendant did not stop and having filled up the tank, he took possession of the land. Even after serving the notice, the plaintiff prevented him but he did not listen.

The relief, as before, is for ejectment and for an order that the earth be removed from the tank, that it be restored to its former condition and that the plaintiff thereupon be placed in possession. On the date of hearing, the defendant appeared and the plaintiff did not appear. Consequently after the Court had ascertained whether the defendant admitted the claim or part thereof and having discovered that he did not, it dismissed the suits under O. 9, R, 8, Civil P. C. The present suit is for possession of both these plots of land. The allegations are precisely the same as before except that here it is also stated that the "forcible and wrongful possession of the portions of this abadi land" constitutes a tort and a continuing trespass and that therefore the cause of action being a continuing one, the suit is maintainable. It is to be observed that the plaintiff still complains of the forcible and wrongful possession of the defendant. He still states that he has built a house on one part of the land and filled up the tank so far as the other portion is concerned. He also states, as before, that this has been done in spite of his protest and notice.

The first Court dismissed the claim under O. 9, R. 9, but the lower Appellate Court held that the acts complained of constituted a continuing trespass apparently within the meaning of S. 23, Limitation Act, that the cause of action for the present suit was not the same as the causes of action in the previous two suits and that therefore the present suit was not barred under O. 9, R. 9. The case was therefore remanded for trial on the merits. I am clear that the lower Appellate Court is wrong and that the first Court is right. It is in my opinion impossible to regard dispossession of the character complained of in these suits as a continuing wrong. If that was so, it would be impossible ever to apply Arts. 142 and 144, Limitation Act. Of course dispossession is a trespass and in one sense a continuance of possession thereafter is a continuance of the original wrong, but that is not the meaning of S. 23. The Limitation Act must be read as a whole and due regard paid to its different provisions. It must clearly be construed in such manner that there is no conflict between S. 23 and Arts. 142 and 144. Complete usurpation of possession and occupation such as appears here and consequent dispossession of the owner of the land is a wrong which is complete from the moment of the dispossession. It is not a continuing trespass of the character contemplated by S. 23. Consequently, the cause of action in the present case is clearly the same as the causes of action in the two previous suits and therefore the present suit is barred by O. 9, Rule 9.

It was argued on behalf of the respondent that since the land was in the abadi of the village, it constituted common village land and was communal land in which everybody had a right, and it was urged that trespass on communal land would be a continuing trespass. I am unable to accept this contention. Whether the land belongs to a community or not, if one person takes sole and exclusive possession of it, or some portion of it, and excludes all others who have a right to occupation from possession, then the trespass is not a continuing trespass of the kind contemplated by S. 23 but is dispossession of the character dealt with in Arts. 142 and 144. But apart from that, I am clear that the village abadi is not communal land. Expressions like 'common land' and 'communal land' which are used in connexion with the Land Revenue Act of these Provinces refer to land in which no person has a right to sole and exclusive occupation of any particular portion of it. Every member of the community to which the land belongs, or in which they have an interest, has an equal right to the use of every square inch of it. That is certainly not the case in the abadi. Persons entitled to plots of land in the abadi are entitled, when they receive possession of it, to exclusive possession and are entitled to exclude every other member of the community from occupation. Therefore, it is not communal land nor is it so dealt with in any portion of the Central Provinces Land Revenue Act. It was argued then, that however that may be with respect to the site on which the house has now been built, those considerations cannot apply to the tank. So far as that is concerned, it is communal and any right to obstruct taking of water from that tank constitutes a continuing trespass. It is also suggested that every member of the village community has a right to the use of the water of this tank. None of these facts has been pleaded and even if it had, there is a difference between obstructing a person from drawing water from a well, or from obstructing water

from water course, or from preventing him from exercising a right of way, and from taking complete possession of an area of land even if it happens to be under water. I need not therefore examine the cases cited by the learned counsel for the respondent which deal with undoubted cases of continuing wrongs. None of them is in the slightest degree relevant to the facts of this case. The learned Judge of the lower Appellate Court has relied upon A I R 1926 All 34.[1] But that case is clearly distinguishable because the finding there was that the cause of action in the second suit was different from that in the former. If that had been the fact here, then of course this suit would not have been barred, but as I have said the cause of action here is identical with the causes of action in the previous suits. Consequently, the decision of the lower Appellate Court is wrong and that of the first Court right. The appeal is allowed. The decree of the lower Appellate Court is reversed and that of the first Court restored. Costs here and in the Courts below will be paid by the respondent. Counsel's fee Rs. 25.

D.S./R.K. *Appeal allowed.*

1. Kumari v. Adit Misir, (1926) 13 A I R All 34 =89 I C 379.

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STONE C. J. AND VIVIAN BOSE J.

Shaligram Bhagoo Kunbi and another — Appellants.

v.

Mt. Dhurpati w/o Shamrao Kunbi — Respondent.

Letters Patent Appeal No. 2 of 1937, Decided on 4th November 1938, from appellate decree of Gruer J. in S. A. No. 478 of 1936, D/- 11th December 1936.

(a) Civil P. C. (1908), S. 47 — Legal representative —Whether person is legal representative of party to decree should be decided by executing Court — Separate suit does not lie.

The question whether a person is or is not a representative of a party to a decree must be decided by the executing Court and not in a separate suit and once decided, it becomes final (subject of course to revision, review or appeal when they lie) so far as matters relating to the "execution, discharge or satisfaction" of that decree is concerned : *A I R 1916 Nag 89, Foll.; A I R 1918 Bom 175, Rel. on.* [P 148 C 1]

(b) Civil P. C. (1908), Ss. 11 and 47, O. 22, R. 5 and O. 2, R. 2—Order under O. 22, R. 5, is not res judicata but is final so far as suit in which it is made is concerned — Subsequent decision in separate suit does not affect rights of parties in former suit — What matter amounts to res judicata stated.

Though a decision under O. 22, R. 5 is not res judicata because it does not operate as a decree, still that decision is final so far as the suit in which it is made is concerned, not on the ground of res judicata but because of Sec. 47. No subsequent decision in a separate suit can be used to affect the rights of the parties so far as questions relating to the "execution, discharge or satisfaction" of the decree in connexion with which the order was made is concerned. The matters in issue in the former suit cannot be reagitated nor can questions which might and ought to have been raised there be raised in the second suit, nor will a separate suit lie on the same cause of action. The prohibitions contained in O. 2, Rule 2 and S. 47, and the usual rules about res judicata apply so far as those matters are concerned. All that is not res judicata is the question whether or not the person joined as the legal representative really occupies that character. That question is not finally concluded by a decision under O. 22, R. 5, except in so far as it concerns the suit in which the decision is made : *A I R 1921 Nag 23, Explained and doubted; A I R 1936 All 412, Ref.* [P 148 C 2; P 149 C 1]

(c) Civil P. C. (1908), S. 47— Question whether property can be proceeded against held must be decided under Sec. 47 by executing Court and not in separate suit.

Where the decree-holder alleges that the property in possession of a party to the decree can be proceeded against in execution while the judgment-debtor (for that is the position which the person added as a legal representative occupies) states that it does not, that is precisely the type of question that must be settled under S. 47 and not by a separate suit. [P 149 C 1]

R. R. Dandige — *for Appellants.*

V. K. Rajwade — *for Respondent.*

Judgment. — Defendant 1 in this case obtained a decree against one Sampat Daulat on 8th December 1930 and then assigned it to defendant 2. Sampat died on 10th October 1931 and the decree-holders thereupon proceeded against the plaintiffs as the legal representatives of Sampat. Notices were issued but ignored and so the plaintiffs were substituted in place of the deceased judgment-debtor and execution proceeded against them. The property in suit here, which had admittedly once belonged to Sampat and which is now in the plaintiff's hands, was attached. Instead of contesting the execution proceedings, the plaintiffs have filed the present suit for a declaration that they are not the legal representatives of Sampat and so cannot be proceeded against in that capacity. They admit that the property had once belonged to Sampat but claimed that it was now theirs, it having been gifted to them by Sampat on 11th April 1931. The only question in this

appeal is whether these matters can be litigated in this suit or whether the plaintiffs' sole remedy was to contest the execution proceedings. O. 22, R. 5, Civil P. C., states that :

> Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court;

and S. 47 (3) provides that :

> Where a question arises as to whether any person is or is not the representative of a party, such question shall for the purposes of this Section, be determined by the Court.

The result is that a separate suit is clearly barred. It was argued that it cannot be because S. 47 is confined to matters relating to "the execution, discharge or satisfaction of the decree" and this relates to none of them. We do not think there is room for any such contention. Clause 1 of S. 47 contemplates execution not only against the original parties to a decree but also against their "representatives", and Cl. 3 states that a question whether any person is or is not a representative of a party, "shall for the purposes of this Section be determined by the Court." The only meaning we can attach to that is that the question whether a person is or is not a representative of a party to a decree must be decided by the executing Court and not in a separate suit and that once decided, it becomes final (subject of course to revision, review or appeal when they lie) so far as matters relating to the "execution, discharge, or satisfaction" of that decree is concerned. This was the view taken in 13 N L R 32[1] where Mittra A. J. C. held that :

> It is no longer open to the Court to stay the suit until the dispute as to who is the legal representative of a deceased plaintiff has been determined in a separate suit. The question as to who was the representative of a deceased defendant could not be left open for decision in another suit, even under the old Code, but had to be decided by the Court itself. Under the present Code, all such questions have to be decided by the Court.

The Bombay High Court took a similar view in 42 Bom 535[2] at p. 542. The Allahabad High Court in 48 All 422[3] went so far as to hold that a decision under O. 22, R. 5 is res judicata and so the same question cannot be reagitated in a subsequent suit. But this was dissented from in a later decision : 58 All 734.[4] It was there held that such a decision is not res judicata because an order under that Rule does not operate as a decree. With that we agree. It is the Nagpur view : *see* 13 N L R 32[1] and 17 N L R 45[5] and also the view of other High Courts. Their decisions have been quoted in the Allahabad and Nagpur decisions, so we need not re-quote them here. But there is an important qualification to this. It is true the order is not res judicata, but for all that, the decision is final so far as the suit in which it is made is concerned, not on the ground of res judicata but because of S. 47. No subsequent decision in a separate suit can be used to affect the rights of the parties so far as questions relating to the 'execution, discharge or satisfaction' of the decree in connexion with which the order was made is concerned. This distinction was stressed in the Allahabad case, 58 All 734[4]:

> The order of the learned Subordinate Judge substituting Sheo Tahal Singh, the father of the present plaintiffs, in place of Gopal Rai was an order passed under O. 22, R. 5, Civil P. C., and it was passed in the course of a suit which did not concern the property in dispute in this case.

That in our opinion is the vital point. The next question is whether this suit lies. As we have said, the matter is not res judicata and so that does not operate as a bar. But Kotval A. J. C. went further and held in 17 N L R 45[5] that the legal representative, or the person joined as such, is entitled to bring a separate suit in respect of the very property in dispute in the former litigation and thus to re-open the very question decided under O. 22, R. 5 so as to affect the matters at issue there. With that we are unable to agree. Once a person is joined as a legal representative under O. 22, R. 5, and once it is accepted that that is final so far as that litigation is concerned, then it follows that the person so joined becomes a party to the decree, and thereafter all matters relating to the "execution, discharge or satisfaction" of that decree must be decided under Sec. 47 and not in a separate suit. Therefore what we have to see here is whether the questions at issue in this suit relate to the "execution, discharge or satisfaction" of the decree in the former litiga-

1. Tarachand v. Mt. Janki, (1916) 3 A I R Nag 89=38 I C 833=13 N L R 32.
2. Raoji Bhikaji v. Anant Laxman, (1918) 5 A I R Bom 175=46 I C 750 = 42 Bom 535= 20 Bom L R 671.
3. Raj Bahadur v. Narayan Prasad, (1926) 13 A I R All 439=94 I C 157= 48 All 422 = 24 A L J 546.
4. Antu Rai v. Ram Kinkar Rai, (1936) 23 A I R All 412 = 163 I C 283 = 58 All 734 = 1936 A L J 622.
5. Mt. Laxmi v. Ganpat, (1921) 8 A I R Nag 23 =62 I C 303=17 N L R 45.

tion. The prayer clause in the plaint here is as follows :

It be declared that the immovable property in para. 2 above, owned by the plaintiffs, and in their possession by virtue of the registered gift-deed, dated 21st April 1931 (this is an accidental slip and it should be 11th April 1931), is not owned and possessed by them as heirs and it be ordered that they personally or their property are not liable to satisfy the debt of defendants 1 and 2 and to pay charges of maintenance of defendants 3, 4 and 5.

These questions relate exclusively to the execution of the former decree. The allegations amount to no more than this. The decree-holder alleges that the property in possession of a party to the decree can be proceeded against in execution. The judgment-debtor (for that is the position which the person added as the legal representative occupies) states that it is not. That is precisely the type of question that must be settled under S. 47. It follows that this suit cannot lie. We want however to make it plain that our decision is confined to this, namely that matters in issue in the former suit cannot be re-agitated, nor can questions which might and ought to have been raised there be raised in the second suit, nor will a separate suit lie on the same cause of action. The prohibitions contained in O. 2, R. 2 and S. 47, and the usual rules about res judicata, apply so far as those matters are concerned. All that, in our opinion, is not res judicata is the question whether or not the person joined as the legal representative really occupies that character. That question is not finally concluded by a decision under O. 22, Rule 5 except in so far as it concerns the suit in which the decision is made. To that extent we overrule 17 N L R 45.[5] The appeal is dismissed with costs.

N.S./R.K. *Appeal dismissed.*

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STONE C. J.

Raje Shridharrao Shanker Rao Nemiwant Bahadur and others — *Plaintiffs* — Appellants.

v.

Shrawan Vithoba Badhe — *Defendant* — Respondent.

Second Appeal No. 522 of 1936, Decided on 16th November 1938, from appellate decree of Addl. Dist. Judge, Khamgaon, D/- 28th August 1936.

Berar Land Revenue Code (1896), S. 72 (3) —Rent of ante-alienation tenant is charge on his holding—Rent not paid on due date—Jagirdar, in equity, is entitled to interest on arrears of rent.

Where a sum of money is made payable and is charged on land, then in equity it is to be implied that there is an obligation to pay an equitable rate of interest on failure to pay the sum. Under S. 72, sub-s. (3), the rent of an ante-alienation tenant is declared a first charge on his holding. Hence, where one has an ante-alienation tenant in a jagir village so that the jagirdar is the receiver of the rent reserved on the holding of the ante-alienation tenant and that rent is not paid though demand be made on the due date, the jagirdar is entitled to interest on the amount of rent in arrear: *(1903) 1 Ch 781 and A I R 1930 Mad 727, Foll.* [P 149 C 2 ; P 150 C 1, 2]

M. R. Bobde — *for Appellants.*

Judgment. — This appeal raises a question of some little importance, though the sum involved is very small, because the decision is likely to have an application beyond the particular case before me. It is therefore a matter for regret that the respondent is not represented and so I have not had the advantage of an argument contrary to that presented by Mr. Bobde for the appellants. The question is as follows : Where one has an ante-alienation tenant in a jagir village so that the jagirdar is the receiver of the rent reserved on the holding of the ante-alienation tenant and that rent is not paid, though demand be made, on the due date, is the jagirdar entitled to interest on the amount of rent in arrear?

The claim is for interest at 1 per cent. per month on the rent claimed which amounts to Rs. 101-5-9. There has been a decree for the rent but interest has been disallowed. The first Court arrived at this conclusion relying upon a judgment passed in Second Appeal No. 25-B of 1933, decided in 1935 by Mr. Subhedar A. J. C. and not reported. My attention has been drawn to a decision of Gruer J. in Second Appeal No. 230 of 1936 wherein the Judge allowed interest at 4 per cent. founding himself on S. 73, Contract Act, holding that in substance the position of these tenants, though somewhat anomalous, was that of contractual tenants. A Bench of this High Court in L. P. A. No. 8 of 1936[1] considered the position of an absolute occupancy tenant in the Central Provinces and concluded that the rights of such a tenant were statutory rather than contractual. It may well be that there is substantial difference between an absolute occupancy tenant in

1. Daryaosing v. Colonel Kukde, *Reported in* (1939) 26 A I R Nag 91=1938 N L J 366.

the Central Provinces and an ante-alienation tenant in Berar. I hesitate, in view of the Privy Council decision in Privy Council Appeal No. 65 of 1936[2] and the decision in A I R 1930 Mad 727,[3] to found the obligation to pay interest on the Contract Act. Mr. Bobde has very frankly said that he sees a difficulty in claiming interest under the Interest Act, because the Interest Act requires some written instrument imposing an obligation to pay a sum certain at a certain date, and, although he is prepared to say that there is a sum certain payable on a certain date, he is not prepared to say that there is a written instrument. But he asks that the obligation be founded on the English equitable rule that where a sum of money is made payable and is charged on land, then in equity it is to be implied that there is an obligation to pay an equitable rate of interest on failure to pay the sum. This was so held in (1903) 1 Ch 781,[4] the head-note to which says :

Where any settlement or contract contains a provision that a certain fixed sum of money is to be charged on land and to be paid at a fixed time, then, as between the owner of the land and the person entitled to the money, the money, in the eye of a Court of Equity, bears interest from the date fixed for payment of the money, although nothing is said as to interest in the settlement or contract—unless there are circumstances negativing the presumption that interest is payable.

That case was followed in A I R 1930 Mad 727.[3] It is said to be applicable because under S. 72, sub-s. (3), Berar Land Revenue Code, the rent of an ante-alienation tenant is declared a first charge on his holding. That has the effect of creating a statutory charge for rent. In the Madras case the charge was created by a contract. In view of the observations of the Master of the Rolls in (1903) 1 Ch 781[4] at p. 792 and onwards, I am of the opinion that here interest can be allowed. The Master of the Rolls there observes as follows :

Therefore we come to this point — whether, as the result of the charge, interest was or was not payable ; and this appears to me to be the only point in the case. It seems to me to be well established on the authorities, and the result of those authorities does not indeed appear to be disputed, that a Court of Equity has power to give interest, and, in point of fact, does so where a charge is created on land, although there are no words allowing interest in the instrument creating the charge. Indeed, we go back to the principle laid down in many cases showing that, in point of fact, the Court of Equity does charge interest . . . . but counsel for the appellants say that, although the Court has power to charge interest, yet the circumstances of the particular case may lead it to consider that it ought not to order or enforce payment of interest. But in the present case it appears to me—and the learned Judge has so held—that the circumstances, instead of rebutting the presumption that interest was payable, assist it, because the charge was made in order to safeguard the right of the persons entitled to the lunatic's personal estate as against the right of the persons entitled to the land, and to adjust those rights between them. What was the object of it but to give to those representing the personal estate, as against those representing the land, the right to have the charge paid ? Therefore it seems to me that this is just the case in which interest should be paid.

Here, it is pointed out that an ante-alienation tenant, though he owes rent, cannot be ejected. It is therefore urged that as some sort of compensation to the person entitled to the rent the due payment of rent is made chargeable on the land. This, therefore is a case in which it is only equitable to order interest to be paid if the rent is not paid at the due date. I am of the opinion that such an equity does arise. The decree will accordingly be varied by adding interest at 4 per cent. from the date when the rent was due to the date when the rent was paid. I am not disposed, in a case of some doubt, to impose a heavy burden of costs on the defendant and I therefore fix the costs at Rs. 50.

D.S./R.K. *Decree varied.*

2. Bengal Nagpur Ry. Co. Ltd. v. Ruttanji Ramji, *Reported in* (1938) 25 A I R P C 67= 173 I C 15=I L R (1938) 2 Cal 72=32 S L R 374=65 I A 66 (P C).
3. Nanchappa v. V.I. Mannadiar, (1930) 17 A I R Mad 727 = 127 I C 630 = 53 Mad 549 = 59 M L J 358.
4. In re Drax, Savile v. Drax, (1903) 1 Ch 781= 72 L J Ch 505=88 L T 510=51 W R 612.

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NIYOGI J.

On difference between

STONE C. J. AND CLARKE J.

Balkrishna Rajaram Modi—Appellant.

v.

Baijnath Girdharilal Tiwari and others — Respondents.

First Appeal No. 11 of 1935, Decided on 13th January 1939, from decree of Addl. Dist. Judge, Saugor, D/- 26th September 1934.

(a) Interpretation of Statutes — Limitation Acts—Construction (Per *Stone C. J.*).

Limitation Acts should be construed so as to save rather than bar a proceeding. [P 153 C 1]

*** * (b) Limitation Act (1908), S. 12 (2) — Application for copies made on day on which judgment is pronounced — That day must be**

included in days requisite for obtaining copies— *13 N L R 89=A I R 1917 Nag 196=40 Ind Cas 425, Overruled* (Per *Stone C. J. and Niyogi J.; Clarke J.*, Contra.).

However startling, fantastic or absurd it may appear to be, the Courts cannot refuse to give effect to the plain meaning of the words used by the Legislature, if it does not conflict with reason and justice. There is nothing fundamentally unjust or unreasonable in excluding the same day twice. [P 154 C 1]

The day on which copies are applied for is a day requisite for obtaining the copies. [P 154 C 1]

Where therefore an application for copies of judgment and decree is made on the day on which the judgment is pronounced, that day should be included in the days requisite for obtaining copies, though that day is otherwise excluded by law in computing the prescribed period of limitation for appeal : *13 N L R 89 = A I R 1917 Nag 196 = 40 Ind Cas 425*, **Overruled**; *A I R 1924 Lah 599, Dissent.* [P 153 C 2 ; P 154 C 2]

R. S. Dabir and W. B. Pendharkar — *for Appellant.*

D. N. Chaudhary — *for Respondents.*

Clarke J.—The plaintiff has appealed against the judgment and decree of the Additional District Judge, Saugor, dismissing his suit on a mortgage by which he sought to recover nearly Rs. 12,000 from the six defendants. In the trial Court defendant 1 raised a preliminary objection as to the competency of the Court to entertain the suit by reason of the debt having been included in an application made by him to the Debt Conciliation Board under S. 4 (1), Debt Conciliation Act. The Court has held that the suit is barred by S. 16, Debt Conciliation Act, and the plaintiff's suit has therefore been dismissed. The plaintiff in this appeal seeks to reverse the finding of the lower Court that the suit is barred by S. 16, Debt Conciliation Act. The respondents have raised two preliminary objections to the appeal being heard: (i) because it is time barred by one day, and (ii) because insufficient court-fee has been paid. On the point of limitation, the judgment was delivered on 26th September 1934, whilst the appeal has been filed on 11th January 1935. The appellant applied to the copying department for a copy of the judgment and decree on the same day on which the judgment was delivered, i. e. 26th September. The copies were made ready and delivered to him on 12th October 1934. According to Art. 156, Limitation Act, the period of limitation for this appeal is 90 days from the date of the decree. S. 12 (1) of the Act provides : " In computing the period of limitation prescribed " for any suit, appeal or application, the day from" which such period is to be reckoned shall be excluded". The reason for this is obvious because one day is a period of 24 hours from the commencement of the period. One day from 12 noon today is 12 noon tomorrow : therefore today is excluded and tomorrow's date counts as one day. Leaving out of consideration for the time being the effect of the application for copies, we have to start counting 90 days from 26th September. The 27th September being the first day to be counted that gives us 4 days in September, 31 days in October, 30 days in November and 25 days in December. Apart therefore from any complications on account of the application for copies, holidays, etc. the appeal would have had to be filed by 25th December. As to this there can be no two opinions. Now Sec. 12 (2), Limitation Act, provides :

> In computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed, shall be excluded.

The question is how the time requisite for obtaining a copy is to be computed. It appears to me that it must be computed in the same way as the period of limitation is to be computed under Art. 156, that is, that the day on which the application for copy is made is to be excluded and the next day counted as the first day for the same reason that I have shown above, namely that one day comes to an end on the day next after the period commenced. So the period necessary for obtaining a copy commenced when the application was made and the first day was over on the next day. Therefore, as here, the application for copies was made on 26th September ; the first day of the period necessary for obtaining copies ended on 27th September. If then the copies had been delivered to the appellant on 27th September, we could have said that one day was necessary for the preparation of the copies. Similarly, if the copies had been ready on 28th September, we could have said that two days were necessary. If they could be ready on 30th September, we could have said that four days were necessary. Accordingly, we can count 4 days in September and 12 days in October as the period necessary for the preparation of copies, since the copies were delivered to the appellant on 12th October. 16 days only were therefore necessary for the preparation of the copies. Under S. 12 (2), Limitation Act, these 16 days have to be

excluded in reckoning the period of 90 days allowed for the appeal or in other words the period of 90 days may be considered to commence 16 days after it would otherwise have commenced. We have already seen that the period of 90 days would ordinarily commence on 27th September. We can therefore exclude the 27th, 28th, 29th and 30th September which leaves us with 12 days to exclude in October and the period of 90 days will commence to run on 13th October, that being the first day to be counted. There will therefore be 19 days to be counted in October, 30 days in November and 31 days in December which leaves us ten days in January. The appeal should therefore have been filed on 10th January 1935. As it was filed on 11th January 1935, it is one day late.

The appellant urges that the day on which the application for copies was made, i. e. 26th September, should be counted as the first day requisite under S. 12 (2) and that therefore he had five days in September and 12 days in October or 17 days in all to deduct as time necessary for obtaining copies. I have endeavoured above to reveal the fallaciousness of this reasoning. This view finds support in 13 N L R 89[1] and A I R 1924 Lah 599,[2] where it is pointed out that the calculation, as the appellant would like to make it, involves excluding the same day twice. S. 12 (2), as already pointed out, provides that in computing the period of limitation prescribed for an appeal, etc. the day on which the judgment was pronounced and the time requisite for obtaining a copy of the decree, etc. shall be excluded. Here, the word "and" being conjunctive, the day of judgment cannot be included in the time requisite for a copy. To include it therein would be, as pointed out in the aforesaid two cases, to exclude the same day twice. To put the matter in another way, under Art. 156, we know the number of days and have to find out the dates, whereas under S. 12 (2) we know the dates and have to find out the number of days. There is no reason why the number of days should be calculated in one way in order to arrive at a period under Art. 156 and in a different way in order to arrive at the period necessary for obtaining copies. The appellant has not made any application for an extension of time under Sec. 5, Limitation Act. In fact his counsel has definitely stated that he does not want any extension of time but stands on his own right under S. 12 and Art. 156. That being so, I am of the opinion that the appeal should be dismissed as barred by limitation.

On the point of the sufficiency of the court-fee the appellant has paid a court-fee of Rs. 10 on the assumption that the claim cannot be valued being for suspension of the proceedings in the lower Court. It is plain that the value of the appeal to the appellant is the amount of the court-fee which he paid to have his suit decided in the lower Court, viz. Rs. 535. Court-fee in this appeal should therefore be ad valorem on Rs. 535, i. e. Rs. 40-8-0. The difference between this and Rs. 10, viz. Rs. 30-8-0, represents the deficiency in the court-fee. The appellant has been informed that in the event of the point of limitation being decided in his favour it will be necessary for him to make good the deficiency in the court-fee before his appeal can be heard, and he has been instructed to hold the amount in readiness to save further delay.

Stone C. J.—I have had the advantage of perusing the judgment of my learned brother which is supported by the two decisions referred to by him. I find myself unable to agree with the conclusion arrived at on the question of limitation. It is a well established rule that acts of a Court are deemed to be done at the earliest possible moment so that a judgment is deemed to be pronounced immediately the Court sits: *see* Maxwell's Interpretation of Statutes, (Edn. 7, p. 297). This is, of course, a fiction and a dispute might arise as to the time from which the period of limitation starts if the day on which judgment was pronounced were counted in. This kind of inconvenience is doubtless the reason why the General Clauses Act provides in S. 9 that if an Act provides for a time 'from' a day, that day is excluded. Thus, the only difference between providing a period of 91 days including the day on which judgment was pronounced and providing a period of 90 days from the day on which judgment was pronounced is that the latter mode avoids a dispute about the hour in which the judgment was pronounced—a dispute which might not be set at rest by the above-mentioned presumption if in point of fact the Court did not sit at the accustomed Court hours. 90 days is an artificial period. The more natural period

1. Salamsingh v. Hira, (1917) 4 A I R Nag 196 =40 I C 425=13 N L R 89.
2. Ata Muhammad v. Pir Khan, (1924) 11 A I R Lah 599=75 I C 1055.

is 91 days which is 13 weeks or, very approximately, three calendar months or a quarter of a year. The exclusion of the day on which judgment is pronounced is, in my opinion, a mere matter of drafting to avoid any question about whether the 90 days are clear days or not. But in addition to 90 clear days the person proceeding is allowed whatever time is requisite for obtaining a copy. That time is whatever it in fact is. If an application for a copy is made on the day judgment is delivered and the copy is delivered the same day, it cannot be said that no time has been taken in obtaining a copy simply because that particular day has been excluded in calculating the 90 days. Two things have to be excluded: (1) the day on which judgment is pronounced, and (2) the time requisite for obtaining a copy.

Limitation Acts should be construed so as to save rather than bar a proceeding. Even if a rigorous construction were applied there is no justification, in my opinion, for cutting down the time requisite for obtaining a copy from the time actually required where that time happens to include a particular day, viz. the day on which judgment was pronounced. Time does not stand still on that day any more than on other day. To shut out that particular time spent in copying on that day would be simply to prejudice a litigant who makes his application for a copy quickly. It is to be observed that "time requisite" does not include time which need not have elapsed if reasonable and proper steps were taken to obtain a copy: 49 I A 307[3]. The litigant should not be encouraged to delay. Why he should have his time extended by, say, seven days (when the copying takes seven days) if he applies on the day after judgment is pronounced and yet have his time extended by only six days (when the copying takes seven days) if he applies on the day judgment is pronounced I fail to understand. In both cases the day on which judgment is pronounced is excluded in calculating the 90 days. In both cases the time requisite for obtaining a copy is seven days. In the one case the litigant gets 97 and in the other 96 days before he is barred. (Viewed from the angle that the Act is really allowing 91 days including the day on which judgment is pronounced he gets 98 and 97 days respectively.) This apparently unsatisfactory result only follows if one assumes that because the 90 days is exclusive of a particular day on that day time spent in copying is not time requisite for copying. I cannot make any such assumption. There being thus a disagreement between us on this point, the matter will be posted before a third Judge, Niyogi J., for his opinion.

3. Pramatha Nath Roy v. Lee, (1922) 9 A I R P C 352=68 I C 900=49 Cal 999=49 I A 307 P C).

OPINION

Niyogi J. — This matter comes before me under the Proviso to sub-s. 2 of S. 98, Civil P. C., in consequence of difference of opinion between the learned Judges comprising the Division Bench. The point of law upon which they differ may be stated as below: When an application for certified copies of judgment and decree is made on the day the judgment is pronounced, whether that they should not be counted as a day requisite for obtaining copies, for the reason that it is otherwise excluded by law. The facts are that the judgment was pronounced on 26th September 1934, and the decree was signed on 28th September 1934. Application for copies of judgment and decree was made on 26th September 1934 and the copies delivered on 12th October 1934. The appeal was filed on 11th January 1935. The appeal would be barred by time if the day on which the application for copies was made is excluded from the computation of time requisite for obtaining copies. In 13 N L R 89[1] and A I R 1924 Lah 599[2] it was held that one and the same day cannot be excluded twice. The reason is indeed specious, but is not sound as will appear in the sequel. The material part of S. 12, Limitation Act, is as follows:

> In computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed, shall be excluded.

It is evident that in computing the period of limitation prescribed for appeal, two periods are to be excluded: (i) the day on which the judgment is pronounced, and (ii) the time, i. e. the days requisite for obtaining copy of the decree. The first period is excluded by operation of law and the second by act of the party. The first is unconditional and absolute, and the second is contingent on the making of an application for copies. The first is excluded whether such an application is made or not. It is clear that they are distinct and separate in their purpose. The day on which the judgment is pronounced would invariably be a fraction of a calendar day

and the law ignores or eliminates that day absolutely so as to ensure to the party concerned as many complete days as are prescribed for any suit or appeal or application. Thus in the case of appeals, the appellant would have clear 90 days under Art. 156. The copying time is excluded because the appellant is unable to appeal without filing a copy of the decree if not of the judgment. The necessity of filing the copy imposes on the appellant a disability which he works off by applying for it. The law therefore allows him to deduct the days lost in obtaining the copy from the prescribed period of limitation. It cannot be reasonably contended that the day on which the application for copy is made is not a day requisite for obtaining the copy. It is therefore evident that an appellant is entitled to a deduction of the number of days beginning with the day on which he applies for to the day on which he obtains the copy from the number of clear days of limitation prescribed by the statute. This conclusion is supported by the express wording of S. 12. It may be that in an exceptional case, such as the present, one day happens to be excluded twice. However startling, fantastic or absurd it may appear to be, the Courts cannot refuse to give effect to the plain meaning of the words used by the Legislature, if it does not conflict with reason and justice. As I have indicated above, there is nothing fundamentally unjust or unreasonable in excluding the same day twice. If, as Batten A. J. C. remarked in 13 N L R 89,[1] the period of limitation is the actual period beginning on a certain date, not an abstract number of days, there is no reason why it should not be regarded that the time requisite for obtaining copy is the actual period beginning on a certain date, i. e. the date on which it is applied for, not an abstract number of days. In both cases it should be the actual period which should be computed.

If S. 12 (2) is put in a concrete form so as to make it applicable to appeals, it would read as follows : In computing 90 days prescribed for an appeal . . . . the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree . . . . shall be excluded. The meaning is plain that period which is taken up in the preparation of copy should be excluded from 90 days. A question may arise whether the appellant would be entitled to a deduction of the period even when he applies before the judgment is pronounced. My answer is positively in the negative. There can be no preparation of a copy when the original itself is non-existent. The case is however different when the judgment is pronounced and the preparation of a copy is possible. The appellant has the right to apply for copy as soon as the judgment is pronounced and the delivery of the copy is only a question of time. It cannot therefore be disputed that the day on which he applies for copy after the judgment is pronounced is a day requisite for obtaining copy. If so, that day must be excluded from the prescribed period of limitation, i. e. to say 90 days. It must be noticed that Batten A. J. C. himself excludes it, but he excludes it from the time requisite for obtaining copy. That is evidently contrary to the enactment which excludes it from the prescribed period of limitation because it includes it in the period requisite for obtaining copy. For the foregoing reasons I concur with the opinion delivered by my Lord the Chief Justice.

N.S./R.K. *Answer accordingly.*

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* A. I. R. 1939 Nagpur 154

NIYOGI J.

Dipchand Kundanmal Marwari and others — Appellants.

v.

Manakchand Multanmal Marwari and others — Respondents.

Second Appeal No. 551 of 1936, Decided on 5th December 1938, from appellate decree of Addl. Dist. Judge, Khamgaon, D/- 31st August 1936.

*** (a) Tort—Damages—Cause of action — Worry caused by opposition set up by other party is not injury in legal sense and does not furnish cause of action for damages.**

Damages are pecuniary compensation which the law awards to a person for actual injury he has sustained by reason of the act or default of another, when such act or default is a breach of a contract or tort. A mental perturbation or emotional excitement described as worry caused by the opposition set up by the opposite party is of too trivial nature to be regarded seriously as an injury in the legal sense of the term. The so-called worry cannot therefore provide any cause of action for damages. [P 155 C 2]

(b) Specific Relief Act (1877), Ss. 42 and 54 —Legal character — Party preventing invited persons, by peaceful measures, from attending ceremony—Declaration that party has no right to do so cannot be granted—Party having no legal obligation in matter of ceremony — No

cause of action for injunction against party held existed.

A man's status or legal character is constituted by the attributes which the law attaches to him in his individual and personal capacity, the distinctive mark or dress as it were, with which the law clothes him apart from the attributes which may be said to belong to normal humanity in general : *A I R 1915 Mad 584, Rel. on.* [P 155 C 2]

Plaintiffs proposed to celebrate a ceremony in accordance with the custom of their community. Defendants with a view to prevent the ceremony tried to persuade the invited persons by personal appeals and printed circulars from accepting the invitation and attending the ceremony. Plaintiffs filed a suit for a declaration that the defendants had no right to do 'picketting' and trouble the plaintiff and also for an injunction to restrain defendants from carrying out their object :

***Held* that S. 42 did not apply as the allegations of the plaintiff did not involve any question of his legal character and hence he was not entitled to the declaration prayed for. [P 155 C 2]**

***Held further* that there was also no cause of action for an order of injunction as there was no legal obligation on the defendants in the matter of the ceremony nor was the persuation accompanied by any threat to use force or violence. [P 156 C 1]**

Y. V. Jakatdar — *for Appellants.*

M. R. Bobde and T. P. Naik — *for Respondents.*

Judgment. — This is a plaintiffs' appeal from an order dated 31st August 1936 of the Additional District Judge, Khamgaon, in Civil Appeal No. 74-A of 1935, whereby the original Court's order rejecting the plaint under O. 7, Rule 11 (a), Civil P. C., was upheld. The parties are members of Oswal community. The appellants had proposed to celebrate a ceremony called Mosar on 21st November 1933 and 22nd November 1933 in honour of their grand-father's death in accordance with the custom of their community. They alleged that the defendants had decided to prevent the performance of the ceremony and with that view they had distributed handbills in the town of Malkapur to dissuade the persons invited to the function from accepting the invitation and also to prevent them from attending it by means of picketting. On these premises the plaintiffs prayed for a declaration that defendants 1 and 2 had no right to do "picketting" and trouble the plaintiffs and that they should be restrained by an order of injunction from carrying out their object. They also prayed for a decree for damages to the extent of Rs. 100 on account of the worry caused to the plaintiffs by the defendants' threat of obstruction. In my opinion the plaint was rightly rejected by the Courts below on the ground that it did not disclose any cause of action. So far as the prayer for damages is concerned, there was manifestly no cause of action as there was no injury. Damages are pecuniary compensation which the law awards to a person for actual injury he has sustained by reason of the act or default of another, when such act or default is a breach of a contract or tort. What the plaintiffs describe as worry was nothing but a mental perturbation or emotional excitement caused by the opposition set up by the defendants. It is of too trivial nature to be regarded seriously as an injury in the legal sense of the term. The so-called worry cannot provide the plaintiffs with any cause of action for damages.

The question is whether under Sec. 42, Specific Relief Act, the plaintiffs are entitled to the declaration that they have prayed for. That Section grants relief only in cases where the legal character or any right as to any property of the plaintiff is denied by the defendant. In this case there is no question of right as to any property involved. Is there any question of the plaintiffs' legal character arising in the case? Manifestly not. A man's legal character is the same as legal status, that is a position recognized by law, as pointed out in 39 Mad 80[1] at p. 82:

> A man's status or legal character is constituted by the attributes which the law attaches to him in his individual and personal capacity, the distinctive mark or dress, as it were, with which the law clothes him apart from the artributes which may be said to belong to normal humanity in general.

The allegation that the plaintiffs' right to celebrate Mosar was denied or contravened by the defendants does not involve any question of the plaintiffs' legal character, that is, status. It is therefore evident that Sec. 42, Specific Relief Act, has no application.

The next question is whether there was any breach on the part of the defendants of any obligation existing in the plaintiffs' favour so as to bring the case within the purview of S. 54, Specific Relief Act. The plaintiffs no doubt had the right to enjoy the company of their relatives and friends and that the defendants were under an obligation to abstain from interfering with the peaceful celebration of the event. If the defendants had invaded the gathering and tried to disperse it or commit a breach of the peace, that would certainly be amenable to S. 54. But that is not the allegation in the plaint. The crux of the complaint

1. Ramakrishna v. Narayana, (1915) 2 A I R Mad 584=26 I C 883=39 Mad 80=27 M L J 634.

is that the defendants were trying to persuade by personal appeals or by printed circulars the members of their community from joining the celebration. Now, success of the celebration itself depended on the invitees accepting the invitation. There was no obligation on them to accept the plaintiffs' invitations. They had the unfettered option to decline it. Can it be predicated that strangers are under any obligation to see that the invited guests accept the hosts' invitation? It would be preposterous to say so. As the plaintiffs had the right to issue invitation to their friends and relatives, the defendants also had equal right to dissuade them from accepting the invitation, for reasons which from their point of view, justified non-participation in the celebration. Their right to reason with their fellow castemen and to persuade them to their views is indisputable. I fail to see how law can intervene if the persuation is not accompanied with any threat to use force or violence. The plaintiffs only challenge the defendants' right to dissuade the invitees by peaceful means from accepting their invitation but they do not allege that they ever threatened to resort to force or violence. As it is clear that there was no legal obligation on the defendants in the matter of the Mosar celebration, the plaintiffs could have no cause of action for an order of injunction. The appeal is dismissed with costs. Counsel's fees Rs. 50.

N.S./R.K. *Appeal dismissed.*

*** * A. I. R. 1939 Nagpur 156**

STONE C. J. AND NIYOGI J.

Narain Chouthmal Marwadi — *Plaintiff* — Applicant.

v.

Rama Jago and others — *Defendants* — Opposite Party.

Civil Revn. No. 172 of 1937, Decided on 22nd December 1938, from reference made by Niyogi J., D/- 2nd February 1938.

(a) Limitation Act (1908), S. 20—Part payment by manager of joint Hindu family gives fresh period of limitation against other members of family.

A part payment of a joint debt by the manager of a joint Hindu family does bind another member of the family and the fact that the other member had joined the manager in borrowing the loan cannot impair the representative capacity of the manager though it may serve to prove that the borrowing was for a necessary purpose of the family : *A I R 1928 Pat 156, Rel. on.* [P 157 C 1]

*** * (b) Limitation Act (1908), S. 20 — Part payment — To give fresh period of limitation, writing need not be specifically towards principal or interest—It is enough if it is towards the debt and identifies it and amounts to acknowledgment.**

Where a debtor makes payment and acknowledges it in his handwriting but does not specify whether it is towards principal or interest, such acknowledgment does give a fresh period of limitation if the writing sufficiently identifies the debt. Once it is shown to be towards the debt, it is not necessary to show whether it is towards the principal or interest : *Case law referred.* [P 158 C 2]

S. R. Mangrulkar — *for Applicant.*

S. P. Kotval — *for Opposite Party.*

ORDER OF REFERENCE

Niyogi J.—This is a plaintiff's application in revision against the judgment of the Small Cause Court, Saoner, in Civil Suit No. 364 of 1936, dated 3rd December 1936. The plaintiff sued to recover Rs. 415-6-0 on a bond for Rs. 280 executed by Rama (non-applicant 1) and his deceased brother Ganpat now represented by non-applicants 2 and 3. Ganpat paid Rs. 20 on 15th May 1933 and he made the acknowledgment of the payment on the back of the bond without specifying whether the payment was to be appropriated towards principal or interest. The plaintiff instituted his suit on 15th June 1936. The lower Court dismissed the suit on the ground that it was barred by time. It found that Ganpat was not joint with Rama, much less manager of the joint family and held that S. 20, Limitation Act, was not applicable to the case.

I cannot concur in the lower Court's finding that Ganpat and Rama were not joint and that Ganpat was not the manager. That finding is directly contradicted by overwhelming evidence on the record. P.W. 1 Narayan, P. W. 2 Sakharam, P. W. 3 Vithoba, P. W. 4 Daulat and P. W. 7 Narhari agree in stating that they were joint and Ganpat was the manager. Their evidence receives support from Ex. P-2 which shows that their cultivation was joint. P. W. 6 Bhadya no doubt says that they were separate but he is unable to say whether their cultivation was separate. He is not likely to know better than P. W. 7 Narhari who is the Patwari of the village. When the lower Court remarks that "the evidence on the record does not bear out that allegation", in the face of the ample evidence indicated above, the only reasonable inference is that it overlooked that evidence. A finding which is not only unsupported by but directly opposed to the evidence on the record, cannot be accepted as sound. It is therefore reversed.

The lower Court was further wrong in holding that part payment of a joint debt by manager of a joint family does not bind another member of the family because the latter joined the manager in borrowing the loan. That may serve to prove that the borrowing was for a necessary purpose of the family but that cannot impair the representative capacity of the manager. If any authority is needed I may refer to 6 Pat 811[1] which is exactly parallel to this case.

Now I turn to the controversial issue in the case. The endorsement of the payment of Rs. 20 did not specify whether it was to be appropriated towards interest or principal. The question is whether such an acknowledgment of payment serves to extend limitation under Sec. 20, Limitation Act. Answers given by the High Courts in India are not uniform. In 58 All 261,[2] the majority of the learned Judges were of the opinion that it did not extend limitation. In 58 Mad 418[3] a Bench of two Judges took a different view. A I R 1937 Lah 820[4] had followed the majority view in 58 All 261.[2] In 44 Cal 567[5] it was held that the Court was entitled to find whether the payment had been made towards interest or principal. A I R 1937 Sind 95[6] appears to agree with the Calcutta view. 9 N L R 78[7] inclines towards the Allahabad view but the actual decision on the evidence in that case is in conformity with the Calcutta view. The question is of great importance and of frequent occurrence. I think there should be an authoritative pronouncement of this High Court on the vexed question. I therefore submit this case to my lord the Chief Justice for reference to a Bench on the questions formulated below :

1. Where a debtor makes a payment and acknowledges it in his own handwriting without specifying whether it is towards principal or interest, whether that acknowledgment gives a fresh period of limitation under S. 20, Limitation Act.

2. Whether it is permissible for the creditor to prove that the payment was intended to be appropriated towards interest.

OPINION

The questions raised in this reference are as follows :

1. Where a debtor makes a payment and acknowledges it in his own handwriting without specifying whether it is towards principal or interest, whether that acknowledgment gives a fresh period of limitation under S. 20, Limitation Act.

2. Whether it is permissible for the creditor to prove that the payment was intended to be appropriated towards interest.

There has been a considerable diversity of opinion on the first point raised which turns on the interpretation of S. 20, Limitation Act. The critical words are :

(1) Where interest on a debt . . . . is . . . . paid as such . . . . . or where part of the principal . . . is . . . . . paid . . . . . a fresh period of limitation shall be computed from the time when the payment was made : Provided that, save in the case of a payment of interest . . . . . .

In our opinion this means as follows : (1) Where payment of interest on a debt . . . . is made . . . . . etc. Provided that save in the case of a payment of interest . . . The importance of the words "as such" lay and lie in the fact that they make clear a distinction between two possible cases : (1) the case where a debtor pays a sum by way of interest, (2) the case where a debtor pays a sum and the creditor appropriates the sum paid to interest. In the first case the payment is a payment of interest, that is a case of interest paid as such. In the second case the payment is simply a payment. That is to say one has to look at the matter through the eyes of the debtor. Before the amendment the proviso read :

Provided that, in the case of part payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making the same.

Under the old law one had either to prove the payment by a writing of a special kind or one had to establish that the payment was not a part payment of principal. That was regarded as imposing the burden of proving that it was not merely a payment but a payment of interest. That was not established by merely proving payment of a sum and appropriation of that sum. If however the plaintiff proved by oral evidence payment not merely of a sum but of interest, i. e. proved the payment was of interest and nothing but interest

1. Bajrangi Prasad Singh v. Kesheo Singh, (1928) 15 A I R Pat 156=109 I C 655=6 Pat 811.
2. Udeypal Singh v. Lakshmi Chand, (1935) 22 A I R All 946 = 159 I C 387 = 58 All 261 = 1935 A L J 1029 (F B).
3. Lakshmi Naidu v. Gunnamma, (1935) 22 A I R Mad 101=154 I C 1053=58 Mad 418= 68 M L J 470.
4. Lal Chand v. Raman Shah, (1937) 24 A I R Lah 820 = 172 I C 455 = 39 P L R 622.
5. Hem Chandra Biswas v. Purna Chandra Mukherji, (1918) 5 A I R Cal 891 = 35 I C 638 = 44 Cal 567 = 22 C W N 190.
6. Hariram-Dowlatram v. Ramsing-Gopal Singh, (1937) 24 A I R Sind 95 = 168 I C 820 = 31 S L R 68.
7. Gopal v. Govind, (1913) 9 N L R 78 = 19 I C 849.

(otherwise it would be a payment in part of principal), then the proviso did not apply and one got a new starting point. Proof of payment simpliciter by oral evidence was not good enough because it did not exclude the application of the proviso. The mere fact that the creditor appropriated to interest a payment made did not alter the nature of the payment and did not therefore absolve the plaintiff from proving the facts necessary to bring the case within the Section, i. e. either (1) that the payment was not merely a payment of a sum but a payment of interest or (2) that the fact of payment was evidenced by a writing in the handwriting of the person paying.

There were certain ambiguities in the provisions contained in the unamended S. 20 which also opened wide the door to belated claims by leaving the proof of payment of interest in the uncertain realm of oral evidence. The amendment corrected the ambiguities and made it necessary to prove a signed written acknowledgment of payment.

After the date of the amendment what has to be proved is an acknowledgment of payment. The mode of proof is by writing signed. But lest this should unfairly affect past transactions and bring cases within a time-bar that no creditor could foresee, the Legislature included in the new proviso the words "save in the case of a payment of interest made before 1st January 1928." That was clearly a saving clause to save cases where the creditor was relying on oral evidence to establish that (within the words of sub-s. (1) interest on (the) debt . . . . (had been) paid as such. Accordingly it must have been the intention of the Legislature to make the saving words in the proviso and the words quoted from sub-sec. (1), of the same content. This justifies the paraphrase of sub-s. (1) set out at the beginning of this judgment. That paraphrase does not, in our opinion, do violence to the rules of grammar.

After 1st January 1928 it is a matter of complete indifference whether the payment is of interest or principal or both so long as it is a payment relating to the debt. If the acknowledgment of payment is upon the back of a promissory note the fair inference would be that it related to the promissory note but of course that would be rebuttable and if the debtor succeeded in proving that it really related, say, to payment of the purchase price of a tiger cub, then it would not start a new period of limitation. If there be an acknowledgment of payment in writing but it does not appear from the writing what debt was being in part paid, so that oral evidence becomes necessary to link up the acknowledgment with the debt, it might well be that a sufficient acknowledgment would not be established—what has to be proved is an acknowledgment of payment, and the payment has to be either of interest or of part of the principal (the whole includes the part) of the debt. The mode of proof is by writing either (1) in the handwriting of the person paying, or (2) signed by such person. The writing must thus sufficiently identify the debt and amount to an acknowledgment of payment. If it acknowledges that a payment of principal is made that is sufficient. If it acknowledges that a payment of interest is made, that is sufficient. If it acknowledges a payment towards the debt, that is sufficient. If it acknowledges a payment but does not identify the debt, that is not sufficient.

We have expressed the above opinion without reference to decided cases for sake of simplicity. The following cases were cited in argument for the proposition that it is no longer necessary to prove that the payment was on account of interest: A I R 1938 Pat 183,[8] A I R 1938 Rang 280,[9] 58 Mad 418,[3] A I R 1938 Lah 347,[10] 13 Lah 448[11] and 52 All 459.[12] *Contra*: 58 All 261[3] at p. 271, A I R 1937 Lah 820,[4] 40 Bom L R 968[13] and a case before the amendment 7 Rang 522.[14] *See also* the cases referred to in the referring order. From the above analysis the following answers to the questions referred result: (1) Assuming he acknowledges that the payment is in respect of the debt the answer is in the affirmative. (2) Such evidence would be unnecessary.

S.G./R.K. *Reference answered.*

8. Bankanidhi v. Godipatna Co-operative Society, (1938) 25 A I R Pat 183 = 174 I C 1005=16 Pat 294 = 18 P L T 563.
9. Khan Sahib v. Uchil Ahmad, (1938) 25 A I R Rang 280=176 I C 865=1938 R L R 591.
10. Jawahir Singh v. Ghulam Hassan, (1938) 25 A I R Lah 347 = 40 P L R 124.
11. Bharat National Bank Ltd., Delhi v. Bishan Lal, (1932) 19 A I R Lah 212 = 135 I C 673 = 13 Lah 448 = 33 P L R 42.
12. M. B. Singh & Co. v. Sircar & Co. (1930) 17 A I R All 392 = 127 I C 581 = 52 All 459 = 1930 A L J 590.
13. Havabu v. Isup Musa, (1938) 25 A I R Bom 467 = 178 I C 844 = 40 Bom L R 968.
14. U Ba Gyi v. U Than Kyauk, (1929) 16 A I R Rang 339=120 I C 897=7 Rang 522.

*** A. I. R. 1939 Nagpur 159**

STONE C. J. AND CLARKE J.

Nathusa Pasusa Sahu — Appellant.

v.

Mohammad Siddique Md. Usman Musalman and others—Respondents.

First Appeal No. 43-B of 1935, Decided on 13th October 1938, from decree of the Second Addl. District Judge, Amraoti, D/- 30th April 1935.

(a) Contract Act (1872), S. 16—Pardanashin women when executing an instrument must know clearly what they do by independent advice — Courts should see that the transaction is fair — If it is not, it cannot alter its terms to make it fair but must be satisfied that they not only put their hand to the paper but also their mind to the transaction.

In dealing with pardanashin ladies when a deed is executed by them, it is necessary to make it clear to them that what they are doing is not merely a mechanical act but a conscious act though it is not necessary that such explanation should be proved to have occurred at the time of the execution. They must have independent advice and the Courts have to scrutinize the transaction very closely to see that it is a fair one. But if it comes to the conclusion that the transaction is not a fair one, the Court will not make it fair by altering some of its terms as it would amount to making a contract for the parties; and if it appears that the lady executing an instrument had no disinterested advice and that the only persons who in any way explained the matter to her were either the other side or persons who would endeavour to take advantage of her position, then one must most critically examine all the various steps that are taken and must be satisfied that she not only put her hand to the paper but also that she has put her mind to the transaction : *Case law discussed.* [P 160 C 1, 2]

At the instance of the sons, the mother and daughter who were pardanashin Mahomedan ladies executed a mortgage deed along with the sons but the daughter received no part of the consideration and the mother was relieved of her previous obligation. The transaction was done behind a purdah screen mostly in a tonga cart when both the ladies had no independent advice and the only person who explained the matter was the son. There was really nothing whatever to show that these women knew anything about the transaction:

Held that it was one of those cases where even though the fact of execution and attestation were established the document would still be not binding on the female executants because their mind never moved to the transaction in question. [P 162 C 1]

*** (b) Evidence Act (1872), S. 71—Execution of document by pardanashin ladies — Proof of.**

It is the conscious execution and not the mechanical execution of a document that must be established in the case of documents executed by paradanashin ladies. [P 161 C 1]

A. V. Khare and W. B. Pendharkar — *for Appellant.*

M. R. Bobde and J. R. Mudholkar — *for Respondents 3 and 4.*

Judgment. — This is a plaintiff's appeal in a mortgage suit brought against four defendants who are Mahomedans and are related as follows : The first and second are the two sons and the fourth the daughter of the husband (now deceased) of the third. The mortgage in question is alleged to have been executed by all the four. The learned Judge has found that the mortgage is binding on the first two and has dismissed the suit as against defendants 3 and 4 on the ground that there is no proof so far as they are concerned, of due execution and/or attestation. Both execution and attestation are put in issue and the evidence comes almost wholly from the plaintiff's side the only evidence on behalf of the defendants being that of defendant 3. The mortgage consideration is alleged to be made up of two things : (1) the payment off of a prior mortgage of Rs. 7780, and (2) the payment before the Sub-Registrar of a sum of money amounting to Rupees 1220. The Rs. 7780 in turn is arrived at by taking the capital due under the mortgage paid off which is Rs. 6760 and adding to it the interest that accrued. The consideration for that Rupees 6760 was in turn the payment off of a variety of earlier liabilities, the earliest of of which dates from 1918 and the last from 1921. The first of those liabilities is Ex. P-5 which was a mortgage executed by defendants 1, 2 and 3 and it was for Rupees 2000. The next is Ex. P-6 executed by defendants 1 and 2, a mortgage for Rs. 600 dated 29th May 1918. The next is Ex. P-4 for Rs. 1418-4-0 executed by defendants 1, 2 and 3 dated 25th March 1919. The fourth is Ex. P-7 made by defendant 1 alone being a promissory note dated 29th September 1921 for Rs. 334-12-0.

It will be observed that so far as defendant 4 is concerned she gained nothing, unless she can be said to gain the merit which comes from paying other people's debts, by executing this mortgage. None of the pre-existing debts was hers and we are not satisfied that she received any of the consideration that passed in cash. So far as defendant 3 is concerned, she gained a substantial advantage, it may be, because as a result of this mortgage transaction she has been relieved of her obligation under Ex. P-3. What that obligation may have amounted to has not been litigated in this suit, but it is thrown out by way of argument that it did not amount to very much because she would have been able to challenge that mortgage, had she ever been

sued on it. However that may be, as the case stands, so far as we know, defendant 3 did obtain an advantage as a consequence of having Exh. P-3 paid off. It is a very different matter as to whether the suit mortgage was such a one as she would have been well advised to execute. These two women were pardanashin Mahomedans and it is evident that they were in close pardah. Everywhere they went they were shielded from the eyes of men and there is no dispute but that every transaction they entered into, so far as this case is concerned, save one only, was done behind the purdah screen, mostly in a tonga cart with purdah curtains. The one exception is that indicated in the evidence of P. W. 3 who is the employee of the plaintiff and has been his employee for 45 years. His story is that he went to see the two ladies, had them called out by defendant 1, saw them and spoke to them as though they were not ladies in purdah, explained what a splendid thing this change from the old to the new mortgage was, how the interest was less (for it had been Re. 1-8-0 and was now Re. 1) and that they consented. In cross-examination it is made clear that the consent, so far as the younger woman was concerned, must have been based on silence because she said nothing from the beginning to the end, and so far as the benefit was concerned, this man in the service of the plaintiff (a money-lender) forgot to tell the younger woman that the difference between the old position and the new was this, that under the old mortgage she was not liable at all; under the new mortgage she was; under the old mortgage her property was uncharged, under the new mortgage it was.

It has been over and over again stated that in dealing with pardanashin ladies it is necessary to make it clear or to have it made clear to them what it is that they are doing. It is true that it is not necessary that that explanation should be proved to have occurred at the time when she executed the document. It will do if she knew what the transaction was about before: A I R 1926 Pat 529.[1] It is also true that the mere fact that she pretends not to know is neither here nor there: A I R 1936 Cal 378.[2] What is to be made clear is that what she is doing when she executes is not merely a mechanical act but a conscious act. We shall come to that again in a moment. At the present it is sufficient to say that she must have independent advice, and even though she has independent advice the Courts, in these cases, will scrutinize the transaction very closely to see that it is a fair one, (34 C L J 563,[3]) and if it comes to the conclusion that the transaction is not a fair one, the Court will not make it a fair one by altering some of its terms, for that would be making the contract for the parties: 11 Pat 227.[4] It has been pointed out in a variety of cases which we referred to, 34 C L J 563[3] and 34 C L J 333,[5] what sort of tests should be applied. In the former of those two cases a Bench of the Calcutta High Court, presided over by a very distinguished Judge, held that

> the Court, when called upon to deal with a deed executed by a pardanashin lady, must satisfy itself upon the evidence, first, that the deed was actually executed by her or by some person duly authorized by her, with a full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered; and, thirdly, that she had independent and disinterested advice in the matter.

Whether that last requisite in all cases is necessary we somewhat doubt. But certainly, where it appears that she has no disinterested advice, where it appears that the only persons that have in any way explained the matter to her are either the other side or persons who would endeavour to take advantage of her position, then one must most critically examine all the various steps that have been taken and must be satisfied that she has executed the instrument and that the instrument has been duly attested so as to comply with the provisions of the Transfer of Property Act. In considering whether she has executed, one must not be satified with mere proof that she has put her hand to the paper but must also be satisfied that she has put her mind to the transaction.

Here the evidence even of the mechanical act is extremely feeble. It has been urged by the learned counsel for the appellant

1. Thirathman Jha v. Mt. Gunjeswari Kuer, (1926) 13 A I R Pat 529=96 I C 571=8 P L T 17.
2. Suresh Chandra v. Marani Dassi, (1936) 23 A I R Cal 376=166 I C 842.
3. Nibaran v. Nirupama, (1921) 8 A I R Cal 131 =69 I C 476=34 C L J 563=26 C W N 517.
4. Tara Kumari v. Chandra Mouleshwar Prasad Singh, (1931) 18 A I R P C 303=134 I C 1076 =11 Pat 227=58 I A 450 (P C).
5. Krishna v. Nagendrabala, (1921) 8 A I R Cal 435=66 I C 694=34 C L J 333 = 25 C W N 942.

relying on 16 N L R 196[6] and 14 C W N 165[7] in addition to two cases on wills which are somewhat different from this class of case, 2 N L R 65[8] at page 70 and 4 C W N 204,[9] that here the evidence of the factum of execution by persons calling themselves attesting witnesses is sufficient. The learned Judge has held that it is insufficient. Looked at from the angle of proof of what counsel for the respondents has called mechanical execution we agree with the learned Judge that the plaintiff has failed to prove even mechanical execution. Assuming that in that we are wrong and that the admissions made by defendant 3 before the Sub-Registrar and in the course of her examination are sufficient to eke out the evidence that has been given on behalf of the plaintiff, it will be interesting to examine that evidence. The plaintiff (P. W. 2) puts the execution at the registry office. So far as P. Ws. 4, 5 and 10, scribe and attesting witnesses respectively, are concerned they put the execution as follows: P. W. 4, at the house of the plaintiff; P. W. 5 at the house of either the plaintiff or of defendant 1 according as you read the following sentences :

Defendants 1 and 2 signed in my presence and I attested the deed at the place of plaintiff. The marks of defendants 3 and 4 were taken by defendant 1 going inside his house where I had gone with defendant 1. Their marks were not actually taken in my presence.

P. W. 10 at first said that it was at the tahsil office. Then he said that he did not remember anything about it except the registration. He said at first that at the execution the plaintiff was not present but the plaintiff himself says that he was. The scribe says that the execution was not in his presence. P. W. 5 says that the marks were not taken in his presence. P. W. 10 says he knows nothing about it. It is urged that this is a case where the plaintiff is entitled to pray in aid the provisions of Sec. 71, Evidence Act, which provides as follows :

If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

The difficulty in the plaintiff's way here is to point to the evidence establishing not merely mechanical execution but conscious execution. There is really nothing whatever to show that these women knew anything about this transaction. In this case we have the exceptional fact that the Sub-Registrar makes an observation about this transaction in the book kept for that purpose at the registry to the following effect:

On having admitted it, I think the document has not been executed with their full consent. It has come to my notice that they have only admitted at the instance of Mahamad Siddique and to meet the needs for the time being.

He appears to have called upon them to state on affirmation what they knew about the matter and defendant 3 said :

I do not know the name of the person in whose favour I now executed a writing in respect of the field at Paratwada. My sons Mahamad Siddique and Mahamad Hanief know it. I had executed a mortgage deed before in favour of Bandu Nana *alias* Vithal Sadasheo Karkare. That paper was registered. Credit has been allowed for the amount of that mortgage. That (amount) Rs. 7720 has been allowed credit. I do not know the period of the previous mortgage deed. My elder son that is, Mahamad Siddique knows it. I have executed the previous mortgage deed. My daughter Bibabi has not executed it. My daughter that is, Bibabi wife of Nyaj Mahammad Khan, has executed this paper. The name of Bibabi was not in the mortgage deed executed in favour of Karkare. But there was her evidence. My son Mahamad Siddique knows the terms, etc. everything of this document.

Defendant 4 said :

I do not know in whose favour I have executed this mortgage deed. My brother Mahamad Siddique knows it. He knows its terms, etc. everything. I admit the document. I have made the signature at the instance of mother and brother.

The defendants denied the execution and due attestation in their pleadings and defendant 3 gave evidence to the effect that she never gave her signature to any mortgage deed, that she does not know the plaintiff, that she has not received a pie, that when she was taken to the Sub-Registrar's office and when her thumb impression was taken there she understood that what she was doing was placing her thumb on a document for mutation purposes, that she does not know the Marathi language, the document being in Marathi. In cross-examination she says, which seems to be untrue, "the Sub-Registrar never examined me at any time." She also says that she used to transact business from the purdah. Very little is got out of her in cross-examination and it is quite apparent from her evidence and indeed from the evidence of all the witnesses that speak to the subject that both these women were purdah women, that so far as this transaction is concerned nobody saw them and very few of the witnesses had ever seen them and so far as

6. Mt. Kasidanbi v. Gangulal, (1920) 7 A I R Nag 164=56 I C 247=16 N L R 196.
7. Isri Prosad v. Rai Gunga Prosad Singh Bahadur, (1910) 14 C W N 165=3 I C 311.
8. Mulchand v. Mt. Janki, (1906) 2 N L R 65.
9. Sibo Sundari Debi v. Hemangini Debi, (1900) 4 C W N 204.

the attesting witnesses are concerned they had never seen them and did not see them on this occasion. There is nothing to suggest that they knew their voice and there is nothing to suggest that they could in any way identify them. All that they were going upon is that the son said that the women had put the thumb marks on the document and it is therefore said that 14 C W N 165[7] can be used to support this transaction.

Here however the evidence showing that the son said that the mother and the sister had put their thumb-marks relate to the thumb-marks that were put on the document at the Sub-Registrar's Office. The execution, according to the pleadings, was done at the plaintiff's house and the alleged placing of the thumb-marks on the body of the document took place, according to the plaintiff, there. There are two sets of thumb-marks upon the document taken at different times and made in different inks. But that is the least of the difficulties in the plaintiff's way. The chief difficulty is that this is one of those cases where even though the fact of execution and attestation were established this document would still not be binding because the mind of the female executants never moved to the transaction in question. Lord Sumner, speaking on behalf of the Privy Council in 47 All 703,[10] observes at p. 710 as follows:

The law of India contains well-known principles for the protection of persons who transfer their property to their own disadvantage, when they have not the usual means of fully understanding the nature and effect of what they are doing. In this it has only given the special development which Indian social usages make necessary, to the general rules of English law, which protect persons whose disabilities make them dependent upon or subject them to the influence of others, even though nothing in the nature of deception or coercion may have occurred. This is part of the law relating to personal capacity to make binding transfers or settlements of property of any kind. That the instrument here is a wakfnama is a mere accident, and the general and well settled law of wakf is not in question. The case of an illiterate pardanashin lady denuding herself of a large proportion of her property without professional or independent advice, is one on which there is much authority. Independent legal advice is not in itself essential : 36 All 81.[11] After all, advice, if given, might have been bad advice, or the settlor might have insisted on disregarding it. The real point is, that the disposition made must be substantially understood and must really be the mental act, as its execution is the physical act, of the person who makes it : 18 Cal 545[12] at p. 548, 47 Cal 175[13] at p. 180. The appellant clearly had no such advice, nor is it contended that she had. If however the settlor's freedom and comprehension can be otherwise established, or if, as is the respondents' case here, the scheme and substance of the deed were themselves originally and clearly conceived and desired by the settlor, and were then substantially embodied in the deed, there would be nothing further to be gained by independent advice. If the settlor really understands and means to make the transfer, it is not required that some one should have tried to persuade her to the contrary. Again, the question arises how the state of the settlor's mind is to be proved. That the parties to prove it are the parties who set up and rely on the deed is clear. They must satisfy the Court that the deed has been explained to and understood by the party thus under disability, either before execution, or after it under circumstances which establish adoption of it with full knowledge and comprehension: 7 Cal 245[14] at p. 252, 29 Cal 749[15] at p. 757, 34 All 455.[16] Further, the whole doctrine involves the view that mere execution by such a person, although unaccompanied by duress, protest or obvious signs of misunderstanding or want of comprehension, is in itself no real proof of a true understanding mind in the executant. Evidence to establish such comprehension is most obviously found in proof that the deed was read over to the settlor and, where necessary, explained. If it is in a language which she does not understand, it must, of course, be translated, and it is to be remembered that the clearness of the meaning of the deed will suffer in the process. The extent and character of the explanation required must depend on the circumstances. Length, intricacy, the number and complexity of the dispositions, or the unfamiliarity of the subject-matter, are all reasons for requiring an increased amount and efficiency of explanation. Thus, a matter not likely to attract the attention of the executant, in itself ought not to be relied on as binding, unless her attention has been directly drawn to it : 29 Cal 664[17] at p. 673. So if the deed, as presented for execution, differs substantially, either by way of addition or of omission, from the scheme and details which the intending settlor has previously laid down, the discrepancy ought to be clearly pointed out and its nature and effect should be fully described, unless, which must be rare, the difference is so obvious that even a person in the settlor's position must perceive and appreciate it for herself. If the description and explanation have been partial or erroneous, or have not been given at all, the question will then arise, as it arises where there has

10. Farid-un-Nissa v. Mukhtar Ahmad, (1925) 12 A I R P C 204=89 I C 649 = 47 All 703=52 I A 342=28 O C 338 (P C).
11. Kali Bakhsh Singh v. Ram Gopal Singh, (1913) 36 All 81=21 I C 985=41 I A 23=16 O C 378=12 A L J 115 (P C).
12. Wajid Khan v. Iwaz Ali Khan, (1891) 18 Cal 545=18 I A 144=6 Sar 46 (P C).
13. Sunitabala Debi v. Dharasundari Debi, (1919) 6 A I R P C 24=53 I C 131=47 Cal 175=46 I A 272 (P C).
14. Sudisht Lal v. Mt. Sheobarat Koer, (1881) 7 Cal 245=8 I A 39=4 Sar 222 (P C).
15. Shambati Koeri v. Jago Bibi, (1902) 29 Cal 749=29 I A 127=8 Sar 304=6 C W N 682 (P C).
16. Sajjad Hussain v. Abid Husain Khan, (1912) 34 All 455=39 I A 156=16 I C 197=15 O C 271 (P C).
17. Sham Koer v. Dah Koer, (1902) 29 Cal 664=29 I A 132=8 Sar 280=6 C W N 657 (P C).

been no independent legal advice, whether, if proper information had been given, it would have affected the mind of the executant in completing the deed. On the other hand, the doctrine cannot be pushed so far as to demand the impossible. The mere declaration by the settlor, subsequently made, that she had not understood what she was doing obviously is not in itself conclusive. It must be a question whether, having regard to the proved personality of the settlor, the nature of the settlement, the circumstances under which it was executed, and the whole history of the parties, it is reasonably established that the deed executed was the free and intelligent act of the settlor or not. If the answer is in the affirmative, those relying on the deed have discharged the onus which rests upon them. Of course fraud, duress and actual undue influence are separate matters.

Even had this document been read over to the women, it would not follow that they would be regarded as understanding what was in it, and even if they understood what was in it, it does not necessarily follow that the transaction would be binding upon them : *see* A I R 1934 P C 208[18] and A I R 1938 P C 276.[19] In a case such as the present, where the document is not in the mother language of the executant, it would be necessary for the plaintiff to show that the executant understood and not merely heard what was read : A I R 1937 P C 274.[20]

The learned trial Judge has relied on 37 All 474,[21] 12 Pat 359[22] at p. 399 and 45 Cal 748.[23] It is true that the first and the last of these cases are under S. 59 of the old T. P. Act and there has been a substantial alteration in the requirements for attestation effected by the amendments of 1926. The difference however consists in the fact that now it is sufficient if the attesting witnesses though not present at the time of execution received acknowledgment of execution from the executant. To that extent of course those cases have ceased to be good law but apart from that the law then and the law now is the same and there is no evidence here of acknowledgment made by the executant to the attesting witnesses. Accordingly in our opinion the law as laid down in those two Privy Council cases controls this case now as much as it would have before the amendment of 1926, the variation wrought by the amendment not having any application to this case. The learned trial Judge has carefully examined the evidence and has, in our opinion, correctly stated the law, and we see no reason to differ from the conclusion he has arrived at. It follows therefore that the appeal fails and is dismissed with costs.

S.G./R.K. *Appeal dismissed.*

18. Kalyan Mal v. Ahmad Uddin, (1934) 21 A I R P C 208=151 I C 45 (P C).
19. Peoples Bank of Northern India Ltd. v. Mian Ghulam Jan, (1938) 25 A I R P C 276=176 I C 773=32 S L R 947 (P C).
20. Kwamin Bassayin v. Bendentu II, (1937) 24 A I R P C 274=170 I C 423 (P C).
21. Padarath Halwai v. Ram Nain Upadhia, (1915) 2 A I R P C 21=30 I C 366=37 All 474=42 I A 163 (P C).
22. Sabitri Thakurani v. F. A. Savi, (1933) 20 A I R Pat 306=145 I C 1=12 Pat 359=14 P L T Sup 1.
23. Ganga Pershad Singh v. Ishri Pershad Singh, (1918) 5 A I R P C 3=45 I C 1=45 Cal 748=45 I A 94 (P C).

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STONE C. J. AND VIVIAN BOSE J.

Kuwarji Madhao Gujar — Appellant.

v.

Bhurelal Ajitmal Baniya—Respondent.

Letters Patent Appeal No. 7 of 1937, Decided on 25th November 1938, from appellate decree of Niyogi J., in S. A. No. 314 of 1935, D/- 7th April 1937.

(a) C. P. Land Revenue Act (2 of 1917), Sec. 203 — Abadi—Usufructuary mortgage—Mortgagee is mere trespasser, and suit for possession by landlord is governed by Art. 142 or Art. 144 and not by Art. 120.

A usufructuary mortgagee of an abadi site has only a limited interest in the same, yet such a transfer is struck at by S. 203 and the mortgagee is in relation to the landlord a mere trespasser, and a suit by landlord for possession of the site is governed by Art. 142 or Art. 144 and not by Art. 120. [P 164 C 2]

(b) Acquiescence — Circumstances not sufficient to raise effective defence of.

Where a grantee of an abadi site went out and his usufructuary mortgagee entered into possession of the site and the house built thereon by the grantee and continued as such for many years when the lambardar sued for possession, the fact that the lambardar stood by with knowledge of his rights without suing for such a long time as would show laches on his part or would show that he was slow to exercise his remedies, is not sufficient to raise an effective defence of acquiescence : *Case law discussed.* [P 165 C 1 ; P 166 C 1]

Y. V. Jakatdar —*for Appellant.*

A. V. Wazalwar — *for Respondent.*

Judgment.—This is a plaintiff's appeal from a decision of a Judge of this Court dismissing a second appeal on the ground that the suit is barred by limitation. For the appellant, the point of limitation was the only point to be argued but in reply in order to support the learned Judge's judgment the question of so-called acquiescence has been canvassed. The learned Judge finds against acquiescence differing from

the lower appellate Judge. The point of limitation can be very shortly stated after the facts have been referred to.

The plaintiff is a lambardar in a village to which there was attached an abadi site. The plaintiff's predecessor in the lambardarship had granted to a third party (herein referred to as the mortgagor) a residential site in the abadi and the mortgagor effected a usufructuary mortgage to the defendant of that site. As a result, the mortgagor went out of possession and the defendant entered into possession of the abadi site in question on which the mortgagor had built a house and which the defendant now occupies. That was on 14th May 1924. Many years passed. The lambardarship changed hands; the present plaintiff became the lambardar; and the present plaintiff sues for possession of that site.

It had been a matter of doubt in the Judicial Commissioner's Court whether S. 203, C. P. Land Revenue Act, which prohibits a transfer by the person in possession of an abadi site, applied to a mortgage. The matter was in doubt even when this present case came before Niyogi J. in second appeal and that learned Judge referred to a Bench for determination the question,

whether the word 'transfer' used in S. 203 (3), C. P. Land Revenue Act 1917, includes a usufructuary mortgage.

That question was answered by the Bench in the affirmative, the ground of the Bench decision being that the transfer in question related to the right of possession and was not limited to the full proprietary interest and the right of possession was clearly transferred by a usufructuary mortgage. The matter therefore went back for disposal by the learned referring Judge and he has found that there was here no acquiescence. His view appears to be that there is no acquiescence because the lambardar was under the general impression that he could not turn this mortgagee out, and therefore the fact that he stood by for some time and his predecessor had stood by for many years does not raise any question of acquiescence. As we shall have occasion to state hereafter, even this does not limit the circumstances in which acquiescence can be used as a defence, in our opinion, sufficiently.

On these facts the first point that arises is : What is the period of limitation in which the plaintiff can sue ? It is not disputed by counsel for the respondent that the plaintiff had a right of suit from the moment this usufructuary mortgagee entered into possession under a prohibited transfer. It is not disputed that from that moment the defendant was a trespasser. But it is said that this trespasser's possession is not adverse because he lays claim to a limited right to possess as usufructuary mortgagee only. The learned Judge has come to the conclusion that neither Article 142 nor Art. 144 applies, that the appropriate Article to apply is 120, and that accordingly this suit, which was brought after six years and before twelve years, was out of time. The relevant passage in the judgment is as follows :

Article 142 or Art. 144 would have applied had the defendant denied the plaintiff's title in which case he would have been in the position of a trespasser. In the present case the defendant does not deny the plaintiff's title. He only claims to be his licensee. Consequently, this suit does not fall to be governed by either Art. 142 or Art. 144. In the absence of any specific Article applicable to a suit the residuary Article 120, Limitation Act, will operate. According to that Article the period of limitation is six years, that is to say, the suit should have been filed before 15th May 1930. As it was filed in 1934 it is clearly barred by time.

As we have above observed, it is not now disputed that the defendant is a trespasser. But he is a trespasser apparently of a particular type and one who can maintain possession (if Art. 120 is the appropriate Article) if he has stayed on the land for six years because any suit thereafter of this nature would be barred by time. We are unable to understand how that can be. If H. C. Mitra's Limitation Act (Edn. 12) pp. 867-868, Para. 621-A is referred to, a very considerable number of cases will be found relating to the position that arises where the person in possession is claiming a limited interest only. Here the limited interest is said to be that of a usufructuary mortgagee. That interest is undoubtedly a limited interest. But such a transfer is struck at by S. 203, and the mortgagee is, in relation to this land, a mere trespasser. In our opinion either Article 142 or Art. 144 is applicable, which is a matter of indifference in this case, as in either case admittedly the suit will be in time and the plea of limitation will fail.

But it is said by counsel for the respondent in support of the judgment that if it be that the learned Judge was wrong on the question of limitation, he was also wrong in negativing acquiescence, and that this is pre-eminently a case of acquiescence.

Reliance is placed on a variety of decisions of the Judicial Commissioner's Court which we have examined : 11 N L R 126,[1] 54 I C 304,[2] 43 I C 508[3] and 27 N L R 183.[4]

The word "acquiescence" is used by the learned lower appellate Judge as though it were an effective defence once it was shown that the plaintiff had stood by with knowledge of his rights and without suing for a year or two—such a time as would show laches on his part or would show that he was slow to exercise his remedies. If that were sufficient to raise the defence of acquiescence we would observe that no meaning whatever could be given to the Articles, we have been examining of the Limitation Act. Under the law relating to limitation, knowledge of one's right to sue does not contract, though ignorance of the facts creating the cause of action may expand, the time allowed in which to sue. The limitation periods proceed on the basis that the plaintiff could have sued before. To take an ordinary every day case, a plaintiff suing a trespasser for possession can let 11½ years go by during the whole of which period he has been aware that the defendant was a trespasser on his land and still he would be within time because the period of limitation is 12 years. The fact that he knew he was a trespasser, the fact that he did not proceed before, does not give the defence of acquiescence to the defendant. The Lord Chancellor in (1865-66) 1 H L 129[5] set out the various ingredients that must be present before one can raise the defence of acquiescence. His observations are quoted in 2 N L R 34[6] at p. 40 and in the same volume at page 6, 2 N L R 4.[7] Further, as Turner L. J. observed in (1861) 130 R R 28[8] at p. 38 :

> Acquiescence, as I conceive, imports knowledge, for I do not see how a man can be said to have acquiesced in what he did not know, and in cases of this sort I think that acquiescence imports full knowledge, for I take the rule to be quite settled that a cestui que trust cannot be bound by acquiescence unless he has been fully informed of his rights and of all the material facts and circumstances of the case.

As Thesiger L. J. said in (1878) 8 Ch D 286[9] at p. 314, acquiescence "is no more than an instance of the law of estoppel" and not only is full knowledge required, but as the Lord Chancellor in the case above referred to (1865-66) 1 H L 129[5] pointed out, there must be some lying by to the detriment of the other side. There was such a lying by in 27 N L R 183[4] where the lambardar permitted the person to raise a building on the site knowing all along that the person who was building was not entitled to be there and knowing all along that the person building thought he was entitled. That is exactly the kind of case which raises the defence of acquiescence. In 11 N L R 126,[1] what was actually found for was in favour of the landlord. It was a case in which the landlord sued to dispossess the defendant who claimed title under the tenant of a site in the abadi. The landlord had not objected to this transfer and it was assumed throughout the case that the transferee was in possession with the landlord's consent. It was held that that consent merely implied that the landlord was prepared to accept the transferee on the same terms as the original tenant; that is to say he was prepared to allow the transferee to use the site for residential purposes. When, however, the transferee ceased to use the site for those purposes and diverted the land to other uses, namely for the purpose of cultivating tobacco and maize, the landlord stepped in and claimed the right to dispossess him. It was held that he had a right to do so and that his consent did not mean that the transferee was to get an absolute title to that plot of land. This is not a case of acquiescence at all. It is a case where an admitted permission was found to be of a limited kind and was not regarded as sufficient to raise an implied permission to do acts outside the limited permission. The passage upon which reliance was placed (at p. 129) merely states as follows :

> As a general rule then the transferee of a house standing on an abadi site whose occupancy of the site is not objected to by the landlord must be presumed to have been permitted to occupy it on the same terms as his transferor . . . .

That means that the consent of the landlord under those circumstances would not

1. Narain v. Behari, (1915) 2 A I R Nag 119=31 I C 307=11 N L R 126.
2. Ramdayal v. Jagrani, (1920) 7 A I R Nag 21 =54 I C 304.
3. Deoki v. Mukunda Kunbi, (1917) 4 A I R Nag 47=43 I C 508.
4. Dhunnoo v. Sheolal, (1931) 18 A I R Nag 158 =134 I C 852=27 N L R 183.
5. Ramsden v. Dyson, (1865-66) 1 H L 129=12 Jur (N S) 506=14 W R 926=149 R R 543.
6. Collier v. Baron, (1906) 2 N L R 34.
7. Seth Mohan Lal Parwar v. Choudhri Chunni Lal Parwar, (1906) 2 N L R 4.
8. Life Association of Scotland v. Siddal, (1861) 8 D F & J 58=7 Jur N S 785=4 L T N S 811=130 R R 28=9 W R 541.
9. De Bussche v. Alt, (1878) 8 Ch D 286=47 L J Ch 281=38 L T 379.

entitle the transferee to claim an absolute right to do what he liked with the land but would amount to a permission to do what his transferor could lawfully do. That passage cannot be used to mean that the Court is bound to presume consent whenever it is found that a transferee has been in possession for a year or two. Cases such as 54 I C 304[2] and 43 I C 508,[3] if they decide that mere knowledge for a time precludes the landlord thereafter from pursuing his ordinary remedies against a trespasser merely because the trespass is on an abadi site, are, in my opinion, wrongly decided.

In our view there is no question of acquiescence here. The only difficulty we found about this branch of the case is that the lower Appellate Court has found as a fact, which finding is binding not only on the second Appellate Court but also on this Court which is hearing an appeal from the second Appellate Court, that there was acquiescence. We have however carefully examined that judgment and we have come to the conclusion that the learned Judge's opinion was founded on a wrong legal view and he was using "acquiescence" in a sense quite different from the meaning usually ascribed to it when relied upon as a defence. Because the former lambardar had stood by knowing of the position, the Court concluded that the trespasser could rely on the defence of acquiescence because relying on the passage already explained from 11 N L R 126,[1] the Court must draw the inference that the lambardar has acquiesced. Consequently he draws that inference and finds acquiescence. This is, in our opinion, a conclusion arrived at on a mistaken view of the law.

It is finally urged however that here the learned Judge from whose judgment this appeal has been brought was wrong in saying that there was no acquiescence here because the plaintiff was not aware of his rights. It is said that he was aware of his rights. Let it be that he was aware of his rights. It would make, in our opinion, no difference. But the argument proceeds that he was aware of his rights because although there was a doubt as to the position of a usufructuary mortgagee, there was no doubt whatever as to the position where there was a transfer. Although the defendant was in possession as a usufructuary mortgagee, his mortgagor had left the village and therefore the lambardar must have known that this usufructuary mortgagee was something more than a mere usufructuary mortgagee, that he was a mortgagee whose mortgagor had gone away finally and that therefore he was really there as though he were a vendee. In our opinion there is nothing whatever in that argument. Accordingly the appeal succeeds with costs and the suit is decreed with costs throughout.

S.G./R.K. *Appeal allowed.*

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STONE C. J. AND CLARKE J.

Jabbarshah Akbarsha and another — *Plaintiffs* — Appellants.

v.

Kanchhedi Lal Ganpat Kalar — *Defendant* — Respondent.

Letters Patent Appeal No. 11 of 1936, Decided on 12th October 1938, from appellate decree of Pollock J., *reported in A I R 1936 Nag 171.*

(a) Transfer of Property Act (1882), Ss. 58 and 105—Document fulfilling definition of usufructuary mortgage is mortgage though described as lease.

A document, which purports to be a lease but fulfils the definition of a usufructuary mortgage, is a mortgage and the mere fact that it describes itself as a lease does not make it a lease.

[P 167 C 2]

(b) C. P. Tenancy Act (11 of 1898), Ss. 46, 47 and 48 — Transfer by occupancy tenant in contravention of S. 46 (3) is voidable by landlord who can do so only in Revenue Court and not by Civil suit.

A transfer by an occupancy tenant in contravention of the provisions of Sec. 46 (3) is not void but voidable by the landlord whose proper and only remedy is to proceed in the Revenue Court under Ss. 47 and 48. But, if such a voidable transfer is not avoided by persons who can avoid it under S. 47, it would be a perfectly good transfer, and any gratuitous surrender in favour of the landlord by the tenant with the sole object of defeating his mortgagee cannot affect the tenancy which must be deemed to continue to preserve the rights of the mortgagee : *Case law discussed.*

[P 169 C 2; P 170 C 1; P 171 C 1]

M. R. Bobde and G. V. Moharrir — *for Appellants.*

M. B. Kinkhede and A. R. Kulkarni — *for Respondents.*

Judgment. — This is a Letters Patent Appeal on the part of the plaintiffs against the judgment and decree of Pollock J. dismissing their suit for possession of two fields which have been recorded at the last settlement as occupancy fields and which were surrendered to the plaintiffs by the occupancy tenant Bhulansha on 11th December 1931. Bhulansha's father and cousin, whose interests admittedly devolved upon

Bhulansha, before the execution of the said surrender on 11th December 1931, had mortgaged these fields to the defendant-respondent by two registered documents (Exs. D-1 and D-2) under which the defendant was in possession of the fields. Those documents were executed on 11th November 1915 and 11th February 1916 and are respectively Exs. D-2 and D-1. When the plaintiffs tried to take possession on the strength of the surrender deed, they were resisted by the defendant, who was in possession on the strength of his mortgages and hence the plaintiffs have brought this suit to recover possession of the fields through the Civil Court. The appellants contend that the mortgages which are the basis of the respondent's title are invalid for three reasons: (1) because they have not been legally attested, (2) because they are void under the C. P. Tenancy Act having been executed by an occupancy tenant in contravention of the provisions of S. 46, C. P. Tenancy Act of 1898, and (3) because their registration is ineffective having been procured by fraud. The third reason is only part of the second reason and will be considered along with it. The defendant countered by denying that the fields were occupancy fields and therefore the C. P. Tenancy Act did not apply to them : he was therefore at liberty to take a mortgage of them if he pleased. Moreover, he contended that even if the fields were held in occupancy right by Bhulansha the plaintiffs' remedy lay in the Revenue Court under Sec. 47, Tenancy Act of 1898 and not in the Civil Court. He further contends that the attestation has been satisfactorily proved. He also raised another defence, which has not been considered by the learned Judge in second appeal, that whether or not the mortgages were valid at their inception the mortgagee obtained title by prescription over a period of 12 years. The lower Appellate Court rejected this plea, but it has been raised again by the respondent-defendant in the argument before us. The points therefore which arise for our consideration are: (i) What was the tenure of the fields? Were they held by Bhulansha in occupancy or proprietary right? (ii) Are the mortgages of the fields void or voidable, and, if the latter, can the plaintiffs avoid them by a suit for possession in the Civil Court or should they have proceeded under Sec. 47, C. P. Tenancy Act of 1898? (iii) Are the mortgages validly attested? (iv) Has the defendant's title as mortgagee been perfected by prescription?

Before proceeding to consider the above points, we desire to dispose of a suggestion rather than a contention put forward by the appellants that one of the two so-called mortgage deeds, Ex. D-1, is not a mortgage at all but is a lease. It calls itself a lease and if it is a lease no question of attestation arises to be considered, nor any question as to jurisdiction under Sec. 47, Tenancy Act. We would point out that in all the three Courts which have already considered this it has been taken for granted that the document is a mortgage and not a lease and we are also of opinion that it is a mortgage. S. 58, T. P. Act, defines a mortgage in these terms :

> *58.* (a) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability.

Sub-section (d) of S. 58 is as follows :

> Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage money, and to receive the rents and profits accruing from the property, or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage money, or partly in lieu of interest or partly in payment of the mortgage money, the transaction is called a usufructuary mortgage, and the mortgagee a usufructuary mortgagee.

Exhibit D-1 fulfils the above definition of a usufructuary mortgage. The mere fact that the document describes itself as a lease does not make it a lease. We hold accordingly that it is a mortgage.

Whether it is a mortgage or a lease, there is no doubt that the other document Ex. D-2 is not a lease but a mortgage and all the questions which we have set out above for determination would have to be determined in respect of Ex. D-2 whether or not they arose in respect of Ex. D-1. Hence, it would in no way simplify the discussion to hold Ex. D-1 to be a lease.

Accordingly, we first take up the point of jurisdiction, because if that point is decided against the appellants, all the rest go out. The learned Judge of this Court has discussed the matter in paras. 5 and 6 of his judgment, where he states that, as the mortgages are not void but only voidable in the manner and to the extent provided by Sec. 47, C. P. Tenancy Act of 1898, the landlord's remedy lies in the

Revenue Court alone by an application under that Section. The question has to be considered in two aspects : firstly whether, if there had been no surrender, the plaintiff could have brought his action in the Civil Court, and secondly whether the surrender makes any difference. The appellants argue that Ss. 46 and 47 did not affect their right of suit in the Civil Court because the C. P. Tenancy Act does not purport to lay down the rights of landlords but only the rights of tenants. They argue that the relationship of landlord and tenant arises out of a contract and but for the Tenancy Act it would be lawful for the landlord to enhance the tenant's rent or evict him for which purpose he could go to the Civil Court. The Tenancy Act has placed a limitation on his powers of eviction only permitting him to evict if the tenant transfers his holding in a manner which is not allowed by the Act. S. 47 is only meant therefore to give the landlord a special remedy for evicting him other than his ordinary remedy which however still subsists. All that S. 47 means, according to the appellants, is to provide that if the landlord decides to take action under that Section he must do so within two years. They cite 18 N L R 82[1] at p. 83, which holds that it is open to a landlord where his title is in jeopardy from the aggressions of a trespasser or where his title may be injured by denial of his rights over his land to bring a suit for possession and for having his own rights declared against the trespasser and to claim khas possession. That was, however, a case in which the defendant was an out and out trespasser who did not claim any title under the tenant. It is not a case as here where the defendant is only regarded as a trespasser because his mortgage is held to be void, if the plaintiffs' argument is correct. Moreover, in that case the application of Ss. 46 and 47, Tenancy Act, was never considered. That case therefore is no authority for holding that in a case like this the landlord has a right of suit in a Civil Court. The mortgages which we are considering admittedly come under the purview of S. 46 and the important question is whether they are void or only voidable in the particular manner provided by Ss. 47 and 48. S. 46 (3) provides:

> No occupancy-tenant shall be entitled to sell, make a gift of, mortgage, sub-let (except for a period not exceeding one year) or otherwise transfer his right in his holding or in any portion thereof, and every such sale, gift, mortgage, sub-lease (other than for a period not exceeding one year) or transfer shall be voidable in the manner and to the extent provided by the two next following Sections.

The respondent argues that there is a distinction between saying that "no occupancy tenant shall be entitled to sell, etc.", which is the same as to say that "an occupancy tenant shall not be entitled to sell, etc.", and saying that "an occupancy tenant shall be incompetent to sell, etc.". He argues that in the latter case, sale, etc., by an occupancy tenant is void, whereas in the former case it is not void but can be done subject to certain penalties provided for the doing of it. That is to say, certain relations and the landlord can avoid it, and the only way in which they can avoid is by the procedure provided in Ss. 47 and 48. There is no doubt that under the previous Tenancy Act of 1883 such a transfer was voidable and not void and as no machinery was provided for avoiding it, the landlord could go to the Civil Court. The Act of 1898 made a change in the wording relating to the rights of an occupancy tenant to transfer his holding and also provided machinery for the relations and the landlord to avoid it. This question as to the right of the landlord to seek his remedy in a Civil Court under the Act of 1898 was considered by the Judicial Commissioner in 16 C P L R 135[2] where he held that a suit was barred and that the only remedy for the landlord was by proceeding in Revenue Courts. It is true that that was the case of an ordinary tenant whereas we are here dealing with an occupancy tenant, but as the Sections of the Act relating to the rights of transfer of ordinary and occupancy tenants are similar, the reasoning there applies with equal force to occupancy tenants. In that case also, a distinction was drawn between the words "shall not be entitled" and "shall be incompetent." The same view was held in 8 N L R 22.[3] There it was pointed out at p. 27 that in cases where the transfer would be a nullity under the ordinary civil law irrespective of the provisions of S. 46, Tenancy Act, the enactment is not called into operation ; there is nothing upon which it can fasten : there is no otherwise legal transaction for the consideration of the Revenue Officer. He

1. Allibhai v. Shamrao, (1922) 9 A I R Nag 216 =84 I C 902=18 N L R 82.

2. Dayaram v. Shaligram, (1903) 16 CPLR 135.

3. Ganeshdas v. Shankar, (1912) 8 N L R 22=13 I C 909.

cannot be required to make terms upon the basis of a nullity. In such cases the Civil Court has jurisdiction and one of such cases is where the transfer is made by an instrument compulsorily registrable but not registered.

Here the documents have been registered although they ought not to have been registered according to S. 46 (5). But, apart from S. 46 (5), there is nothing to prevent the Sub-Registrar from registering them. He did not refuse to register them because on their face there was nothing to show that they came under the ban of sub-s. (5), since the lands were only described as muafi khairati or muafi khairati mokasa, and the Sub-Registrar did not know that such a description could only apply to occupancy land. (We are not to be taken as holding that under the 1898 Act, land which is described as muafi khairati is necessarily occupancy land, but we are only assuming for the sake of this argument that such may be the case.) The learned Judge, following 31 N L R 223,[4] has held that as the documents did not ex facie indicate to the Sub-Registrar that the mortgages were forbidden by the Tenancy Act, the registration was not invalid and cannot be ignored. This view has since received the approval of the Privy Council in I L R 1936 Nag 104.[5] If therefore 8 N L R 22[3] is correctly decided, as we think it is, it will follow that the proper and the only remedy for the plaintiffs, unless their position is affected by the surrender deed which position we shall examine next, was to proceed in the Revenue Court under Ss. 47 and 48. In 44 Cal 816[6] Mookerjee J. has quoted passages from two English cases. These passages can be used with equal effect in the present case. One is by Lopes L. J. in (1887) 18 Q B D 704[7] at p. 825 :

> In the case of an Act which creates a new jurisdiction, a new procedure, new forms or new remedies, the procedure, forms and remedies there prescribed and no others must be followed.

The other is by Lord Halsbury in (1898) A C 387[8] :

> The principle that where a specific remedy is given by a statute, it thereby deprives the person, who insists upon a remedy, of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law.

The view expressed in 8 N L R 22[3] was approved by Niyogi A. J. C. in 31 N L R Sup 96[9] at p. 98. The same view was also taken by the Calcutta High Court in 17 C W N 621,[10] a case from Sambalpur which was governed by the C. P. Tenancy Act of 1898. 8 N L R 22[3] was approved again in A I R 1922 Nag 126.[11] It has therefore been generally accepted in the Judicial Commissioner's Court that a transfer by an occupancy tenant in contravention of S. 46 (3), Central Provinces Tenancy Act of 1898 is not void but voidable by the landlord, and that too only in the manner provided by Ss. 47 and 48 and not by a suit in the Civil Court. We are also of the same opinion, although we would like to make it clear that except for the inclusion of the words from " and every such sale " to the end of Para. 1 in S. 46 (3), we would have been of the opinion that such transfers were not only voidable but absolutely void. It seems to us that this is the only way in which sub-sec. (5) can make sense alongside sub-s. (3). Sub-s. (5) provides :

> Notwithstanding anything contained in the Registration Act, 1877, no officer empowered to register documents shall admit to registration any document which purports to transfer the right of an occupancy-tenant in his holding or in any portion thereof, unless the document recites that the transferee is a person who, if he survived the tenant, would inherit the right of occupancy, or is a person in favour of whom as a cosharer the right of occupancy originally arose or who became by succession a cosharer therein.

If then a transfer is only voidable and is not avoided by the persons who can avoid it under S. 47, it would, according to sub-sec. (3), be a perfectly good transfer. Yet, under sub-sec. (5), the Sub-Registrar is not allowed to register it. There is thus a conflict between the two sub-sections. If, on the other hand, such transfers are absolutely void, then it is perfectly intelligible that the Sub-Registrar should be precluded from registering such documents under any circumstances. Nevertheless the addition of the words "every such sale, gift, mortgage, sub-lease or transfer shall be voidable in the manner and to the extent provided by

4. Kisansao v. Nanaji, (1935) 22 A I R Nag 182 =157 I C 793=31 N L R 223.
5. Parashram v. Asaram, (1936) 23 A I R P C 301=164 I C 345=I L R (1936) Nag 104 (PC).
6. Budhu Lal v. Chattu Gope, (1918) 5 A I R Cal 850=39 I C 465 = 44 Cal 816=25 C L J 193=18 Cr L J 497=21 C W N 269.
7. Reg. v. County Court Judge of Essex, (1887) 18 Q B D 704=56 L J Q B 315=57 L T 643 =35 W R 511=51 J P 549.
8. Pasmore v. Oswaldtwistle Urban District Council, (1898) A C 387 = 67 L J Q B 635 = 78 L T 569=62 J P 628=14 T L R 368.
9. Kanhaiya v. Sitaram, (1936) 23 A I R Nag 18 =159 I C 862=31 N L R Sup 96.
10. Baikuntha Nath Misra v. Laboo Nag, (1913) 17 C W N 621=18 I C 273=17 C L J 646.
11. Chunga Prasad v. Phulwa, (1922) 9 A I R Nag 126=67 I C 121.

the two next following Sections" must mean, as has been so frequently held in the Judicial Commissioner's Court, that such transfers are only voidable and not void. No doubt this inconsistency in the Act of 1898 led to the clarification of the position in Ss. 12 and 13 of the Act of 1920.

The next point for consideration is whether by reason of the surrender deed the position is in any way altered. The learned Judge has dealt with this aspect of the case in para. 7 of his judgment where he comes to the conclusion that it makes no difference in the case of a gratuitous surrender like this, and that in such a case the tenancy must be deemed to continue for the purpose of preserving the rights of mortgagees. He relies on 27 N L R 186.[12] We think however that the learned Judge has expressed rather too broadly what that case decides. It does not decide, as the learned Judge says, that where a tenant having effected a valid sub-lease or mortgage subsequently surrenders the holding, he does not thereby affect the rights of the sub-lessee or mortgagee. It only refers to the special circumstances of a widow's limited estate. The learned Judge was however correct in pointing out that in 28 N L R 93[13] it was held :

> If a tenant after having made a transfer which is valid as against himself and as against the landlord, were to voluntarily surrender his tenancy the law will presume that the tenancy has a continuance in order to work out the rights created by such a valid transfer.

This was decided also in 2 N L R 170[14] where Ismay J. C. quoted Coke upon Littleton as follows.

> Having regard to the parties to the surrender, the estate is absolutely drowned. But having regard to strangers who are not parties or privies thereunto, lest by a voluntary surrender, they may receive prejudice touching any right or interest they had before the surrender, the estate surrendered hath in consideration of law a continuance.

Different considerations, which were examined by us in a recent case, may arise where the tenant dies without heirs or the tenancy determines by operation of law. Here, as the learned Judge observes, the tenancy had not come to an end by operation of law but by voluntary act of the tenant. The appellants argue that surrender is not a transfer and that therefore it does not give cause for any action under S. 47, Tenancy Act, and moreover that where the tenant right is surrendered it comes to an end by operation of law and therefore under 28 N L R 93[13] the rights created by the mortgages come to an end with them. Besides this, it is argued that 28 N L R 93[13] presupposes a valid sub-lease or mortgage and has no application to a case like this where the mortgages are invalid and that in the case of an invalid mortgage it does not become valid merely because the landlord has taken no steps within the period allowed by S. 47 to avoid it. Mr. Barway in his Law of Tenancy, Edn. 2 at page 371, observes :

> It has been pointed out in the aforesaid rulings that it is only a valid mortgage of the tenant right that will not be affected by a voluntary surrender. But if the mortgage is void or voidable at the instance of the landlord, it will certainly be extinguished by a voluntary surrender and the landlord will be entitled to sue for immediate possession. So, in one case, the sale (or rather surrender) of an absolute occupancy holding to the landlord, was held to have extinguished the mortgage which was voidable under S. 41 (7), Tenancy Act of 1898, so as to entitle the landlord to sue for immediate possession,

and he has cited A I R 1930 Nag 119[15] in support of this proposition. We do not agree entirely with what Mr. Barway has there said. A mortgage which can be avoided is valid until it is avoided. Further, the words "and the landlord will be entitled to sue for immediate possession" require qualification. A I R 1930 Nag 119[15] was the case of an absolute occupancy holding, in respect of which there is no doubt that the landlord had a right of suit. It does not follow however that he could sue in the case of an occupancy holding where the Legislature has laid down a special procedure for the landlord to obtain redress. The argument that a surrender is not a transfer and does not therefore give rise to any action under S. 47, Tenancy Act, is beside the point because it is not the surrender but the mortgages which give the landlord the right to proceed under S. 47. And as to the argument that in the case of a surrender the tenancy comes to an end by the operation of law we cannot accept this either. The appellants have relied on 30 N L R 25[16] but that was a very different matter. There the tenant who had mortgaged his holding in favour of a third party was ejected by the Revenue Court and it was held that under those

12. Prem Narayan v. Jhado, (1931) 18 A I R Nag 129=133 I C 385=27 N L R 186 (F B).
13. Baldeoprasad v. Premnarain, (1932) 19 A I R Nag 107=139 I C 369=28 N L R 93.
14. Bhuray Brahmin v. Lala Vishwanath, (1906) 2 N L R 170.
15. Jairam v. Jankibai, (1930) 17 A I R Nag 119=122 I C 697.
16. Shivlal v. Abdul Hussein, (1933) 20 A I R Nag 255=148 I C 257=30 N L R 25.

circumstances the tenancy came to an end by operation of law and therefore the mortgage came to an end also. This is a very different position from the present where the tenant has voluntarily surrendered his holding to the landlord, and that too with the sole object of defeating the mortgagee. If then the Legislature has laid down a special procedure for avoiding such mortgages under the Tenancy Act and the landlord has failed to avail himself of that procedure and if we are right in holding that apart from the surrender he has no right to avoid the mortgages by a suit in the Civil Court, we cannot see why he should be able to recover the right to avoid the mortgages by means of a collusive arrangement with the tenant.

We agree with the learned Judge in holding that the Civil Court has no jurisdiction to entertain the plaintiffs' suit. That being so, it is not necessary to consider the other points which have been argued before us. The Letters Patent Appeal must fail and it is consequently dismissed with costs.

S.G./R.K. *Appeal dismissed.*

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GRILLE J.

Amrutlal Chunnilal Mehta — Applicant.

v.

President, Town Municipal Committee, Amraoti — Non-Applicant.

Criminal Revision Nos. 292 and 293 of 1938, Decided on 19th December 1938, from order of Addl. Sess. Judge, Amraoti, D/- 8th June 1938.

(a) C. P. Motor Vehicles Taxation Act (as amended in 1935), S. 3 (1), Proviso—License fee for motor lorries imposed by Amraoti Town Municipality under its bye-laws is not tax—Person residing within other Municipality would be liable for license fees in respect of lorries plying between those municipal towns.

By an amending Act in 1935 the words "rent or fees" were deleted from the Proviso to S. 3 (1), C. P. Motor Vehicles Taxation Act. This clearly raises the implication that a person residing within one Municipality would not be liable to pay any tax on his motor vehicles which any other Municipal Committee might impose under the provisions of Sec. 66, Municipalities Act, as applied to Berar, but would be liable for any other fee imposed by its bye-laws. The definition of 'tax' in the C. P. Municipalities Act, would not include any toll, rate, due or fee of any kind whatever in addition to whatever kind of impost is mentioned in Sec. 66. License fee for motor lorry imposed by Amraoti Town Municipality is not tax and hence a person residing within Chandur Bazar Notified Area Committee would be liable for license fees imposed by Amraoti Town Municipality in respect of motor lorries plying between Chandur Bazar and Amraoti. [P 172 C 1, 2]

(b) C. P. Municipalities Act (2 of 1922 as applied to Berar) S. 179 (g)—Rules under—R. 1 framed by Amraoti Town Municipal Committee—Words "plying for hire within limits of Amraoti Town Municipality"—Interpretation.

The words "plying for hire within the limits of Amraoti Town Municipality," occurring in R. 1, cannot be confined to the narrow interpretation that the whole of the service which is offered must take place within the limits of the Municipality and that otherwise the rules do not apply. Hence vehicles operating as a regular service between Amraoti Town and Chandur Bazar and picking up passengers within limits of the Amraoti Town Municipality ply for hire within the limits of the Amraoti Town Municipality. [P 172 C 2]

P. Y. Deshpande — *for Applicant.*

W. R. Puranik, Advocate-General — *for Non-Applicant.*

Order.—This order will also cover Criminal Revision No. 293 of 1938, the only difference in the two cases being in the number of the motor vehicles owned by the applicant, five in one case and three in the other. The applicant owns motor lorries which he plies for hire between Amraoti and Chandur Bazar. He resides at the latter place. He has been convicted under Rr. 1, 2 and 33 of the rules made by the Amraoti Town Municipal Committee under S. 116, Berar Municipal Law of 1886. That particular Section corresponds to S. 179 (g), C. P. Municipalities Act of 1922, as applied to Berar, and the rules are to be deemed to have been made under that Act. The validity of the rules has not been challenged and is not in question. These rules run as follows:

1. No vehicles of any kind shall be let to hire or shall ply or be offered for hire within the limits of the Amraoti Town Municipality except under a license granted in that behalf under these rules.

2. No person shall act as a driver of a licensed vehicle within the limits of the Amraoti Town Municipality except under a license granted in that behalf and no owner of a licensed vehicle shall allow it to be driven by an unlicensed driver.

33. Any person committing breach of any Rr. 1, 2, ... shall be liable to prosecution and on conviction before a magistrate shall be punished with fine which may extend to Rs. 20 and where the breach is a continuing breach, with further fine which may extend to Rs. 5 for every day after the first during which the breach is proved to have been persisted in. It may also involve forfeiture of license by the order of the committee.

The applicant has admittedly not obtained a license to ply these vehicles for hire from the Amraoti Town Municipal Committee, neither are his drivers licensed by the committee. It does not appear from the record whether he has previously paid

these license fees, but it is probable that he has, and that he has refused to take out licenses this year as he claims that he is already paying license fees to the Chandur Bazar Notified Area Committee within whose limits he resides, and that by virtue of the Proviso to S. 3 (1) C. P. Motor Vehicles Taxation Act of 1932, he is not liable to pay any dues to a Municipal Committee other than that within whose local limits he resides. His appeals against his conviction failed and applications for revision have been made in this Court, and a rule was issued.

In the judgments of the Courts below I find it stated that the applicant claims to have paid license fees in Chandur Bazar. No bye-laws have been shown me whereby this Notified Area is empowered to recover license fees, and the learned counsel for the applicant has stated that in all probability what his client pays to the Chandur Bazar Notified Area Committee is a tax under S. 66 (1) (c), C. P. Municipalities Act, as applied to Berar. Such a tax was imposed in May 1937, *vide* C. P. Gazette Notification No. 3214-1247-M-XIII, dated 22nd May 1937 (the Gazette gives the date as 22nd May 1936; this is clearly a misprint, since the publication occurs in the Gazette of 28th May 1937 and the other notices in the Gazette bear the date 1937).

Now the Proviso to S. 3 (1), Motor Vehicles Taxation Act, originally laid down that no person residing within a municipality shall be required, in respect of a motor vehicle which is taxed under this Act (which the vehicles in this case undoubtedly are), to pay any dues by way of tax, rent or fees to a municipality other than the one within whose local limits he ordinarily resides. By an amending Act in 1935 the words "rent or fees" were deleted. This clearly raises the implication that the applicant would not be liable to pay any tax on his motor vehicles which the Amraoti Town Municipal Committee might impose under the provisions of S. 66, C. P. Municipalities Act, as applied to Berar, but would be liable for any other fee imposed by its bye-laws. I am asked however to accede to the proposition that the license fee which is imposed is in effect a tax. But the only argument which has been advanced to support this contention is quite unsupportable. It is this: that "tax" as defined in the Motor Vehicles Taxation Act merely means a tax leviable under that Act and that we must look to the definition of "tax" in the Municipalities Act. It is there defined in S. 3 (n): "tax" includes any toll, rate, due, fee or other impost specified in S. 66.; and it is argued that this definition of "tax" includes a fee and that therefore the applicant is exempted from paying any fee to the Amraoti Town Municipal Committee. This argument depends for its validity on the proposition that "specified in Sec. 66" refers solely to the words "other impost." The definition cannot be read in this way, and to my mind the only possible reading of the definition is that "tax" includes any of the imposts, by whatever name they may be called, specified in S. 66. It would be quite impossible to conclude that the definition of "tax" in the Municipalities Act would include any toll, rate, due or fee of any kind whatever in addition to whatever kind of impost is mentioned in S. 66.

Then it is contended that the vehicles, operating as a regular service between Amraoti town and Chandur Bazar, are not plying for hire within the limits of the Amraoti Town Municipality. It is not denied however that they pick up passengers within that area, and the words "plying for hire within the limits of Amraoti Town Municipality" occurring in Rule 1, cannot be confined to the narrow interpretation that the whole of the service which is offered must take place within the limits of the Municipality and that otherwise the rules do not apply.

An argument has also been addressed on the question of the expediency and the results of the judgments of the Courts below. It is pointed out that if the lower Courts are correct, any motor vehicles plying for hire passing through any municipalities between two termini would be liable to pay license fees in respect of vehicles and drivers in those municipalities, provided that they picked up passengers in their areas, if they had bye-laws corresponding to those obtaining in Amraoti, and that this would be a great hardship. This is true; but the argument cannot be allowed to prevail against the power which the Municipalities Act gives. On behalf of the Crown it is pointed out that the license fees are exacted in return for services rendered such as the provision of a motor stand, and the learned counsel for the applicant agrees that owners of motor vehicles plying for hire but not residing in the municipalities concerned should pay something for the amenities provided, but considers that the municipalities should charge

license fees for parking grounds under Sec. 70. This may be possible, but it is a matter for the municipalities themselves to decide whether they should do this or impose a license fee on vehicles plying for hire as they are entitled to do.

The Amraoti Town Municipality imposes a tax under S. 66, C. P. Municipalities Act as applied to Berar on private cars only, and charges a license fee in respect of motor vehicles which are used for hire both in respect of those vehicles whose owners live outside the municipality and within the municipality. By this method it does not impose any additional disability on the owners of motor omnibuses who reside at Amraoti and at the same time spreads its net widely but legitimately to recover fees from owners of such vehicles who reside at the other end of the line on which their vehicles operate. By this means they need not have any concern with what the owners pay elsewhere, a question which would arise if tax under S. 66 were levied in respect of vehicles used for profit. This may in certain instances cause hardship to such owners who may be taxed in their own municipality in addition to the tax paid under the Motor Vehicles Taxation Act and who may be required to pay license fees to any municipality through which they pass and where they pick up passengers. In addition to this they may legitimately be charged a license fee even in the municipality in which they reside in addition to a tax. The Amraoti Municipality does not enforce this double levy, and I am unaware if any municipality does so ; but there can be no doubt that any municipality is entitled to make bye-laws levying a license fee on vehicles plying for hire which operate in the municipality, whether the owners reside there or no.

The result is that the convictions are correct and must be maintained. The applications are dismissed and the rule is discharged.

D.S./R.K. *Applications dismissed.*

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GRUER AND POLLOCK JJ.

Brijmohan Mathulal Marwadi — Appellant.

v.

Chandrabhagabai w/o Girdharilal — Respondent.

Second Appeal No. 237 of 1935, Decided on 4th January 1939.

(a) Civil P. C. (1908), S. 103 and O. 41, R. 25—Scope of O. 41, R. 25—Issue not determined by first Appellate Court — In second appeal issue remitted to trial Court for recording further evidence—Trial Court after taking evidence returning case to High Court—Issue can be determined by High Court under S. 103.

Order 41, R. 25 refers primarily to first appeals though the Rule so far as possible can be applied to second appeals. The Rule as it stands allows reference only to the Court from whose decree the appeal is preferred, which in the case of second appeals would be the lower Appellate Court. Therefore, it does not follow in the case of second appeals that a finding from a first Court is to be treated on the same footing as a finding from an Appellate Court : *A I R 1936 Nag 140 ; A I R 1924 Lah 455 ; 7 All 765 (F B); 24 Cal 98 and 7 Mad 52, Ref.* [P 174 C 2]

Where an issue has not been determined by the first Appellate Court and in second appeal that issue is remitted on remand to the trial Court the evidence having been found to be insufficient and the trial Court after recording such evidence and giving its finding on that issue returns the case to the High Court, the issue cannot be said to have been determined by the lower Appellate Court. Therefore High Court has jurisdiction to determine such issue of fact under S. 103. [P 174 C 2]

(b) Vendor and Purchaser—Vendor repudiating bargain—Purchaser claiming specific performance how can discharge onus about readiness and willingness stated.

After a bargain of sale has been repudiated by the vendor, the purchaser claiming specific performance can, in the absence of any evidence to the contrary, easily discharge the onus about readiness and willingness by simply showing that he is still ready and willing to carry out the bargain : *A I R 1934 P C 91 and 30 Cal 865 (P C), Referred.* [P 175 C 2]

M. B. Kinkhede and G. S. Brahmarakshas and M. R. Indurkar — *for Appellant.*

M. R. Bobde and B. T. Amlekar — *for Respondent.*

Judgment.—This appeal is by the defendant Brij Mohan against whom the claim of the plaintiff Chandrabhagabai for specific performance of a contract for sale of a house was upheld in both the lower Courts. The agreement for sale is Ex. P-1 dated 14th March 1933. The sale price was fixed at Rs. 3000 out of which Rs. 201 was paid on account of earnest money. This agreement or receipt further states that the house is in the name of the vendor's mother and is now in his ownership, and that the costs of registration shall be borne by the purchaser. In the plaint, it was stated that the defendant had agreed to execute the sale deed immediately and that the defendant committed a breach of the contract on or about 15th March 1933, i. e. the next day. Later on, it was explained by plaintiff's pleader that by this word 'immediately' it was meant that the sale deed was

agreed to be executed within a reasonable time and that time was never the essence of the contract. On 21st September 1937 a remand order was passed by this Court. At that time it had been established and accepted that it was obviously Girdharilal, whose mistress the plaintiff was, who had been carrying out all the negotiations for the sale, and in the absence of any evidence by Girdharilal it appeared that the plaintiff Chandrabhaga was merely benamidar for him. The finding was also accepted that time was not of the essence of the contract. The first Court however had thrown the burden of proof on the defendant throughout and in particular had in issue 6 asked him to prove his assertion that the plaintiff was unwilling to perform her part of the contract. The lower Appellate Court, too, thought it was unnecessary to consider whether plaintiff was trying to back out of the contract between 13th March 1933 and 22nd March 1933 on which last date a telegram was sent to her by the defendant stating that the contract had been cancelled. The remand order of this Court points out that a plaintiff claiming specific performance must show that he was at all material times ready and willing to carry out the contract. The following issue was therefore remitted to the trial Court:

> Was the plaintiff at all material time ready, desirous, prompt and eager to complete the contract ?

After remand only two witnesses were examined for the plaintiff, one being Girdharilal and the other Baldeoprasad. The lower Court taking this evidence into consideration with the circumstances of the case finds the issue in the affirmative in favour of the plaintiff. Objections to this finding have been put in for the appellant-defendant. But the other side contends that this is a finding of fact which cannot be questioned in second appeal. The appellant on the other hand maintains that such a finding after remand is open to scrutiny by the Appellate Court on merits. The respondent relies on I L R (1936) Nag 188[1] and 5 Lah 268.[2] In I L R (1936) Nag 188[1] the evidence was taken by the Appellate Court. Bose J. does say at page 193 of the report that after remand under O. 41, R. 25, Civil P. C., it is not open to a Court of Second Appeal to examine the facts except in so far as it is empowered to do so under S. 103, and it is immaterial whether the first Court takes the evidence or the lower Appellate Court. The remark about the first Court is an obiter dictum, and the possible difference between the two cases has not been examined. O. 41, R. 25, Civil P. C., refers primarily to first appeals though the Rule so far as possible can be applied to second appeals. The Rule as it stands allows reference only to the Court from whose decree the appeal is preferred, which in the case of second appeals would be the lower Appellate Court. Therefore, it does not follow in the case of second appeals that a finding from a first Court is to be treated on the same footing as a finding from an Appellate Court. Cases, which say that such a finding cannot be questioned, all refer, so far as we have been able to see, to findings coming back on reference from the lower Appellate Court. Amongst these are 7 All 765,[3] 24 Cal 98,[4] 7 Mad 52[5] and 5 Lah 268.[2] If the lower Court had proceeded under O. 41, R. 28, Civil P. C., it would undoubtedly have had to assess the evidence on its merits, and we think that the same thing must be done when there is merely a finding of the first Court. If it were otherwise, the result might well be that the case would be virtually decided on this finding of the first Court untouched by the scrutiny of the lower Appellate Court. The matter is different when the lower Appellate Court comes to the finding because owing to its higher status the finding of such a Court has more weight. The same result is arrived at on a broad application of S. 103, Civil P. C. This issue had not been determined by the lower Appellate Court, and when the case came before this Court the evidence on record was found to be insufficient. That evidence is now sufficient. There is now a finding on it, it is true, but the point still "has not been determined by the lower Appellate Court." This Section therefore allows the High Court to determine the issue of fact itself. We proceed then to scrutinize the finding on its merits.

The defendant's objection that the plaintiff had no funds to complete the sale need not detain us long. In spite of Girdharilal's denials there is ample evidence in the

1. Balaji v. Vishnu, (1936) 23 A I R Nag 140= 170 I C 527=I L R (1936) Nag 188.
2. Ram Mehr v. Pali Ram, (1924) 11 A I R Lah 455=78 I C 404=5 Lah 268.
3. Bal Kishen v. Jasoda Kuer, (1885) 7 All 765= 1885 A W N 225 (F B).
4. Beni Pershad Kuari v. Nand Lal Sahu, (1897) 24 Cal 98.
5. Hinde v. Brayan, (1884) 7 Mad 52.

cross-examination, etc. to show that he was backing up his mistress in this transaction throughout. He is a man of substance and able to supply Chandrabhagabai with all the money she required. We also think that her own savings were sufficient to meet this expenditure. There is also the fact that after getting a decree in her favour the plaintiff deposited the sale price in Court on 21st July 1934. It is true that in the notice dated 23rd March 1933 Chandrabhaga's demand for delivery of possession of the house before payment of the balance of the price is not justified in law. This notice was filed late and hence not admitted; but it has been referred to by both sides and we admit it now as we think that it is relevant for the disposal of this appeal. Reading it as a whole, it certainly does repudiate the cancellation of the agreement by Brij Mohan and expresses a wish to have the sale carried through. On that being done of course, the vendee was entitled either to possession of the house or to have the tenants attorn to her. Then it is said that it was plaintiff's duty to have a draft sale deed prepared and submitted to the seller and to tender the sale price to him. A number of cases including 31 C L J 87,[6] 9 All 705[7] and 52 Bom 597[8] are quoted in this connexion. The principle no doubt is correct, but as it has been held that time was not of the essence of the contract, it was not essential that the preparation of the draft sale deed should be done before 22nd March 1933. After Brij Mohan had sent the telegram on that day it was obviously useless to proffer the draft deed or tender the money until he changed his mind about cancellation. This telegram is the only documentary evidence about cancellation, and it raises the question why if defendant himself wished the sale to take place he should have acted so precipitately without giving Chandrabhaga further time and without threatening to bring a suit for specific performance. The evidence after remand about Chandrabhaga's willingness is certainly not very weighty, but read along with what is to be found already on record, we think that it proves the issue in plaintiff's favour.

An attempt has been made to show that the witness Baldeoprasad who says that "last Holi was the fourth", is referring to 1934 instead of 1933 when these transactions actually took place. From the point of view of the witness, Holi of 1934 was the first Holi after the incident to which he speaks, as Holi of 1933 had just taken place. This witness had merely to give an oral message to Brij Mohan in his shop and might have been employed for that purpose even though he did not know him personally. General considerations are in favour of the plaintiff's willingness and readiness. As pointed out in A I R 1934 P C 91[9] at p. 92, the onus about readiness and willingness in the absence of evidence to the contrary may be easily discharged. After the other side had repudiated the bargain, all that was necessary was that the plaintiff should be still ready and willing to carry it out: 30 Cal 865[10] at p. 871. No reason is apparent why the plaintiff should change her mind so quickly or should act so as to lose her earnest money. If she really wanted the matter to drop, why did she as soon as the defendant's telegram was received assert that she did want the sale carried through and assert this to the extent of publishing a notice in the newspaper and then subsequently bringing this suit? We find then that the plaintiff has made out her case and that the decree passed in her favour was correct. This appeal fails and is dismissed with costs on the appellant.

N.S./R.K. *Appeal dismissed.*

6. Ma Hnit v. Maung Po Pu, (1919) 6 A I R P C 124=55 I C 791=31 C L J 87 (P C).
7. Bindeshri Prasad v. Jairam Gir, (1887) 9 All 705=14 I A 173=5 Sar 61 (P C).
8. Ardeshir H. Mama v. Flora Sassoon, (1928) 15 A I R P C 208=111 I C 413=52 Bom 597=55 I A 360 (P C).
9. Abdullah Bey v. Tenenbaum, (1934) 21 A I R P C 91=149 I C 816 (P C).
10. Shriram Rupram v. Madangopal Gowardhan, (1903) 30 Cal 865=8 C W N 25 (P C).

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POLLOCK J.

Shree Vithal Bhagwan Mandir of Pushkarraj through Sarbarakar Kesuraj — Appellant.

v.

Narayanrao Raghunath Rao Kekre — Respondent.

Second Appeal No. 49 of 1937, Decided on 16th December 1938, from appellate decree of Second Addl. District Judge, Hoshangabad, D/- 1st September 1936.

C. P. Tenancy Act (1 of 1920), S. 6—Transfer by absolute occupancy tenant — He ceases to be tenant from date of transfer—Transferee is liable either for rent or for damages for occupation between date of transfer and date on which it is avoided.

In case of transfer of absolute occupancy holding, the original tenant ceases to be a tenant from the date of transfer. He is not therefore liable for the rent after that date. Whether the transferee is a tenant or not between the date of the transfer and the date on which it is avoided, he is liable either for rent or for damages for use and occupation : *A I R 1938 Nag 292 and 14 C P L R 129, Rel. on; A I R 1933 Nag 205, Ref.* [P 176 C 1, 2]

B. L. Gupta and J. Sen—*for Appellant.*

K. B. Tare—*for Respondent.*

Judgment. — One Kana was the tenant of an absolute occupancy holding which passed into the possession of the defendant in April 1931 by a compromise decree. The plaintiff, who is the landlord of the village, applied under S. 6, C. P. Tenancy Act, to a Revenue Officer to fix the value of the holding and to put him in possession. The price fixed by the Revenue Officer was deposited by the plaintiff and he was placed in possession in April 1935. The present suit was brought by the plaintiff to recover Rs. 134, which is the rent assessed on the holding, either as rent or as damages for use and occupation for the year 1934-35. The lower Appellate Court, differing from the first Court, held that the plaintiff is entitled to Rupees 134 as rent and has passed a decree for that amount, making it a charge on the purchase money which is said to be still in deposit.

The appellant relies on the decision in A I R 1933 Nag 205[1] in which it was held that in such circumstances the original tenancy continues until the transfer is either confirmed in favour of the transferee or acquired by the landlord, that the transferee's position is neither that of a tenant nor of a transferee, that the landlord has no remedy against the transferee, and that his proper course is to sue the original tenant for rent. That view was not altogether accepted in A I R 1938 Nag 292,[2] where it was held that "the transfer is valid unless and until it is avoided by the landlord in the manner and to the extent provided by S. 6," and that the tenant loses his rights from the moment of transfer. In that case, where the transfer was not avoided by the landlord, it was held that the transferee obtained a good title and became a tenant from the date of transfer. I respectfully agree with the view that the original tenant ceases to be a tenant from the date of transfer. He is not therefore liable for the rent after that date. Whether the transferee is a tenant or not between the date of the transfer and the date on which it is avoided, it seems to me clear that he is liable either for rent or for damages for use and occupation. In 14 C P L R 129[3] it was held that in such circumstances there would be an implied agreement on the part of the transferee to pay for the use of the land and that his position was not unlike that of a tenant holding over after the expiry of his lease. I therefore hold that, whether the defendant was a tenant or not during this period, he is liable for Rs. 134 either as rent or as damages for the use and occupation. The amount was claimed in the alternative and an admission by counsel during the argument in the trial Court that the plaintiff was not entitled to ask for compensation for use and occupation, apparently based on the decision in A I R 1933 Nag 205,[1] would not be conclusive. The objection that no claim for rent would lie in the trial Court has been dealt with by the lower Appellate Court which pointed out that as the tenancy came to an end when the transfer was avoided, the parties do not now occupy the position of landlord and tenant.

Under S. 6 (5), C. P. Tenancy Act, where the holding is already mortgaged or charged the Revenue Officer has to fix the value of any right in it as if it were not mortgaged or charged, and the mortgage debt or charge becomes a charge on the purchase money in exoneration of the land. Under S. 9, the rent of an absolute occupancy holding is a first charge on the holding but apparently the rent for 1934-35, which is now claimed, was not a charge on the holding when the application was made to the Revenue Officer, and I doubt if it would be a charge on the purchase money. The plaintiff however is quite willing to accept a simple money decree. The decree of the lower Court will therefore be modified so as to make it a simple money decree. Apart from this, the appeal fails and is dismissed with costs. Counsel's fee in this Court Rs. 15.

D.S./R.K. *Appeal dismissed.*

1. Sujansingh v. Sadasheorao, (1933) 20 A I R Nag 205=142 I C 358.
2. Madhorao Govindrao v. Pannalal Mohanlal, (1938) 25 A I R Nag 292=177 I C 173.
3. Raghoba v. Ragho, (1901) 14 C P L R 129.

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NIYOGI J.

Bulakhidas Narsingdas Marwadi — *Defendant* — Appellant.

v.

Radhakisan Gopikisan Shop — *Plaintiff* — Respondent.

Second Appeal No. 31 of 1937, Decided on 12th December 1938, from appellate decree of Addl. Dist. Judge, Khamgaon, D/- 4th November 1936.

Limitation Act (1908), Arts. 49 and 115—Applicability—Cause of action arising ex delicto —Suit is governed by Art. 49 and not by Article 115.

Article 49 contemplates a case of a cause of action arising ex delicto whether or not wrongful taking or wrongful detention is preceded by a contract, and the material date is the date on which the detention becomes wrongful. Even if possession is at its inception under a contract that would not preclude the application of Art. 49 which comes into play only at the moment when the possession becomes unlawful or wrongful: *A I R 1929 Cal 42, Foll.; A I R 1919 All 102; A I R 1916 Mad 314 (F B) and 54 I C 159, Ref.* [P 177 C 2; P 178 C 1]

In pursuance of a contract of marriage between the plaintiff's daughter and the defendant's son, the plaintiff sent ornaments for the bride which according to the caste custom were to be presented to her after marriage. The defendant broke the contract. The plaintiff demanded back the value of the ornaments:

Held that from the time the defendant came in possession of the ornaments to the time they were to be presented to the bride by him, his possession would be that of a bailee in trust for the plaintiff and hence lawful but the same would be wrongful subsequent to the demand by the plaintiff and the case was governed by Art. 49 and not by Article 115. [P 178 C 1, 2]

V. V. Kelkar — *for Appellant.*

T. J. Kedar and R. G. Rau — *for Respondent.*

Judgment.—This is a defendant's appeal from a reversing judgment of the Additional District Judge, Khamgaon, delivered on 4th November 1936 in Civil Appeal No. 13-B of 1936. The case is simple. The plaintiff claims back the value of certain ornaments, which are specifically described in the plaint, on the ground that the defendant had agreed to perform the marriage of the plaintiff's daughter with his son and that the plaintiff, according to the custom of the caste, sent the ornaments for the bride but that subsequently on 10th February 1931 the contract of marriage was broken and that the plaintiff's demand for the return of the ornaments was refused by the defendant. The defendant contested the suit on various grounds and the trial Court without deciding the several issues dismissed the suit on the ground of limitation. The lower Appellate Court held that the suit was within time, but it also did not go into the other issues in the case except the one as to the weight and value of the ornaments. It accepted the plaintiff's statement of the weight and the value as given in the plaint and decreed the suit in toto.

The main question of law which arises upon this appeal is the Article that would be applicable to the present case. The lower Appellate Court has applied Art. 49. It is contended on behalf of the appellant that that Article would not apply to a case of contract but that the appropriate Article to be applied is Art. 115. There is, no doubt, some divergence of judicial opinion as to whether Art. 49 applies to a case of breach of contract or tort. In 41 All 643,[1] it was held to apply to a case of tort only, but in 39 Mad 1[2] the learned Judges were inclined to apply it to the case of a breach of contract. In 54 I C 159[3] Ismay Offg. J.C., applied it to a case of breach of contract. In my view the Courts must be guided by the words used in that Article. The Article says that the period of limitation will begin to run when the property is wrongfully taken or when the detainer's possession becomes wrongful. It therefore contemplates a case of a cause of action arising ex delicto whether or not the wrongful taking or wrongful detention was preceded by a contract; the material date is the date when detention becomes wrongful. The Article appears to contemplate two kinds of cases, (1) when the property is initially taken wrongfully. In such a case there can be no suggestion of a contract. (2) But the element of contract may enter into a case of subsequent wrongful detention. A person may come into possession of property quite lawfully, that is either with the permission of the owner or under a contract, but later on, his possession, whether due to the withdrawal of permission by the owner or breach of the conditions of the contract would become wrongful. So even if the possession was at its inception under a contract that would not preclude the application of Art. 49 because that Article comes into play only at the moment when the

1. Kalyan Mal v. Kishan Chand, (1919) 6 A I R All 102 = 55 I C 45 = 41 All 643=17 A L J 888.
2. Venkatasubba Rao v. Asiatic Steam Navigation Co. of Calcutta, (1916) 3 A I R Mad 314 =30 I C 840=39 Mad 1=29 M L J 342 (FB).
3. Bhaosingh v. Biharilall, (1920) 54 I C 159.

possession becomes unlawful or wrongful. In 32 C W N 133[4] it was observed that Art. 49 is the ordinary Article to apply in a case where the original possession of the defendant is lawful but it becomes unlawful by reason of certain facts. That seems to lay down the law, if I may say so with respect, correctly and I am in full agreement with that view. Therefore the question is at what point of time did defendant's possession become unlawful.

It is contended that the facts cannot make out any case of wrongful detention because it was in pursuance of a contract of marriage that the defendant came into possession of the ornaments and since the contract was broken he was bound to restore the parties to status quo ante. This argument postulates that the ornaments were given in terms of the contract of marriage. If that was so, it would be something like a bride price and it would make the contract void and unenforceable; the plaintiff has been shrewd enough to avoid committing himself to any such position as is evident from the stand taken by him in the plaint. He says that there was an agreement to perform the marriage but he delivered the ornaments in accordance with the caste custom. That means that the ornaments were to have been in the custody of the defendant for the purpose of being presented to the bride after marriage. From the time that he came into possession of these ornaments to the time that the ornaments would be gifted to the daughter-in-law his possession would be that of a bailee in trust for the plaintiff. His possession would therefore be lawful, but he would not be entitled to retain possession thereof after a clear demand was made for the return of them by the plaintiff. His detention of the ornaments subsequent to the demand without the consent of the plaintiff would make his possession of them wrongful and this demand was made on 10th February 1931 and was also refused on that date. It is remarkable that although the defendant's written statement covered a very wide ground it did not contain a specific denial of the allegation that a demand was made on 10th February 1931 and was refused. The lower Appellate Court has taken the cause of action to have arisen on 18th March 1933 when a formal demand was made through a notice addressed to the defendant, but it is not necessary to go so far as that date. It is enough for the plaintiff, to save his suit from the bar of limitation even if the cause of action is taken to arise on 10th February 1931. The suit was filed on 10th February 1934 and would, though late, answer the requirements of law of limitation.

For the foregoing reasons, I agree with the lower Appellate Court that the case falls to be governed by Art. 49 and that the suit is within time. The next contention is that the lower Appellate Court ought to have gone into the question whether or not the plaintiff was guilty of the breach of contract in marriage. As I already indicated above the defendant's custody of these ornaments was quite independent of the contract of marriage. Whoever committed the default in implementing the marriage the defendant would not be entitled to retain the ornaments against the plaintiff's will. That question therefore appears to be irrelevant and need not be enquired into.

But the appellant ought to succeed on his last contention, viz. that the lower Appellate Court was wrong in adopting without criticizm the statement of weight and price contained in the plaint. The lower Appellate Court's attention was presumably not directed to the plaintiff's deposition wherein he said that he did not weigh the ornaments and that their weight was not entered in his account books. He states that he had given the weight as a rough estimate. The defendant had produced the ornaments in Court while the plaintiff was being cross-examined. The plaintiff was not really entitled to the value of the ornaments so long as the ornaments were returnable in specie. Here there is clear evidence on record that the ornaments are still intact and that the defendant is willing to return them in case it is found that he is liable to do so. Although the plaintiff has chosen to claim compensation for these ornaments he should not be given a decree in that form if it is found that the ornaments can be returned to him in specie. It appears to me reasonable at this stage that this case should go back to the trial Court for the purpose of getting the defendant to produce the ornaments in Court. If the plaintiff admits the identity of the ornaments he should be asked to take possession of them. If however the ornaments produced by the defendant are not admitted by the plaintiff to be those which he had handed over to him,

4. Bhupendra Nath v. Goonendra Nath, (1929) 16 A I R Cal 42 = 106 I C 885 = 32 C W N 133.

then there will be an enquiry as to the identity of those ornaments. If the issue is found in favour of the defendant the plaintiff would have a decree for the recovery of those ornaments but if the issue is determined in favour of the plaintiff then he would be entitled to get the compensation estimated on the value of the ornaments which the Court will determine afresh. The costs of this appeal will abide the event. Counsel's fees Rs. 40.

S.G./R.K. *Case remanded.*

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STONE C. J. AND NIYOGI J.

All India Railwaymen's Benefit Fund Ltd., Nagpur, and another—Auction-purchaser — Appellants.

v.

Ramchand Hemraj Maheshri, Decree-holder and another, Judgment-debtor — Respondents.

Civil Revn. No. 338 of 1937, Decided on 13th January 1939, from order of Dist. Judge, Nagpur, D/- 24th February 1937.

*** (a) Civil P. C. (1908), O. 21, Rule 90—Auction-purchaser is entitled to set aside sale :** *68 I C 429=A I R 1923 Nag 161, Overruled.*

Rule 90 of O. 21 entitles an auction-purchaser to seek to set aside a sale just as it does in case of decree-holder or judgment-debtor : *68 I C 429 = A I R 1923 Nag 161,* **Overruled**: *A I R 1922 Nag 113 and A I R 1937 Nag 140, Approved : Case law discussed.* [P 180 C 2; P 182 C 2]

(b) Interpretation of Statutes—Duty of Court.

It is not the function of the Court to make alterations in the terminology of the plain provisions of law, as in that case they would not be interpreting but making the law. [P 181 C 1]

*** (c) Civil P. C. (1908), O. 21, Rule 90—Interests—Word being plural implies more than one interest and includes that of auction-purchaser.**

When the Legislature used the word 'interests' in plural it must be presumed that it intended to attach some special significance to it. That plural word obviously means more than one interest which may be of the same kind or different kinds, which may be held by one or more persons. It may be proprietary or pecuniary as in the case of a decree-holder who is expressly mentioned in the Rule. Both the judgment-debtor and auction-purchaser are equally interested in the sale of the property and their interests are equally affected and must stand on the same level. To deny a right to the auction-purchaser while conceding it to the judgment-debtor or the decree-holder would be manifestly unjust and unreasonable. It would be wrong to impute to the Legislature an intention to create such an anomaly : *A I R 1924 Cal 786, Ref.* [P 181 C 1, 2; P 182 C 1]

(d) Civil P. C. (1908), O. 21, Rr. 90 and 91—Difference between.

The express mention of the auction-purchaser in R. 91 cannot of itself exclude him from the purview of R. 90. The object of the two enactments is different. R. 91 postulates that the sale is free from any fraud, irregularity or illegality, whereas Rule 90 leaves the door open for questioning the validity of the sale on the above three specific grounds. The fact that the auction-purchaser is specifically mentioned in R. 91 itself evidences the intention of the Legislature to afford him a summary remedy. [P 182 C 1]

(e) Evidence Act (1872), S. 115—Estoppel—Statement of puisne mortgagee in witness-box that he would not enforce his mortgage does not estop him from enforcing his legal rights.

Mere statement by a subsequent mortgagee in the witness-box that he would not enforce his mortgage cannot estop him from enforcing his legal rights. A mortgagee's right is created by a registered deed and can only be extinguished by a registered deed. The assurance would have some value if the auction-purchaser offers his bid relying on that assurance. But an assurance given before confirmation of sale, which is an act of Court and not of a party, can have no legal significance. [P 182 C 2]

(f) Civil P. C. (1908), O. 21, R. 66—Irregularity on account of omission to mention mortgage in sale proclamation cannot be cured by mortgagee's statement in witness-box that he would not enforce it.

Where a mortgagee states in the witness-box that he would not enforce his mortgage his statement cannot cure the irregularity of the non-disclosure of his mortgage in the proclamation of sale : *40 Cal 635 (P C), Ref.* [P 182 C 2; P 183 C 1]

A. L. Halwe — *for Applicants.*

A. V. Khare and W. B. Pendharkar — *for Non-applicant 1.*

Order.—This case has been referred to this Bench for decision of the following questions of law :

(1) Whether the auction-purchaser is competent to apply under O. 21, R. 90, Civil P. C., to have the sale in his favour set aside; and

(2) Whether the statement made in Court by the puisne mortgagee operates as an estoppel against him and cures the irregularity of non-disclosure of his mortgage in the proclamation of sale.

In execution of a mortgage decree for sale a house was sold and applicant 2 became the purchaser. In the suit in which that decree was passed one Sheikh Kasam, who was supposed to be a puisne mortgagee, was not impleaded and in the proclamation of sale the subsequent incumbrance was not disclosed. The auction-purchaser offered Rs. 2200 in ignorance of the subsequent incumbrance and purchased as if the property had been sold free of any incumbrance. He however learnt later on that the property was subject to a second mortgage and applied to the executing Court under O. 21, R. 90, Civil P. C., for the sale being set aside on the ground of fraud and irregularity. In the course of the proceed-

ings Sheikh Kasam was examined as a witness and he stated that although he had no intention to enforce his mortgage he would be willing to accept payment of his debt if made.

The first question is not free from difficulty in view of the acute conflict of opinion among the several High Courts of India. In 38 M L J 228,[1] 47 All 479,[2] 5 Rang 516,[3] A I R 1931 Lah 630,[4] 18 N L R 98[5] and A I R 1937 Nag 140[6] it was held that an auction-purchaser is a person whose interests are affected by the sale and that he is entitled to apply under O. 21, R. 90, Civil P. C., to have the sale set aside on grounds mentioned in that Rule. The contrary view was taken in A I R 1928 Cal 828,[7] 14 Lah 1,[8] A I R 1931 Sind 107,[9] 60 Bom 750,[10] A I R 1923 Nag 161[11] and 6 Rang 621.[12] There has been in some High Courts remarkable fluctuation of opinion. The latter view which the Patna High Court had taken in 3 Pat L J 516[13] and A I R 1924 Pat 319[14] was overruled by the majority of the Judges constituting a Full Bench of the Court in 12 Pat 665.[15] On the other hand the view taken in A I R 1931 Lah 630[4] was overruled on a Letters Patent Appeal in 14 Lah 1.[8]

The difference of opinion turns on the meaning to be attached to the expression "any person whose interests are affected by the sale" contained in R. 90 of O. 21, Civil P. C. The learned Judges who exclude an auction-purchaser from the ambit of that expression do so on the undermentioned grounds: (i) that the word "interests" occurring in that expression properly signifies interests subsisting in the property at the time of sale and not those which come into existence as the result of it; (ii) that an auction-purchaser's sole remedy in execution proceedings is one provided in R. 91, O. 21, Civil P. C., and (iii) that there is no guarantee of title held out in execution sales.

After carefully examining the various conflicting decisions and the points set forth above we are of opinion that R. 90, O. 21, Civil P. C., entitles an auction-purchaser to seek to set aside the sale just as it does in case of decree-holder or judgment-debtor. It may be useful to recall that the expression "any person whose interests are affected by the sale" has been substituted for the expression "any person whose immovable property has been sold" which occurred in S. 311 of the repealed Code of 1882. In a case which arose under the Code of 1882 their Lordships of the Privy Council held that an auction-purchaser was not entitled to apply under that Section as he was not a person whose immovable property has been sold within the meaning of that Section: *see* 20 Cal 8.[16] It is however pertinent to notice that the expression had been construed as meaning any person "whose interest had been legally affected by the sale" in the Full Bench case in 15 Cal 488.[17] Consequently, persons claiming title paramount to the judgment-debtor or of person claiming to be a purchaser of immovable property from the judgment-debtor prior to the attachment were not held entitled to apply for setting aside sale notwithstanding that they had interests in the property. Similarly a person was held not entitled to apply when the share of his co-sharer was sold in execution: *see* 5 All 42.[18] On the

1. Gopalkrishnayya v. Sanjeeva Reddi, (1920) 7 A I R Mad 145=55 I C 333=38 M L J 228.
2. Ravinandan Prasad v. Jagarnath Sahu, (1925) 12 A I R All 459=87 I C 273=47 All 479=23 A L J 233.
3. Subramanian Chettyar v. N. L. M. Chettyar Firm, (1927) 14 A I R Rang 301=105 I C 465=5 Rang 516.
4. Pritam Singh v. Nihal Chand Gopal Das, (1931) 18 A I R Lah 630=132 I C 525=32 P L R 933.
5. Sheoprasad v. Santooji, (1922) 9 A I R Nag 113=65 I C 875=18 N L R 98.
6. Sangidas v. Chahadu, (1937) 24 A I R Nag 140=168 I C 970.
7. Surendra Nath Das v. Alauddin Mistry, (1928) 15 A I R Cal 828 = 116 I C 156 = 49 C L J 207.
8. Nihal Chand-Gopal Das v. Pritam Singh, (1932) 19 A I R Lah 468=138 I C 817 = 14 Lah 1=33 P L R 788.
9. Kalumal v. Ahmed Nur, (1931) 18 A I R Sind 107=134 I C 373=25 S L R 405.
10. Balkrishna Waman v. Sakharam Babaji, (1936) 23 A I R Bom 311=164 I C 644 = 60 Bom 750=38 Bom L R 589.
11. Balwant v. Ratanlal, (1923) 10 A I R Nag 161=68 I C 429.
12. K. V. A. L. Chettyar Firm v. M. P. Maricar, (1929) 16 A I R Rang 33=114 I C 538 =6 Rang 621.
13. Khetro Mohan Datta v. Shekh Dilwar, (1918) 5 A I R Aat 636=46 I C 614=3 Pat L J 516.
14. Kartick Chandra Chatterji v. Nagendra Nath Roy, (1924) 11 A I R Pat 319=74 I C 760=5 P L T 41.
15. Mahadeo Ram v. Mohan Vikram Sah, (1933) 20 A I R Pat 435=145 I C 421=12 Pat 665 =14 P L T 388 (F B).
16. Birj Mohun Thakur v. Rai Umanath Chowdhry, (1893) 20 Cal 8=19 I A 154 (P C).
17. Asmutunnissa Begum v. Ashruff Ali, (1888) 15 Cal 488 (F B).
18. Bisheshar Kuar v. Hari Singh, (1882) 5 All 42 =1882 A W N 146.

other hand, a reversioner entitled to succeed on the death of Hindu widow was held to be entitled to apply under this rule: *see* 4 Pat L J 360[19] and 19 C L J 72.[20] Thus, it would appear, that mere subsisting interest in the property was not regarded as the criterion, but the detriment to some interest, whether or not such interest was actually subsisting at the date of the sale.

What is clearly material is not interest in property so much as the prejudice to any interest occasioned by the sale. It cannot be gainsaid that when an auction-purchaser is misled by the decree-holder's omission to specify an incumbrance in the proclamation of sale into offering a higher bid, his interests are affected by the sale. That gives rise to the question whether the auction-purchaser can be regarded as a person having any interest at all to be affected by the sale. The answer would depend upon the range of the meaning naturally conveyed by the word 'interests'. If it is understood in a narrow and restricted sense of interest in the property the auction purchaser must clearly be excluded but this view is open to reasonable attack on the ground that one would be reading the words 'in property' in the Rule which the Legislature itself could have inserted if it intended to convey that meaning.

It is not the function of the Courts to make alterations in the terminology of the plain provisions of law, as in that case they would not be interpreting but making the law. When the Legislature used the word 'interests' in plural, it must be presumed that it intended to attach some special significance to it. That plural word obviously means more than one interest which may be of the same kind or different kinds, which may be held by one or more persons. The interests of a mortgagee with or without possession, of a lessee or of a mere trespasser are either proprietary or possessory but regarded as a whole they are of one species namely, interests in the property, but a person may have a pecuniary interest in respect of a property such as a decree-holder has and it is presumably for this reason that a decree-holder is expressly mentioned in the Rule. In 51 Cal 495[21] the expression "any person whose interests are affected by the sale" was held not restricted to proprietary or possessory title so as to exclude pecuniary interest. On that wide interpretation, a decree-holder who has lost his right to rateable distribution was held to have such interest as would entitle him to apply under this Rule to set aside a sale held at the instance of another creditor. Can it be said that the auction-purchaser has no pecuniary interest that is affected by the sale? It is obvious that an execution sale primarily affects the interests of three parties although their interests may be different and conflicting, namely the decree-holder, the judgment-debtor and the auction-purchaser. Any person who comes forward to bid at the auction does so manifestly because he has some interest in the purchase of the property. The bidders are persons who are interested in converting their cash into the property which is offered for sale. The interest of the purchaser at the time of the sale appears pecuniary but by necessary implication it comprises an inchoate interest in the property. It cannot therefore be gainsaid that the auction-purchaser has an interest to be protected just as the decree-holder or the judgment-debtor has.

The summary remedy to set aside the sale is provided in Rr. 89, 90 and 91 of O. 21. R. 89 in clear terms describes the person entitled to set aside the sale on deposit as any person either owning such property or holding an interest therein or holding an interest by virtue of a title acquired before such sale. That wording clearly excludes those whose interest is other than proprietary or possessory. R. 91 expressly mentions only the execution purchaser. The intermediate Rule however expressly mentions the decree-holder or any person entitled to share in a rateable distribution of assets but does not specifically mention the judgment-debtor. It uses the expression "whose interests are affected by the sale" in a general way with the obvious purpose of including a wide variety of interests other than that of the judgment-debtor. The hypothesis that this expression does not contemplate its application to an auction-purchaser renders R. 90 manifestly illogical and unreasonable. The omission to specify incumbrances

19. Brij Kishore v. Pratab Narain, (1919) 6 A I R Pat 127=51 I C 359=4 Pat L J 360.

20. Pankhabati v. Nonihal Singh, (1914) 1 A I R Cal 838 = 21 I C 207 = 18 C W N 778 = 19 C L J 72.

21. Dhirendra Nath Roy v. Kamini Kumar Pal, (1924) 11 A I R Cal 786=84 I C 119=51 Cal 495=28 C W N 899.

in the proclamation of sale would unquestionably entitle both the judgment-debtor and the decree-holder to apply for setting aside the sale: *see* 40 Cal 635.[22] If this is a good ground for the judgment-debtor whose property is sold and for the decree-holder who has no proprietary interest in the property, why should it not be equally good in the case of one who purchases the property. The judgment-debtor parts with his property for a price and the auction-purchaser parts with his money for the property. Both are equally interested in the sale of the property and their interests are equally affected and must stand on the same level. To deny a right to the auction-purchaser while conceding it to the judgment-debtor or the decree-holder would be manifestly unjust and unreasonable. It would be wrong to impute to the Legislature an intention to create such an anomaly.

It is argued that the Legislature has made its intention clear in R. 91 which is meant solely for the benefit of the auction-purchaser and that therefore the auction-purchaser can only look to that Rule and not to R. 90 for a summary remedy. The express mention of the auction-purchaser in R. 91 cannot of itself exclude him from the purview of R. 90. The object of the two enactments is different. R. 91 postulates that the sale is free from any fraud, irregularity or illegality, whereas R. 90 leaves the door open for questioning the validity of the sale on three specific grounds mentioned above. The fact that the auction-purchaser is specifically mentioned in R. 91 itself evidences the intention of the Legislature to afford him a summary remedy. Consistently with this how is it possible to predicate that the auction-purchaser is denied a similar remedy on other grounds vitiating the sale? R. 91 so far from refuting the wider interpretation put upon R. 90 goes to reinforce it.

The last point, viz. the absence of guarantee of title survives for consideration. If the sale is confirmed in spite of the auction-purchaser's complaint that it was irregular and illegal what remedy does the law provide him? Once the sale is confirmed he has no remedy open to him by a regular suit to have it set aside as there is no guarantee of title held out in auction sales: *see* 3 Cal 806.[23] He may at best be entitled to obtain compensation from the impecunious judgment-debtor. That is decidedly placing him in a worse position than a private purchaser who under S. 18(c), Specific Relief Act, is entitled to compel the mortgagor to redeem the mortgage and to obtain a conveyance from the mortgagee. The fact that a purchaser at a court sale buys the property with all risks and all defects in the judgment-debtor's title ought to be the overpowering consideration to leave him scope to amend matters before the sale becomes conclusive. That the law makes it imperative on the decree-holder to specify the various particulars including incumbrance specified in R. 66 of O. 21 shows the anxiety of the Legislature that the purchaser should have a fair deal. The buyer would be purchasing at his risk only when all these requisite formalities of law are observed and there is no fraud, but if they are not observed or there is fraud, would the law afford him no remedy? Where can he get his remedy except in the execution proceedings. At all events, the executing Court would be the best tribunal qualified to adjudicate on these matters as it possesses first-hand knowledge of the circumstances in which the sale is held and has to decide whether or not to confirm the sale. From the foregoing discussion the conclusion is inevitable that the auction-purchaser is entitled to apply under R. 90 as a person whose interests are affected by the sale. We are therefore of opinion that 18 N L R 98[5] was correctly decided.

As to the next question, we are of opinion that mere statement by the subsequent mortgagee in the witness-box that he would not enforce his mortgage cannot estop him from enforcing his legal rights. A mortgagee's right is created by a registered deed and can only be extinguished by a registered deed. The subsequent mortgagee's assurance would have some value had the auction-purchaser offered his bid relying on that assurance. An assurance given before confirmation of sale, which is an act of Court and not of a party, can have no legal significance. In any case it is a matter for the auction-purchaser himself to decide whether or not he would press his application under R. 90 relying on the assurance of the subsequent mortgagee. The executing Court cannot compel him to act

22. Krishna Pershad Singh v. Moti Chand, (1913) 40 Cal 635=40 I A 140=19 I C 296=17C L J 573=17 C W N 637 (P C).

23. Dorab Ally Khan v. Executors of Khajah Moheeooddeen, (1877) 3 Cal 806=5 I A 116=2 C L R 529=3 Suther 520=3 Sar 818 (P C).

to his prejudice on the view that the puisne mortgagee's statement would in future debar him from enforcing his rights. His statement cannot possibly cure the irregularity of the non-disclosure of his mortgage in the proclamation of sale.

S.G./R.K. *Revision allowed.*

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GRILLE AND NIYOGI JJ.

Azhar Husain Mahzar Husain Musalman — Decree-holder — Appellant.

v.

Mohammad Shibli Hafiz Mohamad Raza and others — Plaintiffs, Judgment-debtors — Respondents.

Misc. Appeal No. 139 of 1937, Decided on 28th February 1939, from order of 2nd Addl. Dist. Judge, Jubbulpore, D/- 18th March 1937.

(a) Civil P. C. (1908), S. 47, O. 21, R. 58 — Term " representatives " in S. 47 includes not only legal representatives but also representatives-in-interest, i. e. transferees from decree-holder or judgment-debtor—Assets of deceased person in hands of legal representatives attached in execution of a decree against legal representatives in respect of debt charged on assets — Question whether property belongs to assets of deceased or not raised by legal representatives or the transferees from them, who are bound by decree, falls under S. 47 and not under O. 21, R. 58—It must be determined in execution and not by separate suit.

The term "representatives" occurring in S. 47 includes not only legal representatives in the sense of heirs, executors or administrators, but also representatives-in-interest, i. e. any transferee of the decree-holder's interest or any transferee from the judgment-debtor's interest, who so far as such interest is concerned, is bound by the decree: *24 Cal 62 (F B); A I R 1914 Cal 828* and *A I R 1934 Pat 413, Rel. on.* [P 184 C 2]

Where therefore the assets of a deceased person in the hands of his legal representatives are attached in execution of a decree obtained against the legal representatives in respect of a debt charged against the assets of the deceased, the question whether the attached properties belong to the assets of the deceased or to the legal representatives themselves, raised by the legal representatives or transferees from them, who are bound by the decree (having purchased the property subsequent to the attachment) is a question relating to execution, discharge and satisfaction of the decree and falls under S. 47 and not under O. 21, R. 58 and must be determined in the execution and not by a separate suit. It is only when the judgment-debtor claims to represent the interest of a third party in whom the property is vested that the case would fall outside the purview of S. 47. In such a case as this what the judgment-debtor says is, that although the property is vested to him, it is so vested not beneficially but as trustee or executor for some one else. It is clear that in such a case the real objecting party is one, who is a stranger to the suit, and the objection having been made on his account his claim must be regarded as that of a third party and dealt with under O. 21, R. 58: *Case law referred.* [P 184 C 2 ; P 185 C 1 ; P 186 C 1]

[Distinction between the position of a legal representative of a deceased person and that of a shebait of a deity pointed out].

(b) Civil P. C. (1908), S. 47 — Auction-purchaser is not necessary party to proceedings arising out of S. 47 between parties to suit.

In a proceeding arising under S. 47 between the parties to the suit, the auction-purchaser is not a necessary party. [P 186 C 1]

Where therefore in an appeal from an order falling under Sec. 47 the auction-purchaser is not joined as a party, the non-joinder is not fatal to the appeal : *A I R 1934 Nag 21, Rel. on ; A I R 1930 Nag 5, Disting.* [P 186 C 1]

Fida Hussain — *for Appellant.*

W. B. Pendharkar — *for Respondent 1.*

Order.—This is a decree-holder's appeal from an order passed by the Second Additional District Judge, Jubbulpore, in Civil Appeal No. 29-B of 1936 on 18th March 1937. In Civil Suit No. 2-B of 1934, one Mt. Tahirabi obtained a decree for Rupees 3000 on account of her dower debt against the assets of deceased Syed Ahmad Hussain in the hands of Altaf Hussain and Mt. Hira, respondents 2 and 3. The appellant Azhar Hussein is the legal representative of Mt. Tahirabi. In execution of that decree two houses, Nos. 76 and 77, were attached and one of them was auctioned while the attachment of the other remained in force. Respondent 1, Muhammad Shibli, lodged an objection to the attachment on the allegation that neither of the two houses attached formed part of the estate of Syed Ahmad Hussein but that both the houses belonged to Ahmad Hussein's brother Imdad Hussein and that he orally gifted them to Mt. Hira and Altaf Hussein's daughter who in their turn sold the houses to Muhammad Shibli on 7th December 1935 after the date of the decree in Civil Suit No. 2-B of 1934 and the attachment. It is pertinent to state that the decree in Civil Suit No. 2-B of 1934 was passed on 27th August 1934 and that the houses had been already attached before judgment. In his objection Muhammad Shibli also contended that there was no valid attachment of the houses. The objection was dismissed in the original Court on the ground that the purchase of the house by the objector was contrary to the attachment and that it was void under S. 64, Civil P. C. It thus rejected the objection on a preliminary point and did not enter into the merits of the case. On appeal by Muhammad Shibli, the objector,

it was held that the objection should have been treated as falling under S. 47, Civil P. C., and not under O. 21, R. 58, Civil P. C., and the case was remanded to the executing Court for enquiry into its merits.

This appeal is preferred by the decree-holder. It is contended on his behalf that the proceeding arising out of the objection fell to be governed by O. 21, R. 58 and not by S. 47 and that the appeal was incompetent. It is also urged that the non-joinder of the auction-purchaser was fatal to the appeal and that there was no necessity for remanding the case as the fact of attachment was admitted by the objector in the course of proceedings in the Court of first instance. It is conceded in this Court on behalf of the objector that the attachment was in fact made and that it was also valid; but that does not conclude the case since if it is held that the proceeding fell under S. 47 and not under O. 21, R. 58, Civil P. C., the remand would be inevitable as there was no enquiry into the merits of the objection.

The main point in this appeal is whether S. 47 or O. 21, R. 58, Civil P. C., applies. S. 47, which corresponds to S. 244 of the Act of 1882 and S. 11 of the Code of 1861, runs as follows:

> All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

The Section lays down two conditions, (1) that the questions which arise between the parties to the suit or their representatives, and (2) that they should relate to the execution, discharge or satisfaction of the decree. A party means a person who is either plaintiff or defendant, that is a person who seeks a remedy or a person against whom a remedy is sought. Normally a plaintiff or defendant comes to Court on his own account, but in some cases either of the parties may not sue or be sued on their own account but on account of some third person. Their capacity in the suit may not be that of the principals but that of representatives. This circumstance gives rise to important legal consequences so far as the rights and liabilities of the parties are concerned. In suits to recover a simple money debt the plaintiff has a remedy against both the person and property of his debtor but in some suits there are defendants who cannot, save in exceptional circumstances, be made personally liable such as trustees, executors, receivers of insolvent estates, principal officers of corporation, shebaits of Hindu idols, mohanth of math or a guardian of a minor or legal representatives of a deceased person. They are not primary parties, that is to say, those who are liable on their own account but are representative parties who are liable on account of those whom they represent. Even among such representative parties there are some, for example, shebaits and mohanths and guardians who are nominal, and others, such as trustees, receivers and legal representatives of a deceased person who are real parties. This distinction must be borne in mind before entering on the discussion on the point raised here. The term 'representatives' occurring in S. 47 includes not only legal representatives in the sense of heirs, executors or administrators but also representatives-in-interest, that is, any transferee of the decree-holder's interest or any transferee of the judgment-debtor's interest who so far as such interest is concerned is bound by the decree: *see* 24 Cal 62,[1] 41 Cal 418[2] and A I R 1934 Pat 413.[3] It is therefore clear that Altaf Hussein and Mt. Hira who were sued as being in possession of the assets of Syed Ahmad Hussein were parties to the suit and that Muhammad Shibli, the objector who claimed interest in the two houses by virtue of a sale deed dated 7th December 1935, is their representative.

The next question is whether the claim made by him that the attached properties were not the assets of Ahmad Hussein but of Altaf Hussein and Mt. Hira involved a question relating to execution, discharge or satisfaction of the decree. On this point there is a mass of authority. In 12 All 313[4] it was held that the question whether certain property belongs to the assets of the deceased or not are questions which must be determined in execution and not by a separate suit. It was pointed out that there was no distinction in this respect between the position of legal representatives added to the suit before and those added after the decree. It is only when the judgment-debtor claims to represent the interest of a third party in whom the property is vested that the case would

1. Ishan Chunder Sirkar v. Beni Madhub Sirkar, (1897) 24 Cal 62=1 C W N 36 (F B).
2. Tara Prasanna Bose v. Nilmoni Khan, (1914) 1 A I R Cal 828=25 I C 118=41 Cal 418.
3. Gauri Dutt v. D. K. Dowring, (1934) 21 A I R Pat 413=151 I C 683=13 Pat 735.
4. Seth Chand Mal v. Durga Dei, (1890) 12 All 313=1890 A W N 137 (F B).

fall outside the purview of S. 47. In such a case as this what the judgment-debtor says is that although the property is vested in him it is so vested not beneficially but as trustee or executor for someone else. It is clear that in such a case the real objecting party is one who is a stranger to the suit and the objection having been made on his account his claim must be regarded as that of a third party and dealt with under O. 21, R. 58. This case was followed in 21 All 323,[5] 28 All 51[6] and 39 All 47.[7] The same view was taken in 17 Cal 711[8] which was followed in 27 Cal 34,[9] 34 Bom 506,[10] 58 Bom 513,[11] 2 Rang 168,[12] 5 Rang 659,[13] 6 Lah 544,[14] 26 Mad 501[15] and 39 Mad 570.[16] In all these cases the judgment-debtor or his representative asserted his title to the property and claimed in his own right. On the other hand there are cases in which the objection was made by the judgment debtors not in their own right but in that of a third party. It was held consistently that the proceeding was governed not by Sec. 47 but by O. 21, R. 58: *see* 23 Bom 237,[17] 23 Mad 195[18] and 39 Cal 298.[19] In the first mentioned case Ranade J. pointed out that when a legal representative objects on the ground that it is trust property a different set of issues arises which has no relation to the execution, discharge or satisfaction of the decree as between the parties to the suit. It is clear that in such cases the legal representatives really assert a *jus tertii*, that is rights of persons who are not parties to the decree or their representatives. In 39 Cal 298[19] the legal representative asserted that he was in possession as a shebait of a deity to whom the properties have been dedicated and it was held that the objection fell under Sec. 278 of the Code of 1882 which corresponds to O. 21, R. 58.

The learned counsel for the appellant relied strongly on 42 Cal 440[20] as an authority supporting his contention. In that case a decree for money had been passed against a person in his capacity as a shebait of a deity and he objected to the attachment on the ground that he was in possession of it not as a shebait of the deity but in his own right. It was held that the case did not fall within the scope of Sec. 47, Civil P. C., 1908. It must be observed that the learned Judges who decided the case followed 39 Cal 298[19] and distinguished 17 Cal 711.[8] The ratio decidendi was that the judgment-debtor having set up a *jus tertii*, that is the right of a third party, the case was not one between the parties to the suit so as to attract Sec. 47, Civil P. C. It is urged on behalf of the appellant that the principle of this decision should be extended to the present case for the reason that the judgment-debtors who are legal representatives in the present case are only representative parties in the same way as the shebait in the cited case was and that in that sense they should not be regarded as being parties to the suit. This argument ignores the fundamental distinction between the position of a legal representative of a deceased person and that of a shebait of a deity. A legal representative is not a mere figurehead as the shebait is. Legal representatives are persons to whom the rights and obligations of the deceased are transmitted. They are real parties to the suit although they represent the rights and liabilities of a deceased person. A shebait on the other hand is a nominal party who stands in Court as a physical representative of an ideal person, namely the idol, as observed by their Lordships of the Privy Council in 32 Cal 129.[21] While a

5. Beni Prasad Kunwar v. Lukhna Kunwar, (1899) 21 All 323=1899 A W N 104.
6. Kali Charan v. Jewat Dube, (1905) 28 All 51 =1905 A W N 180.
7. Dulla v. Shib Lal, (1917) 4 A I R All 460=36 I C 281=39 All 47=14 A L J 846.
8. Punchanun Bundopadhya v. Rabia Bibi, (1890) 17 Cal 711 (F B).
9. Madhusudan Das v. Gobinda Pria Chowdhurani, (1900) 27 Cal 34=4 C W N 417.
10. Narayan Shridhar v. Pandurang Bapuji, (1910) 34 Bom 506=6 I C 905=12 Bom L R 471.
11. Dinbai v. Bamansha, (1934) 21 A I R Bom 296 =152 I C 168=58 Bom 513=36 Bom L R 608.
12. Arunachellam Chetty v. Maung San Ngwe, (1924) 11 A I R Rang 323=83 I C 550=2 Rang 168.
13. Ma Shwe Mra Pru v, Maung Ba On, (1928) 15 A I R Rang 29=107 I C 856=5 Rang 659.
14. Ishar Das v. Parma Nand, (1926) 13 A I R Lah 134= 93 I C 30=6 Lah 544.
15. Vengapayyan v. Karimpanakal Parvati, (1903) 26 Mad 501.
16. Rajah of Karvetnagar v. Venkata Reddi, (1916) 3 A I R Mad 20=29 I C 231=39 Mad 570= 29 M L J 96.
17. Murigeya v. Hayat Saheb, (1899) 23 Bom 237.
18. Ramanathan Chettiar v. Levvai Marakayar, (1900) 23 Mad 195=10 M L J 64.
19. Kartick Chandra Ghose v. Ashutosh Dhara, (1912) 39 Cal 298=12 I C 163=16 C W N 26 =14 C L J 425.
20. Upendra Nath v. Kusum Kumari Dasi, (1915) 2 A I R Cal 327=27 I C 328=42 Cal 440= 20 C L J 485=19 C W N 520.
21. Jagadindra Nath Roy v. Hemanta Kumari Debi, (1905) 32 Cal 129 = 31 I A 203 = 8 C W N 809=8 Sar 698 (P C).

dead person whose rights and liabilities in regard to his assets are represented by his legal representatives cannot conceivably be regarded as a party to the suit, the idol, which is a juridical person, although in an ideal sense is unquestionably a real party to the suit in the eye of the law. It is evident therefore that a shebait cannot, like the guardian of a minor, be regarded as a party to the suit. Consequently the objection made by a shebait asserting his own right is not an objection made by a party to the suit. On the other hand an objection made by a legal representative who is a real party to the suit is made by a party to the suit.

The objector, Muhammad Shibli, stands in the shoes of the judgment-debtors as his sale being subsequent to the attachment he is bound by the decree. When he claims the property to be his own in right of the judgment-debtors from whom he purchased and denies that it forms part of the assets of the deceased he is raising a question which relates to the execution of the decree in the suit. The case therefore falls to be governed by S. 47, Civil P. C., as has been rightly held by the lower Appellate Court. There now survives the minor question as to the effect of the auction-purchaser's non-joinder on the validity of the appeal. Reliance is placed on 26 N L R 127[22] but that was a case of an application made under O. 21, R. 90, Civil P. C., and not one under S. 47 as in the present case. As pointed out in 31 N L R 67,[23] in a proceeding arising under S. 47 between the parties to the suit, the auction-purchaser is not a necessary party. The non-joinder of the auction-purchaser in the appeal was not therefore fatal to it. The appeal is dismissed with costs. Counsel's fees Rs. 25.

R.M./R.K. *Appeal dismissed.*

22. Haridass v. Mofatlal, (1930) 17 A I R Nag 5=121 I C 658=26 N L R 127.
23. Brijlal v. Mahohar Prasad, (1934) 21 A I R Nag 21=150 I C 611=31 N L R 67.

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* * A. I. R. 1939 Nagpur 186
FULL BENCH

STONE C. J., GRILLE AND VIVIAN BOSE JJ.

Ramdayal Munnalal Sonar and another — Defendants 2 and 3 — Appellants.

v.

Sheodayal, Plaintiff and others, Defendants 1 and 4 — Respondents.

First Appeal No. 10 of 1936, Decided on 12th January 1939.

(a) Precedents — Principle of stare decisis— Applicability of.

The principle of stare decisis does not apply and the Courts are not prevented from giving effect to what they conceive to be the law when security of title is not affected and no injustice results from so doing: *A I R 1932 Pat 205, Ref.* [P 187 C 1, 2]

*** * (b) Civil P. C. (1908), S. 89 and O. 23, R. 3—Award by arbitrator privately appointed by parties to pending suit cannot be recorded as adjustment by compromise :** *23 N L R 100= 95 I C 89=A I R 1926 Nag 405 and 24 N L R 55=107 I C 525=A I R 1928 Nag 173, Overruled.*

The word 'compromise' in O. 23, R. 3 standing by itself is wide enough to embrace an award given by arbitrator privately appointed by parties to a pending suit; but the words "or any other law" in S. 89 though capable of different interpretation do not include O. 23, R. 3 and hence where reference to arbitration is not in accordance with the provisions of Sch. 2, such award cannot be recorded as an adjustment by compromise under O. 23, R. 3, the policy of the Code being to prevent parties coming to Courts for settlement of their disputes from withdrawing from their jurisdiction except in the manner expressly provided in the Code : *23 N L R 100 = 95 I C 89 = A I R 1926 Nag 405 and 24 N L R 55=107 I C 525=A I R 1928 Nag 173,* **Overruled;** *Case law discussed.* [P 187 C 2; P 188 C 2; P 189 C 2; P 190 C 2]

(c) Interpretation of Statutes—General words following specific words of same nature.

In construing a statute, the usual rules of construction must be applied unless there is something to suggest the contrary. When therefore general words are found following particular and specific words of the same nature they must be construed as taking their meaning from the specific words which precede them and must be restricted to the same genus. [P 189 C 2]

(d) Civil P. C. (1908) — Interpretation of — Conflict between body of Code and Schedule— Former must prevail.

The scheme of the Civil Procedure Code is to make the body of the Code confer jurisdiction and the schedules to detail the mode in which that jurisdiction is to be exercised. Therefore if there is a conflict between the body and the schedules, the former must prevail. [P 190 C 1]

R. R. Dandige—*for Appellants.*
R. G. Rao — *for Respondent 1.*

Judgment.—This appeal arises out of a a partition suit in which the plaintiff sues for partition and separate possession of his one quarter share in the family property. After the suit had been instituted the parties asked for time to settle their differences out of Court through an arbitrator. One Sheonarain, a close relative of both the parties was appointed, and the question before us is whether the award, which he made, can be given effect to. All the parties to the suit accept the award except defendant 2 Ramdayal and defendant 3, Bhola, who is his minor son. These two have lost in the lower Court and so appeal here.

The first objection they raise is that the award is invalid because the permission of the Court was not obtained. It was argued that under S. 89, Civil P. C., all references to arbitration and all proceedings thereunder have to be in accordance with the provisions of Sch. 2 except in two cases neither of which applies here. The first of these exceptions comes into operation where the provisions of the Arbitration Act 1899 apply, and the second when "any other law for the time being in force" applies. The respondents on the other hand contend that O. 23, R. 3 applies and that the matter can be recorded as an adjustment of the suit under a lawful compromise. They claim that the phrase "any other law for the time being in force" occurring in S. 89 embraces O. 23, R. 3 and so its provisions must apply.

The Judicial Commissioner's Court applied O. 23, R. 3, in two cases, namely 23 N L R 100[1] and 24 N L R 55,[2] but unfortunately neither decision discusses the law. The former was decided by a single Judge and merely followed without comment an unreported ruling of the Judicial Commissioner's Court and three other decisions, one from Allahabad, one from Bombay and one from Madras. The latter was decided by a Bench of two Judges one of them being the Judge who had decided the former case, and it does no more than follow the earlier ruling. A reference was also made to O. 23, R. 3 and to one of the above cases in 31 N L R (Sup) 72[3] at p. 75, but as the present questions did not arise there, there is naturally neither discussion of nor decision on the points now at issue. We are unfortunately unable to agree that O. 23, R. 3, applies though there is considerable weight of authority against us. For a time considerations of stare decisis weighed with us, as they did with the Patna High Court in 11 Pat 237[4] at p. 239, but on the whole we do not think that that should prevent us from giving effect to what we conceive to be the law. Security of title will not be affected, nor will injustice result. In fact none of the factors which normally induce Judges to apply the rule of stare decisis is present here. All that will happen will be that the case will be decided in the usual way by the ordinary Courts to which the parties had in the first instance resorted instead of by an outside tribunal.

So far as O. 23, R. 3, is concerned, we agree that the word "compromise" standing by itself is wide enough to embrace the award in this suit. That is one of the meanings given to the word in the shorter Oxford English Dictionary and it has been elaborately analyzed in 51 Bom 908[5] at pp. 920 and 947. The following cases also take that view, namely 51 Mad 800[6] at p. 806, 6 Luck 591[7] at p. 595 and 9 Rang 39[8] at page 41. But that is not the only meaning and therefore what we have to determine is whether this particular aspect of the definition has been excluded by the Legislature in some other part of the Code. If it has not been, then of course full effect must be given to the plain and ordinary meaning of the term. But we think it has. In the first place it is to be observed that Marten C. J., in considering the juxtaposition of the words "agreement or compromise" in O. 23, R. 3 states at p. 922 of the Bombay Full Bench just cited that :

> I do not mean that in every case under O. 23, R. 3, we are to construe "compromise" as meaning arbitration, but that in an appropriate case we may do so.

It is clear then that in that learned Judge's view there can be cases in which a compromise does not amount either to an agreement or to an award. It was therefore necessary for the Legislature to use both terms even though it desired, as we think it did, to exclude awards from the scope of the rule. In one sense of the term the word "compromise" includes "agreement," but since both terms have been employed, it seems to us that the Legislature was thinking in technical terms and not merely of the dictionary meanings of the words. In any case the fact that both expressions have been used does not militate against the view we take.

1. Namdarkhan v. Nanhoo, (1926) 13 A I R Nag 405=95 I C 89=23 N L R 100.
2. Narayandas Bhagwanji & Co. v. Kalyanji Mawaji & Co., (1928) 15 A I R Nag 173=107 I C 525=24 N L R 55.
3. Tatyarao v. Shrikrishna, (1936) 23 A I R Nag 8=160 I C 202=31 N L R (Sup) 72.
4. Ramadhar Rai v. Subedar Pathak, (1932) 19 A I R Pat 205=138 I C 82=11 Pat 237 = 13 P L T 434.
5. Chanbasappa v. Basalingayya, (1927) 14 A I R Bom 565 = 105 I C 516 = 51 Bom 908 = 29 Bom L R 1254 (F B).
6. Subbaraju v. Venkatramaraju, (1928) 15 A I R Mad 1025= 113 I C 632 = 51 Mad 800 = 55 M L J 429 (F B).
7. Basaoo v. Jagannath, (1931) 18 A I R Oudh 127=131 I C 443=6 Luck 591=8 O W N 71.
8. Laljee Serang v. Chander Bhan, (1931) 18 A I R Rang 58=131 I C 57=9 Rang 39.

There can be no doubt that an award, at any rate in the sense in which it is used among lawyers, is a very special kind of adjustment by consent and that this term is not ordinarily used to cover an award. Therefore when we find the Code dealing elaborately and specifically not only with arbitrations and awards in a separate place but also with the settlement of pending cases by those means it would seem prima facie that the intention was to treat these different modes of adjustment separately. These considerations weighed with the Calcutta and Patna High Courts and also with certain Judges in Allahabad and Bombay. Rankin J. analyzed the scheme of the Code in 49 Cal 608[9] and pointed out that unless awards are excluded from the scope of O. 23, R. 3, the whole scheme of the Code dealing with arbitrations is ruined. Mukerji J. in his dissenting judgment in the Allahabad Full Bench, 47 All 637[10] at pp. 658 to 662, states that the Code has provided for every possible case of arbitration and that it has used the word "arbitration" in a special sense throughout, a sense which is nowhere co-extensive with that of an adjustment of a dispute by lawful agreement or compromise. Courtney-Terrell C. J. was of the same opinion in 14 Pat 799[11] at page 812. In referring to the judgment of Mukerji J., he states:

> There can be no doubt that the Code of Civil Procedure uses a recognized expression for the proceeding which involves a reference of their dispute by the contending parties to a third party for his decision. This has been described as an "arbitration." Nowhere in the Code has the word "arbitration" been used in a sense co-extensive with that of an adjustment of a dispute by lawful agreement or compromise. In other words, the provisions relating to an agreement and compromise are of the character entirely different from those which govern the conduct of a voluntary tribunal.

Macleod J. came to a similar conclusion in 40 Bom 386[12] though he changed his mind in a later ruling, 45 Bom 245[13] at p. 259. Beaman J. was also of the same opinion in 38 Bom 687.[14] We agree that none of this is conclusive but we feel that these are powerful reasons for construing Sec. 89 in the way we do. In view of the conflict of authority on this point it is evident that the words "or any other law" in Sec. 89 are capable of different interpretations. In those circumstances the considerations which we have discussed above ought, in our opinion, to prevail.

But before dealing with Sec. 89, there is another matter which we think also adds weight to our view. Arbitration is an exception to the ordinary rule that the jurisdiction of the Courts cannot be ousted by agreement between the parties, so much so that agreements to refer future disputes which have not yet arisen are not binding (see S. 28, Contract Act). Therefore when we find the Code dealing with this exception in the detailed and comprehensive manner in which it does, one prima facie inclines to the view that the intention was to make those provisions exhaustive and this is fortified by the observations of the Privy Council in 29 Cal 167[15] at p. 182:

> Where the parties to a litigation desire to refer to arbitration any matter in difference between them in the suit, in that case all proceedings from first to last are under the supervision of the Court.

The policy of the Code then seems to be to prevent parties who have once come before the Courts for a settlement of their disputes from withdrawing from their jurisdiction except in the manner expressly provided in the Code. This was the view taken not only in the Patna and Calcutta cases already cited but also in a later Calcutta case, 55 Cal 538[16] at p. 545, and in 54 Bom 197[17] at page 206. This policy has, we think, been clearly enunciated in S. 89 which runs thus:

> Save in so far as is otherwise provided by the Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in Sch. 2.

But the Allahabad, Rangoon, Lucknow, Madras and Bombay High Courts consider

9. Amar Chand Chamaria v. Banwari Lall Rakshit, (1922) 9 A I R Cal 404 =69 I C 808=49 Cal 608.
10. Gajendra Singh v. Durga Kumari, (1925) 12 A I R All 503=88 I C 768= 47 All 637 = 23 A L J 561 (F B).
11. Bhimraj Kanai Lal v. Munia Sethani, (1935) 22 A I R Pat 243=156 I C 1050= 14 Pat 799 =16 P L T 280.
12. Shavaksha Dinsha v. Tyab Haji Ayub, (1916) 3 A I R Bom 125=37 I C 140 = 40 Bom 386 =18 Bom L R 559.
13. Manilal M[illegible]ilal v. Gokaldas Rowji, (1921) 8 A I R Bo[illegible] 110=59 I C 53=45 Bom 245=22 Bom L R [illegible]8.
14. Vyankatesh Mahadev v. Ram Chandra Krishna, (1914) 1 A I R Bom 184= 27 I C 46 =38 Bom 687=16 Bom L R 653.
15. Ghulam Khan v. Muhammad Hassan, (1902) 29 Cal 167=29 I A 51=8 Sar 154 =6 C W N 226 (P C).
16. Gulmoni Dasi v. Tarini Charan, (1927) 14 A I R Cal 887=104 I C 360= 55 Cal 538=47 C L J 59=33 C W N 390.
17. Dinkarrai Lakshmiprasad v. Yeshvantrai Hariprasad, (1930) 17 A I R Bom 98=124 I C 119=54 Bom 197=31 Bom L R 1403.

that the phrase "any other law" includes O. 23, R. 3 and that therefore an award of the kind which we find here can be recorded as an adjustment by compromise: *see* 47 All 637[10] at p. 648, 9 Rang 39[8] at p. 42, 6 Luck 591[7] at p. 594, 51 Mad 800[6] at p. 807 and 51 Bom 908[5] at p. 945. So far as the Allahabad Full Bench is concerned, one of the three Judges, Mukherji J. dissented and Walsh J. based his decision on general principles of law without adverting to S. 89 at all. Therefore the opinion on this point expressed by the third Judge, Kanhaiya Lall J., is really that of a single Judge. In the Rangoon case the learned Judges said that they knew of no other law to which these words could possibly be appropriate except O. 23, R. 3; but the answer is furnished by the Bombay Full Bench itself. Crump J. points out at p. 944 that there are statutes other than the Arbitration Act which deal with arbitration such as the Companies Act and the Dekkhan Agriculturists' Relief Act, and both the learned Chief Justice and Blackwell J. referred to the general law of contract as falling within the meaning of those words. We may add the Co-operative Societies Act and the Electricity Act as further examples.

In the Madras Full Bench the learned Judges came to the conclusion that O. 23, R. 3 conferred certain rights on the parties to a suit and that therefore full effect must be given to its terms unless these rights are curtailed or taken away by some specific enactment. They were therefore of the opinion that S. 89 ought not to be construed as having that effect unless it was necessary to do so. But we feel it is necessary. If considerations of this kind are to prevail then we think that the intention of the Legislature should be construed so as to restrict arbitrations in the manner specified by Sec. 89 and that therefore O. 23, R. 3 which does not form part of the body of the Code should not be construed so as to curtail S. 89 which does. The reasons given in the Bombay Full Bench are more difficult to answer. As we have said Marten C. J. was of the opinion that the general law of contract conferred the right in question and Blackwell J. was also of that view. But Crump J. considered that the words "any other law" suggested that statute law was meant. The Calcutta High Court is clear that the general law of contract is not included: *see* 49 Cal 608[9] at p. 614 and 55 Cal 538[16] at p. 544. On the whole we agree with the Calcutta view for the reasons given in the two cases cited and also for other reasons which we give below.

In construing a statute the usual rules of construction must be applied unless there is something to suggest the contrary. When therefore we find general words following particular and specific words of the same nature they must be construed as taking their meaning from the specific words which precede them and must be restricted to the same genus. This is the well-known rule of ejusdem generis which is explained in Maxwell on the Interpretation of Statutes (7th Edition), p. 284. We therefore agree with Crump J. in the Bombay Full Bench and with Courtney-Terrell C. J. at p. 808 of 14 Pat 799[11] at p. 816, that other statutory law dealing with arbitration is indicated; but we do not agree with the rulings which decide that another provision in the Code itself is also included. In the first place as was pointed out by Agarwala J. in 14 Pat 799,[11]

> it would be contrary to all canons of the construction of statutes, that where a Code lays down that certain proceedings shall be governed by provisions contained therein and relating to those proceedings, words referring to "other laws" should be taken to refer to the Code itself. It is not open to us to substitute for the words "by any other law" in S. 89 the words "except as provided in this Act or by any other law".

Courtney-Terrell C. J. was of the same opinion at p. 809. In the next place as Mukerji J. points out at p. 661 of the Allahabad Full Bench, Sch. 2 and O. 23, R. 3 are as much a part of the Code as S. 89 itself and so the words "any other law" must mean law other than the Code in which the words are used as well as other than the Arbitration Act. Fawcett J. thought so too in 45 Bom 245[13] at p. 273, though he ultimately came to the opposite conclusion for other reasons. Moreover we find that whenever an exception contained in the Code itself has been made the Legislature has been always careful to say so specifically and to use expressions such as "subject to the provisions herein contained" or words having a like effect. See for example Ss. 9, 20, 96, 100, 104 and 146. On the whole therefore we think that the words "any other law" do not include the provisions of O. 23, R. 3.

There are two other points to notice. Though S. 89 states that all arbitration proceedings shall be governed by Sch. 2 except in so far as the provisions of the Arbitration Act or any other law provide, para. 1 of Sch. 2 uses the word "may". The Madras and Bombay Full Benches accord-

ingly considered that parties who want to settle a pending suit by arbitration are not compelled to resort to Sch. 2 but are entitled to proceed under the general law of contract if they so prefer and the learned Chief Justice in the Bombay case criticizes the Calcutta decision, 49 Cal 608,[9] on the ground that Rankin J. had overlooked the word " may " and construed the provisions as compulsory, see pp. 933 and 951 of the Bombay Full Bench ; but we do not think he did. What he said was that the provisions in the Code relating to arbitration when viewed as a whole were compulsory and this we think follows from the use of the word "shall" in S. 89. In any case if we must choose between 'shall' in the body of the Code and 'may' in a Schedule, preference ought, we feel, to be given to the former.

The other point is this: The Bombay Full Bench was of opinion that the Schedules to the Code cannot apply unless they are brought into operation by some provision in the body of the Code itself and that as there is nothing else which brings O. 23, R. 3, into operation, S. 89 was introduced to fulfil this function. With the utmost respect we cannot agree. The Code must be regarded as a whole and it came into being as a whole as its first Section will show. On the contrary we are of opinion that the scheme was to make the body of the Code confer jurisdiction and the Schedules to detail the mode in which that jurisdiction is to be exercised. Therefore if there is any conflict between the body and the Schedules the former must prevail; not that we think there is any conflict between S. 89, and O. 23, R. 3. All that has happened is that one of the senses in which the word " compromise " is used in the English language has been cut out of the purview of O. 23, R. 3 by Section 89.

Turning now to the arguments about the general law of contract which the Bombay Full Bench considered so weighty, what we think was overlooked is Excep. 2 to Sec. 28, Contract Act. The Section itself enumerates the well known rule of law that agreements tending to oust the jurisdiction of the Courts are void. The second exception excludes certain references to arbitration, namely where disputes between the parties have already arisen, but the exception also states :

> Nor shall this Section . . . . affect any provision of any law in force for the time being as to the references to arbitration.

This, we think, clearly makes the provisions of the Code of Civil Procedure the governing factors in so far as they apply. Sec. 21, Specific Relief Act, has a similar saving clause : "Save as provided by the Code of Civil Procedure . . . ." We do not mean to imply that such agreements are unlawful or altogether void. It is possible that they are not, though as that matter is not before us we say nothing about it. But it is one thing to say that an agreement is lawful for certain purposes and quite another to say that it can be enforced in a particular way. Sec. 21 shows that such agreements cannot be specifically enforced and in our opinion S. 89, shows that they cannot be recorded as an adjustment under O. 23, R. 3. Whether other remedies are available is a question with which we are not here concerned though we observe in passing that this possibly explains the use of the word "may" in para. 1 of Sch. 2. What we are clear about is that an award of the kind we have here cannot be recorded as an adjustment by compromise under Order 23, Rule 3.

In our opinion the true view of the matter is this: there was considerable conflict of opinion before the present Code of Civil Procedure was introduced as to whether such agreements could be recorded as adjustments or not. Then followed the observations of Lord Macnaghten in the case which we have quoted and so Sec. 89 was introduced to set this conflict at rest and to bring the law into line with Lord Macnaghten's observations. It is immaterial whether those remarks apply to the case we are considering or not (Marten C. J. thought they did not at page 930 of the Bombay Full Bench) for they undoubtedly indicate a desirable line of action and in our opinion Sec. 89 applies to it. In this view of the matter, it is unnecessary to consider the other questions raised in the appeal. We therefore allow the appeal and overrule 23 N L R 100[1] and 24 N L R 55.[2] The suit will now continue from the point at which it broke off.

As regards costs we are inclined at first to saddle the costs on the party resiling from the award ; but we find from the order sheet of the lower Court dated 13th December 1933 that the arbitration was not relied on, on that date and so the suit was ordered to proceed de novo. In the circumstances we see no reason why the usual rule about costs should not be enforced. The respondents will therefore pay the

costs of the appeal and will also pay the costs incurred in the lower Court between 20th April 1933 and 31st October 1935. These will not be costs in the suit. Counsel's fee in this Court Rs. 50.

S.G./R.K. *Appeal allowed.*

A. I. R. 1939 Nagpur 191

STONE C. J. AND VIVIAN BOSE J.

Laxminarayan Ganeshdas — *Judgment-debtor* — Appellant.

v.

Ghasiram Dalchand Palliwal — *Decree-holder* — Respondent.

First Appeal No. 105 of 1935, Decided on 12th December 1938, from order of Addl. Dist. Judge, Hoshangabad, D/- 13th July 1935.

Civil P. C. (1908), O. 21, R. 1 — Decree awarding interest until payment — Sum paid into Court—Interest ceases to run from date of such payment.

Where a decree orders the payment of a sum of money awarding interest until payment and the money is paid by payment into Court under the provision of O. 21, R. 1, the interest does not run until notice has been given to the decree-holder under O. 21, R. 1 (2) but ceases to run from the date of such payment : *A I R 1924 P C 133, Rel. on; A I R 1919 Mad 445 and A I R 1932 Cal 111, Ref.; A I R 1925 Nag 52, Expl.* [P 191 C 1; P 192 C 1]

Fida Hussain — *for Appellant.*

W. K. Sheorey — *for Respondent.*

Judgment. — This appeal raises a short point and one which would not normally be of very much importance. Even in this suit which originally involved approximately Rupees 50,000 the difference between the figures whether one takes this view or that is under Rs. 300. The point is as follows : Where a decree orders the payment of a sum of money awarding interest until payment and the money is paid by payment into Court under the provision of O. 21, R. 1, does the interest run until notice has been given to the decree-holder under O. 21, R. 1 (2)? or, does interest cease to run from the date of such payment?

The matter has been twice considered in India, so far as the report of the decisions indicate, that is to say in 42 Mad 576[1] where it was held that interest does not cease to run until notice of deposit is given, and in A I R 1932 Cal 111[2] where 42 Mad 576[1] was followed. A I R 1925 Nag 52[3] which is cited does not appear to us to be helpful because there the decree was specially worded and required not only payment but notice to be given. That case is concerned with whether notice should be given. It does however contain the following observation :

> Order 21, rule 1, sub-rule (2), Civil P. C., ... clearly shows that a notice in writing of the payment into Court has to be given to the decree-holder and served in the manner provided for the service of summons.

Unfortunately in none of those cases was A I R 1924 P C 133[4] at p. 135 adverted to. 42 Mad 576[1] was of course before that Privy Council decision but in A I R 1932 Cal 111[2] apparently the Court's attention was not directed to it. In A I R 1924 P C 133[4] what their Lordships were concerned with was the following question : In a suit to set aside a sale a conditional decree was passed. The condition was that the plaintiffs should pay a certain sum within a certain time. If they did so they would recover possession. If they did not, then the suit stood dismissed. In point of fact the plaintiffs' mortgagee, not a party, paid by paying into Court. The question was : Was the condition fulfilled ? At page 135 their Lordships of the Judicial Committee observe :

> Their Lordships are clearly of opinion that while the condition would have been satisfied by a payment to the appellant in person, which he accepted it was equally satisfied by a payment into Court, and that the latter was, in the circumstances, the appropriate mode of satisfying the condition.

If interest runs until payment and payment into Court is payment, then it is difficult to see why interest should run thereafter. 42 Mad 576[1] is largely based on considerations of convenience. Oldfield J. observed that

> there would be nothing to compel compliance by the judgment-debtor with Cl. 2, which enjoins the giving of notice of the payment to the decree-holder, if the running of interest stopped.

Seshagiri Ayyar J. went rather on the analogy of O. 24, R. 3. That is a Rule which expressly stops interest where money has been paid into Court in satisfaction of the claim and the interest is stopped not from the date of payment in but from the

1. Ramaraya Shanbogue v. S. Venkataramanayya, (1919) 6 A I R Mad 445=50 I C 410=42 Mad 576.

2. Rangpur Raiyat Bank v. Hesabuddin, (1932) 19 A I R Cal 111=135 I C 799=35 C W N 544.

3. Baliram v. Ghasiram, (1925) 12 A I R Nag 52 =81 I C 1001.

4. Rahimtullah v. Esmail, (1924) 11 A I R P C 133=80 I C 411=48 Bom 404=51 I A 236 (P C).

date of the notice of the deposit which is required to be given through the Court by the person paying into Court. It must however be observed that, in our opinion, that analogy is not helpful because if interest stops only with the giving of notice in the absence of any provision one way or another R. 3 of O. 24 is unnecessary. The fact that that Rule is in O. 24 and no similar Rule is in O. 21, R. 1, suggests to our mind that where the decree provides that interest should be paid up to the date of payment then interest is paid up to the date of payment only. We are impressed with the argument based on convenience but at the same time in view of the Privy Council decision that payment in Court is equivalent to payment we think that it would be illogical to say that interest which is only payable up to the date of payment runs after such payment has been made. We therefore allow this appeal. We make no order as to costs.

D.S./R.K. *Appeal allowed.*

A. I. R. 1939 Nagpur 192

POLLOCK J.

Ramsingh Ranjitsingh and another — Appellants.

v.

Jalamsingh Sonusingh Rajput and another — Respondents.

Second Appeal No. 22 of 1937, Decided on 12th December 1938, from appellate decree of Addl. District Judge, Amraoti, D/- 26th October 1936.

Hindu Law — Debts — Avyavaharika debt— Debt to buy motor to ply for hire is not avyavaharika and is binding on sons.

Where a Hindu father on behalf of himself and his two minor sons executed a mortgage of his family house, the consideration being the balance due on a previous mortgage loan taken by him and his brother to purchase a motor to ply for hire, and the sons challenged the transaction :

Held that a debt taken in order to purchase a motor to ply for hire not being repugnant to good morals was not avyavaharika ; and that the same was binding on the sons whose obligation to pay their father's debts extended to commercial debts: *A I R 1933 Nag 89 and A I R 1926 Mad 323, Rel. on.* [P 193 C 1]

J. Sen — *for Appellants.*

T. L. Sheode — *for Respondent No. 1.*

Judgment.—On 4th March 1924 Ranjit Singh, defendant 2, and his brother Umrao Singh mortgaged their house to Jalam Singh for Rs. 1800. In 1929 there was a partition between Ranjit Singh and Umrao Singh at which this house was allotted to Ranjit Singh, and on 18th December 1929 Ranjit Singh on behalf of himself and his two minor sons, the plaintiffs, mortgaged this house for the balance due on the previous mortgage, which was again Rs. 1800. The mortgagee brought Civil Suit No. 205 of 1933 against Ranjit Singh and his two sons to enforce the second mortgage and obtained a decree for sale. The present suit has been brought by the sons of Ranjit Singh for a declaration that they have a two-third share in the above house which is not liable to be sold in execution of the mortgage decree.

The plaintiffs, who were parties to the suit in which the mortgage decree was obtained, contend that they are not bound by the decree in that suit because their guardian ad litem was grossly negligent in not raising the plea that the debt incurred in 1924 was avyavaharika. It has been found that the money was borrowed in order to buy a motor to ply for hire. The learned Additional District Judge has held that this was a new business as Ranjit Singh was up till then a mason and a cultivator and that a debt incurred in order to start a new business is avyavaharika. The learned Additional District Judge's view seems to be that any debt incurred which is tinged with illegality or immorality is avyavaharika. That view cannot be accepted. The question was discussed in 29 N L R 107[1] and it was there stated :

> The word avyavaharika does not merely comprise debts which are illegal and immoral only but all debts which the Court regards as inequitable or unjust in point of Hindu law to make the son liable.

I do not think that it was ever intended to lay down the proposition that all debts except those for legal necessity or family benefit are avyavaharika, and Colebrooke's definition of avyavaharika debt as being "for a cause repugnant to good morals" was cited without disapproval. In 49 Mad 211[2] it was held that pious obligation of a son to pay his father's debts extends to commercial debts and that no one could pretend that the contrary view would be entertained today. In Mayne's Hindu Law at page 409, Edn. 10, there is the following comment :

> When Gautama says that a father's commercial debts need not be repaid by the son, he is certainly not referring to the debts incurred in the

1. Rajeshwar v. Mangniram Gangabisan, (1933) 20 A I R Nag 89=142 I C 242=29 N L R 107.
2. Achutaramayya v. Ratnajee Bhootaji, (1926) 13 A I R Mad 323=92 I C 977=49 Mad 211 =50 M L J 208.

usual course of carrying on a business or trade but evidently to sums borrowed for speculative and hazardous ventures, involving something like gambling. For Gautama himself recognizes traders and their usages or laws and almost every Smriti does the same. . . . . It is impossible therefore to believe that commercial debts in the ordinary sense were regarded by Gautama as improper and no other Smriti refers to it. Interpreting the term as a commercial debt, the Courts have however held the rule to be obsolete.

I find it difficult to understand why anybody should say that the purchase of a motor to ply for hire was repugnant to good morals and I hold that the debt was not avyavaharika. In the previous case in appeal from Civil Suit No. 205 of 1933 this plea was taken before Staples A. J. C., who held that the debt was not avyavaharika. That finding is binding on the plaintiffs.

Once it is held that the debt is not avyavaharika it follows that the second mortgage which was executed for an antecedent debt is binding on the plaintiffs. The plaintiffs' suit must therefore fail, though not for the reasons given by the learned Additional District Judge, and the appeal is dismissed with costs. Counsel's fee Rs. 45.

S.G./R.K. *Appeal dismissed.*

A. I. R. 1939 Nagpur 193

STONE C. J. AND VIVIAN BOSE J.

Ganpatrao Madhorao Hatker and others—Plaintiffs—Appellants.

v.

Sheikh Badar Farid Musalman and others—Defendants—Respondents.

Letters Patent Appeal No. 8 of 1937, Decided on 10th February 1939, from appellate decree of Digby J. in S. A. No. 163 of 1937, D/- 2nd July 1937.

(a) Letters Patent — Practice — Leave — Judge, being satisfied that there is no case to be made out by appellant, refusing to admit second appeal — He is not justified in granting leave to file Letters Patent appeal.

As a rule one does not on motion hearing refuse to admit a second appeal unless one is satisfied that there is no case to be made out by the appellant. If the Court is so clearly satisfied as to even refuse to admit the appeal it is not justified in granting leave to file a Letters Patent appeal which leave is only given as a rule where there is a point of law of difficulty and importance about which Judge entertains a doubt. [P 193 C 2]

(b) Easement — Custom of burial — It is not necessary to establish immemorial user — Certain land used by Mahomedans for burial for 45 years — Court can infer that right to bury dead was granted to Mahomedans in past.

To hold that a good custom has been established it is not necessary to establish immemorial user because the English common law rule of immemorial user is not required to establish a custom in India. The custom must be (1) reasonable, (2) certain and it must be proved that (3) the user was not permissive, (4) the user was not exercised by stealth, (5) the user was not exercised by force, and (6) that the right had been enjoyed for such a length of time as to suggest that by agreement or otherwise the user has become the customary law of the locality. [P 194 C 2]

Where the suit land has been used by Mahomedans as a burial ground for 45 years, the Court is bound to infer that at some time in the past there was granted to this Mahomedan community the right to bury their dead in the suit land : *17 All 87; 20 Mad 389; 23 Bom 666; 33 All 257 and L. P. A. No. 31 of 1936, Rel. on.* [P 194 C 2; P 195 C 1]

(c) Limitation Act (1908), S. 26 — Act does not exclude other modes of acquiring easements.

The Limitation Act is remedial, and is neither prohibitory nor exhaustive. A man may acquire a title under it who has no other right at all, but it does not exclude or interfere with other titles and modes of acquiring easements : *6 Cal 394 (P C), Rel. on.* [P 195 C 1]

M. R. Bobde—*for Appellants.*

A. Razak Khan—*for Respondents 1 to 5 and 9.*

Judgment.—This Letters Patent appeal comes before us in rather unusual circumstances. The learned Judge who granted leave did not hear the appeal but refused to admit it. As a rule, one does not on motion hearing refuse to admit a second appeal unless one is satisfied that there is no case to be made out by the appellant. If one is so clearly satisfied as to even refuse to admit the appeal it is difficult to see how the learned Judge felt justified in granting leave to file a Letters Patent appeal which leave is only given as a rule where there is a point of law difficulty and importance about which the learned Judge entertains a doubt. However the matter has come before us and we must deal with it.

The claim is by certain Hindus for possession of a plot of land as to part of which without doubt there are at the present moment a large number of Mahomedan graves. As to part of it there are no Mahomedan graves. The whole site is part of a field belonging to the plaintiffs who are Hindus. There has been an inspection by a Commissioner and his map appears at p. 50 and his report at page 20. The Judge also made an inspection and his inspection note is at p. 23. It is abundantly plain that in this sort of question that arises here the Judge who has made an inspection has an immense advantage over us. From the

inspection notes, the map and the evidence it is apparent that the suit strip is on higher ground than the rest of the field, that the part of the suit strip which contains the tombs is the northern part which is higher than the southern part and that the sourthern part is marked by a neem tree which is surrounded by Massi goddess stones, that part of the southern portion shows signs of recent cultivation and disturbance but that for the most part it shows signs of cultivation and no disturbance. The learned lower Appellate Judge found as a fact that over the suit land (which means not only the northern portion, but the southern portion also) there had been burials by the Mahomedan community extending over a period of 45 years. The learned Judge considered whether that founded a good customary easement and he came to the conclusion that it did not because to establish such an easement or right it was necessary to prove immemorial user and 45 years is not immemorial. But although he found that there was no custom he found that the defendants had acquired a prescriptive right. The learned Judge from whose order dismissing on motion hearing the appeal this appeal is brought based his opinion on the view that as the defendants had used the plot in suit, that is to say both the northern half and the sourthern half as a burial ground for the last 45 years they had established a customary right and that one must conclude from such a user that they had exercised that right from time immemorial. Against that order this appeal is brought.

The ground of appeal is that the right in question is not a customary right which can be acquired by user, that you cannot acquire the right to bury the dead by custom, that the Judge was wrong in disagreeing with the lower Appellate Court that immemorial user was not established, that the claim based on customary right was inconsistent with the claim of title by adverse possession, that 40 years' user was not enough to establish custom and that the necessary elements giving rise to customary rights were neither pleaded nor proved. Before us the point is taken that what was pleaded by the defendants was a customary easement and that you cannot have a customary easement within the meaning of the Easements Act without a dominant tenement and that there is no proof of a dominant tenement here. There is no pleading as to customary right as distinct from a customary easement (*see* Ss. 2 and 18, Easements Act). Therefore the defence that there is here a customary right established cannot be entertained. It was also argued that one cannot acquire a right of burial by prescription. In point of fact, as we understand this case, the right is claimed as a right founded on custom and 23 Bom 666[1] is relied on. *See also* 13 A L J 1094.[2] In our opinion, the difficulty that was felt by the lower appellate Judge in holding that there was here a good custom established, viz. that it is necessary to establish immemorial user, was founded on a misapprehension of the law. As Peacock observes in his "Law Relating to Easements in British India" (Edn. 3) p. 33 :

> The Easements Act does not say how a local custom may be established. But it has been laid down by the Courts that the English Common law rule of immemorial user is not required to establish a custom in India.

See 17 All 87[3] at page 92, 20 Mad 389,[4] 23 Bom 666[1] and 33 All 257.[5] When dealing with Sec. 18, that is to say customary easements, this Bench laid down in L. P. A. No. 31 of 1936[6] the following requisites : The custom must be "(1) reasonable, (2) certain," and it must be proved that

> (3) the user was not permissive, (4) the user was not exercised by stealth, (5) the user was not exercised by force, and (6) that the right had been enjoyed for such a length of time as to suggest that by agreement or otherwise the user has become the customary law of the locality.

Here, in our opinion, the finding is binding on us for two reasons: (1) this is a Letters Patent appeal from a second appeal, and (2) the point is not taken in the grounds of appeal. We are bound by the finding of fact, viz. that the suit land has been used, as a burial ground for 45 years as that, in our opinion, must mean this: bearing in mind the inspection note and the plan that has been made in this case although the graves do not occupy the whole of the suit land the whole of the suit land has been treated as a grave-yard in which the dead have been interred. We think that on those facts we are bound to

1. Mohidin v. Shivlingappa, (1900) 23 Bom 666 =1 Bom L R 170.
2. Mathura Prasad v. Karim Baksh, (1915) 2 A I R All 402=31 I C 805=13 A L J 1094.
3. Kuar Sen v. Mamman, (1895) 17 All 87=1895 A W N 10.
4. Palaniandi Tevan v. Puthirangonda Nadan, (1897) 20 Mad 389.
5. Shadi Lal v. Muhammad Ishaq Khan, (1911) 33 All 257=9 I C 198=8 A L J 10.
6. Karimbux v. Shamrao, L.P.A. No. 31 of 1936.

infer that at some time in the past there was granted to this Mahomedan community the right to bury their dead in the suit land. As their Lordships of the Privy Council observed in 6 Cal 394[7] at page 403 speaking of the Limitation Act :

> The Statute is remedial, and is neither prohibitory nor exhaustive. A man may acquire a title under it who has no other right at all, but it does not exclude or interfere with other titles and modes of acquiring easements. Their Lordships think that, in this case, there is abundant evidence upon the facts found by the Courts for presuming the existence of a grant at some distant period of time.

The grant would be of the whole strip. The right conferred by the grant would be to put graves therein. The user would of course be over such portion of the strip as within the proof period graves had been dug. But, we think that the Courts have correctly inferred that the right extends over the whole of the suit land. In any case as to what are the boundaries of the suit land, that is essentially a question of fact with which we are not concerned here. The plan made by the Commissioner shows the southern boundary of this strip as extending to the south of the neem tree. The decree of the trial Court however only declares the defendants entitled to bring their dead over the site marked B Z V on the plan at p. 50. That means the plot's southern boundary is fixed five feet north of the southern boundary shown on the plan. Mr. Abdul Razak taking notice of the observations of the Court that it would not be desirable to have within a Mahomedan burial ground a tree that was surrounded by the stones of a Hindu goddess agreed before us that the southern boundary of the strip as a matter of concession should be terminated within five feet to the north of the most northern Massi goddess stone which we are told is near the neem tree. The need for this concession however disappears when it is seen that the southern boundary fixed by the decree is that distance north of the southern boundary shown in the Commissioner's plan. It is accordingly not necessary to vary the decree. The appeal stands dismissed with costs.

D.S./R.K. *Appeal dismissed.*

7. Rajrup Koer v. Abdul Hossein, (1881) 6 Cal 394 = 7 I A 240 = 7 C L R 529 = 4 Sar 199 (P C).

A. I. R. 1939 Nagpur 195

GRUER J.

Kamruddin Yusaf Alli Bohra and another — *Defendants* — Applicants.

v.

Municipal Committee, Khandwa — *Plaintiff* — Opposite Party.

Civil Revn. No. 81 of 1938, Decided on 8th December 1938, for revision of decree of Small Cause Judge, Khandwa, D/. 23rd December 1937.

(a) Municipality — C. P. Notification No. 5931-1924-M-8, dated 25th October 1932, Sch. 2 (e)—Ammonium Sulphate and Sulphate of Potash are chemicals taxable under Sch. 2 (e) even if they are used as manure.

Ammonium Sulphate and Sulphate of Potash are chemicals taxable under Sch. 2 (e) of Notification No. 5931-1924-M-8, dated 25th October 1932, and the mere fact that they are to be used as manure does not take them out of the category of chemicals. There is nothing in the notification to show that manures as such are exempted if they fall under a head which is taxed. A chemical does not cease to be a chemical because it contains impurities. [P 196 C 1]

(b) Estoppel—Chemicals taxable by Municipality with terminal tax—Consignment received by shopkeeper but not taxed at that time — Shopkeeper selling his goods on this basis— Municipality subsequently is not estopped from holding shopkeeper liable for tax.

There cannot be an estoppel on a point of law. [P 196 C 1]

According to the Rules of a Municipality certain chemicals were liable to terminal tax. A shopkeeper received consignments of these chemicals but at that time he was not taxed. He therefore concluded that he was not liable to tax and sold his goods on this basis. Subsequently the Municipality claimed from him certain amount as terminal tax on the consignments :

Held that the Municipality was not estopped from holding the shopkeeper liable for the tax : *A I R 1937 P C 114 and (1892) 1 Q B 43, Applied.* [P 196 C 2]

Held also that according to S. 115, Evidence Act it would have to be shown that the Committee had intentionally caused the shopkeeper to believe that he was not liable for the tax. [P 196 C 1]

(c) Estoppel — Wrong representation to oneself is no estoppel.

If a person had been making wrong representations to himself, this is no estoppel. [P 196 C 2]

Fida Hussain — *for Applicants.*

Abdul Razak — *for Opposite Party.*

Order. — The claim of the Municipal Committee, Khandwa, against the defendants-applicants, Kamaruddin and Akbarali has been decreed for Rs. 322. This amount was claimed as a terminal tax at annas eight per maund on various consignments of Ammonium Sulphate and Sulphate of Potash imported by the defendants through

Khandwa railway station for their shop in Khandwa during the years 1933 to 1935. The two questions for decision are whether these substances are chemicals which are taxable under Sch. 2 (e) of Notification No. 5931-1924-M-8, dated 25th October 1932, and secondly whether the plaintiff Municipal Committee is now estopped from holding the defendants liable. On the first point I have no doubt that the decision of the lower Court is correct. The defendants say that these consignments were imported as artificial manure, but the mere fact that they were to be used as manure does not take them out of the category of chemicals. There is nothing in the notification to show that manures as such are exempted if they fall under a head which is taxed. A chemical is described in the dictionary as a substance obtained or used in chemical operations. These substances were manufactured by the Imperial Chemical Company of Bombay. Also, in the dictionary "Ammonium" and "Sulphate" have the abbreviation "chem," after them which means "in Chemistry." In common parlance they are well-known chemicals. The evidence which defendants have attempted to give to the contrary is useless. A chemical does not cease to be a chemical because it contains impurities.

On the second point also, I agree with the lower Court that no estoppel is made out. There cannot be an estoppel on a point of law, and also according to Sec. 115, Evidence Act, it will have to be shown that the committee had intentionally caused the defendants to believe that they were not liable for the tax. Defendants' contention is only that as they were not taxed at the time they concluded that they were not liable and sold their goods on this basis: they are prejudiced because if they had known that the tax will be recovered they would have charged higher prices to their customers. Learned counsel for the non-applicant has referred me to a Privy Council case from Canada, which is very apposite. This is reported in A I R 1937 P C 114.[1] In that case the appellants had charged the respondents for use of electric energy required in the manufacture of ice cream and other products. By mistake the calculation was based on the actual dial reading of the electric meter, whereas in order to arrive at the correct amount of electric energy it was necessary to multiply the dial reading by 10. The respondents were therefore charged only 1/10 of what they ought to have been. The principles on which the plea of estoppel was negatived were that the appellants were not intending to induce any course of conduct on the part of the respondents other than the payment of the amounts stated to be due, and secondly that such a plea cannot enable the defendant to escape from a statutory obligation of such a kind, as the duty of each party was to obey the law. A similar case was quoted before their Lordships, (1892) 1 Q B 43,[2] in which a municipal body under a mistake of law had sent demands to a railway company for only one-third of the sums legally due. The error continued for four successive years, and in the fifth year when steps were taken to recover the amounts unpaid the company set up an estoppel based on the contention that it had acted on the statements sent to it and paid out the money in dividends, but the estoppel was disallowed. The same principles must apply to the present case.

There are also peculiar circumstances in this case which show that the defence is inequitable. During the period when these consignments were being received one of the defendants Kamaruddin was himself Chairman of the Tax Sub-Committee of the Municipality. In that capacity it was no doubt his duty to see to the proper collection of taxes, and he had a very special duty cast upon himself to see that the taxes for which he himself or his shop was liable were duly collected. Even if such goods were not being taxed previously or if there had been no such consignments before this —the record is not very clear on this point —still he ought to have been aware that prima facie such products did fall under the heading "chemical" and were taxable. As he was in a position to direct the actions of the Octroi Moharrir in the matter he is in no better position than if he had been making wrong representations to himself, which of course is no estoppel, and as he is one of the partners in the shop his brother, the other partner, likewise cannot be heard in equity on this defence. The decision is a correct and just one. The application is dismissed with costs. Counsel's fee Rs. 20.

D.S./R.K. *Application dismissed.*

1. Maritime Electric Co. Ltd. v. General Dairies, (1937) 24 A I R P C 114 = 168 I C 616 (P C).

2. Reg. v. Blenkinsop, (1892) 1 Q B 43= 61 L J M C 45 = 66 L T 187= 40 W R 272=56 J P 246.

*** A. I. R. 1939 Nagpur 197**

NIYOGI J.

T. Rajlu Naidu — Plaintiff — Appellant.

v.

M. E. R. Malak — Defendant — Respondent.

Second Appeal No. 374 of 1936, Decided on 21st December 1938, from appellate decree of First Addl. Dist. Judge, Nagpur, D/- 15th April 1936.

(a) Second Appeal—Court considering documents as pieces of evidence involving no question of construction—Inference of fact cannot be challenged in second appeal.

When the Court only considers various documents as mere pieces of evidence involving no question of construction, its inference of fact is not open to challenge in second appeal : *A I R 1931 Nag 189, Rel. on.* [P 198 C 2]

(b) Easement — Suit by person for specific performance on basis of agreement of sale of certain land in his favour — This does not preclude him from claiming easement in respect of that land.

It is true that a person who enjoys a right under the belief that he is an owner, does not acquire an easement. A right of easement is a right which is capable of being acquired in respect of other's land and not one's own : *A I R 1915 P C 131, Rel. on.* [P 199 C 1,2]

But the mere fact that the person claiming easement had previously filed a suit for specific performance on the basis of an agreement of sale alleged to have been executed in his favour affecting the land in respect of which the right of easement is claimed by him does not preclude him from claiming the easement, because an assertion of a personal right against the owner does not imply an assertion of a right in the property. It is only an equitable right which is remote from ownership : *A I R 1932 Bom 513, Disting.; A I R 1926 Mad 728 (F B), Rel. on.* [P 199 C 2]

(c) Easements Act (1882), S. 15—Long user of right of way—Relation between parties not indicating that user was attributable to leave and license—User is presumed to be as of right.

It is no doubt incumbent on the person claiming easement to establish that his user was as of right but the law presumes that it is as of right, that is to say it has a lawful origin, if he proves open and notorious user. On proof of the fact of enjoyment from time immemorial there must arise a presumption of a legal origin for the right claimed. Hence where a person had been exercising his right of way for himself, for his servants and for his carts from remote past as appurtenant to his shop and relations between the parties were not such as to indicate that the user was attributable to leave or license, it must be presumed that his user was as of right : *Case law referred.* [P 200 C 1,2]

*** (d) Easements Act (1882), S. 15 — Person by prescription acquiring right of way for himself, his servants and carts — Right of way cannot be presumed to include passage for sweepers.**

The presumption of constructive enjoyment can no more be made in favour of a person acquiring easement by prescription than the presumption of constructive possession be made in favour of a trespasser acquiring prescriptive title. If there is a grant, it is construed against the grantor but in case of prescriptive right, its extent must be measured and determined by the accustomed user. It is on this principle that a servitude acquired for one purpose cannot lawfully be used for another. Hence where a person has by prescription acquired a right of way on other's land for himself, his servants and carts, the right of way cannot be presumed to include the passage for sweepers. Nor can such a presumption be based on the circumstances that the houses occupied by the parties had at one time belonged to a common owner unless the way was necessary for enjoying the tenement which was purchased by the person claiming easement. Moreover, right of way is not a continuous and apparent easement. The case therefore cannot fall within the terms of S. 13 (f), Easements Act. Nor can it be presumed that the way is for all purposes on the ground of its being a common way because it is only when the land that is used for passage is found to belong to both the neighbours that the way might be presumed to be used for all purposes : *13 Cal 136 (P C); 24 Bom 188 and A I R 1920 Bom 233, Rel. on.* [P 201 C 1,2; P 202 C 1]

(e) Easement — Easement of necessity explained.

An easement of necessity is one without which the property retained upon the severance cannot be used at all; it is not one which is merely necessary to the reasonable enjoyment of that property: *(1902) 2 Ch 557, Rel. on.* [P 201 C 2]

(f) Deed — Construction — Discrepancy between dimensions and boundaries—Area specified within boundaries will pass.

In case of a discrepancy between dimensions and boundaries the area specified within the boundaries will pass, whether it be less or more than the quantity specified : *15 C P L R 163, Rel. on.* [P 202 C 2]

(g) Limitation Act (1908), Arts. 120 and 142 — Gallery of person's house encroaching on land of other person — Latter bringing suit against former for relief under S. 54, Specific Relief Act coupled with prayer for possession of land beneath gallery — Suit is not governed by Art. 120.

Whether Art. 120 or Art. 142 would come into operation depends upon the nature of the relief claimed. If a gallery of a person's house encroaches upon another's land he is unquestionably a trespasser in view of the maxim "whosoever has the soil, also owns to the heavens above and to the centre of the earth." Hence, where the owner of the land on whose land the gallery encroaches brings a suit for relief under S. 54, Specific Relief Act coupled with claim for possession of land beneath the gallery to which the person making encroachment has asserted his title, the suit is not governed by Art. 120 : *13 Mad 445; 26 All 391; A I R 1925 Bom 373; A I R 1926 Nag 25 and 33 Cal 303, Disting.* [P 202 C 2]

M. R. Bobde, M. B. Kinkhede and A. D. Mande — *for Appellant.*

D. T. Mangalmurti and S. R. Mangrulkar — *for Respondent.*

Judgment. — This appeal and Second Appeal No. 381 of 1936 arise out of a suit filed by the appellant in this appeal, which had been dismissed in toto by the original Court but was partially decreed in the lower Appellate Court. This judgment governs the disposal of both the appeals. The parties now own premises which are adjacent to each other. At one time, the land comprising them was owned by Mt. Laxmi Devi, appellant's sister. On 11th April 1908 she sold a portion of the premises to the respondent's father, who about the year 1922 constructed a building which is now known as the Sadar Bazar Mahdibagh Shop on a part of the site purchased by him. Laxmi Devi sold the residue of the premises to the appellant under sale deeds, dated 24th June 1919, 5th March 1921 and 22nd October 1927. The appellant's case was that the respondent, while constructing his building in 1922, encroached upon Laxmi Devi's land along the whole length of the southern wall varying in breadth from 1½′ to 9¾′ and along the whole length of the western wall from 1¼′ to 4¼′, that he constructed a wooden gallery projecting from the western wall, that he opened some windows and ventilators in the ground and first floors of his building and constructed a bathroom and a lavatory touching the southern wall of his building with the night-soil aperture opening on the appellant's land, that the respondent was wrongfully using the open space lying between the two premises as passage for his carts and sweeper; that he had also further encroached on the appellant's land by constructing pucca drain and two chabutras with steps below two doors D-1 and D-2 (marked in the map). The suit was hotly contested by the respondent and it was wholly dismissed in the trial Court.

The lower Appellate Court granted a decree to the appellant as follows: (a) The respondent shall remove the gallery on the west; (b) he shall fix the shutters of the door above that gallery and the windows below that gallery, in such a way that they open inside his building and not on the land of the appellant; (c) if the respondent fails to carry out these directions, the appellant will be at liberty to get them carried out through Court at the expense of the respondent; and (d) the respondent is perfectly restrained from making, use of the land on the south of his building as a way of sweeper for cleaning his latrine. The rest of the appellant's claim was dismissed. Both parties have filed separate appeals. I shall first deal with the plaintiff's appeal. Two points are pressed: (1) that the respondent encroached towards his southern side by building a part of his shop, drain, chabutras etc., (2) that the respondent did not acquire right of way for the passage of carts over the open space intervening the two premises.

The first point does not involve any question of law. The lower Appellate Court compared the extent of the area covered by the respondent's building with the measurements and other description contained in his sale deed, dated 11th April 1908 and came to the conlcusion that he had encroached on 3′ 7″ of land. It however found the encroachment to be towards the northern side of his building. That sale deed mentions the existence of a verandah and steps leading up to it on the southern side. The western and southern boundaries are described therein as being respectively the site and house of Laxmi Devi and the Avar (compound) and tabelas (stables) of Laxmi Devi. Examining the sale deeds in favour of the appellant the lower Appellate Court found that the appellant was entitled to 87′ north to south along the Residency Road, but that he was actually in possession of 89′ 2″, that is, 2′ 2″ in excess of what was transferred to him. This conclusion of fact is assailed here on the ground that the lower Appellate Court misunderstood the various instruments of title. It was pointed out in 27 N L R 213[1] that when the Court only considers various documents as mere pieces of evidence involving no question of construction, its inference of fact is not open to challenge in second appeal. It must be borne in mind that the lower Appellate Court's finding is concurrent with that of the original Court and it receives support from the recitals in the appellant's sale deeds of 1919 and 1927 (Exs. P-2 and P-3) as to the boundaries of premises sold to the appellant. The land sold to the appellant was described as being bounded inter alia by the Mahdibagh shop, and there is absence both in the sale deeds and Ex. P-13 of any complaint as to this particular encroachment by the respondent. There are also other considerations in support of the lower Appellate Court's finding but it is unnecessary to go into further details as I am not satisfied that the finding is vitiated by any error of law or

1. Sheonarayan v. Dindayal, (1931) 18 A I R Nag 189=134 I C 673 = 27 N L R 213.

that it is otherwise manifestly unreasonable or perverse.

The other point relating to easement no doubt raises a question of law. The lower Appellate Court's finding is that the open space lying between the two buildings had been used as a passage for the respondent, his servants and carts from 1908 onwards and that he had acquired a right of way to that extent as an easement before the institution of the suit in 1933. It is urged for the appellant that the user was not proved to have been as an easement and as of right. It is necessary here to refer to a litigation between the parties which commenced in 1927 and terminated in 1931. The respondent filed a suit for specific performance on the basis of an agreement of sale alleged to have been executed by Laxmi Devi in respondent's favour on 9th August 1927 affecting the land in respect of which the right of easement is claimed by him. It is argued that inasmuch as in that suit the respondent asserted his claim as owner of the land, he could not be deemed to have used it as an easement. Reliance is placed on 49 Mad 820,[2] 56 Bom 427[3] and A I R 1935 Cal 282.[4] The first case negatives the contention, the last one is not in point. In the intermediate one, the person who claimed the right of easement claimed also the ownership of the land. It is now a well-established rule of law since it was enunciated in (1915) A C 599[5] that a person who enjoys a right under the belief that he is an owner, does not acquire an easement. A right of easement is a right which is capable of being acquired in respect of other's land and not one's own. But was this the case here? The right which the respondent asserted in his suit for specific performance was a right in personam against the contracting owner. S. 54, T. P. Act, lays down in clear terms that an agreement to sell does not of itself create any interest in or charge on the property. It is evident that an assertion of a personal right against the owner does not imply an assertion of a right in the property. The one is a right in personam, the other is a right in rem. The very object of the suit of the respondent was to acquire title to the land to the exclusion of any other claimant on the basis of the personal right which the contract of sale created in his favour. It is therefore inaccurate to say that from the time he instituted his suit in 1927 he had the animus of an owner when he exercised his right of passage as before. He was seeking to acquire title which eventually he failed to do. Throughout the course of the litigation he was only asserting an equitable right which is remote from ownership. In 49 Mad 820[2] at page 830 it was observed that a man is not finally precluded from claiming the benefit of an easement merely because in the course of legal proceedings he made an unfounded claim to be owner. Their Lordships further pointed out that the question of onus was one of fact. If that is so, it must, in the circumstances of the present case, be held that the defendant did not claim to be owner while he was exercising his right of way. The appellant's contention must therefore fail.

The next question is whether the right of passage was enjoyed as of right. Reference is made to 16 Bom 592[6] and 8 C W N 359.[7] In the first mentioned case the person who claimed to have acquired a right of easement claimed it by right of ownership which, in that case, was held to be inconsistent with enjoyment as of right as an easement. In the present case, the defendant never claimed ownership of the land as has been shown already and consequently this case has no application. In the other case, the original Court's finding was that there was no proof of the existence of any way and that even if there was any, it could not be as of right but was permissive. The first Appellate Court failed to determine the question whether the user was permissive or as of right. It was rightly observed that the burden lay on the claimant to prove that his user was as of right but it was clearly indicated that the onus could be discharged by the proof of circumstances which would found a presumption that the user was as of right and not permissive, with due regard to the habits of the people. The judgment cites

2. Subba Rao v. Lakhshmana Rao, (1926) 13 A I R Mad 728 = 96 I C 968 = 49 Mad 820 (F B).
3. Marghabhai v. Motibhai Mithabhai, (1932) 19 A I R Bom 513=139 I C 571=56 Bom 427= 34 Bom L R 1015.
4. Jogesh Chandra Roy v. Sm. Sachchnanda, (1935) 22 A I R Cal 282 = 155 I C 833 = 60 C L J 412.
5. Attorney-General of Southern Nigeria v. John Holt & Co. Liverpool, Ltd., (1915) 2 A I R P C 131=(1915) A C 599=84 L J P C 98=112 L T 955.
6. Chunilal Fulchand v. Mangaldas Goverdhandas, (1892) 16 Bom 592.
7. Shaikh Khoda Buksh v. Shaikh Tajuddin, (1904) 8 C W N 359.

with approval a passage from an unreported judgment:

> The nature and character of the servient land, the friendship or relationship between the servient and dominant owners and the circumstances under which the user had taken place may induce the Court to hold that the enjoyment was not "as of right" although there is no direct proof that the enjoyment was had with the permission of the servient owner.

It is pertinent to notice here that the learned Judge who decided the case alluded to the rule in England that evidence of mere user over a long period was by itself sufficient to warrant the inference of the user being as of right, but declined to apply it to India in view of the differing habits of the people. It is true that on the point there is a divergence of judicial opinion in India. This view found favour in 19 I C 66,[8] 18 I C 211,[9] 25 I C 499[10] and 56 Cal 927;[11] but, on the other hand, it was not endorsed in 45 Mad 633,[12] 45 Bom 1027,[13] A I R 1925 Lah 344,[14] A I R 1926 Pat 460[15] and A I R 1925 Cal 788.[16] In the Court of the Judicial Commissioner, C. P., it was consistently held that long user itself gave rise to a presumption of right: *see* A I R 1923 Nag 192,[17] A I R 1925 Nag 270[18] and 16 N L R 76.[19] In our High Court also this view received assent in 20 N L J 12.[20] As pointed out in this case it is no doubt incumbent on the plaintiff to establish that his user was as of right but the law presumes that it is as of right, that is to say it has a lawful origin, if the plaintiff proves open and notorious user. The expression "as of right" was explained by James L. J. in (1881) 17 Ch D 535[21] at p. 584 as meaning "a thing which the claimant was entitled to do under some right or another. On proof of the fact of enjoyment from time immemorial, there must arise a presumption of a legal origin for the right claimed: *see* 31 Cal 503[22] at p. 509. Regard being had to the weight of the authorities, the appellant's contention must be overruled. There is evidence, though meagre, to sustain the findings of the Courts below that the defendant was exercising his right of way for himself, for his servants and for his carts since 1908 as appurtenant to his shop. The land on which he exercised his right was and is admittedly set apart as a passage. The relations between the parties were not such as to indicate that the defendant's user was attributable to leave or license; on the contrary the circumstances leave no doubt for the inference that it was regarded as a natural and lawful mode of the beneficial enjoyment of his tenement. It must therefore be presumed that his user was as of right. For the foregoing reasons the plaintiff's appeal must fail.

The first point taken in the defendant's appeal is as regards the defendant's right to let his sweeper use the way for purpose of cleaning his latrine. There is ample evidence on the record to sustain the lower Appellate Court's finding that the latrine was built in 1922 at the place where it stands. The question of law which arises is whether the right of way which the defendant acquired as an easement comprised the right to use it also for conservancy purposes. On behalf of the defendant reliance is placed on 7 Cal 665,[23] 38 Mad 141[24] and 57 Bom 186.[25] In these cases the right of easement was granted in general terms and it was held that the grant of a general right of way included the right to admit scavengers to clean the latrine. That is a matter of mere construction of a grant. In the present case the defendant had not

8. Rameshur v. Nut Behari, (1913) 19 I C 66.
9. Baroda Kant v. Sreenath, (1912) 18 I C 211.
10. Ganga Sahai v. Shib Charan, (1914) 1 A I R All 407=25 I C 499.
11. Siti Kanta Pal v. Radha Gobinda Sen, (1929) 16 A I R Cal 542=119 I C 293=56 Cal 927=33 C W N 517.
12. Kunjammal v. Rathnam Pillay, (1922) 9 A I R Mad 5=66 I C 11=45 Mad 633 = 42 M L J 417.
13. Rambhai v. Vallabbhai, (1921) 8 A I R Bom 430=62 I C 65=45 Bom 1027=23 Bom L R 422.
14. Ishaqlal v. Pujarilal, (1925) 12 A I R Lah 344 =86 I C 595=26 P L R 110.
15. Nazir Hussain v. Aulad Haider, (1926) 13 A I R Pat 460=96 I C 1010.
16. Behari Lal v. Ashutosh Banerjee, (1925) 12 A I R Cal 788=87 I C 19=41 C L J 379.
17. Sonba v. Dattatraya, (1923) 10 A I R Nag 192 =71 I C 831.
18. Narain v. Ikram, (1925) 12 A I R Nag 270= 85 I C 81.
19. Ramchandra Rao v. Venkat Rao, (1920) 7 A I R Nag 26=54 I C 936=16 N L R 76.
20. Natharam v. Kalu, (1939) 26 A I R Nag 69= 171 I C 121=I L R (1938) Nag 21=20 N L J 12.
21. Earl De La Warr v. Miles, (1881) 17 Ch D 535 =50 L J Ch 754=44 L T 487=29 W R 809.
22. Bhola Nath Nundi v. Midnapore Zemindary Co., (1904) 31 Cal 503=31 I A 75=8 C W N 425=8 Sar 611 (P C).
23. Chunder Coomar Mookerji v. Koylash Chunder Sett, (1881) 7 Cal 665.
24. Venkiah v. Krishnamoorthy, (1915) 2 A I R Mad 795=19 I C 80=38 Mad 141=24 M L J 552.
25. Maneklal Harilal v. Maneklal Gordhan, (1932) 19 A I R Bom 574 = 141 I C 686 = 57 Bom 186=34 Bom L R 1150.

acquired any right of easement under his sale deed (P-2) from Laxmi Devi; nor does he rely on any grant apart from it. He claimed the easement on ground of prescription and he succeeded in proving his acquisition of that right so far as he, his servants and carts were concerned. His user which culminated in his prescriptive right had begun in 1908 when the latrine was not in existence. In the plan submitted by the defendant to the Municipality in 1922 (P-18) a latrine was shown in the extreme north of the west corner, i. e. towards the Dangerfield Road. The lower Appellate Court declined to believe that there was any regular latrine before even at the place shown in the plan. It is significant that Laxmi Devi protested against the construction of the latrine in the place where it stands (*see* Ex. P-13). The way could not therefore have been used as a sweeper's passage before 1922. It is clear therefore that the user of the land for this purpose began in or after 1922 and the statutory period of 20 years was interrupted by the institution of this suit in 1933. The defendant seeks to escape out of this difficulty by saying that the passage for sweeper must be presumed to have been acquired as being implicit in the general right of way. The answer clearly is that he did not acquire any general right of way but only for particular purposes already specified.

The defendant acquired the servitude by prescription, in consequence of his enjoyment and user in a particular manner and the requisite length of user would only culminate in a right of enjoyment of the particular description and no other. The presumption of constructive enjoyment can no more be made in favour of a person acquiring easement by prescription than the presumption of constructive possession be made in favour of a trespasser acquiring prescriptive title. If there is a grant, it is construed against the grantor but in case of prescriptive right, its extent must be measured and determined by the accustomed user. It is on this principle that a servitude acquired for one purpose cannot lawfully be used for another: *see* 13 Cal 136[26] at p. 142. S. 28 (a), Easements Act, expressly provides that a right of way of one kind does not include a right of way of another kind. In 24 Bom 188[27] it was held that a right of way enjoyed for agricultural purposes could not be converted into a way for carrying timber. In 22 Bom L R 1131[28] the defendants who had established their right of passage for persons, cattle and carts were held not entitled to use it as a way for sweepers. The argument that the right of way acquired by the defendants should be deemed to have been acquired for all purposes connected with the beneficial enjoyment of his house cannot prevail unless it was proved that it was used for a variety of purposes in general as was explained in the leading case in (1838) 4 M & W 245.[29] The contention that it being a "formed road" its user for a variety of purposes should be presumed was negatived in 26 Cal 311[30] at p. 313. Fry L. J. applied that description in (1888) 20 Q B D 225[31] to the land which was a formed roadway bounded on either side by turf banks and hedges and which, although it ran through defendant's land, had been used by plaintiff for many years and had been from time to time repaired by him. Nor can such a presumption be based on the circumstance that the houses occupied by the parties had at one time belonged to a common owner unless the way was necessary for enjoying the tenement which was purchased by the defendant. Such a right arises by implication of law and is regarded as an implied grant.

I need not dilate on the well-recognized distinction made in this particular species of easements: viz. those which are easements of necessity and those which are merely necessary for the reasonable enjoyment of the property granted. An easement of necessity is one without which the property retained upon the severance cannot be used at all; it is not one which is merely necessary to the reasonable enjoyment of that property: *see* (1902) 2 Ch 557.[32] That is the principle

26. Jadulal Mullick v. Gopalchandra Mukerji, (1886) 13 Cal 136=13 I A 77=4 Sar 713 (P C).

27. Desai Bhaoorai v. Desai Chunilal, (1900) 24 Bom 188=1 Bom L R 658.

28. Chintamani v. Ratanji, (1920) 7 A I R Bom 233=59 I C 426=22 Bom L R 1131.

29. Cowling v. Higginson, (1838) 4 M & W 245=1 H & H 269=7 L J (N S) Ex 265=51 R R 555.

30. Ram Narain v. Kamala Kanta, (1899) 26 Cal 311.

31. Thomas v. Owen, (1888) 20 Q B D 225=57 L J Q B 198=58 L T 162=36 W R 440=52 J P 516.

32. Union Lighterage Co. v. London Graving Dock Co., (1902) 2 Ch 557=71 L J Ch 791=87 L T 381=18 T L R 754.

underlying S. 13 (e), Easements Act. In the present case the latrine was not built until 1922 at the place where it stands, that is 14 years after the defendant's purchase of his house, and it cannot be predicated that he was using the way as a passage for his sweepers at that time. Moreover, right of way is not a continuous and apparent easement. The case therefore cannot fall within the terms of S. 13 (f), Easements Act. An attempt was made to show that it was a way for all purposes for the reason that it was a common way; but, it cannot succeed in view of the fact that the entire land belongs to the plaintiff alone. It is only when the land that is used for passage is found to belong to both the neighbours that the way might be presumed to be used for all purposes (*see* Peacock's Easements, p. 511, Edn. 3.) The learned counsel for the defendant contended that a part of the land belonged to the defendant as it was not expressly included in the plaintiff's sale deed, Ex. P.5 dated 22nd October 1927. It must first be remarked that the land which was then being actually used as a passage was specifically mentioned in that sale deed and it must follow that the defendant had no title to this particular piece of land. His having filed Civil Suit No. 32 of 1927=19 of 1928 for specific performance itself refutes the contention. For the foregoing reasons, it must be held that the defendant did not acquire the right to use the way as a passage for his sweepers.

The next contention relates to the western gallery overhanging the plaintiff's land and the shutters of the doors and windows, when opened, projecting over the plaintiff's land. In this connexion, it is contended that about 3′ width of land behind the defendant's shop building, i. e. towards the west belonged to the defendant. As I see no error of law vitiating the lower Appellate Court's concurrent finding in this behalf, I cannot interfere with it. It is true that neither of the plaintiff's sale deeds of 1919 and 1927 covers some portion of the land on the south of the defendant's shop building, but the lower Appellate Court has given sound reasons why it should be presumed to have been transferred to the plaintiff. The defendant cannot claim anything more than was actually sold to him. The plaintiff purchased by his two sale deeds the residue of the land, and it must be presumed that Mt. Laxmi Devi, the seller, did not intend to reserve any land for herself. Moreover, in both the sale deeds of 1919 and 1927 (P.3 and P.5) she described the defendant's building as forming the boundary of the land sold to the plaintiff. In case of a discrepancy between dimensions and boundaries, the rule is now well-established that the area specified within the boundaries will pass whether it be less or more than the quantity specified. (*See* 15 C P L R 163.[33]) The contention must therefore fail.

It is next urged that the plaintiff's suit as affecting the gallery and the shutters is barred by time under Art. 120, Limitation Act. Whether this Article or Art. 142 would come into operation depends upon the nature of the relief claimed. The learned counsel who relies on 13 Mad 445,[34] 26 All 391,[35] 49 Bom 586,[36] A I R 1926 Nag 25[37] and 33 Cal 203[38] would be on firmer ground had the relief been one for injunction simpliciter under S. 54, Specific Relief Act, but, in this case, it is coupled with a claim for possession of land and the defendant also asserted his title to the land beneath the projections. The cause of action under S. 54, Specific Relief Act, is breach of an obligation existing in favour of the owner. If the defendant had admitted the plaintiff's title to the land beneath, the contention would prevail but his attitude has been otherwise. So far as the gallery is concerned, the defendant was unquestionably a trespasser in view of the maxim "whosoever has the soil, also owns to the heavens above and to the centre of the earth." This principle was applied in 29 Mad 511[39] to a case of a cornice overhanging neighbour's land and it was held that the projection constituted a trespass. The gallery has therefore been rightly ordered to be demolished. As regards the projecting shutters the trespass is not so pronounced. It is but nominal and the land is not of any present use to the plaintiff except theoretically as a part of the passage left between the two buildings. Since however the plaintiff is the *de jure* owner of the

33. Bhayalal v. Dwarka Prasad, (1902) 15 C P L R 163.
34. Kanakasabai v. Muttu, (1890) 13 Mad 445.
35. Waziran v. Babu Lal, (1904) 26 All 391.
36. Imambhai Kamruddin v. Rahimbhai, (1925) 12 A I R Bom 373=87 I C 977=49 Bom 586 =27 Bom L R 503.
37. Nathu v. Sheosa, (1926) 13 A I R Nag 25=89 I C 636.
38. Tituram Mukerji v. Cohen, (1906) 33 Cal 203 =32 I A 185=2 C L J 403=9 C W N 1703= 8 Sar 908 (P C).
39. Rathina Velu v. Kolanda Velu, (1906) 29 Mad 511=16 M L J 281.

land, it is but reasonable that the defendant should pay for his enjoyment of it. I would therefore give him the option either to carry out the lower Appellate Court's order or pay Re. 1 per annum as rent to the plaintiff.

Both the appeals substantially fail and are dismissed with costs. The costs of the Courts below will be paid as ordered by the lower Appellate Court. Counsel's fee Rs. 50 in each appeal.

D.S./R.K. *Appeals dismissed.*

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STONE C. J. AND CLARKE J.

Meghaji Jairam Bhate and another — Insolvents — Appellants.

v.

V. D. Bhake, Receiver and another, Creditor — Respondents.

Miscellaneous Appeal No. 113 of 1936, Decided on 22nd September 1938, from order of Dist. Judge, Wardha, D/- 4th April 1936.

Provincial Insolvency Act (1920), S. 37—Receiver applying for annulment of insolvency—Court annulling adjudication and ordering sale of property in receiver's hands for distribution of proceeds among creditors—There was no vesting order—Reverter held subject to condition to distribute proceeds among creditors.

On an application of a receiver for annulment of adjudication the Court passed the following order: " . . . . order that adjudication is annulled subject to the property in the hands of the receiver which will be sold and assets will be distributed amongst the scheduled creditors." The former insolvents applied for the return of their moveable property and account books. There was no vesting order and no person was appointed under S. 37:

Held that the reverter was subject to the condition that the property would be sold and proceeds would be distributed among the creditors and it was all that was necessary: *A I R 1933 Pat 84; A I R 1938 Nag 312; A I R 1934 Lah 468; A I R 1935 Mad 826; A I R 1933 Cal 386; A I R 1936 Rang 284 (F B) and A I R 1933 Rang 223 (F B), Disting.; A I R 1931 All 71, Ref.* [P 204 C 2]

T. J. Kedar and R. G. Rau — *for Appellants.*

M. Adhikari and M. D. Khandekar — *for Respondents 1 & 2 respectively.*

Order.—This matter turns upon the true construction of an order made under the Provincial Insolvency Act, S. 37. In order to understand the point at issue, some facts are necessary. Meghaji and Jamnadas, sons of Jairam Bhate, were adjudged insolvent on 3rd October 1931 and Mr. V. D. Bhake was appointed receiver on 27th April 1932. On 30th April 1932 he filed an application to annul a sale. Apparently (the order sheet is not clear), on 17th February 1934 the sale was annulled and on 28th February 1934, Mr. Bhake filed an application for permission to sell the property the transfer of which was annulled and permission was granted. On the same date he also applied to annul the adjudication and on 13th March 1934 the adjudication was annulled. The order appears in the order sheet for 13th March 1934 as

> . . . order that the adjudication is annulled subject to the property in the hands of the receiver which will be sold and assets will be distributed amongst the scheduled creditors.

It will be obvious there is no vesting order made and no person appointed under S. 37 or at all. The application to annul asked that "the property of the insolvents be ordered to vest in the receiver as before." The order as published in the Gazette is a simple annulment order; it is not made contingent or conditional upon anything, no appointee is mentioned. On 29th March 1934, the former insolvents asked for the return of their moveable property and account books in the hands of the receiver. On 26th April 1934, that application was disposed of in the following words:

> As the adjudication is annulled subject to the creditor (sic) whatever assets have been realized and will be (sic) realised will (sic) vest with (sic) receiver for the benefit of the creditors. This application is not maintainable.

Subsequently, property was put up for sale by the receiver and the alienation was challenged on a variety of grounds. These have now reduced to one, viz: Had the receiver power to realize the assets? It should be noted that there is here no such question as arose in A I R 1938 Nag 312.[1] Before the annulment of the adjudication the impugned alienation had been set on one side. The relevant words in S. 37 are:

> Where an adjudication is annulled . . . . dispositions . . . . and payments duly made . . . . acts therefore done, by the Court or receiver, shall be valid; but . . . . the property . . . . shall vest in such person as the Court may appoint, or, in default of any such appointment, shall revert to the debtor . . . . on such conditions (if any) as the Court may, by order in writing, declare.

In our opinion this is not a case of an appointee. There is no vesting order made under Sec. 37. The position is therefore as follows: When a person is adjudged insolvent and a receiver appointed the property of the insolvent is vested by the Court in

1. Suleman v. Laxman, (1938) 25 A I R Nag 312 =177 I C 760.

the receiver. This was done by order of date, 27th April 1932 which runs inter alia as follows : "From to-day the insolvents' estate vests in him (Bhake). The receiver to realize the property . . . ." The receiver did realize the property, set aside an alienation and so forth. The result was that the estate in his hands became X. It is not disputed that at the time of annulment (1) there was a receiver, (2) the receiver had estate X in his hands, (3) X was property belonging to the insolvents' estate vested in the receiver, (4) apart from a vesting in an appointee under Sec. 37, X would have to go back to the insolvents either unconditionally or conditionally. Here a matter of disagreement arises. It is said that the gazetted annulment order is unconditional and therefore the property goes back to the insolvents unconditionally. On the other hand it is said this was a conditional order, or in any case there should now be a vesting order : 15 Lah 698.[2] We consider Sec. 37 is clear on the point. The property, which is vested in the receiver,

> shall revert to the debtor . . . . on such conditions (if any) as the Court may, by order in writing, declare.

The Court here, by order in writing, has declared the following conditions :

> . . . . . subject to the property in the hands of the receiver which will be sold and assets will be distributed amongst the scheduled creditors.

Though the English is subject to criticizm the sense is reasonably plain. The Court is annulling an insolvency but is providing that there shall be no reverter of the property vested in the receiver under the receiving order to the debtors but that property is to be sold and the proceeds of the sale distributed amongst the creditors. Of course if there were a balance left that balance would go to the debtors the condition having been complied with. But it is said there is a mass of authority against this view.

In 12 Pat 163[3] an order vested the property in the receiver but that order was passed some six weeks after the order of annulment (*see* at page 169). There was no condition attached. It was held that the concluding words of Sec. 37 relate to the reverter to the quondam insolvent not to the vesting in the appointee. It was decided that the vesting order could be made after the annulment. The point does not arise here because here there has been no vesting order. Here there is a condition attached to reverter and that is all that is necessary. 58 Mad 908[4] at page 924 is concerned with the question whether the appointee is a mere custodian or whether the Court can give him directions enabling him to realize and distribute. We do not want anything we said in A I R 1938 Nag 312[1] to suggest that in our opinion there is no such power. We were not there expressing any view on that point. We were concerned not with a case of realizing property (X in the example above put) but a case of adding to X, Y (property which at the date of annulment was not the debtor's but a third party's)—an entirely different case. This present case is not however concerned with the Court's power to give instructions to an appointee. There is no appointee. This is a case in which the annulment has been made by an order which makes the reverter conditional. 15 Lah 698,[2] is a case of a careless order of annulment made apparently ex parte no person being present. No condition was attached, no appointee mentioned, no vesting order made. The result was that the property reverted to the quondam insolvent unless the error could be corrected by making a vesting order. It was held that such a vesting order could be made. It does not touch this case. 60 Cal 259[5] is a case of an ambiguous order of annulment. No vesting order was made and the only condition imposed was that

> the money to the credit of the insolvent's estate be kept in the hands of the Official Assignee pending further order of the Court.

It was held that the intention was to vest the estate in the Official Assignee. It does not touch this case. 14 Rang 254[6] decides that where there is an appointee he holds on behalf of the debtor, not on behalf of the creditors. That is not the present case. Nor were we concerned in A I R 1938 Nag 312[1] with the question whether the appointee holds the property (X in the example given above) forming the estate at the time of the annulment order for and on behalf of the debtor or otherwise. We

2. Ishar Das v. Mt. Fatima Bibi, (1934) 21 A I R Lah 468=153 I C 993=15 Lah 698=36 PLR 499.
3. Chouthmal Bhagirath v. Jokhiram, (1933) 20 A I R Pat 84=141 I C 836=12 Pat 163=13 P L T 775.
4. Veerayya v. Sreenivasa Rao, (1935) 22 A I R Mad 826=158 I C 1060=58 Mad 908=69 M L J 364 (F B).
5 In re Keshab Lal Dhar, (1933) 20 A I R Cal 386=144 I C 214=60 Cal 259.
6. Annamally Chettiar v. R. K. Bannerjee, (1936) 23 A I R Rang 284=163 I C 217=14 Rang 254 (F B).

see great practical difficulties in regarding him as in a position analogous to a bailee but the point does not here arise. So also 11 Rang 287[7] is concerned with an entirely different point, viz. the power to set aside an alienation. 53 All 313[8] is somewhat nearer this case but does not assist the appellant. It follows that the appeal fails and is dismissed with costs.

S.G./R.K. *Appeal dismissed.*

7. Jaing Bir Singh v. R. K. Bannerjee, (1933) 20 A I R Rang 223=145 I C 320=11 Rang 287 (F B).
8. Panna Lal v. Official Receiver, (1931) 18 A I R All 71=134 I C 848=53 All 313=1931 A L J 18.

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* A. I. R. 1939 Nagpur 205

GRILLE AND NIYOGI JJ.

M. Abdul Hussain — Applicant.

v.

Mohmad Ebrahim Riza — Opposite Party.

Civil Revn. No. 340 of 1938, Decided on 13th February 1939, from order of Dist. Judge, Nagpur, D/. 25th April 1938.

*** Mussalman Wakf Act (1923), Sec. 10— Scope and object of Act explained — When existence of wakf itself is in dispute inquiry under S. 10 cannot be held.**

Considering the terms of the enactment and the scope and purpose of the Act it is clear that the Legislature intended to secure merely a record of the extent of income of wakf properties for the purpose of providing some control on the management of properties which are admittedly wakf. It could not have intended to include in its scope the enquiry into the vital question whether the disputed property is wakf property and the person in possession of it is a mutwalli, which are questions of fundamental character such as could be subject-matter of a suit alone. Where therefore the existence of the wakf itself is in dispute the District Judge has no jurisdiction to enquire under S. 10 : *Case law referred.* [P 207 C 1]

Nisar Ali — *for Applicant.*

A. V. Wazalwar and S. R. Mangrulkar— *for Opposite Party.*

Order.—This is an application for revision against an order of the District Judge, Nagpur, passed on 25th April 1938 in Miscellaneous Judicial Case No. 54 of 1937. The question is whether the District Judge has jurisdiction under Sec. 10, Mussalman Wakf Act, 42 of 1923, to enquire into the existence of a wakf when that is in controversy. The applicant made an application under S. 10, Mussalman Wakf Act, alleging that in 1894 a wakf was created by means of a registered deed of certain malik makbuza field situated at Mehdibagh, Nagpur. The non-applicant was alleged to be in possession of the wakf property as mutwalli on behalf of the Bohra Shia Dawoodi Mahomedan community. According to the applicant therefore it was the duty of the non-applicant under Secs. 3 and 4, Wakf Act, to furnish to the Court a statement of particulars in respect of that property and to render an account of the income and expenditure of the wakf property under S. 5 of the Act, and as he failed to carry out his duty as aforesaid the applicant prayed for an imposition of the penalty on him in accordance with Sec. 10 of that Act. The non-applicant denied the existence of the wakf and claimed the property to be his personal property. He questioned the power of the District Judge to try the issue whether the property was wakf property and whether he was the mutwalli of it. The learned District Judge on an elaborate survey of the case law came to the conclusion that he had no jurisdiction and dismissed the application.

The question came up for consideration before several High Courts in India as will appear from 52 All 167,[1] 57 All 754,[2] A I R 1927 Pat 189,[3] 7 Luck 601[4] and A I R 1938 Pat 137.[5] The general trend of opinion is against the applicant's contention. The cases in which the question received elaborate treatment are A I R 1927 Pat 189[3] and 7 Luck 601.[4] Between these two cases there is a direct conflict of opinion on the question and we have consequently to decide which opinion harmonizes with the intention of the Act. In A I R 1927 Pat 189[3] Kulwant Sahay J. on a consideration of the scope and the terms of the Act expressed the view that the Act applied only to admitted wakf and not to properties which are denied to be wakf properties. In 7 Luck 601[4] the question was considered by a Full Bench of three Judges. Wazir Hasan C. J. and Raza J. were unanimous in holding that Sec. 10 of that Act invests the Court with jurisdiction to try questions

1. Nasrulla Khan v. Wajid Ali, (1930) 17 A I R All 81=118 I C 717=52 All 167=1930 A L J 233.
2. Wahid Hasan v. Abdul Rahman, (1935) 22 A I R All 254=157 I C 1088=57 All 754=1935 A L J 307.
3. Ali Mohammad v. Collector of Bhagalpur, (1927) 14 A I R Pat 189=101 I C 207=8 P L T 233.
4. Mohammad Baqar v. Mohammad Casim, (1932) 19 A I R Oudh 210=138 I C 725=7 Luck 601=9 O W N 538 (F B).
5. Nanhe Shah v. Abdul Hasan, (1938) 25 A I R Pat 137=174 I C 152=19 P L T 617.

of title summarily if the Court so wishes to do. It was however conceded that the Act does not lay down any obligation on the Court as to the limits to which it should carry on any enquiry and that it was also open to the Court to decline to launch on an elaborate enquiry if the allegations of parties gave rise to a controversy fit to be determined in a regular suit. In their Lordships' opinion the jurisdiction vested in the Court was discretionary and in view of the facts of that case they took the view that the Court could well exercise its discretion in making an enquiry. With due respect to the opinion of the learned Judges we find considerable difficulty in accepting it. The decision in the circumstances of that case was unexceptionable as the only question which arose in that case was whether or not the will produced in the case purported to create a wakf. It involved no further enquiry than that of interpreting the terms of that document. It cannot reasonably be contended that a Court which has the power to admit documentary evidence would be incompetent to construe its terms. The question however becomes fundamental when a party denies the genuineness of the instrument produced by his adversary or asserts that it has no bearing on his title to or right to hold possession of the disputed property. When such a basic question of title is raised, it is obviously impossible to prescribe any limits to the enquiry. It is ordinarily bound to assume the form of a suit. The question is whether the framers of the Act ever intended to confer such wide powers on the Court.

The answer to the aforesaid question must be found on the proper interpretation of the Act itself. The Act seeks to make provision for the better management of wakf property and for ensuring the keeping and publication of proper accounts in respect of such properties. That being the scope and purpose of the Act, the provisions which follow must be construed so as to keep the effect of the Act within those prescribed limits. S. 2 contains the definition of the words 'mutwalli' and 'wakf' among others. S. 3 imposes an obligation on every mutwalli within six months from the commencement of the Act to furnish a statement containing certain particulars and requires that the statement should be accompanied by a copy of the deed or instrument created thereby or if no such deed or instrument is in existence it should contain full particulars so far as are available of the original nature and objects of the wakf. S. 4 provides for publication of particulars. S. 5 requires the mutwalli to file a statement of accounts within a stated period and S. 6 provides for their audit. Ss. 7 to 9 deal with some minor particulars. S. 10 prescribes penalty for failure on the part of the mutwalli to carry out the duties imposed on him under Ss. 3, 4, 5 and 6. It is pertinent to observe that the word "enquiry" occurs only in Sec. 4 (2) and that too in connexion with the elucidation of further particulars or documents in order that full information may be obtained regarding the original nature of the wakf or the condition of the wakf property. It is clear that Ss. 3, 4 and 10 postulate the existence of the wakf and on that premise the Act makes provisions authorizing the Court to take steps for ensuring the keeping and publication of proper accounts and for the better management of the wakf property. The transparent intention of the Legislature is to provide for effective control and supervision of properties which are admittedly wakf. The power given to the Court is to be exercised to enforce the duties and responsibilities of the mutwalli in respect of the wakf property in his possession and it must be presumed that the Legislature conferred such jurisdiction on the Court as would enable it to attain that object.

The reference to particulars regarding the original nature and object of the wakf in S. 3 does not signify conferral of power to try an issue as to whether certain person is a mutwalli or certain property is wakf. These particulars are required to be furnished only in the absence of the instrument creating the wakf. If the document is produced, a question of its interpretation may arise and if it is not produced it may be open to the Court to enquire into the origin and nature of the objects of the wakf for the purpose of securing a complete information regarding the wakf and that would be incidental to the Court's duty of effectively controlling the management of the wakf. It is remarkable as pointed out by Srivastava, J., in 7 Luck 601[4] that the Act does not contain any provision requiring the Court to enter upon an inquiry as to the existence of the wakf, as is clearly laid down in S. 5, Charitable and Religious Trusts Act, 14 of 1920. The absence of such a clear provision on an important issue which is bound to arise in cases relating to wakf properties negatives the assumption that the Legislature intended that the

Court should deal with the controversy of such a fundamental nature. It is true that if it is held that the Court's jurisdiction is excluded when an alleged mutwalli denies his character as a mutwalli it would defeat the very object which the Legislature intended to attain by enacting this statute, but, on the other hand, it must be remembered that a person on whom a fine is inflicted under Sec. 10 of the Act has no remedy to get back his fine in case he succeeds in getting a declaration in a regular suit that the disputed property is not wakf. In one case there may be no hardship as it is always open to an aggrieved party to seek recourse to his remedy in the ordinary course but in the other case there is positive hardship against which the Act has provided no redress. The Act does not provide for any appeal or revision against orders passed under the Act including that imposing a fine under S. 10. It is inconceivable that the Legislature would give on the one hand wide judicial powers to the extent of adjudicating on issues relating to title and on the other hand denying the aggrieved party the remedy by way of appeal or revision.

Considering the terms of the enactment and the scope and purpose of the Act it is clear that the Legislature intended to secure merely a record of the extent of income of wakf properties for the purpose of providing some control on the management of properties which are admittedly wakf. It could not have intended to include in its scope the enquiry into the vital questions whether the disputed property is wakf property and the person in possession of it is a mutwalli, which are questions of fundamental character such as could be the subject-matter of a suit alone. We are therefore of opinion that where the existence of the wakf itself is in dispute the District Judge has no jurisdiction to enquire under S. 10, Mussalman Wakf Act. We dismiss the application with costs. Counsel's fee Rs. 25.

N.S./R.K. *Application dismissed.*

A. I. R. 1939 Nagpur 207

NIYOGI J.

Kashinath Ganesh Teli and another — Appellants.

v.

Ganesh Bhola Teli, Transferee and another, Insolvent — Respondents.

Misc. Appeal No. 34 of 1937, Decided on 20th January 1939.

(a) Provincial Insolvency Act (1920), S. 28 (6) — Power of secured creditor to realize his security does not authorize him to secure out and out sale of equity of redemption from insolvent in satisfaction of his own charge decree — Such sale during pendency of insolvency proceedings is void.

The power of the secured creditor to realize his security does not authorize him to secure an out and out sale of the equity of redemption in satisfaction of his own charge decree, because the equity of redemption after adjudication vests in the Court under S. 28 (2) and thereafter the insolvent becomes wholly incompetent to deal with the property. To be able to dispose of interest in the property the transferor must have subsisting interest in it. When the interest devolves on somebody else by operation of law it could not validly be transferred by the person after he is divested of it. Since by virtue of sub-s. 7 of S. 28, Provincial Insolvency Act, the order of adjudication relates back to and takes effect from the date of the presentation of the petition under which it is made, the transfer made by the insolvent during the pendency of the insolvency in full satisfaction of charge decree must be pronounced to be void and inoperative: *A I R 1927 P C 108, Rel. on ; A I R 1926 Nag 29, Expl.; A I R 1921 All 232, held overruled by A I R 1927 P C 108.* [P 208 C 1, 2; P 209 C 1]

(b) Provincial Insolvency Act (1920), Ss. 53 and 54 — Transfer made after presentation of creditors' petition on which order of adjudication is passed is not covered by Ss. 53 and 54.

Sections 53 and 54 deal with transfer which is voidable at the option of the creditors. The transfer which is made after the presentation of the creditors' petition on which an order of adjudication was passed, is void ab initio and is not covered by S. 53 or S. 54. [P 209 C 1]

W. R. Puranik, R. K. Rao and M. D. Khandekar — *for Appellants.*

B. R. Mandlekar and R. N. Padhye — *for Respondent 1.*

Order. — This is an appeal under S. 75 (1), Provincial Insolvency Act, against the judgment passed on 15th December 1936 by the District Judge, Nagpur, in Misc. Civil Appeal No. 34 of 1936. The appellants are the creditors of respondent 2 who was adjudged insolvent on 1st March 1935 on the application made by them under S. 9, Provincial Insolvency Act. That application was presented on 27th October 1934.

Respondent 1 Ganesh claimed to be a creditor of Ramchandra on the basis of an award dated 29th June 1934. He instituted proceedings for filing the award and a decree to be passed in terms thereof in the Court of the third Subordinate Judge, Second Class, Nagpur. He obtained a decree whereby the defendant was ordered to pay to him Rs. 863-2-0 in four instalments of Rs. 215-12-6 payable on 10th November 1934, 10th November 1935, 10th November 1936 and 10th November

1937 with interest at 6 per cent. per annum, subject to the condition that in default of any two instalments the whole amount would become exigible. That debt was declared a charge on the defendant's two houses which are particularized in the decree. On 13th February 1935, Ramchandra during the pendency of the insolvency proceedings sold the two houses to respondent 1 Ganesh professedly in full satisfaction of the charge decree passed against him. That sale deed recites repayment of Rs. 263-2-0 leaving a balance of Rs. 600 to liquidate which the two houses were sold. The appellants applied on 4th May 1935 for annulment of the sale dated 13th February 1935 under S. 53, Provincial Insolvency Act. The Court of first instance passed an order annulling the sale but the lower Appellate Court, having taken the view that the power of an incumbrancer to realize his security was not affected by the adjudication order, reversed the original Court's order and dismissed the creditors' application.

I find it difficult to uphold the lower Appellate Court's order. It took the view that S. 28 (6), Provincial Insolvency Act, operates to prevent the vesting of the insolvent's interest in the property in the receiver. The learned counsel for the respondents has addressed vigorous argument in support of the lower Appellate Court's view and contended that the power of the secured creditor to realize his security authorized him to secure an out and out sale of the equity of redemption in satisfaction of his own charge decree. He relied on 43 All 555[1] and A I R 1926 Nag 29.[2] It was indeed held in the last mentioned case that the power to realize security embraces the power to effect a private settlement. In that case, during the pendency of the proceedings in insolvency, the insolvent executed a mortgage in favour of a third party to pay off the first mortgagee and the issue as to the validity of that mortgage was raised in a suit filed on the foot of that mortgage. Although the learned Judges who decided that case took the view set forth above they qualified it by the remark that neither the receiver nor the Court that had appointed the receiver took any objection to the mortgage. That means that the learned Judges were of opinion that the second mortgage executed by the insolvent was not valid unless it was consented to by the Insolvency Court or the receiver.

The other case relied on by the learned counsel for the respondents overlooks the important qualifying observation made in 43 All 555[1] when it followed that case. At all events the view enunciated in 43 All 555[1] must now be regarded as overruled by the decision of their Lordships of the Privy Council in 54 Cal 595.[3] In that case a suit to enforce a mortgage was instituted against the insolvent alone without the receiver being impleaded in the suit, and on the question as to the validity of the decree as against the receiver the learned Judges of the Calcutta High Court interpreted S. 16 (5) of the old Act which corresponds to S. 28 (6) of the Act of 1920 as entitling a secured creditor to deal with the security as though there had been no vesting in the Court or the receiver. Their Lordships of the Privy Council unequivocally disapproved of that construction and pointed out that although the rights of the secured creditor over a property are not affected by the adjudication order, that does not in the least imply that an action against him may proceed in the absence of the person to whom the equity of redemption has been assigned by the operation of law. Their Lordships further emphazised the point by the observation that the official assignee alone is entitled to transact in regard to the equity of redemption for the reason that he and not the insolvent has the sole interest in the subject-matter of the suit. Their Lordships took the opportunity to point out further that the contrary view would encourage collusive arrangements between the secured creditor and the insolvent and might involve the sacrifice of valuable equities of redemption which ought to be made available for the benefit of the unsecured creditors.

The lower Appellate Court obviously confused the security with the equity of redemption and overlooked the important fact that the equity of redemption after adjudication vests in the Court under S. 28 (2) and that thereafter the insolvent becomes wholly incompetent to deal with the property. To be able to dispose of interest in the property the transferor must have

1. Shyam Sarup v. Nand Ram, (1921) 8 A I R All 232 = 63 I C 366=43 All 555=19 A L J 511.
2. Ratanlal v. Govinda, (1926) 13 A I R Nag 29 =90 I C 349.
3. Kala Chand v. Jagannath Marwari, (1927) 14 A I R P C 108=101 I C 442=54 I A 190=54 Cal 595 (P C).

subsisting interest in it. When the interest devolves on somebody else by operation of law it could not validly be transferred by the person after he is divested of it. Since by virtue of sub-s. 7 of Sec. 28, Provincial Insolvency Act, the order of adjudication relates back to and takes effect from the date of the presentation of the petition under which it is made, the transfer made by the insolvent during the pendency of the insolvency proceedings must be pronounced to be void and inoperative. The lower Appellate Court was indeed right in holding that the case was not covered by S. 53 or S. 54, Provincial Insolvency Act. Those Sections deal with transfer which is voidable at the option of the creditors but the transfer in the present case, having been made after the presentation of the creditors' petition on which an order of adjudication was passed, was void ab initio as pointed out above. The result is that the lower Appellate Court's order is set aside and that of the original Court restored. Counsel's fees Rs. 40. The respondent will pay the appellants' costs in all the Courts.

D.S./R.K. *Appeal allowed.*

A. I. R. 1939 Nagpur 209

NIYOGI J.

Tukaram Manbaji Yeole—Plaintiff — Appellant.

v.

Shrikrishna Ramratan Marwadi and another — Defendants—Respondents.

Second Appeal No. 16 of 1937, Decided on 9th December 1938, from appellate decree of 4th Addl. Dist. Judge, Nagpur, D/- 24th September 1936.

Transfer of Property Act (1882), S. 55 (6) (b) — Rights of vendee — Sale of minor's property by guardian — Purchaser has charge on minors' property for earnest money paid to guardian who contracts to sell portion of it to remove pressure on minor's estate from creditors.

Where a guardian in order to remove pressure on the estate of the minors who were badgered by their creditors for debts binding on their estates agrees to sell a portion of their property and receives earnest money, the sale contemplated by such agreement is of a nature that is binding on the minors; and if the guardian declines to fulfil the agreement the purchaser is entitled to a charge on the property affected by the contract of sale in his favour to the extent of the minor's interest therein for the amount of any purchase money properly paid by him in anticipation of the agreement being implemented by a regular conveyance. All that the Court has to see is whether or not the sale of the property was dictated by legal necessity or by considerations of benefit to the minors.

[P 210 C 1]

M. N. Gadgil — *for Appellant.*

V. R. Dhoke — *for Respondents.*

Judgment. — This is a plaintiff's appeal from a reversing judgment of the Fourth Additional District Judge, Nagpur, delivered on 24th September 1936 in Civil Appeal No. 38-B of 1935. The facts are that on 18th March 1934, defendant 1, Mt. Radhabai, acting as guardian of her sons, defendants 2 and 3, Shrikisan and Sitaram, entered into an agreement to sell their fields specified in the plaint for Rs. 8750 out of which she received Rs. 500 in cash and the balance was to be received in the shape of an undertaking by the purchaser to satisfy the seller's debts due to other creditors. The defendants having failed to implement the agreement, the purchaser filed a suit out of which this appeal arises to recover Rs. 500 which he had paid as earnest money. He specifically alleged in the plaint that the transaction was for the benefit of the minors. The defendants did not expressly deny that it was beneficial to them and on the contrary through the oral statement made by their pleader admitted that at the time of the contract itself the purchaser had undertaken to pay Rupees 8250 in this way : Rs. 3000 to Bhikulal Nabira of Katol, Rs. 2400 to Govindrao Joshi of Paradsinga and Rs. 2850 to Asaram Mathuradas of Wadona. It is pertinent to notice that the defendants after having broken off the agreement with the plaintiff sold off their fields by two sale-deeds to satisfy the debts of their creditors. Both the Courts below have found that the minors had received benefit, but while the original Court decreed the plaintiff's claim, the lower Appellate Court dismissed the suit on the ground that unless it was charged on the property of the minors as laid down in 13 N L R 109[1] that money was not liable to be paid out of the minors' estate.

I have no doubt that the lower Appellate Court's view is erroneous. All that the Court has to see in such a case as this is whether or not the sale of the property was dictated by legal necessity or by considerations of benefit to the minors. In the present case there is overwhelming evidence to show that the minors were badgered by their creditors. They did not plead

1. Jhitibai v. Tejmal, (1916) 3 A I R Nag 11=41 I C 35=13 N L R 109.

that the old debts were such as were not binding on them under their personal law. It was natural for the guardian to remove the pressure of the minors' estate, to have sold a part of their property. It must therefore be held that the sale which was contemplated in the agreement for sale under consideration was of a nature that was binding on the minors.

The only question that remains for consideration is whether the lower Appellate Court's view that unless the minors' estate was specifically charged it could not be liable is correct. That principle was no doubt enunciated in 13 N L R 109,[1] but in 24 N L R 54[2] it was explained by Prideaux A. J. C., who observed that the minor's estate would be liable for the obligation incurred by the guardian under the personal law to which he is subject. The proposition is now well-settled that the minor's estate is liable for a debt which is binding on him under his personal law, although the debt may not have been expressly charged on the estate. Mere omission to create a charge on the minor's estate is not by itself material, but in the present case even that consideration does not arise. The guardian mother went much further than merely creating a charge. She entered into an agreement to sell the property and received Rupees 500 as earnest money. Under S. 55 (6) (b), T. P. Act, the purchaser is entitled to a charge on the property affected by the contract of sale in his favour to the extent of the seller's interest in the property for the amount of any purchase money properly paid by him in anticipation of the agreement being implemented by a regular conveyance. In 13 N L R 19[3] Mittra A. J. C. held that a charge which is created under S. 55 (6) (b), T. P. Act, has the same force as if it had been created by act of the parties. There can be no escape from the position that the property is subject to a charge. If so, it is immaterial whether that charge happens to be created by act of parties or arises by operation of law.

Inasmuch as the sale was of a nature binding on the minors and the property comprised in the sale became charged with the purchase money it is evident that the purchaser is entitled to recover his money out of the minor's estate. The lower Appellate Court's decree is set aside and the decree of the Court of first instance restored. The appeal succeeds with costs of this Court and the lower Appellate Court. Costs of the first Court will be paid as ordered by that Court. Counsel's fees Rs. 30.

S.G./R.K. *Appeal allowed.*

2. Lalchand v. Narhar, (1926) 13 A I R Nag 31 =89 I C 896=24 N L R 54.
3. Mt. Kesar v. Mt. Munna, (1916) 3 A I R Nag 78=39 I C 50=13 N L R 19.

*** A. I. R. 1939 Nagpur 210**

NIYOGI J.

Shobhalal Shyamlal Kurmi — *Plaintiff* — Appellant.

v.

Sidhelal Halkelal Bania — *Defendant* — Respondent.

Second Appeal No. 563 of 1936, Decided on 31st January 1939, from appellate decree of Addl. Dist. Judge, Damoh, D/- 31st October 1936.

(a) Second Appeal — Court has only to see whether evidence is admissible and proper for consideration.

In second appeal the Court is not concerned with the weight that is to be attached to the evidence but whether the evidence is admissible and proper for consideration. [P 211 C 2]

(b) Transfer of Property Act (1882), S. 55 (4) (b)—Unpaid vendor's charge — Difference between English law and Indian law explained.

The equity which arises in favour of the vendor who has not received his purchase money is no doubt recognized in English law which gives him a lien, that is a right to enforce payment out of interest he has transferred and this lien continues even after he has parted with the legal estate. The reason is that as soon as the contract of sale is made the seller is deemed to part with the equitable estate, but in India contract of sale does not of itself create interest in or charge on such property. In India the vendor is no doubt entitled to a charge for unpaid purchase money but that is a right which comes into existence not at the date of the contract for sale but on the completion of the conveyance. This charge is created by the statute. Thus while in England the vendor's lien is a creature of equity and is capable of being moulded to suit the circumstances of each case the statutory charge is rigorous and inflexible : *31 Cal 57 (P C), Rel. on.* [P 212 C 1]

*** (c) Transfer of Property Act (1882), S. 55 (4) (b)—Title passing to vendee — Suit by vendee for possession — Court though cannot pass conditional decree it is open to it, while decreeing possession, to incorporate in decree statutory charge under S. 55 (4) (b) — Vendor can enforce that charge by execution of decree and need not have recourse to separate suit.**

Where title in the property has passed to vendee notwithstanding the non-payment of part of purchase money and vendee brings a suit for possession, although it is not competent to the Court to pass a decree for possession conditional on the vendee paying the balance of the purchase money, it is open to the Court, while decreeing possession to the vendee to incorporate in the decree the statutory charge under S. 55 (4) (b) in favour of the

vendor for the unpaid purchase money. There is no reason why the unpaid vendor should be driven to a separate suit to recover his unpaid purchase money. When he has a charge on the property which he is called upon to deliver to the purchaser that charge continues to operate upon the property even when the possession of it passes to the vendee. It would therefore obviously be the proper course to avoid multiplicity of litigation, to declare in the decree granting possession to the vendee that it is subject to the charge of the vendor to the extent of the purchase money that remains to be paid. If the decree incorporates this charge it would be open to the vendor to enforce it by seeking execution of that decree: *A I R 1932 Bom 247, Foll.* [P 212 C 2 ; P 213 C 1]

D. N. Choudhary — *for Appellant.*

J. R. Mudholkar — *for Respondent.*

Judgment.—This is a plaintiff's appeal from a varying judgment of the Additional District Judge, Damoh, delivered on 3rd October 1936 in Civil Appeal No. 20-A of 1936. The respondent, Sidhelal, executed a sale deed on 7th October 1932 affecting 8 pies share of mouza Tigra Fatehpur, tahsil Hatta, in favour of the appellant. The consideration as recited in the sale deed was Rs. 400 and the vendee undertook to satisfy certain taccavi loans which were charged in the property amounting to Rs. 639-12-6. The conveyance was duly executed and registered but there arose some hitch during the mutation proceedings and the vendor declined to deliver possession with the result that the appellant instituted the suit out of which this appeal arises for a declaration of his ownership and for possession of the property. The defendant raised various contentions out of which the one that is material for the disposal of this appeal is that he did not receive the consideration which was stated to be Rs. 800 out of which Rs. 160-3-6 were intended to be paid in cash and the balance of Rs. 639-12-6 was to be paid as stated above. The lower Appellate Court found that the real consideration was Rs. 800 and that the vendee, namely the plaintiff, did not pay Rs. 160-3-6. It however held that the title to the property had passed to the vendee and decreed that the property should be delivered to him subject however to his depositing Rs. 160-3-6 into Court for payment to the vendor, the defendant. This appeal is directed mainly against the form of the decree as passed by the lower Appellate Court.

It is contended in the first instance that the lower Appellate Court's finding that the real consideration of the sale was Rs. 800 was at variance with the pleadings and the evidence in the case. I cannot assent to this contention in view of the fact that the defendant in his written statement dated 7th August 1935 clearly averred that as a result of an award by the arbitrators the plaintiff was to pay to the defendant Rs. 160-3-6 in cash and he was further to undertake the liability to pay taccavi loans of Rs. 639-12-6. He further expressly denied receipt of Rs. 160-3-6. The plaintiff pleaded that the consideration was only Rs. 400 but he did not affirm that he had paid this amount to the vendor, but contended that the failure to pay the purchase money did not prevent transfer of title to the vendee and that the appropriate course for the defendant was to file a separate suit to recover the purchase money if not paid. It is true that the evidence regarding the arbitration is not clear or complete but to the extent that there is evidence bearing on the issue it fully sustains the lower Appellate Court's finding. In second appeal I am not concerned with the weight that is to be attached to the evidence but whether the evidence is admissible and proper for consideration. It is not shown that the facts and circumstances considered by the lower Appellate Court were not relevant and proper for consideration. I therefore see no reason to dissent from the lower Appellate Court's finding that the real consideration was Rs. 800 out of which the vendee agreed to pay Rs. 160-3-6 in cash and bear the burden of the taccavi loan amounting to Rs. 639-12-6.

Since the vendee failed to pay the consideration which he agreed to pay in cash the question which arises is whether he is entitled to possession of the property without having to pay the part of the purchase money which he stipulated to pay in cash as a condition precedent to his obtaining possession of the property. In such a case as the present the points which require to be considered are : (1) whether the parties intended that the title should not pass to the vendee unless the vendor received the consideration and (2) if it is found that there was no such intention and that the title passed to the vendee notwithstanding the non-payment of the purchase money whether the vendee is entitled to unconditional possession of the property purchased by him and the remedy of the vendor for recovering his purchase money lies in a separate suit. As to the first point, the respondent indeed contends in support of the lower Appellate Court's decree that the title

did not pass to the vendee. In the absence of any pleading to that effect I cannot listen to any such contention. It is also negatived by the plain recitals of the sale deed. I must therefore hold that the title in the property passed to the vendee notwithstanding non-payment of the part of the price as agreed.

As to the next question, it was held in 30 All 125[1] that although the non-payment of the purchase money does not prevent the passing of the ownership of the purchased property from the vendor to the purchaser and the purchaser is entitled to possession, it is open to the Court to subject the decree to restrictions and conditions appropriate to the circumstances of the case. On that view the learned Judges ordered the purchaser in that case to pay to the seller the amount of the purchase money as a condition precedent to the delivery of possession to him. This case was followed in 6 N L R 98[2] in a case of sale to which the Transfer of Property Act 1882 was not applicable. The case in 30 All 125[1] was not followed in 34 Mad 543[3] and for good reasons. The equity which arises in favour of the vendor who has not received his purchase money is no doubt recognized in English law which gives him a lien, that is a right to enforce payment out of the interest he has transferred and this lien continues even after he has parted with the legal estate. The reason is that as soon as the contract of sale is made the seller is deemed to part with the equitable estate, but in India contract of sale does not of itself create interest in or charge on such property: *see* Sec. 54, T. P. Act. In India the vendor is no doubt entitled to a charge for unpaid purchase money but that is a right which comes into existence not at the date of the contract for sale but on the completion of the conveyance. This charge is created by the statute.

Thus while in England the vendor's lien is a creature of equity and is capable of being moulded to suit the circumstances of each case the statutory charge is rigorous and inflexible. The distinction was pointed out by their Lordships of the Privy Council in 31 Cal 57[4] at page 72, where they observed that the charge which the vendor obtains under the Transfer of Property Act is different in its origin and nature from the vendor's lien given by the Courts of equity to an unpaid vendor. The law in India does not recognize the distinction between legal and equitable property in the sense in which that was understood when the equity was administered by the Court of Chancery in England and the Transfer of Property Act gives a statutory charge upon the estate to an unpaid vendor unless it be excluded by contract. In 34 Mad 543[3] it was held that the only remedy which the unpaid vendor in India could avail himself of is to counterclaim for the enforcement of his charge. As there is no equitable lien recognized in India and though it is recognized in England it is held to be non-possessory, their Lordships of the Madras High Court held that the defendant was bound to deliver possession unconditionally and he was relegated to a separate suit to recover his purchase money. That case was followed in 42 Mad 203[5] and 43 Mad 712.[6] In 56 Bom 556[7] it was held that although in a suit for possession by the vendee of immovable property it is not competent to the Court to pass a decree for possession conditional on the vendee paying the balance of the purchase money, it is open to the Court, while decreeing possession to the vendee to incorporate in the decree the statutory charge under S. 55 (4) (b), T. P. Act, in favour of the vendor for the unpaid purchase money.

It is true that the unpaid vendor in India is only entitled to a statutory charge provided for under S. 55 (4) (b), T. P. Act, and that the vendee under S. 55 (1) (f) is entitled to possession, but there is no reason why the unpaid vendor should be driven to a separate suit to recover his unpaid purchase money. When he has a charge on the property which he is called upon to deliver to the purchaser, that charge continues to operate upon the property even when the possession of it passes to the vendee. It would therefore obviously be the proper course, to avoid multiplicity of litigation, to declare in the decree granting possession to the vendee that it is sub-

1. Baijnath Singh v. Paltu, (1908) 30 All 125 = 1908 A W N 38 = 5 A L J 96.
2. Balkrishna v. Shripatsingh, (1910) 6 N L R 98 = 7 I C 541.
3. Velayutha Chetty v. Govindasawmi, (1911) 34 Mad 543 = 8 I C 364.
4. Webb v. Macpherson, (1904) 31 Cal 57 = 30 I A 238 = 6 C W N 41 = 8 Sar 554 (P C).
5. Kandasami Pillai v. Ramasami Mannadi, (1919) 6 A I R Mad 168 = 51 I C 507 = 36 M L J 313 = 42 Mad 203 (S B).
6. Krishnamma v. Mali, (1920) 7 A I R Mad 164 = 56 I C 530 = 43 Mad 712 = 38 M L J 467.
7. Baslingawa v. Chinnava, (1932) 19 A I R Bom 247 = 138 I C 534 = 56 Bom 556 = 34 Bom L R 427.

ject to the charge of the vendor to the extent of the purchase money that remains to be paid. If the decree incorporates this charge it would be open to the vendor to enforce it by seeking execution of that decree. I have therefore no hesitation in following the course adopted in the Bombay case[7] declaring in the decree that the property is subject to the charge in favour of the vendor and that he is entitled to enforce it in execution of the decree against the appellant.

The lower Appellate Court's decree will now be modified in the form described above. As the appeal virtually fails the appellant will pay the respondent's costs of this appeal. Costs of the lower Courts will be paid as ordered by the lower Appellate Court.

D.S./R.K. *Decree modified.*

A. I. R. 1939 Nagpur 213

STONE C. J. AND VIVIAN BOSE J.

Manaklal Bhimraj Mahesri — *Plaintiff* — Appellant.

v.

Mt. Phulabai, widow of Bhimraj Mahesri, and another — *Defendants* — Respondents.

Misc. Appeals Nos. 165 and 171 of 1937, Decided on 16th March 1939, from order of Dist. Judge, Chindwara, D/- 8th April 1937.

(a) Civil P. C. (1908), O. 17, R. 2 and O. 9, R. 8—Order under O. 17, R. 2 read with O. 9, R. 8 is not appealable.

If an order is made under O. 17, R. 2 read in with O. 9, R. 8, then it is as though it were an order under O. 9, R. 8 and is not appealable at all. [P 213 C 2]

(b) Civil P. C. (1908), O. 9, R. 8 and O. 17, R. 2—Case reaching stage after issue stage has in part been passed—Court is not compelled to exercise its powers under O. 9, R. 8 but can, in doubtful case, make order under O. 17, Rule 2.

Courts should not lightly dispose of litigation without going into the merits. It is also equally plain that Courts are bound in certain circumstances to dismiss cases for default. One case is that indicated in O. 9, R. 8. It is true that when a case reaches the stage after the issue stage has in part been passed, the Court is not compelled to exercise its powers under O. 9, R. 8 but is given power to make another order under O. 17, R. 2, and in any doubtful case the Court should so act. [P 214 C 1]

M. B. Kinkhede, D. W. Kathalay and A. R. Kulkarni — *for Appellant.*

M. R. Bobde and R. N. Padhye — *for Respondents.*

Order. — This order governs Miscellaneous Appeals No. 165 of 1937 and No. 171 of 1937. The first of these appeals is from an order dismissing a suit. The nature of the order we shall examine later. The second of these appeals is from an order passed on an application to restore the suit. A preliminary objection is taken to the maintainability of the first of these appeals on the ground that the order in question was either under O. 17, Rule 3, or under O. 17, Rule 2 read in with O. 9, R. 8. If the first of the two, then clearly the order amounts to a decree which is appealable and indeed an appeal has been admitted and is pending but is not now before us. If the order was made under O. 17, R. 2 read in with O. 9, R. 8, then it is as though it were an order under O. 9, R. 8 and it is not appealable at all. In our opinion, the order in question was passed under the authority conferred by O. 17, R. 2 read in with O. 9, R. 8, and accordingly no appeal lies. The objection is upheld. But although that be so the second miscellaneous appeal does lie and raises the merits of the case sufficiently.

It is next urged that Miscellaneous Appeal No. 171 of 1937 cannot be entertained because the application on which the order was made was untenable. This is founded on the argument that the lower Court in passing its first order was operating under O. 17, R. 3. If that were so, the proceedings ended with a decree dismissing the suit and there could thereafter be no question of applying under O. 9. R. 9 for restoration. As we have already observed the Court operated under O. 17, R. 2 read in with O. 9, R. 8. There is therefore no substance in this objection. That leaves the question whether on an application being made under O. 9, R, 9 read in with O. 17, R. 2, the Court should have restored the suit. The Rule provides that a plaintiff so situate

may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit.

The learned Judge came to the conclusion that no sufficient cause had been shown. The ground that was taken before him is the same as the ground that has been taken before us. The application was supported by an affidavit to the following effect :

That the plaintiff about a fortnight prior to the date fixed for evidence in the above case got an attack of typhoid and continued to be confined to bed upto 4th March 1937. That on account of the

aforesaid illness plaintiff could not attend the Court on 4th March 1937 and was unable to instruct his counsel to examine his witnesses.

There is also a doctor's certificate put in to the following effect :

I hereby certify that I have examined Maneklal, son of Bhimraj, at village Karmadi, who is in extremely debilitated condition as a result of continued type of fever for 14 days (probably paratyphoid fever). He is not in a position to attend Court at least for a fortnight.

This is a claim which has been launched by the plaintiff in forma pauperis. It is a claim for a very substantial amount, approximately a lakh of rupees. It is a claim that is apparently founded upon the plaintiff's right springing out of adoption and the first question for determination was as to the factum of adoption. We gather this from the order sheets and the nature of the preliminary issue that was settled as long ago as 30th November 1936. That question of fact was going to be the subject of keen contest. The plaintiff alone named no fewer than 70 witnesses. The Court, seeing that it was likely to be a lengthy case, set aside a whole week, 4, 5, 6, 8, 9 and 10th March, for the hearing of these witnesses. On the very day that the first set of witnesses—and each day had its appropriate witnesses allocated to it were to be examined—counsel appeared for the plaintiff and asked for an adjournment, and on that being refused, said he had no instructions whereupon the case was dismissed.

It may be laid down as a certain proposition which hardly admits of exceptions that Courts should not lightly dispose of litigation without going into the merits. It is also equally plain that Courts are bound in certain circumstances to dismiss cases for default. One case is that indicated in O. 9, Rule 8. It is true that when a case reaches the stage that this had (that is to say, after the issue stage has in part been passed) the Court is not compelled to exercise its powers under O. 9, Rule 8, but is given power to make another order under O. 17, R. 2, and in any doubtful case the Court should so act.

It is however a matter for comment that for some years past in this Province the provisions of O. 17, Rule 1 were almost universally departed from. Those provisions, in our opinion, are extremely salutary. They make for justice, avoid coaching of witnesses, prevent to some extent perjury. Those provisions require that a case, once the witness stage is reached, shall be tried from day to day until it is concluded. If obeyed, long periods do not elapse between the giving of evidence by one side and the giving of evidence by the other or the giving of evidence by one witness and the giving of evidence by another. The strictest instructions have been given to all the Judges in this Province to see that that rule is complied with. Inspections are made to see whether those orders are being obeyed and Judges have their confidential files marked if it is found that they are not obeying those instructions. It is a little hard on Judges to require them to comply with a rule of that nature, and then when they set aside a suitable period (as this learned Judge did) for the disposal of a lengthy witness case for day to day trial, to excuse a litigant whose conduct has resulted in the time thus set apart being wasted. In this case the learned Judge took occasion to inspect the Courts over which he has administrative control. Some Judges would not be in a position to so spend their time. Fixing other cases would be quite impracticable bearing in mind the circumstances appertaining in this Province.

These considerations, powerful as they are, should not however be allowed to destroy a meritorious case where the bona fides are not in doubt and where a sufficient cause for the failure exists. But here there is no doubt that bona fides are completely lacking. It is said that the plaintiff could not instruct his lawyer because he (the plaintiff) was ill. It is within the experience of every one who has been a lawyer that instructions to lawyers are given long before a case is called on in Court, certainly in a case of this type involving the calling alone by one side of 70 witnesses. Here the critical date was 4th March 1937. The application for leave to sue as a pauper, which embodies the plaint, was filed on 9th November 1935. That plaint which is drafted by a pleader could clearly not have been drafted by him unless he received instructions. A preliminary issue was settled on 30th November 1936 after counsel had made statements in Court. Time for filing lists of witnesses was given on 23rd December 1936. On 2nd January 1937 the plaintiff gave a list of 70 witnesses and those witnesses were allocated their various days. It is, in our opinion, obvious that no counsel could array all his witnesses like that putting this man in the first day, that man in the second day and so on unless he had instructions as to what

they would say or the sort of evidence they were going to give on the subject they were going to speak about. The question that was going to be spoken to by these witnesses was the factum of adoption. The date of that event was so far back into the past that the plaintiff who is now 20 was then 4. It is manifest that a child of 4 or a man of 20 speaking with the knowledge of a child of 4 with the defects of memory stretching over 16 years to overcome, would not be in a position to give anybody instructions as to the details of the events that occurred at that date. On the other hand the plaintiff's father who would be a prominent participant in the adoption ceremonies would be more likely to be acquainted with what on that date occurred. The plaintiff's father was in the Court on 4th March 1937. The learned Judge suggested to counsel who appeared and asked for an adjournment that he might take instructions from the father if he, the counsel, was not sufficiently acquainted with the case to be able to call witnesses. After consultation the counsel found the father unable to give him any instructions. Their Lordships of the Privy Council observe in 24 N L R 182[1] at page 185 :

> Their Lordships cannot agree with the course taken by the Appellate Court. As found by it, there was no "good cause shown" before the lower Court, and without such "good cause shown" it was therefore bound to pass the judgment it did. The Appellate Court do not say that any such "good cause" was shown even before them, and it is difficult to understand, therefore, under what powers they claimed to overrule the lower Court.

We should be opening ourselves to similar criticizm if we in this case overruled an experienced Judge when he concludes that no good cause was shown for the non-appearance. Not only was it not shown to him, but it has not been shown to us. What has been shown to us is (accepting the medical certificate and the affidavit) that the plaintiff was too ill to attend the Court on that day. We have not been shown that he was unable to instruct anybody to appear for him on that date. Unless the work of Courts is to be reduced to chaos, or alternatively, unless the provisions of O. 17, R. 1, are to be given the go-by, some stop must be put to practices such as these—practices which as a rule have as their motive the unfair conduct of litigation. Whether that is so here or not we are not called upon to decide. All that we have to decide is whether the learned Judge was justified in concluding that sufficient cause had not been shown. In our opinion, the learned Judge was quite right in concluding on the evidence before him and the materials on the record that no sufficient cause for non-appearance was shown. The result is that the appeal fails and is dismissed.

The learned District Judge has, we think, perhaps exceeded what was called for in the matter of costs. But in view of the offer of the defendants-respondents to forgo their entire costs of appeal we let that order as to costs stand as being more beneficial to the plaintiff than half costs in both the Courts which we would otherwise have to award to the defendants.

D.S/.R.K. *Appeal dismissed.*

1. Motilal v. Ujiar Singh, (1928) 15 A I R P C 187=109 I C 467=55 I A 207=55 Cal 821=24 N L R 182 (P C).

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STONE C. J. AND VIVIAN BOSE J.

Janardan Sadasheo Kunbi and others, Defendants — Appellants.

v.

Madanlal Mangulal Marwari and others, Plaintiffs — Respondents.

Misc. Appeal No. 133 of 1937, Decided on 16th March 1939, from order of Addl. Dist. Judge, Yeotmal, D/- 30th January 1937.

Transfer of Property Act (1882), S. 92—Mortgage split up—Each part should be treated as independent mortgage — Person redeeming any part in full can claim right of subrogation of that part and is entitled to be substituted as decree-holder under O. 22, R. 10, Civil P. C.

When a mortgage is split up it has to be looked upon as if it were in distinct parts with different considerations assigned to different portions of the property, and it has therefore to be treated as if it were two independent mortgages. Consequently, if there is redemption of either part in full then the provisions of Sec. 92 are complied with so far as that part is concerned. Hence a person who acquires the right of subrogation to such a part of the mortgage is entitled under O 22, R. 10, Civil P. C., to be substituted as decree-holder to the extent of his right : *36 Cal 193, Disting; A I R 1932 Oudh 268, Expl. and Doubted ; A I R 1916 All 81, Ref.* [P 216 C 1, 2]

M. R. Bobde — *for Appellants.*

N. T. Mangalmurti — *for Respondents 1 to 4, 7 to 11 and 13.*

Judgment. — This is an appeal against an order refusing the right of subrogation to defendants 2 to 5. The facts are as follows : On 23rd December 1930, a preliminary decree for foreclosure was passed

against 14 defendants. The decree was split up into two parts, the first part directing that if defendants 1 to 14 paid a sum of Rs. 17,687-10-0 on defendant 1's 1/10th share in the mortgaged property then they could redeem that 1/10 share on payment of that sum, also that if defendants 2 to 14 paid a sum of Rs. 8524-7-0 due on the 9/10 share of defendants 6 to 14 in the mortgaged property then these defendants 2 to 14 could redeem that 9/10 share on payment of that sum. There was an appeal against this decree by defendants 6 to 14, the other defendants not appealing. The Judicial Commissioner's Court allowed the appeal and amended the decree of the lower Court in the following way: The modification was that defendants 6 to 14 were to be entitled to redeem their 9/10 share in the mortgaged property on payment of Rupees 4654 and that defendants 1 to 5 were to be entitled to redeem the whole mortgage on payment of Rs. 18,000. In each case some costs were also decreed. Defendants 6 to 14 did not redeem but defendants 2 to 5, who were subsequent mortgagees and had been joined in the suit as such, paid off the Rs. 4654 and costs due on the 9/10 share of defendants 6 to 14 and thereby freed that share from the mortgage. They now claim that having freed that share they are entitled to be subrogated to the rights of the mortgagees as against defendants 6 to 14 and to be brought on the record in that capacity under O. 22, Rule 10. The lower Court holds that there can be no subrogation unless the entire amount of the decree is paid off and relies on 8 Luck 103[1] and on the Proviso to S. 92, T. P. Act. S. 92, so far as is relevant, provides :

> Any of the persons referred to in S. 91 (other than the mortgagor) .... shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

So far as that is concerned the decree has split up the mortgage and has allowed redemption of 9/10 of the property on payment of a certain sum. That portion of the property has been redeemed in full by defendants 2 to 5 and consequently under that part of S. 92 they are entitled to be subrogated to the rights of the mortgagees in so far as that portion of the property is concerned. So far as the Proviso is concerned, it is in these terms :

> Nothing in this Section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.

That of course assumes that the mortgage has not been split up. When it is split up, the mortgage has to be looked upon as if it were in distinct parts with different considerations assigned to different portions of the property, and it has therefore to be treated as if it were two independent mortgages. Consequently, if there is redemption of either part in full then the provisions of S. 92 are, in our opinion, complied with so far as that part is concerned. That being so, defendants 2 to 5 have the right of subrogation which they claim. If they have that right then they are entitled under O. 22, R. 10 to be substituted as decree-holders to the extent of their right. The learned counsel for the respondents relies on 36 Cal 193[2] but that was not a case in which the mortgage was split up. In that case the subsequent mortgagee paid only part of the price fixed for redemption and claimed subrogation in respect of the amount paid. That is clearly against the provisions of the law even as it stood before the amendment, and consequently the ruling cited does not apply here. As regards 8 Luck 103[1] the facts are somewhat complicated and we are unable to determine whether there had been any splitting up of the mortgage in respect of which the right of subrogation was claimed or not. If there was, then we respectfully dissent from that decision. If there was not, then we are in agreement with it. As far as we can gather from the report the facts were as follows : On 26th July 1912 one Riasat Ali mortgaged a 5 biswa share to four persons, through his guardian, by a deed Ex. 1. On the same day he executed Ex. 2, which is called 'a deed of further charge' in the judgment at page 105 and is referred to later as a mortgage. On 7th October 1915 he mortgaged another 5 biswa share by a deed, Ex. 3, to the plaintiff, also through his guardian. He then died and was succeeded by his mother who had acted as his guardian in the above transactions. She then executed Ex. 4 on 9th February 1917 which is called "a deed of further charge" in one place and a mortgage in another, also to the plaintiff. Having done this she

1. Kanhaiya Lal v. Ikram Fatima, (1932) 19 A I R Oudh 268=139 I C 358=8 Luck 103=9 O W N 557.

2. Gurdeo Singh v. Chandrikah Singh, (1909) 36 Cal 193=1 I C 913=5 C L J 611.

sold the entire 10 biswa share to the plaintiff on 12th April 1917. The consideration for this sale was Rs. 15,000 which was made up as follows: Rs. 2444 "were credited in respect of the amount due to the plaintiff on account of the mortgage deed (Ex. 3) and the deed of further charge (Ex. 4)." Rs. 2050 were left with the plaintiff "for redemption of the mortgage deed (Ex. 1) and the deed of further charge (Ex. 2)." Three sums of Rs. 156, Rs. 3800 and Rs. 466-15-0 were otherwise accounted for "and the rest was to be left in the hands of the vendee for payment to certain creditors of the vendor." Then follows a sentence in the judgment which we are not altogether able to understand.

In 1917 and 1923 Kahaiya Lal (the plaintiff) obtained deeds of release (Exs. 6 and 7) from two out of the four (mortgagees) of the deeds (Exs. 1 and 2) and redeemed 2½ biswas out of the 5 biswas mortgaged under those deeds.

It will be seen from the facts given above that the plaintiff was a mortgagee of half the mortgaged property; not a subsequent mortgagee because the 5 biswas mortgaged to him had no connexion with the other 5 biswas mortgaged in the year 1912. In the year 1917, he purchased the entire 10 biswas and so stepped into the shoes of the mortgagor. What happened after this is not clear but we gather that he redeemed 2½ out of the 5 biswas which were mortgaged in 1912, and we take it that this was done by the common consent of the mortgagees and himself. If that was so, then it had the effect of splitting up the mortgage with the result that the original transaction had to be regarded as if it had consisted of two separate and independent mortgages over different properties for different considerations. A number of other complications arose because of subsequent transactions but we need not enter into them. It is enough to state that the suit was decided against the plaintiff mainly on two grounds, res judicata and the fact that he had not intended, when he purchased, to keep any of the four encumbrances alive. At the end of the judgment the learned Judges also stated in a short paragraph:

It may also be pointed out that the plaintiff cannot claim any right of subrogation in respect of the mortgages (Exs. 1 and 2), because admittedly only a half share in those mortgages has been redeemed.

They then referred to Sec. 92, T. P. Act, and to two cases one of which is 36 Cal 193[2] which we have already distinguished, and the other is 38 All 502[3] which at pp. 504 and 505 draws the same distinction which we have done. The learned Allahabad Judges state:

The contention is that this right of the purchaser is limited to cases in which he has discharged the prior incumbrance in its entirety. It is difficult to see upon what principle this distinction proceeds. No doubt the prior incumbrancer is entitled to refuse a part payment of his mortgage debt. If however he accepts the part payment and allows the liability upon the property to be discharged in part, the puisne incumbrancer benefits in exactly the same way as he would if the entire debt had been discharged, though not (to) the same extent. His security is enhanced to the extent that the debt has been discharged. There seems to be no reason why the purchaser of the equity of redemption should not be entitled to stand in the shoes of the prior incumbrancer where he has with the consent of that incumbrancer partially discharged the liability.

The Lucknow decision therefore largely depends upon the facts there. If we have stated the facts correctly then with the utmost respect we cannot agree. It may however be that the facts have not been fully given in the judgment because it proceeded in the main on the other two grounds, and therefore it is impossible that there was there some important point of distinction which does not appear in the facts given. The fact that the Allahabad case was also referred to appears to indicate that. But in any case the ruling does not alter our view. The appeal is allowed and the costs of the appellant will be paid by the plaintiffs-respondents throughout. Counsel's fee Rs. 60.

N.S./R.K. *Appeal allowed.*

3. Udit Narain Misir v. Asharafi Lal, (1916) 3 A I R All 81=35 I C 732=38 All 502=14 A L J 662.

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NIYOGI J.

Sunderlal Shanker Lal Mahesri — Appellant.

v.

Amrut Rao Daulat Rao Deshmukh — Respondent.

Second Appeal No. 321 of 1937, Decided on 27th February 1939, from appellate decree of Addl. Dist. Judge, Khamgaon, D/- 21st August 1936.

Mortgage — Subrogation — Land burdened with prior and subsequent mortgages purchased by person for full price and free from incumbrance — Purchaser compelled to discharge prior mortgage, when disclosed, to protect his interest — He is subrogated to rights of prior mortgagee.

Where land burdened with prior and subsequent mortgages is purchased by a person for full price and free from any incumbrance and he is subsequently compelled to discharge the prior mortgage, when it is disclosed to him, to protect his own interest, he is subrogated to the rights of the prior mortgagee as against the subsequent mortgagee: *10 Cal 1035 (P C) and A I R 1924 P C 36, Rel. on; A I R 1937 Nag 372 (F B), Disting.* [P 218 C 2; P 219 C 1, 2]

R. N. Padhye and S. P. Kotwal — *for Appellant.*

V. K. Rajwade — *for Respondent.*

Judgment. — This is a plaintiff's appeal from the concurring judgment of the Additional District Judge, Khamgaon, in Civil Appeal No. 63-A of 1935 delivered on 21st August 1936. Sawanjee executed a mortgage in favour of Zango on 17th April 1916 and another mortgage in favour of Punamchand on 11th November 1918. The respondent, Amrutrao, purchased the property comprised in the two mortgages on 6th January 1919 for Rs. 1500. The property was represented to be sold free from any incumbrance, as will be clear from the terms of the covenant of freedom from incumbrance contained in the sale deed, namely:

The aforesaid field has not been transferred to anyone either by mortgage, or patta or the like. And if it be found, the entire liability therefor shall be mine.

Zango, the prior mortgagee, filed a suit to enforce his mortgage. That was Civil Suit No. 415 of 1919 in which he impleaded the respondent Amrutrao and the puisne mortgagee Punamchand. The respondent satisfied the preliminary decree passed in that suit by payment of Rs. 956-4-0 in 1921. On 14th March 1931 Punamchand assigned his mortgagee rights to the appellant Sunderlal who instituted the suit out of which this appeal arises to recover the debt due on Punamchand's mortgage of 1918. The respondent claimed right of subrogation on the ground that he had paid off the prior mortgagee Zango. To escape from this defence the appellant alleged that the respondent had retained with him Rs. 1400 out of the consideration of the sale in his favour under an agreement to discharge the prior incumbrances and that consequently he was not entitled to hold the prior mortgage as a shield against the subsequent mortgage. The plaintiff's plea was negatived by both the Courts below, who held that the appellant was bound to pay the amount due on the Zango's mortgage, which had been paid off by the respondent, before he could claim foreclosure of the property.

The question which arises upon this appeal is whether in the circumstances of this case the respondent was entitled to be subrogated to the rights of the prior mortgagee as against the subsequent mortgagee. The lower Appellate Court relied on Illus. 5 in the commentary on S. 92, T. P. Act, by Sir Dinshah Mulla, which is based on 49 All 233.[1] The case reported in 54 All 897[2] also took the view that if a third mortgagee pays off the first of the two prior mortgagees out of consideration left with him for redeeming both the earlier mortgages that he would be entitled to be subrogated to the position of the first mortgagee so as to enable him to claim priority. That was also the view which I had taken in 30 N L R 164.[3] The learned counsel for the appellant contends that in view of the Full Bench ruling of this Court in I L R (1938) Nag 206[4] the respondent who was the purchaser of the property subsequent to the mortgages is not entitled to claim subrogation against the puisne mortgagee unless there was an express agreement to that effect in writing and registered as required by S. 92, T. P. Act, as amended by Act 20 of 1929. In order to bring the present case within the ambit of that ruling, an attempt is made to attack the concurrent finding that the respondent did not retain with him Rs. 1400 for discharging the incumbrances but that he paid the full consideration to the mortgagor. The burden of substantiating the contention lay on the appellant and it has rightly been held by the Courts below that he failed to discharge it. From the recitals in the sale deed, which have been reproduced above, it is clear that the mortgagor purported to sell an unencumbered property for Rs. 1500 which were actually received by him. Nothing has been said here to induce me to interfere with that finding.

The position is this: the respondent purchased the property free from any incumbrance and yet he was compelled to discharge the first mortgage when it was disclosed to him. The Full Bench ruling of this Court

1. Madho Singh v. Pancham Singh, (1927) 14 A I R All 211=101 I C 409=49 All 233 = 25 A L J 45.
2. Tota Ram v. Ram Lal, (1932) 19 A I R All 489=139 I C 107 = 54 All 897 = 1932 A L J 627 (F B).
3. Mohanlal v. Mohammad Sujat, (1933) 20 A I R Nag 155 =144 I C 96)=30 N L R 164.
4. Taibai Laxmanrao v. Wasudeorao, (1937) 24 A I R Nag 372 = 172 I C 142 =I L R (1938) Nag 206 (F B).

referred to above can have no application to this case in view of different sets of circumstances. It is true, as pointed out in that case, that under S. 59-A, T. P. Act, as amended in 1929 the term mortgagors may include persons deriving title from them. The question whether a person who purchases an unencumbered estate and then discovers an incumbrance which he redeems should be regarded as a mortgagor or not was, in that case, left open. That case discussed only the respective rights of a purchaser who purchased an encumbered estate that is only an equity of redemption and a purchaser who purchased an unencumbered estate subject to the condition of paying off any undisclosed incumbrance. It has therefore no application to the present case.

The respondent paid full price of the property as if it was free from incumbrance. He had in the bargain to pay off the prior mortgage and that payment was made out of his own funds to protect his own interest. He paid not only the price of the equity of redemption but also the debts which were charged on the property when he purchased it in ignorance of those incumbrances. Whether a purchaser of encumbered property stands in the shoes of the mortgagor or not would depend upon the nature and extent of the interest purchased by him, and also the nature of the agreement he makes with the mortgagor. When a person mortgages his property for a certain consideration he converts a part of his proprietary right into cash which becomes the debt for which the property remains a security. What is left of his right in the property is only an equity of redemption. If a purchaser purchases only the equity of redemption he stands in the position of the mortgagor and when he pays off the debt he discharges a liability openly accepted by him. When one purchases the equity of redemption only but pays consideration exceeding the price of the equity of redemption and intends that the surplus should be devoted to the discharge of the incumbrances he stands in principle on no different footing. The respondent in the present case cannot be put into the category of these persons. The mortgagor professed to sell him an unencumbered freehold and he never undertook to discharge any undisclosed incumbrance. When he was compelled to pay off the prior mortgage he did so to safeguard his own interest and not that of the mortgagor. His case would therefore fall within the rule enunciated by their Lordships of the Privy Council in 10 Cal 1035.[5] When he paid off the first mortgage he might have intended either to keep alive that mortgage or let it merge in his ownership but, as their Lordships remarked, when there is no express evidence of such intention the ordinary rule is that a man having a right to act in either of the two ways, shall be assumed to have acted according to his interest, that is to say, the presumption would be in favour of the mortgage being kept alive. In 47 Mad 190[6] at page 194 their Lordships reiterated the rule in this way:

> It is now settled law that where in India there are several mortgages on a property, the owner of the property, subject to the mortgages may, if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor, or to put in it another way, he may keep the incumbrance alive for his benefit and thus come in before a later mortgagee. This rule would not apply if the owner of the property had covenanted to pay the later mortgage debt, but in this case there was no such personal covenant.

The present case must be decided on this principle inasmuch as there was no covenant by the respondent to pay off the incumbrances. Nothing that was decided in 59 Mad 359,[7] A I R 1937 All 588[8] or I L R (1938) Nag 206[4] can affect the authority of the two Privy Council decisions referred to above. It is unnecessary to go into the question whether S. 92, T. P. Act, has or has not retrospective operation, since if it has no retrospective operation the case would be determined on the well-recognized equitable principle laid down in the two Privy Council cases and if it has retrospective operation the case would fall to be governed by para. 1 of Sec. 92 which does not require any registered instrument to confer the right of subrogation. The appeal is dismissed with costs. Counsel's fees Rs. 25.

D.S./R.K. *Appeal dismissed.*

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5. Gokaldas Gopaldas v. Puranmal Premsukhdas, (1884) 10 Cal 1035 =11 I A 126 = 4 Sar 543 (P C).
6. Malireddi Ayyareddi v. Gopalakrishnayya, (1924) 11 A I R P C 36=79 I C 592 = 51 I A 140=47 Mad 190 (P C).
7. Lakshmi Amma v. Shankara Narayana, (1936) 23 A I R Mad 171=160 I C 137=59 Mad 359 =70 M L J 1 (F B).
8. Hira Singh v. Jai Singh, (1937) 24 A I R All 588 = 171 I C 153 = I L R (1937) All 880 = 1937 A L J 659 (F B).

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STONE C. J. AND VIVIAN BOSE J.

Ramchandra Krishnaji Kunbi — Defendant — Appellant.

v.

Zolba Balaji Kunbi and another — Plaintiffs — Respondents.

Letters Patent Appeal No. 1 of 1938, Decided on 9th February 1939, from appellate decree of Pollock J. in S. A. No. 566 of 1934, D/- 18th November 1937.

Stamp Act (1899), S. 36—Once improperly stamped document is admitted S. 36 comes into play and Court should proceed as though it were properly stamped.

Where a document which is not duly stamped is once admitted in evidence, S. 36 comes into play and thereafter the Court should proceed as though it were properly stamped ; the letting in of document cannot be regarded as an imperfection in procedure which can be corrected in appeal : *Case law discussed.* [P 221 C 1]

M. B. Kinkhede and N. M. Dharasker — *for Appellant.*

A. V. Khare and W. B. Pendharkar — *for Respondent.*

Judgment.—The point that is raised in this appeal has been so recently decided in favour of the view taken by the learned Judge, against whose judgment this appeal is brought, that it seems unnecessary to do more than quote from the Bench decision in First Appeal No. 73 of 1935 :

Section 61 admittedly has nothing to do with the point here. It has been argued in a large number of cases that S. 36 only applies where the admission was not contrary to S. 35. In other words the admission must be rightful. But it has been decided time after time that once it is admitted that concludes the point so far as the stamp question is concerned. We have had our attention directed to 27 C W N 513[1] at p. 519 followed in 53 Cal 515,[2] 39 Cal 669[3] at p. 678, 57 Mad 779,[4] 16 Pat 84,[5] A I R 1937 Mad 431,[6] 13 Lah 800,[7] and there is also the case reported in 63 M L J 548.[8] There is the Privy Council decision, 7 Rang 624[9] at p. 631 which would render the citation of the others unnecessary were it precisely on the point now raised. There the objection was taken in the written statement; after the objection was taken the plaintiff applied to the Court for the return of the document in order to apply to the Collector for the rectification of the stamp. The District Judge, acting under S. 33, Stamp Act, impounded the document. Eventually under the direction of the High Court the document was forwarded to the Collector. The Collector on payment of a further duty of Rs. 100 and a penalty of Rs. 5 certified it to be duly stamped. It was then received in evidence by the District Court. Their Lordships of the Judicial Committee say: "It follows that, in accordance with S. 36 of the Act, its admission could not be called in question at any stage of the suit on a stamp objection. The question of admissibility is thus disposed of."

Counsel for the appellant cited 40 M L J 479[10] to establish his proposition but on examination it is found to tend in the same direction.

It has been argued : (1) that S. 36 only applies where no contest has been raised at the time of admission. There are two answers to that. One is it is highly doubtful whether a contest ought to be at the instance of counsel because this is not a matter that affects parties at all. It is a matter in which the State is interested. Secondly, objection was taken in the Privy Council case as above observed as well as in the case reported in 57 Mad 779.[4] Next it is urged (2) that it cannot be the intention of Sec. 36, Stamp Act, to preclude an Appellate Court from considering what on its true construction is the correct classification of the document in question. The answer to that is that the Appellate Court is not precluded. In this very case it would have been quite within our power to hold that what the learned Additional District Judge has decided is a bond is in point of fact a promissory note. But that decision of ours would not in the least affect its admissibility on the stamp point because that is concluded by S. 36, and that distinction their Lordships of the Privy Council quite clearly make.

It is however necessary to refer to the argument that has been urged before us by the counsel for the appellant because the points that have been raised by him were not taken in that case. It will be seen from the above that there is not a single case in favour of the appellant's view on S. 36. On the contrary, there are a large number of authorities in favour of the view taken by the learned Judge on S. 36. But it is argued with some ingenuity that all those cases have attached too much importance to admissions and have not attached suffi-

1. Rung Lal v. Kedar Nath, (1921) 8 A I R Cal 613=77 I C 845=27 C W N 513.
2. Joyman Bewa v. Easin Sarkar, (1926) 13 A I R Cal 877=95 I C 483=53 Cal 515=43 C L J 493=30 C W N 609.
3. Bombay Co. Ltd. v. National Jute Mills Co. Ltd., (1912) 39 Cal 669=16 I C 153.
4. Venkata Reddi v. Hussain Setti, (1934) 21 A I R Mad 383=150 I C 51=57 Mad 779=66 M L J 709.
5. Krishna Kumar v. Jagpati Kuer, (1937) 24 A I R Pat 73=167 I C 152=16 Pat 84 = 17 P L T 769.
6. Satyavati v. Pallaya, (1937) 24 A I R Mad 431 =169 I C 641.
7. Harnarainsahib Ram v. Bihari Lal Chiranji Lal, (1932) 19 A I R Lah 582=142 I C 729= 13 Lah 800=34 P L R 92.
8. Alagappa Chetty v. Narayanan Chettiar, (1932) 19 A I R Mad 765=140 I C 315= 63 M L J 548.
9. Ma Pwa May v. S. R. M. M. Chettiyar Firm, (1929) 16 A I R P C 279 = 120 I C 645 = 7 Rang 624=56 I A 379 (P C).
10. Venkatarama Aiyer v. Chella Pillai, (1921) 8 A I R Mad 413=62 I C 607=40 M L J 479.

cient importance to the prohibition against acting upon a document that is not stamped. The argument is that although by S. 36 the Court is directed, once a document has been admitted in evidence, not to object to its admissibility on the ground that it is improperly stamped, yet when it comes to passing a decree the Court need not act upon it and can refuse to pass a decree based upon it. In support of that argument the following cases have been cited : 18 Bom 369[11] at page 371, 30 Mad 386[12] at p. 387, 6 I C 903[13] at p. 905, A I R 1934 Lah 606,[14] 64 M L J 79[15] and A I R 1935 Rang 282.[16] These cases, especially the first four, are all dealing with the position that arises where it is not strictly necessary owing to admissions in pleadings or otherwise to prove the document on which the suit is really founded and therefore the question of admitting or not admitting a document in evidence never arises, and then the Court when it comes to pass judgment discovers that the fundamental document is unstamped. Should the Court pass a decree based on admissions in pleadings or should it pass a decree based on the unstamped document ? The above group of cases decide that the Court should refuse to pass a decree based on an unstamped document. As to that we would say that we have not heard the other side because, in our opinion, the whole difficulty in the appellant's way here is due to S. 36 and were it not for S. 36 we have no doubt at all that the document would not have been admitted in evidence. But when the document has been admitted, then S. 36 comes into play and thereafter the Court should proceed as though it were properly admitted. That view, in our opinion, takes away the protection afforded by S. 100, Civil P. C., read with O. 13, R. 3 of the Code. The latter gives power to the Court to reject any document which it considers irrelevant or otherwise inadmissible and S. 100 gives powers to the Court in second appeal to correct imperfections in procedure. There is no imperfection here excepting the imperfection of letting this document in, but that cannot be regarded as an imperfection after it has been let in and it has not been challenged, the reason being the reason that was assigned in the above quoted passage from the Bench decision in First Appeal No. 73 of 1935.

There remains one point to mention and that is based on A I R 1919 Nag 141[17] where it was decided that mere letting in and exhibiting a document is not admitting a document in evidence so as to attract the provisions of S. 36, and the trial Judge before whom the document was exhibited has decided in his judgment that it is inadmissible. Here the position is that the Judge held that the document was admissible. The order holding that it was admissible went in revision on the preliminary point and ended in a very unfortunate way. The order on the revision application is as follows :

> Even assuming that the lower Court has erroneously decided the question of law involved in the first part of issue 2, I decline to interfere with its preliminary finding as the mistake if any can be rectified in appeal when the case terminates in a decree in the lower Court.

In point of fact the application for revision was dismissed without notice to the other side, with the result that the order remained as it was, that the document was admitted and that S. 36 is attracted, and now the defendant finds himself subject to a decree which might not have been passed had his revision application not been rejected. We are however clear that the learned Judge against whose judgment this appeal is brought is correct on the law, and the appeal is dismissed with costs.

S.G./R.K. *Appeal dismissed.*

11. Chenbasapa v. Lakshman Ramchandra, (1894) 18 Bom 369.
12. Thaji Beebi v. Tirumalaiappa Pillai, (1907) 30 Mad 386=17 M L J 308.
13. Chunilal Tulsiram v. Mulabai, (1910) 6 I C 903=12 Bom L R 466.
14. Sohan Lal v. Raghu Nath, (1934) 21 A I R Lah 606=153 I C 1076=37 P L R 494.
15. Achutaramana v. Jagannadham, (1933) 20 A I R Mad 117=140 I C 833=64 M L J 79.
16. Maung Po Chein v. Chettiyar Firm, (1935) 22 A I R Rang 282=158 I C 533.
17. Sitaram v. Thakurdas, (1919) 6 A I R Nag 141=50 I C 781.

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STONE C. J. AND VIVIAN BOSE J.

Firm Madhodass Gulabdas — Decree-holder — Appellant.

v.

Appaji Raoji Jadhao and others — Judgment-debtors — Respondents.

Second Appeal No. 184-B of 1934, Decided on 16th March 1939, from appellate decree of 1st Addl. Dist. Judge, Akola, D/- 23rd June 1934.

Second Appeal —Question of fact—Omission of lower Appellate Court to mention this or that piece of evidence is no ground for interference.

No second appeal has any chance of success where the only ground is that the lower Appellate Court has omitted to mention this or that piece of evidence. The Legislature rightly or wrongly has decided that the first Appellate Court is to be trusted and it behoves first Appellate Judges to bear in mind the fact that their findings of fact are conclusive and that they therefore have a great responsibility and should be especially careful in such cases. If they are not, it may be a matter for administrative discipline but a second Appellate Court cannot put the matter right in second appeal : *18 Cal 23 (P C), Rel. on ; Case law discussed.* [P 223 C 2]

V. K. Rajwade and D. M. Deshpande — *for Appellant.*

R. S. Dabir and R. G. Pande — *for Respondents.*

Judgment.—This is an appeal by the decree-holder who was the plaintiff in a suit on a contract entered into between him and one Sheoram. He obtained a decree. Sheoram died and the decree-holder now seeks to execute that decree against the joint Hindu family of which, it is said, Sheoram was the representative when sued on the debt contracted by Sheoram with the decree-holder. That is to say, that suit is, it is said, a suit brought against Sheoram as representing the family : the decree, though passed against Sheoram, is really a decree passed against the family and the family assets can accordingly be taken in execution of that decree. The family in question now consists of the father and brothers of Sheoram. The respondents resist any effort to execute that decree against the family property on the ground that the suit in which the decree was given was a suit against Sheoram personally and could not be otherwise because Sheoram was contracting personally and was not representing the family. That in turn raises the question as to whether in point of fact Sheoram, who admittedly was carrying on some sort of business, was carrying on that business as a joint family business or on his own behalf. There is a finding by the lower Appellate Court to the effect that he was carrying on the business on his own behalf. That is a finding of fact and as such it is binding on us in second appeal. As so often happens in these second appeals however we are induced to go into the evidence on the representation that this is yet another case which is an exception to the broad rule laid down in a number of Privy Council decisions to the effect that the second Appellate Court has no jurisdiction whatever to go into questions of fact. The ground on which it is said that we should go into the question of fact in this case is that the lower Appellate Court completely overlooked a mass of relevant evidence. Although in support of that no authority has been cited to us there are some observations that seem to give countenance to it made by Niyogi J. in I L R 1938 Nag 535[1] at p. 541 where the learned Judge observes :

There is an error of law when a Court's finding proceeds upon a misconception of the real nature of the issue in the case, when several facts admitted or proved are not considered in their relation to each other and weighed as a whole, when a certain legal consequence which naturally flows from admitted and proved facts is overlooked, or when a material part of admissible evidence which vitally bears on the point at issue is disregarded. A case which involves such an error of law must in my opinion fall within the ambit of S. 100, Civil P. C. : *see* 25 N L R 68,[2] 15 N L R 97[3] and 17 I A 122[4] at p. 127, where Lord Macnaghten pointed out that an erroneous finding of fact is a different thing from an error or defect in procedure. Where there is an error of defect in the procedure the finding of fact is vitiated and cannot be accepted as final in second appeal.

If the last case quoted there is referred to (and it will be found in 18 Cal 23,[4] and Lord Macnaghten's remarks are seen at page 30), it will be found that the Privy Council there observed :

Where there is no error or defect in the procedure, the finding of the first Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding.

14 Cal 740[5] and 17 Cal 291[6] are referred to. If the first case of the three cited by Niyogi J. is referred to it will be found that there their Lordships of the Privy Council were not concerned with a second appeal but with an appeal under the Land Acquisition Act. In the second of the cases their Lordships observed that the second Appellate Court was competent to go into findings of fact where it appeared that the lower Appellate Court had misconceived the point, that is to say had addressed his

1. Mt. Anupa Bai v. Bhagwant Singh, (1938) 25 A I R Nag 470=179 I C 285=I L R (1938) Nag 535.
2. Atmaram Bhagwant v. Collector of Nagpur, (1929) 16 A I R P C 92=114 I C 587=25 N L R 68 (P C).
3. Damusa v. Abdul Samad, (1919) 6 A I R P C 29=51 I C 177=46 I A 140=47 Cal 107=15 N L R 97 (P C).
4. Mt Durga Choudharain v. Jawahir Singh, (1891) 18 Cal 23=17 I A 122=5 Sar 560 (P C).
5. Anangamanjari Chowdhrani v. Tripura Sundari, (1887) 14 Cal 740 = 14 I A 101 = 5 Sar 45 (P C).
6. Pertab Chunder Ghose v. Mohendra Nath Purkait, (1890) 17 Cal 291 = 16 I A 233 = 5 Sar 444 (P C).

mind and had marshalled the evidence in relation to the wrong question so that he never addressed his mind to the question that had to be answered. In 46 Cal 189[7] their Lordships observe that the powers of the second Appellate Court are

completely circumscribed by the provisions of a statute passed for the express purpose of securing some measure of finality in cases where the balance of evidence, verbal and documentary arose for decision.

There their Lordships observe that

the proper legal effect of a proved fact is essentially a question of law; so also is the question of admissibility of evidence, "so is the question whether there is any evidence at all to support a finding." But the question whether the fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact.

At page 195 they observe :

Their Lordships have carefully considered the judgment of the High Court with these matters present to their minds, but they are unable to find that the decision of the District Judge stood in any shadowy borderland between fact and law. The question for determination was as to the character of certain lands, and as to what was the measurement properly applicable, and the real objection to the judgment of the District Judge was that there were underlying assumptions which vitiated his decision and that the form of his judgment showed that he had misweighed the evidence.

Again at page 197 :

. . . it really amounts to no more than a finding that upon the documents and evidence placed before the learned District Judge the High Court would have come to a different conclusion.

In this case we are asked to upset the finding of fact on the ground that the lower Appellate Court has ignored a mass of documentary evidence. A Full Bench of the Allahabad High Court in 54 All 6[8] observe :

The misreading or ignoring of important documentary evidence amounts to a substantial error or defect in the procedure within the meaning of Sec. 100 (1) (c).

As to that observation, as regards misreading we have nothing to say except that caution is necessary in applying any such rule. But as regards ignoring we entertain a doubt with respect, as to whether that is not putting the proposition in too wide a form. Their Lordships of the Judicial Committee in 18 Cal 23[4] at p. 29 observe:

The lower Appellate Court, it was said, had clearly misapprehended the effect of the settlement proceedings in 1864; undue weight had been attached to the registration in Beni Singh's sole name; the oral evidence had been wholly discarded; sufficient weight had not been given to the important statement in Beni Singh's petition, or to the separate dealings of his two sons; the Court had thus been led to misconceive the case entirely, and to find for the defendant when the finding should have been for the plaintiff.

It would be an unprofitable task to inquire how far this contention is well founded, because their Lordships cannot accept the rulings of the High Courts of Calcutta and Allahabad as a correct statement of the law. Nothing can be clearer than the declaration in the Civil Procedure Code that no second appeal will lie except on the grounds specified in S 584. No Court in India or elsewhere has power to add to or enlarge those grounds. It is always dangerous to paraphrase an enactment and not the less so if the enactment is perhaps not altogether happily expressed. Their Lordships therefore will not attempt to translate into other words the language of S. 584. It is enough in the present case to say that an erroneous finding of fact is a different thing from an error or defect in procedure, and that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be.

We apprehend that what their Lordships are there saying in the clearest possible terms is that the discarding of the whole of the oral evidence is not an error or defect in procedure and that if it results in an erroneous finding of fact, however gross or inexcusable, that finding of fact is conclusive. Different considerations of course arise where there is no evidence to support the finding if the evidence discarded is put on one side. In our opinion, it is desirable in the interests of the litigant public that it should be understood that no second appeal has any chance of success where the only ground is that the lower Appellate Court has omitted to mention this or that piece of evidence. The Legislature rightly or wrongly has decided that the first Appellate Court is to be trusted and it behoves first Appellate Judges to bear in mind the fact that their findings of fact are conclusive and that they therefore have a great responsibility and should be especially careful in such cases. If they are not it may be a matter for administrative discipline, but a second Appellate Court cannot put the matter right in second appeal. So to do would be to go in the face of the clear provisions of the Code and the equally clear decisions of their Lordships of the Judicial Committee. In this particular case, we are satisfied that there has been no such finding as can be stigmatized as inexcusable. The items of evidence overlooked are of the kind requiring a most strenuous argument to show their relevance. We are satisfied that there is evidence to support

7. Nafar Chandra v. Shukur Sheikh, (1918) 5 A I R P C 92 = 51 I C 760 = 45 I A 183 = 46 Cal 189 (P C).
8. Municipal Board Benares v. Kandhaiya Lal, (1931) 18 A I R All 499 = 134 I C 21 = 54 All 6 = 1931 A L J 757 (F B).

the finding which is binding upon us in second appeal. The appeal accordingly fails and is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Nagpur 224

GRUER J.

Syed Ahmad Syed Shahazada— Plaintiff — Applicant.

v.

Ram Gopal Bhagwandeen Trivedi and another — Defendants — Opposite Party.

Civil Revn. No. 179 of 1938, Decided on 31st January 1939, from decree of Small Cause Court Judge, Ramtek, D/- 17-1-1938.

(a) C. P. Debt Conciliation Act (2 of 1933), Sec. 12 — Scope — Settlement by transfer of lands.

Section 12 contemplates a settlement by way of payment of money and not by transfer of lands : *1938 N L J 472, Rel. on.* [P 224 C 2]

(b) Contract — Novation — Agreement with respect to debts, entered between creditor and debtor, subsequently backed out by debtor — Creditor cannot file suit on original debt.

Where a creditor and a debtor enter into a private agreement with respect to the debts and the agreement is partly performed by both the parties but the debtor afterwards backs out of the agreement and refuses to carry it out, the creditor may well put an end to the contract under Sec. 39, Contract Act but he is not allowed to file suit upon the original debt : *A I R 1935 Lah 897; A I R 1929 Sind 49 and A I R 1923 All 518, Rel. on.* [P 224 C 2]

T. B. Pendharker — *for Applicant.*

R. S. Dabir — *for Opposite Party.*

Order. — The parties to this application went before a Debt Conciliation Board for conciliation of the defendants-nonapplicants' debts. On 29th May 1937, they reached an agreement whereby the creditor agreed to take shares in two villages and to pay Rs. 150 in cash to the debtors and give up five houses in another village while the debtors agreed to execute a sale deed for these village shares and *sir* and khudkasht lands. The settlement was partly performed by payment of Rs. 150 and by the defendants giving up possession of these two villages, but thereafter defendants refused to execute the sale deed. The plaintiff therefore brought the present suit in the Court of Small Causes on his original debt due on a bond and cash advanced. The Judge found that the agreement was still valid and operative and plaintiff's only remedy was to sue the defendants for breach of it and he could not fall back on the original debt.

Section 12, Debt Conciliation Act, contemplates a settlement by way of payment of money and not by transfer of lands. This is pointed out by Binney F. C. in 1938 N L J 472.[1] It is conceded that this agreement must be looked on as purely a private one and not one under Sec. 12. Learned counsel for the applicant however contends that seeing that the contract has been broken he has two remedies, either to sue for specific performance or to fall back on the original contract. He certainly may put an end to the contract under S. 39, Contract Act, but the question is whether he can be allowed to sue on the original debt. The other side urges that he could either have sued for specific performance or for damages for breach of the contract. Applicant relies on Ss. 64 and 65, Contract Act. I do not see how either helps. The contract was not voidable and S. 65 would only support a claim for damages. Applicant argues that so long as no sale deed was executed there was no novation or substitution of a new contract. I do not think that this argument can be supported. From S. 62 of the Act it will be seen that a mere agreement to substitute a new contract does away with the necessity for performance of the first one. In A I R 1935 Lah 897[2] it was held that even where there is an alteration in the original contract the creditor cannot fall back on it. In A I R 1929 Sind 49,[3] where there had been a composition between the debtor and his creditors which it was alleged by the creditors had not been properly carried out the latter were not allowed to fall back on the original liability. So in 45 All 472[4] the parties had agreed to be bound by the decision of a panchayat, and one side was not allowed to fall back on the original contract when the other had failed to make payment in accordance with that decision. For the above reasons I think the lower Court's conclusion was correct, that the suit in its present form is not maintainable. The application fails and is dismissed with costs. Counsel's fee Rs. 20.

N.S./R.K. *Application dismissed.*

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1. Dajiba v. Narayan, (1938) N L J 472.
2. Balak Ram v. Telu, (1935) 22 A I R Lah 897 =160 I C 963.
3. Teomal v. Dharamdas, (1929) 16 A I R Sind 49=114 I C 109.
4. Ram Nath v. Mannu Lal, (1923) 10 A I R All 518=73 I C 615=45 All 472=21 A L J 380.

A. I. R. 1939 Nagpur 225

GRUER J.

Ramlalsao Gupta — Defendant — Applicant.

v.

M. E. R. Malak — Plaintiff — Opposite Party.

Civil Revn. Nos. 625, 717, 718 and 797 of 1938, Decided on 17th March 1939, from decree of Addl. Judge, Small Cause Court, Nagpur, D/- 31st August 1938.

(a) Companies Act (1913), S. 101 (3)—Provisions of sub-s. (3) are mandatory—Application for share not accompanied by 5 per cent. of share amount does not constitute valid offer—Hence company cannot demand share amount from applicant.

Sub-section (3) of S. 101 lays down a mandatory requirement. The applicant for a share is under a statutory obligation to pay five per cent. of the nominal amount of the share along with his application and the Company is also under the obligation to see that he does so and it is against public policy that any allotment should be made without compliance with this requirement. Hence an application for share, if not accompanied by any such payment does not legally constitute a valid offer so as to entitle the Company to demand the share money from the applicant : *A I R 1936 Lah 790 and A I R 1934 All 855, Rel. on.* [P 225 C 2]

(b) Contract Act (1872), S. 6 (2) — Scope — Proposal for purchase of shares made in July 1933 and December 1934 — Allotment of shares not made till August 1935—No notice of allotment sent—Revocation not waived by proposers—Proposals held must be deemed to have been revoked.

If a proposer revokes his offer before its acceptance then Sec. 6 (1) applies. Even if he does not revoke, Sec. 6 (2) applies unless of course the proposer's conduct amounts to a waiver of the revocation which would follow on the lapse of a reasonable time. [P 226 C 1]

Applications for shares were made to a Company in March and July 1933 and December 1934. But allotment of shares was not made by the Company till August 1935. No notice of allotment was given to proposers till then and there was nothing in the applicant's conduct which amounted to waiver of the revocation :

Held that Sec. 6 (2) applied and the proposals must be deemed to have been revoked : *A I R 1934 Bom 97 and (1866) 1 Ex 109, Ref.* [P 226 C 1, 2]

R. S. Dabir — *for Applicant.*

R. K. Manohar — *for Opposite Party.*

Order. — This order will dispose also of Revision Applications Nos. 717, 718 and 797 of 1938. The relevant facts in the case are not disputed, and they are that the various defendants-applicants made applications for shares in the Central India Press Ltd., Nagpur, on 15th March 1933, 14th July 1933, 24th December 1934 and 27th December 1934, respectively. Allotment was made to them on 26th August 1935, and on 12th September 1935 the Company called upon them to pay the amounts due on their shares. The Company, I am informed, has subsequently gone into liquidation. These defendants failed to pay the money demanded and have resisted the present suits against them on two grounds: (1) that there was no valid offer and acceptance of shares, and (2) that there was revocation of the proposal under S. 6 (2), Contract Act. S. 101, Companies Act, 1913, sub.cl. 3, provides that the amount payable on application on each share shall not be less than 5 per cent. of the nominal amount of the share. It is admitted that these applications were subsequent to the first allotment of shares and also that they were not accompanied by any payment. The question is whether the applications were legal so as to constitute a valid offer. Sub-section 1 of this Section mentions two conditions, (a) and (b), which must be complied with before any allotment can be made. The payment of 5 per cent. on an application is not one of these conditions, but it does not necessarily follow that the allotment is valid unless the conditions in sub-section 1 are violated. Sub-s. 5 says that any condition requiring or binding any applicant for shares to waive compliance with any requirement of this Section shall be void. Sub-sec. 3 is one of such requirements and sub-sec. 6 makes it clear that sub-sec. 3 applies to allotments of shares subsequent to the first allotment. In A I R 1936 Lah 790[1] it was laid down by a Division Bench that any allotment which is made without payment of at least 5 per cent. of the nominal value of the shares by the applicant is invalid. I respectfully agree with that dictum. Sub-s. 3 lays down a mandatory requirement. The applicant for a share is under a statutory obligation to pay 5 per cent. of the nominal amount of the share along with his application, and the Company is also under the obligation to see that he does so and it is against public policy that any allotment should be made without compliance with this requirement. In A I R 1934 All 855[2] it was similarly held that an allotment of shares by directors without having received the minimum subscription was a misfeasance. That being so, the Company should not be

1. Mutual Bank of India v. Sohan Singh, (1936) 23 A I R Lah 790=161 I C 952.

2. Indian States Bank, Ltd. v. Sardar Singh, (1934) 21 A I R All 855=154 I C 33.

allowed to take advantage of its own wrong-doing and neglect of the provisions of the Act by demanding the share money subsequently.

In support of the second ground about revocation by the lapse of a reasonable time without communication of acceptance of the offer, reference is made to an English case, (1866) 1 Ex 109.[3] In that case application for 50 shares accompanied by a deposit of one pound per share was made on 8th June 1864. On 8th November the defendant having received no communication from the Company withdrew his application, and on 23rd November the Company intimated that 50 shares had been allotted and demanded payment of the balance of the first call. It was held that the allotment had not been made within a reasonable time and so judgment should be given for the defendant. It is true that in that case the defendant had withdrawn his application before the demand was made. But Sec. 6, Contract Act, does not lay down that this must happen before S. 6 (2) comes into play. If the proposer revokes his offer before its acceptance then S. 6 (1) applies. Even if he does not revoke, Sec. 6 (2) applies unless of course the proposer's conduct amounts to a waiver of the revocation which would follow on the lapse of a reasonable time. In the cases before me there is no allegation in the plaints that intimation of their enrolment was sent to the defendants before 12th September 1935. In the case of Mr. C. B. Parakh, there is no doubt an allegation in the plaintiff's reply that acceptance of the proposal was duly communicated to the defendant, but the date is not given. Their failure to protest until demand for payment was made on them cannot therefore be imputed to them as waiver. In A I R 1934 Bom 97,[4] (1866) 1 Ex 109[3] was referred to with approval. It was remarked that if the defendant had been given notice of the allotment and had not objected to it promptly he would have been bound. In the cases before me, except perhaps in the case of Mr. C. B. Parakh, there is nothing to show that such notice was given. I therefore hold that in three of these revision applications S. 6 (2) does apply and the proposal should be held to have been revoked, and in the case of all four, the application was invalid and no money can be recovered as there was no valid contract. The reasons given by the lower Court for holding that the delay was reasonable because the defendants are gentlemen of good status and the Company believed they would pay up—these reasons appear to me to be beside the point. It is also immaterial that the present plaintiff is a transferee for valuable consideration. He is a business man, who no doubt undertook the risk of failing to recover all the amount said to be due to the Company. The applications are allowed with costs and these suits will be dismissed. I fix counsel's fee at Rupees 20 in each case.

N.S./R.K. *Revision allowed.*

3. Ramsgate Hotel Co. v. Montefiore, (1866) 1 Ex 109=4 H & C 164 = 35 L J Ex 90 = 12 Jur (N S) 455=13 L T 715=14 W R 335.

4. Indian Co-operative Navigation and Trading Co. Ltd. v. Padamsey Premji, (1934) 21 A I R Bom 97=150 I C 645=36 Bom L R 32.

A. I. R. 1939 Nagpur 226

POLLOCK J.

Sarup Singh Murat Singh Chhatri
Accused
v.
Emperor.

Criminal Revn. No. 514 of 1938, Decided on 3rd February 1939, from reference by Addl. Sess. Judge, Bhandara, D/- 7th December 1938.

Criminal P. C. (1898), S. 195 (1) (b)—Complaint alleged to be false made to police and then to Court — Prosecution under Sec. 211, Penal Code, cannot proceed without complaint of Court.

Where an alleged false complaint is made to the police and then to the Court, a complaint under S. 211, Penal Code, subsequently filed is a complaint of an offence alleged to have been committed in or in relation to a proceeding in a Court, and hence the prosecution under Sec. 211, Penal Code, cannot proceed without the complaint of the Court. [P 227 C 1]

It is undesirable that where a case has been taken into Court it should thereafter be open to the police to evade the provisions of S. 195, Criminal P. C., by filing a complaint under Sec. 211, Penal Code, on the complaint by a police officer; and the wording of S. 195 (1) (b) is quite wide enough to require that in such circumstances the Court itself shall make a complaint. It is certainly undesirable in such circumstances that the police should file a complaint under S. 182, Penal Code: *A I R 1917 Cal 596; A I R 1927 Cal 95; A I R 1932 Pat 152; A I R 1927 Mad 851 and A I R 1928 Rang 254, Rel. on; A I R 1931 Rang 12, Expl.; A I R 1928 All 765, Not approved.* [P 227 C 1, 2]

M. Adhikari — *for Accused.*

S. R. Mangrulkar — *for Complainant.*

Order.—This is a reference under S. 438, Criminal P. C., by the Additional Sessions Judge, Bhandara, recommending that the

prosecution of Sarup Singh under S. 211, I. P. C., should be quashed on the ground that it is barred by S. 195 (1) (b), Criminal P. C. On 11th March 1938, Sarup Singh made a report to the police that certain named persons had cut and taken away some of his trees. The police did not prosecute these persons, and on 4th May Sarup Singh filed a complaint of theft in Court. On 23rd May the police filed a complaint against Sarup Singh under S. 211, I. P. C., and it is now contended that no such complaint could be filed without a complaint from the above Court.

At the time the police filed their complaint under S. 211, I. P. C., a complaint of theft had already been filed in Court, and therefore in my opinion the complaint under S. 211, I. P. C., was a complaint of an offence alleged to have been committed in or in relation to a proceeding in a Court. This is the view taken in 44 Cal 650,[1] 53 Cal 824,[2] 11 Pat 155,[3] A I R 1927 Mad 851[4] and A I R 1928 Rang 254.[5] The decision in 8 Rang 499,[6] to which I have been referred, is not a decision the other way, because there it was held that a complaint under S. 182, I. P. C., could be filed by the police after a complaint to the Court ; the question whether a complaint under S. 211, I. P. C., could be filed was not considered. The only decision the other way is 51 All 382,[7] and with due respect I prefer the contrary view adopted by most of the High Courts. It seems to me undesirable that where a case has been taken into Court it should thereafter be open to the police to evade the provisions of Sec. 195, Criminal P. C., by filing a complaint under S. 211, I. P. C., on the complaint by a police officer ; and the wording of S. 195 (1) (b) is quite wide enough, in my opinion, to require that in such circumstances the Court itself shall make a complaint. It is certainly undesirable in such circumstances that the police should file a complaint under S. 182, I. P. C., as has been remarked in some of the above cases and in A I R 1929 Sind 115,[8] but on the question whether it is legal or not, it is not necessary to express any opinion here. I hold that the present prosecution under S. 211, I. P. C., cannot proceed without a complaint of the Court, and the Court has already stated that it considers that the complaint was made bona fide. The reference is accepted and the prosecution under S. 211, I. P. C., is quashed.

D.S./R.K. *Revision allowed.*

1. Brown v. Ananda Lal, (1917) 4 A I R Cal 596 =36 I C 857=44 Cal 650 = 25 C L J 59=18 Cr L J 25=20 C W N 1347.
2. Samir v. Sajidar Rahman, (1927) 14 A I R Cal 95=99 I C 118=28 Cr L J 86=53 Cal 824.
3. Subhag Ahir v. Emperor, (1932) 19 A I R Pat 152=1932 Cr C 269=135 I C 520=33 Cr L J 153=11 Pat 155=12 P L T 905.
4. Murugan v. Gutha Rami Naidu, (1927) 14 A I R Mad 851=104 I C 625=28 Cr L J 849 =53 M L J 455.
5. Rambrose v. Emperor, (1928) 15 A I R Rang 254=114 I C 685 = 30 Cr L J 342 = 6 Rang 578.
6. Ma Paw v. Emperor, (1931) 18 A I R Rang 12 =1931 Cr C 28=128 I C 836=32 Cr L J 202 =8 Rang 499.
7. Emperor v. Prag Datt, (1928) 15 A I R All 765=111 I C 858=29 Cr L J 938=51 All 382 =1929 A L J 68.
8. Ramchand v. Emperor, (1929) 16 A I R Sind 115=1929 Cr C 106=115 I C 313=30 Cr L J 399=23 S L R 225.

A. I. R. 1939 Nagpur 227

STONE C. J. AND VIVIAN BOSE J.

Shridhar Krishnarao and another — Appellants.

v.

Narayan Namaji and another — Respondents.

Misc. Appeal No. 306 of 1937, Decided on 24th February 1939, from order of First Addl. Dist. Judge, Wardha, D/. 27th September 1937.

(a) C. P. Debt Conciliation Act (3 of 1933), Ss. 12 (1), 12 (2), 13—Payment of debts can be agreed to be made in cash or in kind—Amount made payable in cash—S. 13 applies—Jurisdiction of Civil Court does not arise until S. 13 (3) is complied with — Amount payable in kind — Agreement is enforceable as decree by Civil Court as soon as it is registered.

The settlements contemplated by the Debt Conciliation Act are not restricted in their scope, and payment of the debts can be agreed to be made either in cash or in kind. If the amounts due are made payable in cash, then the provisions of S. 13 are attached and in that case the jurisdiction of the Civil Courts does not arise until the provisions of S. 13 (3) have been complied with; but if the amounts are payable in kind, then the agreement is enforceable as a decree by the Civil Courts the moment it is registered. No suit for specific performance of the contract is necessary : *1939 N L J 85, Rel. on.* [P 230 C 1, 2]

(b) C. P. Debt Conciliation Act (3 of 1933), S. 12 (1)—Word "amounts" in S. 12 (1) is not limited to sums of money — Both liabilities as well as payments in kind are contemplated.

The word "amounts" in S. 12 (1) is not limited to sums of money and both liabilities, as well as payments in kind, are contemplated. The word "amounts" in S. 12 (1) is used in a wider sense, than usual and it includes the total quantity of the debtor's liabilities in cash or in kind and the

payments of these "amounts" can be either in cash or in kind. [P 228 C 2]

(c) Interpretation of Statutes — Construction — Grammatical and ordinary sense of words leading to absurdity or inconsistency—It can be modified so as to avoid these consequences.

In construing all statutes the grammatical and ordinary sense of words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the statute in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity or inconsistency but no further : *(1857) 6 H L C 61 and A I R 1939 P C 47, Ref.* [P 229 C 2]

D. V. Gharpurey — *for Appellants.*

N. T. Mangalmurti — *for Respondents.*

Judgment.—This appeal raises an important question which is likely to affect a large volume of litigation in this Province. The respondents applied to the Debt Conciliation Board for a settlement of their debts. Their creditors are the appellants here, and one Jankibai with whom we are not concerned. A settlement was reached in which the creditors undertook to receive payment, not in cash but in kind. The exact terms were that the respondents should sell certain immovable property to the appellants in satisfaction of the debt of Rs. 1300 which the respondents owed the appellants and of Rs. 825 which they owed Jankibai, bringing the total consideration for the sale up to Rs. 2125. The appellants undertook to pay Jankibai her Rs. 825 and she agreed to release the respondents and to look to the appellants for her money. The agreement was thereupon registered in accordance with the provisions of the Act. Up to this point the matter never reached the Courts. It was all accomplished without any suit being filed. The respondents now refuse to fulfil their undertaking and so the appellants come to Court and seek execution of the agreement under S. 12 (2), C. P. Debt Conciliation Act, treating the agreement as if it were a decree. The question is whether they can do so or whether a regular suit for specific performance is required. The lower Court holds that the Debt Conciliation Act does not contemplate agreements of this kind and that consequently the agreement here cannot be executed under Sec. 12 (2); a separate suit specifically to enforce it is necessary. Gruer J. held otherwise in (1939) N L J 85.[1] The Act is not easy to construe; in fact, to put it bluntly, it is ill-drafted, and hastily considered provisions are in many cases antagonistic to each other and thus place an impossible strain upon the Courts in interpreting them. The object of the Act is to enable debtors who are agriculturists to reach amicable settlements with their creditors and thus to relieve them from indebtedness. The Preamble recites :

> Whereas it is expedient to relieve agriculturists from indebtedness by amicable settlement between them and their creditors;

No restrictions have been placed on the nature of the settlement which can be reached in respect of debts which fall within the purview of the Act and so it would be wrong for us to infer them unless they are necessarily implied. What we have to see then is whether there is any necessary implication. S. 12 (1), which deals with the conditions of settlement, merely states :

> If the creditors . . . come to an amicable settlement with the debtor, such settlement shall forthwith be reduced to writing in the form of an agreement recording . . .

and then follow a list of matters which must be recorded. Among them are

> (1) "the amounts payable to such creditors", and
>
> (2) "the manner in which and the times at which they are to be paid."

Now the word "they" clearly refers to the word "amounts" which precedes it, and so the Section directs that among the matters to be recorded are the "amounts" due to the creditors specified and the time at which and the manner in which these "amounts" are to be paid. What we have to see then is whether an "amount" can be paid in kind. That in turn depends upon what an "amount" is. One of the definitions given to the word in Webster's International Dictionary is "the sum total of two or more sums or quantities," and the definition of "debt" given in S. 2 (e) of the Act is "debt includes all liabilities owing to a creditor in cash or kind," while S. 12 (1) speaks of the "total amount of the debtor's debts." It is clear then that the word "amount" is used here in a wider sense than usual and that it includes the total quantity of the debtor's liabilities in cash or in kind. Consequently, the payment of these "amounts" can also be either in cash or in kind. It follows that the word "amounts" is not limited to sums of money and that both liabilities as well as payments in kind are contemplated. That being so, and there being no express restriction on the nature of the agreement which may be reached, we would not be justified in curtailing the scope of this otherwise unrestricted Section

1. Seth Shankardas v. Seth Nandlal, (1939) N L J 85.

unless there be "necessary implication." Then follows S. 12 (2) which states that

an agreement thus made shall. . . . . be registered . . . . . and it shall then take effect as if it were a decree of a Civil Court.

That clearly means that it takes effect as if it were a decree from the moment of registration, and of course every decree of a Civil Court is, in the absence of a provision to the contrary, executable at once by the Civil Courts. But then follows S. 13:

If a debtor defaults in paying any amount due in accordance with the terms of an agreement registered under sub-s. (2) of S. 12, such amount shall be recoverable as an arrear of land revenue.

Now it is clear that only sums of money can be recoverable as arrears of land revenue, and had it not been for the word "then" in S. 12 (2), it might have been possible to hold that since the Act must be read as an intelligible whole, therefore the word "amount" in the former Section must be restricted to sums of money. Such a construction would have been strengthened by a reference to sub-ss. (3) and (4) of S. 13. The former states that:

Where the Deputy Commissioner fails, under sub-s. (1) to recover as an arrear of land revenue any part of the amount referred to therein, he shall certify that it is irrecoverable and thereupon the agreement shall cease to subsist.

Sub-s. (4) then continues:

Where an agreement ceases to subsist, any amount which was payable under such agreement but has not been paid shall be recoverable as if a decree of a Civil Court had then been passed for its payment.

What S. 13 says is therefore clear. In the first place, it speaks of sums of money and not of liabilities in kind imposed by the agreement. It then says that this agreement shall not, in the first place, operate as a decree but shall be enforced instead in a particular way by the revenue and not the Civil Courts. If that fails, then the agreement must be officially killed by a certificate of the Deputy Commissioner and it is only when it has thus "ceased to exist" as an agreement that any "amount" due under it is to be recoverable "as if a decree of a Civil Court had been passed." Therefore clearly the agreement does not lose its character as such and become a decree until the contingency contemplated has occurred, that is to say until the agreement ceases to exist as an agreement for the reason given; until that happens, there is only an agreement and not a decree. But all this is directly counter to the word "then" in S. 12 (2) which states that the agreement shall take effect as a decree of a Civil Court from the moment it is registered. It is clearly impossible for it to take effect from that moment as a decree and yet at the same time be deemed not to be a decree until it has ceased to subsist because of the Deputy Commissioner's certificate. We are sensible of the fact that the present S. 13 was not introduced into the Act until the year 1936 and that it was not there when the Act first came into force. But the original Section used exactly the same language so far as this matter is concerned. Sub-ss. (1), (2) and (3) of the old Section are exactly the same as sub-s. (1), (3) and (4) of the present. The only departure is contained in sub-s. (2) of the new Section and that does not affect the present question. In these circumstances, it being impossible to reconcile these contradictory provisions, it becomes necessary for us to modify the ordinary sense of the words used. Our power to do so is contained in a passage from Lord Wensledale's speech in (1857) 6 H L C 61[2] at p. 106 which was quoted with approval by the Privy Council in Privy Council Appeal No. 81 of 1938[3] on a question relating to the construction of a statute:

I have been long and deeply impressed with the wisdom of the rule, now I believe, universally adopted, at least in the Courts of law in Westminster Hall, that in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further.

We have now to see how and in what way the modification is to be made. As regards this we bear in mind (1) the fact that this legislation makes drastic inroads upon vested rights and that therefore (2) we should not attempt to fetter the usual freedom of contract permissible under the law for the settlement of these vested claim except in so far as we are expressly or by necessary implication directed to do so; and (3) we note that S. 12 not only imposes no restrictions upon the kind of settlement which may be made, but on the contrary indicates that it is using at least one word, the word "amounts," in a much wider sense than usual. We also think it right to take into consideration other matters to which reference would not have been permissible

2. Grey v. Pearson, (1857) 6 H L C 61 = 26 L J Ch 473=3 Jur (N S) 823=5 W R 454.

3. Pakala Narayanaswami v. Emperor, *Reported in* (1939) 26 A I R P C 47=180 I C 1.

had the words of the Act been clear and unambiguous. In the official introduction to the Provincial Government's introduction to the Central Provinces Debt Conciliation Act, the following passage occurs at page 2 :

In cases in which the debts are too heavy to be liquidated from surplus annual income in a reasonable number of years, one way out of the difficulty is to satisfy a portion of the compounded debt by a transfer of a part of the property.

It is true that the passage continues :

Strictly speaking, such settlements are not within the purview of the Act.

But it goes on to say :

But there is no bar to the Board using its good offices to bring them about, and in practice they are made whenever possible.

Therefore not only have these Boards been encouraged to bring about such settlements but here is an official statement by Government that the practice is to do this whenever possible; and the present case is one of these instances. Now it seems clearly wrong to us that an authority of this kind, in whom all parties should have confidence and trust, should be encouraged to bring about a result which is said to be beyond the scope of his powers without his being told in the clearest terms that he must explain to these parties that he is acting, when matters reach this stage, only as a mediator and a friend and not in an official capacity; that he must explain that he has no official status to intervene. If the present case is a sample, and we are told it is, then clearly the parties are left under the impression that his good offices are being exercised under the Act itself. All the procedure of the Act has been used and the agreement is drawn up in the specified form and it has been registered as an agreement under the Act. It seems to us therefore that a large number of these settlements must have been effected under these conditions and under the impression that they come under the Act. In these circumstances it behoves us to uphold them under the Act if we can; otherwise much injustice will result. And lastly we have here the fact that the Act has already been judicially interpreted along those lines by a Judge of this Court in (1939) N L J 85.[1]

In these circumstances we feel that the nearest we can come to reconciling these conflicting Sections is to hold (1) that the settlements contemplated by the Act are not restricted in their scope and that payment of the debts can be agreed to be made either in cash or in kind, and (2) that if the "amounts" due are made payable in cash, then the provisions of S. 13 are attracted and in that case the jurisdiction of the Civil Courts does not arise until the provisions of S. 13 (3) have been complied with; but (3) if the amounts are payable in kind, then the agreement is enforceable as a decree by the Civil Courts the moment it is registered. The appeal is allowed and the order of the lower Court is reversed. The agreement will be treated as a decree for specific performance of the contract to sell the land contained in the agreement and execution will proceed accordingly. Costs here and in the Courts below will be paid by the respondents.

R.M./R.K. *Appeal allowed.*

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STONE C. J. AND VIVIAN BOSE J.

Thakur Chudaman Singh Rajput — Defendant — Appellant.

v.

Babu Kamtanath Gauri Shanker Bhargava — Plaintiff — Respondent.

Letters Patent Appeal No. 35 of 1936, Decided on 15th March 1939, from appellate decree of Gruer J., in S. A. No. 31 of 1935, D/- 29th October 1936.

(a) C. P. Tenancy Act (1 of 1920), Ss. 49, 110 — S. 49 has no retrospective effect in respect of leases of sir land validly granted under old Act by ex-proprietor when he was proprietor — Rights acquired under the lease are saved by S. 110.

The provisions of Sec. 49 have no retrospective effect in respect of leases of *sir* land, validly granted under the old Act, by an ex-proprietor, when he was proprietor. The leases and the rights acquired by the tenant under them, under the old Act are expressly saved by S. 110 of the present Act : *A I R 1933 Nag 378, Rel. on; 9 N L R 158, Ref.* [P 232 C 1]

(b) Interpretation of Statutes — Construction of Acts.

No Act should be construed so as to destroy existing rights unless there is unambiguous language to that effect. [P 231 C 2]

(c) Interpretation of Statutes — Marginal notes — Marginal notes can be looked into if particular construction leads to conflict of rights granted by Act and those acquired under old Act repealed by it.

Where a particular construction of a Section of an Act leads to a conflict of rights granted by the Act and those acquired under an old Act repealed by it, the Court is entitled to look to the marginal note in the Section for purpose of interpreting it. [P 231 C 2]

M. B Kinkhede, J. Sen and A. R. Kulkarni — *for Appellant.*

R. N. Padhye and R. K. Rao — *for Respondent.*

Judgment. — This is a Letters Patent Appeal which raises an important question about the retrospective effect of S. 49, C. P. Tenancy Act of 1920. One Tikaitsingh was the proprietor of an 8 annas share in Mouza Chhapara Khurd and held certain *sir* land in connexion with that share. On 13th January 1908 he mortgaged his proprietary rights to the defendant-appellant. The mortgage was for foreclosure and in 1919 the defendant sued upon it. But before he did that Tikaitsingh granted two leases of his *sir* fields to one Gauri Shankar, the father of the present plaintiff, by two documents dated 12th March 1917 and 6th August 1917. They were permanent leases and the plaintiff now claims title under those documents and claims the right to possess this land under rights derived from them. It was conceded in the trial Court that these two permanent leases were valid. After the suit on the mortgage had been instituted, the new Tenancy Act came into force, that is to say it came into force on 1st May 1920 save as to S. 96 with which we are not here concerned. Then on 12th March 1921 the defendant obtained a decree for foreclosure and thereby the original mortgagor Tikaitsingh, or rather his son Dillisingh, Tikaitsingh being dead, became the exproprietary occupancy tenant and the mortgagee became his landlord. Dillisingh defaulted in paying his rent and consequently the defendant sued him in 1930 for arrears of rent and obtained a decree on 11th June 1930. In pursuance of this decree he obtained an order for ejectment on 11th April 1931 and took possession of the land. It is to be observed that the present plaintiff was not a party either to the mortgage suit or to the rent suit or to the proceedings for ejectment. But in spite of that the defendant obtained possession though exactly how is not clear. Because of that the plaintiff filed the present suit for possession and obtained a decree in the trial Court which was confirmed in second appeal, the decree of the intervening Court to the opposite effect having been set aside.

It is urged on behalf of the defendant that S. 49, C. P. Tenancy Act, either has retrospective effect or at any rate operates so as to destroy any vested interests which the plaintiff might have obtained under the old law. It is said that sub-s. (1) enacts that

> notwithstanding any contract to the contrary . . . a proprietor who temporarily or permanently loses . . . . . his right to occupy any portion of his *sir* land as a proprietor, shall, at the date of such loss, become an occupancy tenant of such *sir* land and any tenancy right granted by him in such *sir* land for a period exceeding five years, without the sanction of a Revenue Officer, shall thereupon lapse.

Our attention is also drawn to S. 49 (3) which states that

> nothing in this Section shall affect rights under any document duly registered before 21st October 1898.

It is argued that such documents having been saved and no other documents having been saved, S. 49 has retrospective effect, or at any rate destroys these vested rights.

It is a rule of construction that no Act should be construed so as to destroy existing rights unless there is unambiguous language to that effect. When we turn to S. 110 of the present Tenancy Act it enacts that

> all rules . . . . . made . . . . . and leases granted . . . . rights acquired and liabilities incurred . . . . under any of the enactments hereby repealed shall, so far as may be, be deemed to have been respectively made . . . . . granted . . . . . acquired and incurred . . . . . under this Act.

It is thus clear that so far as rights acquired are concerned, provided they were acquired under one of the former Acts repealed by the present Act, they have been saved and are deemed to have been acquired under the present Act. A difficulty may arise as regards the word "leases" in this way: if the leases in question are deemed to have been acquired under the present Act then they are inoperative, or at any rate inoperative beyond the term of five years, because of S. 49. But since such a construction would lead to a conflict between rights under the leases deemed to have been so granted and the rights acquired under the old Acts hereby saved we are entitled to look to the marginal note : *see* Maxwell on the Interpretation of Statutes, Edn. 7, page 186. The marginal note indicates that the Section is dealing with the extent of the savings made by the Act. Therefore, in our opinion, the leases granted, together with all rights acquired, are being saved and not destroyed. We were referred to the words "so far as may be." But as there is no difficulty in saving the leases and the rights acquired and liabilities incurred under them, provided they can be said to have been acquired and incurred under one of the old Acts repealed by the present one, these words introduce no complication into this case. We have now to see what rights the plain-

tiff acquired under the old Tenancy Act. Under that he was an ordinary tenant. Tenants of that kind were divided into two classes, namely those whose holding consisted entirely of *sir*, and others. So far as the former are concerned they held, according to the old law, under the terms of the contract entered into between the landlord and themselves except as regards certain particulars which do not concern us here. This is not to be found in express terms in the old Act but it must be implied from Ss. 63, 64, 67 and 69, and it was so held in 9 N L R 158[1] at page 159. Sec. 45 conferred ex-proprietary occupancy rights upon the proprietor of *sir* land who transferred his rights, but sub-s. (5) expressly saved the rights of a tenant whose holding consisted exclusively of *sir*. It is in these words :

> The accrual of occupancy-tenant right under sub-s. (1) shall not affect the rights of an ordinary tenant holding any part of the *sir* land at the time of such accrual.

Therefore it is clear that under the old Act the rights which accrued to the plaintiff by his leases were expressly saved by S. 45 (5). It follows that those rights were acquired under that Act and consequently are deemed to have been acquired by Section 110 of the present Act, under the present Act. Therefore his rights under these leases are saved to him and remain as they were before. That being so, it follows that the decrees of the first Court and this Court which decree his right to possession are correct. In support of this view are 19 N L R 110[2] and 30 N L R 109[3] at p. 111 which hold that the provisions of the present Act relating to this matter have no retrospective effect in respect of leases of *sir* granted by the ex-proprietor when he was proprietor. Most of the arguments on behalf of the appellant, and the rulings cited by his learned counsel, were based on the assumption that the present position of the plaintiff is that of a sub-tenant because of the definition in S. 37 (2) (b) of the present Act. Those rulings are : 13 C P L R 19,[4] at p. 21, 14 N L R 107,[5] 28 N L R 93,[6] 30 N L R 25[7] and 50 Cal 419.[8] Reference was also made to Secs. 115 and 117, T. P. Act. But since in our view the plaintiff's rights are expressly preserved by him by S. 110 no further reference to these arguments and authorities is necessary. The appeal is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

1. Narayan v. Bisram, (1913) 9 N L R 158 = 21 I C 607.
2. Hindusingh v. Mangal, (1923) 10 A I R Nag 227=72 I C 438=19 N L R 110.
3. Bholu v. Chajjulalsa, (1933) 20 A I R Nag 378=147 I C 561=30 N L R 109.
4. Venkat Rao v. Kohlu Gond, (1900) 13 C P L R 19.
5. Sarjerao v. Tukaram, (1917) 4 A I R Nag 86= 46 I C 244=14 N L R 107.
6. Baldeoprasad v. Premnarain, (1932) 19 A I R Nag 107=139 I C 369=28 N L R 93.
7. Sheolal v. Abdul Husein, (1933) 20 A I R Nag 255=148 I C 257=30 N L R 25.
8. Ramkissendas v. Binjraj Chowdhury, (1923) 10 A I R Cal 691=77 I C 910=50 Cal 419.

* A. I. R. 1939 Nagpur 232

POLLOCK J.

Liquidator of Society Sangakheda Kalan Co-operative Bank, Hoshangabad — Appellant.

v.

Ayodhyaprasad Shiamlal and others — Respondents.

Misc. Appeal No. 77 of 1938, Decided on 16th January 1939, from order of Addl. District Judge, Hoshangabad, D/- 1st December 1937.

*** Civil P. C. (1908), Ss. 2 (17) (h) and 80— Liquidator appointed under S. 42, Co-operative Societies Act, is public officer—Attachment by him in execution of award issued by Registrar of Co-operative Credit Societies — Objection by person to attachment dismissed — Suit by that person under O. 21, R. 63 must fail for want of notice to liquidator.**

The duties of the liquidator appointed under S. 42, Co-operative Societies Act, are quasi-judicial duties and he has authority to summon and enforce the attendance of witnesses and to compel the production of documents in the same way as the Civil Court. As the liquidator is appointed by Government and performs public duties, he is an officer in the service of Government when acting as liquidator and is therefore a 'public officer' as defined in the Civil Procedure Code. Hence where in execution of an award issued by the Registrar of Co-operative Credit Societies the liquidator has attached a house and an objection to the attachment brought by a person on the ground that the house belonged to him being dismissed, a suit under O. 21, R. 63, Civil P. C., is brought to establish his title, the suit must fail for want of notice to the liquidator : *A I R 1927 P C 176, Rel. on ; A I R 1934 Nag 201, Disting.*

[P 233 C 1]

B. L. Gupta — *for Appellant.*

K. B. Tare — *for Respondents.*

Judgment.—In execution of an award issued by the Registrar of Co-operative Credit Societies against Ramcharan for a debt due to the Sangakheda Society under liquidation the liquidator attached a house. The respondents Ajodhya Prasad and Banwari

objected to the attachment on the ground that the house belonged to them, and, after that objection had been dismissed, brought a suit under O. 21, R. 63, Civil P. C., to establish their title. The trial Court dismissed the suit on the ground that no notice had been given to the defendant liquidator as required by S. 80, Civil P. C. The lower Appellate Court held that no notice was necessary under Sec. 80 and remanded the case for trial.

In the lower Court it was assumed that a liquidator is a public officer as defined in S. 2 (17), Civil P. C. This was also assumed in 30 N L R 240[1] without discussion. The point has been taken in this Court that the liquidator is not a public officer. Under cl. (h) of S. 2 (17) a 'public officer' includes every officer in the service or pay of the Government. An affidavit that has been filed in this Court shows that the liquidator is the manager of the Co-operative Central Bank Ltd., Hoshangabad, and is paid a salary of Rs. 50 p. m. by that institution; that he had been appointed a liquidator under Sec. 42 (1), Co-operative Societies Act, (2 of 1912) by order of the Registrar of the Co-operative Societies and has the powers mentioned in S. 42 (2) of that Act; and that as liquidator he is not paid any allowance. The duties of the liquidator appointed under Sec. 42, Co-operative Societies Act, are quasi judicial duties and he has authority to summon and enforce the attendance of witnesses and to compel the production of documents in the same way as the Civil Court. As the liquidator is appointed by Government and performs public duties, I consider that he is an officer in the service of Government when acting as liquidator and is therefore a "public officer" as defined in the Civil Procedure Code.

Section 80, Civil P. C., requires that no suit shall be instituted against a public officer in respect of any act purporting to be done by such public officer in his official capacity until the expiration of two months next after notice in writing has been given to him. The decision of the Privy Council in 51 Bom 725[2] makes it quite clear that no suit can be brought without previous notice against a public officer in respect of any act purporting to be done by him in his official capacity even if the relief claimed is merely a declaration or injunction. Here the action of the liquidator that gave rise to the present proceedings was his attachment of the house. The remark in 30 N L R 240[1] that notice was not necessary in that case, was obiter and the facts were different because there, there had been no attachment by the liquidator. I therefore agree with the trial Court that the suit must fail for want of notice. The appeal is allowed and the plaintiff's suit will stand dismissed with costs. Counsel's fee in this Court Rs. 25.

D.S./R.K. *Appeal allowed.*

1. Yedha Society, Nimar v. Pragdas, (1934) 21 A I R Nag 201=148 I C 714=30 N L R 240.
2. Bhagchand Dagadusa v. Secy. of State, (1927) 14 A I R P C 176=104 I C 257=54 I A 338 =51 Bom 725 (P C).

*** A. I. R. 1939 Nagpur 233**

FULL BENCH

STONE C. J., GRILLE AND VIVIAN BOSE JJ.

Mohammad Azizullakhan Mohammad Salamullah Khan — Plaintiff — Appellant.

v.

Mohammad Noorullah Khan and others —Defendants — Respondents.

Misc. Appeal No. 26-B of 1935, Decided on 14th April 1939, from order of the Addl. Dist. Judge, Buldana, D/- 9th January 1935.

***(a) Registration Act (1908, as amended by Act 21 of 1929), S. 17 (1) (b) — Applicability to Berar — Notification No. 3510-B issued by Governor-General in Council in 1913 stating that Registration Act (1908) shall apply to Berar subject to any amendments to which that enactment is for the time being subject in Central Provinces is not ultra vires — Amendment of 1929 therefore applies to Berar and award is compulsorily registrable under Section 17 (1) (b).**

Notification No. 3510-B issued by the Governor-General in Council in 1913 stating that not only should the enactments specified in the Schedule (which included the unamended Registration Act of 1908) apply to Berar but also those enactments subject to any amendments to which the enactments are for the time being subject in the Central Provinces is not ultra vires. Cl. 4 of the Indian (Foreign Jurisdiction) Order in Council, 1902, can be read as meaning that the Governor-General in Council may, if he thinks fit, and if that is the more convenient way of introducing modifications of existing laws into Berar, (as indeed it is), pass such a general administrative measure. There is nothing inherently wrong in it. As a matter of broad practice, Berar is governed along with the Central Provinces as one large administrative unit although legally and technically it is entirely separate, and in general, laws which obtain in the Central Provinces are introduced almost automatically into Berar as a mere routine of administration. Therefore this is clearly the more convenient way of dealing with amending enactments. As this

practice is in vogue for a long time and has been followed without question or objection for a number of years and which has affected for better or for worse the lives and properties of countless numbers of people it behoves the Court, if that be at all possible, to try and find a legal origin for it. Hence the amendment of 1929 to Sec. 17 can be regarded as legally applicable to Berar and therefore award is compulsorily registrable under Section 17 (1) (b), Registration Act. [P 235 C 2; P 236 C 1, 2]

*** (b) Registration Act (1908), Ss. 17 (1) (b) and 49—Effect of unregistered award — Filing of award under Para. 20 of Sch. 2, Civil P. C., affects immovable property comprised in award and therefore requires registration when it is used for purpose of being filed under Para. 20 of Sch. 2, Civil P. C.**

There is no law which requires an award to be registered before it can operate as an award in the same sense as the Transfer of Property Act requires the registration of sales and mortgages dealing with immovable property of the value of one hundred rupees and more. An unregistered award is not therefore invalid for all purposes. The only drawbacks attached to it are those mentioned in S. 49, Registration Act, that is to say, it cannot be used to "affect any immovable property comprised therein" and it cannot be received "as evidence of any transaction affecting such property." The filing of an award under Para. 20 of Sch. 2, Civil P. C., does not merely form a document which forms part of a judicial proceeding but it affects immovable property comprised in the award and hence requires registration when it is used for the purpose of being filed under Para. 20 of Sch. 2, Civil P. C. : *A I R 1929 P C 269 and A I R 1938 Bom 422, Rel. on; Case law reviewed.*

[P 236 C 2; P 237 C 1; P 239 C 1; P 240 C 1]

(c) Civil P. C. (1908), O. 23, R. 3 — Parties agreeing in stating that suit has been adjusted —Court must record it even if compromise was embodied in unregistered document *(Obiter).*

When both parties come before the Court and are agreed in stating that the suit has been adjusted, then the Court has no option (except perhaps an inherent power to prevent its proceedings from being used to work substantial injustice) but to record it. It does not then matter whether the compromise was embodied in an unregistered document or not because the authority to proceed is grounded on the statements made to the Court, the admissions of both sides on which the Court is warranted to, and in fact must, act when both sides are agreed. That is the "proof" of which the rule speaks. The reason is that that which is admitted in the pleadings or statements made to the Court need not be proved. Under the law the writing becomes (unless registration is necessary to effect the transaction itself in certain sales and mortgages) the only evidence when the matter is in dispute, but that evidence becomes unnecessary when the agreement is not in dispute: *A I R 1930 P C 158, Rel. on; 24 Cal 20; A I R 1924 Cal 558; 5 Bom 143 and 3 Mad H C R 342, Ref.*

[P 238 C 1]

(d) Arbitration — Award — Award need not be in writing — Proof of oral award is not excluded by provisions of Registration Act.

An award need not be in writing. An arbitrator can validly deliver an oral award whatever the nature and value of the property involved. The Registration Act only fastens upon written instruments and therefore proof of an oral award would not be excluded by its provisions. [P 239 C 1]

(e) Arbitration — Award — Registration — Unregistered award affecting immovable and moveable properties — Portion dealing with moveable property not separable with reasonable clearness from portion dealing with immovable property—Award must be rejected as a whole.

The doctrine that unregistered award is bad only in so far as it affects the immovable property and that therefore effect can be given to it so far as the moveables are concerned cannot apply unless the good portion of the award can be separated with reasonable clearness from the bad. If it cannot, and if the two are inextricably mixed up, then the award has to be rejected as a whole, and this even though the Court should approach an award with a desire to support rather than to destroy it. [P 240 C 2]

Y. V. Jakatdar — *for Appellant.*

V. K. Rajwade, A. V. Khare and W. B. Pendharkar, and A. Razak Khan—*for Respondents 1, and 2 to 7 respectively.*

Judgment.—This appeal arises out of a suit under Para. 20 of Sch. 2, Civil P. C., in which the plaintiff sues for the filing of an award. The parties are heirs of the late Nawab Khan Bahadur Salamullah Khan of Deulghat. Of them the second son is the plaintiff-appellant. The other heirs are the defendants-respondents, the eldest son being respondent 1. The third son died during the pendency of these proceedings and respondents 2 to 5 are his heirs. The remaining heirs, namely respondents 6, 7 and 8, are the deceased's daughters. When the late Khan Bahadur died and questions arose about the division of his estate, all his heirs, that is to say, his three sons and his three daughters, referred the matter to arbitration and agreed to abide by the award of Mr. M. Sharfuddin, a pleader of Amraoti, whom they appointed as arbitrator. The agreement to refer was signed on 11th June 1931 and the award was delivered on 21st March 1932.

All the parties to this suit accept this award except the eldest son, respondent 1, and he contends that the award not having been registered no suit will lie on it, and also that the suit is in any case barred by time. The first of these points has been found in his favour by the learned Judge of the lower Court and the second against him, with the result that the suit has been dismissed. The plaintiff appeals. We will deal with the question of registration first. The argument under this head consists of several parts. The first, and the most important from an administrative point of

view, is whether a certain amendment to S. 17, Registration Act, has ever been legally applied to Berar, or whether the Notification of the Gevernor-General in Council under which it has hitherto been assumed that the amendment applies, is ultra vires. It is admitted that if the amendment does not apply to Berar, then registration will not be necessary. The question arises in this way. Sec. 17 (1) (b), Registration Act, requires registration of all non-testamentary instruments [not being gifts of immovable property; that is separately dealt with in cl. (a)]

which purport or operate to create, declare, assign, limit or extinguish, etc. . . . any right, title or interest . . . . of the value of Rs. 100 and upwards, to or in immovable property.

There can be no doubt that awards, when they relate to immovable property of the value of Rs. 100 and upwards, fall within the ambit of this clause. But in the Registration Act, as it stood before the amendment in question, awards were expressly exempted under S. 17 (2) (vi) which in its unamended form was in the following terms:

Nothing in clauses (b) and (c) of sub-section (1) applies to. . . . . .

(vi) any decree or order of a Court and any award.

Therefore up to the date of the amendment awards did not require registration. Then came S. 10 of Act 21 of 1929 which introduced amendments to S. 17. In so far as they are relevant to the present matter the words "and any award" were deleted from cl. (vi) above and in their place were substituted

except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding.

This, of course, had the effect of making cl. (b) of sub-sec. (1) applicable, and so awards now require registration wherever the Act and its amendment apply. We now turn to the question at issue here, which is, has this amendment ever been properly introduced into Berar. There can be no doubt that Berar is not British India and that until the passing of S. 47 of the present Government of India Act of 1935 it was technically administered as a separate unit by the Governor-General in Council acting under the Indian (Foreign Jurisdiction) Order in Council, 1902. Among the administrative powers conferred by that Order were those of legislation. These, as their Lordships of the Privy Council point out in 26 N L R 326,[1] are derived from cl. 3 of the Order in Council of 1902 referred to above. Therefore the Governor-General in Council has the right to legislate for Berar either personally or by delegating any such power or jurisdiction "to any servant of the British Indian Government." Cl. 3 having thus conferred powers of legislation, cl. 4 then clothes the same authority with the right to make such rules and orders as may seem expedient for carrying "this Order into effect," that is to say, in so far as the present matter of legislation is concerned, for carrying into effect such legislative measures as the Governor-General in Council, or his authorized agent as above, may think fit to make for Berar. One of these means is by applying "with or without modifications all or any of the provisions of any enactment in force elsewhere or otherwise." Now the Registration Act of 1908, that is to say the unamended Act which did not require the registration of awards, was introduced into Berar by the Governor-General in Council on 3rd November 1913 by Notification No. 3510-B, but the Amending Act of 1929 (Act 21 of 1929) has never been so introduced. What the Governor-General has done instead has been to state in the above Notification that not only shall the enactments specified in the schedule (which includes the unamended Registration Act of 1908) apply to Berar but also those enactments

subject to any amendments to which the enactments are for the time being subject in the Central Provinces.

The question is whether he has power to do this. It is argued, and not unnaturally, that the Indian (Foreign Jurisdiction) Order in Council clothes the Governor-General in Council with authority to legislate and that he cannot delegate this authority to any other person or body except as provided in the Order, that is to say except to "any servant of the British Indian Government." But what he has done here has been completely to abrogate his functions in so far as all amending measures are concerned and not even to appoint a subordinate authority to determine whether a measure which is deemed by a Legislature in British India, even a subordinate Provincial Legislature which can in no sense be considered a servant of the British Indian Government, to be suitable for British

1. Dattatraya Krishnarao v. Secy. of State, (1930) 17 A I R P C 267=128 I C 664=57 I A 318=58 Cal 570=26 N L R 326 (P C).

India, is also suitable for Berar. It is argued that the Governor-General in Council cannot thus abandon his responsibilities and that no measure can become law in Berar, even if it be only an amending enactment, until the Governor-General in Council has brought his mind to bear upon the question and has determined whether it is suitable for introduction there or not. We confess that there is considerable force in this contention and had it not been for the long continued practice, we would have been inclined to decide that way. But the effect of so deciding would be so disastrous and the consequences so serious (it would have the effect of rendering important amending enactments between 1913 and 1935 null and void in Berar) that we hesitate to do so. When Courts find in vogue a long continued practice which has been followed without question or objection for a number of years and which has affected for better or for worse the lives and properties of countless numbers of people it behoves them, if that be at all possible, to try and find a legal origin for it. This we think is to be found in cl. 4 itself. In the first place, it is perfectly general :

> The Governor-General in Council may make such rules and orders as may seem expedient for carrying this Order into effect.

It is not entirely impossible though we confess the construction is strained, to read this as meaning that the Governor-General in Council may, if he thinks fit, and if that is the more convenient way of introducing modifications of existing laws into Berar, (as indeed it is), pass a general administrative measure of the character we find here. There is nothing inherently wrong in it. As a matter of broad practice, Berar is governed along with the Central Provinces as one large administrative unit although legally and technically it is entirely separate, and, in general, laws which obtain in the Central Provinces are introduced almost automatically into Berar as a mere routine of administration. Therefore this is clearly the more convenient way of dealing with amending enactments. Consequently, since cl. 4 is worded so generally, it is not impossible to construe it as conferring the powers which in fact we find have been exercised. This is especially so as sub-cl. (a) is also worded widely,

> for determining the law and procedure to be observed, whether by applying with or without modifications all or any of the provisions of any enactment in force elsewhere or otherwise.

It is not easy to determine the force of the words "or otherwise" but we think it is possible to ascribe to them a meaning which does not tie the Governor-General in Council down to the procedure of issuing a fresh notification in respect of each amending enactment. We observe that this does not necessarily imply a complete abdication of function and we have no doubt that in practice that is never the case. The Governor-General in Council can always state that notwithstanding the notification we are considering any particular amendment of an enactment which would apply to Berar under the notification shall not apply, and we have no doubt that he would do so if it were undesirable that it should. When carefully analyzed therefore the matter merely comes to this: that there are two ways of doing the same thing, one a positive and direct way and the other an indirect one. When therefore we find that the functions bestowed by the Order in Council of 1902 have been exercised in the indirect way for a large number of years and in respect of a large volume of important legislation, and when we find that such a construction of the Order is not an impossible one, it behoves us to accept it even though we would not have so interpreted it if the matter had been one of first impression.

It is also possible to conclude that cl. 3 of the Order in Council deals with legislation which is being initiated for the first time, such for example, as the Berar Alienated Villages Tenancy Law of 1921 with which their Lordships were dealing, while cl. 4 refers to enactments which are already in force elsewhere and which merely have to be incorporated in whole or in part into the laws of Berar. It is possible to conclude that the powers of the Governor-General are wider in the latter case. We therefore hold that the notification we have been discussing was not ultra vires, and that means that the award in suit was compulsorily registrable under S. 17 (1) (b).

We have next to consider the effect of that. There is no law which requires an award to be registered before it can operate as an award in the same sense as the Transfer of Property Act requires the registration of sales and mortgages dealing with immovable property of the value of one hundred rupees and more. An unregistered award is not therefore invalid for all purposes. The only drawbacks attached to it are those mentioned in S. 49, Registration Act, that is to say, it cannot be used to

"affect any immovable property comprised therein" and it cannot be received "as evidence of any transaction affecting such property." The question is whether the mere filing of an award under para. 20 can be said to amount to one of these purposes or whether the award when used solely for this purpose merely forms a document which forms part of a judicial proceeding. If it does, then, according to repeated decisions of the Privy Council, it will not require registration in so far as it is used for that purpose.

It will be necessary however to examine carefully the exact scope of their Lordships' pronouncements. The rule as originally enunciated was simply this. Their Lordships stated in 20 All 171[2] that

the provisions of S. 17 of the Act do not apply to proper judicial proceedings, whether consisting of pleadings filed by the parties, or of orders made by the Court.

These remarks were made in respect of a petition for extension of time put in by the mortgagors in that suit in foreclosure proceedings, and the question was whether the petition could be used in evidence in another suit between the same parties in respect of the same property. In a later case, 22 Mad 508,[3] somewhat similar remarks were made in the following circumstances. There was a suit for the possession of certain lands and certain other lands were expressly excluded from the scope of the suit. This suit was compromised by two documents. One was called a razinamah and the other an agreement of union. The former related exclusively to the lands in suit and set out the proportions in which the parties had agreed to share them. It also made independent reference to the lands which had been excluded from the scope of the suit and about which the parties had also compromised, and set out the effect of that compromise. It placed the lands in a separate schedule called Sch. D. The other document, the deed of union, referred to both sets of land.

The parties produced the razinamah in Court and asked the Court to pass a decree in accordance with it "under S. 375, Civil P. C., after settling." That was done, but the decree made no reference to the lands in Sch. D which had been excluded from the scope of the suit. The parties acted upon the entire agreement but subsequently disputes again arose and this time a suit was brought for possession of the lands which had been excluded from the scope of the former suit, namely the lands contained in Sch. D of the razinamah. The defendant endeavoured to defend her possession by setting up a title derived under the compromise. Their Lordships held that in maintaining this defence the defendant could derive no aid from the agreement of union because it had not been registered. But as regards the razinamah they said :

The razinamah was not registered in accordance with the Act of 1877; but the objection founded upon its non-registration does not, in their Lordships' opinion, apply to its stipulations and provisions in so far as these were incorporated with, and given effect to by, the order made upon it by the Subordinate Judge in the suit of 1885. The razinamah, in so far as it was submitted to and was acted upon judicially by the learned Judge, was in itself a step of judicial procedure not requiring registration; and any order pronounced in terms of it constituted res judicata, binding upon both the parties to this appeal who gave their consent to it.

But their Lordships went on to point out that the razinamah itself was not admissible in evidence and that since the portion of the compromise relating to the lands in Sch. D had not been incorporated in the decree and that since the suit in question related solely to those lands, any defence based exclusively upon the razinamah must fail. This question was again considered by their Lordships in 47 Cal 485[4] where their earlier decision was examined at length and they stated that what the Board were considering in the earlier case was the effect of S. 375, Civil P. C., and they went on to hold that a decree of a Court which recorded a compromise was always admissible as evidence of the adjustment in so far as the adjustment was incorporated and recorded in it even though its terms might not be executable without registration in so far as it affected property outside the suit. Their exact words are :

They think the document did purport to create a contingent right or interest in immovable property, and they do not think that in treating the decree pro tanto as a nullity the learned Subordinate Judge has given effect to the difference between receiving the decree in evidence as a decree and executing its terms as against property outside the suit.

The reference to Sec. 375 (now O. 23, R. 3) is, in our opinion, important. What that Rule states is that :

Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in

2. Bindesri Naik v. Ganga Saran Sahu, (1898) 20 All 171=25 I A 9=7 Sar 273 (P C).
3. Pranal Anni v. Lakshmi Anni, (1899) 22 Mad 508=26 I A 101=7 Sar 516 (P C).
4. Hemanta Kumari Debi v. Midnapur Zamindari Co., (1919) 6 A I R P C 79 = 53 I C 534 = 46 I A 240 = 47 Cal 485 (P C).

part by any lawful agreement or compromise . . . the Court shall order such agreement, compromise or, satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit.

Now when both parties come before the Court and are agreed in stating that the suit has been adjusted, then the Court has no option (except perhaps an inherent power to prevent its proceedings from being used to work substantial injustice) but to record it : 57 Cal 1311[5] at p. 1321. It does not then matter whether the compromise was embodied in an unregistered document or not because the authority to proceed is grounded on the statements made to the Court, the admissions of both sides on which the Court is warranted to, and in fact must, act when both sides are agreed. That is the "proof" of which the Rule speaks. *See* on this point 24 Cal 20[6] at pp. 23, 25; 28 C W N 1033,[7] 5 Bom 143[8] at pp. 152, 153 and 3 Mad H C R 342[9] at p. 345. The reason is that that which is admitted in the pleadings or statements made to the Court need not be proved : *see* S. 58, Evidence Act. Under the law the writing becomes (unless registration is necessary to effect the transaction itself in certain sales and mortgages) the only evidence when the matter is in dispute, but that evidence becomes unnecessary when the agreement is not in dispute.

This we think is what their Lordships stressed in 47 Cal 485,[4] for they state at p. 499 that in their opinion the view which Beachcroft J. took in the High Court was accurate. The learned Judge had disagreed with his colleague Mookerjee J. and held that the petition before them (which embodied the terms of the compromise) "was not an agreement to lease but a mere statement to the Court that the parties had made such an agreement." The view of Mookerjee J. which we take it was not accepted, was that the document afforded the necessary proof qua document and not qua a statement made to the Court. These two differing views are to be found at pp. 489 and 490 of the report.

5. Sourendranath v. Tarubala Dasi, (1930) 17 A I R P C 158 = 123 I C 545 = 57 I A 133= 57 Cal 1311 (P C).
6. Satyesh Chunder Sircar v. Dhunpul Singh, (1897) 24 Cal 20.
7. Lakshan Chandra Mandal v. Takin Dhali, (1924) 11 A I R Cal 558 = 80 I C 357 = 28 C W N 1033 = 39 C L J 90.
8. Burjorji Cursetji Panthaki v. Muncherji Kuverji, (1880) 5 Bom 143.
9. Chidambara Chetty v. Karunalyavalangapuly Taver, (1866) 3 Mad H C R 342.

We take it that the effect of this difference would be this: when the parties are not agreed, then an issue has to be struck and the matter has to be "proved" in the ordinary way, and in that event the usual rules of evidence, including those embodied in S. 49, apply. The result is that when the agreement is embodied in a document which requires registration (such for instance as an agreement to lease, as in the Privy Council case) and the formality of registration is not complied with, then the document is not receivable in evidence and no oral evidence of its contents is permissible because of S. 91, Evidence Act. The point, as we see it, is that it is not the document upon which the Court proceeds in such cases but the statements or rather the admissions made before it as provided for in S. 58, Evidence Act. Therefore the document, qua document, forms no part of the proceedings of the Court. It can only do so in so far as it constitutes the statement of one or other of the parties; and in so far as it does that, no Court can decree a claim or act on such a statement, if it is contested, to the detriment of the person challenging it. If that stage is reached, then proof is required in the ordinary way.

The question then resolves itself into this: does the award have to be proved under para. 20, and if so, does S. 49, Registration Act, shut it out when it is not registered and when it relates to property of the requisite value? We wish to make it clear that we are not dealing with a case such as may arise where the arbitration is on a suit where the award is a step in the course of a suit. To such case different considerations apply. The filing, in such a case, is by the arbitrators and no contest is contemplated: *see* Sch. 2, Para. 10. On the other hand, where the arbitration is without the intervention of the Court the award is filed by a party. Para. 20 makes provision for an application to file. That application initiates a contest. That contest has as an essential part the proof of the award. Then comes para. 21 :

Where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon, and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award.

Clause 2 provides that "upon the judgment so pronounced a decree shall follow." Three things are therefore necessary: first, the Court must be satisfied that the matter

has been referred to arbitration; secondly, that an award has been made thereon; and thirdly, that no matter, such as is referred to in paras. 14 and 15, is proved. No; so far as the first is concerned, an agreement to refer to arbitration does not require either writing or registration. Therefore that can clearly be proved by oral evidence unless it has been reduced to writing and in that case the writing must be produced. In either case want of registration is no bar.

The next step is more difficult: the plaintiff [for that is what the applicant is now termed under para. 20 (2)] has to prove that an award has been made. Now an award need not be in writing: an arbitrator can, we conceive, validly deliver an oral award whatever the nature and value of the property involved. The Registration Act only fastens upon written instruments and therefore proof of an oral award would not be excluded by its provisions. But that is a contingency we need not consider here because para. 20 contemplates only written awards. The application must ask "that the award be filed in Court," and it is clear that only a written award can be so filed. Therefore we shall confine our attention to written awards, and so far as this case is concerned, to awards of a kind which require registration under S. 17 (1) (b).

Section 49 states that in such a case the document shall not (a) affect any immovable property comprised in it, nor shall it (b) be received as evidence of any transaction affecting such property, but that it can be used as evidence of any collateral transaction not required to be evidenced by a registered instrument. This, we agree, does not shut out proof of the terms of the document in all cases. It merely prevents the document from being used for the purpose of affecting immovable property of the requisite value, or as evidence of any transaction which affects such property. Founding upon this however it was argued that when a person applies to have an award filed in Court he is not endeavouring to affect the property in it. He is only asking that a piece of paper be filed in Court and that, it was urged, is a transaction affecting that piece of paper only and not the property comprised in it. This contention, though ingenious, has, we think, been negatived by their Lordships of the Privy Council in 33 C W N 1150.[10] That was a case in which a plaintiff who had obtained a sale deed which required registration, and which therefore he was unable to enforce, brought a suit for specific performance and endeavoured to use the deed, not for the purposes of enforcing the sale, but in proof of an agreement to sell. Their Lordships declined to countenance such a subterfuge. They stated at p. 1155 that an instrument which requires registration

> cannot be used in any legal proceedings to bring about indirectly the effect which it would have had if registered. It is not to "affect" the property, and it is not to be received as evidence of any transaction "affecting" the property.

They also stated:

> Their Lordships are clearly of opinion that this is within the prohibition of the Section. They think that an agreement for the sale of immovable property is a transaction "affecting" the property within the meaning of the Section inasmuch as, if carried out, it will bring about a change of ownership. The intention of the Act is shown by the provision of Sec. 17 (2) (V), which exempts from registration, and therefore frees from the restriction of Sec. 49, a document which does not itself create an interest in immovable property but merely creates a right to obtain another document which will do so. In the face of this provision, to allow a document which does itself create such an interest to be used as the foundation of a suit for specific performance appears to their Lordships to be little more than an evasion of the Act.

These remarks, we think, apply with equal force to arbitration awards. The matter becomes evident upon an examination of para. 21, which states that the Court must be satisfied that the matter has been referred to arbitration and that an award has been made thereon. This, as we see it, means not merely that an award has been made but that the award sought to be filed is the award in question, that is to say the Court has to be satisfied not merely that the piece of paper produced was signed by the arbitrators but that it contains the very terms and conditions which the arbitrators intended should govern the rights and liabilities of the parties. It may be that the document will be the only means of proving this in the ordinary way but that will not always be so. Para. 21 also states that the Court must be satisfied that no ground such as is mentioned in para. 14 or para. 15 exists. Among these grounds is the following:

> Where it (the award) determines any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred.

Therefore the Court may have to examine evidence in suitable cases about the actual making of the award, that is to say of the transaction which affects the property in

10. James R. R. Skinner v. Robert Hercules Skinner, (1929) 16 A I R P C 269 =119 I C 633= 56 I A 363=51 All 771=33 C W N 1150 (P C).

dispute. Another possible ground of investigation is whether either party has been guilty of "fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire." Then also there may be allegations of forgery, as for instance, that terms have been fraudulently inserted or substituted or erased from the document by one of the parties or their agents, after it had been duly signed and delivered. Therefore it is clear that when para. 21 directs the Court to be satisfied that "an award has been made thereon" the Court has to examine the transaction itself and this it can only do by receiving evidence of it. It does not matter in the least whether the objections which we have indicated are actually raised in any particular case or not because the Court is nonetheless examining the transaction when the only evidence produced—and it may well be the only evidence receivable—of its terms, is the document itself.

This is further evident from the fact that the Court is directed under para. 21, when it is satisfied about the matters we have referred to above, to order the award to be filed, and then to "pronounce judgment" according to the award, and upon this judgment follows a decree. It will be noted that the Court does not merely direct the award to be filed and then draw up a decree in accordance with its terms but has first to "pronounce judgment," that is to say to give a "statement . . . . . of the grounds of the decree." [*See* the definition of judgment in S. 2 (9), Civil P. C.]

We are clear that none of this can be done without at least using the award as evidence of the transaction which affects the property comprised in it even if it can be contended that the award is not being used in these proceedings to affect the property itself within the meaning of S. 49 (a). But, as we have shown, such a contention is effectively negatived by their Lordships of the Privy Council. After their pronouncement it is impossible to contend that the filing of an award under para. 21 with its necessary concomitant of judgment and decree does not affect the property comprised in it just as much as the filing of a sale deed in a suit for specific performance (the case before their Lordships), or for possession. This is also the view of the Bombay High Court in 40 Bom L R 952[11] at p. 955.

The last contention which we have to examine is this. It was urged that even if this be so, the award is bad only in so far as it affects the immovable property and that therefore effect can be given to it so far as the moveables are concerned. It was argued that the two have been separately dealt with in the award and that the one can be separated from the other. Reliance was placed upon the following authorities: Russell on Arbitration, 13th Edition, page 214, (1917) 1 K B 736[12] at pp. 747 and 748, 36 All 336[13] at p. 342, 21 Bom L R 716[14] and 15 Mad 336.[15]

We need not examine the applicability of this doctrine to the present case because it cannot apply unless the good portion of the award can be separated with reasonable clearness from the bad. If it cannot, and if the two are inextricably mixed up, then the award has to be rejected as a whole, and this even though, as McCardie J. says in the English case cited "the Court should approach an award with a desire to support rather than to destroy it."

Now so far as this award is concerned, the arbitrator has divided the bulk of it into separate compartments, but towards the end when dealing with the Jagir income he states that before the income is paid over to each sharer in the shares he gives, Nurullah Khan will be entitled as Jagirdar to deduct, among other things,

> such amount for the maintenance of the fort and other property that has been ordered to remain in common as would be agreed before by all the sharers.

It will be impossible to do this without giving effect to the other portions of the award which divide most of the immovable property but keep some of it, including the fort referred to above, joint. Therefore the portion dealing with the moveables is unfortunately bound up with that which deals with the immovable property and we cannot disentangle the two without re-writing this portion of the award, and that of course we have no power to do.

An objection of limitation was also raised but on this point we agree with the learned Judge of the lower Court for the reasons

11. Chimanlal v. Dahyabhai, (1938) 25 A I R Bom 422=177 I C 911=40 Bom L R 952.

12. Shelby v. Whitbread & Co., (1917) 1 K B 736=86 L J K B 974=116 L T 690=33 T L R 214=81 J P 165=15 L G R 279.

13. Amir Begam v. Badruddin Husain, (1914) 1 A I R P C 105=23 I C 625=17 O C 120=36 All 336 (PC).

14. Hanmant v. Ramabai, (1919) 6 A I R Bom 38=51 I C 954=21 Bom L R 716.

15. Thandavan v. Valliamma, (1892) 15 Mad 336=2 M L J 130.

given by him in para. 5 of his judgment that the time occupied by the proceedings in the Court of the Subordinate Judge, First Class, should be allowed under S. 14, Limitation Act. In view of our other findings it is not necessary to say more than this on this point. The decision of the lower Court declining to file the award is therefore right and we dismiss the appeal with costs.

D.S./R.K. *Appeal dismissed.*

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STONE C. J. AND VIVIAN BOSE J.

Sheikh Rahman Sheikh Rahim — Appellant.

v.

Seth Sheodas Daga and others — Respondents.

Misc. Appeal No. 37 of 1937, Decided on 16th March 1939, from order of Additional District Judge, Raipur, D/- 17th October 1936.

(a) Civil P. C. (1908), S. 47, O. 21, R. 90 — Judgment-debtor's application for setting aside sale falls under O. 21, R. 90 and not under Sec. 47 even though auction-purchaser is not made party to it.

An application by a judgment-debtor for setting aside an execution sale falls under the specific provisions of O. 21, R. 90 and not under the general provisions of Sec. 47 even though the auction purchaser may not have been made a party to such application : *A I R 1934 Nag 21, Dissent.; A I R 1930 Nag 5, Ref.* [P 241 C 2]

(b) Civil P. C. (1908), O. 21, R. 90—Sale of portion of houses when entire houses proclaimed to be sold amounts to material irregularity—Whether it results in substantial injury depends upon facts of case.

If the sale proclamation states that the entire houses would be sold but actually only a portion of them is sold, this constitutes an irregularity and even perhaps a material irregularity, but whether such irregularity results in substantial injury depends upon the facts of each case : *A I R 1933 Mad 225, Ref.* [P 242 C 1]

D. N. Chaudhuri — *for Appellant.*

M. R. Bobde, and Y. V. Jakatdar — *for Respondents 1 and 2, and 3 respectively.*

Judgment.—This is a judgment-debtor's appeal against an order in execution refusing to set aside a sale. The decree-holders who are the respondents before us obtained a mortgage decree for sale which embraced three houses. Three separate proclamations were issued in which each of these three houses was put up for sale. The sale was fixed for 3rd October 1936 and on that date one of the houses was sold. As regards the other two, although the proclamations indicated that the entire houses would be sold, in point of fact only a 7/10 undivided interest in those two houses was sold. Judgment-debtor 1 thereupon applied to have these sales set aside on the ground that there had been a material irregularity which had caused him substantial injury. This prayer was refused in the lower Court and the appeal is against that order. The reason why a 7/10 share only was sold in each of the other two houses was because after the decree-holders had obtained their decree against these three houses certain other persons instituted another suit, entirely unconnected with the suits with which we are concerned here, claiming a 3/10 share in the two houses of which only 7/10 undivided interest is sold. They thereupon obtained an order from the Court staying the sale to the extent of 3/10 share in these two houses. That order was of course communicated to the sale-amin and consequently he sold only the remaining 7/10 share. One of the points urged in the appeal here is that there was nothing in the stay order to specify which of the two houses was to be sold partially and that that constitutes an illegality. We do not think there is anything in this because the order of stay refers to the suit in which the order had been obtained and in that suit only two of the houses were in question. Therefore the order clearly referred to those two houses. The judgment-debtor had an opportunity of objecting at the time of the sale and also after that and he has not made this one of the grounds of his objection in the lower Court.

The next question is whether this application is under S. 47 or under O. 21, R. 90, Civil P. C. It is urged that as the auction-purchaser did not appear the application must be deemed to have been made under S. 47 and that consequently the limitations imposed by O. 21, R. 90 do not apply here. In support of that 31 N L R 67[1] at p. 80 is relied on. O. 21, R. 90 states the conditions on which alone an application for setting aside a sale may be made. It states inter alia that :

> Where any immovable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale.

It will be seen that the persons entitled to apply include the judgment-debtor.

1. Brijlal v. Manohar Prasad, (1934) 21 A I R Nag 21=150 I C 611=31 N L R 67.

Therefore we are unable to see how a judgment-debtor when he applies to set aside a sale can be said to apply under S. 47 when there is this specific provision in the Code. So far as the Nagpur ruling[1] we have just cited is concerned, that states that if the auction-purchaser is not joined and the application does not purport to be under O. 21, R. 90, then it must be taken to have been made under S. 47. With the utmost respect we are unable to agree. As we have said, as there is a specific provision in the Code for the setting aside of sales the application can only be under that provision and not under a general provision like S. 47. Also we are unable to see how a person who is obliged to come under O. 21, R. 90, can evade that provision by the simple expedient of not joining a person interested in the auction-sale. If the person is not joined and if his presence is necessary then the proper procedure would be to dismiss the application as was done in 26 N L R 127.[2] We are consequently of opinion that the application is under O. 21, R. 90, and not under S. 47. That being so, the applicant-appellant has to show that there was material irregularity and also that substantial injury was caused to him by reason of that irregularity. The irregularity pleaded here is that whereas the sale proclamation stated that the entire houses would be sold only a portion was sold. We have no doubt that that does constitute an irregularity and perhaps even a material irregularity, but whether substantial injury would flow from that is another matter. The learned counsel for the appellant relied on 56 Mad 356[3] where in somewhat similar circumstances the learned Judges of the Madras High Court came to the conclusion that substantial injury had not occurred. But, in our opinion, the ruling does not really support him. What was said there is to be found in the decision of Reilly J. at page 364:

I do not wish it to be understood that the absence of direct evidence in such a case as this, that is the evidence of some witness coming before the Court and saying that he was misled by such a notice as these which were published in the villages, would in all cases prevent a reasonable inference being drawn that by such an irregularity in the publication of the proclamations substantial loss had been caused to the judgment-debtors.

2. Haridas v. Mofatlal, (1930) 17 A I R Nag 5 = 121 I C 658=26 N L R 127.

3. Sivaskhandaraju v. Narasimha Pattamani, (1933) 20 A I R Mad 225 = 144 I C 414 = 56 Mad 356=64 M L J 439.

In point of fact they found that in that case substantial injury had not been traced to the irregularity. They found that there was no substantial injury. In our opinion, each case must depend on its own facts. There may be cases in which a defect of this kind clearly leads to injury, but in this case it has not been shown that any injury at all occurred. Nor has it been shown that if it did, it was by reason of the irregularity. On the contrary there are indications to show that a full price was paid. The auction-purchaser was joined as a party to the application which incidentally purported to be under O. 21, R. 90, and notices were served on him. He remained absent as is evident from the order sheets of 20th June 1936 and 22nd August 1936. We do not think he would have remained absent if he had obtained a bargain. The fact that he did not turn up indicates to our mind that he paid a proper price for the property purchased and that therefore it did not matter very much to him whether he retained the property or not. There is in addition the fact that no objection was raised by the judgment-debtor to the sale being allowed in respect of a 7/10 undivided share. The appeal is accordingly dismissed with costs. Counsel's fee Rs. 50.

N.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Nagpur 242

GRILLE AND NIYOGI JJ.

Sarju Prasad Gillelal Agarwal — Defendant 4 — Appellant.

v.

Badri Prosad Ramaiya Prasad Tiwari, Plaintiff and others, Defendants — Respondents.

First Appeal No. 46 of 1935, Decided on 8th March 1939, from decree of the Addl. Sub-Judge, First Class, Jubbulpore, D/- 15th January 1935.

(a) Civil P. C. (1908), O. 1, R. 1 —Object of joining necessary parties — Mortgage in favour of *B* and *D* —Suit by *B* alone—*D* dying during course of suit — *B* acquiring *D's* rights of recovering debt — Non-joinder of *D* held immaterial.

The object of joining the necessary parties is to enable the Court to pass an effective decree : *AIR 1930 Mad 714, Rel. on.* [P 244 C 1]

A mortgage was executed in favour of *B* and *D*. *B* alone brought a suit upon the mortgage. During the course of the suit *D* died and his right to recover the debt devolved upon *B* :

Held that although *B* alone had no right to sue on the day when he instituted the suit, he acquired the full and exclusive right when *D*

died. On the date on which the decree was passed the non-joinder of *D* became wholly immaterial as he died pending the suit and hence *B* was entitled to the decree. [P 244 C 1]

(b) Civil P. C. (1908) O. 6, R. 14 and O. 4, R. 1—Scope of O. 6, Rule 14—Mortgage suit by one of two co-mortgagees presented by pleader for plaintiff-mortgagee is deemed to have been properly presented.

Order 6, R. 14 which requires a pleading to be signed by the parties is merely a matter of procedure. That provides for signature being made by any person who is authorized by the party. Hence a mortgage suit brought by one of the two mortgagees but duly authorized by the other is competent. Plaint in such case if presented by the pleader of the litigating mortgagee is deemed to have been properly presented : *17 Cal 580 (P C) and A I R 1918 All 275, Rel. on; 4 N L R 117 and A I R 1924 All 54, Disting.* [P 244 C 1, 2]

(c) Limitation Act (1908), Art. 132—Operation of—Debtor's default during term of mortgage when furnishes starting point of limitation stated — Mortgage for certain period also providing that debt would become exigible on default by mortgagor in payment of annual interest —Provision enures for benefit of mortgagee but not of mortgagor — Limitation against mortgagee begins when mortgage debt becomes due and not when default is made by mortgagor in payment of interest.

Article 132 comes into operation only when the mortgagee is bound to sue and not when he has an option to sue. [P 245 C 2]

The period fixed by the parties for payment of the mortgage debt means that during that period neither the debtor is liable to pay nor the creditor is entitled to recover the debt. It only fixes the term of the mortgage and from the point of view of the mortgagee it marks the temporal limit of his investment. For the debtor's default during the term of the mortgage to be regarded as a cause of action for the suit the default ought to be such as would entitle the mortgagor to redeem before the expiry of the term as much as it would entitle the mortgagee to recover his debt in full. [P 245 C 1]

Where a mortgage for a certain period also contains a proviso that the debt would become exigible on default by mortgagor in payment of the annual interest payable under the mortgage bond, such a clause only purports to give the mortgagee an option either to enforce the security at once or if the security is ample, to stand by his investment for the full term of the mortgage. The mortgagor cannot claim to redeem the property after having broken his own contract by refusing to pay interest. The proviso therefore enures only for the benefit of the mortgagee and not the mortgagor, and consequently time begins to run against the mortgagee under Art. 132 not when default is made by mortgagor in payment of interest but when the mortgage debt becomes due: *A I R 1932 P C 207, Foll.; A I R 1934 All 152, Rel. on.* [P 245 C 1, 2]

E. M. Joshi — *for Appellant.*

N. T. Mangalmurti — *for Respondents.*

Judgment.—This is a defendant's appeal from the judgment of the Additional Subordinate Judge, First Class, Jubbulpore, delivered on 15th January 1935 in Civil Suit No. 31 of 1933. The appeal arises out of a suit to enforce a mortgage executed by Damarilal, respondent 2, on 10th November 1919 in favour of the plaintiff Badriprasad and his uncle Durga Prasad, since deceased, to secure a debt of Rs. 3200. The appellant and respondents 3 to 6 were impleaded in the suit as subsequent mortgagees. The suit was resisted on various grounds out of which those which are material for decision of this appeal were that the plaint bore a forged signature of Durga Prasad and that it was not properly presented, and further that the suit was barred by time. The lower Court found that Durga Prasad's signature on the plaint was made by Badriprasad and that it having been made under his authority the suit was properly filed, and it negatived the plea of limitation. The lower Court's decree is contested on these points. At the outset it is urged that the suit ought to have been thrown out for non-joinder of Durga Prasad as the promise to pay the debt was a joint promise which under S. 45, Contract Act, was not capable of being enforced by one only of the two joint promisees. Reference is made to a number of decided cases but none of them, as will be shown presently, have any applicability to this case in view of the fact that Durga Prasad died during the pendency of the suit.

In 6 Cal 815[1] the additional plaintiffs were made parties to the suit but as the claim had become barred by S. 22, Limitation Act, so far as the added plaintiffs were concerned, it was held that in view of S. 45, Contract Act, the claim of the original plaintiff was also barred. The same view was taken in A I R 1923 Mad 337,[2] A I R 1930 Mad 714,[3] A I R 1931 P C 229[4] and 1 All 453.[5] It must be observed however that in these cases it was held that the excluded parties could be joined in the suit at any time before the judgment provided the claim was not barred by limitation at the time of their joinder. In the present case

1. Ramsebuk v. Ramlall Koondoo, (1881) 6 Cal 815=8 C L R 457.
2. Mohana Velu Mudaliar v. Annamalai Mudaliar, (1923) 10 A I R Mad 337=72 I C 63=44 M L J 249.
3. Amirchand Nagindas and Co. v. Raoji Bhai Moti Bhai, (1930) 17 A I R Mad 714 = 130 I C 453=58 M L J 613.
4. Naba Kumar v. Radhashyam Mahish, (1931) 18 A I R P C 229=134 I C 654 (P C).
5. Dular Chand v. Balram Das, (1875-77) 1 All 453.

Durga Prasad died pending the suit and his right to recover the debt devolved on Badriprasad. Although he had no right to sue alone on the day on which he instituted the suit he acquired full and exclusive right to enforce the mortgage in the course of the suit when Durga Prasad died. As pointed out in A I R 1930 Mad 714[3] at p. 717 the object of joining the necessary parties is to enable the Court to pass an effective decree. On the day when the decree was passed the non-joinder of Durga Prasad became altogether immaterial as he had died. If it was open to Durga Prasad to join in the suit at any time before his claim was barred by limitation he could have signed the plaint and entered the suit any time before the judgment, but he could not obviously do so as he died pending the suit.

The lower Court has found that the signature of Durga Prasad was made by Badriprasad with his consent. Badriprasad who went into the witness-box as P. W. 1 affirmed that he read over the contents of the plaint to Durga Prasad and he was believed by the lower Court. Nothing has been said here to discredit the testimony of Badri Prasad. Badri Prasad's evidence clearly goes to show that the signature was made with Durga Prasad's consent. O. 6, R. 14, which requires a pleading to be signed by the parties is merely a matter of procedure. That provides for signature being made by any person who is duly authorized by the party. If it is found that the suit was duly authorized by Durga Prasad the question whether his signature was made by him or by somebody else on his behalf becomes immaterial : *see* 17 Cal 580[6] and 40 All 147.[7] It is urged on the authority of 4 N L R 117[8] and A I R 1924 All 54,[9] that the plaint was not properly presented. The cases relied on are those in which the suits were filed by the sole plaintiffs. In the present case the mortgage was in favour of Badriprasad as well and he signed the plaint and the power of attorney. The plaint was presented by his pleader. Whatever objection to the suit there can be on the ground of non-joinder, the contention that the plaint was not properly presented is untenable.

Turning to the question of limitation it is urged that the cause of action to enforce the mortgage arose on 10th November 1921 and not on 10th November 1924 as stated by the plaintiff for the reason that under the terms of the contract the debt became exigible when there was a default in payment of the interest in the year following the mortgage deed. The contention is negatived by the decision of their Lordships of the Privy Council in 7 Luck 442[10] but before applying the law, it is desirable to see what the precise nature of the agreement was. The relevant passage in the mortgage deed, dated 10th November 1919, runs as follows :

> I have therefore taken from you this day a loan of Rs. 3200 before the Sub-Registrar, Mandla. I will pay interest thereon at the rate of 10 as. per cent per mensem. I agree to pay the same in five years and will pay the interest annually. If I fail to pay I will pay interest at the same rate till full satisfaction thereof and I will pay it in a lump.

The interpretation that is sought to be put upon this passage is that in default of payment of interest on the due date in any year the mortgage debt including the principal was to be exigible. This cannot be accepted as the true construction of the words. The expression "if I fail to pay" may be related to the expression "I agree to pay the same in five years" and the expression "will pay the interest annually." If it is read as referring only to the latter, as is argued, it would be meaningless to say that if interest is not paid annually it will be paid till full satisfaction and in a lump sum. It can acquire sense only when it is read in relation to the expression "I agree to pay the same in five years." It would then mean that if he failed to pay the mortgage debt in five years as stipulated he would pay interest thereafter until satisfaction. The secondary contract is to pay post diem interest, that is interest after due date. Thus it is clear that there was no intention that the mortgagee should be given the right to recover the entire amount of mortgage debt simply on the occurrence of a default of payment of the annual interest. On this view the cause of action for the suit could not arise, as contended on behalf of the appellant, on 10th November 1920 on which date there was failure to pay interest. Even on the assumption that the interpretation

6. Mohini Mohan Das v. Bungsi Buddan Saha, (1890) 17 Cal 580=5 Sar 498 (P C).
7. Bisheshar Nath v. Emperor, (1918) 5 A I R All 275=44 I C 28=19 Cr L J 865 = 40 All 147=16 A L J 64.
8. Chandramal v. Ganpat Rao, (1908) 4 N L R 117.
9. Ruhul Amin v. Shankar Lal, (1924) 11 A I R All 54=77 I C 30=45 All 701=21 A L J 626.
10. Lasa Din v. Gulab Kunwar, (1932) 19 A I R P C 207=138 I C 779=59 I A 376 = 7 Luck 442 (P C.)

proposed on behalf of the appellant is correct, it cannot prevail in the face of the abovementioned Privy Council ruling. In that case it was pointed out that a proviso of this nature is inserted in a mortgage deed exclusively for the benefit of the mortgagees and that it only purports to give them an option either to enforce their security at once, or, if the security is ample, to stand by their investment for the full term of the mortgage. It is however argued that as the mortgage debt was payable within the period of five years the proviso operated both for the benefit of the creditor and the debtor and not unilaterally for the benefit of the creditor. The Hindi expression used in the document is *panch sal me deyenge*; that is the mortgage debt was payable in five years. A similar expression occurred in the mortgage deed of a case reported in 17 N L R 202[11] and the question there was whether the mortgagor was entitled to redeem before the expiry of the term fixed and it was held on the authority in 36 All 195[12] that in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created the right of redemption can only arise on the expiry of the specified period. Any doubt which existed once upon a time on the point was resolved by their Lordships of the Privy Council in the case just mentioned. The period fixed by the parties for payment of the debt means that during that period neither the debtor is liable to pay nor the creditor is entitled to recover the debt. It only fixes the term of the mortgage and from the point of view of the mortgagee it marks the temporal limit of his investment. For the debtor's default during the term of the mortgage to be regarded as a cause of action for the suit the default ought to be such as would entitle the mortgagor to redeem before the expiry of the term as much as it would entitle the mortgagee to recover his debt in full. In A I R 1934 All 152[13] Sulaiman C. J. specifically refers to this dictum of their Lordships of the Privy Council made in 7 Luck 442[10] and observes that it would be an impossible result if the mortgagor can claim to redeem the property after having broken his own contract by refusing to pay the interest. Thus, it is obvious that the debtor's default in the present case would enure only for the benefit of the mortgagee and unless there was mutuality the mortgagor could not compel him to sue and consequently the time would not begin to run against the mortgagee under Art. 132, Limitation Act. That Article would come into operation only when the mortgagee is bound to sue and not when he has the option to sue. On 10th November 1920 on which date the appellant failed to pay the annual interest the mortgagee had the option to sue but when he failed to pay the mortgage debt on 10th November 1924 the mortgagee had no alternative but to sue. The suit is within time from that date. The appellant's contention fails. The result is that the appeal stands dismissed with costs in both the Courts. Counsel's fees Rs. 125. The respondent will pay to the appellant the costs of the handwriting expert.

N.S./R.K. *Appeal dismissed.*

11. Bala v. Ghasi, (1921) 8 A I R Nag 22=64 I C 730=17 N L R 202.
12. Bakhtawar Begam v. Husaini Khanum, (1914) 1 A I R P C 36=23 I C 355 =41 I A 84 = 36 All 195 (PC).
13. Abdul Rahman v. Sheo Dayal, (1934) 21 A I R All 152 = 151 I C 900 = 56 All 496 = 1934 A L J 371.

*** A. I. R. 1939 Nagpur 245**

STONE C. J. AND VIVIAN BOSE J.

Yadorao Wasudeorao Pathak — *Decree-holder* — Appellant.

v.

Govindrao Ramji Pant — *Judgment-debtor* — Respondent.

Letters Patent Appeal No. 13 of 1937, Decided on 12th April 1939, from appellate order of Puranik J., in S. A. No. 106 of 1935, D/- 23rd July 1937.

*** Civil P. C. (1908), S. 48 — S. 48 is not controlled by S. 6, Limitation Act.**

Section 48, Civil P. C., lays down a rule of limitation and controls Art. 182, Limitation Act, and not vice versa. As S. 6, Limitation Act, merely allows extensions in respect of periods prescribed in the first schedule and as the aggregate of the periods prescribed there for successive applications (other than the first) is confined within certain limits by outside legislation and not by the schedule itself, it follows that expansion outside those limits is not permissible. In other words, S. 6, Limitation Act, does not govern S. 48, Civil P. C., and therefore the twelve years rule laid down in S. 48 most also apply to minors: *A I R 1938 Cal 25, Rel. on; A I R 1929 Mad 394, Dissent; A I R 1915 Mad 449, Ref.* [P 247 C 1]

B. L. Gutpa—*for Appellant.*

D. T. Mangalmurti—*for Respondent.*

Judgment.—The question for decision in this Letters Patent Appeal is whether S. 6, Limitation Act, governs S. 48, Civil P. C. The High Courts are divided, the majority view being that it does not and that

therefore the twelve years' rule laid down in S. 48 must also apply to minors. The matter is of first impression in this Province. The facts are simple. The decree-holder appellant, who is a minor, obtained the decree, which he is now seeking to execute, on 19th December 1919. On 16th December 1922 he put in an application for execution. He was represented by his father who acted as his next friend. We are informed by counsel that the father died on 15th May 1923; anyway, nothing happened and the application was dismissed as wholly infructuous on 10th March 1923. Thereupon on 8th February 1934, the applicant, who by then had attained majority, put in a fresh execution application. This application is more than 12 years after the decree and so is beyond time under Sec. 48, Civil P. C., unless the appellant can avail himself of the provisions of S. 6, Limitation Act. The question is whether he can.

The first Court decided that he could not. The lower Appellate Court held that he could. The learned Judge who has granted leave to appeal agreed with the trial Judge. The decree-holder therefore appeals here. All the available cases, except the following, have been discussed in the judgment appealed from. Those which have not been mentioned are A I R 1915 Mad 449,[1] A I R 1929 Mad 394[2] and I L R (1937) 2 Cal 373.[3] It would, we think, be bootless to cover the same ground, and so except for a reference to these three cases, we will confine ourselves to a discussion of the two Sections in question and of the general principles which apply to them. So far as S. 48 is concerned, in itself it is perfectly clear. Ignoring portions not relevant to the present case, it reads as follows :

> Where an application to execute a decree . . . . . has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of 12 years from (a) the date of the decree sought to be executed . . .

An application for execution of the decree under consideration was made in this case; therefore under that rule no fresh application after the expiry of 12 years from the date of the decree was competent. The application we are considering was made more than 12 years after that date and therefore so far as S. 48 is concerned it did not lie. S. 6, Limitation Act, enacts :

> Where any person entitled to . . . . . make an application for the execution of a decree is, at the time from which the period of limitation is to be reckoned, a minor . . . . . he may . . . . . make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in col. 3 of Sch. 1.

The time from which the period of limitation is to be reckoned in this case is 10th March 1923, that is to say, the date on which the first application for execution was dismissed. The appellant was a minor on that date. Therefore, according to this Section, he would be entitled to make his second application within the same period after attaining majority as would otherwise have been allowed under col. 3 of Article 182, the Article in Sch. 1 applicable to cases of this kind. That Article prescribes three years from the date of the final order passed on the previous application for execution. Therefore under this rule, the appellant had three years from the date on which he attained majority, and admittedly his application was made within that time. There is thus apparently a clash between these two Sections and the question is which is to prevail. In our opinion, the clash is more apparent than real.

Under S. 6 the respite granted to a minor is the period which he would "otherwise have been allowed from the time prescribed in col. 3 of Sch. 1." If therefore the period is not prescribed in col. 3 of Sch. 1 but is to be found elsewhere, then S. 6 does not assist, for, it only purports to control the periods prescribed by Sch. 1. Art. 182 allows three years from the date of the decree in respect of the first application. S. 48 does not apply at all to the first execution application. Its provisions do not come into play until there has been at least one prior application. What it prohibits is a fresh application after the 12 years prescribed. Therefore in respect of the first execution application the minor has three years from the date on which he attains majority, and thus in conceivable circumstances, the total period permissible may amount to as much as 21 years, and in still others to 24.

But as regards subsequent applications the position is different. Art. 182 allows an indefinite number of applications for execution provided each is made within three years from the date of the final order in

1. Kumara Venkata v. Velayuda Reddy, (1915) 2 A I R Mad 449=24 I C 195=27 M L J 25.
2. Mannarswami v. Ramaswami, (1929) 16 A I R Mad 394=119 I C 39.
3. Kartik Chandra v. Bata Krishna, (1938) 25 A I R Cal 25=176 I C 212=I L R (1937) 2 Cal 373=65 C L J 403.

the one which preceded it. So far as the Limitation Act is concerned, this could go on for ever, for there is no restriction upon the number which can be so made. But S. 48 steps in and prohibits any application after the first, which is made more than 12 years after the date of the decree. S. 48 therefore clearly controls Art. 182. If therefore S. 6 merely allows extensions in respect of periods prescribed in Sch. 1 (and that is what it says), and if the aggregate of the periods prescribed there for successive applications (other than the first) is confined within certain limits by outside legislation and not by the schedule itself, then it follows that expansion outside those limits is not permissible, for otherwise S. 6 would be controlling these outside Acts and not merely Sch. 1. That is the view taken in the majority of the cases cited, and we think it follows from a careful reading of the two Acts.

We are further fortified in this conclusion by an examination of S. 48 (2). After laying down a general rule controlling the provisions of Art. 182 in sub-s. (1), it proceeds in sub-s. (2) to make certain exceptions, and it does not place either S. 6 or Art. 182 among them, whereas it does place Art. 180, Sch. 2 to the Limitation Act of 1877 (Art. 183 of the present Act). We can only conclude from this that S. 48 was intended to control Art. 182 and not vice versa, and when we find it exempting only certain of the provisions of the Limitation Act and not others, it must mean that the others were not meant to be excluded.

Of the three new cases cited before us, I L R (1937) 2 Cal 373[3] agrees with the majority view, which we follow, at p. 385. In A I R 1915 Mad 449[1] one of the learned Judges remarked that the Code of Civil Procedure was not a special statute but a general law of procedure and therefore S. 48 does not control the Sections in the Limitation Act relating to the exclusion of time and those which allow the time spent in the doing of certain necessary acts, etc. We say nothing as to this. We are only concerned with the apparent conflict between S. 6 read with Art. 182 on the one hand and S. 48 on the other. We have no doubt that S. 48 controls Art. 182 and the only question is whether this control ceases when minority intervenes. As we have said we do not think it does. That also is an answer to A I R 1929 Mad 394.[2] With the utmost respect we cannot agree that S. 48 does not lay down a rule of limitation which is the assumption upon which that decision is based. In our opinion, the heading to S. 48 places that beyond doubt: "Limit of time for execution." The Bombay High Court agrees that that Section is expressly limited to cases where the limitation is prescribed by Sch. 1. The learned Judges there however state that under general principles of law a minor is entitled to an extended period. With the utmost respect, we are unable to see how general principles of law can be invoked when there are special statutory enactments dealing with the matter. Also this is not the present view of that Court. The later decisions follow the earlier ones merely on the principle of stare decisis. The appeal is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Nagpur 247

GRUER J.

Amraoti Town Municipal Committee — Plaintiff — Applicant.

v.

Minamal Manbhar Das Agarwal and others—Defendants—Opposite Party.

Civil Revn. No. 210 of 1938, Decided on 23rd February 1939, from decree of Additional Small Cause Court Judge, Amraoti, D/- 22nd January 1938.

(a) C. P. Municipalities Act (2 of 1922), S. 25, Rules under, R. 7 — R. 7 does not provide for representation on behalf of Committee — Members of Committee, engaging counsel without sanction to represent Committee in appeal by dismissed employee — Members are liable for payment made to counsel.

Rule 7 makes no provision for representation on behalf of the Committee but only for the employee in special cases. Engaging of counsel for the Committee, being outside the scope of the rules, would certainly require special sanction which can justifiably be applied for only in extraordinary circumstances. Hence where in an appeal by a dismissed employee to the Local Government against dismissal, the members of the Committee engage counsel to represent the case of the Committee without obtaining sanction and pay him, the members are liable for the payment made to him. [P 248 C 2]

(b) C. P. Local Fund Audit Act (9 of 1933), Ss. 8 to 13 — Civil suit is maintainable even if procedure laid down by Secs. 8 to 13 is not followed.

There is nothing in the Local Funds Act to indicate that the procedure laid down in it is exclusive or must necessarily be followed before a civil suit is launched. Hence a civil suit can be launched even if procedure laid down by Ss. 8 to 13 is not followed. [P 248 C 2]

Dr. D. W. Kathale and K. V. Brahma— *for Applicant.*

P. Y. Deshpande — *for Opposite Party.*

Order.—The non-applicants-defendants were members of the Town Municipal Committee of Amraoti. They had dismissed their Assistant Secretary, one Gosawi. He appealed to the Local Government, and non-applicant 1, who was then President of the Committee, by order dated 20th July 1934 engaged Mr. Y. G. Deshpande, Pleader, on Rs. 100 to represent the case of the Committee and sanctioned an advance payment to him of Rs. 50. This payment was confirmed by resolution, dated 20th January 1935 of the Special General Committee of which the defendants were members. In fact they were actually present and voted for the resolution. Audit objection to this payment was taken in the audit note for 1934-35, and it was recommended that this sum should be recovered from the ex-President and members who voted for it. Thereupon the Committee on 8th January 1937 resolved to file a suit against these defendants, and sanction of the Provincial Government was obtained on 3rd April 1937. It should be added that on 6th July 1934, Government intimated to the Committee that the appeal would be heard on 27th July 1934. Some time between 21st July 1934, when the payment of Rs. 50 was sanctioned, and 26th July 1934, the Committee applied to Government for sanctioning the appointment of counsel. The Revenue Secretary replied by telegram (Ex. P-7) which reads: "Law does not permit representation by counsel in such cases; regret unable to grant request."

The defence to the present suit was that it was considered necessary for the Committee that it should be defended in appeal and that the action of the defendants was bona fide showing due care and attention and hence they are not liable to refund the money. The Judge of the Additional Small Cause Court held that as difficult points of law were involved and when the rules say that the appointment of a legal practitioner may be sanctioned by the authority holding the enquiry or hearing the appeal the defendants may have reasonably anticipated that they would get sanction from the Government: they acted bona fide as was shown by the fact that when the Local Government refused permission they refrained from paying the balance of the Rs. 100 to the pleader. The lower Court also holds that neither neglect nor misconduct of the defendants has been shown and therefore they are not liable under S. 49 and are protected under S. 47, C. P. Municipalities Act. The learned Judge cannot have read the rules very carefully. The relevant rule is No. 7 found under S. 25, Municipalities Act (page 69 of the Manual):

> Representation by a legal practitioner shall ordinarily not be permitted. When however the charges are complicated or special cause is shown, the officer hearing the appeal or revision petition may allow the employee concerned to be represented.

The rule makes no provision for representation on behalf of the Committee but only for the employee in special cases. The inference to be drawn by a prudent man is that engaging of counsel for the Committee being outside the scope of the rules would certainly require special sanction which could justifiably be applied for only in extraordinary circumstances. There was no question of an emergency here. The Committee had ample time to get previous sanction. The administration of public funds has to be jealously scrutinized. It was all the more incumbent on the defendants to consider whether this expenditure was unavoidably necessary, as their own Secretary was a law graduate and so presumably capable of dealing with the legal aspects of the case by submitting a written or oral argument. It appears that this expenditure is not covered by any provision of the Act or rules thereunder and by incurring it needlessly and without sanction, the defendants wasted public money for which they must be held responsible. Their good faith is not impugned, but the facts show that they have acted without due care and attention, and the unnecessary and unauthorized expenditure of Rs. 50 is a direct consequence of their negligence. It is also urged on their behalf that the procedure laid down by Ss. 8 to 13, C. P. Local Funds Act (9 of 1933), not having been followed the present suit does not lie. I cannot accept that argument. There is nothing in the Local Funds Act to indicate that the procedure laid down in it is exclusive or must necessarily be followed before a civil suit is launched. The application succeeds. I set aside the decree of the lower Court and pass a decree for Rs. 50 against the defendants. I am not inclined to award any interest, but the defendants must pay costs in both Courts. Pleader's fee here will be Rs. 25.

D.S./R.K. *Revision allowed.*

A. I. R. 1939 Nagpur 249

STONE C. J. AND VIVIAN BOSE J.

Trimbak Wamanrao and others — *Defendants* — Appellants.

v.

Mt. Bhagu Bai w/o Damuji Mali — *Plaintiff* — Respondent.

Letters Patent Appeal No. 10 of 1937, Decided on 16th March 1939, from appellate decree of Pollock J., in Misc. Appeal No. 12-B of 1935, D/- 22nd March 1937.

(a) Hindu Law — Widow — Maintenance—Agreement by members of Hindu family to pay maintenance to widow at certain rate—In absence of express terms to contrary agreement is subject to implied condition that rate will be subject to variation in family fortunes—Only method of obtaining variation is by showing that circumstances justifying variation have come into play.

Under the Hindu law the widow's right to maintenance is dependant upon the family fortunes and so is liable to fluctuation both up and down in sympathy with them; and though the parties concerned can contract themselves out of this and undertake to pay and receive a fixed and unvariable sum irrespective of the state of the family's finance at any given time, they cannot be said to intend to do so altogether unless they say so in express terms. When they agree to a certain rate, and say nothing more, the ordinary law will continue to apply in all other respects. An implied term has to be read into the contract that the agreement is subject to the variation in the family fortunes. Variation is permissible only when the circumstances have altered to such an extent as to justify a variation of the figure agreed upon, and they are altered before the cause of the action for maintenance accrued. The only method of obtaining relief of variation in the rate would be by showing that the agreement has ceased to subsist or that the circumstances which according to its implied meaning will justify a variation, have come into play. *Case law referred.* [P 250 C 2; P 252 C 1; P 253 C 2; P 254 C 1; P 255 C 1]

(b) Hindu Law — Widow — Maintenance—Deed agreeing to pay maintenance to widow must be construed with reference to practice and usage in these matters.

The deed agreeing to pay maintenance to widow must be construed in the light of the surrounding circumstances and with reference to the practice and usage in these matters. [P 251 C 1]

(c) Hindu Law — Widow — Maintenance—Practice of Court.

In decrees where maintenance is awarded Court should insert words which would enable them on application to set aside or modify their orders as circumstances might require and in such cases the remedy would be the more appropriate one by application under the leave reserved : *24 Bom 386, Rel. on.* [P 253 C 1]

(d) Hindu Law — Widow — Maintenance—Right of alteration.

The right to alter or rescind rate of maintenance fixed for payment to widow does not rest in the hands of either one side or the other but depends upon external circumstances which apply equally to both. [P 253 C 2]

(e) Decree—Variation—Decree can be varied by Court itself and only in particular way *(Obiter).*

If a decree directs the doing of a certain thing, then that thing must be done unless and until the decree is altered or provides on the face of it for the limits of its own existence. It is not like a contract which can be varied by common consent and which the law recognizing the unwillingness of the average person to put into writing clauses which are too obvious to his mind to require mention, takes into consideration the surrounding circumstances. No such laxness can ordinarily be imputed to Judges. Their decrees can only be varied or altered by the Court itself and only in a particular way. [P 254 C 1, 2]

(f) Hindu Law—Maintenance — Agreement by manager to pay maintenance is binding on family.

The manager of a joint Hindu family has the right to settle maintenance claims. When he does so he acts on behalf of the family as a whole ; so it is bound by his action. [P 256 C 1]

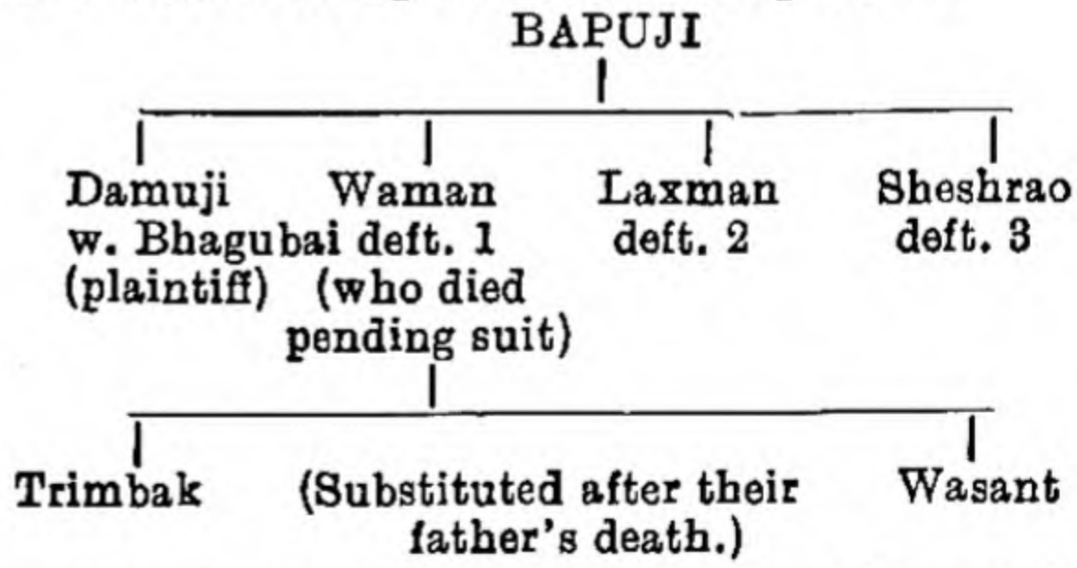
(g) Hindu Law — Maintenance — Past and future.

Ordinarily the questions regarding the payment of past and future maintenance would be separate and independent and so in the absence in a deed of an express statement to the contrary, it must be assumed that they are treated separately there. [P 256 C 1]

K. B. Tare and G. S. Brahamrakshas — *for Appellants.*

M. R. Bobde —*for Respondent.*

Judgment. — The plaintiff is a Hindu widow who is suing the members of her late husband's family for maintenance. The claim is founded on a deed, Ex. P-1, dated 4th June 1925, which was executed by Bapuji, the plaintiff's father-in-law, who is now dead. The suit is against his sons. The following genealogical tree will show the relationship between the parties.



The deed, in so far as it is relevant for the purposes of this case, is in the following terms :

I promise to give you Rs. 250 annually for your maintenance. I shall give you the abovementioned rupees every year on the 1st April. According to that deed your first year of maintenance begins from the date 1st April 1925. I promise to give you your maintenance every year in advance that is as soon as the new year begins. I have already promised to give you Rs. 250 for the first year of your maintenance that is for the year 1925-26 before the registering officer. I shall give you Rs. 250 on the date 1st April 1926 for your second year of

maintenance, that is for the year 1926-27. Thus in this way I shall give you Rs. 250 every year for your maintenance until you are alive. I have got three sons at present. There has been no partition between them and myself. We are all one family. My eldest son died while we were a joint family. At present I am the karta of the family. I shall give you your maintenance amount as I have agreed till my life. But after my death all my sons must also give you Rs. 250 for your maintenance once every year as I have agreed. By this deed all my sons are bound to maintain you. A mutual understanding between you and me has been concluded for your past maintenance. I do not owe anything to you for your past maintenance.

It will be observed that the deed has three marked features. The first is that the maintenance is payable in advance: accordingly the suit which was filed on 16th November 1933 is in the main for the Rs. 250 due on 1st April 1933 for the year 1933-34. There is also a small claim for Rs. 2-8-0 on account of the previous year, the contention being that the amount paid for that year fell short of the Rs. 250 due by this sum of Rs. 2-8-0. The balance of Rs. 60 is for the interest which the plaintiff says she has made herself liable for on a loan which she was forced to borrow owing to the defendants' omission to pay the Rs. 250 for which this suit has been brought. The second outstanding feature of the deed is that Bapuji, though acting as karta of the family and though settling a maintenance allowance which under the Hindu law would normally vary according to the fortunes of the family, has nevertheless contracted on behalf of his sons as well as himself, that the plaintiff will be paid Rs. 250 a year for the period of her life.

The defendants contend that this contract must be construed in the light of the surrounding circumstances and that there must be read into it an implied clause which makes the undertaking to pay Rs. 250 a year subject to variation in the family fortunes. They also urge that Bapuji had no power to bind them contractually except to the extent that the manager of a joint Hindu family can bind the other members that an undertaking of this sort, (if there is no implied term as above), which takes no account of possible fluctuations in the family fortunes, is on the face of it imprudent, and therefore the family is not bound to honour it when its fortunes decline, as they have at the present juncture.

The third feature is that the agreement settles not only the amounts payable in the future but also all claims in respect of arrears. The plaintiff's contention is that she gave up her right to a lump sum in respect of arrears; which she says were then due, on condition that she would be paid a steady and unvarying allowance of Rs. 250 a year irrespective of fluctuations in the family fortunes. The argument against this is that the clause dealing with arrears has nothing to do with the rest of the agreement. It merely states that the parties have come to a mutual understanding about the matter and agree that nothing is now due. This forms no part of the consideration for the remainder of the agreement and merely recites a settled fact. The defendants admit that the agreement was executed by their father, and admit the plaintiff's right to maintenance, but they contend that since that agreement was executed there has been a sharp decline in the family income and that therefore the amount fixed in the agreement must now be reduced. The plaintiff replies that there can be no reduction and relies on the terms of her bond.

The First Court upheld the plaintiff's contention and decreed her claim, though on agreement (which also gave the defendants liberty to appeal) instalments were allowed. The lower Appellate Court agreed with the defendants. In second appeal, the learned Judge from whose decision the appeal has been filed agreed with the first Court and so allowed the appeal and restored the original decree. The defendants appeal again. Two things are, we think, beyond doubt. First that under the Hindu law the widow's right to maintenance is dependent upon the family fortunes and so is liable to fluctuation both up and down in sympathy with them; and second that the parties concerned can contract themselves out of this and undertake to pay and receive a fixed and unvariable sum irrespective of the state of the family's finance at any given time; that is to say as Pollock, J. has put it, they can contract themselves out of the realm of status and enter the domain of contract and can agree to regulate their relations henceforth according to the terms of an agreement. The first thing therefore to look to is the deed and that is what the learned Judge whose decision we are now considering has done. According to him the deed is plain. It says that the plaintiff is to be paid Rs. 250 for her life and is to be paid not only by the father Bapuji but also by his sons after his death. It does not make this payment

subject to fluctuations and does not say that the figure is liable to variation on the happening of a given event. Therefore the learned Judge holds, full effect must be given to these terms.

There can be no doubt that that is what the deed actually says and had there been no complications, we would have had no hesitation in agreeing with that view. But we feel that the matter is not as simple as that. The deed must be construed in the light of the surrounding circumstances and with reference to the practice and usage in these matters; to do otherwise would result in an unjust conclusion. The right and in fact the duty to do so is conferred by proviso 5 to S. 92, Evidence Act. The reason for allowing an exception of this kind is given by Lord Campbell in (1857) 110 R R 587[1] at p. 593. His remarks with the necessary modification are apposite here. He says :

> Merchants and traders with a multiplicity of transactions pressing on them and moving in a narrow circle and meeting each other daily desire to write little and leave unwritten what they take for granted in every contract. In spite of the lamentations of Judges they will continue to do so; and in a vast majority of cases of which Courts of law hear nothing, they do so without loss or inconvenience; and upon the whole, they find this mode of dealing advantageous even at the risk of occasional litigation. It is the business of Courts reasonably so to shape their rules of evidence as to make them suitable to the habits of mankind and such as are not likely to exclude the actual facts of the dealings between parties when they are to determine on the controversies which grow out of them. It cannot be doubted in the present case that in fact this contract was made with the usage understood to be a term in it; to exclude the usage is to exclude a material term of the contract and must lead to an unjust decision.

If we might paraphrase that we would say that in spite of the lamentations of Judges, Hindu widows and members of joint Hindu families dealing with widows and other maintenance holders will not employ skilled draftsmen for the drawing up of their deeds and will persist, much to the embarrassment of Courts and Judges, in resorting to crude instruments fashioned by crude craftsmen. It is possible that in a poor country like India where skilled legal advice is not easily available and indeed is a luxury resorted to only as a last resort, this occasions no great ill in a large class of cases which never reach the Courts, but unless this is borne in mind when a case does find its way into the Courts, injustice is likely to result. People who enter into these agreements may not be learned in the law but they are usually steeped in an atmosphere of Hindu tradition and know well enough Hindu ideas and usage about these matters. They know that the amount claimable by a Hindu widow for her maintenance fluctuates with the family fortunes and consequently when agreeing to any particular rate all that they mean is that that is the fair rate when the family fortunes are at a certain ebb. Therefore their undertaking is to pay at that rate so long as the family income and expenditure remains where it is at the date of the agreement. All concerned understand that if the income increases and there is no corresponding increase in the expenditure, as for example having more mouths to feed, then so also will the amount claimable by the widow; on the other hand, if it decreases, then so also will the sum agreed upon. The agreement in such cases is not so much about the right, nor yet the circumstances in which it is claimable, for about that ordinarily there neither is nor can be room for controversy, but about the rate which is reasonable in a given set of circumstances and that is all that they usually apply their minds to. There is thus force in the appellants' contention that an implied term should be read into the contract, and we think this follows from the observations of their Lordships of the Privy Council in 6 M I A 526[2] at page 550 :

> The Hindu law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily, the words of the will are to be considered. They convey the expression of the Testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded is the law of the country under which the will is made and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption.

The right to maintenance is, in the absence of a contract to the contrary, governed by the Hindu law, and is, as Pollock J. has put it, matter of status. The incidents attaching to it are well known and the

1. Humfrey v. Dale, (1857) 7 El & Bl 266=26 LJ Q B 137=3 Jur (N S) 213=110 R R 587.

2. Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick, (1854-57) 6 M I A 526=4 W R 114=1 Suther 291 (P C).

term itself has acquired a particular meaning when used in relation to a given set of facts like the ones we have present here, and although it is true that such persons may contract themselves out of this status we hardly think that they intend to do so altogether unless they say so in express terms. When they agree to a certain rate, and say nothing more, they are, we think, merely reaching agreement on one question, namely the fair rate applicable to a given set of circumstances. We do not think that they usually mean to abrogate the rest of the law which states that that rate shall be liable to variation if and when circumstances alter, and indeed, to cease altogether under certain conditions.

The force of this is seen when we turn to another class of cases. It is a rule of Hindu law that a widow loses her right to maintenance (except at a starving rate) if she becomes unchaste, also that while unchaste she is not entitled to any maintenance at all. So also it is well settled that the right ceases upon remarriage. It has never been doubted that these rules obtain in full force, unless expresly abrogated, even when there has been a decree or an agreement of the kind now under contemplation : *see* 9 Bom 108[3] at p. 110, 15 All 382,[4] 17 Mad 392,[5] Mayne's Hindu Law, Edn. 10, p. 831. The true principle then is, we think, that when one contracts oneself out of status one must include in the agreement expressly or by necessary implication every point on which the laws appertaining to that status are intended to be set aside; either that or agree wholly to leave the realm of status and expressly agree from thenceforth to be governed, solely by the laws of contract in all matters touching the subject-matter of the agreement. Unless that is done, the ordinary law will continue to apply in all other respects. An implied term has to be read into the contract that the agreement is subject to the usual incidents of Hindu law and is to be read along with it and interpreted in that light.

This, as we understand it, is the principle upon which decrees, including compromise decrees, and also agreements, have so repeatedly been held to be subject to variation in the absence of an express direction to the contrary, when on the face of it they do not appear to be so. In any event it is the only legal foundation we are able to find for the long line of rulings which deal with this matter. But however that may be, and whether these were the reasons which prompted the learned Judges who so interpreted the law or not, the fact remains that maintenance decrees and agreements have so repeatedly been treated as subject to variation in the absence of an express direction to the contrary that that has now become the settled practice, and to hold otherwise at this stage would seriously disturb existing rights and might ruin families which have placed their hands to documents on the assumption that that was the law. It is, in our opinion, a class of case to which the rule of *stare decisis* should apply.

Turning now to the rulings on this point, they can be summarized thus. The Calcutta High Court enunciated the rule as far back as 1868 in 9 W R 152[6] and applied it to a compromise decree in the year 1879 in 5 C L R 18.[7] The Bombay High Court made similar observations in connexion with decrees in a Full Bench case decided in the year 1878. It is reported in 2 Bom 624[8] at p. 630. The Allahabad High Court followed suit in a case decided in the same year in which an earlier decree had directed payment of a particular sum "so long as the firm of Gulab Rai Chura Mal (the family firm) should exist," a provision not unlike the one found here. That decision is reported in 1 All 594.[9] Madras comes next with three decisions, one in 1884, one in 1888 and the other in 1899. The first two, though obiter, uphold this principle, and the third is directly in point. These decisions are 8 Mad 94[10] at p. 96, 12 Mad 183[11] at p. 185 and 22 Mad 175[12] at p. 177. Then comes a decision from this province decided in 1900: 13 C P L R 156.[13] It was also a case of a decree. There is also another Bombay case to the same effect in that year: 24 Bom 386.[14] These decisions have been followed

3. Vishnu Shambhog v. Mangamma, (1885) 9 Bom 108.
4. Daulta Kuari v. Meghu Tewari, (1893) 15 All 382=1893 A W N 149.
5. Nagamma v. Virabhadra, (1894) 17 Mad 392.
6. Sreeram Bhuttacharjee v. Puddomokhee Debia, (1868) 9 W R 152.
7. Rajendernath Roy v. Putto Soondery Dassee, (1879) 5 C L R 18.
8. Sidlingapa v. Sidava, (1878) 2 Bom 624 (F B).
9. Ruka Bai v. Ganda Bai, (1875-77) 1 All 594.
10. Vijaya v. Sripathi, (1885) 8 Mad 94.
11. Venkanna v. Aitamma, (1889) 12 Mad 183.
12. Bangaru Ammal v. Vijayamachi Reddiar, (1899) 22 Mad 175.
13. Narayan Rao v. Mt. Janki Bai, (1900) 13 C P L R 156.
14. Gopika Bai v. Dattatraya, (1900) 24 Bom 386 =2 Bom L R 191.

since and the rule has been reproduced in the latest text books: *see* Mayne's Hindu Law, 10th Edn., p. 835 and Mulla's Hindu Law, 8th Edn., p. 596, para. 568. The same rule was applied to agreements as distinct from decrees in 11 Luck 607[15] and in 14 M L J 339.[16] We have not been shown any case to the contrary. There are therefore strong reasons for applying the principle of *stare decisis.*

A decision the other way round is 47 Mad 308.[17] There the agreement provided expressly that the sum fixed was not to be varied. That illustrates the rule we have been expounding. When the contract or decree, either expressly, or by necessary implication, provides that there shall be no variation, then the Hindu law rule of variation is excluded. To the same effect is A I R 1937 Bom 358.[18] We may observe in passing that it would save trouble, and in many cases unnecessary litigation, if agreements, and certainly decrees, were to be more specific and were to include clauses allowing variation instead of leaving them to be inferred. So far as decrees are concerned, it is the more logical, and certainly the more convenient course, and in England there would always have to be a "liberty to apply" clause. Without it variation would not be permissible. Of course, the rules of Hindu law do not obtain there and that makes a difference, but the rules for construing decrees ought to be the same in both countries; and in any case a clause of that kind would avoid the necessity for bringing a fresh suit to have the decree varied. This was pointed out by Parsons J. in 24 Bom 386[14] and we reproduce his observations for the future guidance of Courts in this province:

> We think that, in decrees where maintenance is awarded, Courts should insert words which would enable them on application to set aside or modify their orders as circumstances might require, and in such cases the remedy would be the more appropriate one by application under the leave reserved.

We turn now to a more difficult question. Granting that an agreement of the kind we are considering can be varied, the question arises as to how it can be done and from what date the variation is to take effect. It was argued that the only logical rule is that so long as the contract subsists, it must be enforced as it stands and if variation is desired, then the contract itself must be varied in one of the ways known to law before variation can be permitted, and then the variation will, in the absence of an express agreement to the contrary, take effect from that date and will affect only the future and not the past. We agree that this is so but what is the contract ? If what we have said is correct, then there is an implied condition in it incorporating the usual incidents of Hindu law relating to this matter. It must be remembered that there is no case here either for rescission or for rectification of an instrument. The only circumstances in which rectification is possible are enumerated in S. 31, Specific Relief Act, namely when through "fraud or mutual mistake of the parties . . . . the instrument . . . . does not truly express their intention." There is no case of fraud here nor yet of mutual, or to use a more correct expression, common mistake, nor does the instrument fail to express the intention of the parties. If the principles which we have been analyzing are correct, then both sides understood quite clearly what was meant and expressed their intention adequately enough for all legal purposes. There is therefore no room for rectification : nor are there grounds for rescission. That is dealt with in S. 35 and the only ground relevant here is the one given in cl. (a) : "where the contract is voidable or terminable by the plaintiff." As we read the law the right to alter or rescind does not rest in the hands of either one side or the other but depends upon external circumstances which apply equally to both.

The issue before the Court in such cases is therefore a simple one. Have the circumstances changed to the necessary extent ? If they have, then variation is permissible; if not, then it is not. If that is so, then it does not matter when the question is raised ; that is to say whether by a suit in which the family sue for a declaration (not for rescission or rectification, be it observed, for on these assumptions there is nothing to rectify or rescind), or by way of defence when the maintenance holder sues. The issue in either case will be the same : have the circumstances altered to such an extent as to justify a variation of the figure agreed

15. Sheo Mangal Singh v. Bodhi Kuar, (1936) 23 A I R Oudh 60=159 I C 356=11 Luck 607=1935 O W N 1249.
16. Subramanian Patter v. Vembammal, (1904) 14 M L J 339.
17. Mohieswara Rao v. Durgamba, (1924) 11 A I R Mad 687=78 I C 831=47 Mad 308=46 M L J 189.
18. Purshottamdas v. Rukmini, (1937) 24 A I R Bom 358=170 I C 897 = I L R (1938) Bom 1 =39 Bom L R 458.

upon, and did they alter before the cause of action for the maintenance accrued? This, we think, follows from a decision of their Lordships of the Privy Council. It was doubted for a time whether a widow could sue in respect of arrears, and some Courts held that this was a matter within the discretion of the Courts and that the Court could for sufficient reason refuse to award any arrears, or that it could award arrears at a lower rate than that fixed for her future maintenance. But their Lordships of the Privy Council overruled this in 8 Pat 840[19] at p. 847 and held that "such arrears if they truly exist, fall within the range of the widow's right to maintenance." Therefore, as we see it, all that the Courts are required to determine is whether the right to the figure claimed existed when the cause of action accrued. If it did, the widow is entitled to it whatever the date of suit (questions of limitation aside); if not, then the figure must be fixed in accordance with the state of the family fortunes at the date when the right accrued. Whether the issue is raised by way of attack or in defence is immaterial. The point for determination is the same in either event.

We observe in passing that it is not any and every alteration in circumstances which will justify variation. The alteration in fortune must be substantial and of a kind which will justify an inference that the parties could not possibly have intended the old rate to continue in the altered circumstances. It is also to be observed that the alteration must have occurred before the cause of action to the maintenance holder accrued. It is only when both elements are present that a departure from the figure agreed upon can be justified. The decisions deal mainly with decrees and would appear to indicate a different rule, namely that unless a decree provides on the face of it machinery for its own alteration, variation can only be obtained by a separate suit properly framed for the purpose. But a decree, we think, stands on a different footing. There is not there, or at any rate ought not to be, room for implied clauses and unexpressed understandings. If a decree directs the doing of a certain thing, then that thing must be done unless and until the decree is altered or provides on the face of it for the limits of its own existence. It is not like a contract which can be varied by common consent and in which the law, recognizing the unwillingness of the average person to put into writing clauses which are too obvious to his mind to require mention, takes into consideration the surrounding circumstances. No such laxness can ordinarily be imputed to Judges. Their decrees can only be varied or altered by the Court itself and only in a particular way.

It is true that owing to the unfortunate practice which has grown up in the matter of drawing up maintenance decrees, they now have to be construed, for reasons of *stare decisis*, as liable to alteration even though they do not say so. But though we would not feel justified in making a greater departure than is necessary from normal rules of construction in the case of decrees, we do not think that the same considerations apply to contracts which have not merged in a decree. The rulings are as follows: In the following cases a decree had fixed the rate and it was allowed to be varied as regards the future, or so we gather, though it is not expressly so stated in some of the judgments: 1 All 594,[9] 22 Mad 175,[12] 24 Bom 386.[14] To the same effect is 14 M L J 339,[16] the only difference being that the rate there was fixed by a document and not in a decree. These rulings are not of much assistance because they do not determine whether a separate suit is necessary. That question can naturally only arise in a suit for arrears. It did arise, however, in the following cases: In 26 Bom 707[20] modification of the rate fixed *de futuro* was sought in execution of the decree fixing it. It was held that the decree could not be altered in execution and that the proper remedy was a separate suit. This, we think, lays down the right rule as regards decrees in spite of a sentence in the judgment of Westropp C. J. in 2 Bom 624[8] at p. 630 which indicates other possibilities:

> Unless either party, by suit or otherwise brought to the notice of the Court that circumstances rendered it equitable that the rate should be enhanced or reduced.

But, as we have said, we do not think this rule applies to agreements for, as we have explained, an agreement can only be varied or rescinded (apart from common consent) when the conditions specified in S. 31 or S. 35, Specific Relief Act, are present. Therefore unless the agreement provides

19. Ekradeshwari Bahuasin v. Homeshwar Singh, (1929) 16 A I R P C 128=116 I C 409=8 Pat 840=56 I A 182 (P C).

20. Maharana Shri Ranmalsingji v. Bai Shri Kundankuwar, (1902) 26 Bom 707=4 Bom L R 531.

on the face of it for variation, or that is the necessary implication, it cannot, in the absence of a subsequent agreement modifying it be varied either by suit or otherwise so long as it subsists. Consequently, the only method of obtaining relief would be by showing that the agreement has ceased to subsist, or that the circumstances which, according to its implied meaning will justify a variation, have now come into play.

The decision in 2 Bom 624[8] does not assist us because there the claim was made for the first time in the suit itself. The rate had not been fixed previously either by agreement or in a decree. In 11 Luck 607[15] the rate had been fixed in an agreement. The suit was by the maintenance holder for arrears, claiming at the agreed rate. The defendant was allowed to set up a plea of altered circumstances by way of defence and to obtain relief accordingly. Similar prayers were allowed in 5 C L R 18[7] and 13 C P L R 156;[13] in both these cases the rate had been fixed by a decree, a compromise decree in the first case and an ordinary decree after contest in the other. There can therefore be no doubt that the plea can be set up either by way of attack or by way of defence and that it can relate to arrears of maintenance. But none of these cases decide when the altered circumstances must come into existence so as to affect the claim, nor is it possible to deduce any rule in respect of this from the facts given. This therefore is a matter which is of first impression. In our opinion, the only possible rule is the one we have given. As we have said the Judicial Committee has decided that if the widow's right to arrears truly exists, then she is entitled to recover them. The extent of this right can only be determined with reference to the circumstances as they exist on the date when the right accrues. Therefore, any alteration in circumstances after the right has matured cannot avail either side. They can only affect a right which accrues after they themselves have come into existence.

Turning back now to the deed sued on and reading it in the light of these observations, we do not think that the parties contracted themselves wholly out of the realm of status. All they did was to settle the rate of maintenance applicable to the circumstances of the family at the date of the agreement. We hold therefore that it is subject to variation both up and down if the circumstances of the family can be shown to have altered, and the basis for this decision is that that was the implied understanding between the parties and the sense in which the words found in the document were used.

We do not think that the words making the sum settled payable for life make any difference, for that would be the case under the Hindu law as well. The right enures through life, but the amount payable is subject to variation, and if the true principle be that the amount was settled with reference to the circumstances of the family as they existed at the date of the agreement, then the true construction of the document, read in the light of the circumstances in which it was executed, is that maintenance is to be paid for life, and that the rate fixed is to enure for life also, unless the fortunes of the family change either for better or for worse. In that event the rate will be liable to alteration either up or down provided of course the circumstances altered before the sum became due. The defendants raised this plea in this case. Therefore the burden will be on them to show that the agreement to which their father set his hand has ceased to subsist. That is to say they will have to prove that the family circumstances altered for the worse before 1st April 1933 when the Rs. 250 due for 1933-34 became due; and as regards the sum of Rs. 2-8-0 due on account of the previous year that they had altered on 1st April 1932 as well.

There is also an item of Rs. 60 in the claim. The plaintiff says that she had to borrow money because the maintenance due to her was not paid in advance and that this represents the interest on that loan. If she succeeds in proving this, then she will, in our opinion, be entitled to it provided she borrowed at a reasonable rate, reasonable, that is to say in the circumstances in which she was placed. The test will be whether she could have obtained money at a lower rate if she had made reasonable efforts to do so. The state of the family circumstances is a matter peculiarly within the knowledge of the other side, and so, unless they either pay the widow her money when it is due, or make her a reasonable offer, telling her the reason for the reduction, on or before the date on which the sum is due, she is entitled to assume that there has been no alteration in the circumstances. If that has not caused her to act to her detriment, then of course no complication arises, for no damage or loss can be said to have resulted to her. But if

she has been caused thereby to act to her detriment (and that is a matter which she must allege and prove), then an estoppel arises and she will be treated exactly as if the circumstances had not altered. If they had not altered, she would have been entitled to her money on the dates due, and if she was not paid promptly, she would be entitled to borrow on such reasonable terms as she was in a position to obtain. The defendants would then be liable to make good that loss to her.

Two more points remain but they need not detain us long. The defendants contended that they were not liable for an agreement made by their father. We are of opinion that they are. The agreement was made as manager, and the manager of a joint Hindu family has the right to settle maintenance claims. When he does so, he acts on behalf of the family as a whole; so it is bound by his action. On the interpretation which we have placed upon the agreement, the father acted within his powers and there is no suggestion that the sum fixed was so unreasonable as to place the matter beyond the manager's implied authority.

The other point is that the rate was fixed at Rs. 250 on consideration that the plaintiff gave up her right to arrears. We are unable to read the document in that way. It does not state that this formed any part of the consideration for the payment of the Rs. 250 a year. We are of opinion that that clause is an independent one reciting a settled fact. Ordinarily the two questions would be separate and independent and so in the absence of an express statement to the contrary, we must assume that they were treated separately there.

The result is that the appeal succeeds. The decree of this Court is reversed and the order of the lower Appellate Court remanding the case for a determination of the remaining issues is upheld. As regards costs it was the duty of the defendants either to pay the sum promised or to tender a lesser amount, giving their reasons. Since they have done neither, they will pay the entire costs of this litigation from the beginning whatever the result.

D.S./R.K. *Appeal allowed.*

A. I. R. 1939 Nagpur 256

NIYOGI J.

Haridas Narayandas Koshti — Appellant.

v.

Jagannath Das and others — Respondents.

Second Appeal No. 116 of 1937, Decided on 17th March 1939, from appellate decree of 4th Addl. Dist. Judge, Nagpur, D/- 15th October 1936.

(a) Civil P. C. (1908), O. 2, R. 6—Misjoinder of causes of action and parties is not invariably fatal to suit — When such misjoinder is objectionable stated.

The joinder of causes of action and parties is not invariably fatal to the suit. O. 2, R. 6 is a rule of expediency and convenience. Whether the trial would be convenient or not is a matter which has to be determined on the facts of each case and no hard and fast rule of an absolute character can be laid down. No doubt the misjoinder of claims and parties is to be discouraged when it is calculated to defeat the ends of justice; but such joinder would be unexceptionable unless it is apparent that the defence will be embarrassed by confusing different issues and proofs in the same litigation. The trial would be manifestly irregular when the causes of action or claims are so distinct and independent as to be incapable of coalescence and would be objectionable only when the union of such claims embarrasses the trial and renders adjudication impracticable. [P 257 C 2]

(b) Transfer of Property Act (1882), Secs. 59-A and 68 (1) (c)—'Mortgagor' includes subsequent purchaser.

In view of the provisions of S. 59-A, the word "mortgagor" in S. 68 (1) (c) must include the subsequent purchaser of the mortgaged property: *A I R 1932 Pat 273 and A I R 1938 Oudh 210, Foll.; A I R 1930 Nag 139, held Overruled; 34 All 63 (P C), Ref.* [P 258 C 1]

(c) Appeal—Abatement—Decree for damages passed — Judgment-debtor dying after appeal filed — Appeal does not abate — Maxim "actio personalis moritur cum persona"—Application of.

No doubt the general rule applicable to causes of action in tort is embodied in the maxim *actio personalis moritur cum persona* but that maxim cannot operate when the suit has ended in a decree for damages so as to result in the abatement of the appeal, where the judgment-debtor dies after the filing of appeal : *26 Bom 597 and 26 Mad 499, Rel. on.* [P 258 C 1]

(d) Transfer of Property Act (1882), S. 68 (1) (c)—Mortgagor's liability under—Value of materials removed by him resulting in depreciation is no criterion.

Under S. 68 (1) (c) a mortgagor is liable to the extent to which the security has been rendered insufficient by him. The cost of materials removed by the mortgagor, resulting in the depreciation of the security is not the criterion. [P 258 C 1, 2]

M. B. Kinkhede and K. A. Pote — *for Appellant.*

R. N. Padhye and T. B. Pendharkar — *for Respondent 1.*

Judgment.—This is an appeal by defendant 3 from the concurring judgment of 4th Additional District Judge, Nagpur, in Civil Appeal No. 30-A of 1936 delivered on 15th October 1936. Mahadeo and Shrawan, defendants 1 and 2, who are now respondents 2 and 3, had on 21st April 1927 executed a mortgage, affecting a house, in favour of plaintiff-respondent 1, Jagannathdas. The mortgage debt was due on 21st April 1929 and the property was to be foreclosed on default of payment of the debt. On 2nd September 1929 the appellant's father Narayandas purchased the mortgaged house but he re-conveyed it in their favour on 6th July 1934. During the interval that he was in possession of the house, in the month of May 1933, he, in common with the mortgagors, removed the wooden materials, fixtures and corrugated iron sheets of the house whereby the value of the house was substantially diminished. The mortgagee alleged that the value of his security was, at the date of the mortgage, Rs. 5000 and that in consequence of the wrongful act of the defendants it had been reduced to Rs. 1500. He therefore prayed for a decree for foreclosure against the mortgagors defendants 1 and 2 and a personal decree for Rs. 3500 against all the defendants. Later on, the plaintiff asked for a decree for sale instead of a decree for foreclosure. The trial Court passed a decree for Rs. 3634-6-9 including interest and costs against defendants 1 and 2 and ordered the property to be sold on default of payment of that amount and passed a personal decree against defendant 3 Narayan for Rs. 1500. The lower Appellate Court affirmed that decree. Defendant 3 Narayan preferred this second appeal on 6th February 1937 disputing the correctness of the personal decree passed against him. He having died pending the appeal his son Haridas brought himself on record as appellant and has prosecuted the appeal.

On behalf of the appellant it is at the outset contended that the trial was defective on account of multifariousness, namely misjoinder of causes of action and of parties. It is true that there has been a joinder of two causes of action, namely (1) failure to pay the mortgage debt, and (2) the wrongful act of removing the wooden materials, etc. whereby the security was rendered insufficient; but the question is whether this joinder of separate claims or causes of action and of parties vitiated the trial. It must be observed in the first instance that under O. 2, R. 7, the objection as to misjoinder of causes of action and parties ought to have been taken at the earliest opportunity in the suit, but that was not done. Apart from this initial weakness of the appellant's contention it would appear that the contention itself is untenable. The joinder of causes of action and parties is not invariably fatal to the suit. O. 2, R. 6, Civil P. C., provides that when it appears to the Court that several causes of action joined in one suit cannot be conveniently tried or disposed of together, the Court may order separate trials. That shows that it is a rule of expediency and convenience. Whether the trial would be convenient or not is a matter which has to be determined on the facts of each case and no hard and fast rule of an absolute character can be laid down. No doubt the misjoinder of claims and parties is to be discouraged when it is calculated to defeat the ends of justice; but such joinder would be unexceptionable unless it is apparent that the defence will be embarrassed by confusing different issues and proofs in the same litigation. The trial would be manifestly irregular when the causes of action or claims are so distinct and independent as to be incapable of coalescence and would be objectionable only when the union of such claims embarrasses the trial and renders adjudication impracticable. Can that be predicated of this case? The obvious answer is "no." In so far as the claims for the enforcement of the mortgage and for personal decree were made against the mortgagors themselves, it could hardly be said that there was any misjoinder, and the joinder of defendant 3, Narayan, in respect of the claim for personal decree would not be open to attack in view of the allegation that he made common cause with the mortgagors in damaging the security: the cause of action against the defendants being one and indivisible justified their joinder. Under O. 2, R. 3, it is open to a plaintiff to unite in the same suit several causes of action against the same defendants jointly and it was not possible to file a separate suit against defendant, 3 Narayan, alone. The contention therefore must be overruled.

The next contention is that Narayan who was only a subsequent purchaser of the mortgaged property could not be made personally liable. Reliance is placed on 34 All 63.[1] This argument cannot prevail in view of the important fact that Narayan's liabi-

1. Jamna Das v. Ram Autar Pande, (1912) 34 All 63=13 I C 304=39 I A 7 (P C).

lity here is rested on his wrongful act in causing damage to the security. The claim against him is sought to be made out under S. 68 (1) (c), T. P. Act, because the mortgagee was deprived of a part of the security in consequence of the wrongful act of Narayan. It is true that the Section only speaks of the mortgagor, but in view of S. 59-A of that Act the word "mortgagor" must include the subsequent purchaser of the mortgaged property. No doubt a different view was taken in 26 N L R 312,[2] but that must be deemed to have been overruled by S. 59-A. The proposition is too plain to need any authority for its confirmation, but if one were needed, I may refer to A I R 1932 Pat 273[3] and A I R 1938 Oudh 210.[4] The next contention is that the cause of action came to an end with the death of Narayan and that in any case the present appellant Haridas would not be liable for the tortious act of his father. The first branch of this contention is self-contradictory and if given effect to would destroy Haridas's right to prosecute this appeal. No doubt the general rule applicable to causes of action in tort is embodied in the maxim *actio personalis moritur cum persona*, but that maxim cannot operate when the suit has ended in a decree for damages so as to result in the abatement of the appeal: *see* 26 Bom 597[5] and 26 Mad 499.[6] Haridas as the legal representative of Narayan cannot raise any defence personal to himself. The issue before me is only this, whether or not the decree was rightly passed against Narayan. The question whether it would be binding on his son or not is totally irrelevant and I need not pronounce my opinion at this stage as it can well be raised in execution.

Lastly, it is urged that inasmuch as the plaintiff in his notice dated 19th October 1934 estimated the damages to amount to Rs. 500 he was not entitled to a decree exceeding that amount. The materials which had been removed might have been worth Rs. 500 but that is not the criterion. The mortgagee is entitled to compensation for the depreciation of his security. He would be liable to the extent to which the security was rendered insufficient. On this point Narayan himself as D. W. 1 admitted that when he had purchased the mortgaged house it was worth Rs. 3000 but that as the result of the wrongful act its value was reduced to Rs. 1500. Both the Courts have agreed in estimating the depreciation at Rs. 1500 and that finding cannot be disputed in the face of Narayan's admission. The appeal is dismissed with costs. Counsel's fees Rs. 25. The costs of the lower Courts will be paid as ordered by the lower Appellate Court.

N.S./R.K. *Appeal dismissed.*

2. Tretanath v. Ajodhyaprasad, (1930) 17 A I R Nag 139=124 I C 690=26 N L R 312.
3. Janki Saran Singh v. Mohammad Ismail, (1932) 19 A I R Pat 273 = 139 I C 525 = 13 P L T 373.
4. Mt. Mathura Devi v. Mohan Lal, (1938) 25 A I R Oudh 210=177 I C 100=1938 O W N 806.
5. Gopal v. Ramchandra, (1902) 26 Bom 597 = 4 Bom L R 325.
6. Paramen Chetty v. Sundararaja Naick, (1903) 26 Mad 499.

A. I. R. 1939 Nagpur 258

GRUER J.

Pannalal Singhai and another — Judgment-debtors — Applicants.

v.

Firm Hasan Dada through its owner Haji Wali Mohammad — Defendants — Opposite Party.

Civil Revn. No. 50 of 1938, Decided on 5th December 1938, from order of Dist. Judge, Chhindwara, D/- 23rd December 1937.

(a) Civil P. C. (1908), O. 21, R. 90—Irregularity and illegality — Difference — Holding of sale few hours before advertised time is illegality which renders sale void — Court can set aside sale on its own initiative — It is at least material irregularity and can be dealt with under O. 21, R. 90.

The difference between an irregularity and an illegality is one of degree. An irregularity of so serious a nature as to render impossible the publicity which affords some main security for fairness of public sales must be deemed to be an illegality. Hence, the holding of a sale two or three hours before the time fixed is not merely an irregularity but an illegality which in itself renders the sale void, because it is more than likely that intending bidders relying on the proclamation would not turn up until too late. The fact that there was beat of drum in the village just before the sale was actually held would not make any difference to intending bidders. In such a case therefore the Court can set aside the sale on its own initiative: *16 Cal 794; 17 Cal 769; 7 All 289 and A I R 1921 Mad 583, Rel. on.* [P 259 C 2]

In any case such an illegality is at least a material irregularity and the matter can therefore be dealt with under O. 21, R. 90: *A I R 1919 Nag 128, Rel. on.* [P 260 C 1]

(b) Civil P. C. (1908), O. 21, R. 90—Irregularity apparent from record but not taken in application — Objection based on such irregularity can be considered by Court at any stage.

Where an irregularity is demonstrable from the record itself it is within the power of the Court to consider the objection based on such irregularity

even if not specifically taken in the application and the Court's dealing with it cannot be questioned at a later stage on the ground of delay. [P 260 C 1]

(c) Execution sale — Setting aside — Application by one of several judgment-debtors — Property sold consisting of only one item — Irregularity not apportionable — Sale must be set aside as a whole.

There is a distinction between an irregularity and injury which can be allotted to one part only of the sale, in which case a Court may be justified in setting aside the sale of that part only, and an irregularity affecting the whole property and all the lots, where the sale should be set aside in toto: *A I R 1933 Pat 223, Rel. on.* [P 260 C 1]

Where an application for setting aside a sale is made by one of the judgment-debtors and the property sold consists of only one item and the irregularity cannot be apportioned, the sale must be set aside as a whole : *41 C W N 224, Disting.* [P 260 C 1]

N. T. Mangalmurti — *for Applicants.*

R. N. Padhye — *for Opposite Party.*

Order. — On an objection preferred by one of the judgment-debtors, Babulal under O. 21, R. 90, Civil P. C., the first Court set aside the sale in execution of the judgment-debtors' house. This order was reversed by the District Judge in appeal and the judgment-debtors now come up in revision. The findings of the first Court are that the house was worth Rs. 1500 and the price obtained in auction (Rs. 350) was inadequate, that there was an irregularity, as the sale was proclaimed for 12 midday but was held at 9 A. M. and that by reason of this irregularity substantial injury had been caused to the judgment-debtors. The District Judge's order proceeds on the ground that this objection had not been raised by the judgment-debtors in their application and in fact not till some time later in February 1937. In his opinion this was too late, and the objection should not have been entertained at that stage. The application says that the price obtained is inadequate and that there has been a mistake in the proclamation. The real objection now put forward is not of course any mistake in the proclamation but in the holding of the sale at a time at variance with that given in the proclamation. The applicants-judgment-debtors contend however that they should not be tied down to defective phraseology in their application, that the objection was taken when after renewal of the proceedings which had been stayed the matter was taken up for disposal, that issues were framed, evidence led and the irregularity clearly made out and so it is improper now to disallow the objection altogether. It is also contended that the holding of a sale before the hour fixed is not merely an irregularity but an illegality, which means that there was no sale at all and that the Court itself should set it aside, apart from any application under O. 21, R. 90. The findings of the first Court about inadequacy of price and injury caused by reason of the irregularity have not been upset by the Appellate Court and so must stand good.

On the other hand it is contended that the objection was an afterthought which occurred to the judgment-debtors' legal advisers later on when they went through the auction papers. It is not made out that the holding of the sale at this time had anything to do with the low price obtained. The matter must be decided under O. 21, R. 90, and not on the wider ground of illegality. Finally it is said that as only one of the judgment-debtors took objection the sale could be set aside only so far as his interest is concerned.

There is no doubt authority for the view that the holding of a sale before the time fixed is not merely an irregularity but an illegality which in itself renders the sale void. It was so held in 16 Cal 794,[1] which was followed in 17 Cal 769[2] at p. 782; *see* also 7 All 289.[3] In 44 Mad 35[4] at p. 38 it was said that the difference between an irregularity and an illegality was one of degree, and that an irregularity of so serious a nature as to render impossible the publicity which affords one main security for the fairness of public sales must be deemed to be an illegality. Now when sale is held two or three hours before the advertised time it is more than likely that intending bidders relying on the proclamation would not turn up until too late. It is said that in the present case there was beat of drum in the village just before the sale was actually held. Still that would not make any difference to intending bidders from outside; and even in the village, the beat of drum and its import may not have been appreciated by all. I therefore think that there was a good cause for the Court to set aside the sale on its own initiative. In any

1. Basharutulla v. Uma Churn Dutt, (1889) 16 Cal 794.
2. Mohendro Narain v. Gopal Mondul, (1890) 17 Cal 769.
3. Bakhshi Nand Kishore v. Malak Chand, (1885) 7 All 289=1885 A W N 42.
4. Jayarama Ayyar v. Vridhagiri Aiyar, (1921) 8 A I R Mad 583=59 I C 167=44 Mad 35=39 M L J 188.

case the matter can be dealt with under Order 21, Rule 90, Civil P. C., as the illegality is at least a material irregularity. In 15 N L R 125[5] the omission to state the time of sale was held to be a material irregularity. It was within the power of the Court to consider the objection even if not taken specifically in the application, and seeing that the irregularity was demonstrable from the record itself I do not think that the Court's dealing with it should have been questioned at a later stage on the ground of delay. There is a finding which has not been reversed that an inadequate price was obtained. The sale papers show that there were only two bidders, one of them being plaintiff's agent, and there were only three bids. There is a strong probability that there might have been more bidders if the advertised time had been adhered to, so that it is reasonable to conclude, as the first Court did, that substantial injury has been caused by reason of the irregularity. It is unfortunate that the execution proceedings should be so delayed, but the decree-holder himself might have noticed the wrong procedure and pointed it out to the sale Amin.

Although only one judgment-debtor has objected I do not think that the sale can be set aside in part. That would be most inconvenient and unfair because the half of a house is not necessarily half as valuable to an auction-purchaser as the whole of it is. In 41 C W N 224[6] in which the sale was not entirely set aside the facts and circumstances were different and the other judgment-debtors had previously put in applications which failed. In 12 Pat 181[7] a good distinction was drawn between as irregularity and injury which could be allotted to one part only of the sale, in which case a Court may be justified in setting aside the sale of that part only, and an irregularity affecting the whole property and all the lots, where the sale should be set aside in toto. In the present case there is only one house, and the irregularity cannot be apportioned. Also, on the view that there has been illegality it is immaterial whether both judgment-debtors objected or not. The application is allowed with costs, and the order of the first Court setting aside the sale is restored. Counsel's fee Rs. 20.

N.S./R.K. *Revision allowed.*

5. Narhar v. G. M. Buti, (1919) 6 A I R Nag 128 =51 I C 864=15 N L R 125.
6. Amulya Krishna v. Dilip Kumar, (1936) 41 C W N 224.
7. Chhaterbijai Singh v. Damodar Das, (1933) 20 A I R Pat 223=144 I C 62=12 Pat 181 = 14 P L T 493.

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* A. I. R. 1939 Nagpur 260

NIYOGI J.

Pannalal Baliram and others — Defendants — Appellants.

v.

Sumranlal Rupram — Plaintiff — Respondent.

Second Appeal No. 214 of 1936, Decided on 19th October 1938, from appellate decree of Dist. Judge, Jubbulpore, D/- 16th March 1936.

(a) Hindu Law—Widow—Remarriage—Effect of, on rights of widow to hold property. *(Obiter).*

Re-marriage according to the accepted view of the Court of the Judicial Commissioner of Central Provinces, results in the forfeiture of the widow's right to hold possession of the property that devolves on her from her husband or from his lineal heir. [P 261 C 1, 2]

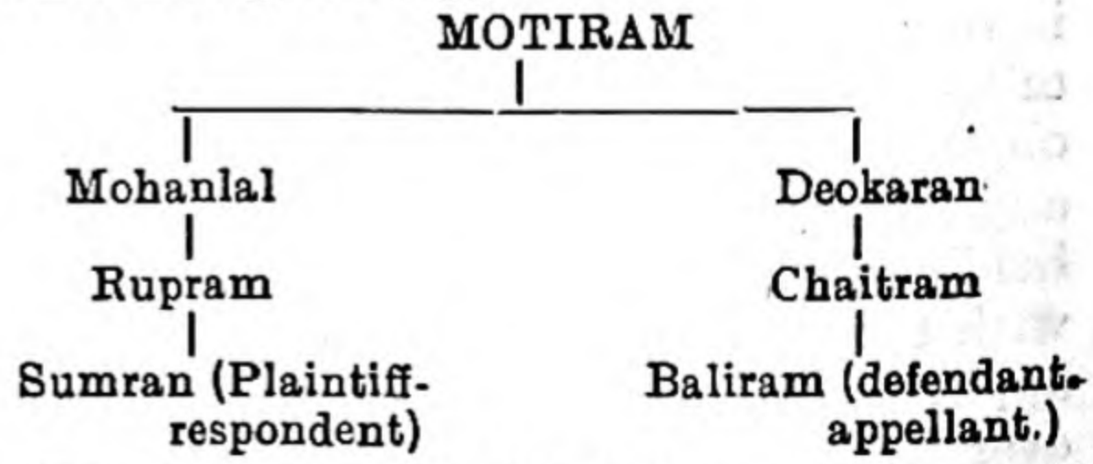
*** (b) Adverse possession—Widow—Adverse possession against widow does not affect reversioner's rights.**

Adverse possession, howsoever long held, cannot impair the right of a person who was not during the continuance of that adverse possession, entitled to possession. The right of the reversioner as is well known is spes successionis and his reversionary estate falls into possession only on the death of the intermediate owner, namely the widow. Consequently the adverse possession against the widow can hardly be recorded as hostile to the reversioners whose right was until the widow's death only an expectancy: *Case law discussed.* [P 263 C 1, 2]

M. B. Kinkhede and V. R. Dhoke — *for Appellants.*

J. R. Mudholkar — *for Respondent.*

Judgment.—This is a defendant's appeal from a reversing judgment of the District Judge, Jubbulpore, delivered on 16th March 1936 in Civil Appeal No. 8-A of 1935. The appellant and the respondent are related in the way that will appear from the undermentioned genealogy :



The respondent filed the suit out of which this appeal arises for possession of the property in suit in his capacity as reversioner to Chaitram who died as far back as 1884. The plaintiff dated the cause of action for the suit on the death of Mt. Chukho, the widow of Chaitram, which

occurred on 15th November 1926. The question that arose in the suit was whether the defendant Baliram who was in possession of the property in suit continuously from 1884 to the exclusion of and adverse to Mt. Chukho acquired such a prescriptive title in respect of the property as to extinguish the plaintiff's reversionary right. I need only refer to the material facts to elucidate the issue of law that arises in the case. Rupram's widow, Mt. Premabai, was living with Chaitram as his mistress and she bore him a son by name Baliram who was the defendant in the suit but is now represented by his son, the appellant. Some time after Chaitram's death his widow Chukho left her husband's house and lived with one Sheoram of mouza Barela as his mistress. She died as already stated above on 15th November 1926. When Chaitram died in 1884 the mutation proceedings were started in which the mother and step-mother of Chaitram by name respectively Mt. Dulia and Mt. Chukho and Chaitram's widow Mt. Chukho and his illegitimate son Baliram figured in those proceedings. The mutation officer remarked that although Baliram was an illegitimate son there was no difference made in point of legal rights between illegitimate and legitimate sons in the family of Chaitram and he therefore recorded the whole property in the name of Baliram with lambardari right and provided at the same time that 2 annas share in the property would be recorded in pattidari against the names of each of the three widows above named. The suit was contested on several grounds out of which those that are material are two: (1) that Mt. Chukho had left her husband's house after she became a widow and began to live openly with Sheoram of Barela as his mistress, and (2) the effect of adverse possession on the part of Baliram as against the widow Mt. Chukho on the reversionary right of the plaintiff Sumran.

On behalf of the appellant it is urged that it ought to have been held that Mt. Chukho had contracted remarriage with Sheoram and that she was not his mistress as was found by the original Court. I do not see my way to enter into this question for the reason that this question which was one of pure fact was not agitated in the lower Appellate Court as it ought to have been done. It may be conceded that if Mt. Chukho had been remarried then a question would arise whether the plaintiff Sumran would be entitled to claim possession on the date of the remarriage, as re-marriage according to the accepted view of the Court of the Judicial Commissioner Central Provinces results in the forfeiture of the widow's right to hold possession of the property that devolves on her from her husband or from his lineal heir, but obviously the appellants are not entitled to raise this question of law unless they are in a position to displace the original Court's clear finding against them that Mt. Chukho was Sheoram's mistress. This point should have been canvassed in the lower Appellate Court. It is true that the appellants in this Court were respondents in the lower Appellate Court but even then they were entitled under O. 41, R. 22, Civil P. C., to support the trial Court's decree in their favour on any points which were decided against them. As it was open to them to take that opportunity in the lower Appellate Court and they failed to avail themselves of that opportunity, they cannot now ask the Court in second appeal to go into the evidence bearing on that issue. As however I have perused the pleadings as well as the evidence, I may briefly state that the respondent's pleadings are devoid of any averment to show that Mt. Chukho had re-married Sheoram. There is no express allegation made as to the re-marriage, nor is the date of re-marriage suggested in any place. There was no issue on the point and whatever evidence there is on the record tends to discount the story of re-marriage. The first contention therefore must be overruled.

The second contention no doubt involves an important question of law. Baliram was admittedly the illegitimate son of Chaitram. He was not entitled to possession yet the mutation order was made in his favour in 1884 and he continued to be in possession all along up to the date of the suit. His possession was admittedly adverse to Mt. Chukho who died on 15th November 1926. The question is whether that adverse possession would bar the reversioner's right. That has been answered in the negative by the lower Appellate Court. It is that finding which is being challenged here. Reliance is placed on 48 Mad 883[1] for the proposition contended for. It is not necessary for me to deal, at any great length, with this contention as their Lordships of the Privy Council themselves have explained the scope and the effect of the decision reported in

1. Vaithialinga Mudaliar v. Srirangath Anni, (1925) 12 A I R P C 249 = 92 I C 85=52 I A 322=48 Mad 883 (P C).

that case in 51 All 439.[2] Reading the decision in 48 Mad 883[1] correctly, I do not understand it as laying down the rule as contended, that the principle of the *Shivaganga case*[3] should be extended to the case of adverse possession against the widow. On the particular facts of that case, their Lordships no doubt had to deal with both the questions, namely the effect of a decree obtained against a widow and the adverse possession against her. It was in relation to the first point that their Lordships of the Privy Council referred to the *Shivaganga case*[3] and other cases, but they treated the question of limitation on quite a different footing unconnected with any considerations of the *Shivaganga case*[3] as is clear from the discussion of that point at p. 904. Their Lordships took the view that they did for the reason that under Art. 129, Sch. 2, Act 9 of 1871, it was incumbent on the reversioner to sue not only for a declaration as to the invalidity of an adoption but also for possession. That Article ran in these terms: for a suit to set aside an adoption the period of limitation is 12 years from the date of the adoption or (at the option of the plaintiff) the date of the death of the adoptive father.

The question naturally arose whether that Article applied also to a suit for possession, and in 13 Cal 308[4] their Lordships of the Privy Council held that if the plaintiff could not succeed without displacing an apparent adoption by virtue of which the opposite party was in possession, a suit by the plaintiff for possession fell under that Article. That case was followed in 20 Cal 487,[5] and the view taken in 48 Mad 883[1] was quite in accordance with the current of the old rulings bearing on the effect of Art. 129 of Act 9 of 1871. It was because the reversioners in that suit had failed to file a suit not only to set aside the adoption which took place in 1862 but also to claim possession for more than 12 years before the Act of 1877 was passed, that it was held that Art. 141 of the Act of 1877 had no application as the adverse possession against the widow as well as the reversioners was completed before the new Act came into force. It is therefore clear that the considerations which were applied in 48 Mad 883[1] cannot be extended to a suit which is filed in terms of Art. 141 of the Act of 1877. That this is so is made clear by their Lordships themselves in certain cases which arose after the Act of 1877, where their Lordships held that Art. 118 of the Act of 1877, which now supersedes Art. 129 of the Act of 1871, refers only to a suit for bare declaration and not to suit for possession of property, even though it may be necessary in such suits to decide that a given adoption is invalid: *see* 28 All 727,[6] 39 Cal 418[7] and 48 Bom 411.[8]

In 55 Cal 903[9] the observations made in 48 Mad 883[1] were obviously misunderstood and it was thought that the question of adverse possession against the widow fell to be decided by the same considerations as would apply to a case of a decree fairly and honestly obtained against a widow, namely by the principle of the *Shivaganga case.*[3] That was a decision by a single Judge of that Court and the erroneous view taken in that case was pointed out in 57 Cal 289,[10] but the authority which clinches the issue is the decision reported in 51 All 439[2] where their Lordships of the Privy Council explained the scope of the decision in 21 Cal 8[11] and 48 Mad 883,[1] and pointed out that those cases illustrate the application of the rule in the *Shivaganga case*[3] where a decree found against a widow had been obtained against her in her lifetime and that they do not lay down that adverse possession against a widow per se would extinguish the reversioner's right. Their Lordships referred to the case in 23 Bom 725.[12] That was a case in which the trustees had been in adverse possession against

2. Jaggo Bai v. Utsava Lal, (1929) 16 AIR P C 166 =117 I C 498=56 I A 267=51 All 439 (P C).
3. Katama Natchiar v. Raja of Shivaganga, (1861-63) 9 M I A 539=2 W R 31 = 2 Sar 25 (P C).
4. Jagadamba Chaudhrani v. Dakhina Mohun Roy Chaudhri, (1886) 13 Cal 308=13 I A 84= 4 Sar 715 (P C).
5. Mohesh Narain Munshi v. Taruck Nath Moitra, (1893) 20 Cal 487=20 I A 30=6 Sar 261 (P C).
6. Tribhuwan v. Rameswar, (1906) 28 All 727 = 33 I A 156=9 O C 377 (P C).
7. Muhammad Umar Khan v. Muhammad Niaz-ud-din Khan, (1912) 39 Cal 418=13 I C 344= 39 I A 19=15 C L J 172 = 16 C W N 458 = 126 P R 1912 (P C).
8. Kalyandappa v. Chanbasappa, (1924) 11 A I R P C 137 = 79 I C 971= 51 I A 220=48 Bom 411 (P C).
9. Aurabindo Nath v. Manorama Debi, (1928) 15 A I R Cal 670=112 I C 496=55 Cal 903=32 C W N 913.
10. Abinashchandra Ghosh v. Narhari Mathar, (1930) 17 A I R Cal 165=123 I C 444=57 Cal 289=50 C L J 260.
11. Hari Nath v. Mothurmohan, (1894) 21 Cal 8 =20 I A 183=6 Sar 334 (P C).
12. Runchordas v. Parvatibai, (1899) 23 Bom 725 = 26 I A 71 = 1 Bom L R 607 = 7 Sar 543 (P C).

the widow and it was held that their adverse possession was not a bar to the reversioners' right to sue in terms of Art. 141 of the Act of 1877. The case in 51 All 439[2] was not a case in which a decree had been obtained against a widow but a case of mere adverse possession against the widow and their Lordships pointed out that the case was governed by the dictum that was laid down in 23 Bom 725.[12]

That there is a well-defined difference between a case of a decree obtained against a widow and a case of adverse possession against a widow is made amply clear in the observations made by their Lordships at page 452 of 51 All 439.[2] They are as follows:

It is therefore established by this decision that where a decree founded upon the law of limitation is obtained against the widow in her lifetime the reversionary heir is barred and does not get the benefit of Art. 141. The question raised by the present case is whether the same result follows where there has been no decree, though at the death of the widow a stranger had been in adverse possession for 12 years or more.

Their Lordships pronounced their opinion in these terms:

In their Lordships' judgment where there has been no decree against the widow or other act in the law in the widow's lifetime depriving the reversionary heir of the right to possession on the widow's death, the heir is entitled, after the widow's death, to rely upon Art. 141 for the purpose of the determination of the question whether the title is barred by lapse of time. To hold otherwise would in their Lordships' opinion, in effect, compel the Court in determining a question within the scope of the Article to ignore the express words of the Article.

It appears to me that this case conclusively disposed of the question now raised that the appellants' adverse possession against Mt. Chukho operated to extinguish the reversionary right of the respondent. I may in passing refer to some cases decided by the High Courts in India which sustain the view that I have taken: *see* 57 Cal 289,[10] 63 Cal 155[13] and A I R 1932 Bom 434.[14] The general principle, it appears to me, is indisputable that the adverse possession, howsoever long held, cannot impair the right of a person, who was not during the continuance of that adverse possession, entitled to possession. The right of the reversioner, as is well known, is spes successionis and his reversionary estate falls into possession only on the death of the intermediate owner, namely the widow. Consequently, the adverse possession against the widow can hardly be recorded as hostile to the reversioners whose right was until the widow's death only an expectancy. For the foregoing reasons I agree with the lower Appellate Court and dismiss this appeal with costs. Counsel's fees Rs. 50.

N.S./R.K. *Appeal dismissed.*

13. Hemendranath Ray v. Jnanendraprasanna Bhaduri, (1935) 22 A I R Cal 702 = 159 I C 1101=40 C W N 115 = 62 C L J 49=63 Cal 155.

14. Bai Manchha v. Tribhawan, (1932) 19 A I R Bom 434=139 I C 28=34 Bom L R 385.

A. I. R. 1939 Nagpur 263

NIYOGI J.

Provincial Government, C. P. and Berar — Applicant.

v.

Dinanath Lala Ganpatrai and others — *Accused* — Non-applicants.

Criminal Revn. No. 159 of 1939, Decided on 10th June 1939, from order of the Sess. Judge, Raipur, Dated 13th and 16th February 1939.

(a) Penal Code (1860), Ss. 34 and 120-A—Difference between S. 34 and S. 120-A explained.

There is not much substantial difference between conspiracy as defined in S. 120-A and acting on a common intention as contemplated in S. 34, Penal Code. While in the former the gist of the offence is the bare engagement and association to break the law even though the illegal act does not follow, the gist of the offence under S. 34, Penal Code is the commission of a criminal act in furtherance of a common intention of all the offenders which means that there should be a unity of criminal behaviour resulting in something for which an individual would be punishable if it were all done by himself alone: *A I R 1925 P C 1, Rel. on.* [P 264 C 1, 2]

(b) Criminal P. C. (1898), S. 239 — Prosecution alleging unity of criminal behaviour actuated by common intention on part of all accused to extort confession—All accused are triable jointly.

Where the prosecution has alleged that there was unity of criminal behaviour actuated by a common intention on the part of all the accused to extort confession, all the accused would be jointly triable under S. 239, Criminal P. C. The unity of criminal behaviour and the common intention prompting it would render all that was done in furtherance of an object as a part of one transaction. The necessity of a joint trial is strengthened if there is the additional element of proximity in time as well: *2 N L R 147, Rel on.* [P 264 C 2]

(c) Criminal P. C. (1898), S. 239—"Sameness of transaction"—Relevant point of time is time of accusation.

The relevant point of time in the proceedings at which the condition as to the sameness of transaction must be fulfilled is the time of accusation and not that of the eventual result: *A I R 1938 P C 130, Foll.* [P 264 C 2]

W. R. Puranik, Advocate-General — *for Applicant.*

Order.—This is an application in revision made against the order passed in Sessions Case No. 4 of 1939 on 13th February 1939 directing separate trials. The issue is considerably simplified by the fact that the learned Advocate-General has announced his readiness to withdraw the prosecution against accused 13, 14 and 15, Nanjatia, Bhagua and Jageshwar respectively, and also to withdraw the charges in regard to the incidents of 25th and 26th May 1938. The trial will thus proceed only against accused 1 to 12 in respect of wrongful confinement and use of violence for the purpose of extorting information leading to the detection of the culprits. The result of the learned Judge's order had been to multiply trials. While all the accused and Nos. 1 and 2 would be jointly tried on the charge of wrongful confinement and beating respectively, accused 3 to 12 would each be separately tried. The learned Sessions Judge observes in para. 5 of his order under revision that the complaint filed before the committing Magistrate did not contain any allegation that all the accused formed a conspiracy in order to extort confession. The complaint in para. 4 says:

> All these persons were kept confined from 27th May 1938 to 31st May 1938, in the bada of the malguzar at Sajapali and they were not allowed to go out and talk with anybody..... During this confinement, all these persons were beaten by the accused and their thighs were trampled upon by them, while some were pricked with pins in order to extort confession, restoration of property.. .....

Then in para. 7 there is an allegation:

> The accused have committed offence under Ss. 330 and 348 read with S. 34, I. P. C., and that each one of them has abetted the commission of the offence committed by every other of them either by actual participation or by omission and have thus committed offences under Ss. 330 and 348 read with S. 114, I. P. C.

Although the word "conspiracy" is not used, there is a very clear indication given by the nature of the allegations made in para. 4 and the reference to S. 34, I. P. C., made in para. 7 to make it clear that all the accused were animated by the common intention of extorting confession from the suspects by resorting to illegal means, namely wrongful confinement and the use of violence and force. There is not much substantial difference between conspiracy as defined in S. 120-A and acting on a common intention as contemplated in S. 34, I. P. C. While in the former the gist of the offence is the bare engagement and association to break the law even though the illegal act does not follow, the gist of the offence under S. 34, I. P. C., is the commission of a criminal act in furtherance of a common intention of all the offenders—which means that there should be a unity of criminal behaviour resulting in something for which an individual would be punishable if it were all done by himself alone as explained by their Lordships of the Privy Council in 52 Cal 197.[1] What was alleged by the prosecution was that there was unity of criminal behaviour actuated by a common intention to extort confession. Consequently, all the accused persons from 1 to 12 would be jointly triable under S. 239, Criminal P. C. The unity of criminal behaviour and the common intention prompting it would render all that was done in furtherance of an object as a part of one transaction. The acts of violence committed by several persons in respect of the several suspects were so related to one another in point of purpose as to constitute one continuous action. There is the additional element in this case of proximity in time as well: *see* 2 N L R 147[2] at page 149.

It may turn out in the end that the acts were done without any common intention but that is a consideration which is foreign to the issue. As pointed out by their Lordships of the Privy Council in A I R 1938 P C 130,[3] the relevant point of time in the proceedings at which the condition as to the sameness of transaction must be fulfilled is the time of accusation and not that of the eventual result. For the foregoing reasons the order of the Sessions Judge is set aside and it is directed that the trial of accused 1 to 12 be proceeded with relating to the incidents which occurred from 27th to 31st May 1938 in the bada of the malguzar of Sajpalli. Presumably the learned Sessions Judge was misled by the terms of the charges framed. It is open to him to amend the charges, if necessary.

D.S./R.K. *Order set aside.*

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1. Barendra Kumar Ghosh v. Emperor, (1925) 12 A I R P C 1=85 I C 47=52 I A 40=26 Cr L J 431=52 Cal 197 (P C).
2. Emperor v. Hari Raot, (1906) 2 N L R 147=4 Cr L J 420.
3. Babulal Chaukhani v. Emperor, (1938) 25 A I R P C 130=174 I C 1=65 I A 158=39 Cr L J 452=I L R (1938) 2 Cal 295=32 SLR 476 (P C).

:9 Nagpur 265

:OGI J.

Chandra Sharma — Appellant.

v.

Kumar — Respondent.

No. 224 of 1937, Decided 39, from appellate decree udge, Saugor, D/- 28th

yance and contract of sale — Distinction between ex-

on between conveyance and a minor's property. When the lready alienated, the Court is ıd whether the alienation is r or not. In such a case no ity arises. The relief of specific ef in equity and the question aced with is whether it should so perform the onerous act of rty in consequence of the con- incurred by his guardian: *, Dissent.; A I R 1933 Mad* [P 266 C 2]

ntract of sale by guardian on — Purchaser cannot ask for ıce against minor.

ıtract for sale or purchase made minor is not enforceable by or . The reason is that a contract ovable property is a contract of ıture and as no personal liability ı the minor, the minor cannot be orm the contract; for the same ; take advantage of the contract fic performance. There is another stion. In every case when there lement the contract of sale by the each is committed by the guardian the minor. The purchaser therefore can [illegible]m compensation against the guardian and not against the minor or his property except in the case where the guardian uses the money obtained from the purchaser for the improvement of the minor's estate, a case which stands on a separate footing. The purchaser is not entitled to hold the minor personally responsible for the breach of contract of sale made by his guardian and he is not therefore entitled to claim compensation from him. As that is so, S. 24-A, Specific Relief Act, debars the purchaser from claiming the relief of specific performance against the minor: *Case law reviewed.* [P 267 C 1, 2]

J. Sen — *for Appellant.*

V. V. Kelkar — *for Respondent.*

Judgment. — This is a plaintiff's appeal from the concurring judgment of the Additional District Judge, Saugor, in Civil Appeal No. 24-A of 1936 delivered on 28th November 1936. The suit out of which this appeal arises was to enforce specific performance of a contract of sale, in respect of a house belonging to the minor defendant, made by his mother acting in her capacity as his guardian. The sale deed had in fact been executed on 14th October 1934 but the guardian mother changed her mind and refused to have it registered. The sale deed was not however produced in Court as it was alleged to have been lost. The plaintiff had at first claimed the relief that the defendant be directed to get the sale deed registered and also for rectification of the contract, but subsequently he withdrew these reliefs and prayed for a decree for specific performance. The plaintiff averred that the sale was justified by legal necessity and also for the minor's benefit. The original Court did not formulate the issues of fact arising out of the pleadings but tried the suit only on the preliminary issue whether on the facts pleaded by the plaintiff he was entitled to a decree for specific performance. It held that he was not, and dismissed the suit. The lower Appellate Court agreed with that view and affirmed the decision.

The general rule is that a contract to be specifically enforced by the Court must be mutual, that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. When, therefore, whether from personal incapacity to contract, or the nature of the contract or any other cause, the contract is incapable of being enforced against one party, that party is generally incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former: see Fry on Specific Performance, Edn. 6, Chap. 8, page 219. In (1895) 1 Q B 683[1] at p. 684, Lindley L. J. observed: "You cannot get specific performance against an infant." The doctrine has, no doubt, some limitations which it is not necessary to indicate here. The weight of authorities in India is opposed to the granting of specific performance in favour of or against a minor. In 20 Cal 508[2] Norris J. following (1828) 4 Russ 298[3] held that a minor could not maintain a suit for specific performance of a contract entered into on his behalf by his guardian on the ground of mutuality. That view was not accepted by the Madras High

1. Lumley v. Ravenscroft, (1895) 1 Q B 683=64 L J Q B 441=14 R 347=72 L T 382=43 W R 584=59 J P 277.
2. Fatima Bibi v. Debnath Shah, (1893) 20 Cal 508.
3. Flight v. Bolland, (1828) 4 Russ 298=28 R R 101.

Court in 18 Mad 415[4] in which it was held, following the opinion of Mr. Whitley Stokes, that the doctrine of mutuality had no application in India. The same view was taken in 27 Cal 276.[5]

In 34 Cal 163[6] the Calcutta High Court held that if a contract is validly entered into on behalf of a minor, and there is mutuality in such contract, it is capable of being specifically enforced. In that case, the manager of an infant's estate entered into an agreement to purchase certain property on behalf of the minor and the question was whether the minor on attaining majority could sue for specific performance of the agreement. The appeal was taken to the Privy Council in 39 Cal 232.[7] Their Lordships approved of the application of the doctrine of mutuality but reversed the decision on the ground that it was not within the competence of the manager of a a minor's estate to bind the minor or the minor's estate by a contract for the purchase of immovable property, and further that as the minor in that case was not bound by the contract there was no mutuality and that he could not obtain specific performance of the contract.

It is pertinent to notice that although the minor being a Muslim the guardian's contract was void their Lordships did not rest the non-enforceability of the contract on its being ab initio void but on the ground that the guardian's contract, valid or void in itself, did not affect the minor or the minor's estate. Their Lordships applied the doctrine of mutuality and refused specific performance on the ground of want of mutuality notwithstanding that the contract sought to be enforced was advantageous to the minor. In 47 Mad 692[8] Ramesam J. held that where a guardian of a minor enters into a contract on behalf of the minor that contract cannot be specifically enforced though it may be for the purpose of necessity or for the minor's benefit. In 47 All 784[9] the Allahabad High Court declined to recognize the distinction between a case where a minor is a purchaser and a case where he is a vendor on the ground that in either case there is absence of the element of mutuality. In 57 Cal 268,[10] which was a case of a contract by the manager of a joint family to sell land belonging to joint family including a minor, it was held that the application of the principle laid down in 39 Cal 232[7] was not limited to the case of a contract for the purchase of immovable property and that consequently the contract was not enforceable against the minor's share.

In A I R 1924 Pat 81[11] it was pointed out that no distinction could be drawn between a contract of purchase and a contract of sale and that the decision of the Judicial Committee was based on the broader ground that it is impossible for the Court to decree specific performance against a minor. Das J. rested his decision on the ground of mutuality which Foster J. was not prepared to accept although for other reasons he agreed with the decision of Das J. A different view was taken by Wort J. in A I R 1935 Pat 237.[12] The criterion which the learned Judge appears to have adopted was whether the sale of the minor's property was justified by legal necessity or benefit and acting on the principle that a guardian's alienation made for legal necessity or benefit of the minor is binding on the minor he decreed specific performance. With due respect, the learned Judge overlooked the distinction between a conveyance and a contract. When the minor's property is already alienated the Court is required only to find whether the alienation is binding on the minor or not. In such a case no consideration of equity arises. The relief of specific performance is a relief in equity and the question which the Court is faced with is whether it should compel the minor to perform the onerous act of alienating his property in consequence of the contractual obligation incurred by his guardian. This was pointed

4. Krishnasami v. Sundarappayyar, (1895) 18 Mad 415=5 M L J 164.
5. Khairunnessa Bibi v. Loke Nath Pal, (1900) 27 Cal 276.
6. Mir Sarwarjan v. Fakhruddin Mahomed Chowdhury, (1907) 34 Cal 163=11 C W N 34 =4 C L J 431 (F B).
7. Mir Sarwarjan v. Fakhruddin Mahomed, Chowdhuri, (1912) 39 Cal 232 = 13 I C 331= 39 I A 1=16 C W N 74 (P C).
8. Narayan Chetty v. Muthiah Chetty, (1924) 11 A I R Mad 680=80 I C 658=47 Mad 692=46 M L J 575.
9. Swarath Ram-Ram Saran v. Ram Ballabh, (1925) 12 A I R All 595=89 I C 27 = 47 All 784=23 A L J 625.
10. Nripendrachandra Sarkar v. Ekherali Joardar, (1930) 17 A I R Cal 457=127 I C 66=57 Cal 268=34 C W N 272.
11. Abdul Haq v. Yehia Khan, (1924) 11 A I R Pat 81=78 I C 483=4 P L T 553.
12. Brahamdeo v. Haro Singh, (1935) 22 A I R Pat 237=157 I C 327.

out by Sundaram Chetti J. in 56 Mad 433[13] at p. 441. The Madras High Court, with the exception of 18 Mad 415,[4] which was decided before the clear pronouncement of the principle by their Lordships of the Privy Council in 39 Cal 232,[7] has been quite consistent in declining specific performance against a minor on the ground of want of mutuality as is evident from the two cases cited already, and A I R 1924 Mad 863[14] and A I R 1928 Mad 830.[15] I may in passing refer also to A I R 1927 Lah 355[16] which applied 39 Cal 232[7] in the wider sense indicated by the observations of their Lordships of the Privy Council cited above.

The review of the authorities shows that barring Wort J., all the High Courts are unanimous on the view that a guardian's contract for sale or purchase made on behalf of the minor is not enforceable by or against the minor. The principle underlying the view enunciated by their Lordships of the Privy Council evidently appears to be that a minor is not personally bound by any contract made on his behalf by his guardian as was laid down by their Lordships of the Privy Council in 11 Bom 551[17]: *see also* 42 Mad 185.[18] A contract for sale of immovable property does not of itself create an interest in or charge on such property: *see* S. 54, T. P. Act. If it is a contract of purely personal nature and no personal liability can be imposed on the minor it must logically follow that the minor cannot be compelled to perform the contract; for the same reason he cannot take advantage of the contract and ask for specific performance. There is another aspect to the question: can the purchaser recover compensation from the minor for a breach of contract by the guardian? In every case when there is refusal to implement the contract of sale by the guardian the breach is committed by the guardian and never by the minor. The purchaser therefore can only claim compensation against the guardian and not against the minor or his property except in the case where the guardian uses the money obtained from the purchaser for the improvement of the minor's estate, a case which stands on a separate footing. The purchaser is not entitled to hold the minor personally responsible for the breach of contract of sale made by his guardian and he is not therefore entitled to claim compensation from him. If that is so, S. 24-A, Specific Relief Act, debars the purchaser from claiming the relief of specific performance against the minor. The appeal is dismissed with costs. Counsel's fees Rs. 25.

D.S./R.K. *Appeal dismissed.*

13. Venkatachalam Pillai v. Sethuram Rao, (1933) 20 A I R Mad 322=142 I C 315=56 Mad 433 =64 M L J 354 (F B).
14. Chidambara Swamigal v. Ramakrishna Reddiar, (1924) 11 A I R Mad 863=82 I C 926 = 47 M L J 688.
15. Nageswara Rao v. Mandava, (1928) 15 A I R Mad 830 = 110 I C 492.
16. Malla v. Muhammad Sharif, (1927) 14 A I R Lah 355=99 I C 684=8 Lah 212=28 P L R 492.
17. Waghela Rajsanji v. Shekh Masludin, (1887) 11 Bom 551=14 I A 89=5 Sar 16 (P C).
18. Ramajogayya v. Jagannadham, (1919) 6 A I R Mad 641 = 49 I C 872 = 42 Mad 185 = 36 M L J 29 (F B).

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STONE C. J. AND VIVIAN BOSE J.

Seth Laxminarayan Ganeshdas — Applicant.

v.

Seth Ghasiram Dalchand Palliwal — Opposite Party.

Misc. Civil Case No. 113 of 1937, Decided on 12th December 1938, from decree of Judicial Commissioner's Court, Nagpur, in F. A. No. 163 of 1930, D/- 16th January 1931.

C. P. Reduction of Interest Act (32 of 1936), S. 2—"Secured debt" — Attachment does not cause judgment-debt to be secured debt.

In India attachment of the judgment-debtor's property after judgment does not create a charge on attached property. It also does not create equitable or judicial lien and hence does not cause judgment-debt to be a secured debt so as to affect the interest that may be allowed after 1st January 1932: *A I R 1918 Cal 351; 29 Cal 428 (F B); A I R 1914 P C 129 and A I R 1933 Nag 229, Rel. on.* [P 268 C 1,2]

Fida Hussain — *for Applicant.*

J. Sen and M. Adhikari — *for Opposite Party.*

Order.—This miscellaneous civil case is connected with First Appeal No. 105 of 1935.* This matter raises a point under the Central Provinces Reduction of Interest Act (Act 32 of 1936) which can be expressed as follows: There was in this case an attachment of the judgment-debtor's property after judgment. The question is whether that causes the judgment-debt to be a secured debt so as to affect the interest that may be allowed after 1st January 1932. "Debt" as defined by S. 2 of that Act includes a liability created by a decree. "Secured debt" is defined as meaning

* *Reported in* (1939) 26 A I R Nag 191.

a debt due to a creditor from his debtor for which the creditor holds a mortgage, charge or lien .... as a security for that debt.

The argument is that an attachment, though not creating a charge, creates what is described as a judicial lien, alternatively an equitable lien. In support of that argument para. 698, p. 554, Vol. 20 of Halsbury's Laws of England (2nd Edn.) is referred to. That paragraph runs as follows:

A lien in its secondary sense, where the person claiming the lien has not got possession of the thing in respect of which the lien is claimed, is either judicial, equitable or statutory. Judicial liens are obligations established by judgments or orders of Courts of justice binding the property but giving no right of possession. Equitable liens are founded upon the consideration of a duty or implied intention on the part of the owner to make property answerable for a specific claim.

The equitable lien can be put on one side at once because quite clearly, as appears from the same volume of the same book, para. 714, p. 567:

An equitable lien may be defined as an equitable right, conferred by law upon one man, to a charge upon the real or personal property of another.

Admittedly an attachment does not create any kind of a charge and consequently does not create that particular type of charge known as an equitable lien. But it is said that an attachment falls within the meaning of the term "judicial lien" as it is an obligation established by a judgment or order binding the property without giving a right to possession. It has been held—that this is recognized by counsel for the appellant—in a number of cases that an attachment does not create a charge. It was observed in 44 Cal 1016[1] at p. 1024:

I do not think that an attachment in this country creates any charge or lien upon the attached property such as attaches in England upon seizure under a writ of *fi.fa.* Attachment in this country only prevents alienation, it does not confer any title.

That is an observation which is based on 29 Cal 428[2] and 42 Cal 72[3] at p. 80, a Privy Council decision, and it expresses the law as well settled now in India and would appear to dispose of the argument at once. So far as the Judicial Commissioner's Court is concerned, the matter was considered by a Bench in a case reported in 29 N L R 303[4] where it was held that

an attachment by itself, whether it is before or after judgment, does not give the attaching creditor any charge or lien on the property, nor does it give him any priority in respect of the property attached as against the official assignee or receiver; the only effect of the attachment is to prevent private alienation.

In that case the following cases were relied on: 57 Cal 122,[5] 26 Mad 673,[6] (1903) 2 K B 41[7] and 39 Mad 903.[8]

It is ingeniously suggested that in 44 Cal 1016[1] the lien that is being spoken about is the ordinary lien and is not concerned with that unusual type of lien known as the judicial lien, and so far as the Reduction of Interest Act is concerned the term "lien" is not defined and must be deemed to include any conceivable kind of lien. If one turns to the Provincial Insolvency Act one will find in S. 2 (e) the same sort of definition that one has in the Reduction of Interest Act. There the definition is of a secured creditor whereas in the Reduction of Interest Act what we have defined is secured debt. In the Provincial Insolvency Act "secured creditor" means

a person holding a mortgage, charge, or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor.

The cases above cited are concerned with insolvency and it is permissible to apply the reasoning in those cases to this case, but even beyond that in our opinion judicial lien is not the same thing as that which arises where property is attached. As an example of a judicial lien one may refer to (1870) 4 H L 414.[9] Such lien arises, e. g., where in a judgment in rem a lien is established by the judgment. It has never been held that an attachment creates that type of a lien any more than any other kind of lien so far as India is concerned at any rate. In our opinion therefore this point fails and interest will be calculated at the rate provided in the Act for unsecured debts as from 1st January 1932. The applicant will pay the costs of this application fixed at Rs. 25. The amount of the variation in the decree amount caused by the operation of the Reduction of Interest Act will be worked out

1. In re Premlal Dhar, (1918) 5 A I R Cal 351=43 I C 348=44 Cal 1016.
2. Peacock v. Madan Gopal, (1902) 29 Cal 428=6 C W N 577 (F B).
3. Raghunath Das v. Sunder Das, (1914) 1 A I R P C 129=24 I C 304=41 I A 251=42 Cal 72 (P C).
4. Bansilal v. Kashinath, (1933) 20 A I R Nag 229=145 I C 695=29 N L R 303.
5. Haranchandra Chakravarti v. Joy Chand, (1929) 16 A I R Cal 524=123 I C 737=57 Cal 122.
6. Kristnasawmy Mudaliar v. Official Assignee of Madras, (1903) 26 Mad 673=13 M L J 278.
7. In re H. E. Pollard, (1903) 2 K B 41=72 L J K B 509 = 88 L T 652 = 51 W R 483 = 10 Manson 152.
8. T. Errikulappa Chetty v. Official Assignee of Madras, (1917) 4 A I R Mad 743=32 I C 190 =39 Mad 903.
9. Castrique v. Imrie, (1870) 4 H L 414=39 L J C P 350=23 L T 48=19 W R 1.

in office on this basis and the decree modified accordingly.

D.S./R.K. *Order accordingly.*

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STONE C. J. AND VIVIAN BOSE J.

Lokman Chhabilal Jain Bani — Auction-purchaser — Appellant.

v.

Motilal Tulsiram Agarwala and another, Decree-holder and another, Judgment-debtor — Respondents.

Misc. Appeals Nos. 140 of 1938 and 130 of 1936, Decided on 14th April 1939, from order of Addl. Sub-Judge, First Class, Jubbulpore, D/- 5th April 1938.

(a) Civil P. C. (1908), O. 21, R. 77— Sale of moveable property is complete when officer conducting sale declares who is purchaser and receives purchase money and grants receipt.

So far as the sale of moveable property is concerned, it is the officer who is holding the sale who concludes the matter by saying who has purchased, within what time the purchase price must be paid by receiving the purchase money and by granting a receipt. Thereupon the sale becomes complete, property passes and the matter is over. [P 270 C 2; P 271 C 1]

(b) Civil P. C. (1908), O. 21, R. 84— Officer conducting sale can declare highest bidder to be purchaser — He need not ask Judge to declare who is purchaser.

In the Central Provinces a time is set aside during which persons may make their bids which are entered in a list. When that time is up, the highest bidder is declared by the officer conducting the auction, to be the purchaser. It is not the practice for the officer conducting the sale merely to take the list of bidders to the Judge and ask the Judge to declare who is the purchaser : *Case law reviewed.* [P 271 C 1]

(c) Civil P. C. (1908), O. 21, R. 84—Failure of officer conducting sale to wait for payment of deposit is not material irregularity.

It cannot be said that the officer conducting the sale has to wait for the payment of the deposit; he cannot be compelled to wait. Hence it is not material irregularity if the officer conducting the sale has not waited for the payment of the deposit. [P 272 C 2]

(d) Civil P. C. (1908), O. 21, R. 84—'Forthwith'—Meaning of—Re-sale can be held on same day as date of default in payment of deposit if circumstances permit.

The word 'forthwith' in R. 84 governs the time at which the re-sale is to be held. The word 'immediately, governs the time when the deposit is to be made. "Forthwith" means " as expeditiously as circumstances permit." The officer conducting the sale can hold a re-sale the same day as the default in payment of deposit if circumstances permit and if it is proper to do so. [P 272 C 1; P 273 C 1]

(e) Civil P. C. (1908), O. 21, R. 71—Decree-holder can apply to recover deficit even if judgment-debtor, and not he, is damnified by default.

O. 21, R. 71 gives the right to recover the deficit to either the decree-holder or the judgment-debtor. Though one might well expect in circumstances where the decree-holder is not damnified by default that he would leave the matter to the judgment-debtor he need not do so. He may decide to recoup himself from the defaulter. Anything left over from these realizations will of course go to the judgment-debtor so that the decree-holder is in effect fighting the judgment-debtor's battles for him. [P 273 C 1]

(f) Civil P. C. (1908), O. 21, R. 71—Bid made on behalf of temple by its managing trustee —Default in payment of deposit — Trustee is not personally liable for deficit.

The temple, unlike an idol, not being a juristic person, cannot sue or be sued but somebody has to sue or be sued on behalf of the temple. Where the bid was made on behalf of the temple by the managing trustee (sarbarahkar) of the temple the liability for deficit in case of default is not of the trustee personally but of the trustee representing the temple. In other words deficit is to be payable out of temple funds. [P 273 C 2]

J. Sen—*for Appellant.*

R. S. Dabir, and W. B. Pendharkar — *for Respondents Nos. 1 and 2, and 3 respectively.*

Order. — This order governs Miscellaneous Appeals Nos. 140 of 1938 and 130 of 1936. The second of these appeals is an appeal by the judgment-debtor against an order refusing to set aside a sale held in execution on the ground of material irregularity resulting in inadequate price. The first of these appeals is an appeal by one Lokman who has been treated as an auction-purchaser who defaulted in depositing 25 per cent. of his bid with the result that the property was forthwith re-sold. Miscellaneous Appeal No. 140 of 1938 raises a point of some importance in the practice of conducting auction sales and makes it necessary to consider in some detail the various relevant rules contained in O. 21, especially in view of the decisions arrived at in other High Courts : *see* 2 Pat 548,[1] 58 Cal 788,[2] A I R 1929 Lah 673[3] and 6 Rang 609.[4] These (with the exception of 2 Pat 548[1]) are cases which follow 2 Pat 548[1] and decide that a declaration under R. 84 of O. 21 must be made by the Court and should not be made by the officer conducting the sale. 2 Pat 548[1] to

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1. Jaibahadar Jha v. Matukdhari Jha, (1923) 10 A I R Pat 525=76 I C 113=2 Pat 548 = 4 P L T 498.
2. Surendramohan Sarkar v. Manmathanath Banerji, (1931) 18 A I R Cal 583 = 134 I C 447=58 Cal 788.
3. Punjab National Bank v. Sundar, (1929) 16 A I R Lah 673=118 I C 901.
4. Afazuddin v. Howell, (1929) 16 A I R Rang 12=114 I C 522=6 Rang 609.

some extent turns upon local practice. At p. 551 the matter is stated as follows :

The rule laid down by the High Court, which is also in accordance with long standing practice, is that the auction should be conducted in the immediate presence of the presiding officer, and where that is not possible, in another place within the Court premises to be selected by the presiding officer.

In that particular case accordingly the bid was not finally accepted by the officer conducting the sale but was referred to the Munsif, that is the presiding officer or the Court. The Munsif wrote "close." Thereafter, on certain representations being made, he cancelled that order. The question was whether he was entitled so to do. It seems to have been assumed throughout that in Patna owing to the rules obtaining there bids are not accepted by the officer conducting a sale but that the officer conducting the sale refers the matter to the Judge and it was for the Judge to say whether the bid shall be accepted or not. Similar rules do not obtain here. The rules relating to the conduct of sales are to be found in the Rules and Orders (Civil) of 1938, Part 1, Ch. 10, p. 78 *et seq.* Para. 213 provides as follows :

Sales of immovable property in execution of decrees other than those which have been transferred to the Collector shall be conducted by the following officials, viz. (i) when the sale is held at the District Court house, by the Sale Amin or an official not inferior in rank to a Naib-Nazir ; (ii) when the sale is held at a place other than the District Court house, by a Sale Amin or a Naib-Nazir or an official superior in rank to a process server.

In 29 N L R 52[5] the position was considered where the auction sale was held in the mofussil and it was held there that the sale is complete if the final bid is accepted by the Sale Amin who conducts it. The permission of the Court ordering the sale is not necessary under the law to make the sale binding on the parties concerned. That decision, to some extent, is founded on 7 Rang 425[6] which distinguishes 2 Pat 548[1] and dissents from 6 Rang 609.[4] 2 Pat 548[1] was distinguished on the ground that the practice obtaining in Patna was as stated above, viz., the officer conducting the sale does not accept the bids but places them before the Court. It was observed in 7 Rang 425[6] :

There has been no such practice in the Courts of this Province (Burma). Under R. 65 of O. 21, Civil P. C., every sale in execution of a decree shall be conducted by an officer of the Court or by such other person as the Court may appoint in this behalf and shall be made by public auction in manner prescribed. Under R. 258 of the Rules of this Court published at p. 126 of the High Court Rules and Orders sales of immovable property in execution of a decree for money are to be conducted by the Bailiff under the direct supervision of a Registrar. There is no provision in the Rules which requires a Judge to accept a bid.

Here also there is no rule requiring the Judge to accept the bid. In 7 Rang 425[6] it was held that

neither the provisions of O. 21, Civil P. C., nor the rules of the High Court or of the Courts Manual require a bid to be accepted by a Judge before the contract of sale can be held to be complete. The officer conducting the sale can declare the highest bidder to be the purchaser.

58 Cal 788,[2] which follows 2 Pat 548,[1] appears to overlook the special local rules and practice obtaining in Patna and the fact that there in fact the bid was sent to the Judge for acceptance and the question was as to whether the Judge had or had not finally accepted the bid. Nevertheless there being authority against the view that we are taking we consider it desirable to examine the various relevant rules relating to sales. Court auction sales in execution are of two kinds, (a) of immovable, and (b) of moveable property. In either case the sale results in the transfer of property from the judgment-debtor to the auction-purchaser, but according as the subject-matter is immovable or moveable the mode of transfer is necessarily somewhat different. In the case of immovable property it is necessary to have some sort of vesting order which operates to transfer the property and this is done by means of confirmation of sale and the granting of a certificate of sale which has the effect of a vesting order. Title of course is not guaranteed. On the other hand moveable property does not require a vesting order and so far as title to moveable property is concerned that is dealt with in R. 77 (2) which provides as follows :

On payment of the purchase money, the officer or other person holding the sale shall grant a receipt for the same and the sale shall become absolute.

Further R. 77 (1) says :

. . . the price of each lot shall be paid at the time of sale or as soon after as the officer or other person holding the sale directs . . . .

It appears clear from those provisions that so far as the sale of moveable property is concerned it is the officer who is holding the sale who concludes the matter by saying who has purchased, within what time the purchase price must be paid, by receiv-

5. Mannulal v. Nanhelal, (1933) 20 A I R Nag 123=141 I C 367=29 N L R 52.
6. Maung Ohn Tin v. Chettyar Firm, (1929) 16 A I R Rang 311=120 I C 142=7 Rang 425.

ing the purchase money and by granting a receipt. Thereupon the sale becomes complete, property passes and the matter is over. If the sale is of immovable property further safeguards are introduced to guard against cases where the vendor has no title (R. 91), of irregularity or fraud (Rule 90), where the judgment-debtor pays the decretal amount together with a sum by way of compensation to the purchaser (R. 89). The importance of R. 77 is to be found in the fact that the relevant rules relating to sales generally, Rr. 64 and 65, are concerned with sales either of moveable or immovable property. If the officer conducting the sale is in sufficient charge of the sale in the case of moveable properties to be able to say who is the buyer, when he must pay, and to be empowered to receive the price and, by giving a receipt, to pass title it is difficult to see how he is merely ministerial officer in the case of a sale of immovable property. R. 64 empowers the Court to order a sale. R. 65 directs how the sale shall be conducted and provides that

save as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the Court or by such other person as the Court may appoint in this behalf, and shall be made by public auction.

The auction having been proclaimed in the prescribed manner and the time for the auction having arrived this officer conducts the auction and prima facie it seems to us to be clear that any person conducting an auction must be in a position to say who is the highest bidder. How he says it will depend upon the rules laid down for the conduct of an auction. In England, the practice is to announce by the falling of a hammer when the bidding for a particular lot has ended and it is the highest bidder at that moment who is declared the purchaser. In the Central Provinces, the practice is different. A time is set aside during which persons may make their bids which are entered in a list. When that time is up, the highest bidder is declared by the officer conducting the auction to be the purchaser. It is not the practice for the officer conducting the sale merely to take the list of bidders to the Judge and ask the Judge to declare who is the purchaser. Nor do we think that such a rule would work satisfactorily in these Provinces. Many sales are held far away from any Judge, and in a vast number of cases a rule requiring the bid to be taken before a Judge, would involve trouble and delay and the Judge, so far as we can see, would have nothing to do but select the highest bidder. No arguments would be addressed to him, no parties would appear before him. There is nothing on which he can exercise a judicial mind. He would merely be doing the simple work, within the competency of the Sale Amin, of deciding who is the highest bidder. It is to be observed that R. 69 gives the officer conducting the sale as well as the Court power to adjourn the sale and before the officer adjourns the sale it is not necessary for him to take the orders of the Judge except in the case where the sale is within the precincts of the court-house. Further, the officer conducting the sale is entitled to stop the sale

if, before the lot is knocked down, the debt and cost (including the costs of the sale) are tendered to the officer conducting the sale, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court which ordered the sale, [R. 69 (3)].

Appendix E (Mulla's Civil Procedure Code, page 1235) shows the normal conditions of sale as contained in the proclamation of sale. Condition (3) is to the following effect:

The highest bidder shall be declared to be the purchaser of any lot, provided always that he is legally qualified to bid, and provided that it shall be in the discretion of the Court or officer holding the sale to decline acceptance of the highest bid when the price offered appears so clearly inadequate as to make it advisable to do so.

It will be seen from Rule 84 that the deposit of 25 per cent. has to be paid immediately to the person conducting the sale and it has to be paid immediately after the declaration that he is the purchaser. Bearing in mind the fact that sales are frequently held far away from a Court and that the sales frequently consist of many lots it is the intention, in our opinion, of the Rule to treat the person conducting the sale as the person who makes the declaration. Otherwise, there would be in many cases a long period stretching between the declaration and the payment which would consequently, of necessity, not be immediately after the declaration. If after the officer conducting the sale has declared a certain person to be a purchaser that person does not immediately pay the 25 per cent. R. 84 requires that the property shall forthwith be re-sold. The question that has been much debated is : What is the value to be given to the word "forthwith"? It has been said that "forthwith" means "as expeditiously as circumstances permit" as was held in 53 Mad 900[7] and that here the

7. Hanumayamma v. Ankamma, (1930) 17 AIR Mad 761=127 I C 303=53 Mad 900=59 MLJ 267 (F B).

circumstances did not permit of the sale being held the same day and that the sale should have been held the next day. In 44 All 266[8] a Full Bench of the Allahabad High Court were concerned with the case where the abortive sale ended towards the end of a day. Being late, the officer conducting the sale announced that the property would be re-sold the next morning. At the abortive sale the highest bid was Rs. 5050. Next morning the property fetched Rs. 2850. The argument there addressed to the Court was that this re-sale was not forthwith and that it should have been held the same day. In 53 Mad 900[7] the re-sale was some weeks later after a proclamation and again it was argued that it was not held forthwith. It is true that in both cases the argument failed but the argument was the other way round to that addressed to us. We were pressed with the view that when the re-sale is immediately after the abortive sale it is not forthwith because "forthwith" means "as expeditiously as circumstances permit" and circumstances did not permit of a re-sale so soon.

We have however no material before us to say that the re-sale was held more expeditiously than circumstances permitted. There is nothing to show that the circumstances did not permit of the sale taking place the same day. It is to be observed that the upset price was Rs. 10,000 and that the successful bid was Rs. 12,600, Rs. 2600 in excess of the upset price. In the second auction which was held somewhere between 3-30 and 5-45 P. M. — not an unreasonable time of the day—there were 37 bids. In the first auction there were 31 bids. The first auction started with Rs. 3000, the second with Rs. 6000. In the first auction there were only 18 bids of Rs. 6000 or over. There is nothing to show that the bidders had dispersed except the evidence of the bidder for Rs. 15,000 who said that because of the temple bid he went away. There is nothing to show that the second sale was a mere mockery of a sale. On the contrary there were more bids. At both sales the decree-holder, who had been given leave to bid, bid the same figure, viz. Rs. 12,500.

It is suggested that had the sale taken place the next day the loss would not have occurred. In 44 All 266[8] the sale did take place next day and the loss was proportionately much more serious. It does not encourage bidders to go to high prices when it is known that the successful bidder in the former sale had defaulted. When the successful bidder is a rich temple the inference is that the failure to pay the deposit is an excuse for getting out of the purchase. When one finds as here a private servant bidding Rs. 15,000 and then a person who has chanced to drop in bidding Rs. 15,001 on behalf of the temple and then one finds the bidder of Rs. 15,000 giving evidence to the effect that as the temple had bid he did not increase his bid although he thought that the property was more valuable and when one finds him going away forthwith one is left in some doubt as to whether this bid of Rs. 15,001 was not a means of getting out of a bad bargain not only on behalf of the temple but on behalf of the bidder of Rs. 15,000. However that may be, here the values do not suggest that the second sale was wholly for an inadequate price. The decree-holder put the value at Rs. 15,000 but he had not tried at the sale to go beyond Rs. 12,500. The bidder of Rs. 15,000 put the value up to Rs. 17,000, it is true, and other witnesses for the judgment-debtor valued it at Rs. 16,000, Rs. 17,000 and Rs. 18,000. But these valuations carry very little weight. The one who gave Rs. 18,000 as the value thought that the rent "ought to" be Rs. 50 or Rs. 60. In fact it is Rs. 40, and if his valuation was based on a number of years purchase of the rental instead of Rs. 18,000 it should be Rs. 12,000.

We cannot set aside a sale with consequential loss and inconvenience to the purchaser unless there be some invalidating fact present. Before us the argument was that this sale was not held forthwith because it was held sooner than was reasonably proper and practicable. For the reasons above given we do not think that this is so. The matter was put somewhat differently in the preliminary stages. An effort was made then to set aside the second sale on the ground of irregularity and the allegation of irregularity is to be found at p. 25 of Miscellaneous Appeal No. 130 of 1936 as follows: "The material irregularity consists in not waiting for Lokman's deposit of 1/4th money offered." We cannot possibly say that the officer conducting the sale has to wait for the payment of the deposit. He cannot be compelled to wait. The relevant issues are:

(2) Whether Lokman offered a bid for Rs. 15,001 and failed to deposit one-fourth price forthwith.

8. Sita Ram v. Janki Ram, (1922) 9 A I R All 200 =65 I C 813=44 All 266=20 A L J 105 (FB).

(3) Whether re-sale upon Lokman's failure to deposit the 1/4th price amounted to a material irregularity.

We have dealt with issue (3). As to issue 2 we have two observations to offer: (1) Lokeman did not offer a bid of Rs. 15,001. The temple through Lokman offered a bid of Rs. 15,001. This is made quite clear in the decree-holders' application where they say,

or in case it is proved that he was authorized by the temple to bid and purchase the property for the alleged temple, the said temple is liable to make good the loss.

Before us it was not disputed that he was authorized to bid and was bidding for the temple; it so appears in the list of bidders and it so appears in the order sheets that the purchaser was the temple. (2) The question is not whether the offerer failed to deposit "forthwith" but whether he failed to deposit "immediately." The word "forthwith" in Rule 84 governs the time at which the re-sale is to be held. The word "immediately" governs the time when the deposit is to be made. We are clearly of the opinion (1) that the officer conducting the sale was justified in holding a re-sale the same day, (2) that the re-sale resulted in a deficiency of price by reason of the purchaser's default (in the first sale) within the meaning of R. 71 of O. 21, and (3) that as a consequence either the decree-holders or the judgment-debtor can recover the difference from the defaulter (Rule 71).

The point was taken that here the decree was for much less than Rs. 12,600 and that accordingly the decree-holders-applicants were not damnified. It was the judgment-debtor that lost as a consequence of that default and therefore it is said that the judgment-debtor should have made the application and not the decree-holders. In our opinion, however, R. 71 gives the right to recover the deficit to either the decree-holder or the judgment-debtor. Though one might well expect in circumstances such as these that the decree-holder would leave the matter to the judgment-debtor he need not do so. He may decide to recoup himself from the defaulter. Anything left over from these realizations will of course go to the judgment-debtor so that the decree-holders are, in effect, in these proceedings fighting the judgment-debtor's battles for him. Why they should do so is neither here nor there.

This leaves outstanding the question of whether these proceedings are against the right person. The difficulty is due to the fact that the temple is shown as the purchaser and yet the notice of the application to recover the deficit was served on Lokman, not on anybody as representing the temple. The order sheet in the judgment-debtor's application to set aside the sale (M. A. 130 of 1936) shows on 25th January 1936 as follows:

Decree-holder 2 Kisanlal with Mr. Agarwal. Mr. Nathulal with Mr. Mukherjee. Auction purchaser Harpershad in person with Mr. Agarwal. Defaulting bidder Digamber Jain Temple by one Lokeman. Prospective purchaser Babulal in person.

As we have already pointed out the decree-holder having claimed against Lokman—in the alternative he claimed against the temple — an order for the payment of the deficit has been given against Lokman personally. We think that this is clearly wrong. On the facts it is beyond contest that the bid was made on behalf of the temple by Lokman. Before us it was not denied that Lokman was the managing trustee (sarbarahkar) of the temple and it was not disputed that he was entitled to bid and he bid on behalf of the temple. Indeed the bid was repeated before us on behalf of the temple. The temple, unlike an idol, not being a juristic person cannot sue or be sued but somebody has to sue or be sued on behalf of the temple. Nobody has disputed that the appropriate person to represent the temple in proceedings such as these is Lokman. In those circumstances it appears to us plain that the liability is not Lokman's personally but Lokman's as representing the temple. In other words the order will be against him to pay the deficit out of the temple funds. As this matter was however much disputed in the lower Court and as we are in an important respect, so far as Lokman is concerned, varying the lower Court's orders so as to make the deficit payable by Lokman out of the temple funds, not by Lokman personally, the appeal so far as Miscellaneous Appeal No. 140 of 1938 is concerned is allowed, without costs, to the above extent, that is to say, the order will be varied by making Lokman liable in his capacity as managing trustee of the temple.

Miscellaneous Appeal No. 130 of 1936 is based on the view that there has been an irregularity in the conduct of the second sale which irregularity has resulted in a loss to the judgment-debtor and that therefore the sale should be set aside. There is on the above conclusions a double answer: (1) There is no irregularity. (2) There is no loss because the difference will be made

good through the decree-holders to the judgment-debtor. That is to say the decree-holders, having recovered the deficit from the temple, will credit the judgment-debtor with the amount so recovered. Miscellaneous Appeal No. 130 of 1936 is accordingly dismissed with costs.

D.S./R.K. *Order accordingly.*

A. I. R. 1939 Nagpur 274

STONE C. J. AND VIVIAN BOSE J.

B. L. Chouda and others — Appellants.

v.

B. K. Rai and another — Respondents.

First Appeal No. 36 of 1937, Decided on 23rd February 1939, from decree of Addl. Dist. Judge, Saugor, D/- 17th October 1936.

(a) Civil P. C. (1908), S. 66 — S. 66 does not draw distinction between purchase by person in name of stranger and one by father in name of son.

There is no difference between purchases by *A* in the name of *B* where *A* and *B* are strangers and where *A* and *B* are closely related as in the case of father and son. Consequently S. 66 applies also to purchase by father in the name of son: *6 M I A 53 (P C); A I R 1928 P C 172 and A I R 1925 P C 181, Expl.* [P 275 C 1]

(b) Civil P. C. (1908), S. 66 (1) — S. 66 (1) does not deal with cases in which *A* purchases at court auction in his own name though on behalf of somebody else.

Section 66 (1) does not deal with the kind of cases where *A* has purchased at court auction property in his own name though he purchased on behalf of somebody else. It deals with a case where "any person" has made the purchase "on behalf of the plaintiff." [P 276 C 1]

(c) Civil P. C. (1908), S. 66—Object.

The object of S. 66 is to put a stop to benami purchases at execution sales. [P 276 C 1]

(d) Evidence Act (1872), S. 32 (2) — Cancelled will used in support of statement made by testator against his own interest is admissible.

A cancelled will is admissible under S. 32 (2) if it is used in support of a statement made by the testator in the interest of other persons, his sons, and against his own interest : *A I R 1928 P C 172, Disting.* [P 277 C 2]

D. N. Choudhary — *for Appellants.*

R. N. Padhye and W. B. Pendharkar — *for Respondents 1 and 2 respectively.*

Judgment. — This is a plaintiffs' appeal from a judgment dismissing the suit. The plaintiffs are three executors under the will of a gentleman who was in his lifetime a member of the English Bar but obviously towards the end of his life had shed those ideas which sometimes come with education in Europe. He died a man of considerable property leaving a small sum of money (Rs. 30 a month) to his widow, some small presents to friends and nothing to his two sons and daughter. Most of his will is concerned with directions with regard to certain religious and charitable purposes which appear to be designed to secure him favourable reception in the world to come. This is the kind of will which the Romans treated as an inofficious will which a dependant could upset. It is a kind of will that does not look well unless there are grave reasons for disinheriting those who have some claim upon the author of their being. However with those considerations we are not in this case concerned because in this case we are not concerned with whether this is a good or a bad will but whether a particular item of property belonged to the testator at all. If it did, then he has disposed of it under this will. If it did not, the will and any other dispositions of the testator have nothing to do with the passing of title. This is not a case of a beneficiary being put to his election. The property in question is a somewhat valuable one, a bungalow occupied at the present moment by the European Club, Saugor, and a property which was purchased some time ago for a sum of Rs. 15,000. The question is : Did it belong to the testator so as to now form part of the testator's estate or does it belong to his sons? The learned Judge has found that it belongs to the sons. He has founded that conclusion on two different grounds : (1) the conclusive presumption created by S. 66, Civil P. C., and (2) the facts of the case (assuming that presumption does not arise).

On 30th March 1919 the subject-matter of this suit was sold in a Court auction. The persons mentioned in the sale certificate as the purchasers are the defendants, B. K. Rai and B. P. Rai. The case of the executors is however that the true purchaser was the deceased, the defendant's father. At the time of the purchase the defendants were minors and it is said that the testator has, in his will, declared it to be his property and that there is abundant evidence to show that the purchase price was paid out of the money standing to his credit with his bankers, Bansilal Abirchand. It is therefore urged that this is a case of a purchase by a father with that father's money in the name of his sons ; in other words it is a benami transaction. All the property of the testator is to be treated as his self-acquired property. The sons are not to be regarded as members with him of a joint Hindu family. We proceed on the

basis therefore that all his property was self-acquired and that we are dealing with a father and two children who are not joint. The applicability and construction of S. 66, Civil P. C., are the first points that arise. That Section, in sub-s. (1), provides as follows :

> No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims.

The argument addressed to us would involve reading that sub-section as follows: "No suit shall be maintained against [a stranger] claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made [by the person certified as the purchaser] on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims."

We have placed in square brackets the words which it is said should be read into this Section. It is said that there is a big difference in these benami matters, including cases that fall within S. 66, between purchases by *A* in the name of *B* where *A* and *B* are strangers and where *A* and *B* are closely related as in the case of father and son. I L R (1936) Nag 65,[1] 6 M I A 53[2] and 55 Cal 944[3] are referred to. In our opinion there is no difference at all between such purchases. In 6 M I A 53[2] an endeavour was made to draw a distinction between them. The argument that was then addressed to their Lordships of the Judicial Committee was to the following effect :

In English law if *A* pays the purchase price for the conveyance of Blackacre which is taken in the name of *B* a resulting trust arises whereby *B* becomes trustee for *A* and therefore where it is once established that the price has been paid by *A* the presumption arises that the title is in *A* although it appears to be in *B*. This in India is reflected in the law relating to benami transactions so that if one finds in India a transfer taken in the name of *B* and the purchase price supplied by *A* then the presumption is that the title, despite the fact that the transferee is *B*, is in *A*. The argument was then advanced that in India, as in England, different considerations arise when *A* and *B* are so related as to raise a presumption in such circumstances, that *A* paid that money, not with a view to get title in himself, but with a view to the advancement of *B*. Such circumstances arise in England in the case of a child or in the case of a wife. 6 M I A 53[2] was a case of a child and 55 Cal 944[3] was a case of a wife. In both cases (*see also* 48 Mad 605[4]) their Lordships of the Judicial Committee upheld the Courts in India, came to the conclusion that Indian social conditions did not attract that particular rule of advancement and that there was no presumption of advancement in such circumstances in India. Therefore, their Lordships decided that even where *A* was a father and *B* was a son or a wife still the rule that the purchase is benami holds good. But, although that be so, the person alleging that the transaction is benami would have to give evidence in the first place to show that the deed did not speak the truth. In the most common case he would discharge that burden if he established that he supplied the consideration. If he established that, the burden of proof would shift. It would then be for the person in whose name the transfer was taken to show that it was not a benami transaction. That burden is not discharged by merely proving that he is a son.

In this present case the converse was argued in an endeavour by Rai Bahadur Choudhari to get us to read for "any person" "a stranger." It was said that a difference exists in the case of strangers and in the case of a father and son. The difference, it was said, was so deep as to make it necessary to limit the cases that S. 66 is concerned with two cases other than those where a father purchases in the name of a son, or a husband in the name of a wife. In developing that argument he relied on a further series of Privy Council cases, that is to say 37 All 545[5] and the earlier Privy Council case therein referred to at p. 555, 12 Beng L R 317,[6] together with two more decisions one of which purports to follow 37 All 545,[5] that is to say A I R 1919 Mad

1. Gopal v. Keshosa, (1936) 23 A I R Nag 185 = 165 I C 350=I L R (1936) Nag 65.
2. Gopeekrist Gosain v. Gungapersaud Gossain, (1854-57) 6 M I A 53 = 2 Suther 13=4 W R 46=1 Sar 493 (P C).
3. Guran Ditta v. Ram Ditta, (1928) 15 A I R P C 172=109 I C 723 = 55 Cal 944 = 55 I A 235 (P C).
4. Lakshmiah Chetty v. Kothandarama Pillai, (1925) 12 A I R P C 181=88 I C 327=52 I A 286=48 Mad 605 (P C).
5. Ganga Sahai v. Kesri, (1915) 2 A I R P C 81 =30 I C 265=42 I A 177=37 All 545 (P C).
6. Bodh Singh Dodhoria v. Gunesh Chunder Sen, (1873) 12 Beng L R 317=19 W R 356=3 Sar 253 (P C).

942[7] and A I R 1937 Lah 471.[8] The last named case decided that on the facts there present S. 66 did not apply and accordingly the benami nature of the transaction could be gone into. 37 All 545,[5] as we read it, is a case in which it was found that a fraud had been perpetrated and is a case quite different on its facts from the present. The fact that their Lordships of the Judicial Committee founded their view on fraud is seen when their observations at page 555 are read.

That leads us to the second alteration in the wording of the Section which it is said should be made if one is to arrive at a true construction of S. 66 (1), that is to say after the words "was made" should be added "by the certified purchaser." That however in our opinion is a hopeless construction because that would mean that we are not dealing with benami transactions at all but are dealing with cases in which *A* has purchased at court auction property in his own name though he purchased on behalf of somebody else. That is not the kind of case that S. 66 (1) is dealing with. It is dealing with a case where "any person" has made the purchase "on behalf of the plaintiff." In such a case if the person in whose name the purchase is taken is certified as the purchaser the plaintiff cannot maintain a suit against him claiming title on the ground that the purchase was made on his behalf. The most important case is where the purchaser is the plaintiff and where he has taken a transfer in the name of another who is the person certified as the purchaser. The reason why such a distinction has been made between court auction sales and private sales is brought out in Sir Dinshah Mulla's Notes to S. 66. As he observes the object of the Section is to put a stop to benami purchases at execution sales. Of course these provisions, like other provisions, are not permitted by Courts of law to operate so as to work a fraud, but where is the fraud in the present case?

In the present case the facts are as follows : The testator attended this auction sale and bought this property in the name of his two sons. He paid off the purchase price by a cheque drawn on his bank. He fed the bank from a variety of sources, partly from his business, and round about the time of this sale undoubtedly from the sale of property which was equally undoubtedly his. But he has himself made it quite clear in a document that we shall refer to later, that he was buying this property not on his own behalf but on behalf of his sons. He was not buying it on behalf of his sons by way of advancement out of his own money but he was buying it on behalf of his sons with the sons' own money, only the sons' money had been used by him in the past and he was not in effect repaying them out of his own money. That is, as we understand this case, the truth of the matter. We derive that from the documents. Before we come to the documents it is desirable to make one or two preliminary observations.

This gentleman made at least two wills. The one was made in 1927 and will be referred to as the cancelled will and the other in 1929, the effective will. He was at the time of his death well advanced in years, as things go in the East and between those two dates, whether it was due to declining mental powers or to other reasons, he appears to have entirely changed his attitude not with regard to one of his dependants only but with regard to them all. In the earlier cancelled will there is the following statement :

> List of property which is separately owned by respective persons is not included in mine ; for it was separately purchased with their amounts.
>
> Club bungalow [the suit property] which at present fetches a rent of Rs. 100 per month. It was purchased in the names of Bhairo Prasad and Balkrishna [the two defendants] only with the amount accumulated, of all the four sons. Money used always to be given to them in their early life since their birth by way of presents which was laid by in a Savings Bank and led to profit being invested into the business. As for the way in which the rent of the same should be distributed. . . . .

If reference is made to Ex. D-1, one finds a corroboration of the defendants' story that in addition to the sums which came to them by way of gift in the manner stated in the cancelled will they also obtained substantial sums from their mother. Exhibit D-1 refers to two sums, one of Rs. 3000 and another of Rs. 2300 which appears as credited to Bhairo Prasad and Bal Krishna respectively. There is also an entry: "His mother paid from ornaments, etc. Hence credited to him." All these moneys would appear to have been mixed by the testator with his own moneys.

After this purchase was concluded one finds in the testator's books the following entries : Under date 28th March 1921

7. Patrachariar v. Ramaswami, (1919) 6 A I R Mad 942=49 I C 734.
8. Jai Kishan v. Parmeshri Das, (1937) 24 A I R Lah 471=171 I C 856=39 P L R 152.

"Rs. 90 credited on account of rent of the Club House of Bhaiya Bhairo Prasad Bal Krishna for the month of February." Similar entries are to be found under dates 28th June 1921, 2nd August 1921, 30th September 1921 and 5th November 1921. On 7th December 1921 we have this entry:

Credited to the khata of Bal Krishna Bhairo Prasad on account of rent of the Club House for the month of October 1921.

The last entry of this kind that we have is under date 1st February 1922. It will be observed that in the entry dated 7th December 1921 a reference is made to the khata of these two sons "on account of the rent of the Club House." If Ex. P-6 is referred to we find "khata 1, khata of the Club House . . . from 24th October 1919," then certain credits and debits are given. Altogether a sum of Rs. 1534-2-0 is credited and that shows not only that those payments were put into a separate khata of the Club House but, read in with the entry that we have mentioned under date 7th December 1921, that that khata was the khata of the two sons. There is also the oral evidence of the son who went into the witness-box and gave evidence to the effect that he was 11 when this property was purchased for him and therefore was then told what had been done for him. Putting that quite on one side it seems to us that the documentary evidence is all one way until we come to the last will of the testator. The last will of the testator is obviously made either after a quarrel or, what appears more probable, after he had commenced to lose his mental faculties. We incline to the latter alternative because a son is disinherited apparently because he was active in causing an ailing sister to go into hospital and undergo an operation which probably saved her life. We are not to be taken as saying that the testator was of non-testamentary capacity, but the will does bear on its face the signs of being made by a man who had lost all regard for his dependants. That is a state of mind that does occasionally afflict people who are not well. In his last will, unquestionably, he treats the suit property as property belonging to him, property that he bought benami in the name of his sons, and he claims to exercise full disposing power over it. But we do not in any way regard the evidence supplied by this last will as comparable with the evidence supplied by the cancelled will. The cancelled will has no force or effect as a will and Rai Bahadur Choudhari argued that it has no evidentiary value at all founding himself on 55 Cal 944.[3] But the reason their Lordships of the Privy Council treated the will there as being of no evidentiary value was because the cancelled will was there being used in support of a statement made by the testator in his own interest. Here the statement is being made by the testator in the interest of other persons, his sons, against his own interests, and is accordingly admissible under S. 32 (2), Evidence Act.

We observe that in this case we are sitting as an Appellate Court and the learned Judge, who had the advantage of seeing the witnesses, has arrived at a certain conclusion of fact which ends the matter if upheld. That is to say the question under S. 66 does not arise if his finding of fact is correct. We, looking at the whole record, at a very early stage in this appeal arrived at the same conclusion of fact. That is enough to dispose of the appeal. Accordingly the appeal is dismissed with costs. We observe that the costs in the lower Courts have been given against the plaintiffs without in any way indicating that they are to come out of the estate. There has been no appeal from this part of the decree but the respondents leave the matter to us to deal with according to equity and bearing in mind what is usual in executors' cases. We have no reason to think that this is a litigation undertaken maliciously or with the sole desire to cause trouble to the defendants, but we think that the executors really considered, acting under legal advice, that the case was one that should, in the interests of the testator's estate and the charities, be filed. In such cases it is not usual to impose the burden of costs on executors or trustees personally. Accordingly the costs throughout will be paid by the plaintiffs to the defendants out of the estate.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Nagpur 277

NIYOGI J.

Pitambar Ramchandra Paliye —
Defendant—Applicant.

v.

Sahebchand Harakchand Shop through Kasturchand and another —
Opposite Party.

Civil Revn. No. 301 of 1938, Decided on 26th July 1939, from decree of Small Cause Court, Nagpur, D/- 15th February 1938.

(a) C. P. Debt Conciliation Act (2 of 1933), Rules under, R. 18—R. 18 does not cure illegality occurring under R. 47.

Rule 18 only deals with a notice sent in an irregular form but does not cure the illegality occurring under R. 47. [P 278 C 2]

(b) C. P. Debt Conciliation Act (2 of 1933), Rules under, R. 47 and S. 8—Failure of Board and debtor to have proper guardian appointed after due notice to minor and guardian—Proceedings are null and void.

Where the Board and the debtor have failed to have proper guardian appointed after due notice to minor creditor and his guardian, the proceedings are initially illegal and minor is gravely prejudiced if this has resulted in failure to submit a statement of debt due to minor. The proceedings therefore being irregular minor is entitled to a declaration in Civil Court that the proceedings are null and void. [P 279 C 1]

T. B. Pendharkar—*for Applicant.*

B. R. Mandlekar—*for Opposite Party.*

Order.—This is an application to revise the judgment of the Judge of the Small Cause Court, Nagpur, in Civil Suit No. 125 of 1937, decided on 15th February 1938. The non-applicant Sahebchand Harakchand Shop represented by the proprietors Kasturchand and Kapurchand, both minors, filed the suit out of which this application arises to recover a debt due on an instalment bond, dated 16th June 1933 for Rs. 487 executed by the defendant in favour of the shop (Sahebchand Harakchand) then represented by the proprietor Premchand Punamchand, the father of the plaintiffs. Prior to the suit there were proceedings before the Debt Conciliation Board initiated by the defendant for settlement of his debt. The plaintiff was described there by the name of the shop Sahebchand Harakchand as being represented by the owner Kasturchand Premchand who was shown as a major. Notice was issued by the Board in the name of Sahebchand Harakchand, proprietor Kasturchand Premchand. Although Premchand had died and his sons Kasturchand and Kapurchand were minors, no guardian was appointed to represent the minors. The notice issued in the name of the shop as above was received by Hemkaran who was one of the agents appointed under a power of attorney executed by the minors' mother. It is not known whether Hemkaran was present at the proceedings before the Board but from the fact that a note is made in the order sheet as to the presence of all the creditors it may be presumed that somebody on behalf of the shop Sahebchand Harakchand was present at the proceedings. The plaintiffs' mother died during the pendency of the proceedings. That was on 2nd November 1936. That fact was apparently brought to the notice of the Debt Conciliation Board but no attempt was made to appoint a guardian for the minors. It appears one Panmal became the natural guardian. No notice was sent to Panmal or to anybody else on behalf of the minors. According to S. 8 (1), Debt Conciliation Act, statement of debt owed to the minors ought to have been submitted to the Board but that was not done with the result that the Board declared that the debt owed to the shop of Sahebchand Harakchand was discharged. In view of that order the defendant contended that the suit was not maintainable. The lower Court overruled the contention on the ground that the minor had not been served in accordance with law and that the proceedings before the Board were null and void. It therefore passed a decree in plaintiffs' favour.

On behalf of the applicant it is urged that although there has been irregularity, that was only technical and that it did not prejudice the minors' interest in any way. Reliance is placed on O. 30, R. 10, Civil P. C., S. 99, Civil P. C. and R. 18 of the rules framed under the C. P. Debt Conciliation Act, 1933. It is true that the agents appointed by the minors' mother were fully aware of the proceedings before the Debt Conciliation Board as is clear from a telegram, Ex. D-5, and the letter, dated 31st May 1936. There was however an irregularity in not issuing notice to the minor Kasturchand whose name was mentioned as the proprietor of the shop Sahebchand Harakchand. He was there described as a major and his brother Kapurchand was not impleaded at all. Under R. 47 of the rules framed under the C. P. Debt Conciliation Act, 1933, the Board and the debtor were bound to follow the procedure laid down in O. 32, Civil P. C., 1908. They have ignored that rule altogether. R. 18 of those rules only deals with a notice sent in an irregular form but does not cure the illegality occurring under R. 47. Under O. 32, R. 3 it was incumbent on the debtor first to have a proper guardian appointed after due notice to the minor and to the guardian. The proceedings were initially illegal as this important step to secure the minors' representation in the proceedings was not taken. Even on the death of the minors' mother no step was taken to have a fresh guardian appointed. In short, the parties who were intended to be affected by the proceedings

of the Debt Conciliation Board were not properly brought before the Board. The fact that Hemkaran appeared in the Court is *non sequitur* as he happened also to be one of the creditors and had notice to appear before the Board. It is not clear from the record whether Hemkaran appeared on his own behalf or on behalf of the minors. Even if he had appeared in the latter capacity it was imperative on him to submit a statement of debt due to the minors and his failure to do so has resulted in grave prejudice to the minors' interest in that the debt due to them was declared to be discharged. The proceedings before the Board were so irregular as to entitle the minors to a declaration in the Civil Court that the proceedings were null and void and inoperative to affect their interest. Consequently, the lower Court was right in holding that the order discharging the plaintiffs' debt made by the Debt Conciliation Board was void and of no avail. The Civil Court has under S. 8 (2) power to revise the debt which has been illegally declared by the Debt Conciliation Board to have been discharged.

I may add that this is particularly a case in which the Civil Court cannot overlook serious irregularities in the procedure of the Debt Conciliation Board on the ground that they were of a technical character. If the irregularity is condoned in this case the minors' debt would be wiped off and that would result in great injustice to them. On the other hand to take serious notice of these irregularities and regard them as invalidating the order of the Debt Conciliation Board would induce a sense of responsibility in the mind not only of the parties but also the Board when the minors are arrayed as parties before it. R. 47 lays the responsibility of securing the due representation of minor parties on the Board as well. Weighing the considerations advanced on either side there is no doubt that the interests of justice would be served better by exacting a stricter standard of procedure before the Board as the lower Court has done than otherwise. This will not mean any injustice to the debtor as it is open to him even now to move the Board, if in existence, or to move its successor for settlement of the debt. The fact that a decree has been passed does not impair his right to have the debt settled. The application is dismissed with costs. Counsel's fees Rs. 20.

D.S./R.K. *Application dismissed.*

A. I. R. 1939 Nagpur 279

NIYOGI J.

Kisan Dewaloo Mali—Decree-holder — Appellant.

v.

Ganga Bai w/o Jairam Mali and others — Respondents.

Misc. Appeal No. 125 of 1938, Decided on 26th July 1939, from order of First Addl. Dist. Judge, Akola, D/- 19th January 1938.

Pre-emption — Holder of decree for pre-emption depositing pre-emption price within prescribed period but withdrawing it on reversal of decree in appeal — In second appeal decree of trial Court restored—Pre-emption price which is withdrawn should be allowed to be deposited.

The pre-emption decree made in terms of O. 20, R. 14, Civil P. C., is in the nature of a preliminary decree. It becomes operative as a decree dismissing the plaintiff's suit with costs in case the plaintiff fails to pay the full pre-emption price within the time allowed by the Court. On the other hand it becomes operative as a decree entitling the plaintiff to claim possession of the pre-empted land in case he deposits the pre-emptive price within the prescribed time : *18 All 223, Rel. on.* [P 280 C 2]

Where a holder of a decree for pre-emption has deposited pre-emption price within the prescribed period and withdraws it on the reversal of the decree in appeal, he should be allowed to deposit it when in second appeal the decree of the trial Court is restored, because the deposit of the pre-emptive price completes the sale in favour of the plaintiff and the title passes to him. If thereafter he withdraws the amount the vendor would be entitled to claim the price. He cannot get back his title which had already passed away from him unless the plaintiff on demand made by the Court declines to pay the pre-emption price. [P 280 C 2]

W. B. Pendharkar — *for Appellant.*

V. K. Rajwade — *for Respondents.*

Order.—This is a decree-holder's appeal from an order passed on 19th January 1938 in Transferred Civil Appeal No. 38-A of 1937 by the First Additional District Judge, Akola. The facts are that the appellant Kisan had filed a suit for pre-emption in respect of field No. 614 against Bhagai, Damodar and Gangabai. The field belonged to defendant 2 Damodar who sold it to defendant 1 Bhagai who in turn sold it to Gangabai just on the eve of the institution of the suit for pre-emption. The plaintiff succeeded in the first Court and he was ordered to deposit into Court Rs. 100 any time between 15th February 1934 and 15th March 1934 for payment to defendant 1. The plaintiff deposited that amount on 7th March 1934 and had thus become entitled to possession of the field. Defendant 3 filed

an appeal from that decree and succeeded in getting that decree reversed on 13th April 1934. The plaintiff thereon filed a second appeal in the High Court. The High Court decreed the plaintiff's suit with costs in all Courts but omitted to extend time for depositing the pre-emption price. The plaintiff who had on 2nd May 1934 withdrawn the amount which he had deposited within the time prescribed by the trial Court tendered that amount in Court, but the tender was rejected on the ground that the time fixed by the original pre-emption decree had expired. The plaintiff's suit was consequently dismissed and his appeal also was unsuccessful.

It appears to me that in this case technicality has been pushed to the extreme. It is true that the executing Court cannot extend time fixed in the decree for payment of the pre-emption price. The cases relied on by the learned counsel for the respondents, namely 19 N L R 8,[1] 18 All 223,[2] 45 All 456[3] and 6 Lah 316[4] lay down the same proposition, but no case has been brought to my notice in which the plaintiff obeyed the decree of the original Court by depositing the money within time as the plaintiff did in the present case. If the High Court's decree superseded the decree of the original Court, and it omitted to fix the time within which the money was to be paid the natural inference would be that the High Court permitted the plaintiff to deposit within reasonable time. If, on the other hand, the effect of the High Court's decree was to restore in terms the decree of the original Court then the direction in that decree was obeyed by the plaintiff when he deposited the sum of Rs. 100 in the Court on 7th March 1934, that is before 15th March 1934 which was the last date fixed for payment. If the plaintiff is held bound by the terms of the first Court's decree he must, in equity, be given the benefit of his deposit made within time. The pre-emption decree made in terms of O. 20, Rule 14, is in the nature of a preliminary decree. As pointed out in 18 All 223[2] it becomes operative as a decree dismissing the plaintiff's suit with costs in case the plaintiff fails to pay the full pre-emption price within the time allowed by the Court. On the other hand it becomes operative as a decree entitling the plaintiff to claim possession of the pre-empted land in case he deposits the pre-emptive price within the prescribed time. On 7th March 1934, when the plaintiff deposited the pre-emptive price, there was in the eye of the law a final decree in his favour. That final decree was vacated as the result of the lower Appellate Court's dismissal of the plaintiff's suit. When the High Court restored the original Court's decree the final decree, as the result of the deposit of 7th March 1934, was also automatically restored. The fact that the plaintiff withdrew the amount after the dismissal of the suit by the lower Appellate Court is inconsequential so far as his substantial right to recover possession of the pre-emptive land is concerned. The deposit of the pre-emptive price completed the sale in favour of the plaintiff and the title passed to him. If thereafter he withdrew the amount the vendor would be entitled to claim the price. He cannot get back his title which had already passed away from him unless the plaintiff on demand made by the Court declined to pay the pre-emption price.

As the plaintiff tendered the amount which he had once deposited but had withdrawn because the vendor refused to accept that amount and his suit also was dismissed in the lower Appellate Court, it ought to have been allowed to be deposited in the Court. The lower Appellate Court's order is set aside and the Court of first instance is directed to accept the deposit made by the plaintiff. I grant the plaintiff one month's time for depositing the amount in Court. If he fails to deposit within time his suit will be dismissed with costs. The respondents will pay the costs of the appellant in all the Courts. Counsel's fees Rupees 15.

D.S./R.K. *Order accordingly.*

1. Ambadas v. Laxman, (1923) 10 A I R Nag 210 =71 I C 401=19 N L R 8.
2. Jaggarnath Pande v. Jokhu Tewari, (1896) 18 All 223=1896 A W N 43.
3. Girdhari Singh v. Bhupal Singh, (1923) 10 A I R All 516=74 I C 745=45 All 456.
4. Sukhram Das v. Nazar Muhammad, (1925) 12 A I R Lah 380=89 I C 163=6 Lah 316=26 P L R 183.

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NIYOGI J.

Laxman Namdeo Koshti—Accused Applicant

v.

Emperor.

Criminal Revn. No. 166 of 1939, Decided on 17th June 1939, from order of the Addl. Sess. Judge, Nagpur, D/- 24th January 1939.

C. P. Protection of Debtors Act (4 of 1937), Secs. 3 and 4 — Creditor going to debtor to demand money and being told to go to Civil Court hitting him — This act does not amount to offence under Sec. 3.

Where a creditor goes to the debtor to demand debt due to him and, on being told by the latter to go to Civil Court for its recovery, gets annoyed and beats him, his act does not amount to an offence under S. 3, C. P. Protection of Debtors Act, though he may be prosecuted for hurt or insult under Penal Code: *Criminal Revn. No. 358 of 1938, Disting.* [P 282 C 1, 2]

T. J. Kedar — *for Applicant.*

Order.—This is an application to revise the order of the Additional Sessions Judge, Nagpur, in Criminal Revision No. 58 of 1938, decided on 24th January 1939. The case involves the question of construction of Sec. 3, Central Provinces Protection of Debtors Act, 1937. The facts are that one Upashya was indebted to the accused Laxman. On 13th January 1938, the accused demanded payment of his debt, whereon Upashya became angry and bade him go to Civil Court. The accused lost his temper and beat Upashya with a shoe and left the place. The accused was prosecuted for an offence punishable under S. 4, C. P. Protection of Debtors Act, 1937, for molesting the debtor for the recovery of a debt owed by him. In a summary trial he was convicted of the offence and sentenced to pay a fine of Rs. 100. The accused applied to the Additional Sessions Judge, Nagpur, for revising the order of conviction and sentence on the ground that his assault on the debtor did not constitute an offence punishable under S. 4, C. P. Protection of Debtors Act, 1937. The learned Additional Sessions Judge followed Criminal Revn. No. 358 of 1938[1] and held that the object of the intimidation was to make the complainant to pay a debt without forcing the accused to take proceedings against him in a Civil Court, that a threat which would prevent him from taking up a position which the law allows him falls within the mischief of molestation as defined in Sec. 3, C. P. Protection of Debtors Act; and that the Act does not permit a money-lender by threatening his client to deter the debtor from forcing his creditor to take action against him in a Court of law.

On this view he held that the assault on the debtor amounted to an offence of molestation as defined in S. 3 of that Act.

The situation in the case which came up before this Court in Criminal Revn. No. 358 of 1938[1] was somewhat different. In that case the creditor threatened the debtor while he was going to his office on duty as an Assistant Foreman at the Power House. The threat was made in the vicinity of the place where he worked. The creditor was fined Rs. 100. The Additional Sessions Judge, Nagpur, referred the case under S. 438, Criminal P. C., for the opinion of the High Court as, in his opinion, no debtor could claim a right of not paying his creditor and that therefore the threat to induce the debtor to pay up his debt did not constitute molestation as defined in S. 3 of that Act. The reference was not accepted by this Court and the reason given was that the object of the intimidation was to make the debtor pay a debt without forcing the accused to take proceedings against him in a Civil Court. It was conceded that a debtor could not claim a right that he would not pay his creditor but it was explained that the object of the threat was to prevent a case being brought in the Civil Court which would prevent the debtor from urging pleas in mitigation such as an exhorbitant rate of interest and any other pleas which the law would allow him. The rule was propounded that a threat which would prevent a debtor from taking up a position which the law allows him falls within the mischief of molestation as defined in S. 3, C. P. Protection of Debtors Act. To understand the precise meaning of the foregoing expression, I have made an analysis which shows that the learned Judge had envisaged the position as follows : The creditor wants to avoid going to Civil Court and the debtor wants to force him to go to it for recovering his debt. The law allows the debtor to force the creditor to go to Civil Court although the debtor has no right to abstain from paying off his debt if he is able to do so. When the creditor threatens the debtor with evil consequences to compel him to pay a debt without recourse to Civil Court, he thereby intends to cause the debtor to do an act which he has a right to abstain from doing. The material words in Sec. 3, C. P. Protection of Debtors Act, 1937, are as follows :

1. Emperor v. Mohammad Khan, Criminal Revn. No. 358 of 1938 dated 7th November 1938.

For the purposes of this Act, a person who, with intent to cause another person to abstain from doing or to do any act which he has a right to do or to abstain from doing, (a) obstructs, or uses violence to, or intimidates, such other person .... shall be deemed to molest such other person.

The terms of the definition indicate that the obstruction or using violence or intimidation to constitute molestation should be accompanied by the intent to cause the debtor to abstain from doing what he has a right to do or to compel him to do what he has a right to abstain from doing. It is evident that the particular intent is a question of fact in every case. If the Court holds that the creditor's intention in obstructing, or using violence to, or intimidating, the debtor is to compel him to pay a debt which he has a right in certain circumstances to abstain from doing, the creditor's act would amount to molestation. In the present case, the circumstances in which the creditor used violence do not warrant any assumption that the creditor's intention was to compel him to pay the debt. But on the contrary its effect would presumably be to confirm the debtor's resolve not to pay. The trial Magistrate says in para. 5 of his order :

It has thus been proved that the accused did go to Upashya's house to dun him for recovery of debts, that as the complainant asked him with impunity to have a recourse to the Civil Court the accused got annoyed and abusing the complainant hit him. It is thus clear that the accused molested the complainant as contemplated under S. 3, C. P. Protection of Debtors Act.

The finding of fact is that the creditor hit the debtor as a result of the annoyance caused to him by the debtor having asked him to go to Civil Court for recovering his debt. The violence done to the debtor was never regarded by the creditor as a means to compel him to pay his debt. I can well imagine a case where, in circumstances such as those proved in the present case, a creditor might use violence to his debtor and ask him to pay up his debt to avoid further violence. That would indeed be a case of clear molestation. But here the creditor did not resort to violence as an instrument to compel the debtor to pay when he was not disposed to pay. It was only a manifestation of the pitch of his passion that was aroused by the debtor's remark that the creditor should look to Civil Court. The violence was not intended to operate on the debtor's mind so as to induce him to pay but it was intended to be a punishment for his impertinence in asking the creditor to go to Civil Court.

The creditor was indeed liable to be punished for assault under the Penal Code, but I cannot persuade myself to concur in the view that his act amounted to an offence under Sec. 3, C. P. Protection of Debtors Act, 1937, in the particular circumstances of the present case. For the foregoing reasons I set aside the conviction and sentence and direct that the applicant be acquitted. The fine, if recovered, will be refunded to the applicant. It would be open to the complainant to prosecute the applicant for assault or causing hurt or insult, which are offences punishable under the Penal Code, if he so wishes to do.

D.S./R.K. *Revision allowed.*

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NIYOGI AND VIVIAN BOSE JJ.

Akbar Ali Fida Hussain — Defendant — Judgment-debtor — Appellant.

v.

Sobharam Motiram Parwar and another — Plaintiffs — Decree-holders — Respondents.

Misc. Appeal No. 82 of 1937, Decided on 14th April 1939, from order of Dist. Judge, Chhindwara, D/- 1st February 1937.

(a) C. P. Debt Conciliation Act (2 of 1933), Ss. 15 and 21— Sale in execution before application under S. 4 is made — Power of Civil Court to confirm sale under O. 21, R. 92, Civil P. C., is not affected either by S. 15 or S. 21.

Section 15 can have no application where after the sale, but before its confirmation, the judgment-debtor puts in an application to the Debt Conciliation Board under S. 4. Moreover, the proceedings under O. 21, R. 92, Civil P. C., for the confirmation of a sale already made cannot be said to be proceedings in respect of a debt for the settlement of which application has been made, within the meaning of S. 21. Hence neither S. 15 nor S. 21 affects the power of the Civil Court under O. 21, R. 92, Civil P. C., to confirm a sale held in execution proceedings when such sale has taken place before an application under S. 4, Debt Conciliation Act, has been made to the Debt Conciliation Board : *AIR 1937 Nag 98 ; AIR 1938 Nag 273 ; 1938 N L J 229 and A I R 1938 Nag 109, Approved; 1938 N L J 150, Dissent.* [P 287 C 1]

(b) C. P. Debt Conciliation Act (2 of 1933) —Act must be construed strictly.

The Debt Conciliation Act is a coercive measure intended to affect vested interests and rights and to bring pressure upon creditors to effect a settlement with their debtors; therefore however beneficent it may be from the point of view of debtors, it operates to the detriment of another class of persons, namely creditors, and consequently, the Act must, in accordance with the usual rules of construction, be construed strictly. Any ambiguity in its clauses must therefore be resolved along lines which interfere as little as possible with

existing rights unless the contrary is unmistakably indicated in other parts of the Act. [P 285 C 2]

(c) C. P. Debt Conciliation Act (2 of 1933), S. 21 and R. 11—Object of certificate.

Rule 11 of the Rules framed under the Act merely empowers a Board to issue a certificate in respect of proceedings which should be suspended under S. 21. The object of the certificate is merely to bring to the notice of the Court officially that there are proceedings pending before the Board which must be stayed under S. 21. [P 286 C 1, 2]

(d) C. P. Debt Conciliation Act (2 of 1933), S. 21—Stay operates from date on which certificate is produced in Court.

The stay under S. 21 operates from the date on which the certificate is produced in Court and not from the date on which it is granted : *A I R 1938 Nag 109, Rel. on.* [P 286 C 2]

Hidayatullah — *for Appellant.*

S. P. Kotwal and R. N. Padhye — *for Respondents.*

ORDER OF REFERENCE

Niyogi J. — This is an appeal from the judgment of the District Judge, Chhindwara, in Miscellaneous Civil Appeal No. 15 of 1936, dated 1st February 1937. The respondent in execution of his decree attached the appellant's share in mouza Dongaria and got the decree transferred to the Collector for sale. The property was sold but as the appellant produced before the Civil Court a certificate of the Debt Conciliation Board under S. 21, Debt Conciliation Act, declaring that an application for settlement of the appellant's debts had been filed, that Court stayed the confirmation of sale. On appeal the learned District Judge following the view of Pollock J., in 19 N L J 296,[1] set aside the original Court's order. Pollock J.'s view was that when property is sold in execution, the proceedings thereafter cease to be execution proceedings and that S. 21, Debt Conciliation Act, does not operate to prevent the Court from confirming the proceedings. This view was followed by me in Civil Revision No. 319 of 1937 and Civil Revision No. 534 of 1937 reported respectively in 1938 N L J 60[2] and 1938 N L J 229.[3]

The learned counsel for the appellant has brought to my notice a decision of Grille J. reported in 1938 N L J 150,[4] in which the learned Judge virtually dissented from Pollock J.'s opinion. On a question which affects interests of the debtors in general and is of frequent occurrence, it is essential that the High Court should pronounce its authoritative opinion. I am therefore of opinion that the question formulated below should be determined by a Bench of two Judges of this Court.

Do Ss. 15 and 21, Debt Conciliation Act, affect the power of the Civil Court under O. 21, R. 92, Civil P. C., to confirm a sale held in execution proceedings?

The case will be submitted to my Lord the Chief Justice for necessary orders.

OPINION

This reference raises a question relating to the construction of Ss. 15 and 21, Debt Conciliation Act. The question referred is as follows and speaks for itself:

Do Ss. 15 and 21, Debt Conciliation Act, affect the power of the Civil Court under O. 21, R. 92, Civil P. C., to confirm a sale held in execution proceedings ?

The matter was considered by Pollock J. in 19 N L J 296,[1] and by one of us, Niyogi J., in 1938 N L J 60[2] and in 1938 N L J 229.[3] The decision in 19 N L J 296[1] was upheld by a Division Bench consisting of Pollock and Digby JJ. in A I R 1938 Nag 109.[5] In all these cases the question was answered in the negative. But recently Grille J. dissenting from 19 N L J 296[1] reached the opposite conclusion in 1938 N L J 150.[4] We have now to choose between these two views. In our opinion, though there is much to be said in favour of both views, the former is to be preferred. The question referred is couched in a wide form but since it can only have reference to the facts of the case out of which it arises, we will deal with the matter only in so far as it relates to the facts of that case. They are as follows :

The respondent obtained a simple money decree against the appellant and in execution attached the appellant's share in Mouza Dongaria. The decree was transferred to the Collector for execution and he put the property up for sale. At the auction it was purchased by the decree-holder himself, that is to say by the respondent here. After the sale, but before its confirmation, the judgment-debtor-appellant put in an application to the Debt Conciliation Board under S. 4 and obtained a

1. Firm Haji Dada Kachhi-Malik Haji Wali Mohammad v. Pannalal, (1937) 24 A I R Nag 98=169 I C 99=19 N L J 296.
2. Madhao v. Ramchandra, (1938) 25 A I R Nag 278 = 178 I C 268 = 1938 N L J 60= I L R (1939) Nag 104.
3. Hari Sadasheo v. Waman Vithal, (1938) N L J 229.
4. Thakur Prasad v. Thakur Raghurajsingh, (1938) N L J 150.
5. Mahtabsingh Pransingh v. Krishnachandra Tarachand, (1938) 25 A I R Nag 109 = 172 I C 592.

certificate under R. 11 to S. 21, Debt Conciliation Act. He then produced it before the Civil Court. It was in the usual terms and recited that an application under S. 4 of the Act for the settlement of the appellant's debts had been filed before the Board. That Court thereupon stayed the confirmation proceedings. This decision was reversed in appeal and so the matter came up here. In our opinion Sec. 15 does not apply to cases of this kind. It deals, so far as this point is concerned, with only two situations. S. 15 (2) states :

> Where any creditor sues in a Civil Court for the recovery of a debt in respect of which a certificate has been granted under sub-s. (1).

The suit contemplated is therefore one filed after the grant of the certificate under S. 15 (2). This is also clear when this Section is compared with S. 21 which recites:

> When an application has been made to a Board under Sec. 4, any suit or other proceedings, then pending before a Civil Court, etc.

The Act refers to several different points of time, namely (1) the date of the application under Sec. 4; (2) the date of the certificate under S. 15 (2); (3) the date of the registration and so on; and deals with suits and other proceedings instituted before and after these several dates differently. In the case of Sec. 15 (2), the point of time is the date of the certificate under S. 15 (1), and what is struck at is suits instituted after that date. It will be observed that the words "or other proceedings" are not used in this sub-section. Apart from that the only penalties provided are: (1) that the plaintiff is to be deprived of his costs and (2) that certain restrictions are to be placed upon the amount of interest which he can claim. It is clear when sub-s. (2) is read in conjunction with sub-s. (1) that a person who has instituted his suit before the application to the Board is made is not being struck at. The penalties are imposed upon creditors who having been taken before the Board, and having been offered a fair settlement, refuse it, and then sue. Therefore in no event can S. 15 (2) stop confirmation proceedings in respect of a suit instituted before the grant of the certificate. Turning next to S. 15 (3), the point of time dealt with there is the date of registration of the agreement. It runs thus:

> Where, after the registration of an agreement under sub-s. (2) of Sec. 12 any unsecured creditor sues, etc. . . . or any creditor sues for the recovery of a debt incurred after the date of such registration, etc.

The present suit was instituted before the registration; in fact, we understand that there has been no registration at all so far, but whether that is so or not, the suit was instituted before that date and so S. 15 (3) cannot apply. That being so, S. 15 is not a bar to confirmation in the present case. We are not concerned with other kinds of cases and so limit our observations to the facts of the present case. That answers the reference in so far as it relates to S. 15. We now turn to S. 21. It refers to suits, "or other proceedings," filed before an application to the Board under S. 4 has been made, and this is the third point of time upon which we must rivet our attention. The Section speaks of any suit or other proceedings "then pending before a Board," and the word "then" relates back to the opening sentence: "when an application has been made to a Board under S. 4." Therefore S. 21 deals with suits and other proceedings instituted before the application under S. 4 is made and which are still pending at that date.

There is also another limitation. Not only must the suit or other proceedings have been pending at the date of the application under S. 4, but it must also be "in respect of any debt for the settlement of which application has been made." It is only suits or other proceedings which fulfil both these requirements that can be stayed under S. 21. The question therefore arises whether proceedings under O. 21, R. 92, for the confirmation of a sale already made can be said to be proceedings "in respect of a debt for the settlement of which application has been made." Now we have no doubt that if the execution proceedings are continued after a certificate under R. 11 has been brought to the notice of the Court, and in spite of it, then the proceedings after that date will be incompetent if they fulfil both the requirements specified above, and in that event the matter would have to be set right in revision or in appeal. But if the proceedings up to and including the sale are valid, then we do not see how mere confirmation can be stayed unless the confirmation proceedings can be regarded as proceedings in respect of a debt, etc.

That brings us up against a conflict of authority. When the auction-purchaser is a stranger, there is not much difficulty. Their Lordships of the Privy Council have decided in 27 N L R 95[6] at p. 100 that once the sale has taken place and the property

6. Nanhelal v. Umrao Singh, (1931) 18 A I R P C 33 = 130 I C 686 = 58 I A 50=27 N L R 95 (P C).

is purchased by a stranger, then the execution proceedings cease to be solely between the judgment-debtor and the decree-holder. The interests of a third party have come into existence and they cannot be disregarded. Therefore their Lordships held that unless the requisite amount together with the statutory compensation of 5 per cent. is deposited within 30 days under O. 21, R. 89, or unless the sale is set aside on one or other of the narrow grounds given in O. 21, Rr. 90 and 91, the Court has no option but to confirm it, and once confirmed the title relates back to the date of the sale. For these reasons their Lordships decided that the judgment-debtor and the decree-holder are incompetent to effect an adjustment of the decree under O. 21, R. 2, so as to affect the title of a stranger auction purchaser under the sale. Their Lordships have also held in another case, 10 All 166[7] at p. 172 that a stranger auction-purchaser is not affected by the subsequent reversal of the decree. Therefore when a stranger purchases it is impossible to say that the proceedings subsequent to the sale are in respect of the debt for the satisfaction of which the sale was made.

But when the decree-holder purchases, the position is not quite as simple. There is nothing to prevent the decree-holder and the judgment-debtor from making an adjustment even at that stage, and of course a reversal of the decree would involve an automatic setting aside of the sale. But even then there is considerable difference of opinion among the various High Courts as to the exact position of the decree-holder purchaser. One view is that he has a dual capacity and that in so far as matters relating to the sale are concerned, such for example, as proceedings for the obtaining of possession, he is not even a party to the decree and that such proceedings cannot be said to relate to the "execution, discharge and satisfaction of the decree" within the meaning of S. 47, Civil P. C. The other view is to the opposite effect. But we do not think it necessary to enter upon this vexed question here because we have now to construe S. 21, Debt Conciliation Act and not Section 47, Civil P. C. The one speaks of proceedings in respect of a debt, the other of proceedings relating to the execution, discharge or satisfaction of a decree.

7. Zain-ul-abdin Khan v. Muhammad Asghar Ali Khan, (1888) 10 All 166 = 15 I A 12 = 5 Sar 129 (P C.)

Once the debt has merged in the decree and matters have reached a stage in which it is no longer in the judgment-debtor's power to recall the sale, we are unable to regard proceedings from that point on as relating to the debt. They may or may not relate to the execution, discharge or satisfaction of the decree, but they cease to have effective connexion with the debt. The tie between the two thereafter is only an historical one and so we do not think it would be right to construe these words in such a way as to enable the judgment-debtor to hold the purchaser at bay even when there is no hope of his being able to save his property. The disadvantage of this is obvious. In some cases instalments have been granted by these Boards stretching over 20 years to creditors who have settled. It can hardly have been the intention to withhold possession for 20 years and then at the end of it to relate title back to the date of the sale. But of course that would not be a relevant consideration if the Section was clear, nor do we place much weight upon it though it is one of the grounds which influenced Pollock J.

What we think more important is this: The Debt Conciliation Act is a coercive measure intended to affect vested interests and rights and to bring pressure upon creditors to effect a settlement with their debtors, therefore however beneficent it may be from the point of view of debtors, it operates to the detriment of another class of persons, namely, creditors, and consequently, the Act must, in accordance with the usual rules of construction, be construed strictly. Any ambiguity in its clauses must therefore be resolved along lines which interfere as little as possible with existing rights unless the contrary is unmistakably indicated in other parts of the Act. In the present case the contrary is not indicated, and consequently proceedings which cannot affect the debt one way or another cannot be construed as proceedings in respect of that debt even though there may be a certain historical connexion between them. This is the view which Pollock J. and one of us, Niyogi J., have already taken in 19 N L J 296[1] at p. 298, 1938 N L J 60[2] at p. 63 and 1938 N L J 229[3] at page 230 and it is the view which a Division Bench consisting of Pollock and Digby JJ. upheld in A I R 1938 Nag 108.[5] As regards the decision of Grille J. to the contrary in 1938 N L J 150[4] he proceeded upon the assumption

that the earlier decision of Pollock J. was in respect of a certificate under S. 15 and that consequently the observations in it relating to S. 21 were obiter and did not bind him. He therefore dissented from those observations and reached the opposite conclusion, but unfortunately has not stated his reasons and that places us at a disadvantage.

So far as his criticism of Pollock J.'s observations is concerned, we are, with the utmost respect, unable to agree that they are obiter. The facts are given at pp. 296 and 297 of the report. The decree in that case was obtained on 23rd April 1933. On 19th July 1933, the execution proceedings commenced and the property attached was sold on 13th March 1934. After this, but before the confirmation of the sale, namely on 4th January 1935, the judgment-debtor obtained a certificate from the Debt Conciliation Board. This was produced in the executing Court on 19th January 1935 and the question arose whether the confirmation proceedings could be stayed. In our opinion S. 15 can have no possible application to a case of this kind, for not only had the suit been instituted before the grant of the certificate and a decree obtained, but the sale had actually taken place; and that is what Pollock J. held:

> Sub-section (3) of S. 15 which deals with the stay of execution of decrees does not apply because there has been no suing after the registration of an agreement nor was the debt in question incurred subsequent to such agreement.

He then proceeded to consider the effect of S. 21 and held that it could not apply either because, at that stage, the proceedings no longer related to the execution of the decree. We say nothing about this ratio decidendi here, because, as we have said, there is a wide divergence of opinion on this point and we prefer not to enter upon it in these proceedings. But the ultimate conclusion has our respectful concurrence, and with all due deference to Grille J. we are unable to regard the remarks as obiter.

It is true no mention is made in the judgment about the issue of a certificate under R. 11 and it may be accepted that no such certificate was ever issued, but R. 11 merely empowers a Board to issue a certificate in respect of proceedings "which should be suspended under S. 21." The object of the certificate is merely to bring to the notice of the Court officially that there are proceedings pending before the Board which must be stayed under S. 21. But if it turns out that S. 21 has no application, then clearly no question of stay under that Section can arise. The crux of the matter therefore turns upon the meaning of S. 21 and that is what Pollock J. considered.

Turning now to the actual decision in 1938 N L J 150[4] with the utmost respect, we dissent from it. In the first place, the sale there had not only taken place but had actually been confirmed on the date on which the certificate under S. 21 was produced in Court. It is true the certificate was issued before the date of confirmation, (though after the sale), but a Division Bench of this Court has held in A I R 1938 Nag 109[5] that the stay under S. 21 operates from the date on which the certificate is produced in Court and not from the date on which it is granted. This decision was not brought to the notice of Grille J. (we are not sure that it had been reported at that date), and it is possible that he would not have reached the same conclusion if he had been aware of it. In any case if the certificate under R. 11 is only a stay order, as Grille J. describes it, then it is a moot point whether it can operate till it has been communicated to the Court concerned. The High Courts in India have differed on this point and we feel that the question merits fuller consideration than it received especially as a Division Bench of this Court has decided that so far as S. 21 is concerned, the stay does not operate until the certificate is produced in the Civil Court. But we need not enter into this either. It is enough for us to state that, in our opinion, the proceedings for confirmation of the sale are not proceedings "in respect of the debt" within the meaning of S. 21. The problem which was before the Division Bench does not arise here because the application to the Board in this case was not made until after the sale had taken place, and of course the certificate under R. 11 was not obtained till after that date either. It is pertinent in this behalf to refer to two more Division Bench decisions. In I L R (1938) Nag 489[8] the following words in S. 16 were considered:

> 16. No Civil Court shall entertain—
> (a) any suit in respect of—
> (i) any matter pending before a Board

and the learned Judges stated:

> We must confess to some difficulty in understanding what is meant by a suit in respect of any matter pending before a Board or a suit in respect

8. Shivdin v. Ramratan, (1937) 24 A I R Nag 259 =170 I C 905=I L R (1938) Nag 489.

of the validity of any procedure or the legality of any agreement made under this Act referred to in sub-cls. (i) and (ii) of cl. (a). The matter pending before a Board would appear to be an amicable settlement between the debtor and his creditors, and the only suit in respect of such a matter that we can think of would be a suit restraining the Board from making such settlement. Again, the only suit in respect of the validity of any procedure or the legality of any agreement made under this Act would appear to be a suit for a declaration that some procedure has been invalid or some agreement illegal.

In 1939 N L J 173[9] at p. 182 another Division Bench stated:

We feel the same difficulty as the Judges felt in I L R (1938) Nag 489[8] in understanding what is meant by 'any matter pending before a Board.'

The position here is similar. The confirmation proceedings are in respect of a sale which has been held and which can no longer be challenged. We find it difficult to see how they can be said to be proceedings "in respect of any debt, etc." within the meaning of S. 21. On this ground therefore we agree with the decisions in 19 N L J 296[1] at p. 298, 1938 N L J 60[2] at p. 63, 1938 N L J 229[3] at p. 230 and A I R 1938 Nag 109[5] and respectfully dissent from the decision in 1938 N L J 150.[4] Our answer to the question referred is that neither S. 15 nor S. 21 affects the power of the Civil Court under O. 21, R. 92, Civil P. C., to confirm a sale held in execution proceedings when such sale has taken place before an application under S. 4, Debt Conciliation Act, has been made to the Debt Conciliation Board.

D.S./R.K. *Answer in the negative*

9. Balkrishna v. Pandit Baijnath, (1939) 26 A I R Nag 150=182 I C 662=I L R (1939) Nag 185 =1939 N L J 173.

A. I. R. 1939 Nagpur 287

STONE C. J. AND VIVIAN BOSE J.

Gangaprasad Nandasao Bani and another — Appellants.

v.

Itwarsingh Manoharsingh Maowar and others — Judgment-debtors — Respondents.

First Appeal No. 138 of 1935, Decided on 16th March 1939, from order of Addl. Dist. Judge, Bilaspur, D/. 8th November 1935.

(a) C. P. Land Revenue Act (2 of 1917), S. 203—S. 203 has nothing to do with rights and liabilities of proprietors as between themselves.

Section 203 regulates the rights of the proprietor of the mahal vis-a-vis the persons specified in S. 203 and has nothing to do with the rights and liabilities of the proprietors, when there are more than one, as between themselves. [P 288 C 1, 2]

(b) C. P. Land Revenue Act (2 of 1917), S. 203 (2)—Cosharer parting with agricultural land and retaining only proprietary share in village cannot be said to forfeit his right to house site in abadi.

It is wrong to say that a cosharer who parts with all his agricultural land and retains only a proprietary share in the village would forfeit his right to a house site in the abadi however long he may have been there and however palatial a residence he may have set up on it. [P 288 C 2]

(c) C. P. Land Revenue Act (2 of 1917), S. 188 (2)—Lambardar is not landlord vis-a-vis his coproprietors.

In so far as the lambardar is deemed to be the landlord he is so vis-a-vis tenant only in so far as they hold land of him. This does not make the lambardar the landlord vis-a-vis his coproprietors, except in so far as one or more of them may happen to be a tenant of the whole proprietary body and hold land of them. [P 289 C 1]

(d) C. P. Tenancy Act (1 of 1920), Sec. 2 — Definition of land does not apply to sites in abadi — Same meaning is assigned to 'land' in C. P. Land Revenue Act.

The term 'land' in C. P Tenancy Act and the C. P. Land Revenue Act does not apply to sites in the abadi because such sites are let out for the purposes of constructing houses for the habitation of human beings and that cannot be regarded as a purpose subservient to agriculture within the meaning of that definition: *16 N L J 277, Rel. on.* [P 289 C 1, 2; P 290 C 1]

(e) C. P. Land Revenue Act (2 of 1917), S. 203 (6)—Exproprietor transferring site and building in abadi and keeping acre or two of occupancy land—Palatial residence erected by him in abadi is not preserved for him.

It is not the intention of the legislature to preserve to an ex-proprietor a palatial residence which he may have erected in the abadi in the past when subsequently he may have only an acre or two of occupancy land left to him, after he has himself transferred the site and the building on it and reaped the full benefit of the proceeds. The Court may however if it is just and convenient direct suspension of the operation of the decree for a short period to give him breathing space in which to make other arrangements: *A I R 1918 P C 165, Expl.* [P 291 C 1, 2]

(f) C. P. Land Revenue Act (2 of 1917), S. 68 (5) — Full effect must be given to entry however much vested rights are affected— It is sufficient notice of entry to all concerned if wide publicity is given to all settlement operations.

Once the entry becomes final, full effect must be given to its implications however much vested rights are affected. Even though true notice of matters is not sent to the transferees it does not matter because giving wide publicity to all settlement operations is sufficient notice to all concerned: *A I R 1933 Nag 378, Ref.* [P 292 C 2]

(g) C. P. Tenancy Act (1 of 1920), S. 49 (1) — Mortgagor losing right to occupy sir land by foreclosure is entitled to benefit of Sec. 49 (1) even if land was declared sir after mortgage but before suit — Benefit can be claimed in execution.

Where a mortgagor loses his right to occupy his sir land as proprietor by means of foreclosure suit

by mortgagee, he is entitled to the protection of Sec. 49 (1) even if the land was declared to be *sir* after the date of mortgage but before the date of the foreclosure suit : *A I R 1933 Nag 104; A I R 1924 Nag 155 and A I R 1934 Nag 241, Rel. on.* [P 293 C 1]

The benefit of S. 49 (1) can be claimed in execution when the decree itself does not confer it, because the right does not arise until the date of the loss, that is to say until the date of the foreclosure decree. All that will pass to the decree-holder will be possession of the proprietary rights in the land subject to the occupancy rights which have accrued in the mortgagor's favour : *S. A. No. 517 of 1935, Expl. and Disting.* [P 293 C 1, 2]

(h) Mortgage — Mortgage by conditional sale — Mortgagor's title and right of possession is not lost on date of mortgage.

A mortgagor does not lose either his title or his right to possess on the date of the mortgage even if the mortgage is by conditional sale. [P 294 C 2]

M. R. Bobde — *for Appellant.*

M. B. Kinkhede and A. R. Kulkarni — *for Respondent 1.*

Judgment. — This is a decree-holder's appeal in objection proceedings in execution. The objector is the judgment-debtor and is the respondent here. The appellant obtained a final decree for foreclosure against the respondent on 26th June 1935. Among the property foreclosed is the whole of the defendant's malguzari share in the village (twelve annas in extent), 24.65 acres of *sir* land, and a house in the abadi. The last two items form the subject-matter of the objection and of this appeal, the respondent's contention being that he having become the exproprietary occupancy tenant of the *sir* by reason of the foreclosure decree cannot be evicted; and in respect of the house, that he now being entitled to a house site in the abadi under S. 203, C. P. Land Revenue Act, cannot be turned out of that either.

We will take up the question of the house first. At the date of the mortgage, the respondent was a cosharer in the village; in fact he was the lambardar, but that makes no difference in the view we take. He was therefore owner of the house and of the site, and in the absence of a contract with the rest of his cosharers restricting his rights of alienation had as much right to dispose of both the house and the site as he had to dispose of the share itself, without consulting his cosharers. The restrictions on transfer contained in S. 203 do not apply to him. That Section regulates the rights of the proprietor of the mahal vis-a-vis the persons specified in S. 203 and has nothing to do with the rights and liabilities of the proprietors, when there are more than one as between themselves.

Sub-section 1, S. 203 states that every person holding land in a mahal for agricultural purposes is entitled to a house site in the abadi free of rent. Now that is curious language to use of a proprietor, for one does not usually speak of a proprietor holding his own land free of rent, but even if it be conceded that this sub-section is wide enough to cover such a person, the other clauses leave us in no doubt, and of course the Section, which is a special Section dealing with special customary rights, now made uniform and crystallized in a statute, must be read as a whole.

Sub-section (2) states that such person on ceasing to hold such land, etc., shall forfeit his right. That would mean, if the respondent's contention is sound, that a cosharer who parts with all his agricultural land and retains only a proprietary share in the village would forfeit his right to a house site in the abadi however long he may have been there and however palatial a residence he may have set up on it. Many malguzars who own no agricultural land have acquired, especially of recent years, a sort of country residence to which they like to repair at intervals. If this contention is sound, they would forfeit their rights to these sites, and also most of the money they have sunk in their buildings, for granting their right to take away the materials, though even that is doubtful once their right to occupy has ceased, the labour of erection and demolition would be a dead loss, as also the depreciation of the materials. We do not think that the Legislature intended that such a result should ensue.

We turn next to sub-s. 4 which we think is the crucial one so far as this point is concerned. It states that the proprietor of the mahal shall be entitled to allot sites in the abadi. Now who exactly is the proprietor? In the absence of any special definition, it would of course mean the owner of the mahal if there was only one, or the whole body of owners if more than one. But there are special definitions in the Act and so we have to see whether and how far they modify that fundamental conception. The Act has a number of definitions which deal, in one way or another, with the word "proprietor." But the only one relevant to the present purpose is the one given in S. 2 (6):

Lambardar means the proprietor of a mahal appointed to discharge the duties imposed upon a lambardar by this Act.

That is to say, when there are a number of proprietors, one of them is selected by the requisite authority to discharge certain specified duties on behalf of the entire proprietary body. What those duties are, are to be found in S. 188 (1). They include several things grouped under three heads but do not include the letting out of sites in the abadi. S. 188 deals with two things. The first sub-section deals with the duties of lambardars and the second with their powers. Since the letting out of house sites in the abadi has not been placed among the duties of lambardars, and since this clear cut distinction has been made between duties and powers, it is clear that the lambardar has no statutory authority to deal with house sites in the abadi so far as S. 188 (1) and the definition just given are concerned. We must look elsewhere for that. We turn next to sub-s. (2). Cl. (a) states that the lambardar "shall be deemed to be the landlord within the meaning of the Central Provinces Tenancy Act, 1898." When we turn to the definition of landlord given there, (it happens to be the same in the Act of 1920), we find him defined as follows:

Landlord means the person of whom a tenant holds land and to whom a tenant is, or but for a contract, would be liable to pay rent.

Therefore in so far as the lambardar is deemed to be the landlord, he is so vis-a-vis tenants only and only in so far as they hold land of him. This does not make the lambardar the landlord vis-a-vis his co-proprietors, except in so far as one or more of them may happen to be a tenant of the whole proprietary body and hold "land" of them. Now the words "tenant" and "land" have not been used in their ordinary sense in the C. P. Land Revenue and Tenancy Acts but have been given special meanings by a number of definitions and clauses which are peculiar to these Acts, one of them being that a tenant is a person who holds land of the landlord. Now what does the word "land" as used here mean? Does it include house sites in the abadi? We do not think it does. The word has not been defined in the Land Revenue Act but it is defined as follows in the present Tenancy Act, (the definition was the same in the old Act):

Land which is let or occupied for agricultural purposes or for purposes subservient thereto and includes the sites of buildings appurtenant to such land.

The Revenue Courts held in 16 N L J 277[1] that this does not apply to sites in the abadi because such sites are let out for the purposes of constructing houses for the habitation of human beings and that that cannot be regarded as a purpose subservient to agriculture within the meaning of that definition. We think this is right though we have no doubt that had it not been for the special meanings assigned to these words in the Land Revenue and Tenancy Acts of this Province, that would probably not have been so. Agriculture was not defined in the old Tenancy Act but is now defined in the present Act as including

(a) the raising of annual or periodical crops and garden produce ; (b) horticulture ; (c) the planting and upkeep of orchards ; and (d) the reserving of land for fodder, grazing or thatching grass.

The only difference this has made to the law as then interpreted by the Courts in Nagpur is in respect of horticulture. Certain rulings of the Judicial Commissioner's Court had doubted whether agriculture included these purposes. The new Act makes it clear that it does. It is clear therefore that the building of a house in the abadi is not agriculture. Is it then a purpose subservient to agriculture? Now, we have no doubt that the building of a house may, in certain circumstances, amount to that and in fact the definition itself says so, but the question is whether the building of a house site in the abadi amounts to a purpose subservient to agriculture. None of these definitions helps us to solve that problem. We have therefore to look elsewhere. The Tenancy Act defines a tenant as

a person who holds land of another person and is, or but for a contract would be, liable to pay rent for such land to such other person . . . . etc.

If house sites in the abadi are "land" within the meaning of these Acts, then the moment a proprietor lets a person into possession under a special contract he would at once make him an occupancy tenant and would thereafter be unable to get rid of him or even to enforce the terms of his contract against him whatever they might be. But S. 203 (6), Land Revenue Act, negatives this by enacting that "nothing in this Section shall affect the terms of any contract and the holder of a site in the abadi." And it is to be observed that the Section carefully avoids the use of the term "land" when referring to sites in the abadi. Whenever it uses the word "land," as it does in sub-ss. (1) and (2), it uses the term to

1. Ghanshiam Singh Gupta, (1933) 16 N L J 277.

mean land in the mahal which is outside the abadi. This matter will be found discussed in Barway's Tenancy Act, Edn. 2, pp. 31 and 32. Therefore, we think that the term "land" as used in these Acts does not include house sites in the abadi.

Once that is accepted, then it becomes clear that the lambardar is not the "landlord" of the persons who hold these sites, within the meaning of S. 188 (2) (a), Land Revenue Act. It is to be observed that S. 203 does not speak of the landlord but of the proprietor, and we think advisedly for this reason. Tenants are not the only persons entitled to house sites in the abadi free of rent : there are also agricultural artisans and labourers and the village watchmen. These persons do not necessarily hold their sites free of rent because of a contract, but originally, because of custom, and now because of the statute. Therefore they do not fall within the definition of " tenant " given in the Tenancy Act and consequently the proprietor is not their 'landlord' within the special meaning given to this term in the two Acts. That leaves us then with S. 188 (2) (b). This says that the lambardar shall " exercise the powers of the proprietors in matters relating to the village abadi . . . ." The lambardar therefore derives his authority to act in the abadi from this part of the Section, but he acts there on behalf of the proprietary body as its agent, and not because of some peculiar status which places him above his cosharers and gives him the right to dispose of their own personal possessions. He is not acting there as " the landlord. " He is deemed to be that only vis-a-vis " tenants" in respect of "land" held of him, and for no other purpose.

Now it is impossible to say that an agent can farm out his principal's land to his principal, or to any one of them when there are more than one, unless he is specially invested with such powers by statute. But we have seen that so far as the abadi is concerned, the lambardar is not "the landlord" but only an agent empowered by statute to do certain acts on behalf of his principals, but not over their heads.

The moment that is accepted then it becomes clear that S. 203 is not dealing with the rights and limitations of the proprietors as between themselves, but with the rights of the persons specified in sub-s. (1) (which on this hypothesis is limited to persons who have obtained house sites from " the proprietor" and cannot include the proprietor himself) vis-a-vis the proprietors, and that being so, the restrictions in the Section on transfer do not apply to the proprietors. Historically also this is so. It must be remembered that S. 203 merely reproduces with modifications what originally were the village customs recorded in the wajibularz. Of course the new Land Revenue and Tenancy Acts have radically altered the old conceptions of certain terms, but for all that S. 203 substantially crystallizes in a statute and unifies a series of village customs originally recorded in the wajibularz. Now the history of the wajibularz is this. In the sixties proprietary rights were conferred upon malguzars but they were not the fee simple rights known to English lawyers; in fact the term is sometimes quite unknown to them. The following paragraph from our decision in F. A. No. 177 of 1933,[2] where this matter has been discussed at length, will explain the position :

> It is to be observed that the term proprietary right is not used by English lawyers and Baden Powell suggests in his Land Tenures of British India, Vol. 1, page 217 that it was used because Government rarely acknowledged anything like a complete unfettered right vested in any one person. But however that may be, this much is certain, that the 'proprietor' does not possess 'the entire bundle of interests which in the aggregate make up a complete or absolute estate but only some of them, the remainder being enjoyed by other persons such as 'tenants' 'inferior proprietors,' 'tenure holders' and the like'; also there is the obligation to pay land revenue to Government and the reservation by Government of its rights in mines and quarries and in large tracts of uncultivated forest. The tenure is therefore not the fee simple of English law.

These rights which were carved out of the fee simple were entered in the wajibularz or village administration paper which thus embodied not only the village customs but also the conditions on which the malguzars were to hold their villages in " proprietary rights." It regulated the rights as between the malguzars taken as a body on the one hand, and as between Government and the tenants and other inhabitants of the village on the other. Originally, all interested had to sign this document, but in some places the lambardar alone signed on behalf of the whole proprietary body. See Baden Powell's Short Account of the Land Revenue and its Administration in British India, 2nd Edn., p. 194, Note 1. This cumbrous method of requiring countless signatures (see S. 80 of the old Land Revenue

2. Thakur Laxmansingh v. Durgapershad, First Appeal No. 177 of 1933.

Act) was abolished by the present Act, and in its place was substituted the present system which presumes the correctness of these entries, the aggrieved parties being given rights of appeal in the Revenue Courts and also an opportunity of contest in the Civil Courts. But the point is this: lambardars frequently signed the wajibularz on behalf of the whole proprietary body. They could hardly have done this if the wajibularz was intended to regulate the rights and liabilities of the malguzars inter se. If that had been the case, the signatures of all would have been necessary. Therefore, whether the question is viewed in its historical perspective or as a pure matter of construction, the conclusion is, we think, the same. Now once it is established that the respondent, as one of the proprietors, owned his house and the site on which it stood, and that he had every right to transfer it, it is clear that having done so he cannot resist the implications of his act unless the Legislature or some special law protects him. S. 49, Tenancy Act, does not help him because it does not relate to abadi sites, nor does S. 203, Land Revenue Act, because it does not preserve to a proprietor entitled to transfer the fruits of the property transferred by reason of the transfer.

It was argued that it is the policy of the Legislature to give every agriculturist, whether a proprietor or not, a place to live in so as to enable him to carry on his agricultural operations and that until another suitable site is found for him he cannot be turned out of the one he already occupies. We can only gather the intention of the Legislature from the language it employs and when we find in S. 203 (6) that the holder of a site in the abadi can effect a transfer with the proprietor's permission by the simple expedient of entering into a contract with him, the argument loses much of its force. Moreover, when, as here, the respondent himself would be the one to give such permission, he can clearly not be heard to say that he did not consent to his own transfer. We can hardly think that the intention of the Legislature was to preserve to an ex-proprietor a palatial residence which he may have erected in the abadi in the past when now he may have only an acre or two of occupancy land left to him, after he has himself transferred the site and the building on it and reaped the full benefit of the proceeds.

We do not see how he can be in a better position than a tenant who transfers his site with the consent of the lambardar, a thing which the Act permits. He may be, and indeed is, entitled to a fresh site and it may be just and convenient in most cases to direct suspension of the operation of the decree for a short period to give him breathing space in which to make other arrangements, but we can find no justification for holding that that permits him to break a contract which the law has permitted him to make. If the intention was to give him special protection in this behalf it would have been given in express terms. In the absence of any such limitation full effect must, we feel, be given to the transfer. We have dealt with this at length because of a decision in 14 N L R 165[3] at p. 174 which is often cited as authoritative in these matters. That case went up to their Lordships of the Privy Council but only in respect of the ex-proprietary occupancy land and not in respect of the houses in the abadi. Therefore though the judgment of this Court was upheld by their Lordships, this question was not before the Board and the decision on this point remains a decision of the Judicial Commissioner's Court.

We do not think it is of assistance here because the present Land Revenue Act was not then in force. The decision was given in the year 1910 in respect of a contract of February 1905 and rested upon provisions contained in the wajib-ul-arz, the provisions of which have not been placed before us. But even if they were generally similar to those of S. 203 the matter would not be carried much further because of the special technical significance of the terms "proprietor," "lambardar" and "landlord" and "land" in the present Acts. The old conception of these terms has been radically altered by the present Land Revenue and Tenancy Acts. One illustration will suffice. The definition of "lambardar" given in the Land Revenue Act of 1881 is that he is the person appointed to represent the proprietary body "in its relations with the Government." Beyond that no statutory recognition was afforded him and he was merely looked upon as a sort of customary agent of the proprietary body: *see* 11 N L R 164[4] at page 168.

3. Narayan Ganesh Ghatate v. Baliram, (1918) 5 A I R P C 84=48 I C 141=45 I A 179=46 Cal 76=14 N L R 165 (P C).

4. Dina v. Bishambar Singh, (1915) 2 A I R Nag 125=31 I C 464=11 N L R 164.

One result of this was that his powers, except in his dealings with Government, could be withdrawn and the proprietors could, when they so chose, appoint another man, not the lambardar, and not even a proprietor, to represent them in all matters unconnected with Government: *see* 10 N L R 93.[5] Also, that when there were more lambardars than one, the consent of all had to be obtained to invest their action with validity unless the proprietors made some express or implied arrangement to the contrary: 12 N L R 24.[6] Now, he has to discharge the duties of the proprietors in some matters, is deemed to be "the landlord" in others, and is a statutory agent who cannot be removed except by the revenue authorities and whose powers cannot be abrogated in still others. Therefore, a ruling based upon conceptions so fundamentally different to the ones now prevalent cannot assist us in construing the meaning of expressions vested with the special technical significance given to them for the first time by the Act of 1917: 14 N L R 165[3] was distinguished by one of us along these lines in M. A. No. 204 of 1936[7] and by a Division Bench which upheld it in I L R (1939) Nag 59.[8] We think therefore that it can be accepted that the view taken in 14 N L R 165,[3] as regards house sites in the abadi, is now obsolete because of the change in the law effected by the Legislature.

The appeal consequently succeeds so far as the house and the house site are concerned. Possession of this will be given to the appellant. But since the respondent is entitled to a house site of reasonable dimensions consonant with his present status as an ex-proprietary occupancy tenant of 24·65 acres of land, we direct suspension of the operation of this decree for a period of three months to enable him to make other arrangements for himself. We make it clear however that this will not entitle him to remove any portion of the materials of the house. They became the property of the appellant along with the site and the building on the date of the foreclosure. We also make it plain that we are exercising here a purely discretionary power which cannot be claimed as of right: and in suitable cases it may be right to place the judgment-debtor upon terms such as payment of rent, or compensation for use and occupation, in the interval. We do not do so here because no terms have been suggested and we do not know what the rent is likely to be except that it cannot be much and so not worth while enquiring about further.

We turn now to the question of the land. The difficulty here is that it was not *sir* at the date of the mortgage. It was converted into *sir* after the mortgage but before the institution of the suit. A second difficulty is that this matter was not brought to the notice of the Court which passed the decree with the result that the decree was passed on the assumption that the land was khudkast and the respondent has been directed to deliver possession of it to the appellant. The first point taken on behalf of the appellant on this part of the case is that any rights conferred upon the mortgagor subsequent to the mortgage must be subject to the mortgage and that the mortgagee cannot be prejudiced by subsequent events to which he was not a party. This is no doubt the normal rule but here a statute has intervened and so the rights of both sides are subject to its provisions. S. 68, C. P. Land Revenue Act, empowers the Settlement Officer (and S. 106 (c) the Deputy Commissioner when a settlement is not in progress) to record land as *sir* and, subject to S. 68 (5), makes the entry conclusive. Therefore once the entry becomes final, full effect must be given to its implications however much vested rights are affected. S. 68 (5) affords a *locus penitentiae* within which any person aggrieved can institute a civil suit for the cancellation of the entry, but if that is not done, no other remedy is available. It is true, notice of these matters is not sent to mortgagees but on the other hand wide publicity is given to all settlement operations and if the Legislature deems this sufficient notice to all concerned, it is not for the Courts to hold otherwise: *see* in this respect 30 N L R 109[9] at p. 110.

This question has been debated in the Judicial Commissioner's Court in 29 N L R 142,[10] A I R 1924 Nag 155[11] and 17 N L J

5. Haijnath v. Raghunath, (1914) 1 A I R Nag 84 =26 I C 608=10 N L R 93.
6. Ganpatsao v. Pandurang, (1915) 2 AIR Nag 41 =33 I C 758=12 N L R 24.
7. Ramadhin v. Seth Sheodutt Rai, *Reported in* (1938) 25 A I R Nag 544=180 I C 690.
8. Dukhuram v. Khanderao, (1939) 26 AIR Nag 83=181 I C 577=I L R (1939) Nag 59.
9. Bholu v. Chhajjulalsa, (1933) 20 A I R Nag 378=147 I C 561=30 N L R 109.
10. Rajeshwar v. Mt. Rukhma, (1933) 20 A I R Nag 104=142 I C 603=29 N L R 142.
11. Bhimraja v. Mukundilal, (1924) 11 A I R Nag 155=76 I C 637.

100,[12] and in each case the fact that the land was declared *sir* between the date of the mortgage and that of the suit was held not to matter, and so the protection afforded by Sec. 49, C. P. Tenancy Act, was given to the exproprietor. That Section, in our opinion, admits of no doubt. It is in these terms :

> Notwithstanding any contract to the contrary . . . a proprietor who . . . . loses . . . . his right to occupy any portion of his *sir* land as a proprietor shall, at the date of such loss, become an occupancy tenant of such *sir* land.

The mortgage cannot, we think, be placed higher than an express contract to the contrary, and there can be no doubt that the right to occupy as a proprietor is lost at the date of foreclosure. Consequently, following these decisions, we hold that the respondent is entitled to the benefits conferred upon him by S. 49 (1). We observe however that this position is not, in our opinion, satisfactory even from the point of view of the agricultural community. It permits a mortgagor here and there to gain and, as a consequence, a mortgagee to lose. But this sort of unfair result can be and is reflected in a general raising of interest rates. The very high rates of interest required by money-lenders in India are, bearing in mind the usual law of supply and demand, necessary. We speak of course of reasonable rates such as 10 per cent. Such a rate is more than double what is charged in England (4-4½ per cent.) The reason doubtless is that the risk is higher. It is higher because of the law to a large extent. The emergence of a minor, the peculiarities of the joint family system, the statutory intrusion of provisions such as we have been examining are all factors which make it necessary, if the money-lender is to make his business pay, to charge higher rates than would otherwise be necessary. We consider that this particular risk could and should be eliminated by giving notice to persons whose rights are affected before land is converted from khudkast to *sir*.

The next question is this : can these benefits be claimed in execution when the decree itself does not confer them? This was resolved in favour of the judgment-debtor in 17 N L J 100,[12] and we think rightly. The right does not arise until the date of the loss, that is to say, until the date of the foreclosure decree. Consequently, we cannot see how a person can be compelled to claim it (however much it may be desirable in his own interests to do so) in advance before it has accrued. It accrues automatically in the passing of the final decree and as a result of that decree. Consequently the earliest stage at which it ought logically to be put forward is as an objection in execution. In all these matters the rule of "might and ought" obtains. It is not only that which might have been claimed which has to be considered but that which ought to have been claimed and as we say we find it impossible to say that a right which has not accrued ought to be claimed until it actually comes into existence. That also answers the next objection, namely, that as the decree directs delivery of possession, the executing Court has no option but to obey. Under S. 74, and O. 21, Rr. 97 and 98, Civil P. C., the judgment-debtor is entitled to resist execution for any just and sufficient cause; and we cannot see what juster cause there can be than that a statute ordains that on the passing of the decree the rights which the judgment debtor claims are to spring into existence. The decree in such a case must be read subject to the statute. Therefore all that will pass to the decree-holder will be possession of the proprietary rights in the land subject to the occupancy rights which have now accrued in the respondent's favour. The appeal as regards this is dismissed.

After we had heard arguments, and after the above portion of the judgment had been partially written in draft, but before judgment was delivered, the learned counsel for the decree-holder appellant drew our attention to a decision of Pollock J. in S. A. No. 517 of 1935[13] and said that it might throw a new light on this difficult question. In these circumstances we thought it right to rehear counsel on this one point. Having done so we are of opinion that the decision of Pollock J. has no application to the facts of this case. The facts there, in so far as they are relevant here, can be stated as follows: *A*, the owner of a patti in a malguzari village which had *sir* and khudkast lands appertaining to it, agreed to sell the patti together with the lands comprised in it, to *B* excluding however the "cultivating rights in the *sir*." We will call these khudkast fields *X* and *Y* and the *sir* land *Z*. This agreement was made on 1st August 1928. After this, and in defeasance of the above

12. Vishwanath v. Jagannath, (1934) 21 A I R Nag 241=151 I C 1062=17 N L J 100.

13. Sk. Juman v. Durgaprasad, Second Appeal No. 517 of 1935.

agreement, *A* sold the same property to *C* on 6th December 1928. *C* took with notice of the prior agreement in favour of *B*. *B* thereupon sued *A* and *C* for specific performance and obtained a decree on 21st June 1930. Some time before this, namely on 15th March 1929, though whether before or after *B's* suit is not clear, (we will assume in the appellant's favour that it was before the suit), khudkasht field *X* was declared *sir* by the Settlement Officer. After the decree *B* was given formal possession of the property "excluding the cultivating rights in the *sir*" and according to the judgment of the lower Court in that case *B* was not placed in khas possession of *X* which by then had been declared *sir*. But in spite of that *B* took actual cultivating possession. *C* therefore sued *B* for the recovery of possession. Pollock J. decided (1) that in circumstances like these *B's* title takes effect from the date of his prior agreement (in that case 1st August 1928) and that therefore (2) *A*, the vendor, had no title left in him which he could transfer to *C* after that date; consequently, (3) *C* took without title and was a trustee for *B* and so could not withhold possession from him. With that we entirely agree. Not only is it clear from Illus. (g) to S. 3, Specific Relief Act, and from S. 91, Trusts Act, both of which have been referred to by the learned Judge, but it also follows from S. 27 (a), Specific Relief Act, read with the illustrations to it, particularly the second. Pollock and Mulla, in their learned commentary on the Specific Relief Act, Edn. 6, page 815 explain that :

> The rule is a consequence of the equitable doctrine which regards a purchaser as acquiring as soon as the contract is complete, the rights of an owner against the vendor and all persons not being purchasers for value without notice of the contract, and not claiming under an independent title adverse to the vendors.

This is also the decision of the Calcutta and Bombay High Courts in 49 Cal 495[14] and 40 Bom 498,[15] both of which have been cited by Pollock J. It is clear then that on this view *B* is deemed in the eye of the law to have obtained title as against *C* from the date of the agreement and that consequently *C's* title was entirely displaced as against *B*. If his title was displaced from the date of the prior agreement, then so also was his right to possess, and consequently, when the land was declared *sir* *C* had neither title nor a right to possession as against *B*. In the eye of the law he never had either right as against *B*, or if he did, then both must be deemed to have been lost from the date of the agreement. That being so *C* could clearly not claim the benefit of S. 49, Tenancy Act, and resist *B's* right to possess the land. That Section can only operate on *sir* land, and can only enure for the benefit of the person who was the proprietor of the land at the date when the loss occurred, and on this hypothesis *C* was never a proprietor so far as *B* was concerned, and in any event must be deemed to have lost his right to possess before the land became *sir*. It is to be observed that *A* does not come into the picture at all in Pollock J.'s case except incidentally, and we say nothing here about his rights in a case of that kind; all we decide here is that the decision of Pollock J. has no application to the facts of this case because a mortgagor does not lose either his title or his right to possess on the date of the mortgage. It is also to be noted that Pollock J. took the same view as we are taking in a mortgage case, namely 17 N L J 100[12] to which we have already referred.

It was argued that a mortgagor does lose his title, as also his right to possess, from the date of the mortgage when, as here, the mortgage is by conditional sale, and reference was made to S. 58 (c), T. P. Act. But the opening words of that clause furnish the answer: "when the mortgagor ostensibly sells the mortgaged property." The stress is on the 'ostensibly.' It means clearly that when on the face of the deed he purports to sell but in reality has no intention of doing so, and the conditions are such that the law infers a transaction of mortgage from the words of ostensible sale. It is too late in the day to suggest that the full proprietary title passes on the date of the mortgage in such cases, and still less to urge that the right to possess is also lost unless the mortgage is possessory. We are of opinion therefore that S. 49 (1), C. P. Tenancy Act, applies, and that the judgment-debtor respondent became the ex-proprietary occupancy tenant by reason of the foreclosure decree, and that he is therefore entitled to resist the decree-holder's claim to khas possession of the land now in dispute. As regards costs, the trouble has arisen because of the respondent's omission to inform the trial Court about the fact that subsequent to the mortgage the lands in question here were converted into *sir*.

14. Jahar Lall v. Bhupendra Nath, (1922) 9 A I R Cal 412=67 I C 108=49 Cal 495=34 C L J 79.
15. Gangaram v. Laxman Ganoba, (1916) 3 A I R Bom 95=37 I C 360=40 Bom 498=18 Bom L R 455.

Therefore we direct that the appellant will obtain his full costs here and in the Courts below. The lower Court's decree will be modified accordingly.

D.S./R.K. *Order accordingly.*

A. I. R. 1939 Nagpur 295

NIYOGI AND POLLOCK JJ.

Baliram Singh and others — Accused Appellants

v.

Emperor.

Criminal Appeal No. 66 of 1939, Decided on 23rd May 1939, from order of Sess. Judge, Amraoti, D/- 7th March 1939.

(a) Criminal P. C. (1898), Ss. 164 (3) and 533 — Certificate recorded only partly complying with S. 164 (3) — Evidence that statement was voluntarily made is admissible under S. 533.

Where after the confession had been recorded the Magistrate certified that the examination of the accused was taken in his presence and hearing but the certificate only partly complies with sub-s. (3) of S. 164, S. 533 renders it admissible to give evidence that the statement was duly recorded, i. e. that the statement was voluntarily made and represents what was said : *A I R 1937 Nag 220, Disting.* [P 298 C 2]

(b) Evidence Act (1872), Ss. 10 and 30 — Object of conspiracy carried out — Subsequent confession made by accused after arrest is not admissible under S. 10 though it may be taken into consideration against co-accused under Section 30.

Where the object of the conspiracy had been carried out and the conspiracy had come to an end, a subsequent confession made to the Magistrate by the accused after arrest cannot be said to have reference to the common intention of the conspirators. The confession may however be taken into consideration against co-accused under S. 30. It does not stand on the same level as substantive evidence but it may be used to supplement the substantive evidence : *A I R 1920 Cal 300 ; A I R 1932 Bom 56 and A I R 1933 Oudh 86, Rel. on.* [P 299 C 1]

(c) Criminal Trial — Confession — Retracted confession cannot be used to contradict co-accused's confession.

Retracted confession though can be used to contradict the accused making it, it being not substantive evidence cannot be used to contradict co-accused's confession. [P 230 C 1]

T. J. Kedar, R. G. Rau, R. D. Saranjame, J. Sen and M. Adhikari — *for Appellants.*

W. R. Puranik, Advocate-General — *for the Crown.*

Judgment. — The appellants Baliram Singh, Rajaram Bapu, Waman Singh, Hiralal Brahmin, Motilal, Mungilal and Chhote Khan have been convicted of conspiring to murder Narayan Singh. Hiralal Brahmin, Motilal, Mungilal and Chhote Khan have also been convicted of actually murdering him, and Baliram Singh, Rajaram Bapu and Waman Singh have been convicted of abetting that murder. Hiralal Brahmin and Motilal, who were alleged to have done the actual killing, were sentenced to death, and the other five accused were sentenced to transportation for life. Parashram Singh and Hiralal Kalar, who were tried jointly with these accused on charges of conspiring to murder and abetting the murder, were acquitted. Tulsia, who is alleged to have been a member of the conspiracy and to have taken part in the murder, was granted a pardon and turned approver. An unusual feature of the case is that the assessors were unanimously of opinion that all the appellants except Waman Singh were guilty of the offences with which they were charged. In the Sessions Court wholesale allegations of misconduct were made against the police, but these have been more or less abandoned.

On the morning of 1st August 1938 Narayan Singh was found lying seriously injured in the field of Lutturam (P. W. 5) just outside Chandur Bazar. Lutturam at once made a report at the Station-house and Narayan Singh was taken in a lorry to the Chandur Bazar hospital where he died shortly afterwards without regaining consciousness. Narayan Singh had three incised wounds on the left side on his head, varying in length from $5\frac{1}{2}''$ to $4\frac{3}{4}''$ bone deep, and the skull was very extensively fractured. A portion of the left ear had also been severed and there was an incised wound on the middle finger of the right hand. With such serious injuries it is surprising that he survived so long as he did. Suspicion fell on Hiralal Brahmin from the start because Narayan Singh's widow Mirabai (P. W. 42) at once stated that her husband had been called away in the night by Hiralal Brahmin. The Sub-Inspector Gazanfar Husain (P. W. 4), who was away at the time, returned to Chandur Bazar at 4 P. M. on 1st August and sealed Hiralal Brahmin's house that evening as there was no time then to search it; it was searched on the following day and a safa (Art. M) and satur (Art. N) were seized. The murder was obviously committed with some heavy cutting weapon and the satur is a heavy knife which, according to the Civil Surgeon, might easily have caused the wounds found on Narayan Singh. Blood stains were found on the safa, though it has not been shown that the stains were of human blood, and

the satur gave the benzidine test for blood. On the same day Hiralal Brahmin told the Sub-Inspector that he would show the place where Narayan Singh had been murdered. There is some discrepancy whether Hiralal Brahmin stated that he would show the place where he murdered Narayan Singh or the place where Narayan Singh was murdered. As it is not clear which he said, it must be taken that he stated that he would show the place where Narayan Singh was murdered. He pointed out the spot marked A in the map, just outside Chandur Bazar, where the earth appeared to be blood stained and three rags stained with blood and fæces were found on the ground. This spot was just off the main road which leads from Chandur Bazar to Morsi. From the point B, 280 feet east of A, blood stains were found along the road up to the bridge which is 2207 feet east of B. Narayan Singh's body was found in a field 149 feet north of the road at C, which is 380 feet from the bridge. Mirabai's statement that it was Hiralal Brahmin who took Narayan Singh away with him on the night of 31st July-1st August was corroborated by Mt. Bedi (P. W. 45) and to some extent by Shaikh Kadar (P. W. 18) who stated that he saw two men going towards the Morsi Road that night and later three others following them. Both these witnesses came forward on 2nd August to inform the police of what they had seen and we agree with the learned Sessions Judge and the assessors that there is no reason why this evidence should be rejected. The witnesses differ to some extent as to the time when Hiralal Brahmin called Narayan Singh but such differences are to be expected and we do not think that they weaken the evidence in any way. The earth and the rags found at the spot indicated by Hiralal Brahmin gave the benzidine test for blood, and this together with the blood-stains found on the safa (Art. M) and the discovery of the satur which was found hidden in the roof, leave no doubt that Hiralal Brahmin was one of the murderers.

Though the record is extremely bulky and the arguments in the case have been extremely lengthy, the evidence of any real significance lies within a very small compass. As against the other accused, the most important evidence is that of Suleman (P. W. 7). He has stated that on 24th July Motilal came to his house at Rajna and told him that Baliram Singh wanted to see him. Baliram Singh is a resident of Shirasgaon Band which lies about two miles west of Chandur Bazar on the road to Ellichpur. Of the other accused Rajaram Bapu, Parasharam Singh, and Motilal and the approver Tulsia are residents of Shirasgaon Band, and Waman Singh, Chhote Khan, Mungilal and the two Hiralals are residents of Chandur Bazar. The deceased Narayan Singh was living in Chandur Bazar at the time of his death but had resided for a time in Shirasgaon Band. While Suleman reached Baliram Singh's house, Baliram Singh, according to Suleman, offered him Rs. 500 if he would kill a man and said that he would give one or two men to help him, pointing to the accused Motilal. Suleman however said that, though he was quite willing to beat anybody, he was not willing to kill anyone and asked who the man was. Baliram Singh said that he was a Kalar of Chandur Bazar. Suleman who had previously sworn that he would not reveal anything told to him, was then asked not to mention it to Baliram Singh's brother Raghubanshi, a pleader of Ellichpur who had defended Suleman on one or two occasions. Rajaram Bapu then came in and asked Baliram Singh whether it was all right and Baliram Singh replied that the man was frightened. After Baliram Singh and Rajaram Bapu had gone into the house, Suleman asked Motilal who was the man to be killed and Motilal said that it was Narayan Singh. After that Suleman left.

The murder was committed a week later. According to Suleman, he left Rajna on the Wednesday following the above talk and preceding the murder and went to Indla where his brother lives and stayed there for 13 or 14 days. He then returned to Rajna and four or five days later heard of the murder of Narayan Singh at Chandur Bazar. Two days later on the following Sunday he went to the Chandur Bazar weekly market where he saw constable Inayatali, who, like himself, is a Rohilla. He told the constable that he knew something about the murder and wanted to see the Station-house officer, but he and the C.I.D. Inspector had gone to Ellichpur. Suleman stayed in Chandur Bazar till their return and made a statement to them, apparently on 26th or 28th August.

Suleman's evidence was corroborated by Inayatali (P. W. 67), Ramrao (P. W. 9) and Baburao (P. W. 10). Ramarao, who lives at Dhanora which is between Rajna and Shirasgaon Band, said that he saw Suleman

and Motilal as they were passing through his village on the morning of Sunday (that would be 24th July) and Suleman told him that he was going to see Baliram Singh Babarao (P. W. 10), who also lives in Rajna, merely stated that he saw the accused Motilal at his village on that Sunday morning going towards the Musalmanpura. Now Suleman is not a respectable person, but respectable persons are not asked to take part in murders: nor is Ramrao a particularly reliable witness for he admittedly gave false evidence on behalf of Suleman in a case under Sec. 145, Criminal P. C. There seems however no reason to suppose that these witnesses would come forward to give false evidence against the accused on a charge of murder. Suleman was cross-examined at very great length and the learned Sessions Judge was impressed by his demeanour and considered that he was worthy of belief. All the assessors apparently took the same view. His evidence appears to us to be true and we agree that it should be accepted.

That shows that on 24th July Baliram Singh and Rajaram Bapu were trying to find somebody to commit a murder and from the statement of Motilal who was in the conspiracy it appears that the man to be murdered was Narayan Singh. A week later, Narayan Singh was in fact murdered. It has been contended that Baliram Singh had no adequate motive for wishing to murder Narayan Singh and that Rajaram Bapu had no motive at all. Baliram Singh's motive, according to the prosecution, was enmity arising out of the intrigue discovered by Baliram Singh between his married daughter Kamla and Narayan Singh. There is evidence that Narayan Singh boasted of this intrigue, but, apart from that, there is not very much evidence of it, though it is quite likely that all the relations of the parties wished to keep quiet. It is obvious however that there was enmity between Baliram Singh and Narayan Singh, whatever its cause may have been. Narayan Singh was prosecuted in the previous August for the theft of cotton on the complaint of Baliram Singh and acquitted; shortly afterwards he was convicted of stealing money in a cinema theatre. His defence on each occasion was that the case had been concocted by Baliram Singh on account of enmity. Baliram Singh may well therefore have been apprehensive that Narayan Singh would seek to take revenge on him when he came out of jail after serving his sentence of nine months and may have come to the conclusion that it was desirable to do away with Narayan Singh. Rajaram Bapu had no personal motive but is a close friend of Baliram Singh.

Rajaram Bapu has led evidence to show that he was not in Shirasgaon Band on Sunday the 24th July. He admittedly had to give evidence in a criminal case at Ellichpur on the 25th and attended the Court for that purpose. The evidence given by him is that he left Shirasgaon Band on the afternoon of 24th July, spent the night at Amraoti, and proceeded to Ellichpur on the following day. There is a pacca road between Chandur Bazar and Amraoti and between Amraoti and Ellichpur; this distance is about 60 miles. There is also a direct road but not a pacca road between Chandur Bazar and Ellichpur, a distance of about 20 miles. As there are motors plying on the pacca road the most convenient way is via Amraoti. The registers showing the passengers carried in the motor buses that left Chandur Bazar for Amraoti on 24th July are not conclusive and the passenger's name shown as Rajaramji who left in the eighth car that day would not necessarily be Rajaram Bapu who is ordinarily described as such and not as Rajaramji Uttamrao (1 D. W. 4), who also gave evidence in the case at Ellichpur on 25th July, said that he left Chandur Bazar by lorry at 10 A. M. and reached Ellichpur at 1 P. M. and then met Rajaram Bapu in the tahsili. Deorao (3 D. W. 3), who officiated for a short time as Assistant Superintendent of Land Records at Amraoti, said that Rajaram Bapu spent a night with him in Amraoti in July or August and went on to attend a case at Ellichpur the next day, but Rajaram Bapu attended two or three hearings in this case, so that evidence is not conclusive. The evidence of Shankarrao (3 D. W. 4) who is related to Rajaram Bapu, appears to us to be of very doubtful value. Had Rajaram Bapu really left Chandur Bazar on 24th July, we think that he could probably have given better evidence than this, and we do not think that this evidence is sufficient to rebut the evidence given by Suleman.

Apart from the evidence considered above, there is the confession made by the accused Motilal. Motilal was produced before Mr. Lawale, Additional District Magistrate, at 3.20 P. M. on 5th September. When the Magistrate asked him whether he wished to make a confession Motilal

said that he did not know anything about the case and did not wish to make a statement. He was accordingly taken away. At 3.35 P. M. Motilal was brought back and he said that he wished to make a confession. The Magistrate explained to him that it was his choice to make a confession or not and Motilal said that he wished to make a confession voluntarily. He was accordingly given time to reflect. On the following day at 3.45 P. M., Motilal was produced and the Magistrate put the prescribed questions to him. In addition to this the Magistrate asked the following question: "You are not making this statement under police threat or fear of beating or other inducement" and Motilal replied: "No Sir, I make it voluntarily." The Magistrate then recorded the opinion that "the answers to the questions put to the accused show that the confession is not involuntary and that it will not be irrelevant." After the confession had been recorded the Magistrate certified that the examination of the accused was taken in his presence and hearing, that the record contained a full and true account of the statement, and that it was read over to the accused and admitted by him to be correct. This is only part of the certificate prescribed by sub-s. (3) of S. 164, Criminal P. C. That Section requires the Magistrate first to satisfy himself from questions put to the accused that the accused is making the confession voluntarily, and finally to certify, after he has recorded the confession, that the confession was, in his opinion, made voluntarily. After the confession has been recorded the Magistrate is in a better position to say whether the confession was voluntary or not, for the manner in which it was made affords some indication whether it was made voluntarily. This is the second case within a day or two that we have had before us in which Magistrates have failed to follow the proper procedure in recording confessional statements, and as a result very lengthy arguments have been addressed to us in each case on the question whether the confession was admissible in evidence or not.

In I L R (1937) Nag 268,[1] where the certificate required by S. 164 was not given and the signature of the accused was not taken, it was held that the confession was inadmissible and reliance was placed on the decision of the Privy Council in 17 Lah 629.[2] S. 533, Criminal P. C., provides that if any of the provisions of S. 164 or S. 364 have not been complied with by the Magistrate recording the statement the Court shall take evidence that the statement was duly made and such statement shall be admitted if the error has not injured the accused as to his defence on the merits. In I L R (1937) Nag 268[1] it was stated that the practice of allowing defects in the formalities in recording confessions to be cured by S. 533 had received a check by the recent ruling of the Privy Council in 17 Lah 629[2] where the practice had been emphatically condemned. In 17 Lah 629[2] the Magistrate made rough notes of what he was told and then dictated a memorandum from those rough notes which he afterwards destroyed. It was not contended that he had purported to act under S. 164 of the Code, but it was argued that evidence could be given of a confession made to a Magistrate just as much as of a confession made to any other person. Their Lordships stated:

> In this case no question of the operation or scope of Sec. 533 arises and their Lordships desire to express no opinion on that matter. It is here conceded that the Magistrate neither acted nor purported to act under S. 164 or S. 364 and nothing was tendered in evidence as recorded or purporting to be recorded under either of those Sections.

Their Lordships went on to hold that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all and that therefore it was not open to give evidence of the confession made to a Magistrate. In the present case however, the position is very different, and we think it impossible to construe S. 533 of the Code so as to render it inadmissible to give evidence that the statement was duly recorded, i. e. that the statement was voluntarily made and represents what was said. In I L R (1937) Nag 268[1] there was apparently no certificate at all, the signature of the accused was not taken, and the confession was described as less of a confession than an inquisition. In the present case the Magistrate has given evidence to show that the confession was made voluntarily and that appears to us to be correct. It would have been better if he had asked the accused why he had changed his mind about making a confession, but that point was covered by the additional

1. Neharu v. Emperor, (1937) 24 A I R Nag 220 =168 I C 962=38 Cr L J 642=I L R (1937) Nag 268.

2. Nazir Ahmad v. Emperor, (1936) 23 A I R P C 253=1936 Cr C 752=163 I C 881=37 Cr L J 897=63 I A 372=17 Lah 629 (P C).

question put by the Magistrate whether the confession was being made on account of threats or inducements offered by the police. We are therefore of opinion that the confession made by Motilal was made voluntarily and is therefore admissible. It has been contended by the learned Advocate-General that the confession is admissible as evidence under S. 10, Evidence Act. We do not think that what was said by Motilal was said in reference to the common intention of the conspirators. The object of the conspiracy had been carried out and the conspiracy had come to an end, and the confession appears to us to have no reference to the common intention of the conspirators. In support of this view, we may cite the decisions in 46 Cal 700,[3] 55 Bom 839[4] and 8 Luck 286.[5] The confession may however be taken into consideration against a co-accused under S. 30, Evidence Act. It does not stand on the same level as substantive evidence but it may be used to supplement the substantive evidence.

The gist of Motilal's confession is as follows: About 2½ years before Baliram Singh had discovered an intrigue between his daughter Kamla and Narayan Singh. After that Narayan Singh was unsuccessfully prosecuted for a theft of Baliram Singh's cotton and later was successfully prosecuted on a charge of pick-pocketing at Ellichpur in a cinema theatre and sentenced to 9 months' imprisonment. About 2 or 2½ months before his release, Baliram Singh and Rajaram Bapu called Motilal and Tulsia Dhobi and said that Narayan Singh ought to be killed, as otherwise he would do something or other unpleasant. After Narayan Singh's return to Chandur Bazar Baliram Singh and Rajaram Bapu called Motilal and asked whether any arrangement had been made for killing Narayan Singh and who was going to be the accomplice. Motilal said that Tulsia and he would do it and that there was no need of any other accomplice. Five or seven days later Baliram Singh and Rajaram Bapu called Motilal and said that Dr. Waman Singh had told them that he had three accomplices and that Tulsia and Motilal were two more. Baliram Singh added, "one accomplice of ours is Suleman of Rajna. Go and call him." On Sunday Motilal went to Rajna and called Suleman. When they reached Shirasgaon Band Suleman went on ahead and later Motilal found him sitting in Baliram Singh's house having a meal. Baliram Singh and Rajaram Bapu, after making Suleman swear that he would not disclose what was going to be said, asked him whether he was willing to murder a Kalal and Suleman refused. After that Suleman went away. On the following Sunday, Nagpanchmi day, the 31st July, Baliram Singh and Rajaram Bapu, called Motilal and Tulsia and told Motilal to come to the house of Dr. Waman Singh between 12 and 2 that afternoon. There Motilal found Baliram Singh, Tulsia, Rajaram Bapu, and Waman Singh. Later Hiralal Brahmin and Mungilal arrived. It was then settled that they should murder Narayan Singh and that Baliram Singh should pay Rs. 300 for the murder. Baliram Singh accordingly paid Rs. 25 each to Hiralal Brahmin, Mungilal, Tulsia and Rs. 7-8-0 to Motilal; Rs. 25 was to be given to Chhote Khan also but as he was not present it was given to Hiralal Brahmin. That night Tulsia came to Motilal's house at 12 o'clock and they both went to Baliram Singh's house. Tulsia had brought an axe from his house and then the two went to Dr. Waman Singh's house where they found Dr. Waman Singh, Narayan Singh, Hiralal Brahmin, and Mungilal playing cards. The play was stopped and Hiralal Brahmin, Mungilal and Narayan Singh left. Hiralal Brahmin later returned there and told them that Narayan Singh had been told that they were going that night to discover buried treasure. At 3 or 4 in the night Hiralal Brahmin came to Dr. Waman Singh's house and called them. Narayan Singh was there and he and Hiralal Brahmin went ahead, followed by Chhote Khan, Tulsia, Mungilal and Motilal. At a place beside the road they started to dig for buried treasure and while Narayan Singh was bending down Hiralal Brahmin struck him on the head with the satur. Motilal struck him a second blow and Hiralal struck him a third blow with the satur. They then lifted him up and threw him on the left side of the road and returned to Dr. Waman Singh's house and afterwards to Baliram Singh's house. Baliram Singh took charge of the axe, kurta, and the satur.

3. Sital Singh v. Emperor, (1920) 7 A I R Cal 300 =54 I C 53=21 Cr L J 5=46 Cal 700=30 C L J 255.

4. Emperor v. G. V. Vaishampayan, (1932) 19 A I R Bom 56=1932 Cr C 40=134 I C 1238=33 Cr L J 76=55 Bom 839=33 Bom L R 1159.

5. Kunwar Sen v. Emperor, (1933) 20 A I R Oudh 86=1933 Cr C 168=141 I C 192=34 Cr L J 124=8 Luck 286=9 O W N 1136.

Tulsia also made a confession and was made an approver, but when he came to give evidence in Court he went back on his confession altogether and said he knew nothing about the case. That confession was used to contradict him, for he was treated as a hostile witness, but it is not substantive evidence and cannot be used to contradict Motilal's confession. The two confessions differ very considerably on important points, and there is some reason to believe that Tulsia's confession was probably untrue on several points. Motilal's confession corroborates the evidence given by the prosecution which has been summed up above except as regards the satur found at Hiralal Brahmin's house. It was the statement made by Suleman to the police that led to the questioning of Motilal, who a week later made his confession. We agree with the learned Sessions Judge that it is in outline a substantially true account of what happened and sufficiently connects the murder of Narayan Singh with the conspiracy of the 24th July described by Suleman.

Baliram Singh has led evidence to show that he was not in Shirasgaon Band on the night of 31st July. The evidence is that he went to Ellichpur to see his nephew who had returned to Ellichpur after an operation in Nagpur, reached there at 7 P. M. and spent the night there. A letter written by his brother Kanhaiya Singh Raghubanshi (1 D. W. 16), a pleader of Ellichpur, from Nagpur on 30th July has been produced (Ex. D. 6), showing that the operation on his son had been performed, that they were returning to Ellichpur by mail on the following day, and that there was absolutely no reason for him to come. Baliram Singh says that he left for Ellichpur in a bullock cart driven by Vithal Singh (1 D. W. 15). They are said to have left Chandur Bazar at 3.30 or 4. P. M. and reached Ellichpur at 7.30 P. M. It seems to us somewhat unlikely that Baliram Singh would have gone to Ellichpur after receiving this letter and most unlikely that he would have gone by the direct road when he could have gone there more conveniently by motor via Amraoti. Like the Sessions Judge we are not at all impressed by this evidence and we consider that the story is an afterthought. There was no suggestion in the committing Magistrate's Court that Baliram Singh was absent from Shirasgaon Band on the night of the 31st July.

As against Baliram Singh, Rajaram Bapu, Hiralal Brahmin, and Motilal we consider that the charges have been proved. Motilal's confession was subsequently withdrawn, but we think that it may safely be accepted and that Motilal should be convicted on this confession, corroborated as it is by the evidence of Suleman. As against the other accused there is hardly any evidence at all. Blood-stains were found on two garments seized from Chhote Khan; he was away from the village for a few days after the murder contrary to his usual practice; and there is evidence that he associates with some of the other accused. There was also a message sent by Hiralal to Waman Singh asking him to pay Chhotekhan's mother and to try to persuade Chhote Khan not to implicate Hiralal; but it is doubtful whether this message behind his back can be taken into consideration against Chhote Khan. This evidence may raise a suspicion that Chhote Khan had something to do with the murder but it makes out no sort of a case against him; the confession made by Motilal is not substantive evidence but can only be taken into consideration where some sort of a case has already been made out. Against Waman Singh the case is even weaker. If the learned Sessions Judge had attempted to analyze the evidence against each accused he would have realized that there was no case against Waman Singh, Chhote Khan and Mungilal, just as there was no case against Parashram Singh and Hiralal Kalal.

The convictions of Baliram Singh, Rajaram Bapu, Hiralal Brahmin and Motilal are therefore upheld. There are no extenuating circumstances and the death sentences passed on Hiralal Brahmin and Motilal must therefore be maintained. We do not understand why the learned Sessions Judge thought that Baliram Singh who organized the murder should be treated more leniently than the men whom he hired to carry it out, but as there has been no application for enhancement of the sentence passed on Baliram Singh, we do not propose to enhance it now. The appeals of Waman Singh, Mungilal, and Chhote Khan are allowed and we direct that they be set at liberty. The appeals of Baliram Singh, Rajaram Bapu, Hiralal Brahmin, and Motilal are dismissed.

D.S./R.K. *Order accordingly.*

A. I. R. 1939 Nagpur 301

GRUER J.

Jakiuddin Badruddin and others — *Plaintiffs* — Applicants.

v.

Vithoba Jagannath Gadali and another — *Defendants* — Opposite Party.

Civil Revn. No. 359 of 1938, Decided on 11th July 1939.

(a) Partnership — Contract of partnership may be implied.

The contract of partnership may be implied and need not be expressed. [P 301 C 2]

(b) Partnership — Guardian can enter into contract of partnership on behalf of minor.

Though the minors are themselves incapable of contracting there is nothing to prevent their guardian from contracting on their behalf. [P 301 C 2]

(c) Partnership Act (1932), S. 69—Suit disposed of before registration—Proceedings cannot be validated and decree cannot be passed by Appellate Court even if registration takes place during appeal.

If registration has been done during the pendency of the suit it may be legally proceeded from that date unless there is a bar of limitation. But where a suit has been disposed of before registration was carried out, the proceedings cannot be validated and the Appellate Court cannot look into the merits and pass a decree even if registration is effected during appeal: *Case law ref.* [P 302 C 1]

D. N. Chowdhury — *for Applicants.*

J. Sen — *for Opposite Party.*

Order. —It is unfortunate that this case was tried out on the merits before a finding on the issue about its maintainability was given. It would have been better had that issue been tried first. The findings on the merits are in favour of the plaintiffs-applicants, but the suit has been dismissed because the plaintiff's firm has not been registered under S. 69, Partnership Act. Plaintiffs are the sons of Badruddin, who died some years ago, and since then they are admittedly carrying on their father's business. Plaintiff 1 is now major and the others are minors represented through their mother as next friend. It is now submitted that S. 69 of the Act was inapplicable. The plaintiffs, it is said, got the business of their father by inheritance and should have been treated as co-owners and not as partners: partnership implies a contract and there was no such contract; in any case a certificate of registration has now been obtained and presented to this Court, which is asked to hold that the case is now validated, and to pass a decree in favour of the plaintiffs. Plaintiffs rely on 49 Cal 560[1] in which a minor was absolved from liability in a new business. That family was a Hindu one, so special considerations applied as will be seen from S. 5, Partnership Act, which says that the members of a Hindu undivided family carrying on a family business as such are not partners in such business. Here the parties are Mahomedans. They themselves in their reply, dated 5th March 1937, stated that they had become partners of the family business by reason of their being heirs to Badruddin and not by any contract among them. They did not say they were co-owners merely. The contract of partnership may be implied and need not be expressed.

It is to be noted that even during the lifetime of the father the firm was styled "Badruddin Mulla Shamsuddin and Sons." By not having the firm registered the plaintiffs are precluded under S. 68, Partnership Act, from denying that a firm exists. Under S. 58 they had to give details about the partners. A copy of their application is not forthcoming, but it cannot be doubted that all the present plaintiffs were registered as partners. They were in the same position when they carried on the business at their father's death. The minors are themselves incapable of contracting but there is nothing to prevent their guardian from contracting on their behalf. In this case a contract is implied. The institution of the suit was therefore invalid. Is it now validated because registration has since been effected ? Learned counsel relies on A I R 1937 Mad 767[2] in which a suit previously filed was allowed to go on after registration. The Judge in that case was careful to remark that the subsequent act of registration does not validate the plaint from the date of its being filed. In 41 CWN 534[3] a suit was dismissed although registration had previously taken place while the suit was pending. It was held that it should not have been dismissed but ought to have been deemed to have been instituted on the date when the firm was registered. In ILR (1937) Nag 430[4] it is pointed out that a second suit will lie if the previous suit was dismissed under S. 69 (2), provided that there was no determination of the subject-matter of the suit. That case is not helpful to the contention now put forward that a decree can be passed in

1. Sanyasi Charan v. Krishnadhan Banerji, (1922) 9 A I R P C 237=67 I C 124=49 I A 108=49 Cal 560 (P C).

2. Varadarajulu v. Rajamanika, (1937) 24 A I R Mad 767=176 I C 916=(1937) 2 M L J 273.

3. Radha Charan v. Matilal, (1937) 41 CWN 534.

4. Sonalal Hansraj v. Sadashiv, (1937) 24 A I R Nag 146=169 I C 818=ILR (1937) Nag 430.

plaintiff's favour in the present suit. About the possibility of bringing in fresh suit, I make no pronouncement. In A I R 1938 Mad 185[5] it was held that S. 69 must be strictly construed and a suit instituted contrary to its provisions is bad and cannot be subsequently validated by compliance with those provisions. To the same effect is the judgment in AIR 1939 Pat 239[6] and A I R 1938 Lah 767.[7]

The effect of all these authorities then is that as the present suit was disposed of before registration was carried out, these proceedings cannot be validated and this Court cannot look into the merits and pass a decree as requested by the applicants. If registration had been done during the pendency of the suit it might no doubt have legally proceeded from that date unless there was a bar of limitation. The application fails and is dismissed with costs. Counsel's fee Rs. 20.

D.S./R.K. *Application dismissed.*

5. Ibrahim Sahib & Brother v. Gurulinga Aiyer, (1938) 25 AIR Mad 185=175 I C 811=(1937) 2 M L J 717.
6. Firm Laduram v. Jamuna Prasad, (1939) 26 A I R Pat 239=182 I C 796=18 Pat 114=20 P L T 33.
7. Chhagan Lal v. Firm Mangal Sain Raj Narain, (1938) 25 AIR Lah 767=179 IC 363=40 PLR 667.

A. I. R. 1939 Nagpur 302

STONE C. J. AND VIVIAN BOSE J.

Zalliram Battoolal—Appellant.

v.

Mangalsingh Nandlal Singh — Respondent.

Second Appeal No. 387 of 1936, Decided on 12th April 1939, from appellate decree of Addl. Dist. Judge, Damoh, D/- 29-2-1936.

C. P. Land Revenue Act (2 of 1917), S. 157 (3)—Sadar lambardar paying land revenue due in respect of mortgagor's land has only priority over mortgagee to extent of land revenue — Sale by him does not free land from incumbrance.

Where the sadar lambardar has paid land revenue due in respect of mortgagor's land he has priority over the mortgagee standing in Government's shoes to the extent of the land revenue, due in respect of the mortgagor's land paid by him. He can accordingly sell the land giving to the purchaser a like priority unless the mortgagee redeems this charge by payment. But the sale is not free from incumbrance: *Case law reviewed.* [P 305 C 1]

R. S. Dabir and R. G. Pande — *for Appellant.*

M. Adhikari — *for Respondent.*

Judgment.—This second appeal raises an interesting point of law under the Land Revenue Act. The appellant is the mortgagee of a part of the village Nimarmonda which is divided up into a number of pattis. The sadar lambardar of the village was called upon to pay land revenue in respect of the village including the patti belonging to the mortgagor. At all material times the mortgagor had ceased to be interested in the land because he had been sued by his mortgagee and a preliminary and later a final decree had been passed against him. In that state of affairs the sadar lambardar paid the land revenue due in respect of the mortgagor's patti. Next the sadar lambardar sold the mortgagor's patti under the powers conferred upon him by S. 157, Land Revenue Act. Section 157 provides inter alia as follows :

(1) Any sadar lambardar . . . . . who has paid any land revenue due by any proprietor . . . . may within six months from the date of such payment, apply in writing to the Deputy Commissioner to recover the amount on his behalf . . . . . .

(3) The Deputy Commissioner . . . . . may . . . . proceed to recover, as if it were an arrear of land revenue, such amount, with costs and interest, from the person held by him to be liable for the same.

Thus it will be seen that a sadar lambardar can ask the Deputy Commissioner to proceed to recover the amount that he had paid on behalf of the patti in a particular mode. Where land revenue is unpaid to Government, Government may sell the defaulter's land in order to recover the land revenue due. If it do so sell the land, (there are many other ways indicated in S. 128 of realizing land revenue); the purchaser acquires that land free from incumbrances as a consequence of the provisions of S. 138 (1). Before we come to that Section we observe that under S. 122 the land revenue is made a first charge. The provision is as follows:

122 (1). The land revenue assessed on an estate mahal or land, and any sum payable under a subsettlement shall, notwithstanding any partition, be a first charge on the estate, mahal or land to which it relates, and on the rents or profits thereof.

Returning now to S. 138 it is provided that unless the Deputy Commissioner in ordering the sale otherwise directs the purchaser of any estate, mahal, share or land sold for arrears of land revenue due in respect thereof, shall acquire it free of all incumbrances imposed on it, and all grants and contracts made in respect of it, by any person other than the purchaser.

We now turn to S. 128 which details the various modes in which the arrears payable to Government may be recovered. The ones that have been referred to in the arguments are :

(f) by selling such estate, mahal or land, or the share or land of any co-sharer who has not paid the portion of the land revenue which as between him and the other co-sharers, is payable by him

and

(g) by attaching and selling immovable property belonging to the defaulter other than the land in respect of which the arrear has accrued.

It will thus be seen that Government may sell the land for arrears of land revenue and if the arrears of land revenue are due in respect of the land that is sold, that land is sold free from incumbrances unless the Deputy Commissioner otherwise directs. The Act also provides that if the sadar lambardar pays the land revenue due in respect of land belonging to a co-sharer, he may, through the Deputy Commissioner recover the sum that he has paid on behalf of the cosharer as if it were an arrear of land revenue. The question is: Does that relate to a mode or does it also relate to incidents ? In other words: Does S. 157 (3) merely describe the machinery whereby the sadar lambardar can recover the amount of revenue that he has paid on behalf of another or does it also provide that if that machinery is put into operation and the sale of land takes place, the land sold (the land of the mortgagor in this case), that is to say, the land in respect of which the land revenue was paid, is sold free from incumbrances ? The effect of provisions of this kind in other Acts has been considered in a number of cases. In 30 N L R 240[1] the question turned on the wording of S. 225 (d), Land Revenue Act, which provides that

any sum ordered by a liquidator appointed under sub-s. (1) of S. 42, Co-operative Socities Act, 1912, to be recovered as a contribution to the assets of a society or as the cost of liquidation . . . . may be recovered under this Act in the same manner as an arrear of land revenue.

It was held that this provision related to the mode in which the amount due could be recovered. The sale was not free from incumbrance. This kind of case is distinguishable from the present one because it may well be said that the expression "in the same manner" is not the same as the words "as if," the former phrase relating more clearly to the mode in which the money may be recovered. It was indicated in 25 Mad 572[2] at p. 575 however that such difference in phrase is not important. In 7 Mad 434[3] the question arose under the Abkari Act and it was held that where land is sold under the provisions of S. 10, Madras Abkari Act, 1864, for arrears due by an abkari renter, the purchaser at the sale does not take the land free from incumbrances as in the case of a sale for arrears of land revenue under the provisions of the Revenue Recovery Act. Their Lordships observe at page 435, after having considered the provisions of the Revenue Recovery Act, as follows :

Taking these Sections together, the intention is clear that the purchase is free of prior encumbrances only when the arrear is of public revenue of which the land is the first security by statutory declaration. By Sec. 10, Abkari Act, it is enacted that Collectors may proceed against abkari renters or other persons licensed under that Act for the recovery of arrears due by them in like manner as for the recovery of arrears of land revenue. . . The expression 'In like manner as for the recovery of arrears of land revenue' indicates only that the same procedure is to be followed. . . . Arrear of abkari revenue is not due upon any specific land owned by the abkari renter. . . .

It was accordingly held that the land when sold would not be free from incumbrances: 25 Mad 572[2] was a case under the Land Improvement Loans Act, S. 7 (1) (a). As will be seen below there has been made a distinction between cases under S. 7 (1) (a) and S. 7 (1) (c). It is desirable to set out these two clauses. They are as follows :

7. (1) Subject to such rules as may be made under S. 10, all loans granted under this Act, all interest (if any) chargeable thereon and costs (if any) incurred in making the same, shall, when they become due, be recoverable by the Collector in all or any of the following modes, namely :

(a) from the borrower — as if they were arrears of land-revenue due by him;

. . . . . .

(c) out of the land for the benefit of which the loan has been granted — as if they were arrears of land revenue due in respect of that land . . .

It will be seen that there is a broad distinction between (a) and (c) though both give power to recover (as if they were arrears of land revenue). But (a) is "as if they were arrears of land-revenue due by him," and (c) is "as if they were arrears of land-revenue due in respect of that land." In 25 Mad 572[2] it was held that when the land was sold under the provisions of cl. 1 (a) it was sold subject to incumbrances. In 41 Mad 491[4] on the other hand, it was held that when the land was sold under the provisions of S. 7, cl. 1 (c), it was sold free from incumbrances. Ayling J. observes at page 693 :

A comparison of the various clauses (a), (b), (c) and (d) shows that the framers of the Land Im-

1. Yedha Society, Nimar v. Pragdas, (1934) 21 A I R Nag 201=148 I C 714 = 30 N L R 240.
2. Chinnasami Mudali v. Tirumalai Pillai, (1902) 25 Mad 572.
3. Ramchandra v. Pitchaikanni, (1884) 7 Mad 434.
4. Sankaran Nambudiripad v. Ramaswami Ayyar, (1919) 6 A I R Mad 590=47 I C 301=41 Mad 691=34 M L J 446.

provement Loans Act considered that there was some substantial difference between a sale for arrears of land revenue of the land on which the arrears accrued and a sale for the same purpose of other lands whether belonging to the defaulter or some one else.

41 Mad 691[4] was followed in 26 N L R 340,[5] which was another case under the Land Improvement Loans Act, S. 7 (1) (c). In 26 Mad 230[6] the sale was under the powers conferred by the Income-tax Act 2 of 1886. By S. 30 of that Act the Collector is empowered, in default of payment of the tax, to recover the amount as if it were an arrear of land revenue. In that case the Collector proceeded to recover the amount as if it were an arrear of land revenue. It was held that S. 30, Income-tax Act, had not the effect of converting income-tax into an arrear of land revenue due in respect of the land which may be brought to sale for realization of the income-tax but that its effect was to extend the procedure prescribed by (Madras) Act 2 of 1864 and (India) Act 1 of 1890, to the recovery of arrears of income-tax. In other words, the land was sold subject to incumbrances. In 28 Mad 420[7] the case was one of sale for arrears of abkari revenue. The words were "as if they were arrears of land revenue" and it was held that they had the same meaning as the words "in like manner as for the recovery of arrears of land revenue" and accordingly only the mode and not the incidents was applied and the sale was subject to incumbrance. In 5 Rang 458[8] the Madras cases were reviewed. That case arose under the City of Rangoon Municipal Act where the relevant provision uses the words "as if they were arrears of land revenue." It was decided that the question whether the sale had the same consequence as a sale for arrears of land revenue due in respect of the land sold depended on the nature of the tax for which the sale was effected. At page 464 the learned Judge relying on 41 Mad 691[4] observes as follows:

> This ruling shows that the words 'as if they were arrears of land revenue' do not by itself (sic) show that the intention of the Legislature was merely to regulate the procedure to be followed in such cases and that whether it was intended to attract also the provision relating to the substantive right of a purchaser depends upon a consideration of the wording of the Act and the nature of the tax. This is made clear in the judgment of Seshagiri Aiyar J. at p. 698 where, after referring to the passage in 7 Mad 734,[3] I have already cited, the learned Judge says that to his mind that passage is the key-note to the construction of similar provisions in other Acts, i. e. that the fact whether the tax is payable out of any particular or specified land must have a material bearing on the construction of the words.

It was held that the sale was free from incumbrances. The same conclusion was arrived at in 7 Rang 113[9] which was also a case under the same Act. It will be seen that in all the above cases one is concerned with sales by Government or some public body to recover taxes or public loans. They are cases of abkari tax (excise revenue), or income-tax, or municipal tax or a public loan. The present case is a case of recovery of a private debt by a private person, the sadar lambardar. Under the scheme of the Central Provinces Land Revenue Act the Government looks primarily to the sadar lambardar for the payment of land revenue due in respect of the area for which the sadar lambardar is responsible (usually a village). If the sadar lambardar fails to get in and pay over such revenue, he is liable to have his land sold. But on such a sale the land is sold subject to incumbrances because, as will be seen from the above quotation from S. 138, it is only when land is sold for arrears of land revenue "due in respect thereof" that it is sold free from incumbrances.

The sadar lambardar having been made liable he is given a right over against the cosharer whose revenue is in arrear. To recoup himself, he may sell the cosharer's land, through the appropriate officer, or he may take any of the other steps available as if what was owed to him were land revenue owed to Government. We are of the opinion that, having paid Government, the first charge given by the statute to Government passes to him. We see no reason however to sweep away the mortgagee's rights in order to enable another private person, the sadar lambardar, to recoup himself. We conceive that were this so it would open wide the gates to fraud of a type that could hardly be proved. Sec. 138 contains provisions which in certain circumstances compel mortgagees to pay land revenue at the risk of losing their security if they do not. But the person who pays is the sadar lambardar. We take the case, of frequent occurrence, of due payment by the

5. Secretary of State v. Harinath, (1930) 17 A I R Nag 195=122 I C 376=26 N L R 340.
6. Kadir Mohideen Marakkayar v. Muthukrishna Ayyar, (1903) 26 Mad 230=12 M L J 368.
7. Ibrahim Khan v. Rangaswami Naicken, (1905) 28 Mad 420.
8. Chettiyar Firm v. Subramaniam, (1927) 14 A I R Rang 389=105 I C 258=5 Rang 458.
9. Abdur Rauf v. Chettiyar Firm, (1929) 16 A I R Rang 175=117 I C 575=7 Rang 113.

sadar lambardar. There is no delay. In such a case the mortgagee cannot possibly know that although the land revenue has been duly paid without any delay there is, in point of fact, a default on the part of his mortgagor because the mortgagor has not put the sadar lambardar in funds as regards the share of land revenue due in respect of the mortgagor's holding. Yet, were we to hold that the sadar lambardar can recoup himself as if he were Government selling the mortgagor's land in respect of an arrear of land revenue due in respect of that land, the mortgagee would find his security gone without any chance being given to him to pay. This is not, in our opinion, the intention of the Act. We are of the opinion that the sadar lambardar has priority over the mortgagee standing in Government's shoes to the extent of the land revenue, due in respect of the mortgagor's land, paid by him. He can accordingly sell the land giving to the purchaser a like priority unless the mortgagee redeems this charge by payment.

This case is a perfect example of the mischief that would arise if it were held that in such circumstances the sale was free from incumbrances. The plaintiff obtained a foreclosure decree on the basis of his mortgage of two annas share of mouza (village) Nimarmonda. When, the preliminary decree having been made final, the decree-holder came to take possession, the defendant took objection in execution on the ground that he (the defendant) had purchased the share when it was sold for arrears of land revenue. That sale was not at the instance of Government, for Government had been paid, but at the instance of the defendant who was sadar lambardar of mouza Nimarmonda. The defendant applied to the Tahsildar to sell the land. The land was put up for sale and bought by the defendant for Rs. 90. The value of the mortgage decree was something over Rs. 700. This was wiped away if the decisions of the lower Courts are sound and wiped away because a private person, the sadar lambardar is given the same powers to recover the money he has paid as if the debt due to him from the revenue defaulter were due to Government as an arrear of land revenue.

In addition to the Rs. 90 the sadar lambardar incurred costs amounting to Rs. 50 in the objection matter. The plaintiff has not paid anything into Court though in the alternative he prayed only for a conditional order for possession the condition being that he paid the defendant Rs. 90. In our opinion the true position is that until the defendant is paid what is due to him, i. e. until his charge has been cleared, he is entitled to resist. This affects the position so far as costs are concerned. The appeal will be allowed. There will be an order for possession conditional upon the plaintiff paying to the defendant Rs. 90 together with Rs. 50 together with the costs of these proceedings. The plaintiff would have been entitled to possession and to the costs of these proceedings had he tendered to the defendant the Rs. 90 but that he did not do at the time of the objection application which was accordingly properly allowed. As the defendant was in the right in resisting he is entitled to receive the Rs. 50 as well as the Rs. 90 before he can be compelled to deliver up possession.

D.S./R.K. *Appeal allowed.*

A. I. R. 1939 Nagpur 305

GRILLE J.

Seth Mishrilal Seth Lakhmichand Oswal — Plaintiff — Appellant.

v.

Barik Tursi Kirar and others — Defendants 1 to 4 — Respondents.

Second Appeal No. 215 of 1937, Decided on 20th March 1939, from appellate decree of Second Addl. Dist. Judge, Hoshangabad, D/- 12th November 1936.

(a) Civil P. C. (1908), O. 21, R. 63—Property attached declared to be subject to mortgage — Fact that property is subsequently released from attachment does not relieve decree-holder of his duty to bring suit within one year.

The order in objection proceedings that property attached is subject to mortgage of the objector is conclusive as against the decree-holder unless he brings a suit which would terminate in his favour, within the period of one year. The fact that the property is released from attachment afterwards in no way annuls the duty that lies on him if he wishes to bring the property to sale unencumbered. [P 307 C 2; P 308 C 1]

(b) Civil P. C. (1908), O. 21, Rr. 62 and 66 —What is sold as result of order under R. 62 is equity of redemption—Distinction between cases where property is sold subject to mortgage and cases where notice of alleged mortgage is given in sale proclamation.

The phrase "subject to such mortgage" must mean that what is sold is the equity of redemption and a distinction is made between an express order directing the property to be sold subject to a mortgage and cases where notice of an alleged mortgage is given in the sale proclamation. In the former case a prospective purchaser is told exactly what he is buying; in the latter he takes a chance that the mortgage which is alleged to exist may prove unenforceable either from inherent defects or possi-

bly because it may have been satisfied by the time of the sale, and the price which the property would fetch would vary considerably according whether the property is definitely stated to be sold subject to an ascertained encumbrance or merely subject to the risk of encumbrances existing : *28 All 418 ; A I R 1920 Cal 354 and A I R 1935 Oudh 23, Rel. on.* [P 308 C 2]

(c) Civil P. C. (1908), O. 21, R. 62 — Property attached in execution of simple money decree—Mortgagee objecting that property is subject to his mortgage—Judgment-debtor supporting his objection—Property sold subject to mortgage — Auction purchaser having knowledge that mortgage was fictitious keeping silence cannot challenge validity of mortgage in mortgagee's suit.

In execution of a simple money decree property was attached. A mortgagee objected to the attachment on the ground that the property was subject to his mortgage. The judgment-debtor supported this objection and the property was sold subject to the mortgage. The auction-purchaser knowing that the mortgage was fictitious kept silence in the hope of purchasing the property cheaper :

Held that the auction-purchaser could not challenge the validity of the mortgage in a suit brought by the mortgagee. No equitable consideration could be brought into play in favour of such purchaser. [P 309 C 1, 2]

V. V. Kelkar — *for Appellant.*

R. S. Dabir — *for Respondent 4.*

Judgment. — The plaintiff-appellant Mishrilal brought a suit for foreclosure on the basis of a mortgage of which he was the transferee. The transfer was made by the mortgagee Tukaram, son of Tanu in the year 1934, and the mortgage was executed in his favour by Barik and his son Tukaram in 1929. In order to avoid confusion, Tukaram, son of Barik, whose interests were identical with those of his father, will not be referred to again. Defendant 4 was Umrao who was impleaded as an auction-purchaser of part of the mortgaged property at an auction sale in execution proceedings as the result of a simple money decree which had been obtained by one Bhabichand against Barik. In those execution proceedings the property was ordered to be sold subject to Tukaram's mortgage ; the actual sale took place in 1933. Barik and Tukaram did not resist the plaintiff's claim, but the auction-purchaser Umrao contended that the mortgage in question was bogus, fraudulent and without consideration and made with the intention to defeat the claims of Bhabichand, Barik's creditor, and that all these persons had entered into a conspiracy in order to defeat Bhabichand's claim against Barik.

The principal questions at the trial were whether the mortgage and the subsequent assignment of it to the plaintiff were bogus and fraudulent and whether the auction-purchaser had any right at all (the plaintiff denied that he had such a right) to challenge the mortgage inasmuch as he had in execution proceedings purchased the land subject to the mortgage existing and whether the decision that there was a mortgage was conclusive against him. Both the Courts below have agreed that the mortgage and the assignment were fictitious and they also concur, although for somewhat different reasons, in finding that the auction-purchaser was entitled to challenge the validity of the mortgage. The trial Court dismissed the plaintiff's suit entirely, holding that no suit can be based upon a deed of mortgage which is not genuine and which is fictitious and wholly without consideration. The lower Appellate Court however modified this decision by decreeing the plaintiff's claim as against Barik and Tukaram, holding that the transaction was not void but only voidable and that, since Barik and Tukaram had admitted the mortgage, there was no reason why a decree should not be passed against them. The plaintiff's claim however was rejected so far as that portion of the mortgaged property which had passed to the auction-purchaser Umrao in Bhabichand's execution proceedings, was concerned, and a date for redemption by them was fixed. In this second appeal by the plaintiff no appearance has been entered on behalf of Barik and Tukaram, and the only contesting respondent is Umrao. I would also note that there has been no cross-appeal against the lower Appellate Court's decision by Barik and Tukaram. For the proposition that the auction-purchaser Umrao was entitled to challenge the validity of the mortgage in a suit brought by the mortgagee or his representative, the auction-purchaser not being the decree-holder himself, reliance was placed by the trial Court on 1 N L R 150.[1] This view was not accepted by the lower Appellate Court in the following words :

> It is held by the learned Subordinate Judge that respondent 4 is entitled to challenge the validity of the mortgage on the ground that he is a stranger and not a decree-holder himself. This view seems incorrect and I believe the case in 1 N L R 150,[1] relied upon by the lower Court does not lay down that proposition.

The learned counsel for the appellant states that he is in agreement with that view and that proposition is not challenged by the learned counsel for the respondent. The trial Court, considering that it was bound to follow what it considered to be

1. Mt. Dhoka v. R. B. Beharilal, (1905) 1 NLR 150.

the ruling in 1 N L R 150,[1] felt itself unable to follow the contentions which had been advanced on behalf of the plaintiff, supported by 28 All 418[2] and 47 Cal 446,[3] that a purchaser who is not the decree-holder is conclusively bound by an order under O. 21, R. 62, as the result of which the auction-purchaser is bound by an entry in the sale proclamation declaring that the sale is definitely subject to a mortgage, as opposed to an auction-purchaser's right subsequently to challenge an entry in a sale proclamation under O. 21, R. 66, which is merely a statement that an encumbrance may exist the correctness of which has not been determined by the executing Court. The trial Court found some support for its view that the proposition just stated was incorrect in the observations made in 52 All 1032[4] at p. 1035 where 28 All 418[2] was distinguished.

The lower Appellate Court however accepted the proposition of law that there was a clear distinction between an order passed under R. 62 of O. 21 and a mere notification of an encumbrance in a sale proclamation under R. 66 of O. 21, and that when the Court had held an inquiry and found that a mortgage subsisted and the property was put up to sale subject to a mortgage, the auction-purchaser could not challenge the validity of the mortgage, whether he was a stranger or the decree-holder himself. The lower Appellate Court referred to the ruling in A I R 1935 Oudh 23,[5] where the judgment in 28 All 418[2] was quoted with approval and that in 52 All 1032[4] was distinguished. Nevertheless, although holding that the auction-purchaser would ordinarily be bound by a specific declaration in a sale proclamation that the property was to be sold subject to the mortgage, the Court considered that there were cases in which an auction-purchaser would be entitled to challenge the validity of the mortgage subject to which he had purchased the property; and its justification for holding so in the present case was stated to be that there was nothing to show that in the objection proceedings the judgment-debtor Barik was a party, and that he did not become a party by the mere fact that he was a judgment-debtor. The lower Appellate Court cites as its authority for this view a comment of the author in Mulla's Civil Procedure Code under the heading "Parties to suits under this Rule" in the comments on O. 21, R. 63. Apart from the fact that the learned Judge has not connected the auction-purchaser with the judgment-debtor as having a common interest, the point of the argument which appears to be drawn from the Full Bench decision in 30 Mad 335[6] is that the judgment-debtor who was not a party to the proceedings would not be precluded from instituting a suit on the ground that the order was not binding on him, more than one year after the date of the order, so long as he was within the period of limitation otherwise prescribed. Now, in the case before me, it is quite clear that Barik had at no time any intention of filing any suit, and inasmuch as he admittedly appeared on behalf of the object or Tukaram in the execution proceedings in order to support Tukaram's claim that his property was subject to Tukaram's mortgage, it is difficult to sustain the position that Barik was not a party to the proceedings. Bhabichand attempted to execute his decree and attached the fields. Tukaram intervened as an objector and pleaded his mortgage. The judgment-debtor, who would normally be expected to resist a claim that the property had been mortgaged, as in a sale on a simple money decree he would hope to receive a balance if the property was unencumbered, agreed that his property was encumbered and that the claim was justified.

Thereupon the executing Court came to the conclusion that there was a subsisting mortgage and disposed of the objection in the applicant's favour on 21st March 1931. The decree-holder was not present on that date, and on 27th March, as the decree-holder was absent, the case was struck off and the property was ordered to be released. It may here be pointed out that the other ground on which the lower Appellate Court considered that the auction-purchaser was entitled to question the validity of the mortgage was that as the result of the order of 27th March, the order of six days before was a nullity and that the very foundation of the order which would have become conclusive under R. 63 of O. 21

2. Shib Kunwar Singh v. Sheo Prasad Singh, (1906) 28 All 418=3 A L J 200=1906 A W N 68.
3. Kalidas Chaudhuri v. Prasanna Kumar Das, (1920) 7 A I R Cal 854=55 I C 189=47 Cal 446=30 C L J 496=24 C W N 269.
4. Kesho Ram v. Chunni, (1931) 18 A I R All 139 =131 I C 674=52 All 1032=1931 A L J 1.
5. Gallu v. Lekha Singh, (1935) 22 A I R Oudh 23=153 IC 57=10 Luck 343=11 OWN 1475.
6. Krishnasami Naidu v. Sundaram Chettiar (1907) 30 Mad 335=17 M L J 95 (F B).

was gone. In this I am of opinion that the Court is wrong. The order which was passed on 21st March 1931 was conclusive as against the decree-holder unless he brought a suit which would terminate in his favour, within the period of one year. The fact that the property was released from attachment afterwards in no way annulled the duty that lay on him if he wished to bring the property to sale unencumbered; and indeed when he attached the property again more than a year later and Tukaram renewed his objection, the decree-holder at once conceded that he was unable to resist the application inasmuch as he had failed to bring a suit and he consequently agreed that the property should be sold in execution of his decree subject to the mortgage which had been held two years before to be subsisting.

The orders of the Court and the proclamation leave it in no doubt that the Court had found that there was a subsisting mortgage and that the property could only be sold subject to it. The order of the Subordinate Judge, dated 7th January 1933 runs:

As the decree-holder did not file any declaratory suit to get the order, dated 21st March 1931 set aside it is conclusive against the decree-holder and the attached property will be sold subject to the objector's mortgage, dated 18th October 1929. The attached property will therefore be sold subject to the objector's mortgage, dated 18th October 1929 and the Collector will be informed accordingly.

In Collector's proceedings the following order was passed:

Decree-holder in person. Judgment-debtor absent. The attached land be sold subject to objector's mortgage as directed by the Civil Court after proclamation at Multai. Sale on 20th April 1933.

In the sale proclamation against the schedule of property and under the heading "Details of any encumbrances to which the property is liable" the following entry is made: "This property will be sold subject to the mortgage of Tukaram." Now, in this Court the plaintiff-appellant relies on the cases which have already been cited for the proposition that even when the purchaser is the decree-holder, there can be no doubt that he can have no right to challenge: *vide* 19 N L R 15,[7] that is to say, 47 Cal 446,[3] 28 All 418[2] and A I R 1935 Oudh 23.[5] These decisions the learned counsel for the respondent challenges as incorrect law. The learned counsel for the appellant states that 52 All 1032[4] is distinguishable, and I am of opinion that his contention is correct. There the learned Judges were considering a case of a decree-holder auction-purchaser, and the ratio decidendi on which it was held that he was allowed to challenge the validity of the mortgage was that he had in fact brought a suit within one year of the order of the executing Court allowing the mortgagee's claim, and in that case 28 All 418[2] was queried mainly as the ruling did not consider the case of a decree-holder auction-purchaser who desired to bring a suit contesting the validity of the order in the execution department. I am, with great respect, unable to follow the comment that 28 All 418[2] is incorrect in holding that all that is sold as the result of an order under O. 21, R. 62, is the equity of redemption and that what is actually sold is the property itself subject to the mortgage and not merely the right of redemption. I am in respectful agreement with the Bench of the Oudh Chief Court in holding that the phrase "subject to such mortgage" must mean that what is sold is the equity of redemption and that a distinction is made between an express order directing the property to be sold subject to a mortgage and cases where notice of an alleged mortgage is given in the sale proclamation. In the former case a prospective purchaser is told exactly what he is buying; in the latter he takes a chance that the mortgage which is alleged to exist may prove unenforceable either from inherent defects or possibly because it may have been satisfied by the time of the sale, and the price which the property would fetch would vary considerably according whether the property is definitely stated to be sold subject to an ascertained encumbrance or merely subject to the risk of encumbrances existing. This judgment on the material points repeats the judgment in 28 All 418[2] almost verbatim. Again the distinction has been noted in 47 Cal 446[3] where it is stated:

If a person purchases an estate subject to a mortgage, whether under a voluntary conveyance or under a sale in invitum or undertakes to discharge it, he cannot be heard to deny the validity of the mortgage subject to which he made his purchase. Where however the purchaser merely buys an estate which is under mortgage, but does not take it subject to the encumbrance or undertakes to discharge it, he is not precluded from impeaching the validity of the mortgage. The distinction between the two classes of cases depends upon the question, whether the property has been sold subject to the mortgage or whether mere notice of the alleged mortgage has been given in the proclamation of sale. The former contingency is provided for by O. 21, R. 62, the latter is contemplated by O. 21, Rule 66.

7. Govind v. Dheklu, (1929) 10 A I R Nag 282 = 82 I C 771 = 19 N L R 15.

As will be shown later, Umrao was well aware what he was purchasing, and it must be held that he has no right to challenge the mortgage. On this finding it is not really necessary to advert to the contention that the respondent Umrao has not been able to prove that the mortgage was fictitious and that the burden has been wrongly cast. It appears that both the Courts below have been influenced in their consideration of law by the fact that they have held that the transaction was fictitious from beginning to end and was made for the purpose of defeating the claims of Bhabichand, who, as the result of the order under O. 21, R. 62, which he did not challenge, has been able to satisfy his claim only in part, and that Umrao is an innocent purchaser who was unable to challenge the finding in execution proceedings, as naturally he did not appear on the scene until after the sale had been concluded. But Umrao from his own deposition as a witness is deserving of no such sympathy which would justify the Court in seeking equitable considerations on his behalf. He has stated in the witness-box that he had ascertained beforehand that the transaction embodied in the mortgage was a fraudulent and fictitious one and that he also obtained an assurance from Tukaram that, if he purchased the property, he would not be called on to pay any part of the mortgage money as in fact there was nothing owing to Tukaram. He was aware that the objection had been made by Tukaram and that the objection had been found valid and that the Court had come to the conclusion that there was a mortgage and declared that the sale was to be held subject to the mortgage. He has also admitted that as the result of this order he was able to obtain the property much cheaper than he would have done otherwise, that it was a good stroke of business to keep silence about his knowledge that the mortage was fictitious, and that in fact he had saved a considerable sum of money thereby. Equitable considerations cannot be called into play on behalf of such a person. It may be unfortunate from his point of view, assuming that his statements are true, that the executing Court was persuaded into coming to a definite decision that there was a subsisting mortgage and directing the property to be sold subject to that mortgage. That declaration having once been made is final, and an auction-purchaser can in no circumstances be allowed to challenge that finding because of his knowledge that the finding is incorrect and his hopes of obtaining a surreptitious profit by utilizing that knowledge. He may have a cause of action against Tukaram, but he cannot be entitled to resist Mishrilal's claim based on the mortgage.

The appeal accordingly succeeds. The respondents Barik and Tukaram have apparently failed to redeem the mortgage as directed in the Courts below. A decree will be passed for the full claim with costs against all the respondents with interest at the rate given in the Court below. I fix the date of redemption at three months from the date of the delivery of this judgment, failing which the whole property will be foreclosed.

D.S./R.K. *Appeal allowed.*

*** A. I. R. 1939 Nagpur 309**

POLLOCK AND GRUER JJ.

Tikaram Ratiram Kurmi — Appellant

v.

Emperor.

Criminal Appeal No. 62 of 1939, Decided on 5th April 1939, from order of Addl. Sess. Judge, Raipur, D/- 3.3.1939.

(a) Criminal Trial—Evidence—Blood stains on clothes of accused—Evidentiary value.

Finding of small distintegrated blood stains on the dhoti and saluka of accused is not of much importance but it strengthens the case against him as a whole. [P 311 C 1]

*** (b) Evidence Act (1872), S. 30—Confession must be confession of offence for which accused are tried and not of some other offence.**

The principle on which the confession of one accused is used against another is that self-implication is supposed to prove some guarantee of the truth of the accusation made against the other. Where the statement is exculpatory so far as possible, there is no such guarantee. The confession must therefore be a confession of the offence for which the accused persons have been tried and not of some other offence. [P 311 C 2]

Where accused have been tried for murder and one of them confessed only to an offence under S. 201, Penal Code his confession cannot be taken into consideration against the other accused : *2 All 444; A I R 1931 Mad 177; A I R 1939 P C 47; A I R 1926 Nag 117 and A I R 1926 Nag 119, Approved; A I R 1926 Bom 513, Dissent.* [P 311 C 2]

K. K. Gandhe — *for Appellant.*

W. R. Puranik, Advocate-General — *for the Crown.*

Judgment.—The appellant Tikaram has been convicted under S. 302, I. P. C., of the murder of one Khedu and sentenced to death in the Court of the Sessions Judge, Raipur. Khedu was a boy of about 9 or 10 and the nephew of Tikaram. Khedu's father Nathuram and Tikaram are brothers. They made a partition about 10 or 12 years ago

but continued to live afterwards in the same house, though in separate portions of it, until Tikaram recently went to live in a separate house of his own. On Saturday, 3rd December 1938, when Nathuram was away in the village, Awadhram induced Khedu to accompany him to the threshing floor of the malguzar Mahasirbai, for whom Tikaram worked as a mukhtyar. In a room in that threshing floor Khedu was undoubtedly murdered. Awadhram, Rambakas, and Tikaram are alleged to have done it, but Rambakas was granted a pardon and turned approver. Awadhram, who was acquitted of the charge of murder but was convicted under S. 201, I. P. C., and sentenced to six years' rigorous imprisonment, has not appealed. Blood stains were found in the room in the threshing floor, and it is not denied that Khedu was murdered there. The only ornaments that Khedu was wearing at the time — a pair of silver karas — were found intact on the body which was discovered in a well into which it was thrown, so the motive for Khedu's murder was not robbery. The medical evidence shows that death was probably due to throttling, but there were also three lacerated wounds on the head, a fracture of the jaw, and a contusion on the neck.

There is ample evidence to show that Khedu accompanied Awadhram to the threshing floor of Mahasirbai in the afternoon and Awadhram has admitted this both in the committing Magistrate's Court and in the Sessions Court. The story told by him and the approver Rambakas is that while Khedu was in the threshing floor near the room, Tikaram caught hold of him and murdered him and that Tikaram persuaded them to throw the body into a well that night. In short, both of them throw the entire blame on Tikaram, although they admit that they disposed of the body. Tikaram's defence, as put forward in this Court, is that the murder was committed by Awadhram and Rambakas and that he never went to the threshing floor at all that afternoon. It appears that it was at about 2 P. M. when Khedu and Awadhram went to the threshing floor. Both Awadhram and Rambakas were the field servants of Mahasirbai and as such were working under Tikaram. The question is whether the approver's story has been substantially corroborated as against Tikaram. Daswa (P. W. 4) another field servant of Mahasirbai, stated that when he left the threshing floor in the afternoon Rambakas, Awadhram and Khedu were there and no one else, and that when he went there that night Tikaram called him to put the buffaloes in the kotha and told him that if anybody asked him about it he should say that Khedu had not come to the threshing floor that day. Tikaram had probably heard that Daswa was at the threshing floor when Khedu came in the afternoon, and probably thought that Daswa, as a field servant under him, could be induced to keep silence about it. Jagmohan (P. W. 6) stated that he saw Tikaram standing near the door of the threshing floor compound at about 3 P. M. that day. Lulua (P. W. 7), another field servant of Mahasirbai, said that that night Tikaram told him that Rambakas and Awadhram had murdered Khedu and asked him to throw the body away; Lulua then asked Rambakas why he killed the boy and Rambakas replied that it was Tikaram who killed the boy; Tikaram then told all of them to keep quiet. This witness also corroborate's Daswa's statement that Tikaram told him (Daswa) not to say that he had seen Khedu coming to the threshing floor. Nathuram (P. W. 13), Khedu's father, has said that he had no enemy except Tikaram. Some sort of enmity seems to be the only possible explanation of murder, and neither Awadhram and Rambakas had enmity with Nathuram or Khedu. There is ample evidence to show that ill-feeling had long existed between Nathuram and Tikaram, and comparatively recently there was a quarrel in which Nathuram was said to have caught hold of Tikaram's wife. On this point there is the evidence of Lulua (P. W. 7), Kuar Singh (P. W. 11), and Nathuram (P. W. 13). Khedu was in a way responsible for the starting of that quarrel, and possibly for this reason Tikaram took a dislike to the boy. There is the evidence of Dhansai (P. W. 10) and Dhur Singh (P. W. 21) to show that Khedu was really frightened of meeting Tikaram and that Tikaram had made threats against Nathuram's family.

According to the evidence of Rambakas (P. W. 27), he and Awadhram did not know, when they came to the threshing floor that afternoon, that Tikaram was there and it was only when Tikaram actually dragged Khedu into the room that they realized that he was there. It is probable that Awadhram was deputed by Tikaram to bring the boy, as Awadhram has stated, and that Tikaram was concealing himself in the room, as otherwise Khedu

would probably have run away at once on seeing him. This explains why Daswa (P. W. 4) stated that only Awadhram, Rambakas, and Khedu were in the threshing floor when he left. Further corroboration against Tikaram is the fact that he produced the key of the room in which the murder was committed. He has offered no explanation of how he came to be in possession of the key; he has merely denied that he produced it. Small disintegrated blood stains on his dhoti and saluka, one on one garment and two on the other, were also found. These by themselves may not be of much importance, but they strengthen the case against him as a whole. Further, a pen-knife, which has shown to have been in Tikaram's possession, was subsequently found in the well in the threshing floor compound, a weapon that may have caused the incised wounds on Khedu. The approver Rambakas and the accused Awadhram have probably not told the whole story in order to conceal the part that they played, and Rambakas's statement that a log of wood found in the hut was used by Tikaram to press on Khedu is possibly an invention or it may have been that Tikaram tried it and gave it up at once as he found it an unsuitable weapon. However that may be, we think that the story told by Rambakas is substantially true and that it has been substantially corroborated as against Tikaram by the evidence of Daswa, Jagmohan and Lulua. Tikaram alone had a motive for the crime and he no doubt played the leading part in it. We therefore uphold the conviction under S. 302, I. P. C.

The learned Additional Sessions Judge took into consideration under S. 30, Evidence Act, a statement made by Awadhram that he took Khedu to the threshing floor, that Khedu was there murdered by Tikaram, and that then he and Rambakas, by Tikaram's order, took away the dead body and threw it into a well. S. 30, Evidence Act, provides that when more persons than one are being tried jointly for the same offence and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person. Here Awadhram made no confession of murder, but he did confess to an offence under Section 201, I. P. C. In 2 All 444[1] it was held that a confession by one accused should not be taken into consideration against another accused unless the confessing prisoner tars himself and the other accused with one and the same brush. We are of opinion that the confession must be a confession of the offence for which the accused persons have been tried and not of some other offence. Here they have been tried for murder, but Awadhram confessed only to an offence under S. 201, I. P. C. In 50 Bom 683[2] it was held that a statement by one accused which would justify his conviction under S. 201, I. P. C., though not a confession of complete guilt so far as the charge of murder was concerned, was an indirect admission of constructive guilt and therefore could be taken into consideration against a co-accused. That view has been dissented from in 54 Mad 75[3] and is not in accordance with the recent decision of the Privy Council in A I R 1939 P C 47[4] where it was held that an admission of an incriminating fact is not of itself a confession. The view expressed by Straight J. in 2 All 444[1] was adopted in 21 N L R 88[5] and 23 N L R 62,[6] and we consider that this is the correct view, for the principle on which the confession of one accused is used against another is that self-implication is supposed to provide some guarantee of the truth of the accusation made against the other. Where the statement is exculpatory so far as possible, there is no such guarantee. Therefore we are of opinion that the statement made by Awadhram should not be taken into consideration against Tikaram, but we think that the case against Tikaram has been proved beyond all doubt without that statement. For the brutal and deliberate murder of a small boy it is obviously impossible to reduce the sentence. The appeal is therefore dismissed.

D.S./R.K. *Appeal dismissed.*

1. Empress of India v. Ganraj, (1878-80) 2 All 444.

2. Shivabhai v. Emperor, (1926) 13 A I R Bom 513=97 I C 660 = 27 Cr L J 1140=50 Bom 683=28 Bom L R 1013.

3. In re Periyaswami Moopan, (1931) 18 A I R Mad 177 = 129 I C 645 = 32 Cr L J 448=54 Mad 75=59 M L J 471.

4. Narayana Swami v. Emperor, (1939) 26 A I R P C 47=180 I C 1=18 Pat 234=I L R (1939) Kar 123=66 I A 66 (P C).

5. Sheocharan v. Emperor, (1926) 13 AIR Nag 117 =90 I C 385=26 Cr L J 1537=21 N L R 88.

6. Raghunath v. Emperor, (1926) 13 AIR Nag 119 =89 I C 516=26 Cr L J 1380=23 N L R 62.

A. I. R. 1939 Nagpur 312

GRUER J.

Janba Dayaram Pardeshi — *Judgment-debtor* — Applicant.

v.

Manno Kashiram Kirad — *Decree-holder* — Opposite Party.

Civil Revn. No. 436 of 1938, Decided on 4th August 1939.

C. P. Debt Conciliation Act (2 of 1933), Ss. 16 (b), 15 — Allegation of fraud by decree-holder — In spite of it, the Debt Conciliation Board issuing certificate — Question of fraud cannot be reagitated in Civil Court.

The intention of the Legislature in Sec. 16 is to preclude the Civil Courts from examining the reasons whether right or wrong, which induce the Debt Conciliation Board to issue a certificate under Sec. 15. It may be that if fraud was practised on the Board without the knowledge of the Board, the Civil Courts could set the matters right; but where the decree-holder did allege to the Board that the other debt was bogus, but in spite of that the Board accepted it as a genuine one, he is not entitled to have the question of fraud re-agitated in the Civil Court: *A I R 1937 Nag 259, Rel. on; A I R 1939 Nag 136, Discussed and doubted.* [P 312 C 2]

G. R. Pradhan — *for Applicant.*

N. B. Chandurkar—*for Opposite Party.*

Order.—The applicant-judgment-debtor obtained from the Debt Conciliation Board a certificate under S. 15, Debt Conciliation Act, but the lower Court has refused to give effect to it and has ordered execution to proceed. Only two creditors were named before the Board, the present decree-holder and one Imratlal. In the Civil Court the non-applicant-decree-holder Manno took the plea that Imratlal's debt was fictitious and so there is no debt for the settlement of which this decree-holder can be postponed under S. 15 (3). After recording evidence the Subordinate Judge found that the debt of Imratlal is fictitious. The point now to be decided in revision is whether the Judge had jurisdiction to go into this question at all.

The applicant relies on S. 16 (b) of the Act which says that no Civil Court shall entertain any application to execute the decree the execution of which is suspended under sub-s. 3 of S. 15. On the other hand, it is argued that Civil Courts have full power to inquire into the facts necessary for the issue of a certificate especially where fraud was alleged. Reference was made to 1939 N L J 142[1] in which it was held that where there was a miscalculation by the Board about the 40 per cent. of the debts due to the creditors the Civil Courts could find that the Board had acted without jurisdiction in issuing a certificate under S. 15 against a creditor who did not agree to conciliation. That involved not a question of initial jurisdiction to effect a settlement to which S. 7-A is applicable but a question of jurisdiction to issue a certificate. Interference may have been justified as the error of the Board was apparent on the face of the record. But with all due respect I find it a little difficult to reconcile that decision with the remarks of their Lordships in the published case in I L R (1938) Nag 489[2] at page 495:

> If the Board had jurisdiction to attempt to effect a settlement, then the Civil Courts would not have jurisdiction to inquire whether that jurisdiction was properly exercised, and the legality or validity of any orders passed in the exercise of the Board's jurisdiction could not be questioned in any Civil Courts on any ground except perhaps fraud.

These remarks have my respectful concurrence as I think that the intention of the Legislature in S. 16 was to preclude the Civil Courts from examining the reasons, whether right or wrong, which induced the Debt Conciliation Board to issue a certificate under S. 15. It may be that if fraud was practised on the Board without the knowledge of the Board, the Civil Courts could set the matters right; but that was not the case here. The decree-holder did allege to the Board that the other debt was bogus, but in spite of that the Board accepted it as a genuine one. Neither side has filed copies of the proceedings to show how the Board arrived at that conclusion, but that is immaterial. The point was decided by them. The decree-holder could have applied promptly for a review of the decision but he did not. I am of opinion that he was not entitled to have the question of fraud re-agitated in the Civil Court. To hold otherwise would open the way to frivolous applications and lead to Courts being called upon to decide about the existence or validity of debts of persons who are not parties to the suits before them. I hold that the Civil Court acted without jurisdiction in making this inquiry. Its order is set aside, and effect must be given to the certificate issued against the non-applicant-decree-holder. Costs of this application on the non-applicant. Counsel's fee Rs. 15.

N.K./R.K. *Order set aside.*

1. Sadasheo Rao v. Roopchand, (1939) 26 A I R Nag 136=1939 N L J 142.

2. Shivdin v. Ramratan, (1937) 24 A I R Nag 259 =170 I C 905=I L R (1938) Nag 489.

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OUDH CHIEF COURT

1939

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	1939 R D	255
186	1939 O L R	207
	180 I C	879
	1939 O W N	339
189	1939 O W N	391
	181 I C	186
	1939 O L R	242
	14 Luck	624
	1939 R D	259
193	1939 O W N	140
	1939 O L R	80
	179 I C	787
	14 Luck	422
196	1939 O W N	500
	1939 O L R	345
	181 I C	662
207	1939 O L R	389
	182 I C	345
	1939 O W N	576
	40 Cr L J	722
	14 Luck	660
210	1939 O W N	372
	1939 O L R	235
	181 I C	70
	1939 R D	250
	14 Luck	515
213	182 I C	190
	1939 O L R	416
	1939 O W N	581
222	1939 O W N	414
	1939 O L R	238
	181 I C	79
	1939 A W R	76
	40 Cr L J	521
	14 Luck	634
223	1939 O W N	370
	1939 O L R	232
	180 I C	1007
	1939 R D	249
	14 Luck	464
	1939 A W R	72
224	1939 O W N	659
	1939 O L R	490
	182 I C	1007

AIR	Other Journals	
224	1939 A W R	92
	14 Luck	675
225	1939 O W N	467
	1939 A W R	79
	1939 O L R	336
	181 I C	575
	40 Cr L J	569
227	1939 O W N	719
	1939 O L R	507
	1939 R D	453
	1939 A W R	109
	20 U D	17
	14 Luck	694
	183 I C	382
229	1939 O L R	464
	1939 O W N	615
	183 I C	16
	1939 A W R	88
	14 Luek	666
230	1939 O W N	398
	181 I C	181
	1939 O L R	241
	14 Luck	621
232	1939 O W N	656
	1939 R D	420
	1939 O L R	484
	183 I C	254
	1939 A W R	90
	14 Luck	671
233	1939 O W N	736
	1939 R D	455
	1939 O L R	537
	183 I C	604
	1939 A W R	111
	14 Luck	678
238	1939 O W N	716
	1939 O L R	503
	183 I C	378
	1939 A W R	101
239	1939 O W N	749
	1939 O L R	517
	1939 R D	463
	183 I C	463
	1939 A W R	119
	20 U D	22
	14 Luck	698
241	1939 O W N	711
	1939 R D	430
	1939 O L R	519
	183 I C	479
	1939 A W R	105
243	1939 O W N	773
	1939 O L R	530
	183 I C	593
	1939 R D	477
	1939 A W R	132
245	1939 O W N	755
	1939 O L R	523
	1939 R D	467
	1939 A W R	123
	20 U D	26
	14 Luck	701
	183 I C	436
247	1939 O W N	745

AIR	Other Journals	
247	1939 O L R	509
	1939 R D	461
	1939 A W R	117
	20 U D	19
	14 Luck	690
	183 I C	392
249	1939 O W N	777
	1939 O L R	532
	183 I C	597
	1939 A W R	134
	14 Luck	710
254	1939 O W N	662
	1939 O L R	486
	183 I C	265
	40 Cr L J	754
	1939 A W R	96
257	1939 O W N	825
	1939 O L R	563
	183 I C	821
	1939 R D	542
	1939 A W R	160
	14 Luck	723
269	1939 O W N	809
	1939 O L R	558
	183 I C	808
	1939 A W R	153
	14 Luck	763
273	1939 O W N	765
	1939 O L R	544
	183 I C	709
	1939 A W R	127
275	1939 O L R	590
	1939 O W N	863
	184 I C	136
	1939 A W R	185
	1939 R D	576
277	1939 O W N	819
	1939 O L R	582
	184 I C	81
	1939 A W R	149
278	1939 O W N	823
	1939 O L R	576
	1939 R D	515
	184 I C	14
	1939 A W R	152
279	1939 O W N	916
	1939 O L R	600
	184 I C	272
	1939 A W R	217
	1939 R D	593
281	1939 O W N	768
	1939 O L R	546
	183 I C	706
	1939 A W R	129
284	1939 O W N	891
	1939 O L R	602
	184 I C	290
	1939 A W R	203
	40 Cr L J	930
287	1339 O W N	977
	1939 O L R	646
	1939 R D	607
	1939 A W R	282
	184 I C	565

Other Journals = All India Reporter

I. L. R. 14 Lucknow = All India Reporter

ILR	AIR			ILR	AIR			ILR	AIR			ILR	AIR			ILR	AIR		
1	1938	O	87	13	1938	O	107	49	1938	O	156	78	1938	O	171	112	1938	O	184
4	"	"	100	22	"	"	175	65	"	"	125	89	"	"	140	116	"	"	146
9	"	"	97	40	"	"	122	71	"	"	127	106	"	"	169	130	"	"	192

ILR	AIR			ILR	AIR			ILR	AIR			ILR	AIR			ILR	AIR		
138	1938	O	186	247	1938	O	251	366	1939	O	68	467	1939	O	57	649	1939	O	182
144	"	"	260	252	1939	PC	122	378	"	"	49	475	"	"	83	653	"	"	180
147	"	"	199	269	"	O	48	393	"	"	96	478	"	"	120	660	"	"	207
151	"	"	208	272	1938	"	217	401	"	"	54	483	"	"	113	666	"	"	229
156	"	"	218	277	1939	"	2	404	"	"	55	492	"	"	131	671	"	"	232
164	"	"	206	306	"	"	16	409	"	"	81	515	"	"	210	675	"	"	224
172	"	"	212	308	"	"	10	416	"	"	73	524	"	"	75	678	"	"	233
176	"	"	201	316	"	"	40	422	"	"	193	532	"	"	63	690	"	"	247
186	"	"	221	322	"	"	14	430	"	"	110	536	"	"	125	694	"	"	227
192	1939	PC	80	325	"	"	37	435	"	"	111	538	"	"	116	698	"	"	239
211	1938	O	225	328	1938	"	256	438	"	"	107	543	"	"	178	701	"	"	245
213	"	"	188	335	1939	"	42	442	"	"	129	548	"	"	161	707	1940	"	20
218	"	"	224	338	"	"	44	447	"	"	102	588	"	"	141	710	1939	"	249
223	"	"	229	342	"	"	36	450	"	"	128	592	"	"	143	723	"	"	257
227	"	"	226	344	"	"	43	453	"	"	155	595	"	"	145	751	1940	"	55
230	"	"	234	346	"	"	90	456	"	"	142	621	"	"	230	763	1939	"	269
240	1939	"	31	351	"	"	65	459	"	"	158	624	"	"	189				
243	1938	"	250	360	"	"	45	464	"	"	223	634	"	"	222				

1939 Oudh Law Reports = All India Reporter

OLR	AIR			OLR	AIR			OLR	AIR			OLR	AIR			OLR	AIR		
1	1939	PC	1	114	1939	O	155	303	1939	PC	98	517	1939	O	239	646	1939	O	287
6	"	O	94	116	"	"	128	314	"	O	182	519	"	"	241	647	1940	"	77
9	"	"	54	117	"	"	142	316	"	PC	150	521	"	A	399	651	"	"	22
10	"	A	37	118	"	"	116	318	"	"	152	523	"	O	245	653	"	"	75
17	"	O	44	120	"	"	143	323	"	A	291	526a	1940	"	20	655	"	"	33
19	"	"	45	121	"	"	126	331	"	PC	159	528	1939	PC	242	657	"	"	45
22	"	"	49	124	"	"	113	336	"	O	225	530	"	O	243	659	"	"	43
28	"	"	68	128	"	"	157	338	"	PC	157	532	"	"	249	660	"	"	55
33	"	"	57	129	"	PC	6	340	"	"	86	537	"	"	233	666	"	"	52
37	"	"	78	131	"	O	122	345	"	O	196	541	"	PC	235	669b	"	"	26
40	"	"	91	134	"	PC	47	358b	"	PC	128	544	"	O	273	671	"	"	27
42	"	PC	11	140	"	O	156	363	"	O	180	546	"	"	281	677	"	"	111
46	"	"	14	141	"	"	118	366	"	FC	43	548	1940	"	8	681	"	"	96
52	"	O	81	144	"	FC	1	381	"	PC	174	553	1939	PC	249	683	"	"	92
55	"	"	73	187	"	PC	80	385	"	"	167	558	"	O	269	684	"	"	102
57	"	"	96	194	"	O	131	389	"	O	207	563	"	"	257	685	"	"	81
61	"	"	86	204	"	"	158	392	"	PC	170	576	"	"	278	688	"	"	87
65	"	"	85	206	"	"	160	396	"	"	163	577	"	PC	244	689	"	"	88
67	"	"	75	207	"	"	186	399	"	FC	74	582	"	O	277	692	"	"	93
70	"	"	63	210	"	FC	42	411	"	PC	190	584	1940	"	18	695	"	"	63
71	"	"	83	211	1938	"	1	416b	"	O	213	586	1939	PC	238	699	"	"	97
73	"	"	101	213	1939	A	225	427	"	A	433	590	"	O	275	704	"	"	67
74	"	A	97	214	"	O	145	429	"	PC	178	592	1940	"	44	713a	"	"	117
78	"	O	55	225	"	PC	95	433	"	"	213	596	"	"	15	713b	"	"	116
80	"	"	193	229	"	"	114	439	"	"	201	597	"	"	24	715	"	"	84
83	"	PC	27	232	"	O	223	445	"	A	466	600	1939	"	279	718	"	"	132
88	"	O	104	233	"	"	184	461	"	PC	219	602	"	"	284	721	"	FC	1
90	"	PC	22	235	"	"	210	464	"	O	229	605	1940	"	34	723b	"	O	107
95	"	O	108	238	"	"	222	466	"	PC	208	607	"	"	47	727	"	"	80
96	"	"	111	239	"	"	177	472	"	A	403	614	"	"	1	728	"	"	119
98	"	"	107	241	"	"	230	484	"	O	232	621	"	"	21	729	"	PC	7
99	"	"	106	242	"	"	189	486	"	"	254	622	"	"	12	734	"	O	137
101	"	"	110	246	"	FC	58	490	"	"	224	624	"	"	13	735a	"	"	83
103	"	"	120	262	"	PC	122	491	"	PC	228	626	"	"	59	735b	"	"	129
105	"	"	102	268	"	O	178	503	"	O	238	630	"	"	35	739	"	PC	1
106	"	"	105	270	"	PC	110	505	"	PC	200	637	"	"	16	741	"	"	3
107	"	"	99	274	"	O	161	507	"	O	227	639	"	"	90	746	"	O	104
109	"	"	125	291	"	A	299	509	"	"	247	642	1939	A	689	749	"	"	118
110	"	"	129	293	"	PC	133	510	"	PC	225					750	"	"	113
112	"	"	141	298	"	"	117	513	"	"	222								

1939 Oudh Weekly Notes = All India Reporter

OWN	AIR			OWN	AIR			OWN	AIR			OWN	AIR			OWN	AIR		
1	1939	O	96	59	1939	O	94	108	1939	O	63	168	1939	O	107	193	1939	O	129
7	"	"	49	63	"	"	81	118	"	"	75	171	"	"	106	196	"	PC	6
18	"	"	68	68	"	PC	1	125	"	"	101	173	"	"	108	201	"	O	142
27	"	"	91	82	"	O	86	128	"	"	104	176	"	"	120	203	"	"	141
32	"	"	55	89	"	"	73	140	"	"	193	179	"	"	105	206	"	"	116
38	"	"	78	94	"	A	97	146	"	"	110	181	"	"	102	210	"	PC	27
43	"	PC	14	102	"	O	85	155	"	"	111	184	"	"	125	219	"	O	155
53	"	"	11	106	"	"	83	157	"	PC	22	186	"	"	99	225	"	"	128

OWN	AIR			OWN	AIR			OWN	AIR			OWN	AIR			OWN	AIR		
227	1939	O	126	408	1939	O	178	659	1939	O	224	848	1940	O	55	990	1940	O	43
231	"	"	143	412	"	"	177	662	"	"	254	858	"	"	18	992	"	"	111
234	"	"	113	414	"	"	222	669	"	PC	190	863	1939	"	275	997	"	"	63
241	"	"	122	420	"	"	161	678	"	"	208	866	1940	"	44	1005	"	"	134
246	"	"	157	450	"	PC	117	688	"	"	178	868	"	"	15	1010	"	"	104
249	1938	PC	284	461	"	"	114	694	"	"	219	876	"	"	1	1017	"	"	52
265	1939	O	156	467	"	O	225	711	"	O	241	891	1939	"	284	1023	"	"	102
267	"	"	118	471	"	PC	122	716	"	"	238	899	1940	"	34	1028	"	"	93
272	1938	PC	292	480	"	"	98	719	"	"	227	901	"	"	21	1034	"	"	87
282	1939	"	47	500	"	O	196	722	"	PC	222	905	"	"	13	1036	"	"	88
293	"	A	225	522	"	"	182	730	"	"	225	908	"	"	12	1045	"	"	97
296	"	O	131	525	"	"	180	736	"	O	233	911	"	"	24	1055	"	"	47
313	"	PC	80	543	"	PC	133	745	"	"	247	916	1939	"	279	1075	"	PC	1
333	"	O	158	553	"	"	157	749	"	"	239	920	1940	"	59	1078	"	"	7
337	"	"	160	557	"	"	150	754	1940	"	20	927	"	"	90	1086	"	"	3
339	"	"	186	562	"	"	152	755	1939	"	245	932	"	"	16	1087	"	O	67
346	"	"	145	570	"	"	167	760	"	PC	235	936	"	"	27	1107	"	"	80
366	"	A	299	576	"	O	207	765	"	O	273	947	"	"	26	1109	"	"	83
370	"	O	223	581	"	"	213	768	"	"	281	950	"	"	81	1111	"	"	117
372	"	"	210	602	"	PC	213	773	"	"	243	955	"	"	45	1112	"	"	119
378	"	PC	95	615	"	O	229	777	"	"	249	960	"	"	77	1114	"	"	35
385	"	O	184	619	"	PC	163	791	1940	"	8	966	"	"	75	1129	"	"	116
391	"	"	189	626	"	"	170	800	1939	PC	128	970	"	"	33	1132	"	"	137
398	"	"	230	634	"	"	201	809	"	O	269	974	"	"	22	1134	"	"	84
401	"	PC	110	645	"	"	174	819	"	"	277	977	1939	"	287	1141	"	"	132
				656	"	O	232	823	"	"	278	980	1940	"	92	1145	"	"	107
								825	"	"	257	986	"	"	96				

1939 Revenue Decisions = All India Reporter

RD	AIR			RD	AIR			RD	AIR			RD	AIR			RD	AIR		
50	1939	O	57	140	1939	A	331	280	1939	A	385	420	1939	O	232	515	1939	O	278
54	"	"	73	141	"	"	301	282	"	"	502	422	"	A	584	516	"	A	717
61	"	A	197	144	"	PC	14	283	"	"	444	425	"	"	542	542	"	O	257
67	"	O	75	151	"	"	11	285	"	PC	133	428	"	"	533	557	1940	"	55
71	"	A	233	155	"	A	263	292	"	A	529	430	"	O	241	564	"	A	44
73	"	"	209	157	"	"	257	332	"	"	552	440	"	A	619	574	1939	"	732
74	"	"	236	160	"	O	128	335	"	"	507	444	"	"	679	576	"	O	275
78	"	O	83	169	"	A	332	339	"	PC	114	446	"	"	607	578	1940	"	44
85	"	A	251	171	"	"	391	342	"	A	415	449	"	PC	178	579	1939	A	751
86	"	"	206	172	"	"	398	363	"	"	446	453	"	O	227	583	1940	O	34
89	"	"	215	184	"	"	448	365	"	"	518	455	"	"	233	585	"	"	21
91	"	O	110	185	"	"	369	367	"	"	433	461	"	"	247	587	"	"	12
97	"	"	99	189	"	"	291	370	"	"	641	463	"	"	239	590	"	"	24
99	"	"	106	208	"	PC	80	371	"	"	648	466	1940	"	20	593	1939	"	279
101	"	A	210	229	"	A	190	372	"	"	668	467	1939	"	245	607	"	"	287
107b	"	"	226	234	"	"	500	382	"	"	442	477	"	"	243	609	1940	A	22
110	"	"	224	236	"	"	449	386	"	"	677	479	"	A	721	612	"	"	79
112	"	O	63	249	"	O	223	389	"	"	614	481	"	"	611	614	"	O	33
113	"	"	108	250	"	"	210	390	"	"	586	485	"	"	672	616	"	"	67
115	"	A	303	255	"	"	184	400	"	"	646	491	"	"	725	628	"	"	84
117	"	"	336	258	"	"	177	402	"	"	670	493	"	"	626	632	"	"	132
119	"	"	328	259	"	"	189	405	"	"	617	513	"	"	694	635	"	"	107
138	"	"	392																

THE

ALL INDIA REPORTER

1939

Oudh Chief Court

A. I. R. 1939 Oudh 1

THOMAS C. J. AND ZIAUL HASAN J.

Moulvi Rafi Uddin Ahmad and others — Applicants.

v.

Rani Kaniz Abid and others — Opposite Party.

Privy Council Appeal No. 2 of 1937, Decided on 19th October 1938, for leave to appeal to His Majesty in Council.

Civil P. C. (1908), Sec. 110—Multiples prescribed by U. P. Encumbered Estates Act cannot be made basis of calculating values of property.

The multiples prescribed by the U. P. Encumbered Estates Act were fixed for the purposes of the Act and they cannot be made the basis of calculating values of properties generally. The market value of immovable property is usually determined by instances of sales. [P 1 C 2]

Naziruddin — *for Applicants.*

Ali Zaheer — *for Opposite Party No. 1.*

Order.—This is an application for leave to appeal to His Majesty in Council against a judgment and decree of this Court dated 22nd September 1936. A question arose as to whether or not the value of the subject-matter of the appeal was Rs. 10,000 or more. The plaintiff-opposite party valued her suit at Rs. 5990 and this valuation was never objected to by the present defendants-applicants. It was however urged in the application that the decree of this Court involves directly a claim respecting property of the value of Rs. 14,000. We therefore acting under O. 45, R. 5 referred the matter for report to the Court of first instance and the learned Civil Judge of Bara Banki has made a report to the effect that the value of the property in suit at the time when the suit was filed was Rs. 10,370 and at the time of this Court's decree, Rs. 11,720.

This report is objected to on behalf of the plaintiff-opposite party on the ground that the learned Civil Judge was wrong in basing his calculations on the multiples prescribed under the U. P. Encumbered Estates Act, namely at thirty times the profits. We are of opinion that this objection is well founded. The multiples prescribed by the Encumbered Estates Act were fixed for the purposes of the Act and they cannot to our minds be made the basis of calculating values of properties generally. Moreover, the report of the learned Civil Judge shows that he arrived at the figures mentioned above by adding Rs. 500, the amount of mesne profits, to the actual value found out by him by multiplying the profits by 30 ; but no question of mesne profits would arise in the proposed appeal to His Majesty in Council as this Court distinctly dismissed the plaintiff's claim for mesne profits. The market value of immovable property is usually determined by instances of sales, but the applicants did not produce a single sale deed before the Court below to prove the market value of the property in suit. We are not therefore satisfied that the value of the subject-matter in dispute in the present case is Rs. 10,000 or upwards.

It now remains to be seen whether apart from the value of the property in dispute the case is a fit one for appeal to His Majesty in Council. After carefully going through the judgment of this Court, we are of opinion that it is not. The judgment shows that the plaintiff-opposite party's title to the property in dispute was protected by the judgment of their Lordships of the Judicial Committee in the appeal in

Raushan Ali Khan's suit as the following passage in 1936 O W N 1069[1] at page 1074 will show:

Their Lordships of the Judicial Committee in their judgment, Ex. 3, in reciting the history of the case, distinctly stated that the Subordinate Judge 'gave the plaintiff a decree for the properties which fell to the junior widow, with the exception of certain properties in the possession of the Court of Wards, as to which the suit failed for want of the statutory notice', and in the end restored the decree of the Subordinate Judge. It seems obvious that the defendants' rights are subject to the limitations contained in the decree in their favour, and they cannot claim anything more than what has been granted under the decree. Thus there can be no doubt that the plaintiff's title as mortgagee under Ex. B-21, and as owner of the equity of redemption in respect of the mortgage, Ex. B-8, under the purchase made by the Deputy Commissioner not only remained unaffected, but was expressly protected by the terms of the decree passed in Raushan Ali Khan's suit.

How far the prior mortgage in favour of Ratan Lal and Kundan Lal, affected the plaintiff's right to possession of the property was also decided on the decision of their Lordships of the Judicial Committee in 36 I A 203.[2]

In view of the decision of their Lordships of the Privy Council referred to in the judgment no substantial question of law in our opinion remains to be decided. We therefore dismiss this application with costs.

D.S./R.K. *Application dismissed.*

1. Kaniz Abid Talukdaria v. Murtaza Husain Khan, (1937) 24 A I R Oudh 159=165 I C 373=12 Luck 540=1936 O W N 1069.
2. Mt. Izzatunnissa Begam v. Kunwar Pertab Singh, (1909) 31 All 583=3 I C 793=36 I A 203=6 A L J 817 (P C).

A. I. R. 1939 Oudh 2

ZIAUL HASAN AND YORKE JJ.

Har Kishan Das — Plaintiff — Appellant.

v.

Satgur Prasad — Defendant — Respondent.

First Appeal No. 113 of 1935, Decided on 9th September 1938, against order of Thomas J., D/- 17th September 1935.

Res Judicata—Decision of trial Court on certain issue—Appellate Court disposing of suit on different ground without deciding issue decided by trial Court—Issue decided by trial Court is not res judicata in subsequent suit.

Where a trial Court has given a finding on an issue but the Appellate Court without deciding that issue or treating it as material disposes of the suit on a totally different ground, the issue decided by the trial Court cannot be said to have been heard and finally decided and hence cannot operate as res judicata in a subsequent suit: *A I R 1924 P C 144; A I R 1929 P C 289 and A I R 1932 Mad 519, Disting.; 24 Cal 616 (P C), Rel. on.* [P 8 C 1; P 10 C 1, 2]

Niamatullah, Bhagwati Nath, Radha Krishna, Ganga Dayal and Karta Krishna — *for Appellant.*

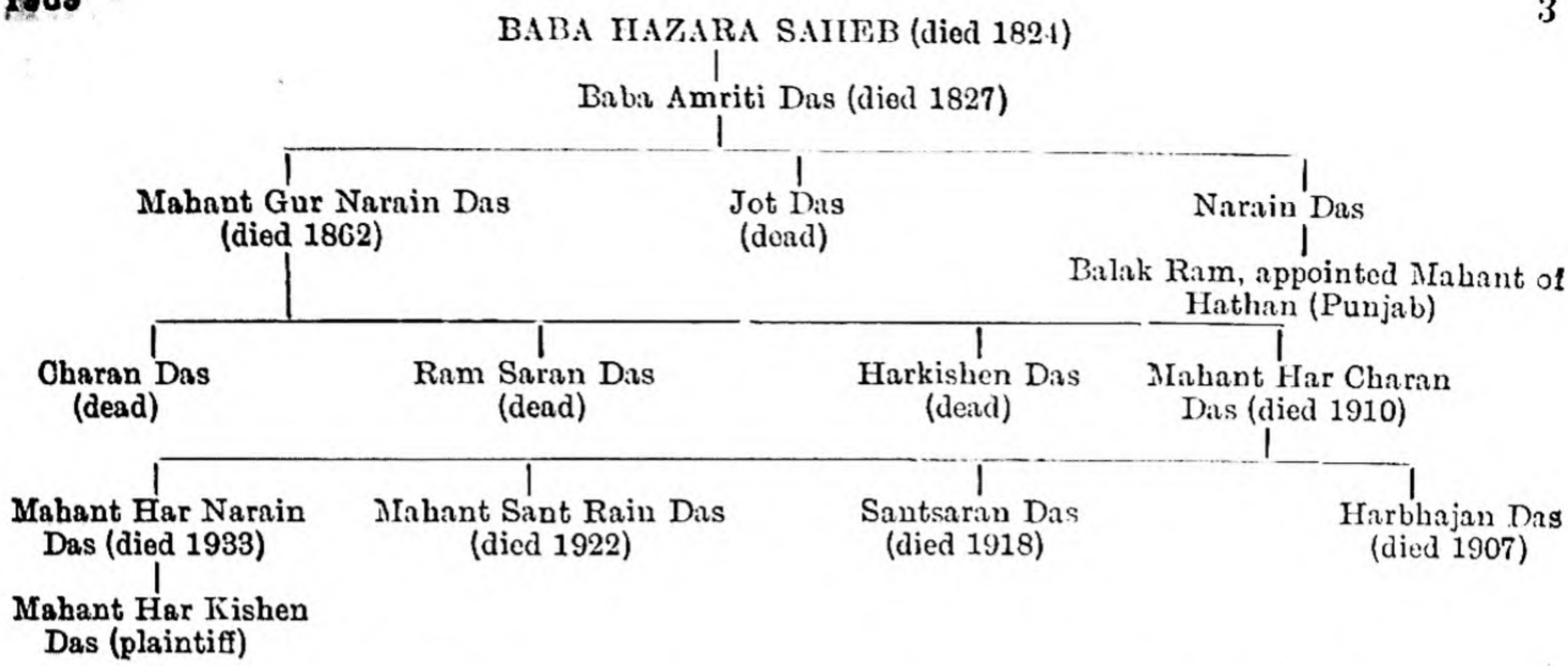
M. Wasim, Ghulam Hasan and B. P. Misra — *for Respondent.*

Judgment.—This is a plaintiff's appeal against a decree of a learned Judge of this Court sitting on the Original Side. The suit of the plaintiff-appellant was dismissed on a preliminary point, namely that it is barred by res judicata owing to the decision in a previous suit (No. 1 of 1927) brought in this Court by Mahant Har Narain Das, the immediate predecessor-in-interest of the plaintiff, against the present defendant respondent, and the only question argued before us was whether or not the decision in Suit No. 1 of 1927 was a bar to the present suit. The present suit was brought by the appellant for possession of properties specified in annexures A to F attached to the plaint and for some other reliefs and he claimed to be the spiritual successor of Baba Hazara and Mahant Gur Narain Das according to the following pedigree:

(For pedigree see next page.)

Annexure A of the plaint relates to villages and shares in villages, one hundred and eighty-one in number, situate in the districts of Lucknow, Unao, Hardoi, Bahraich, Gonda and Kheri which formed what is known as the Maswasi Estate and is entered in lists I and II of the Oudh Estates Act of 1869. Annexure B comprises four villages said to have been acquired by Mahant Gur Narain Das as accretions to the estate. Annexure C contains the names of forty-two villages and shares in villages said to have been acquired by Mahant Har Charan Das. Annexure D is a list of twenty-five villages out of annexures A, B and C which are said to have been made a waqf of for certain purposes by Mahant Har Charan Das on 13th February 1879. Annexure E is the list of moveable property and cash and annexure F of decretal debts standing in the name of Mahant Har Narain Das.

The plaintiff's case is that the properties in suit belong to a religious institution of Udasi Nanakshahi Faqirs founded by Baba



Hazara, the headquarters of which is in a compound known as Bagh Baba Hazara, situate in mohalla Ahata Surat Singh, Lucknow City. The institution is known as Sangat Bagh Baba Hazara. Baba Hazara is said to have flourished in the beginning of the 19th century and to have come to this province from the Punjab. He settled in a grove under a withered nim tree which in course of time revived and the proprietor of the grove influenced by the spiritual powers of the Baba made a gift of the grove to him. Gifts of money and landed property were made by the public and the ex-kings of Oudh to Baba Hazara and his successors, Baba Amriti Das and Mahant Gur Narain Das, so that at the time of the annexation of Oudh and of the proclamation of Lord Canning dated 15th March 1858, confiscating all lands in Oudh, Mahant Gur Narain Das was in possession of the property mentioned in annexure A. Subsequently when the land was released in favour of the previous owners by the letter of the Chief Commissioner dated 10th October 1859, the first and second summary settlements of the aforesaid property were made with Mahant Gur Narain Das. He died in 1862, but when the Oudh Estates Act was passed in 1869, Mahant Gur Narain Das's name was entered as a taluqdar at No. 20 in list I and at No. 4 in list II of the lists prepared under Sec. 8, Oudh Estates Act. A sanad was also granted to him in 1860 and it contains a primogeniture clause.

Mahant Gur Narain Das was admittedly succeeded by his junior chela Mahant Har Charan Das, who is said to have made a waqf of property entered in annexure D in favour of the samadhis of Baba Hazara and Mahant Gur Narain Das situate in the premises known as Bagh Baba Hazara and for expenses of Sadabart, Bhandara and of Ram Lila. Har Charan Das died in 1910 leaving a will dated 1st December 1908 by which he nominated his illegitimate son Sant Rain Das as his successor. By this will he enjoined his successor to observe celibacy and to adhere to the other tenets of the Udasi Nihang cult. Mahant Sant Rain Das accordingly succeeded Har Charan Das to the estate and was in possession of it up to his death which occurred in 1922. As he left no will and, according to the plaintiff-appellant, left no chela, three claimants to the estate appeared on his death. They were Har Narain Das, who claimed to be the chela of Har Charan Das and gurbhai of Sant Rain Das, Mt. Sheoraj Kuar, mother of Sant Rain Das, and the present defendant-respondent Satgur Prasad alias Har Charan Das, who claimed to be the son of Bibi Rup Kuar, daughter of Mahant Har Charan Das and sister of Mahant Sant Rain Das. This tripartite dispute was settled on 20th January 1922 by a compromise (Ex. A-3) brought about by some friends. Under this compromise, Har Narain Das was to remain in possession of the estate during his life and was to be succeeded by the present defendant-respondent and the latter was to nominate only a chela of the Udasi sect as his successor. On 25th November 1924, Har Narain Das executed a deed of release (Ex. A-4) by which he surrendered his life-interest to the present defendant-respondent who was to pay to him Rs. 1000 a month for his life. It was provided in this deed that if the monthly payments were delayed, the present defendant-respondent would lose his rights not only under this deed but also under the compromise of 1922 (Ex. A-3).

The plaintiff's case is that the property in suit belongs to the Sangat Bagh Baba Hazara, that neither confiscation nor granting of the sanad to Mahant Gur Narain Das nor the passing of Act I of 1869 could in law change the nature of the property which continued to belong and appertain to the Sangat Bagh Baba Hazara. He alleges that Mahant Har Narain Das remained in possession of the estate till 25th November 1924, on which date the defendant obtained a release from him by means of fraud and undue influence, that in pursuance of this deed of release the defendant came into possession of the properties except Bagh Baba Hazara which remained in the possession of Mahant Har Narain Das till his death in December 1933, that Mahant Har Narain Das in 1927 brought a suit against the present defendant for cancellation of the deed dated 25th November 1924, on the ground, amongst others, of fraud and undue influence and for possession of the properties, except Bagh Baba Hazara, which was in his possession, and for mesne profits, that in pursuance of the final decree in this suit passed by their Lordships of the Privy Council in 1932, Mahant Har Narain Das obtained delivery of possession of immovable properties and remained in possession thereof till his death. He further alleges that on 11th January 1934, he was installed as Mahant of Sangat Bagh Baba Hazara in place of the deceased Mahant Har Narain Das by Sri Mahants, Mahants and Faqirs of the various Udasi Nihang Nanakshahi Sangats and is entitled to possession of all the properties in suit as such Mahant. It is further stated that after the death of Mahant Har Narain Das the defendant tried to oust the plaintiff from the Sangat where the plaintiff was residing and to take forcible possession thereof, but the said Bagh Baba Hazara with some of the moveable properties mentioned in annexure E was attached by the Criminal Court under S. 145, Criminal P. C., and is still under attachment, that the defendant who claims title under the deed of 20th January 1922, (Ex. A-3) is in unlawful possession of the properties in suit and has no title to them as he is neither an Udasi Nihang Nanakshahi Faqir nor the chela of any preceding Mahant of the Sangat. The plaintiff further says that the properties in suit being at any rate attached to the office of the Mahant of Bagh Baba Hazara he who holds the said office is entitled to them and the defendant who is not the Mahant has no title to them. With regard to the agreement of 20th January 1922 (Ex. A-3) he says that if it was executed by Mahant Har Narain Das, it is void and ineffectual for several reasons, namely, that Mahant Har Narain Das had no right to alter the line of succession and to come to an agreement with regard to succession with the defendant who is neither a chela of any Mahant nor an Udasi Nihang Nanakshahi Faqir and therefore not a spiritual descendant of Baba Hazara, that the defendant retains his natural ties and caste, eats meat, drinks wine and has Mahomedan prostitutes in his keeping so that even if ever he was an Udasi Nihang Nanakshahi Faqir, he has ceased to be such, that Mahant Har Narain Das had no interest to convey to the defendant after his death and could not bind the subsequent Mahants, that the alleged agreement being in disregard of the interests of the Sangat is not binding on the Sangat or the plaintiff and that the agreement being neither a family settlement nor a deed of amicable settlement of doubtful claims, does not affect the rights of the plaintiff with regard to the property in dispute or the Sangat or its Mahantship. The plaintiff further contends that in any case the agreement of 20th January 1922 does not and cannot affect the title of the plaintiff to the Mahantship of the Sangat, the Sangat itself and the properties mentioned in annexures D, E and F. On these allegations the plaintiff claims the following reliefs :

(a) A decree for possession be passed in favour of the plaintiff in respect of the properties mentioned in annexures A, B, C and D and items 23 to 42 in annexure E. (b) That mesne profits amounting to Rs. 2,00,000 or such amount as the plaintiff might be held entitled to be decreed against the defendant. (c) That it be declared that the plaintiff is the lawful Mahant of Sangat Bagh Baba Hazara and is entitled to the possession of the said Sangat and all the properties mentioned in annexure E, items 1 to 22 and F. (d) That if relief (a) is not granted to the plaintiff then it be declared that the properties mentioned in annexures A, B and C are charged with the expenses of the Sangat Bagh Baba Hazara and other religious and charitable objects connected therewith to the extent of Rs. 10,000 per month. (e) That costs of the suit be awarded to the plaintiff. (f) That such other relief or reliefs which the nature of the case may require be granted to the plaintiff.

The suit was contested by the defendant-respondent on various grounds which gave rise to the following issues :

1 (a) Was Baba Hazara an Udasi Nihang (celibate) of the Nanakshahi Faqir sect and did he found a

Sangat in Mohalla Ahata Surat Singh, Lucknow City, known as Bagh Baba Hazara ? (b) Is Bagh Baba Hazara an ancient religious institution and public place of worship of the Nanakshahi sect and does it constitute a religious trust ? 2 (a) Is the plaintiff the sole surviving chela of Mahant Har Narain Das ? (b) Is the defendant a duly constituted chela of Mahant Sant Rain Das as alleged by him ? 3. Was Mahant Gur Narain Das in possession of the immovable properties mentioned in annexure A of the plaint, or any of them, as and in the capacity of the Mahant of the alleged Sangat Bagh Baba Hazara, did those properties belong and appertain to the said Sangat, both before and after the annexation of Oudh by the British Government ? 4. Are the properties mentioned in annexure B accretions to the alleged Sangat made by Mahant Gur Narain Das after the confiscation ? 5. In respect of what property was the sanad granted to Mahant Gur Narain Das ? Was it granted to him in his capacity as the Mahant of the alleged Sangat Bagh Baba Hazara ? 6. Was Mahant Gur Narain Das the owner in his own right, of the properties mentioned in annexure A (excepting items 178 to 181), annexure B and items 14 to 33 of annexure C, before or after the annexation ? 7 (a). Did Mahant Gur Narain Das by his acts and declarations constitute the properties in annexures A and B trust properties and himself a trustee thereof and hold the same as Mahant of the Sangat ? (b) Were the properties mentioned in annexure C acquired by Mahant Har Charan Das with income of the alleged Sangat property in his hands and do they constitute Sangat properties ? (c) If the properties in annexure A excepting items 178 to 181 and B are held to be Sangat properties was Mahant Har Charan Das the owner of properties in annexure C, excepting items 14 to 33, in his own right ? (d) If the properties mentioned in annexures E and F are held to be the personal properties of Mahant Har Narain Das, is the plaintiff entitled to them ? (e) Did Mahant Har Narain Das die possessed of properties mentioned in annexure E excepting items 23, 24, 25 and 42 of annexure E (b) and properties entered in annexure F ? (f) What is the value of the properties mentioned in annexures E and F and of those proved or admitted to be in possession of the defendant ? 8. Is Bagh Baba Hazara a Sangat of Udasi Nihang Nanakshahi Faqirs and do the properties in suit belong and appertain to the said Sangat and are the trust properties for religious and charitable purposes relating to the said Sangat ? 9. If the properties in suit are not Sangat properties are they attached to the office of the Mahant of Sangat Bagh Baba Hazara and is the plaintiff entitled to them as such ? 10. Are the properties mentioned in annexures A, B and C burdened with the obligation of a trust in favour of the alleged Sangat and are they charged with expenses of the alleged Sangat and other religious and charitable objects connected therewith to the extent of Rs. 10,000 per mensem or of any other amount ? If so, is the plaintiff entitled to a declaration to that effect ? 11. Does there exist a custom among the Udasi Nanakshahi Faqir sect or in the Sangat in question regulating the rule of succession, (i) to Mahantship, and (ii) to the properties in suit ? If so what is the custom ?

12. Were Sant Rain Das and his predecessors-in-interest Jats and Sudras and if so how does it affect succession to the properties in suit ? 13. Was the plaintiff nominated as the successor under the will dated 28th December 1931, by Mahant Har Narain Das ? Is the said will valid and operative ? Was the plaintiff installed as the Mahant of the alleged Sangat Bagh Baba Hazara ? If so, what is its effect ? 14 (a). Did the deed dated 13th February 1879, create a valid waqf in favour of samadhis of Bagh Baba Hazara and Mahant Gur Narain Das, as alleged by the plaintiff, or was it void in law ? (b) Was the said deed cancelled as alleged by the defendant and if so, is such cancellation valid and effective ? Is the plaintiff entitled to claim any relief on the basis of the said deed of waqf ? 15 (a). Did Mahant Har Narain Das enter into an agreement with the defendant in 1922 as alleged by him (defendant) ? (b) Is the said agreement void, ineffectual and not binding on the alleged Sangat or the plaintiff, as alleged by the plaintiff in para. 29 of the plaint ? (c) If the said agreement be held to be binding on the plaintiff, then to what properties in suit does it apply ? 16. Is the present suit or any of the issues in the present suit barred by res judicata as alleged in paras. 48 and 49 of the written statement ? 17. Is the plaintiff estopped from contesting the right and title of the defendant to the properties in suit ? 18. Is the suit barred by limitation? 19. To what mesne profits, if any, is the plaintiff entitled ? 20. To what relief, if any, is the plaintiff entitled ?

The learned Judge of this Court who heard the case recorded some evidence and proceeded to decide Issue 16 and held as follows :

(1) That Mahant Har Narain Das, plaintiff, brought the suit (No. 1 of 1927) as representative of the Sangat and for possession of properties of that Sangat and that the present plaintiff is bound by that finding; (2) that reliefs (a) and a (1) were two independent reliefs and that Issue 5 was a direct and substantial issue and it was heard and finally decided with reference to relief a (1) by both the Courts, and the compromise of 20th January 1922, is binding on the plaintiff. Therefore the decision that the property is governed by Act 1 of 1869 and that the property is the personal property of Mahant Gur Narain Das and is not burdened with any trust is res judicata.

While deciding Issue 16 the learned Judge considered the other issues in the case also. With regard to Issues 2, 11, 12, 13, 17, 18 and 19, he held that they became unnecessary for decision in view of the finding upon the main question. With regard to the rest he was of opinion that their trial was also barred by the decision in the previous suit (No. 1 of 1927).

The question before us is whether or not the decision in Mahant Har Narain Das's suit (No. 1 of 1927) operates as res judicata in the present suit. In order to decide this question, we must refer in detail to the pleadings and the decision in the previous suit. The plaint (Ex. A-695) of the previous suit will be found commencing from p. 40, part 3 of the paper-book. It begins with the pedigree of the spiritual family as given

in the present plaint and prays for the following reliefs :

(a) That the deed dated 25th November 1924, be set aside as void. (a1) That a declaration be made to the effect that defendant 1 is not entitled to any benefit under the agreement dated 20th January 1922, and the deed dated 25th November 1924. (b) A decree for possession be passed in favour of the plaintiff in respect of properties mentioned in Schs. A, B and C. (c) That mesne profits amounting to Rs. 5 lacs be decreed against defendant 1. (d) Costs of the suit be awarded to the plaintiff. (e) Such other relief or reliefs as the nature of the case may admit of be granted to the plaintiff.

With regard to relief (a), above, para. 23 of the plaint runs as follows :

That the deed dated 25th November 1924, referred to above, is not binding on the plaintiff 'inter alia' on the following grounds and the plaintiff is entitled to the possession of the property in suit. (a) That the said deed dated 25th November 1924, is without consideration. (b) That the said deed dated 25th November 1924 does not effect any conveyance of the rights of the plaintiff. (c) That the said deed was obtained by the exercise of fraud and undue influence as alleged in the preceding paragraphs practised on the plaintiff who signed it without understanding the nature and effect of the deed on his interests at a time when he had no independent adviser and yielding to the importunity of those on whom he relied and who had their selfish interest in view.

With regard to relief (b) for possession, Mahant Har Narain Das's allegations as contained in para. 24 of the plaint were as follows :

That even if the deed dated 25th November 1924 be held to be valid and binding the plaintiff is entitled to possession of the property in suit 'inter alia' on the following grounds :

(a) That under the deed dated 25th November 1924, the defendant was bound to pay every month to the plaintiff the sum of Rs. 1000 secured by the said deed and in case of default or delay the plaintiff is entitled to enter into the possession of the entire property covered thereby and to avoid both the deeds dated 25th November 1924 and 20th January 1922 the defendant has all along been delaying the payment of the said sum and the payment for the months of November and December 1926 and January 1927 is still in arrears in spite of repeated demands.

(b) That defendant 1 has by his actions and professions renounced his adherence to Udasi sect as contemplated by the will of Mahant Har Charan Dass and the agreements dated 20th January 1922 and 25th November 1924 each have been thereby contravened by defendant 1 and which in so far as they confer benefits on defendant 1 do so only in his capacity of a Nihang Udasi to which particular cult Mahant Gur Narain Das belonged.

(c) That defendant 1 retains his natural ties and caste and professes to be a married man, facts which disqualify him from occupying the position of a Mahant of the Gaddi of Baba Hazara and to be in possession of the property in suit.

It may be noted here that the defendants of Mahant Har Narain Das's suit were not only the present defendant-respondents but also two others, namely Mt. Raj Kumari, defendant 2, who was said to be in the keeping of the present defendant-appellant, and Nand Kumar, defendant 3, who was manager of the estate and who was said to have secured for himself a benefit of Rs. 100 a month as a charge on the property in suit. The suit appears however to have been contested mainly by the present defendant. His pleas will appear from the issues framed in the case. They were as follows :

(1) Was Har Charan Das the senior chela of Mahant Gur Narain Das ? (2) Is the plaintiff the chela of Mahant Har Charan Das and if so, is he the senior chela ? (3) Is Mt. Rup Kuar mother of defendant 1 the illegitimate daughter of Mahant Har Charan Das ? (4) Is defendant 1 the chela of Mahant Sant Rain Das ? (5) Is the property in suit appurtenant to the sangat of Baba Hazara and not the absolute property of the Mahant for the time being ? (6) Was the deed executed by the plaintiff and defendant 1 on 25th November 1924 not a genuine agreement but intended by the parties themselves to remain inoperative ? (7) Does the above deed if genuine amount to a valid conveyance of all the property ? (8) Is the said deed invalid as being (a) without consideration, or (b) obtained by undue influence and fraud as alleged by plaintiff ? (9) Are the holders of this gaddi members of the sect of Nihang Udasi and if so, are they bound to celibacy ? (10) Is defendant 1 married to defendant 2 ? (11) Has defendant 1 forfeited his rights to this property by non-observance of the rules of the Udasi sect in the manner alleged in the plaint and in particular by contravening the terms of the will of Mahant Har Charan Das and the agreement of 20th January 1922 ? (12) Has defendant 1 made default or delay in paying the allowance due to the plaintiff under the agreement of 25th November 1924 and, if so, has he forfeited his rights under that agreement ? (13) Is the plaintiff estopped by accepting benefits under the deed of 25th November 1924 from challenging the validity of that deed ? (14) Is defendant 1 liable to render accounts of the receipts of the property since it came into his possession under the deed of 25th November 1924 ? (15) To what relief, if any, is the plaintiff entitled ? (16) Are the plaintiff's rights extinguished by the doctrine of merger and surrender ?

The suit was tried by Pullan J. whose findings on the above issues were as follows:

On Issue 1 he held that Har Charan Das was the junior chela of Gur Narain Das. On Issue 2, it was held that the plaintiff was the senior chela of Mahant Har Charan Das. On Issue 3, Mt. Rup Kuar was found to be the illegitimate daughter of Mahant Har Charan Das. Issue 4 was found in the negative. On Issue 5, which is most important from the point of view of the present suit, the learned Judge held that the property was not appurtenant to

the Sangat of Bagh Baba Hazara but the absolute property of the Mahant for the time being as a taluqdar under Act 1 of 1869. Issue 6 was found against the plaintiff and it was held that it was a genuine agreement and was intended to be operative. Issue 7 was also decided against the plaintiff subject to the findings on Issue 8. On Issue 8 it was held that the agreement of 25th November 1924 was not without consideration but was obtained by undue influence and fraud. On the question involved in Issue 9 it was held that the holders of the gaddi while abstaining from marrying were in the habit of keeping mistresses. On Issue 10, it was held that no marriage took place between defendants 1 and 2. Issue 11 was decided in the negative, that is to say against the plaintiff. On Issue 12 the decision was that defendant 1 made default in paying the allowance due to the plaintiff and that he had forfeited his rights under the agreement of 1924. Issues 13, 14 and 16 were decided in favour of the plaintiff. As a result of the findings referred to above, the suit of Har Narain Das, plaintiff, was decreed as follows :

(a) The deed of 25th November 1924 is set aside as void, (b) a declaration is made to the effect that defendant 1 is not entitled to any benefit under the agreement dated 20th January 1922, (c) a decree for possession is passed in favour of the plaintiff in respect of the properties mentioned in Sch. A, B and C, (d) the plaintiff will receive such mesne profits as may be subsequently determined from defendant 1, (e) the plaintiff will receive his whole costs from defendant 1. Defendants 2 and 3 will bear their own costs.

Against the decree of the learned Judge the present respondent filed an appeal which was heard by Stuart, C. J. and Wazir Hasan, J.* who varied the decree of the trial Judge in the following terms :

We affirm the decree of the trial Court in so far as the relief of cancellation of the document of 25th November 1924 is concerned, and also to the relief for possession in consequence thereof. As to the relief granted by that Court in respect of the forfeiture of the defendant-appellant's rights under the settlement of 20th January 1922 we accept the appeal and reject that relief. As to mesne profits the plaintiff is only entitled to them from the date of the suit till the recovery of possession by him, the reason being that the document of 25th November 1924 was only voidable at the option of the plaintiff and the plaintiff did not exercise that option earlier than the date of this suit. The amount of the mesne profits will be determined hereafter.

As to costs we are of opinion that the plaintiff is not entitled to his costs in full because he obviously asked for more reliefs than he was entitled to and it was only before us that the claim to relief in respect of a declaration that defendant 1 is not entitled to any benefit under the earlier document of 20th January 1922, that is to say he has lost his remainderman's estate also, was admitted by the plaintiff-respondent's learned counsel as a relief to which the plaintiff is not entitled if the relief as to the cancellation of the deed of 25th November 1924 is granted in his favour. We therefore direct that the plaintiff will be entitled to half his costs from defendant 1, Satgur Prasad, in both the Courts and that the said defendant and the other two defendants will bear their own costs throughout.

It will thus be seen that the Appellate Bench of this Court disallowed relief (a1) of the plaint and varied the decree of the trial Court. With regard to mesne profits by restricting the period of those profits and holding that the plaintiff was entitled to mesne profits from the date of the suit only. Against this decree both the parties appealed to His Majesty in Council and the judgment of their Lordships of the Privy Council (Ex. A-1025) shows that the decree of the Appellate Bench of this Court was varied only in so far as to substitute for the words "date of the suit" the words "25th November 1924" and to add after the words "possession by him" the words :

The defendant-appellant being entitled to credit in the account so to be taken for all sums paid by him after that date to respondent 1 and interest being allowed at the usual rate on both sides thereof.

Thus the decree of the Appellate Bench was amended only in respect of the mesne profits. In other respects the decree was allowed to stand.

There can be no doubt that Issue 5 of the previous suit, namely whether the property in suit appertained to the sangat of Baba Hazara or was the absolute property of the mahant was decided by the trial Court against the then plaintiff and it was held that the property was not appurtenant to the sangat but was the absolute property of the mahant for the time being as a taluqdar. As however, the decree of the trial Judge was appealed from it merged into the Appellate Court's decree and the question is whether or not the Appellate Court decided this question and whether it affirmed or reversed or varied the finding of the trial Court on this point. While the learned counsel for the respondent contends that the finding of the trial Court on Issue 5 was affirmed by the Appellate Bench, it was argued on behalf of the plaintiff-appellant that the Appellate Court did not decide the question at all but confined its decision to a finding on Issue 8 (b), namely

* See (1929) 16 A I R Oudh 44.

whether or not the deed of 1924 was void on account of undue influence and fraud. It is conceded on behalf of the respondent that if the learned Judges who heard the appeal in this Court did not decide Issue 5 the question whether or not the property in suit belonged to the sangat cannot be regarded as res judicata.

After hearing the learned counsel for parties at length and giving our best consideration to the question, we regret we cannot agree with the finding of the learned trial Judge on this point. After reading the judgment of the Appellate Court with care more than once, we have come to the conclusion that the question involved in Issue 5 of the previous suit was left undecided by that Court.

Before quoting some passages from the judgment of the Appellate Bench which bear on the point, we consider it necessary to refer to some proceedings in the trial Court. It appears that during the course of the trial before Pullan J., Mr. Niamatullah, counsel for the plaintiff, made the following among other statements, on 16th July 1927 (page 69 part 3 of the paper-book) :

His client claims the property as successor of Mahant Sant Rain Das but not independently of the agreement of 20th January 1922.

After this statement the counsel for the defendant put in an application on 15th August 1927, saying that in view of the statement of the counsel for the plaintiff, Issues 1 to 5 and 9 in the case had become unnecessary and praying that these issues be deleted : *vide* page 71, part 3 of the paper-book. In reply to this application an application was put in on 22nd August 1927 on behalf of the plaintiff in which it was said that the statement of the plaintiff's counsel referred to in the defendant's application only meant that the plaintiff claimed to be the successor of Mahant Sant Rain Das as alleged by him in the plaint but subject to the covenants binding on him under the agreement of 20th January 1922, and that that statement did not obviate the necessity of Issues 1 to 5 and 9 being tried. On this the learned Judge passed an order in which he said :

In my opinion the issues as already framed should remain intact except for the verbal alteration effected in Issue 3 and I order accordingly.

It will thus be seen that all the issues originally framed in the case were allowed to remain as they were. Indeed the learned Judge recorded findings on each and every one of them. When the case came up in appeal before the Bench however it appears that the learned counsel for the plaintiff agreed that if Issue 8 (b), namely whether or not the release Ex. A-4 was obtained by undue influence and fraud be decided in his favour, other questions raised by him in his memorandum of appeal need not be decided.

We may now refer to the following passages occurring in the judgment of their Lordships of the Appellate Bench :

Before proceeding further, it is necessary to clear one important matter. The plaintiff founded his title to immediate possession exclusively on the settlement of 20th January 1922. This was clearly stated by the learned counsel for the plaintiff on the day of the opening of the trial of this case before Pullan J. This statement will be found at page 32 of part 1 of the record. The statement is as follows :

'Mr. Niamatullah (counsel for the plaintiff) states that his client claims the property as the successor of Mahant Sant Rain Das, but not independently of the agreement of 20th January 1922.'

The question of the plaintiff's title having thus been confined to rest on the settlement of 20th January 1922 the counsel for the defendant-appellant stated in reply that 'in view of the statement just made by Mr. Niamatullah for the plaintiff he does not now consider it necessary to set up the title of defendant 1 prior to the agreement of 20th January 1922.' In this state of pleadings, it is clear that all questions relating to the titles of plaintiff and the defendant to the property in suit under a claim of succession to the estate of Mahant Sant Rain Das outside the terms of the settlement of 20th January 1922 are beyond the scope of the present suit. It follows and this was agreed to by the learned counsel on both sides before us, that in the event of the later agreement of 25th November 1924 being set aside as vitiated by undue influence and fraud, the parties in respect of their rights, are relegated to the position which they occupy under the earlier agreement of 20th January 1922, and in the same event it is further agreed that the decree of the trial Court must be modified by deleting the relief in respect of the deed of 20th January 1922, *It will appear from what has just now been stated that the primary question for decision in the appeal is the one which is covered by Issue 8 (b) (see p. 31, part 1 of the printed record) of the issues framed in the trial Court and if we uphold the finding of that Court on this issue no other question need be decided.* We may however mention that on behalf of the appellant the findings of the trial Court on Issues 12 and 13 and on behalf the plaintiff-respondent on Issue 10 were also challenged. After hearing prolonged arguments on both sides and after having taken time for considering our judgment we have come to the conclusion that the finding of the trial Court on Issue 8 (b) must be affirmed. *In consequence of this conclusion we would refrain from deciding any other issue in the appeal.*

The underlined *(italicized here)* portions of the above passages appear to us to show

clearly that the Appellate Bench considered it unnecessary to decide any of the issues arising in the case except Issue 8 (b) and that they did not decide any other issue.

The learned counsel for the respondent relies on the following passage occurring at page 119.

Mahant Gur Narain Das was therefore a taluqdar within the meaning of the Oudh Estates Act of 1869 and the immovable property held by him and now in suit is an estate within the meaning of the same Act. This conclusion was agreed to by both sides during the course of the arguments before us. In the trial Court however, the plaintiff set up the case that the estate in suit was burdened with a religious trust and the succession to it was regulated by the custom of the foundation to which it was attached. This foundation according to him is the Nanakshahi sangat situated in the City of Lucknow. According to the custom the plaintiff said the title to succession is with him and according to the same custom it is not with the defendant-appellant. The trial Court rejected this case of the plaintiff and found that the estate in suit was held by Mahant Gur Narain Das in his own right without any obligations of a religious trust and that the incidents of an estate as defined in Act 1 of 1869 are applicable to it. This finding of the learned Judge was not questioned before us by the learned counsel for the plaintiff-respondent and is therefore agreed to by both sides.

It is argued that this amounts to an affirmation of the trial Court's finding that the property in suit is not appurtenant to the sangat and that in fact that finding of the trial Court was accepted in appeal by the learned counsel for the then plaintiff-respondent. We cannot however accede to this argument. Though the last sentence of the passage quoted above is not very clear, there can be no doubt that the passage occurs in the narration of the facts of the case and cannot in our opinion be taken as a finding recorded by the Appellate Bench. The narration of facts continued to about three pages after the passage quoted from p. 119 and the consideration of the questions involved in the case commenced with para. 1 at page 123 quoted above, and after referring to the points agreed to by the learned counsel on both sides the learned Judges said :

After hearing prolonged arguments on both sides and after having taken time for considering our judgment, we have come to the conclusion that the finding of the trial Court on Issue 8 (b) must be affirmed. In consequence of this conclusion, we would refrain from deciding any other issue in the appeal.

We are of opinion that the words "any other issue" mean any issue other than Issue 8 (b). The learned counsel for the respondent contends that they mean any issue other than Issue 8 (b) and the other issue referred to at p. 119, but this contention is rebutted and the view taken by us fully supported by what follows at p. 139, namely :

On behalf of the plaintiff-respondent the finding of the trial Court on Issue 10 was challenged but as we have already said every other issue in the case becomes immaterial after we have affirmed the finding of the trial Court on the issue of undue influence and fraud.

This leaves no room for doubt that the learned Judge did not consider it necessary to decide any issue other than that of undue influence and fraud and that they did not decide any such issue. The conclusion that we have arrived at is further strengthened by the fact that the whole of the judgment of the Appellate Bench after the narration of the facts of the case is devoted solely to a consideration of Issue 8 (b), namely whether or not the release of 1924 was obtained by undue influence and fraud. We may also point out that the sole or at least the main object of Mahant Har Narain Das in the previous suit was to obtain immediate possession of the property, and, but for the release of 25th November 1924, he was entitled to possession for life even under the agreement of 20th January 1922, so that it was perfectly reasonable on the part of the counsel for Mahant Har Narain Das to say that if Issue 8 (b) relating to the invalidity of the deed of release on the ground of undue influence and fraud be decided in his favour he did not insist on any other question in the case being decided. Accordingly, the appellate Bench proceeded to decide Issue 8 (b) and having concurred with the trial Court's finding on that issue and having declared the release of 1924 void, decreed the plaintiff's suit for possession "in consequence of" their cancelling the deed of 25th November 1924.

So far as the decree of their Lordships of the Privy Council is concerned, it only confirmed the decree of the Bench of this Court except with regard to the period for which the plaintiff was entitled to mesne profits, and though the plaintiff in his appeal before their Lordships raised various questions in his memorandum of appeal, their Lordships referring to the plaintiff's cross-appeal and to the Appellate Court's finding that the plaintiff was not entitled to mesne profits for a period earlier than the date of the suit, say :

It is against this finding only that the cross-appeal of the plaintiff has been pressed and it is contended on his behalf that, having regard to the conclusion, now established, that the deed under which the defendants got possession was procured by undue influence and fraud the plaintiff is entitled to the account which he has claimed.

It is thus clear that their Lordships also did not decide any question other than that of mesne profits. We are therefore decidedly of opinion that the decision in Mahant Har Narain Das's suit (No. 1 of 1927) does not operate as res judicata on any issue raised in the present suit. In view of this conclusion, it is not necessary to refer to the various cases relied on by the learned counsel for parties except one or two. The learned counsel for the respondent laid great stress on the case in 51 I A 293[1] in which it was held that an issue is res judicata where the judgment of an Appellate Court shows that the issue was treated as material and was decided although the decree made merely affirms the decree of the lower Court which did not deal with the issue, but in Mahant Har Narain Das's case the Appellate Court neither decided Issue 5 nor treated it as material.

The case in A I R 1929 P C 289[2] was also relied on which lays down that an order by consent, not discharged by mutual agreement and remaining unreduced, is as effective as an order of the Court made otherwise than by consent and not discharged on appeal, but this case too has manifestly no application to the facts of the case as found by us. In 139 I C 761,[3] relied on by the learned counsel for the respondent, it was held that where in a prior suit there was no issue or decision of a certain point as it was admitted by both parties and a decree was passed on the basis of the facts admitted, res judicata on account of the prior decision extends not to the actual decision only but to the common basis or facts accepted by both parties and incorporated and made the foundation of the judgment and decree in the case; but as we have seen, the decision of the Appellate Court in Mahant Har Narain Das's case did not proceed on any facts agreed to by the parties.

1. Midnapur Zamindarl Co. Ltd. v. Naresh Narayan Roy, (1924) 11 A I R P C 144=80 I C 827=51 Cal 631=51 I A 293 (P C).
2. Charles Hubert Kinch v. Edward Keith Walcott, (1929) 16 A I R P C 289=118 I C 7 (P C).
3. Sundararajamma v. Ramulu Chetty, (1932) 19 A I R Mad 519=139 I C 761.

The present case appears to us to be governed by the decision of their Lordships of the Privy Council in 24 I A 50.[4] In that case a suit was brought to have it declared that the defendant was not the son of Anar Koer. In a previous suit between the same parties, the issue whether the defendant was or was not the son of Anar Koer had been raised and decided against the plaintiffs by the first Court but the High Court dismissed the suit as not properly constituted without giving any decision of the issue whether the defendant was or was not the son of Anar Koer. It was held by their Lordships of the Privy Council that the issue had not been "heard and finally decided" and was not res judicata. Similarly, in Har Narain Das's case though the trial Court have a finding on Issue 5 the Appellate Court disposed of the suit on a totally different ground. Therefore the finding of the trial Court in the previous suit is not a bar to the trial of the issue in the present suit whether the property in suit appertains to the Sangat Bagh Baba Hazara.

We may also note that it was conceded by the learned counsel for the respondent that even if Issue 5 of Mahant Har Narain Das's suit be deemed to have been decided in that suit, some of the issues in the present suit, namely 2 (a), 2 (b), 11 (i), 12, 13, 14 (b), 15 (c), 17 and 18, will have to be tried. We allow the appeal with costs and having come to a conclusion contrary to the decision of the learned trial Judge on the question of res judicata, remand the case for trial under O. 41, Rule 23, Civil P. C. The costs of the trial Court will abide the result.

D.S./R.K. *Case remanded.*

4. Sheosagar Singh v. Sitaram Singh, (1897) 24 Cal 616=24 I A 50=7 Sar 124=1 C W N 297 (P C).

A. I. R. 1939 Oudh 10

YORKE J.

Sheikh Barsati — Appellant.

v.

Sarju Prasad and others—Respondents.

Second Appeal No. 351 of 1936, Decided on 15th October 1938, against order of Addl. Civil Judge, Gonda, D/- 30th July 1936.

(a) Specific Relief Act (1877), S. 31—Purchaser's rights not affected even if suit under S. 31 not filed.

Section 31 is an enabling Section and the fact of its not being made use of cannot deprive a purchaser of the rights conveyed to him by his sale deed : *A I R 1932 Oudh 123 and A I R 1927 All 355, Rel. on.* [P 11 C 2]

(b) Oudh Rent Act (22 of 1888), S. 108 (8), Proviso — Under-proprietor or proprietor can litigate to establish his right as such in Civil Court, after he is ejected by a Revenue Court.

Although a Revenue Court in Oudh is competent to decide a question between a tenant and a sub-tenant exclusively, an under-proprietor can litigate under S. 108 (10) to establish his rights as such in a Civil Court after he has been ejected by a Revenue Court, *a fortiori* a proprietor cannot be deprived of a similar right. [P 12 C 2]

Plaintiff purchased certain plots of land in Oudh. One of the plots was wrongly entered in the sale deed. Plaintiff was in occupation of all the plots for many years but was subsequently ejected for arrears of rent, as he was treated only as a tenant under Sec. 127 on account of the clerical mistake. Plaintiff brought a suit for possession in a Civil Court :

Held that the Civil Court could not set aside the decree of the Revenue Court, but the suit was maintainable under S. 108 (10), Proviso : *A I R 1916 P C 150, foll.; 1937 O W N 886 and A I R 1926 Oudh 348, Ref.* [P 13 C 1]

(c) Specific Relief Act (1877), S. 31—Mutual mistake between vendor and vendee as to description of property—Subsequent purchaser purchasing it with knowledge of mistake cannot plead having acquired rights in good faith.

Where there is a mutual mistake between the vendee and vendor as to the description of the property in the sale deed, a third person, who being aware of such mutual mistake and intending to take advantage of it subsequently purchases that property from the original vendor, cannot plead that he acquired his rights in good faith : *34 Mad 51, Rel. on.* [P 13 C 2]

Naim Ullah — *for Appellant.*

G. D. Khare — *for Respondents.*

Judgment.—This is a defendant's second appeal by one Sheikh Barsati in a suit for possession of a cultivatory plot No. 691 in village Ekdanga, District Gonda. The plaintiffs came into Court with a statement that on 28th February 1906 they obtained a registered sale deed, Ex. 2, from defendants 2 and 3 in respect of 13 plots, Nos. 681 to 693, measuring 8·53 acres. This sale deed therefore included or was intended to include plot No. 691 with an area of ·90 acre, but by a clerical mistake the number was written in the sale deed as 651 instead of 691. It was said that the plaintiffs entered into possession of all the plots and remained in possession up to 1935, when they were ejected by the defendant treating them as tenants under Section 127, Oudh Rent Act. It appears from the evidence that the plaintiffs applied for mutation on 20th December 1906, when in spite of the statement of one of the vendors, Ex. 3, in which he admitted that plot No. 691 had been sold and that No. 651 had been written in the sale deed by mistake, the mutation Court by its order of 28th January 1907 refused mutation of plot No. 691 telling the vendees-plaintiffs that they should get another sale deed in respect of that plot. The mutation Court did not and could not give mutation in respect of plot No. 651 because that plot was in a different mahal and had an entirely different area from that entered in the sale deed for plot, No. 651. This order of the Mutation Court was made despite the fact that the mutation application was not opposed. It is clear that the vendees could at that stage have instituted a suit under S. 31, Specific Relief Act, but they did not do so, and as has been held in several rulings they were not bound to do so, as that Section is an enabling Section and the fact of its not being made use of cannot deprive a purchaser of the rights conveyed to him. The only result of this failure on the part of the plaintiffs to institute a suit under S. 31 was that they were not recorded in the khewat as proprietors of this plot, and in the village khasra they were recorded as tenants "bila tasfia lagan", that being the only entry which it was possible for the revenue authorities to make.

On 12th December 1932 defendants 2 and 3, that is the plaintiffs' vendors, executed a sale deed, Ex. A-1, in respect of the whole of their 2 annas 8 pies share whose area is 16.03 acres with the exception of the area mentioned in the prior sale deed, Ex. 2, in favour of Noor Mohammad, the predecessor of defendant 1, the present appellant. The recital in the sale deed is that in the share of 2 annas 8 pies transferred, the plots in accordance with the khewat and the sale deed in favour of Sarju Prasad and others are exempted, the whole of the rest of the rights and share of 2 annas 8 pies are sold to the vendees, and it is further on stated that the area of the whole 2 annas 8 pies share is 16.03 acres. In November 1934 defendant 1 issued a notice of ejectment for arrears of rent against the plaintiffs as recorded tenants of plot No. 691. He apparently took steps to eject the plaintiffs, treating them as tenants "bila tasfia lagan" under the provisions of Ss. 53 (2), 54 and 55, Oudh Rent Act. It appears that the plaintiffs did contest this

notice by instituting on 28th April 1935 a suit under S. 59 to contest the notice, but this they withdrew on 24th November 1935 probably in view of the fact that there was little point in proceeding with it as they had previously on 25th April 1935 instituted a declaratory suit in the Civil Court for a declaration that they were in possession of plot No. 691 as proprietors. This suit had been subsequently changed into a suit for possession by an application of 11th June 1935 after defendant 1 had obtained formal possession of the plot.

In answer to the plaintiffs' suit to recover proprietary possession of this plot, the defendant denied the plaintiffs' title under the sale deed of 1906, and claimed that he was owner of the plot under the sale deed of 1932. He further claimed protection under S. 31, Specific Relief Act, and pleaded that the suit was barred by Art. 96, Limitation Act, and that the Civil Court had no jurisdiction to try the suit. The trial Court decided that plot No. 691 had been sold to the plaintiffs as alleged by them. It held that no question of adverse possession arose and gave no finding on the issue which dealt with that question. It held that the suit was not barred by limitation and that it was cognizable by the Civil Court, but it held in favour of the defendant on the view that his predecessor-in-title was a purchaser of the property in good faith and for value, and therefore defendant 1's right could not be interfered with. The learned Civil Judge agreed with the finding of the trial Court that plot No. 691 was sold to the plaintiffs under their sale deed of 1906. It went on to hold that that plot was not sold to the defendant under his sale deed Ex. A-1 of 1932, and it further held that even if it were to be held that that plot which had already been transferred to the plaintiffs and defendants 4 and 5, was also transferred to defendant 1's predecessor, Noor Mohammad, under the subsequent sale deed, it was impossible on the evidence on the record to hold that Noor Mohammad had no notice of the prior sale. It followed that he could not be said to be a purchaser of the property in good faith. The question of limitation was not apparently argued before the lower Appellate Court and has not been argued before me, and from the judgment of the lower Appellate Court it does not appear that the question of the cognizability of the suit by the Civil Court was argued before it.

The first point which I propose to deal with is the question whether this suit was cognizable by the Civil Court. Learned counsel contended that the suit for ejectment of the present plaintiffs was a suit under S. 127, Oudh Rent Act, read with S. 108 (2) of the same Act, which was cognizable only by the Revenue Court. He said that in that suit the defendants could plead that there was no relationship of landlord and tenant between them and the plaintiffs of that suit, and that they were in possession as landlords, but he has omitted to notice that the rent Court under the Oudh Rent Act has no power to decide that question, and is bound by its own records. It is no doubt a fact, as held in 1937 O W N 886,[1] that when a matter exclusively within the jurisdiction of a Court of Revenue has been tried and decided by the Court as between the parties, no subsequent suit would lie in the Civil Court having for its sole object the annulment of the decree passed by the Court of Revenue, but it is quite plain that although a Revenue Court in Oudh is competent to decide a question between a tenant and a sub-tenant exclusively as was done in the case reported in 6 O W N 1214,[2] a case in which there was a dispute between a tenant and a sub-tenant who himself claimed to be the tenant in chief, Sec. 108, Cl. 10 directly provides that :

> Nothing in this Section shall operate to debar any person claiming to be an under-proprietor who has been ejected under the provisions of S. 60 from bringing a suit for possession in a Civil Court.

If an under-proprietor can litigate to establish his rights as such in a Civil Court after he has been ejected by a Revenue Court, *a fortiori* a proprietor cannot possibly be deprived of that right, and that appears quite clearly from the notes at page 463 of Mata Prasad's Rent Law in Oudh (Edn. 7), and the decision of the Privy Council reported in 20 O C 8,[3] where it was held that in Oudh the Court of Revenue has the exclusive jurisdiction to determine what is the status of a tenant of lands, and what are the special or other terms upon which such tenant holds, and that the Civil Courts have the exclusive jurisdiction to

1. Rustam Singh v. Mt. Ahmadunnisa, (1937) O W N 886=170 I C 639.
2. Har Nath Singh v. Sri Ram, (1926) 13 A I R Oudh 348=93 I C 374=6 O W N 1214.
3. Mohammad Abul Hasan Khan v. Prag, (1916) 3 A I R P C 150=38 I C 814=20 O C 8 (P C).

decide whether or not a person in possession of lands holds a proprietary or an under-proprietary right in the lands. To my mind therefore there is no room for doubt on this point. No doubt the Civil Court cannot set aside the decree of the Revenue Court but it can, as indicated by the very frame of the Proviso to Sec. 108, Cl. (8), give a decree to the present plaintiffs for possession.

The second point, which has been urged, is set out in ground No. 3 of the grounds of appeal where it is stated that the learned Civil Judge has misconstrued the sale deed, Ex. A-1, in holding that the defendant-appellant is not the owner of the plot in dispute. There is really nothing to discuss in this point as it has been thrashed out already at great length by the learned Civil Judge. It is quite clear that what was sold to the plaintiffs and defendants 4 and 5 under their sale deed, Ex. 2, was a series of plots from 681 to 693 with an area of 8·53 acres. It is equally clear that there was a slip of the pen by the writer of this sale deed whereby No. 691 was incorrectly written as No. 651. In the light of the admission of the vendor, Ex. 3, and the fact that the plaintiffs were in possession of this plot without payment of rent from 1906 to 1932, there can be no room for doubt that the plot had been transferred to the plaintiffs. It remains then to consider the sale deed of the defendant. By this sale deed, the defendant has sold a share (not plots) having an area of 16.03 acres less the property consisting of plots transferred to Sarju Prasad and others, plaintiffs. A reference to the plaintiffs' sale deed was obviously enjoined upon the purchaser Noor Mohammad, defendant 1's predecessor, by the very wording of his own sale deed and that sale deed Ex. 2 showed an area of 8.53 acres already transferred to the plaintiffs. It further appears from the evidence of the defendant's own witness, D. W. 1, that at the time of the execution of the defendant's sale deed what was considered was only the area sold, and that inquiry was made from the plaintiffs also. The defendant was therefore perfectly well aware that the only area which he could get and was getting by his sale deed was 7·50 acres. It seems to me that the learned Civil Judge was fully justified in coming to the conclusion that the defendant was not a transferee of plot No. 691 at all by virtue of his sale deed, Ex. A-1.

The third point raised is the question whether the last clause of S. 31, Specific Relief Act, has any application to the present case. In view of what has been said already, it seems to me to be clear that the vendee under the sale deed of 1932 could not but be aware of the whole situation in regard to plot No. 691. He must have looked up the khewat and the mutation proceedings and he could not but be aware that the plaintiffs were in possession of plot No. 691 ever since the date of their sale deed. It seems therefore that the vendee of the 1932 sale deed did nothing more than gamble on the existence of this known mistake in the plaintiffs' sale deed, hoping to be able to make a profit out of it. It has been held in 34 Mad 51[4] that

> a second mortgagee who has advanced money with the knowledge of a mutual mistake of fact between the mortgagor and the first mortgagee as to the subject-matter of the first mortgage has notice of that mistake of fact and cannot plead that he acquired his rights in good faith under Sec. 31, Specific Relief Act.

It was also held that

> where a plaint alleges a mutual mistake of fact extrinsic evidence of such mistake is admissible although no rectification thereof is prayed for.

The fact that the plaintiffs did not seek rectification of their sale deed within three years of their knowledge of the mistake cannot be of any assistance to the appellant because, as held in A I R 1932 Oudh 123[5] at p. 131, S. 31 is an enabling Section and therefore the fact that the plaintiffs did not choose to avail themselves of that Section at the time cannot deprive them of the rights which they obtained under their sale deed. The same view was taken in A I R 1927 All 355.[6] In my view, the learned Civil Judge rightly held that even if this plot were to be held to have been transferred to Noor Mohammad under the sale deed of 1932, he was not protected by the last clause of S. 31, Specific Relief Act, inasmuch as he was not a purchaser of this property without notice. In my opinion therefore the lower Appellate Court rightly allowed the appeal before it and decreed the plaintiffs' suit with costs. There is no force in the present appeal which fails and is dismissed with costs.

N.S./R.K. *Appeal dismissed.*

4. Mahadeva Aiyar v. Gopala Aiyar, (1911) 34 Mad 51=8 I C 390=(1911) 1 M W N 36.
5. Lakshmi Narain v. Mt. Mohamdi Begam, (1932) 19 A I R Oudh 123=137 I C 102 = 7 Luck 454=9 O W N 60.
6. Kesho Singh v. Roopan Singh, (1927) 14 A I R All 355=100 I C 568.

Magistrate ought to have proceeded with the case according to the provisions of S. 145. The only case in which a Magistrate can refuse to take action under S. 145 is when he is not satisfied that there is a danger of a breach of the peace, but he never said that there was no danger of a breach of the peace in this case. In fact, the report of the police, as noted above, was to the contrary. In case he was satisfied by the police report, his duty was to proceed under S. 145, Criminal P. C., and to issue notices to the parties. If notices had been issued to the parties and written statements filed by them, it was again his duty under sub-s. 4 of S. 145 to receive all such evidence as might have been produced by the parties. The procedure of the learned Magistrate in considering the evidence given in another case as evidence in this case, even though the other case was pending in his own Court as a Revenue Court, was entirely unauthorized and illegal. I therefore accept this reference and setting aside the order of the learned Magistrate send back the case to him to be disposed of according to law.

R.M./R.K. *Reference accepted.*

A. I. R. 1939 Oudh 16

THOMAS C. J.

Emperor

v.

Behari — Accused — Opposite Party.

Criminal Ref. No. 50 of 1938, Decided on 12th October 1938, reference made by Sess. Judge, Sitapur, D/- 3rd September 1938.

Criminal Tribes Act (1924), Section 23 (1)—Words "any other such offence" mean one of those offences mentioned in Schedule 1.

Section 23, Criminal Tribes Act, refers only to convictions for offences specified in Sch. 1 and has no application to a conviction for an offence which is not contained in Sch. 1. The words "any other such offence" used in the Section mean one of those offences mentioned in the Schedule. S. 23(1) of the Act has in mind not only the previous convictions of the accused but also the offence for which he is being tried. [P 16 C 2]

Asst. Govt. Advocate—*for the Crown.*

Order.—This is a reference under S. 438, Criminal P. C., by the learned Sessions Judge of Sitapur recommending that the order of commitment passed by Mr. D. P. Hardy be quashed. One Bihari, a member of a registered criminal tribe, was sent up before the learned Sub-divisional Magistrate, First Class, of Misrikh on the charge of being found under suspicious circumstances. The learned Magistrate came to the conclusion that the offence under Section 24 (a), Criminal Tribes Act, was established against the accused, but as the accused had several previous convictions, he thought he was unable to pass an adequate sentence. The learned Magistrate has given the following explanation :

> In committing these cases I had regard rather to the previous records of the accused and the limitation of my powers than to the strict interpretation of the words 'such offence' in Sec. 23 (1), Act 6 of 1924.

What the learned Magistrate really thought was that if he was to convict the accused under Sec. 24, Criminal Tribes Act, the accused was liable to enhanced punishment on account of his previous convictions. Therefore the Magistrate was not able to inflict an adequate sentence. This is a wrong view of the law. Sec. 23, Criminal Tribes Act, refers only to convictions for offences specified in Sch. 1 and has no application to a conviction for an offence which is not contained in Sch. 1. The words "any other such offence" used in the Section mean one of those offences mentioned in the Schedule. As far as I have been able to find there is only one conviction against the accused under S. 457, Penal Code, which offence is specified in Schedule 1. There is therefore no question of a second or third conviction under Cl. (a) or Cl. (b) of Sec. 23, Criminal Tribes Act. The learned Sessions Judge is right in remarking that S. 23 (1), Criminal Tribes Act, has "in mind not only the previous convictions of the accused but also the offence for which he is being tried." I accordingly accept the recommendation of the learned Sessions Judge, quash the commitment and send back the case for trial. As Mr. Hardy, on the evidence, has formed an opinion adverse to the accused, the case will be laid before the learned District Magistrate who will either try it himself or transfer it to the file of some other Magistrate of the First Class.

D.S./R.K. *Commitment quashed.*

A. I. R. 1939 Oudh 17

HAMILTON J.

Ch. Jadunath Singh and others — Plaintiffs.

v.

Th. Bisheshar Singh and others — Defendants.

Original Suit No. 1 of 1936, Decided on 17th November 1938.

(a) Evidence — Age — Statements made by deceased as to his age in previous case as witness—Exhibits of these statements produced in subsequent case to prove age of deceased held admissible.

In a case, the age of a deceased was at issue and in order to prove his age exhibits of statements made by the deceased previously as to his age were produced. Some of these exhibits were the statements made by the deceased in certain criminal case as a witness. The paper on which these statements were taken down by the Magistrate was a plain paper and not paper with any printed words such as son of, caste, age, etc. Other exhibits were bonds signed by the deceased with endorsement signed by the Sub-Registrar giving the age of the executant :

Held that in both the cases the presumption was that the presiding officer and the Sub-Registrar followed the usual course of asking the witness and the executant respectively their age instead of guessing it. Hence all these documents proved the statements made by a person who was dead as to his age and they were admissible in evidence : *26 All 108 (P C), Expl.* [P 22 C 1]

(b) Pedigree — Absence of numbers does not necessarily show that pedigree does not give relative seniority of brothers.

It is an exception and not a general rule that where numbers are not given in a pedigree, it cannot be held that the pedigree intended to give the relative seniority of brothers : *A I R 1931 Oudh 246 and A I R 1932 Oudh 172, Expl.* [P 22 C 1, 2]

(c) Handwriting—Importance of writing characteristics stated.

The importance of writing characteristics is recognized by all handwriting experts and it is sound because two different persons have not got the same movements naturally, and in fact there are some advanced movements that a writer of a poor class cannot attain. It is also correct not to pay undue attention to the mere shape of letters because it can be imitated and on the other hand persons do not always make a letter in the same shape, for instance, most people have more than one way of making—say a "t". On the other hand, even the shape of letters cannot be disregarded for obvious reasons. There are many ways of making one particular letter, but the same writer does not use all of them and if therefore it is found that in different writings the forms of the letters differ, it is most unlikely that the writer was the same unless for some special reason he altered his natural writing. [P 23 C 1]

(d) Hindu Law — Custom superseding Hindu law must be ancient, certain and reasonable—Such custom is not proved by showing that family property was held by eldest son without partition.

Where a family had been joint before the annexation of Oudh, the presumption is that the family estate is subject to ordinary Hindu law. The burden of proving that there was a custom superseding Hindu law lies on the person saying so. Such custom must be ancient, certain and reasonable and being in derogation of the general rule must be strictly construed. The fact that in certain family after the death of the holder of the property the property was maintained as a whole without partition in the family in the name of the eldest son is not sufficient to prove such custom because even a Hindu joint family may hold an impartible estate: *A I R 1932 P C 216 and 3 I A 259 (P C), Rel. on.* [P 26 C 2]

(e) Oudh Estates Act (1 of 1869), Sec. 5 — Sanad and Settlement by Government on one member of family of property belonging to joint family—Rights of other members of family are not affected — Even if this is regarded as trust by that member on behalf of family such trust is discharged by acceptance of guzara by other members.

If a settlement is made by the Government upon a member of a family who was in fact holding the estate for himself and other members, which other members had a right in that property, their right continues even if a sanad is granted to this estate and even if subsequently it was entered in one of the lists of the Oudh Estates Act. The sanad and survey settlements are a mere grant by the Government to one member of the family of property which belongs to the family and are not intended to enure to the sole benefit of the grantee and do not affect the rights of the family. But even if this be regarded as a trust by that member on behalf of other members, the trust is discharged by the acceptance by the members of guzara : *A I R 1924 Oudh 273, Rel. on; Case law referred.* [P 26 C 2]

(f) Res Judicata—Decision of Revenue Court of Oudh before 1865 regarding rights to land operates as res judicata.

As is shown by the Preamble of Act 16 of 1865, before January 1862, the date of the introduction of the Code of Civil Procedure into Oudh, jurisdiction about the rights to land was of the Courts of Revenue and S. 2 of that Act shows that during settlement all land suits came to the Revenue Court, that is to say to the Court of the Settlement Officer. Hence the decision of the Assistant Settlement Officer regarding rights to land operates as res judicata. [P 27 C 2]

(g) Adverse Possession—Widow.

Where a female comes into possession of property as widow, there is no adverse possession. [P 28 C 2]

R. B. Lal, R. N. Shukla, Suraj Sahai, Murli Manohar and Uma Shankar — *for Plaintiffs.*

B. P. Misra — *for Plaintiff 2.*

K. P. Misra and S. P. Avasthi — *for Defendant 2.*

D. K. Seth — *for Defendant 3.*

Sheo Govind Tripathi — *for Defendants 4 to 6.*

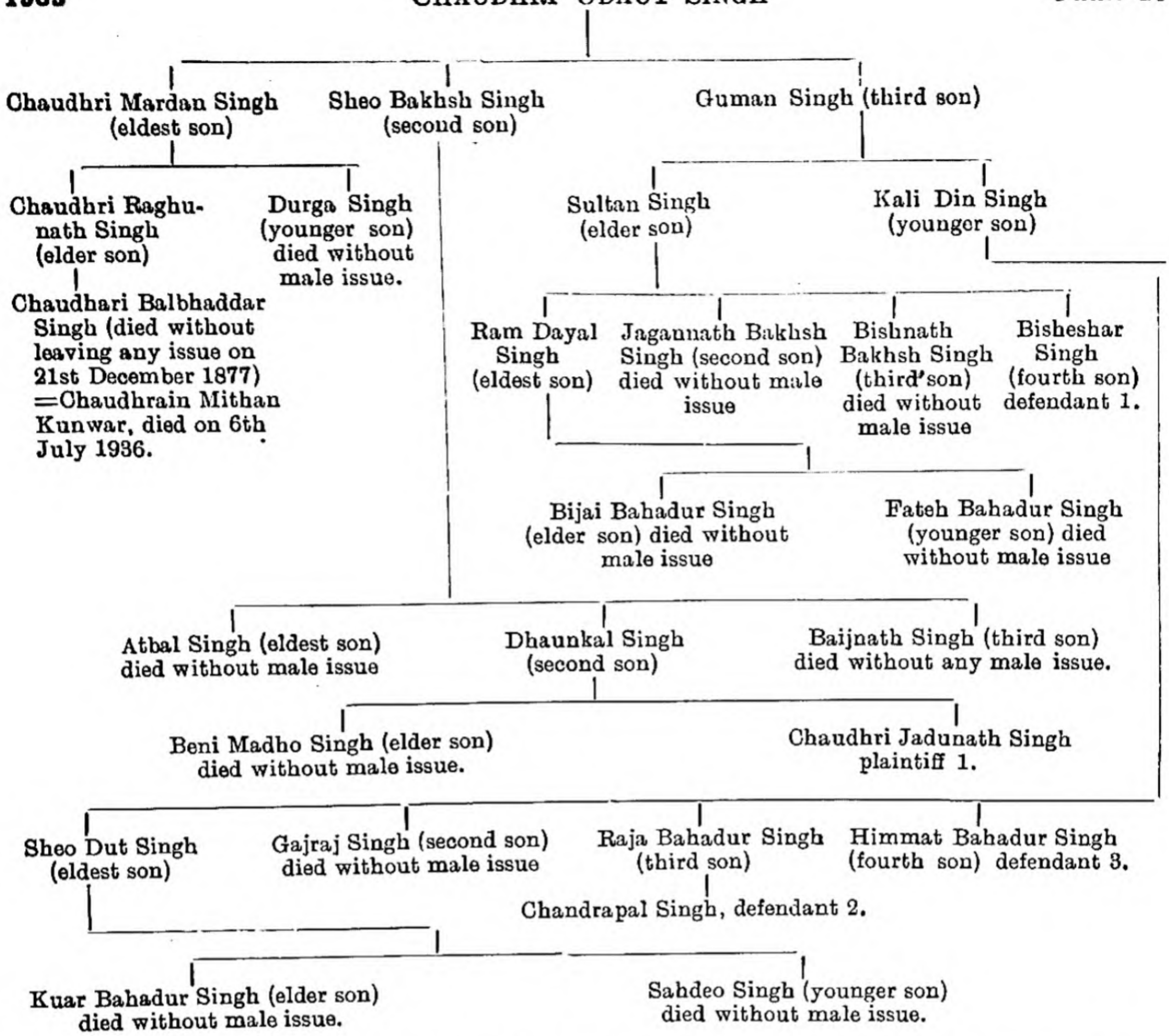
Judgment.—The plaintiffs in this suit ask for a declaration that they are entitled to the property moveable and immovable which was in the possession of Chaudhrain Mithan Kunwar up to her death in July 1936. The principal claimant is plaintiff 1, Chaudhri Jadunath Singh, who belongs to the family of the husband of Chaudhrain Mithan Kunwar whose name was Balbhaddar Singh and who predeceased her. Plaintiffs 2 and 3 are transferees of part of the interest of plaintiff 1 to the extent of five annas in properties in lists A and B excepting items 1, 2 and 3 of list B. Their names are Raj Kumar Lal Baldeo Bakhsh Singh and Thakurain Bachi Kunwar. Plaintiff 4, by name Thakurain Bilas Kunwar, is similarly a transferee of two annas in properties in lists A and B excepting items 1, 2 and 3 of list B and also of a two annas share in the properties contained in list C. The property consists of 22 villages in list A which are said by the plaintiffs to constitute a taluqdari estate, of three houses alleged by the plaintiffs to be houses that go with the estate and of proprietary and under-proprietary land and also of some Rs. 58,000 in cash and various moveables which are specified in list D and are of the value of about Rs. 15,000.

Of the defendants, No. 1, Thakur Bisheshar Singh, No. 2, Thakur Chandrapal Singh, and No. 3, Thakur Himmat Bahadur Singh, are also members of the family to which plaintiff 1 and the husband of Chaudhrain Mithan Kunwar belong. Defendants 4 and 5, Thakur Ran Bijai Bahadur Singh and Thakur Iqbal Bahadur Singh, who claim under a will of Chaudhrain Mithan Kunwar belong to her family as does defendant 6, Mt. Rukmin Kunwar, who however admittedly has no interest in this litigation and may be disregarded in the body of the judgment. Defendants 7 and 8 are Shri Thakurji Birajman Mandir Khiron and Shri Balbhadreshwar Mahadeva Birajman Shiwala Khiron, beneficiaries under two deeds of waqf executed by Chaudhrain Mithan Kunwar, and their case has been argued by counsel for defendants 4 and 5 who are mutawallis under these waqfs. Defendants 4, 5, 7 and 8 are interested as regards only a very small part of the property in suit and I shall not refer to them until I consider the issues which affect them. The pedigree given by the plaintiffs is as follows :

(*See next page.*)

It has not been accepted in toto by the defendants who in fact allege it to be incorrect in three important particulars. It will be seen that admittedly there was a common ancestor Udaut Singh who had three sons Mardan Singh, Sheo Bakhsh Singh and Guman Singh, and plaintiff 1 belongs to the branch of Sheo Bakhsh Singh while defendants 1, 2 and 3, Bisheshar Singh, Chandrapal Singh and Himmat Bahadur Singh, belong to the branch of Guman Singh. The variations to the pedigree which the defendants bring forward are : (1) Guman Singh was the second son of Udaut Singh and not the third as alleged by the plaintiffs, (by defendants 1, 2 and 3). (2) Defendants 2 and 3 allege that Kali Din Singh was the eldest son of Guman Singh and Sultan Singh was the second son, instead of the contrary as is alleged by the plaintiffs and defendant 1, and (3) Beni Madho Singh, elder son of Dhaunkal Singh, had two legitimate sons, Mahabir who is dead and Shambhu who is alive, so that Shambhu comes before Jadunath Singh in any case (by all defendants).

Defendants 1 and 2 admit the existence of a taluqdari estate to which succession is governed by the rule of lineal primogeniture and therefore they say that Guman Singh being elder than Sheo Bakhsh Singh they come before plaintiff 1. Defendant 2 as he also says that his grandfather Kalidin was the elder son of Guman Singh puts himself before Bisheshar Singh by the rule of lineal primogeniture. Under this rule defendant 3 would be cut out by Chandrapal Singh and he therefore alleges that the talukdari estate was really a joint and ancestral property belonging to the ancestors of the parties and Chaudhri Raghunath Singh, father of Chaudhri Balbhaddar Singh, husband of Chaudhrain Mithan Kunwar, and his successor held the said taluka in trust for the entire joint family and consequently he is also entitled to one-third of the alleged talukdari estate under Hindu law. As regards the property which the plaintiffs admit to be not a talukdari estate, it is their case that in this family there is a custom which supersedes Hindu law so that the non-talukdari estate goes by the rule of lineal primogeniture just as much as the talukdari estate. The plaintiffs at first alleged that this result was brought about not merely by family but also by tribal custom, but that has been abandoned and this alleged custom is said to exist in



Note. — At the death of Chaudhrain Mithan Kunwar, the only persons then alive were Chaudhri Jadunath Singh, plaintiff 1, Bisheshar Singh, defendant 1, Chandrapal Singh, defendant 2, and Himmat Bahadur Singh, defendant 3. All other persons of the above pedigree had died before.

the family only as regards property held by the holder of the talukdari estate—property held by other members of the family devolving in accordance with Hindu law.

Defendants 1, 2 and 3, on the other hand, allege that non-talukdari estate devolves according to Hindu law although defendant 2 in his written statement claimed the whole of the property in suit as the nearest male agnate under S. 22 of Act 1 of 1869. This claim to the whole property originally put forward in the written statement must be held to be superseded by the fact that when the counsel for defendant 2 exposed his client's case he stated that property outside the talukdari estate was governed by Hindu law. The issues which were framed by a learned Judge of this Court who was then trying suits within the original jurisdiction of this Court have not subsequently been altered and are as follows :

1. (a) Are properties of list A and items 1 and 2 of list B, and item 2 (a) of list C, attached to the plaint an "estate" within the meaning of Act 1 of 1869 ?

(b) Were items 3 and 4 of list B properties owned by Raghunath Singh ?

(c) Were properties of list C, items 1 and 2 (a) acquired by Chaudhri Balbhadra Singh ?

(d) Were items 3 to 11 of list C acquired by Thakurain Mithan Kunwar as accretions to her husband's estate ?

(e) Were properties of list B owned by Chaudhrain Mithan Kuar her absolute property ?

2. (a) Whether plaintiff 1 is the nearest male agnate according to the rule of lineal primogeniture and did he become entitled to succeed to all or any of the properties in suit on the death of Thakurain Mithan Kunwar, under Cl. 10 of Act 1 of 1869 ?

(b) Has plaintiff 1 succeeded to any of the properties in suit ?

(i) Under the Hindu law. If so what properties ?

(ii) Under the custom of Gaddi-nashini as alleged in para. 12 of the plaint and oral pleadings, dated 10th March 1937 ?

(iii) Under the primogeniture sanad if one be held to have been granted to Chaudhri Raghunath Singh in respect of properties covered by it ?

3. What is the order of seniority ?

(a) Among the sons of Chaudhri Udaut Singh ?

(b) Did Beni Madho Singh have two sons Mahabir and Shambhu of whom Shambhu is alive ?

(c) Is Shambhu Singh a legitimate son of Beni Madho Singh ?

4. Whether Chaudhrain Mithan Kunwar came into possession of the properties in suit, without any right and did she perfect her title to them by adverse possession ?

5. Whether Chaudhrain Mithan Kunwar executed a will in favour of defendants 4 and 5 ? If so, in respect of what properties, and whether she was competent to execute it ?

6. Were all or any of the properties in suit held by Chaudhri Raghunath Singh in trust for the joint family as alleged by defendant 3 ? If so, to what effect ?

7. Whether the deeds of wakf, dated 13th October 1920, and 14th October 1920, are valid and binding on the plaintiffs and was Chaudhrain Mithan Kunwar competent to execute them ?

8. Whether plaintiffs 2 to 4 are purchasers of certain shares in the properties in suit, as stated in para. 13 of the plaint ? If so, to what effect ?

9. To what relief, if any, are the plaintiffs entitled ?

10. Whether the decisions, dated 21st February 1863, 22nd August 1864 and 11th December 1865, operate as res judicata against defendant 3 as alleged by the plaintiff ?

(This last issue was added on 17th March 1937).

As I have already stated, I shall explain the case of defendants 4, 5, 7 and 8 when I take up the particular issues that concern them. The first issue that I am taking up is Issue 3, and the three points for decision are: (1) Whether Kali Din Singh, as alleged by defendants 2 and 3 and not Sultan Singh, was the elder son of Guman Singh. (2) Whether Sheo Bakhsh Singh was the elder brother of Guman Singh as alleged by the plaintiffs and not a younger brother as alleged by defendants; and (3) whether Shambhu Singh is a son of Beni Madho Singh and if so whether he is a legitimate son.

(1) It is of course immaterial to the plaintiffs whether Kalidin Singh was elder brother of Sultan Singh or not, for if Guman Singh was younger than Sheo Bakhsh Singh, plaintiff 1 comes before the defendant members of the family, and if he was not, then all the defendant members of the family come before plaintiff 1 and the order in which they come before him is immaterial to the plaintiffs. For this reason, at the request of the defendants no separate issue was framed on this point, but a decision of this point is nevertheless necessary because the evidence oral and documentary adduced to prove that Kali Din was older than Sultan is also to the effect that Guman Singh was older than Sheo Bakhsh Singh. If this evidence is false or unbelievable on such a material point, it is equally unworthy of credit on the point whether Guman Singh was older than Sheo Bakhsh Singh or not. I think it therefore most convenient to start by considering whether on the evidence adduced in the case Kali Din Singh is shown to be younger or older than his brother Sultan Singh. There are certain documents which give the age of Kali Din in various years and others which similarly give the age of Sultan Singh. All the documents about the age of Sultan Singh have been filed by the plaintiffs and none by the defendants and it may, therefore, be stated that if these documents are admissible there is no disagreement between the parties as to the age of Sultan Singh. There are a number of documents filed by the plaintiffs and two filed by defendant 3—one of these also being filed by defendant 2—which contain the age of Kali Din Singh. Those filed by the plaintiffs are the following: (The numbers which I give as numbers of these exhibits refer to the copies of originals, but the originals have also been produced and are exhibits with different numbers, but as the copies were produced first and those numbers appear in the printed record, I shall refer to these documents under the numbers given to the copies and not the numbers of the originals, but what I state about them refers to the originals and not to the copies unless otherwise stated.)

Ex. 160. Statement by Kali Din, dated 16th February 1859, in vernacular signed by Kali Din and by Sohan Lal, Tahsildar, and also by two witnesses, Akbar Ali and Sital Prasad. It begins with the words "ordinary question" and the answer to it is 'my name is Kali Din, my father's name is Chaudhri Guman Singh, resident of Khiron, occupation zamindari, age 33 years'.

Ex. 161. This is a similar statement, dated 18th March 1859, signed by Kali Din and by two Qanungos as witnesses and by the Tahsildar who was the presiding officer of that Court. Here again the answer about

age which is given as 33 years is in the same form as in Ex. 160.

Ex. 197. This is a copy of proceedings of the Court of Sheikh Najaf Ali, Extra Assistant Commissioner, and includes the names of the parties, the abstract of the claim, the issues and the decision. The date is 17th January 1870, and the age of Kali Din is given as 44 years.

Ex. 200. This is dated 12th March 1870, and is signed by some officer in the vernacular. It has 'Dhaunkal Singh, son of Sheo Bakhsh Singh, aged 48 years, and Kali Din, son of Guman Singh, aged 45 years, stated on oath: Our statements are the same as that of Sultan Singh'.

Ex. 51. This is a bond, dated 8th June 1871, the original being Ex. 253. The bond starts 'I am Kali Din Singh . . . . aged 45 years.' It bears the signature of Kali Din Singh, that of the other party, those of two witnesses and the seal of the Sub-Registrar. The endorsement signed by the Sub-Registrar also gives the age of Chaudhri Kali Din as 45 years.

Ex. 50 is a security bond, dated 11th June 1874, executed by Sultan Singh and Kali Din Singh whose signatures appear to it as well as those of witnesses. The ages are not given in the bond but are to be found in the endorsement which is signed by Sultan Singh, Kali Din Singh and by the Sub-Registrar who states that 'I know the aforesaid Chaudhri Sultan Singh and Chaudhri Kali Din Singh'. The age of Sultan Singh is given as 56 and that of Kali Din Singh as 49 years.

Ex. 73. This is a plaint in the Court of an Extra Assistant Commissioner of Rae Bareli and it is dated 25th June 1878. At the end of the plaint appear the words "we the plaintiffs know and believe that this is true" and there are the signatures Sultan Singh, Kali Din, Dhaunkal Singh and Baijnath Singh written with the pen of Kali Din. There is a note by a clerk of the Court: 'Names of presenters: All four plaintiffs have verified. The ages of the plaintiffs are given as follows: Sultan Singh 60; Kali Din Singh 53; Dhaunkal Singh 58 and Baijnath Bakhsh 53'.

Ex. 77. This is a bond, dated 3rd September 1883, executed by Baijnath Singh, Beni Madho Singh and Kali Din Singh. The certificate of the Sub-Registrar gives the age of Baijnath Singh as 58, Beni Madho Singh 32 and Kali Din Singh 59. The executants' identification marks such as warts, boils, etc. are marked which show the care taken by the Sub-Registrar.

Objection has been made to the admissibility of these documents and my attention has been called to the case in 31 I A 38,[1] where as regards the description of a witness in the heading of the deposition to the effect that the witness was the wife of so and so, their Lordships of the Privy Council stated that it was no part of the deposition proper, that is, no part of the evidence given by the witness on solemn affirmation; that it might have been elicited by questions put by the Magistrate but that it was just as likely that it was filled in by a subordinate official and on the paper when put into the hands of the Magistrate for him to take down the evidence of the witness. Their Lordships therefore held that assuming that this was admissible as evidence against the claim of Makboolan it was not entitled to any weight. (The deposition was of one Ghafooran and not of Maqboolan who was defendant in that suit.)

The plaintiffs, on the other hand, rely on 61 I A 286[2] at p. 306-ff, where it was held that a statement in a decree that certain pedigrees were filed by the parties was admissible to prove that such pedigrees were filed and these pedigrees were admissible evidence against those that filed them. The statements in the decree were evidence either under Sec. 35 or Sec. 13, Evidence Act. It is not contended here that statements by Kali Din and Sultan Singh as to their age are not admissible and indeed defendants 2 and 3 have filed what purport to be statements by Kali Din, but what is asserted is that those statements cannot be proved by the documents produced by the plaintiffs. Their Lordships of the Privy Council in 31 I A 38[1] did not state that an entry at the head of the deposition is inadmissible but only that they could not attach weight to it. The age in Exs. 160 and 161 is not in the heading but is actually in the answer to a question by the Court just as is the rest of the statement. The age given in Ex. 200 is not part of the statement and it was not stated on oath. In none of these cases however is there any reason to suppose that the age could have been filled in by a subordinate official

1. Mt. Maqboolan v. Ahmad Husain, (1904) 26 All 108=31 I A 38=8 Sar 583 (P C).
2. Collector of Gorakhpur v. Ram Sunder Mal, (1934) 21 A I R P C 157=150 I C 545=56 All 468=61 I A 286 (P C).

and be on the paper when put into the hands of the Magistrate for him to take down the evidence of the witness. I have examined these originals and find that they were on plain paper and not on paper with any printed words such as son of, caste, age, etc. and the writing throughout appears to be that of the presiding officer himself. I see no reason either to presume that the presiding officer instead of taking the obvious and usual course of asking the witness age should have put down the age merely by guess-work. Similarly, those entries in the registration endorsements were made by the Sub-Registrar himself, and the presumption is that he too would follow the obvious and correct course of asking persons their age instead of guessing it. A similar presumption, I think, arises in the case of Ex. 197. In Ex. 51 the age appears in the body of the bond which is signed by Kali Din himself; while in Ex. 73, the plaint, where the age is given, was verified in writing by Kali Din himself and in addition to that there is that note that all four plaintiffs had verified the plaint.

In my opinion therefore all these documents prove statements by Kali Din, a person who is dead as to his age and they are admissible in evidence. It will be found that the ages agree except that when Kali Din was 45 on 12th March 1870, he could not be 45 on 8th June 1871 and similarly on 3rd September 1883 when his age is given as 59 it appears to have been over stated by a few months: nevertheless taking all these documents together the agreement as to age is, if anything, remarkable in a country where people are not infrequently uncertain as to their real age. (After examining certain documents the judgment proceeded further.) It is clear therefore that the pedigree which the plaintiffs now set up is the same as that set up a number of times in a number of years by Sultan Singh, father of defendant 1, and by Kali Din Singh, grandfather of defendant 2 and father of defendant 3. It is objected that where numbers are not given, it cannot be held that the pedigree intended to give the relative seniority of brothers and counsel for defendants have quoted 8 O W N 306[3] and 9 O W N 304.[4] The fact that they could only refer to two cases when there have been countless cases involving pedigrees itself indicates that these formed the exception rather than the rule, and a reference to those cases will show that this was so. I agree that a pedigree cannot always be accepted as correct even when it is not a forgery. In cases, for instance, when different pedigrees are put in, they cannot all be correct and when but a single pedigree has been put in it may be unsafe to rely upon it. Here however we have a number of pedigrees put in by the direct ancestors of parties to this case and they are always the same, a fact which cannot be due to chance. There was design in the way those pedigrees were written and that design can only have been to give the correct order. I have further shown that though this absence of numbers is a feature of most of these exhibits, there are exceptions and it is also worthy of consideration that where these pedigrees without numbers include persons as to whose seniority there is no dispute, they agree with the order which is admitted by the parties. (After this the judgment considered some documentary evidence and proceeded further.) As regards the documents with which I will now deal two handwriting experts have been produced, one Mr. Gregory Afzal for the plaintiffs and another Mr. Charles Hardless, Senior, for defendant 2.

It will not be necessary for me to depend much on the evidence of Mr. Gregory Afzal because independently of it, it is clear that these documents, Exs. B-5, B-11, C-19, C-24, C-26 and C-27 are forgeries and clumsy forgeries at that. As regards Mr. Charles Hardless, Senior, I must say in the plainest terms that he is an expert who has clearly proved himself to be a dishonest expert, in fact one who without any regard for the truth is ready to give any evidence which would support the case of the person who has engaged him. When an expert does what he had done in this case, in view of the fact that much of what experts say cannot easily be checked by a Court, he becomes a menace to justice. Although I shall have to refer to his evidence when dealing with various documents there are certain points which I can set out at once. Mr. Hardless helped in the cross-examination of the expert and he admits that before he received the disputed documents for him to examine he was aware of the case of his client, namely that they

3. Abdul Karim v. Rashiduddin, (1931) 18 A I R Oudh 246=131 I C 903=8 O W N 306.

4. Ganesh Bakhsh Singh v. Ajudhiya Bakhsh Singh, (1932) 19 A I R Oudh 172 = 137 I C 349=7 Luck 564=9 O W N 304.

were genuine. Mr. Hardless has explained his modus operandi which is as follows: He takes documents which are given to him as standard documents, examines them all and finds out what are the writing characteristics. He then examines the disputed documents and if he finds that the same characteristics also occur there he comes to the conclusion that all have been written by one and the same person. He says that he takes little or no notice of similarity of form, that is to say of shape of letters and the words that they compose. The importance of writing characteristics is recognised by all handwriting experts and it is sound because two different persons have not got the same movements naturally, and in fact there are some advanced movements that a writer of a poor class cannot attain. It is also correct not to pay undue attention to the mere shape of letters because it can be imitated and, on the other hand, persons do not always make a letter in the same shape. For instance, most people have more than one way of making, say a "t". On the other hand, even the shape of letters cannot be disregarded for obvious reasons. There are many ways of making one particular letter, but the same writer does not use all of them and if therefore, we find that in different writings the forms of the letters differ, it is most unlikely that the writer was the same unless for some special reason he altered his natural writing. (The judgment further dealt with evidence of the handwriting expert and after discussing certain evidence proceeded). I therefore decide Issue 3 as follows:

(a) Sheo Bakhsh Singh was the second son of Udaut Singh and Guman Singh was the third, and (b) and (c) Shambhu Singh is not a legitimate son of Beni Madho Singh but may have been his illegitimate son. I have also decided that I find Sultan Singh to be the elder brother of Kali Din Singh, but this is only material as destroying on other points the evidence of witnesses who say that Kali Din Singh was elder son of Guman Singh and Sultan Singh was the younger son.

Issue 6. The facts which will have to be referred to for the decision of this issue will have a considerable bearing on issues 2, 4 and 10 also. The case of defendant 3 is that Chaudhari Raghunath Singh was, with his cousins, Sultan Singh, Kali Din and Dhaunkal Singh, a member of a joint Hindu family which had held, before the annexation of Oudh, the estate for which settlement was made by the British Government with Raghunath Singh, and so it must be deemed that he held it in trust for the benefit of the joint family. Therefore, it is argued for defendant 3 that the estate must be treated as non-taluqdari property. The plaintiffs allege that the taluqdari estate is governed by the Oudh Estates Act 1 of 1869 and what is non-taluqdari is governed by family custom of Gaddinashini and therefore the plaintiffs are also entitled to it. Defendants 1 and 2 are in agreement with them as regards the alleged taluqdari estate, but they say that the nontaluqdari property is subject to Hindu law.

The heirs of Chaudharain Mithan Kunwar are the heirs of her husband, but, if she perfected her title to the property in suit by adverse possession, then she was entitled to dispose of any part of it by will or by wakf in favour of defendants 4, 5, 7 and 8. The case of the members of this family, other than the taluqdar, has throughout been that the family was a joint Hindu family and the taluqdari estate should be considered as the property of the joint family and not of the taluqdar. This has been asserted even by the plaintiff Jadunath Singh in Ex. 43, the plaint in the suit, against the Chaudharain in 1880 when she was believed to have adopted Anrudh Singh. In para. 2 of the plaint it is stated that the taluqa Pahrauli remained as ancestral property in the joint possession of the descendants of Udaut Singh till 1266-F, but a summary settlement had been made with Ragunath Singh, a sanad was granted by the Government to him and his name was entered in list 3 prepared under Act 1 of 1869 and the plaintiffs got maintenance. The plaintiffs now however rely on certain other documents which are the following.

Exhibit 170, dated 14th December 1859, a reply by Raghunath Singh to an enquiry as to the custom in the family. He stated that from nine generations the family had been holding the post of Chaudhrani of Pargana Khiron and the eldest son always entered into possession and occupation of it and it was not divided with the younger or youngest brothers. From the time the estate was formed, the applicant had been in possession thereof according to the old

custom regarding the holding of the post by the eldest son.

By Ex. 52, dated 1st February 1860, Raghunath Singh again stated that after his death the ilaqa should be maintained as a whole and without partition in the family in the name of the eldest son, Chaudhari Balbhaddar Singh, according to the custom of the Raj and Gaddi. In reply to yet another letter enquiring about the succession to taluqdar Raghunath Singh answered by Ex. 157, dated 19th December 1860, that the custom of his family was that after the death of the father the eldest son becomes owner of the estate. In 1869 Sultan Singh and Dhaunkal Singh put in a claim for 2/3rds of Taluqa Khiron and this is contained in Settlement File No. 33 of 1870 in which is Ex. 184, a decision of the British Indian Association to whom it was sent. It will be instructive to read it to see what claim was then made and what answer was made to it by the taluqdar in whose favour was the decision of the British Indian Association and there is an order of Colonel Barrow on that file. The result was that the applicants failed and merely got maintenance which, however, they had already been in fact enjoying. Defendant 3 refers to a number of documents showing that Sultan Singh, etc. claimed a share in the taluqa from the very beginning.

The earliest in date is Ex. 27 a decision of Mr. Capper, dated 18th August 1860, which is referred to in the other later documents. That decision is itself a revision of some prior decision by him. Other similar documents are Ex. 213 probably of 4th May 1869; Ex. 214 of 22nd September 1867, Ex. 34 of 19th February, 1871, which refers to Ex. 184; Ex. 151 of 18th February 1863; Ex. 152 of 10th March 1863; Ex. 172 of 19th October 1865, which refers to Ex. 27; Ex. 189, a judgment of 7th June 1876, and Ex. 215, proceedings of the Court of the Settlement Officer, dated 21st September 1867. Allegations made in these various documents are that the family had been joint till the year 1266-F, and Raghunath Singh had obtained the settlement without objection by other members of the family, but when he had got the sanad he refused to give his cousins anything and in 1266-F by the order of Mr. Gillan who was apparently Deputy Commissioner, Sultan Singh, etc. gave up possession and then Mr. Capper gave them some land for maintenance as is shown in Ex. 27. There is certainly evidence to show that the family was working together and even that they were regarded as a joint Hindu family with joint Hindu property.

Ex. 66, dated 17th December 1856, is a bond possibly amounting to a mortgage executed in favour of Kali Din by Wali Mohammad Mirdaha. It is to the effect that if certain money was not paid the executant would put the said Chaudhri Kali Din in possession of his taraf in village Haripur. Now this Haripur Mirdaha is one of the villages in list A of the plaint forming the taluqdari estate. We find that on 25th November 1858, when the first summary settlement was about to take place, some enquiry had been made from a Qanungo and he made a report, Ex. 8, in reply giving the prior history of this taluqa Pahrauli. It is to the effect that it was included once in the taluqa of Simri and in 1826 Raghunath Singh, as it was his ancestral village, got it excluded and held it as tahsil mahal. Various things happened and eventually as the revenue was not paid in 1259-F a kabuliat was obtained from Beni Madho Bakhsh and it was hypothecated to him. In 1263-F, that is to say in 1855 or 1856, Raghunath Singh paid up the mortgage money and executed a kabuliat. In 1264 during the British Rule, settlement was made separately in the name of the revenue payers and in 1265, that is to say in 1857-58, Beni Madho Bakhsh again entered into possession which continued up to the time that this report was written, that is to say till 29th November 1858. With this report is a list of various villages now forming part of the property in suit and there are some important entries. Against Khiron it is stated : this is ancestral village, but it is the hissadari of other brothers (really cousins) also. The same remark is made about Kamalpur, although unlike Khiron which is entered as ancestral, it is entered as held under mortgage and the same is the entry about Lalpur. About Mirzapur which is entered as an ancestral village, there is a note that it is hissadari also of other brothers. Mohanpur which is entered as a village held under mortgage is also mentioned as one where the brothers have also shares and this applies also to Narindpur which is held under a mustajri lease. Haripur Mirdaha is also mentioned as a village where other brothers have a share and this is that village that was mortgaged to Kali Din some years previ-

ously. On the other hand, about certain villages Raghunath Singh alone appears to have been entered as owner, the entry being that the village was purchased by Raghunath Singh and at the end of 1264 settlement was made in his name. As regards two villages Kishan Khera and Khajowa, it is not clear whether the remark is that this village is of Beni and his brothers or whether it is meant to read merely "of his brothers also".

On 14th December 1858, Raghunath Singh alone asked for settlement as is shown by Exs. 9 and 10. He gives also the prior history but does not mention his cousins as having any right in the various villages. Exs. 11 and 12 show that it was proposed to settle the 22 villages which formed the taluqdari estate with Raghunath Singh and he executed a kabuliat Exs. 15 and 16. In the month of December 1858, when Raghunath Singh also agreed to deposit arms as is shown by Ex. 162, he agreed to certain terms to obtain the ilaqa as is shown by Ex. 163. The matter was sent up to the Commissioner and the Chief Commissioner and on 1st May 1859 settlement with him was sanctioned.

During this period, other members of the family were working with him or for him. Ex. 158, dated 31st January 1859, shows that there was some question of profits between Raghunath Singh and one Ram Bakhsh and the tahsildar recorded the statement of Raghunath Singh. In Ex. 167 dated 7th August 1859, Dhaunkal Singh, signing as cousin of Raghunath Singh, taluqdar, agreed to pay the money due by Raghunath Singh to Ram Bakhsh. On 12th February 1859, certain persons filed a suit against Raghunath Singh about the zamindari of mouza Dukhanha, one of the taluqdari villages in suit, and the parties agreed to arbitrate. On 16th February 1859, there was a similar dispute about village Khajowa, the opposite party being one Darshan Singh. Kali Din Singh made a statement which he signed as the cousin of Chaudhri Raghunath Singh in which he stated that Khajowa stood mortgaged with them and in Ex. 168, dated 19th February 1859, the tahsildar reported to a superior officer that as regards the claim of Darshan Singh against Chaudhri Raghunath Singh, Kali Din had stated that Raghunath Singh was suffering from paralysis and was not in his proper senses and Darshan Singh should be asked to wait till Raghunath Singh had recovered. This was about Khajowa village, also one of these taluqdari villages, and Ex. 161 is a statement by Kali Din in similar proceedings about Baraula, Kishen Khera, another of these taluqdari villages, and Khajowa where he stated that the zamindars of the aforesaid villages might pay them, that if the zamindars paid them profits, rateable money could be paid. Ex. 164, dated 17th May 1859, shows that Kali Din verified a kabuliat of one of the villages and so is Ex. 165 about another, while Ex. 166 is a receipt for a settlement patta signed by Raghunath Singh by the pen of Kali Din Singh. Ex. 167 shows that Dhaunkal Singh, signing as cousin of Chaudhri Raghunath Singh, that he agreed to pay in two instalments the rateable money claimed in the suit against Raghunath Singh.

On 29th October 1859, Raghunath Singh got a sanad and soon after that troubles started in the family, for, we find in Exhibit C-17 that Raghunath Singh, Sultan Singh and Dhaunkal Singh agreed to appoint certain arbitrators and to accept their arbitration for the decision in settlement of the case of shares of themselves and of Kali Din who apparently was not present on that day and therefore did not sign the application. It seems then that after this Raghunath Singh went back on the agreement and then started a series of applications which went on for years by which Sultan Singh, Kali Din and Dhaunkal tried to get what they considered to be their rights in this talukdari estate. It was held in those days by the Courts in India that when a sanad had been given to one person, other members of the family had no rights in the estate except to get something as maintenance. Hence we get Ex. 27 giving Sultan Singh, etc. certain groves. There are various documents showing that these claimants got inferior rights in lands which would constitute an income of Rs. 1200 a year. There is one more document on which defendant 3 relies and this Ex. C-1 which purports to be an agreement between Sultan Singh, Kali Dīn and Dhaunkal Singh and Raghunath Singh to the effect that the summary settlement was pending and all of them claimed a division of the ilaka. There was a danger of Government depriving them of the ilaka so they all agreed to remain in possession and occupation and to be in profit and loss as before and no claim

for settlement against Raghunath Singh would be made from the others.

This document I am not prepared to find to have been proved to be executed by Raghunath Singh. As I have shown already on 18th August 1860, Mr. Capper had revised some prior order giving maintenance to Sultan Singh and even after that there were renewed applications for a share in the estate. It was not however till 5th August 1864, that any reference is made to this agreement. On that date, it was filed in Court as is shown by Ex. 198. Raghunath Singh, I should say, had already died but the Karinda for his successor says that he knew nothing about it and it must be forged. This Karinda was Sheo Sahai who, as I have already stated, was fully in the confidence of Raghunath Singh and ought to know of it. It bears no signature of Raghunath Singh but only a seal, and the impression of this seal is not shown to be similar to other impressions of a seal of Raghunath Singh. Even if it was the impression of a seal of Raghunath Singh, it would not have been impossible to have obtained the seal which belonged to Raghunath Singh. As for 6 years no mention was made about this agreement in spite of claims being made for which it would have been excellent evidence, I am not satisfied that this agreement was executed by Raghunath Singh.

A number of decisions have been quoted to me: 14 M I A 112,[5] 60 I A 103,[6] 3 I A 259,[7] 4 I A 198,[8] 4 I A 178,[9] 6 I A 161,[10] 16 I A 71,[11] 3 Cal 645,[12] 8 I A 215,[13] 9 I A 41,[14] 14 I A 37,[15] 26 I A 229[16] and 37 I A 161.[17] The facts in these various cases are different, but the general principle appears to me to be that if settlement was made by Government with a certain person and he was in fact holding the estate for himself and others, which others had a right in that property, their right continued even if a sanad was granted to this estate and even if subsequently it was entered in one of the lists of the Oudh Estates Act of 1869. It would appear from Ex. 8 that at the time this settlement was being made the family had for the time being lost possession of the estate. In 1264 settlement was made separately in the name of the revenue payers, whoever they were, and in 1265F, Beni Madho Bakhsh had taken possession and had continued up to 29th November 1859.

Considering all this evidence, I am of opinion that the family was joint before the annexation of Oudh and the presumption would then be that the family estate was subject to ordinary Hindu law. Even a Hindu joint family may hold an impartible estate as was the case in 59 I A 331,[18] but the burden of proving that there was a custom superseding Hindu law lay on the plaintiffs. As has been stated in 3 I A 259[7] such custom must be ancient, certain and reasonable and being in derogation of the general rules of law must be construed strictly. The only evidence that there was such a custom appears in those declarations Exs. 170, 52 and 157 and I do not consider these to be sufficient proof. It has been held in 3 I A 259[7] that:

> The sanad and summary settlements were a mere grant by the Government to one member of the family of property which belonged to the family and were not intended to enure to the sole benefit of the grantee, and did not affect the rights of the family. As regards such property which was not previously part of the family estate, it was granted for services presumably rendered with the use of the joint family funds, and could not therefore be separate self-acquired property within the meaning of Hindu law.

Although in the present case the family had temporarily lost its estate when the summary settlement was being made, I

5. Mt. Thakurain Sookraj Koowar v. The Government, (1870-72) 14 M I A 112=2 Sar 705 = 3 Suther 1 (P C).
6. Raja Mohan v. Nisar Ahmad Khan, (1933) 20 A I R P C 95=143 I C 395=8 Luck 65 = 60 I A 103 (P C).
7. Hurpurshad v. Sheo Dayal, (1875-76) 3 I A 259 =26 W R 55=3 Sar 611 (P C).
8. Widow of Shunker Sahai v. Kashi Prasad, (1876-77) 4 I A 198=I L R Sup 220=3 Suther 4=3 Sar 289 (P C).
9. Hardeo Bakhsh Singh v. Jawahir Singh, (1877-78) 3 Cal 522=4 I A 178 (P C).
10. Thakur Hurdeo Bakhsh v. Thakoor Jowahir Singh, (1878-79) 6 I A 161=3 Suther 608 = 4 Sar 10 (P C).
11. Shankar Buksh v. Hardeo Buksh, (1859) 16 Cal 397=16 I A 71=5 Sar 299 (P C).
12. Thakur Shere Bahadur Singh v. Thakurain Dariao Kuar, (1877-78) 3 Cal 645 (P C).
13. Jaidiyal v. Sita Ram, (1882) 8 I A 215 (P C).
14. Ramanund Kuar v. Raghunath Kuar, (1882) 8 Cal 769=9 I A 41=11 C L R 149 (P C).
15. Pirthi Pal v. Jowahir Singh, (1887) 14 Cal 493 =14 I A 37=4 Sar 758 (P C).
16. Hasan Jafar v. Muhammad Askari, (1899) 26 Cal 879=26 I A 229=4 C W N 65 (P C).
17. Kedar Nath v. Ratan Singh, (1910) 32 All 415 =37 I A 161=7 I C 648=13 O C 332 (P C).
18. Shiba Prasad Singh v. Prayag Kumari Debi, (1932) 19 A I R P C 216=138 I C 861=59 Cal 1399=59 I A 331 (P C).

think it must still be held that the grant was made to Raghunath Singh because that property had originally been held by him and as it was then held by him on behalf of the joint family so after the grant he held it on behalf of the family. If this constitutes a trust nevertheless defendant 3 fails in his case because the acceptance of the guzara amounts to a discharge of the trust. It was held in 10 O L J 657[19] that when a trust was established but the beneficiary claimed partition of his estate and in lieu of the said claim he accepted an annuity that trust was discharged. In this case there was a guzara even while Sultan Singh, Kali Din Singh and Dhaunkal Singh were pursuing their claims for a share in the property, but I do not think that makes any difference. In addition to this the case of defendant 3 also fails for other reasons. When the talukdar refused his cousins any rights in the estate they took steps to assert their rights.

On 18th February 1863, in Ex. 151, Sultan Singh, Kali Din and Dhaunkal Singh applied for settlement with them on the ground that when the family had not been dispossessed of the estate the family was joint and had remained joint till 1266F and the property was going to be partitioned (which is a reference to Ex. C-17) but the talukdar then heard that the person in whose favour settlement had been made was safe till the next settlement. Reference is also made in this exhibit to the applicants having been given land for their maintenance but that, they stated, was not enough and every one knew that they had been joint with their brother. What apparently the applicants wanted was a partition of the estate but what, at any rate, is clear is that they alleged that the talukdar had been holding on behalf of the family and they were entitled to a share in the estate accordingly. Their claim was dismissed by the Settlement Officer as is shown by the last part of Ex. 151 which is also Ex. 49. Almost at the same time, that is to say on 10th March 1863, as is shown by Ex. 152, there was a claim by Sultan Singh, Kali Din Singh and Dhaunkal Singh against Chaudhri Balbhaddar Singh that their possession and occupation as joint owners in the past, as they had always remained, be restored in the ilaka. Reference is made to a condition in the sanad that those persons who have a share in the ownership under the subordination of the talukdar shall have their rights of possession maintained, but it is clear that this application went further than that and actually claimed a share in full proprietary rights based on previous joint possession, that is to say on the doctrine of trust.

This claim was rejected by the Assistant Settlement Officer as is shown by Ex. 150 and although there was a first and a second appeal, both were rejected as is shown by Ex. 235, the decision of the Financial Commissioner of Oudh. The proper remedy for the claimants then was to apply for permission to appeal to the Privy Council as was done in those cases which have been quoted to me but it was not done. As is shown by the Preamble of Act 16 of 1865, before January 1862, the date of the introduction of the Civil Procedure Code into Oudh, jurisdiction about the rights to land was of the Courts of Revenue and S. 2 of that Act shows that during settlement all land suits came to the Revenue Courts, that is to say to the Court of the Settlement Officer. Rae Bareli Settlement Report at p. 103 states that the Assistant Settlement Officer after a time was invested with full powers and the fact that in this case the decision of the Assistant Settlement Officer was never questioned on the ground of lack of jurisdiction and there was, on the other hand, an appeal to the Commissioner followed by a second appeal to the Financial Commissioner shows that Mr. Lang had full powers.

I am therefore of opinion that his decision operates as res judicata and the question of defendant 3 having a right in the estate because the taluqdar was holding the estate for the family, be that regarded as a trust or not, cannot now be re-opened. It has been urged that the decision, Ex. 49, also operates as res judicata because it was an application to Government for settlement and as Raghunath Singh derived such rights as he had from the British Government as grantee, that decision too operates as res judicata. I need not consider this question as I think that while there may be doubt about this, there can be no doubt as regards the proceedings which were decided by Exs. 150 and 235 for there was a regular plaint against Balbhaddar Singh which was decided by the Settlement Officer who had the power to decide it and there

19. Mt. Indar Kuar v. Mt. Nand Rani Kuar, (1924) 11 A I R Oudh 273 = 80 I C 333 = 10 O L J 657.

was a final decision of the Financial Commissioner. Even, however if these decisions do not operate as res judicata, and even if the acceptance of that guzara was not a discharge of the trust, I do not think that the defence of defendant 3 can be accepted now. Whatever may have been his rights in the year 1858 or 1859, at any rate from the moment that he got a sanad, if not before, Raghunath Singh held the estate adversely to the predecessor of defendant 3. Any suit brought by defendant 3 on the basis of such rights as his father had in 1858 would now be barred by limitation. He has in fact no subsisting title now and cannot therefore defeat the right of the plaintiffs. The property in list A of the plaint is entered in List 1 and in List 3 prepared under the Oudh Estates Act and therefore the rule of lineal primogeniture applies and by that rule plaintiff 1 is entitled to so much of the property as forms part of the original taluqdari estate.

As regards non-taluqdari, the plaintiff has to prove custom. He has admitted that there is no tribal custom. He has also admitted that the family custom, if any, does not apply in the case of property belonging to members of the family other than the taluqdar. He bases his claim on those statements of Raghunath Singh, Exs. 170, 157 and 52. On the other hand, Ex. A-20 shows that there was a suit about a market in which the plaintiffs were Sultan Singh and Dhaunkal Singh, and the defendant was Balbhaddar Singh, the taluqdar. It was held there that the Gunj was made by Guman Singh, when the family was undivided and the income was enjoyed by all. The plaintiffs were therefore given a decree as to their rights in this Gunj. C-7 is a report of the Qanungo, dated 30th November 1859, that though the Parauli estate was entered in the name of the eldest son the shares were equally divided among all the brothers. This report precedes in time, Ex. 170, the first of the declarations of Raghunath Singh, and is itself preceded in time by Ex. 8, dated 29th November 1858, to which I have already referred. There is nothing to show that his father or he had alone inherited property from his own father to the exclusion of other members of the family. It is true that in Ex. 10 Raghunath Singh referred to certain villages being ancestral, and the Qanungo who made a report, Ex. 8, also referred to some villages being ancestral, but the Qanungo also stated that other members of the family had a share in these ancestral villages. It would appear from that report that Raghunath Singh recovered the villages from another taluqa and added others to it, but we know that one was a village which had been mortgaged to Kalidin Singh himself. There must be very strong evidence to prove custom that superseded ordinary Hindu law. I am unable to hold that the evidence in this case is sufficient to establish that custom. It is admitted that if Hindu law applies plaintiff 1 is entitled to one third, Bisheshar Singh to another third and Himmat Bahadur to the remaining third. I therefore decide Issue 6 as follows : The trust if any was discharged by the acceptance of guzara and further defendant 3 cannot, as some 80 years have elapsed, allege that the trust still subsists.

I decide Issue 10 as follows : The claim of defendant 3 is barred by res judicata as stated above. I decide Issue 4 as follows: Chaudhrain Mithan Kunwar came into possession of the estate as widow of Balbhaddar Singh, excepting what she bought from profits, and not without any right and so there was no adverse possession. I decide Issue 2 as follows: Plaintiff 1 is the nearest male agnate according to the rule of lineal primogeniture and he is therefore entitled to so much of the property in suit as is taluqdari property. Under Issue 2 (b), I find that plaintiff 1 is entitled under Hindu law to one third of the property which is not taluqdari property subject to the decision which I shall shortly give about the validity of the waqfs and the will. I find that there is no custom of Gaddinashini and I finally find that the primogeniture sanad has been superseded by the Oudh Estates Act and it is under the latter that plaintiff 1 is entitled to the taluqdari estate.

Issue 1. The defence of trust having failed all the property in list A is a taluqdari estate. As regards list C, the only one as to which there is a difference of opinion is item 2 (a), namely Mohal Chaudhrain Mithan Kunwar. It is admitted that there was land called patti Gharib in Merui which was part of the taluqdari estate on which the revenue was Rs. 188. No evidence has been brought to show that this Mohal Chaudhrain Mithan Kunwar corresponds to patti Gharib except the revenue of Rs. 220 which now would more or less correspond to the Rs. 188 revenue of patti Gharib. There is on the other hand no evi-

dence that mohal patti Gharib was ever sold to anyone else, and the fact that no other part of the taluqdari estate has been sold from 1858 to the present time, I think, establishes the probability that Merui patti Gharib was also not sold. In the circumstances, I come to the conclusion that Merui patti Gharib is now identifiable as Mohal Chaudhrain Mithan Kunwar and this also forms part of the taluqdari estate. List B is composed of houses. No. 1 is a taluqdari house which originally went with the estate but which Chaudhrain Mithan Kunwar to an unknown extent reconstructed and bequeathed by a will. I shall anticipate my decision as regards this house which I shall give in dealing with the will by stating now that the reconstructed house must be held to be the taluqdar's house which goes with the estate.

The second house is said to be a taluqdari house with appurtenances at Jamkoriapur. The only evidence is that of defendants and it shows that it was built in the life-time of Chaudhrain Mithan Kunwar by Jang Bahadur Singh and his two brothers Ran Bijai Bahadur and Iqbal Bahadur. Where they got the money from is uncertain, but presuming even it was from Chaudhrain Mithan Kunwar with whom they were living, she could dispose of the profits of the property of her husband and give money to Jang Bahadur and his brothers as a gift. The evidence shows that their mother lived in this house and since then implements belonging to her sons are being kept there. It is not shown that Chaudhrain Mithan Kunwar had ever possession over it and therefore the plaintiffs are in no way entitled to it. Item 3 is the house in mohalla South Jahanabad, Rae Bareli City, and no evidence has been given about it: not even whether now it is in existence. It is not shown to be taluqdari property and therefore if it is in existence plaintiff 1 is only entitled to one third of it. It is immaterial whether other property was acquired by Balbhaddar Singh or Thakurain Mithan Kunwar except in so far as it has been disposed of by the will or the two waqfs and that will be considered then. In all property, not taluqdari property of which Chaudhrain Mithan Kunwar could not validly dispose by the will or the deeds of waqfs, plaintiff 1 is entitled to a one third share.

Issue 5. The case of the plaintiff as to the will which is Ex. D-1 is that the will is invalid because it is improperly attested, that is to say, because the witnesses of defendants that prove attestation are not to be believed and secondly on the ground that the property bequeathed by Chaudhrain Mithan Kunwar was not property that she could bequeath. Thirdly, I am asked to construe the will as bequeathing Rs. 5000 only out of the cash left at the death of the Chaudhrain. Suraj Bali Lal, D 4. W. 8, alleges that the Chaudhrain signed the will and then called the attesting witnesses. D 4. W. 9, Cheda Prasad, says that she showed him and Sheo Darshan the will which already bore her signature and asked them to affix their signatures ; after that she had herself showed to them the signatures that she had affixed. I see no reason to disbelieve this witness or the preceding one and I hold therefore that there was valid attestation.

There remains to be considered whether Chaudhrain Mithan Kunwar could bequeath (1) the residential house in Khiron and (2) the Kothi of Jamnabagh. The house which she calls her residential house is a house which was reconstructed and according to witnesses of the plaintiffs is the taluqdar's house. Against this evidence there is the evidence of one defence witness who alleges that Balbhaddar Singh in his life-time lived in a house jointly with Beni Madho Singh and Jadunath Singh and this house was constructed by the Chaudhrain where previously there had been no house. This is contrary to what the will says that the Chaudhrain had reconstructed this house and I cannot believe this witness. How far the Chaudhrain has reconstructed this house is not known, as evidence has not been produced whether the reconstruction was great or small. If she destroyed any building which previously existed, it was a house which went with the estate and which she had no right to dismantle without replacing it. It was in fact not open to her to deprive the taluqdari estate of this house which was its appurtenance and to dispose of the house which replaced it. In my opinion, whatever was the amount of reconstruction this house must be held to be in law the original house which admittedly goes with the talukdari estate and the plaintiffs are therefore entitled to it.

The plaintiffs only claim such houses as may be called talukdari houses. The Jamunabagh house and garden is no such house for it was constructed by the Chaudhrain

herself with money which was hers to dispose of as she liked and there is no evidence that she intended to make this house an accretion to her husband's estate—in fact she disposed of it by will which shows that she had no such intention. It is not for me in this suit to decide what are the rights of plaintiff 1 as owner of the site, for this house and garden are on talukdari land, against the person to whom the house and garden have been bequeathed. That is a matter which if the parties do not come to an agreement, will have to be decided later. As successors to the estate, talukdari or non-talukdari, of Balbhaddar Singh or as heirs of Chaudhrain Mithan Kunwar, plaintiff 1 is not entitled to this house and garden. The third point is the cash item. In the will the words are :

> Whereas I have now Rs. 5000 only which is lying for occasions of emergency so I . . . . . make this will that this amount, subject to increase or decrease till my death . . . . . shall be owned after my death by my nephews Ran Bijai Bahadur Singh and Thakur Iqbal Bahadur Singh.

A sum of about Rs. 58,000 was found at the death of Chaudhrain Mithan Kunwar and the defendants who claim on the will claim all on the ground that this corresponds to those Rs. 5000 subject to increase till her death, as stated in the will. The plaintiffs on the other hand, allege that in any case what she intended to leave was the sum set aside for emergency, whatever this sum was at her death, and further that she only meant to leave Rs. 5000 because this sum without any mention of increase or decrease appears in the certificate of the Sub-Registrar. It has been proved that the will was read before registration and also at registration that the lady fully understood its contents which are in simple language. D. 4 W. 1, Dr. Kedar Nath Sinha, says that the will was read out to him in the presence of the Chaudhrain and that he even asked her a number of questions about the will and she answered that she was leaving the house where she was living, the cash that she possessed, the garden and the kothi and the contents of the residential house. I am satisfied therefore that the contents of the will were known to her and correctly represent her intentions and the endorsement of the Sub-Registrar was what he understood and may even be an incomplete statement of what the lady actually said. I am satisfied therefore that she meant to leave Rs. 5000 subject to increase or to decrease. On the other hand, I am not able to hold that she meant to leave every anna of the money that would be found at her death because she distinctly said in the will that she left a sum put aside for emergencies and certainly when she executed the will she must have had more money available than Rs. 5000 for she had to meet daily expenditure. I therefore hold that she meant to leave whatever was set aside for the purpose of emergency.

It has not been shown how much nor how little was so set aside when she died. As when she had probably less she set aside Rs. 5000 it is impossible to believe that when she had Rs. 58,000 no part of this was set aside. I know, having had to deal with reports of the receivers, that they had to pay a sum of Rs. 10,000 revenue that was due and over Rs. 3000 was still due to servants which were paid subsequently and the Chaudhrain had to live till the next instalment of revenue became due, which would be some three months after her death. One has as far as possible to carry out the intentions expressed in a will and I am therefore, I think, entitled on this material to arrive at a decision as to what part of this Rs. 58,000 could be held to correspond to the sum set aside for emergency. Deducting Rs. 14,000 for revenue and servants there remain Rupees 44,000. The revenue of the estate was about Rs. 25,000 so the profits might be Rs. 25,000 or Rs. 30,000 so that we may deduct about Rs. 10,000 for what she would normally spend till the next amount of revenue came in. This would leave Rupees 34,000. Allowing for other possible expenditure I think one may safely hold that at least Rupees 25,000 constituted a reserve. It might have been more—it could hardly have been less—if it was more the defendant beneficiaries are at fault for not giving proof of it. I find therefore that the will is valid as to Rupees 25,000 and the balance must be held to be part of the non-talukdari estate after payments of what was due by the Chaudhrain such as land revenue and servants' wages. I therefore decide Issue 5 as follows: Chaudhrain Mithan Kunwar did execute a will in favour of defendants 4 and 5 and the will is valid as to the house and garden of Jamunabagh other than the land itself and as to Rupees 25,000 of the money found in existence at the death of the Chaudhrain, but it is invalid as to the balance of the money and as to the residential house. There being no

mention of any contents of any of the houses in the will itself the will is not valid as to any contents of any of the said houses.

Issue 7.—The wakfs Ex. D-2 and D-3 are only disputed by the plaintiffs on the ground that the property could not be made the subject of a wakf. Ex. D-2 makes a wakf of two bighas of rent free abadi in Khiron proper, on which land is the Thakurdwara built by the Chaudhrain, an orchard and a pucca well and in addition the entire village of Mirazpur. Both Khiron proper and Mirazpur are villages forming part of the taluqdari estate and therefore it was not within the power of Chaudhrain Mithan Kunwar to dispose of them. Consequently this wakf is not valid.

The second wakf, Ex. D-3, refers to certain numbers in Khiron of an area of 7 bighas 18 biswas and 6 biswansis where there is a temple of Sri Mahadeva Balbhadreshwar Swami and further to village Bhitargaon thok Domi mohal Khas. The Chaudhrain could not execute a waqf of this area in Khiron as it formed part of the taluqdari estate and the wakf is invalid to this extent. Bhitargaon is admitted in the plaint to have been property purchased by Chaudhrain Mithan Kunwar herself. The fact that she executed this wakf shows that she did not mean this village to be an accretion to the husband's estate and as it was bought out of the profits with which she was competent to deal, the waqf of this Bhitargaon land must be held valid. As regards buildings the position is as stated above about the Jamnabagh house. I therefore hold that the wakfs are valid only as to village Bhitargaon thok Domi mohal khas.

Issue 8.—The deed by which plaintiff 1 transferred shares as stated in para. 13 of the plaint has been proved and it is therefore valid. I therefore decide Issue 9 as follows : Plaintiff 1, subject to the transfer made by him in favour of the other plaintiffs, is granted a declaration of exclusive right to property in list A, together with Item 2 (a) of list C, namely mohal Chaudhrain Mithan Kunwar in village Marui and to Item 1 in list B, namely the talukdar's house with appurtenances at Khiron. He is not entitled to the house in Jamkoriapur nor to the garden and house in Jamnabagh nor to village Bhitargaon nor to Rs. 25,000 out of the sum found in existence at the death of Chaudhrain Mithan Kunwar. As regards the remaining non-taluqdari property he is entitled to one-third after deducting such amounts as land revenue and servants' wages due in the lifetime of Chaudhrain Mithan Kunwar. This decree is against all the defendants other than Mt. Rukmin Kunwar who has no interest in this property but as she has taken no part in the case there is no reason to grant her any costs.

As regards defendants 4 to 8 they have succeeded in part and failed in part and this applies also to defendants 1 and 3, but the costs incurred by the plaintiffs are mainly due to the defences set up by defendants 1, 2 and 3. The plaintiffs have failed as regards their claim of exclusive title to non-talukdari property but this has not prolonged much the hearing of this case. Taking these facts into consideration defendants 4 to 8 shall bear their own costs. Plaintiffs are entitled to proportionate costs against defendants 1, 2 and 3. Defendants 2 and 3 are responsible for by far the greater amount of the costs, after the suit was filed, which the plaintiffs have had to incur. They shall pay jointly and severally three-fourths of the costs to which plaintiffs are entitled and defendant 1 shall be liable for one-fourth. The plaintiffs are allowed proportionate costs in that they failed to prove exclusive right to non-talukdari property and the proportion is the value of talukdari as compared with non-talukdari property in suit. Counsel fees as to which certificates have not been filed within due time are not to form part of the costs.

D.S./R.K. *Order accordingly.*

A. I. R. 1939 Oudh 31

ZIAUL HASAN J.

Syed Mohammad Nasir and another — Appellants.

v.

Dwarka Singh and another — Respondents.

Criminal Ref. No. 45 of 1938, Decided on 28th September 1938, made by District Magistrate, Fyzabad.

Criminal P. C. (1898), S. 145 (4) and Proviso —Magistrate acting under sub-s. 4 need not see whether any party was dispossessed within 2 months before date of order under sub-s. (1).

The procedure prescribed in the first Proviso to S. 145 (4) is not mandatory and if a Magistrate chooses to act under sub-sec. (4), that is to say, decides the question which of the parties was in possession at the date of the order made under sub-sec. (1), it is not necessary to see whether or-

not any of the parties has been dispossessed within two months next before the date of the order.

[P 32 C 2]

I. A. Abbasi — *for Appellants.*

H. Husain and H. H. Zaidi — *for Respondents.*

Order. — This is a reference by the learned District Magistrate of Fyzabad recommending that an order made by a learned Magistrate of that district under S. 145, Criminal P. C., be set aside and an order under Sec. 146 be substituted for it. The facts of the case are that on 20th September 1937, certain Chhutkau Singh and Dwarka Singh who claimed to be in possession of the entire patti Ram Kishun of village Paikuliakalan, partly as proprietor and partly as mortgagees, made a report to the police against Ram Sumer, Ram Sahai and others stating that they had ejected the accused from certain specific plots of land and had cultivated the plots themselves but that the accused were forcibly cutting away the crops raised by them (the complainants). The police made an investigation, attached the disputed crops (it is said the attachment was made under Sec. 149, Criminal P. C.,) and made a report to the Sub-Divisional Magistrate for action being taken under S. 145, Criminal P. C. as there was a danger of breach of the peace. The Sub-Divisional Magistrate transferred the case to an Honorary Magistrate on 6th October 1937. The learned Honorary Magistrate called for a fresh report from the police and directed the police to attach the crops if necessary. The police again attached the crops and on 11th November 1937 made another report recommending action under Sec. 145, Criminal P. C. On this report the learned Honorary Magistrate by his order dated 19th November 1937 ordered the parties to file their written statements by 29th November 1937. As some of the parties were not served with this order, another date was fixed on 29th November 1937 for filing of written statements. On 7th December however, the learned Honorary Magistrate returned the case to the Sub-Divisional Magistrate and on 10th December 1937, the Sub-Divisional Magistrate fixed a date for the parties filing their written statements. The case continued for several months and finally on 16th June 1938, the Sub-Divisional Magistrate passed the final order declaring that the complainants, that is, Chhutkau Singh and Dwarka Singh, were in possession and ordering the attached crops to be delivered to them.

Against this order Mohammad Nasir and Ram Sumer filed an application in revision in the Court of the District Magistrate and the latter officer has made this reference with the recommendation mentioned above. The learned District Magistrate seems to think that because more than two months had elapsed in the case since the date of the preliminary order, the learned Sub-Divisional Magistrate was not competent to declare any of the parties to have been in possession and that in the circumstances the only course open to the Sub-Divisional Magistrate was to make an order of attachment under S. 146, Criminal P. C. I am of opinion that this is not a correct view of the law. The learned District Magistrate probably had in view the first Proviso to Section 145 (4) which runs as follows:

> Provided that, if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed, he may treat the party so dispossessed as if he had been in possession at such date.

Sub-s. (4) to S. 145 to which the above is a Proviso is as follows:

> The Magistrate shall then, without reference to the merits of the claims of any of such parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them respectively, consider the effect of such evidence, take such further evidence (if any) as he thinks necessary and if possible decide whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject.

A perusal of the Proviso quoted above together with sub-s. (4) leaves no room for doubt that the procedure prescribed in the Proviso is not mandatory and that if a Magistrate chooses to act under sub-s. (4), that is to say decides the question which of the parties was in possession at the date of the order made under sub-sec. 1, it is not necessary to see whether or not any of the parties has been dispossessed within two months next before the date of the order. As in the present case the learned Sub-Divisional Magistrate had decided on the evidence before him that the complainants were in possession, no question arises as to who was in possession two months before the passing of the preliminary order. There is in my opinion no ground for interference with the order of the Sub-Divisional Magistrate and I therefore reject the reference.

N.S./R.K. *Reference rejected.*

A. I. R. 1939 Oudh 33

THOMAS C. J. AND ZIAUL HASAN J.

Ram Damodar and others — Appellants.

v.

Emperor.

Criminal Appeal No. 286 of 1938, Decided on 26th October 1938, against order of Sess. Judge, Hardoi, D/- 15th September 1938.

(a) Criminal Trial—Evidence—Dying declaration not implicating three of the accused—First information report and eye-witnesses mentioning names of all as having assaulted deceased, but not assigning leading part to the three—Dying declaration held should be relied on.

A great deal of sanctity is attached to the dying declaration because it is expected that the person who is on the verge of death will tell the truth. [P 34 C 2; P 35 C 1]

Deceased in his dying declaration did not implicate three of the accused persons but mentioned names of other accused persons as having assaulted him. In the first information report the names of all accused persons were mentioned and some of the eyewitnesses deposed that all accused persons had taken part in the assault but no leading part was assigned to the three accused persons :

Held it was safer to rely on dying declaration rather than on the first information report or on the eyewitnesses. [P 35 C 1]

(b) Penal Code (1860), Ss. 325 and 109—Person attacked by many but dying from blow given by one of them—Others are guilty of abetting offence under S. 325 read with S. 109.

Where a person is attacked by several persons armed with weapons but death is caused by a blow inflicted by one of them, other persons who must have known that grievous hurt would, in all probability, be caused, are guilty of having abetted the offence under S. 325 read with S. 109 : *A I R 1919 Lah 375 and A I R 1938 Oudh 256, Foll.* [P 35 C 2]

Dr. J. N. Misra — *for Appellants.*

Asst. Govt. Advocate — *for the Crown.*

Judgment.—Nabbu Singh, Sobha Singh, Chhuttu Singh, Bala Din, Jai Jai Ram and Ram Damodar have been convicted by the learned Sessions Judge of Hardoi under S. 302, I. P. C., read with S. 149, I. P. C. Nabbu Singh has been sentenced to death and the learned Sessions Judge has submitted the record to this Court for confirmation of the death sentence. The remaining five appellants have been sentenced to transportation for life. All the six appellants have also been convicted under Secs. 147/148, I. P. C. Nabbu Singh has been sentenced to two years' rigorous imprisonment and the remaining appellants to one year's rigorous imprisonment each. Nabbu Singh, Sobha Singh and Chhuttu Singh are brothers and Thakurs by caste. Bala Din, Jai Jai Ram and Damodar are Brahmans. Jai Jai Ram is Bala Din's cousin and Ram Damodar is Jai Jai Ram's sister's son. The date and hour of the murder is 19th April 1938 at about 3 P. M.

The case for the prosecution as given by Hirde Narain, P. W. 2, is that the six appellants went to the threshing floor of Bharat Singh deceased in the afternoon. Bala Din accused said to Bhart Singh that "you abused at Holi, abuse now". Bharat Singh who was sitting on a cot got up. Sobha Singh accused struck a lathi at Bharat Singh who fled towards his house. The six appellants pursued him and surrounded him and Nabbu Singh struck a spear at Bharat Singh and all the accused then ran away. Hirde Narain's statement is corroborated by Kaptan Singh, P. W. 4, and Gaya Bakhsh Singh, P. W. 1. Gaya Bakhsh Singh, P. W. 1, who is the brother of Bharat Singh, deceased, took Bharat Singh to the police station Pali which is at a distance of six miles from the scene of the occurrence. The first information report was made at 6 P. M. by Bharat Singh himself and it is in accordance with the prosecution version excepting that it does not mention that the six accused pursued Bharat Singh and surrounded him. The names of all the appellants are mentioned in it. The motive for the assault is also mentioned in it which is to the effect that abuses were exchanged between Bharat Singh and Bala Din accused. Bharat Singh was sent to the hospital at Shahabad where Dr. Sundar Lal examined his injuries on 20th April 1938 at 7 A. M. He found :

(1) Irregular penetrating wound ¾″ x ¾″ into abdominal cavity (gaping) with protrusion of some fatty tissue through the opening on the upper part of abdomen 2½″ above the navel, (2) contusion 2″ x ¾″ on the middle lumbar region.

In the opinion of the doctor injury No. 1 was grievous and dangerous and was probably caused by a pointed instrument such as a spear. Bharat Singh died about 6 P. M. on the same date. His dead body was sent to the Civil Surgeon at Hardoi for post mortem examination and the following injuries were found on him :

(1) A penetrating wound 1″ x ¾″ and down into the abdominal cavity.

(2) A contusion 10″ x 4″ over upper part of back.

(3) A contusion 8″ x 3″ over middle of back on the left side.

(4) A contusion 6″ x 4″ over right side of head and face. The scalp was congested below the

injuries. The pleurae was congested. Both the lungs were deeply congested. Ventricles of the heart contained clotted blood.

The injury report Ex. 3 prepared by Dr. Sunder Lal shows only two injuries while the post mortem report shows four injuries. It is difficult to understand how Dr. Sunder Lal could have missed injury No. 4 which was a contusion 6″ x 4″ over right side of head and face unless this was a post mortem injury, that is caused by some one after deceased's death. Bharat Singh's dying declaration was recorded by Syed Jafar Mirza Saheb, Naib Tahsildar, P. W. 6, on 20th April 1938, at about 2-30 A.M. and it differs from the first information report. It is as follows :

I was sitting in the threshing floor near my house when Nabbu Singh, Chhuttu Singh, Sobha Singh all the three persons rushed and fell upon me. First Sobha struck a lathi on my waist. I stood up. Then Nabbu Singh struck a spear on my belly. There existed no particular enmity between me (and them); only an exchange of abusive language had taken place in connexion with the nautch party of a natni on the occasion of Holi festival at the door of Ram Singh and from that day onwards he and his companions Jai Jai Ram, Bala Din and Ram Damodar Brahmans armed with lathis and spears used to threaten me. Yesterday in the noon at 2 P.M. they assaulted me with spear. . . . .

He has not named the three Brahman accused, namely Bala Din, Jai Jai Ram and Ram Damodar as his assailants, nor has he stated that they were with Nabbu Singh and others though he has distinctly said that Jai Jai Ram, Bala Din and Ram Damodar Brahmans used to threaten him. The accused have denied the charge and have alleged enmity with the prosecution witnesses. Nabbu Singh examined one witness in his defence, namely Niranjan Lal Patwari, who has stated that Hirde Narain's father has tenancy in a patti of many co-sharers including Sobha Singh and Nabbu Singh accused and Gaya Bakhsh Singh. The evidence of this witness does not help the accused at all on the main incident. He was produced to falsify the statement of Hirde Narain about the tenancy land. The case against the accused depends on the statements of Gaya Bakhsh Singh, Hirde Narain, Deep Singh, Kaptan Singh and Sultan Singh P. Ws. 1 to 5, and Fatte P. W. 7 also to some extent supports the prosecution case. The eye-witnesses are Hirde Narain, Deep Singh, Kaptan Singh and Sultan Singh P. Ws. 2 to 5. Their names are mentioned in the first information report, and they saw the incident from a distance of about 25 paces from the threshing floor.

Hirde Narain has stated that he was sitting under a pakaria tree to the east of Bharat's northern chaupal after his meal and that Deep Singh and Sultan Singh were also there. That the six appellants came to the threshing floor where Bharat was from the west side; that Bala Din said to Bharat Singh "you abused at Holi, abuse now;" that Bharat got up from the cot and Sobha struck a lathi at Bharat; that the six appellants pursued him and surrounded him and Nabbu Singh struck a spear at Bharat; that Bharat Singh fell down and the accused ran away; that Gaya Bakhsh, his brother, came from the house and took Bharat away, that Nabbu had a spear and the other accused had lathis and that they were wielding their lathis but he could not say whether they hit Bharat or not. Deep Singh, Kaptan Singh and Sultan Singh corroborate Hirde Narain. Deep Singh has stated that Nabbu had a spear and the other accused had lathis but he did not see them wield their lathis. P. W. 1, Gaya Bakhsh Singh, is the brother of the deceased. He says that when he got to the scene he saw the appellants whom he recognised running away. Patte P. W. 7 who has a tailoring shop on the west of Bharat's house states that he saw the six appellants with three others consulting together near a ruined house and shortly after the accused went eastwards. He then heard a noise and he ran and saw Bharat Singh lying on the ground. He had a spear injury on the abdomen and on inquiry Bharat Singh told him that Nabbu had struck a spear at him and the remaining accused had lathis.

The learned Sessions Judge has believed the evidence of these prosecution witnesses. We have also carefully considered their statements and, in our opinion, they are true and there are no grounds to reject them so far as they relate against the Thakur accused, namely Nabbu Singh, Sobha Singh and Chuttu Singh. We have already stated that Bharat Singh deceased did not implicate the three Brahman accused in his dying declaration. It might be that he was in expectation of death and he named only those accused persons who actually took part in the assault, that is to say the three Thakur accused. A great deal of sanctity is attached to the dying declaration because it is expected that the person who is on the verge of death will

tell the truth. It is true that the names of all the appellants are mentioned in the first information report, but when Bharat Singh made the report his brother, Gaya Bakhsh Singh, P. W. 1, was with him and he may have suggested their names. In any case we consider it safer to rely on the dying declaration rather than on the first information report or on the eyewitnesses, who do not assign any leading part to the three Brahman accused. There is no special reason why they should have associated themselves with the Thakur accused in this murderous assault. The contention of the learned Assistant Government Advocate is that when Bharat Singh made the dying declaration he was in agony and therefore he might have forgotten or could not state the names of the three Brahmans. It is true that he must have been in great pain, but it is clear from the evidence of Syed Jafar Mirza, Tahsildar, who recorded the statement, that Bharat Singh was in his senses at the time when he made the statement. The deceased mentioned the names of the three Brahman accused as the persons who had been abusing and threatening him on previous occasions, and if they joined Nabbu Singh in the assault he would surely have mentioned their names. In our opinion, the case against the three Brahman accused is very doubtful and we give them the benefit of the doubt.

The case against Nabbu Singh, Sobha Singh and Chhuttu Singh is very clear. We uphold the conviction and sentence passed on Nabbu Singh. The assault on the deceased by Nabbu Singh was premeditated, cowardly and without any justification and the learned Sessions Judge was justified in passing the extreme penalty under the law. With regard to Sobha Singh and Chhuttu Singh, in our opinion, the offence committed by them is under Sec. 325, I. P. C., read with S. 109, I. P. C., and not S. 302, I. P. C. or Ss. 147/148, I. P. C. We believe the evidence of the prosecution witnesses that Sobha Singh assaulted the deceased with a lathi and that Chhuttu Singh pursued the deceased and surrounded him. In 20 Cr L J 711[1] two persons armed with deadly weapons made an attack upon another and it was proved that death was caused by a blow inflicted by only one of them. The Hon'ble Judges who decided that case held that the one who struck the blow was guilty of murder and the other who must have known that grievous hurt would in all probability be caused was guilty of having abetted the offence under S. 325 read with S. 109, I. P. C. The same view was taken by a Bench of this Court in Cri. Appeal No. 233 of 1938[2] of which one of us was a member.

We therefore dismiss the appeal of Nabbu Singh and confirm the sentence of death passed upon him and direct that he be hanged till he is dead. It seems to us that the intention of Sobha Singh and Chhuttu Singh was to give the deceased a beating with lathis. In our opinion, they abetted the offence under Sec. 325, I. P. C. and though the act of murder committed by Nabbu Singh was done with the aid of Sobha Singh and Chhuttu Singh, it cannot, in our opinion, be said that it was the probable consequence of the abetment on their part. We therefore alter the conviction of Sobha Singh and Chhuttu Singh from S. 302 read with S. 149, I. P. C., to one under S. 325 read with S. 109, I. P. C., and sentence them to 7 years' rigorous imprisonment each. We set aside the convictions of Nabbu Singh, Sobha Singh and Chhuttu Singh under Ss. 147/148, I. P. C. We allow the appeals of Bala Din, Jai Jai Ram and Ram Damodar and direct that they be released.

N.S./R.K. *Order accordingly.*

1. Bahal Singh v. Emperor, (1919) 6 AIR Lah 375 =52 I C 791=20 Cr LJ 711=24 PR 1919 Cr.

2. Raja Ram v. Emperor, *Reported in* (1938) 25 A I R Oudh 256=178 I C 162=1938 O W N 1057.

A. I. R. 1939 Oudh 35

ZIAUL HASAN J.

Lallu Ram and others — Applicants.

v.

Emperor.

Criminal Revn. No. 32 of 1938, Decided on 10th October 1938, from order of Addl. Sess. Judge, Kheri, D/- 23rd February 1938.

Criminal P. C. (1898), S. 367—Case referred to superior Magistrate under S. 349—Form of judgment which he should conform to, stated.

It is not sufficient for a superior Magistrate, to whom a case has been referred under S. 349, to accept the findings of the inferior Magistrate making the reference; he should form his own independent judgment and write a judgment according to the provisions of S. 367 : *19 All 506 (F B), Disting.; A I R 1919 Pat 290, Foll.* [P 36 C 1, 2]

Dr. J. N. Misra — *for Applicants.*

Order.—This is an application in revision against an order of the learned Additional Sessions Judge of Kheri who dismissed the applicants' appeal against their conviction and sentences under S. 147, I. P. C. It appears that the applicants were tried by a Tahsildar Magistrate of the Second Class under Ss. 147 and 323, I. P. C. The Tahsildar recorded evidence and came to the conclusion that the applicants were guilty under both the Sections but was of opinion that they deserved severer punishment than he could inflict. He therefore referred the case to the Subdivisional Magistrate under Sec. 349, Criminal P. C. The latter in his judgment after referring to the history of the case but without stating the facts passed the following order in the case:

I have gone through the finding of the Tahsildar Magistrate and the evidence adduced by the complainant in that Court. I am fully convinced that the accused have committed the offence under which they have been charged. I hold them guilty under S. 147, I. P. C., and convict and sentence each of them to undergo three months' rigorous imprisonment. I also hold them guilty under Sec. 323, I. P. C., and convict and sentence each of them to undergo six months' rigorous imprisonment, both sentences to run concurrently.

Against this order the applicants appealed to the Sessions Judge and contended that the judgment of the learned Subdivisional Magistrate was no judgment in law. The learned Judge agreed with this contention but refused to send back the case to the learned Magistrate for writing a proper judgment on the grounds that it would involve a waste of public time and that the accused have by their own dilatory tactics disentitled themselves to any indulgence. The learned Judge was probably also influenced by the fact that the offence under S. 323 was compounded by the parties after the accused filed their appeal. So far as the applicants' conviction under Sec. 147 was concerned, their appeal was dismissed.

The learned Additional Sessions Judge has relied on the case in 19 All 506,[1] but that case relates to the judgment of an Appellate Court while in the present case the judgment in question is the judgment of the trial Court. It has been held by various High Courts in India that it is not sufficient for a superior Magistrate, to whom a case has been referred under Sec. 349, Criminal P. C., to accept the findings of the inferior Magistrate making the reference and that he should form his own independent judgment and write a judgment according to the provisions of Sec. 367, Criminal P. C. In 20 Cr L J 444[2] the facts were very similar to those of the present case and the Subdivisional Magistrate's order was also quite similar to the order passed by the Subdivisional Magistrate in this case. A learned Judge of the Patna High Court holding that upon the test laid down by S. 367, Criminal P. C., the Subdivisional Magistrate's judgment was not a judgment at all, sent the case back to the Magistrate's Court for writing out a proper judgment. I would have adopted the same course in the present case, but for the fact that in view of the special circumstances of the case, this is no longer necessary. As said above, the parties have compounded the offence under S. 323. The accused have already undergone some imprisonment under S. 147 also. The complainant does not appear to oppose this application. In view of these circumstances I accept this revision and reduce the sentence of the applicants under S. 147, I. P. C., to that already undergone by them. The order under S. 106, Criminal P. C., does not also seem to be necessary and is hereby set aside.

D.S./R.K. *Sentence reduced.*

1. Queen-Empress v. Pandeh Bhat, (1897) 19 All 506=1897 A W N 142 (F B).

2. Thakur Singh v. Emperor, (1919) 6 A I R Pat 290=51 I C 268=20 Cr L J 444.

A. I. R. 1939 Oudh 36

ZIAUL HASAN J.

Emperor

v.

Babu Ram — Accused.

Criminal Ref. No. 41 of 1938, Decided on 2nd November 1938, made by Sess. Judge, Sitapur.

Sugar-Cane Act (15 of 1934), Sec. 7—Rules under—U. P. Sugar-Cane Rules (1936), Rules 9 and 13—Two persons charged under Rr. 9 and 13 — One tried and convicted — Other tried afterwards—Conviction of first held no ground for acquittal of other if both acted jointly as agents.

Where two persons who had not paid the price of the sugar-cane purchased by them, were charged under Rr. 9 and 13, U. P. Sugar-Cane Rules, and ordered to be prosecuted, but as one of them could not be found for the time, the case proceeded against the other and ended in his conviction and subsequently the first turned up and was tried :

Held **that the conviction of the second could not be a good ground for acquittal of the first if both of them were acting jointly as agents of persons mentioned in R. 13.** [P 37 C 1]

H. K. Ghosh, Assistant Govt. Advocate — *for the Crown.*

Mathura, Umrao, Kanhai and Jaiabhant *in person.*

Order.—This is a reference made by the learned Sessions Judge of Sitapur recommending to this Court that the conviction of Babu Ram who was sentenced by a Magistrate of the First Class to pay a fine of Rs. 20 under Rr. 9 and 13, U. P. Sugar-Cane Rules 1936 be set aside. It appears that certain tenants of the Sitapur District put in an application before the Deputy Commissioner of that district saying that the H. R. Sugar Factory Ltd. of Bareilly purchased cane from them on 4th May 1936 but that the price of the cane had not been paid to them. This application which was put in, on 26th June 1936, was sent to the Naib Tahsildar for report after inquiry. The Naib Tahsildar made a report on 14th July 1936 that Raghubar Singh and Babu Ram appeared from inquiry to have purchased cane from the applicants on behalf of the H. R. Sugar Factory, Bareilly, and that his inquiries further disclosed that the price of cane had not been paid by these persons to the tenants. It was on this report that both Raghubar Singh and Babu Ram were ordered by the learned District Magistrate to be prosecuted under the Sugar-Cane Rules. As Babu Ram could not be found for the time being the case proceeded against Raghubar Singh and ended in his conviction. Subsequently, Babu Ram turned up and was tried summarily and fined Rupees 20.

The learned Sessions Judge has made this reference mainly on the ground that as the two cases against Raghubar Singh and Babu Ram respectively related to the price of the same cane purchased on the same day and as Raghubar Singh has already been convicted, Babu Ram should not have been convicted. I doubt if the ground taken by the learned Sessions Judge could be urged as a good ground for the acquittal of Babu Ram if both he and Raghubar Singh were acting jointly as agents of persons mentioned in R. 13; on going through the evidence, as it is on the record, I agree with the learned Judge that the accused should have been given the benefit of doubt as the evidence did not prove anything against him beyond the fact that he sometimes used to pay the price of cane sold to the H. R. Sugar Factory Ltd., Bareilly. On the other hand the accused led evidence to prove that he was only a weighman in the factory and had no responsibility about the payment of the price of cane. The trial having been summary, the evidence is not on the record but this is what appears from the judgment of the learned Magistrate. I may also observe that the learned Magistrate was wrong in relying upon the result of the Naib Tahsildar's inquiry as the report of the Naib Tahsildar was based on hearsay and was therefore inadmissible. I accept this reference and set aside Babu Ram's conviction and sentence under Rules 9 and 13 of the Sugar-Cane Rules. The fine if paid shall be refunded.

N.S./R.K. *Conviction set aside.*

A. I. R. 1939 Oudh 37

THOMAS C. J.

Baijoo and others—Accused — Applicants.

v.

Emperor.

Abdul Ahmad Khan — Complainant.

Criminal Ref. No. 52 of 1938, Decided on 2nd November 1938, made by Addl. Sess. Judge, Sitapur.

(a) Criminal Trial — Procedure — Summary trial—Magistrate should record in brief reasons for conviction — But brevity should not tend to obscurity.

Where a Magistrate, invested with powers under S. 260, Criminal P. C., is trying a case summarily, it is desirable that he should set out in the column reserved for that purpose so much of the reasons that have influenced him as to satisfy the accused that the Magistrate has considered each of the ingredients necessary in law for the conviction to which the Magistrate has proceeded, and that while this should be recorded with brevity, the brevity should not be such as to tend to obscurity. [P 38 C 1]

(b) Cattle Trespass Act (1871), S. 22—Compensation cannot be awarded unless specifically claimed—Sentence of imprisonment in default of compensation is not competent.

No compensation can be awarded under S. 22 for loss caused by the seizure of cattle unless the complainant makes the specific claim for it; and the Magistrate is not competent to pass a sentence of imprisonment under S. 22 in default of payment of the compensation. [P 38 C 1, 2]

P. N. Chaudhri — *for Accused.*

Complainant in person.

Order. — This is a criminal reference under S. 438, Criminal P. C., by the

Additional Sessions Judge of Sitapur recommending that the conviction be set aside. Abdul Ahmad Khan filed a complaint under S. 22, Cattle Trespass Act, against Baijoo, Peer Khan and Jafar Khan. The case was tried by the Subdivisional Magistrate of Misrikh, who convicted the accused under S. 24, Cattle Trespass Act (1 of 1871) and fined each of them Rs. 50, in default to undergo rigorous imprisonment for one month. The case was tried summarily. The learned Subdivisional Magistrate has admitted in his explanation that the offence committed was under S. 22, Cattle Trespass Act, but under pressure of work S. 24 was written. I am inclined to think that this was a clerical error. The offence undoubtedly was triable summarily, but in my opinion the learned Subdivisional Magistrate has not followed the correct procedure laid down for summary trials. S. 263 (h), Criminal P. C., lays down that where no appeal lies, the Magistrate need not record the evidence of the witnesses or frame a formal charge; but he shall enter the finding, and, in the case of a conviction, a brief statement of the reasons therefor. The Magistrate's judgment is as follows:

Five witnesses testified on behalf of the prosecution in this case and four for the accused. Upon consideration I find the evidence of the former worthy and of the latter unworthy of belief.

Where a Magistrate, invested with powers under S. 260, Criminal P. C., is trying a case summarily, it is desirable that he should set out in the column reserved for that purpose so much of the reasons that have influenced him as to satisfy the accused that the Magistrate has considered each of the ingredients necessary in law for the conviction to which the Magistrate has proceeded, and that while this should be recorded with brevity, the brevity should not be such as to tend to obscurity. These safeguards are essential so that in case of revision the High Court may have sufficient materials on the record before it for arriving at the conclusion as to whether the order of the Magistrate is right or wrong. The language of the Legislature is sufficiently clear and no authority is needed for this elementary rule of procedure.

The learned Magistrate has committed another error. Under S. 22, Cattle Trespass Act, compensation is to be awarded but no compensation can be awarded for loss caused by the seizure of cattle unless the complainant makes the specific claim for it. The Magistrate is not competent to pass a sentence of imprisonment under S. 22, Cattle Trespass Act, in default of payment of the compensation. Here, as I have pointed out, the learned Magistrate has fined each of the accused Rs. 50 or in default of payment of fine to one month's rigorous imprisonment. The complainant was allowed Rs. 20 as compensation but there is no proof on the record of the damage the complainant actually suffered. The judgment does not show what the complainant actually paid in getting the cattle released. The order of the learned Magistrate is against the law and procedure and therefore it must be set aside. I therefore accept the recommendation of the learned Additional Sessions Judge and set aside the conviction of the accused persons, but I do not agree with the learned Judge that in view of the fact that the accused have already undergone inconvenience and expense therefore no retrial should be ordered. I am of opinion that this is a fit case in which the retrial should be ordered. I therefore direct that the file of the case will be laid before the learned District Magistrate, who will send it to some Magistrate other than Mr. Hardy, who has already expressed his opinion, for retrial.

N.S./R.K. *Retrial ordered.*

A. I. R. 1939 Oudh 38

ZIAUL HASAN J.

Ram Roop and another — Accused.

v.

Emperor.

Criminal Ref. No. 48 of 1938, Decided on 2nd November 1938, made by Sess. Judge, Fyzabad.

(a) Penal Code (1860), Sec. 425 — Accused filling up ditch dug by complainant held not guilty of mischief.

Complainant had a vegetable garden attached to his house to the east. The accused closed the old door of their house and opened a new door towards the complainant's garden and when the complainant dug a ditch around his garden, the accused filled it up and erected a chabutra:

Held that accused was not guilty of the offence of mischief. [P 39 C 2]

(b) Criminal P. C. (1898), S. 106 — Security cannot be taken from person convicted under Sec. 426, Penal Code.

Security under S. 106, Criminal P. C., cannot legally be taken from a person who has been convicted under Sec. 426, I. P. C., as the offence of mischief does not involve breach of the peace: *26 Mad 469, Rel. on.* [P 39 C 1, 2]

(c) Penal Code (1860), S. 425— "Property" does not include right of easement.

"Property" in S. 425 means tangible property capable of being forcibly destroyed and does not include a right like an easement, etc.: *A I R 1930 Mad 973, Foll.* [P 39 C 2]

Bhagwati Nath — *for Accused.*

Order. — This is a criminal reference made by the learned Sessions Judge of Fyzabad. Ram Roop and Ram Chandra were prosecuted under Secs. 447 and 426, I. P. C., on a complaint made by one Ram Dulare. The complaint was to the effect that the complainant had a vegetable garden attached to his house to the east, that the accused closed the old door of their house and opened a new door towards the complainant's garden and that when the complainant dug a ditch around his garden, the accused filled it up and erected a chabutra on which they put up the Congress flag. A Magistrate of the third class who tried the accused convicted them under both the Sections and sentenced them to pay a fine of Rs. 10 under Sec. 447 and of Rs. 5 each under S. 426, I. P. C. The convicted persons appealed to the District Magistrate who set aside their conviction under S. 447 but maintained that under S. 426. He further ordered the accused under Sec. 106, Criminal P. C., to give security for one year. Against the appellate order of the learned District Magistrate the accused filed a revision in the Court of the Sessions Judge. The learned Judge did not accept the accused's plea that their conviction under Sec. 426 was bad in law, but coming to the conclusion that security under Sec. 106, Criminal P. C., could not legally be taken from a person who has been convicted under S. 426, I. P. C., as the offence of mischief does not involve breach of the peace, has sent the case to this Court with the recommendation that the order under Sec. 106, Criminal P. C., be set aside.

Notice of this application was given to the complainant but he has not appeared. The accused persons are represented by a counsel. The learned counsel has not only supported the order of reference but has also contended that on the facts of the case his clients could not be convicted under Sec. 426, I. P. C. I agree with the learned Sessions Judge that an order under S. 106, Criminal P. C., could not legally be passed in this case as the offence of mischief of which the accused were convicted does not involve a breach of the peace. This view is supported by the decision of the Madras High Court in 26 Mad 469.[1]

I am however of opinion that the facts as stated do not even make out a case of mischief against the accused. Under S. 425, I. P. C., a person is said to commit mischief (which is punishable under Sec. 426) when he, with intent to cause or knowing that he is likely to cause wrongful loss or damage to the public or to any person, causes the destruction of any property or any such change in any property or in the situation thereof as destroys or diminishes its value or utility or affects it injuriously. To constitute mischief it is necessary not only that wrongful loss or damage to the public or to any person be intended or be likely but also that any property should either be destroyed or any such change should occur in any property or in the situation thereof as destroys or diminishes its value or utility or affects it injuriously. Now, in the first place it is doubtful if it can be said that any wrongful loss was caused to the complainant by the accused filling up the ditch, as wrongful loss is defined as "loss by unlawful means of property to which the person using it is legally entitled." In the second place the filling up of the ditch by the accused does not affect any property injuriously so as to diminish its value or utility. The learned Judge thinks that the accused were guilty under S. 426 as they destroyed the fruits of the complainant's labour in making a ditch, but property in S. 425 means tangible property capable of being forcibly destroyed and does not include a right like an easement, etc. as was held in 1930 M W N 909.[2] It appears to me therefore that not only is the order under S. 106, Criminal P. C., bad but that the conviction of the accused under S. 426, I. P. C., cannot also be maintained. I therefore accept this reference and set aside the conviction and sentences of the accused and cancel the order passed against them under Sec. 106, Criminal P. C.

N.S./R.K. *Conviction set aside and Order cancelled.*

1. Kannookaran Kunhamad v. Emperor, (1903) 26 Mad 469=2 Weir 48.
2. Rudraraju Ramaraja v. Emperor, (1930) 17 A I R Mad 973=1930 Cr C 1189=129 I C 77=32 Cr L J 225=1930 M W N 909.

A. I. R. 1939 Oudh 40

ZIAUL HASAN AND YORKE JJ.

Pt. Jai Narain Misra — Appellant.

v.

Shiam Lal and another — Respondents.

Second Appeals Nos. 446 to 448 of 1937, Decided on 17th October 1938, against order of Civil Judge, Mohanlalganj, Lucknow, D/- 22nd November 1937.

(a) U. P. Encumbered Estates Act (25 of 1934), Secs. 4, 6 and 7 (1) (b) — *A* executing simple mortgage of his share in village in favour of *P* — *P* obtaining decree on mortgage — After *A's* death his sons and daughter putting in application under Sec. 4—Order under S. 6 passed by Collector —Subsequently one of *A's* son granting lease in favour of defendants in respect of some plots on the land, enabling them to dig earth from them — *P* suing defendants for perpetual injunction restraining them from digging the earth — Suits by *P* held not to be in respect of any debt and held not barred by S. 7 (1) (b).

The expression "in respect of any debts" in S. 7 (1) (b) does not mean "having any connexion with any debts," the latter expression being too wide. [P 41 C 1]

A who owned a share in a village executed a simple mortgage in respect of it in favour of *P*. *P* obtained a decree on the mortgage. After *A's* death his sons and daughter put in an application under Sec. 4 and the Collector passed an order under Sec. 6. Subsequently *M*, one of the sons of *A*, gave four leases to the defendants on behalf of himself and his brother and sister in respect of certain specified plots of land. The leases were executed subsequent to the application under S. 4 and were given for the purpose of enabling the lessees to dig earth from the plots. *P* thereupon filed suits against the defendants for a perpetual injunction restraining them from digging the earth from the plots alleging that the leases infringed his rights and were void :

Held that the suits could not be said to be in respect of any debts and were not barred under S. 7 (1) (b). The special Judge appointed under the U. P. Encumbered Estates Act had no jurisdiction to give a decree for perpetual injunction sought for by *P* : *A I R 1938 Oudh 192, Ref.* [P 41 C 1, 2]

(b) U. P. Encumbered Estates Act (25 of 1934), Secs. 3 and 7 (1) (b) — Jurisdiction of special Judge to decide validity or otherwise of transfer — Effect of.

The jurisdiction of the special Judge to decide the validity or otherwise of a transfer does not bar the jurisdiction of the ordinary Civil Courts to entertain other suits relating to that transfer. [P 42 C 1]

(c) U. P. Encumbered Estates Act (25 of 1934), Ss. 4 and 11 (2) — Sec. 11 (2) does not contemplate claim derived from applicant under S. 4 subsequent to his application.

Sub-section (2) of Sec. 11 does not contemplate any claim derived from the applicant under S. 4, subsequent to his making his application, the reason being that all such transfers are void under Sec. 7 (3). [P 42 C 1]

(d) U. P. Encumbered Estates Act (25 of 1934), S. 11 (4)—Order referred to in S. 11 (4) means special Judge's decision on claim to property mentioned in notice under S. 11.

The order referred to in sub-s. (4) of S. 11 means the special Judge's decision on any claim to the property mentioned in the notice under Sec. 11 brought before him. [P 42 C 1]

Niamat Ullah and Kashi Prasad Srivastava — *for Appellant.*

G. D. Khare — *for Respondents.*

Judgment.— These are three connected second appeals against appellate orders of the learned Civil Judge of Mohanlalganj in three suits brought by the plaintiff-appellant in the following circumstances :

Mohal Ali Mehdi of village Kharka comprising a five annas ten pies share was owned by two brothers, Abul Hasan and Ali Mehdi in the proportion of two annas nine pies and three annas one pie respectively. Abul Hasan died leaving several children and two of his sons, namely Ali Naqi, and Mohammad Askari, made a usufructuary mortgage of a ten pies three krants share in favour of the plaintiff-appellant on 1st January 1932. The term of this mortgage was ten years. On 23rd July 1932 the plaintiff-appellant took a simple mortgage of the three annas one pie share from Ali Mehdi and a decree on foot of this mortgage has already been passed in favour of the appellant on the basis of a compromise. Ali Mehdi is also dead and has left two sons and a daughter. On 29th October 1936 the sons and daughter of Ali Mehdi put in an application under S. 4, Encumbered Estates Act, and the Collector passed an order under Sec. 6 of the Act on the same date. Subsequently one of the sons of Ali Mehdi named Mohammad Ali who had been appointed lambardar of the mohal gave four leases to various persons, the defendants in the present three suits, on behalf of himself and his brother and sister in respect of certain specified plots of land. The lease in favour of Shiam Lal and Ram Lal, respondents to Appeal No. 446 of 1937, was executed on 2nd November 1936. That in favour of Babu Kedar Nath, defendant-respondent in Appeal No. 447, was executed on 25th January 1937 and that in favour of Sardar Sahib Sardar Singar Singh, respondent in Appeal No. 448, was executed on 4th November 1936. It will thus be seen that all the three leases were executed subsequently to the application under Sec. 4, Encumbered Estates Act. All the leases were for 12 years and

were given for the purpose of enabling the lessees to dig earth from the leased plots to the depth of twelve feet for the purpose of making bricks. The suits which have given rise to these appeals were brought by the plaintiff-appellant for a perpetual injunction restraining the defendants from digging earth from the plots in suit on the allegation that the leases given by Mohammad Ali to the different defendants infringed his rights and were void.

The trial Court, the learned Munsif of Havali, Lucknow, decreed the suits except in respect of plots Nos. 37, 41/1 and 50 in Suit No. 91. The reason for dismissal of the suit in respect of these plots was that they were found to have been leased out prior to the mortgage in favour of the plaintiff-appellant. The learned Munsif also dismissed the claim for damages. The defendants to the three suits filed appeals against the trial Court's decrees and the plaintiff filed a cross-objection in respect of the plots about which his suit had been dismissed. The learned Civil Judge who heard the appeals came to the conclusion that the suits were barred by the provisions of S. 7, Encumbered Estates Act, and accordingly decreed the defendants' appeal and dismissed the plaintiff's suits and cross-objections. The plaintiff has therefore brought these appeals against the order of the learned Civil Judge. The question in all the three cases is whether or not the suits were barred by Sec. 7 (1) (b), U. P. Encumbered Estates Act. That Section runs as follows:

> No fresh suit or other proceedings other than an appeal or revision against a decree or order, or a process for ejectment for arrears of rent shall, except as hereinafter provided be instituted in any civil or revenue Court in the United Provinces in respect of any debts incurred before the passing of the said order,

and the order referred to is the order under Sec. 6 passed by the Collector. The question turns on the interpretation to be put on the expression "in respect of any debts" and after giving careful consideration to the points raised by the learned counsel for the parties in their arguments, we have come to the conclusion that the present suits cannot be said to be in respect of any debts. The learned counsel for the respondents wants us to interpret this expression as meaning "having any connexion with any debts;" but we cannot accept this interpretation which appears to us to be too wide. The expression "having connexion with any debt" will embrace a number of suits of various descriptions and would either leave many wrongs without a remedy or would confer on the Special Judge, appointed under the Act, jurisdiction which it was not intended by the Act to confer on him. Sec. 3 of the Act lays down that the Special Judge appointed by the Local Government shall, subject to the orders of Government as regards the area and extent of his jurisdiction, exercise the powers conferred and perform the duties imposed, on him by the Act; but the Act nowhere gives the special Judge jurisdiction to pass a decree for a perpetual injunction under S. 54, Specific Relief Act. If the plaintiff-appellant be entitled to a perpetual injunction, the interpretation of S. 7 (1) (b), Encumbered Estates Act, contended for by the respondents would deprive him of that right. No doubt the plaintiff's right to the injunction sought for by him arises on account of the fact that he holds mortgages of the land in his favour but the suits brought by him cannot in our opinion be said to be in respect of his debts. A representative suit under S. 53, T. P. Act, also arises on account of a debt but in (1938) Oudh Appeals 548[1] a Bench of this Court held that such a suit is not a suit in respect of any public or private debt and cannot be stayed under S. 7, Encumbered Estates Act. Exception was taken to this decision by the learned counsel for the respondents on various grounds but after considering the points urged by him, we are of opinion that the point was rightly decided in the case referred to.

It was argued that every matter which the special Judge called upon to decide must be deemed to be in respect of a debt and that as the special Judge in the present case will have to decide whether or not the plots of land which are subject to the leases in question will be liable to be attached and sold for recovery of debts due from the applicants under Sec. 4, the substance of the plaintiff's suits will be decided by the special Judge and therefore no other Court has jurisdiction to decide it, but in the first place, as we have said above, the special Judge has no jurisdiction to give a decree for a perpetual injunction sought by the plaintiff in these suits, and

1. Nisar Khan v. Abdul Hameed Khan, (1938) 25 A I R Oudh 192=176 I C 903=1938 O W N 683=(1938) Oudh Appeals 548.

in the second, we do not think that the jurisdiction of the Special Judge to decide the validity or otherwise of a transfer bars the jurisdiction of the ordinary Civil Courts to entertain other suits relating to that transfer. Reliance was placed on sub-s. (4) to S. 11 which reads :

> Any order passed by the Special Judge under this Section shall be deemed to be a decree of Civil Court of competent jurisdiction;

and it was argued that the lessees in the present case will have to put forward their claims before the Special Judge under sub-s. (2) of S. 11; but, in the first place, we do not think that sub-s. (2) contemplates any claim, derived from the applicant under S. 4 subsequent to his making his application, the reason being that all such transfers are void under Sec. 7 (3) of the Act which provides that after the passing of the order under S. 6, the landlord shall not be competent without the sanction of the Collector to make any exchange or gift of, or to sell, mortgage or lease proprietary rights, or any portion of them; and in the second place, the order referred to in sub-s. (4) of S. 11 obviously means the Special Judge's decision on any claim to the property mentioned in the notice under S. 11 brought before him. If no such claim is actually brought, there is nothing for the Special Judge to determine. As in the present case the respondents-lessees have not put forward any claim before the Special Judge (nor could they bring such a claim as said above) no order has been or could be passed by the Special Judge to constitute a decree of Civil Court and to bar the jurisdiction of the ordinary Civil Court. It was also argued that no injunction as prayed for by the plaintiff-appellant should be granted to him as his rights under the mortgages in his favour can be extinguished under S. 18 of the Act which provides :

> Subject to the right of appeal or revision conferred in Chap. 6, the effect of a decree of the Special Judge under sub-s. (7) of Sec. 14 shall be to extinguish the previously existing rights, if any, of the claimant, together with all rights, if any, of mortgage or lien by which the same are secured and, where any decree is given by the Special Judge to substitute for those rights a right to recover the amount of the decree in the manner and to the extent hereinafter prescribed.

But this is an argument on the merits of the case and has no connexion with the question whether the present suits are barred under Sec. 7, Encumbered Estates Act. We are definitely of opinion that the learned Judge of the lower Appellate Court was wrong in thinking that the present suits were barred under S. 7. We therefore allow these appeals with costs and send back the appeal to the lower Appellate Court for decision on the merits. The cross-objection of the plaintiff will also be re-heard.

R.M./R.K. *Appeals allowed.*

A. I. R. 1939 Oudh 42

THOMAS C. J. AND ZIAUL HASAN J.

Raja Mohan Manucha and others — Applicants.

v.

Manzur Ahmad Khan and others — Opposite Party.

Privy Council Appeal No. 16 of 1937, Decided on 27th October 1938 for leave to appeal to His Majesty in Council.

Privy Council Rules, R. 9 — Privy Council appeal — High Court can under R. 9 extend time for filing security or to make good the deficiency.

The High Court has, under R. 9 of the Privy Council Rules, full discretion to extend the time for filing the security in a Privy Council Appeal or to extend the time for making good the deficiency in the security : *A I R 1927 Bom 217, Ref.* [P 43 C 1]

M. H. Qidwai — *for Applicants.*

Abrar Husain — *for Opposite Party Nos. 2 to 5.*

Order.—The applicants were ordered to deposit security in the Privy Council Appeal No. 16 of 1937. They deposited 3 per cent. Government Promissory Bonds on 16th September 1938. The limitation for depositing this amount expired on 19th September 1938. The office on inquiry from the Imperial Bank of India Ltd., Lucknow, as to the market rate of the bonds discovered that there was a deficiency of Rs. 90 in the security money. A sum of Rs. 60 was due as interest on these bonds, so strictly speaking there was only a deficiency of Rs. 30. The learned counsel for the applicants was informed on 19th September 1938 of this deficiency, and on 20th September 1938 he deposited the deficit amount. The office now wants directions whether under the provisions of O. 45, R. 7 the deficit deposit may be treated within time for the purposes of the appeal.

The learned counsel for the opposite party has no objection to this Court

extending the time for depositing the deficit amount.

The contention of the learned counsel for the applicants is that under O. 45, R. 7 this Court has discretion to extend the time for accepting the deficit amount, and in support of his contention he relies on the case in 51 Bom 430.[1] It was held in that case that there was no express penalty provided by O. 45, R. 7 for failure to furnish security and to deposit the amount for expenses within the time therein mentioned. It was therefore in contrast with O. 45, Rr. 10 and 11 which provide in R. 11 that if the further security required by R. 10 was not given then the proceedings would be stayed and the appeal was not to proceed without an order of His Majesty in Council. R. 9 of the Privy Council Rules is as follows :

Where an appellant having obtained a certificate for the admission of an appeal, fails to furnish the security or make the deposit required (or apply with due diligence to the Court for an order admitting appeal) the Court may, on its own motion or on an application in that behalf made by the respondent, cancel the certificate for the admission of the appeal, and may give such directions as to the costs of the appeal and the security entered into by the appellant as the Court shall think fit, or make such further or other order in the premises, as in the opinion of the Court the justice of the case requires.

It was held in the Bombay case that the Privy Council Rules were passed as the preamble shows in pursuance of the English Act of Parliament, 4 William IV. It was therefore held that R. 9 should be given preference over O. 45, Rule 7. This case undoubtedly supports the contention of the learned counsel for the applicants. In our opinion under Rule 9 of the Privy Council Rules we have full discretion to extend the time for filing the security or extend the time for ordering the applicants to make the deficiency good. The deficiency has already been made good by the applicants. We accordingly order the office to accept it.

R.M./R.K. *Order accordingly.*

1. Nilkanth Balwant v. Sachidanand Vidya Narsinha Bharati, (1927) 14 A I R Bom 217= 101 I C 555=51 Bom 430 = 29 Bom L R 352 (F B).

A. I. R. 1939 Oudh 43

ZIAUL HASAN AND YORKE JJ.

Sukkhu — Appellant.

v.

Nand Bahadur Singh and another— Respondents.

First Appeal No. 9 of 1938, Decided on 16th November 1938, from order on office report D/- 26th August 1938.

Court-fees Act (1870), Sch. 2, Article 11 — Order of special Judge dismissing claim under provisions of S. 13, U. P. Encumbered Estates Act — On appeal from such order court-fee payable is under Art. 11.

The order of special Judge dismissing claim under the provisions of S. 13, Encumbered Estates Act, on the ground that the claim not having been made within the time required by the Act the debt was to be deemed for all purposes and all occasions to be duly discharged is an order only and not an order having the force of a decree. Hence on appeal from the order the proper court-fee payable is under Article 11 of Sch. 2, Court-fees Act, namely Rs. 2. [P 44 C 1]

Radha Krishna and S. N. Srivastava — *for Appellant.*

Order. — This is a reference in regard to the court-fee payable on an appeal against an order of the special Judge, First Grade, described by the office as dismissing the claim of the appellant under the provisions of Sec. 13, Encumbered Estates Act. What actually happened was that the application was made beyond the period of three months prescribed in the notice issued under Sec. 9 (2) of the Encumbered Estates Act, and the further period of two months allowed by Cl. 3 of the same Section. The learned special Judge heard some arguments in regard to the interpretation of these two clauses but held that the application was made beyond time and he therefore declined to admit it. He also noted in his order that by reason of the provisions of Sec. 13, Encumbered Estates Act, the claim not having been made within the time required by the Act the debt was to be deemed for all purposes and all occasions to be duly discharged. The office report is to the effect that this dismissal of the claim amounts to a decree and therefore ad valorem court-fee of Rupees 205 is payable on Rs. 3600, the amount at which the appeal has been valued.

Learned counsel has gone so far as to argue that even if this had been an adjudication under S. 14, Eucumbered Estates Act, ad valorem court-fee would not have

been payble in a case in which the Court declined to pass a simple money decree under Cl. 7 of that Section. That is a question into which we need not go on the present reference. Cases in which a money decree is granted or refused under the provisions of S. 14 are cases in which there has been an adjudication. In the present case we are of opinion that there has not been any adjudication at all and that the nature of the decision of the learned special Judge is that it is an order only and not an order having the force of a decree. In these circumstances we do not accept the office report but are of opinion that the proper court-fee payable is under Art. 11 of Sch. 2, Court-fees Act, namely Rupees 2. That amount having been paid there is no deficiency to be made good.

D.S./R.K. *Order accordingly.*

A. I. R. 1939 Oudh 44

ZIAUL HASAN J.

Mohammad Ejaz Rasool Khan — Appellant.

v.

Mata Din and others — Respondents.

Second Rent Appeal No. 40 of 1936, Decided on 31st October 1938, against order of District Judge, Sitapur, D/- 19th February 1936.

U. P. Land Revenue Act (3 of 1901), S. 101 —Jurisdiction in matter of reduction of rent is upon Collector only — That jurisdiction cannot be exercised by every Court of revenue.

Section 101 clearly provides a specific procedure for claims to reductions in under-proprietary rent based on a reduction in revenue and confers jurisdiction in the matter upon the Collector only. That jurisdiction cannot be exercised by each and every Court of revenue while dealing with a suit for arrears of under-proprietary rent. [P 44 C 2]

M. Wasim and Ali Hasan — *for Appellant.*

Radha Krishna — *for Respondents.*

Judgment. — This second rent appeal against a decree of the learned District Judge of Sitapur who modified a decree of an Assistant Collector, First Class, arises out of a suit brought by the plaintiff-appellant against the defendants-respondents for recovery of arrears of under-proprietary rent for 1339 and 1342F. The claim was for Rs. 2330-4-0 in respect of the three years in question. It was decreed by the trial Court for Rs. 2316-6-0 which amount included rent (that is land revenue and malikana), local rates, etc. The defendants appealed and contended that as there was admittedly a remission of land revenue to the extent of Rs. 140 the malikana due by them should also be correspondingly reduced and that the local rates payable by them amounted to Rs. 21-4-0 a year and not Rs. 84 a year as held by the trial Court.

On the first point the learned District Judge held that the defendants were entitled to a reduction in their rent as the amount of malikana payable by them had been fixed at a certain proportion as compared with the land revenue and on the second point he held that the defendants were liable to pay local rates under Cl. (a) of S. 8 as well as under the main Section of the U. P. Local Rates Act (1 of 1914). Against these findings, the plaintiff-proprietor has brought this second appeal and the defendants have filed a cross-objection with regard to the amount of the local rates fixed by the learned Judge. So far as the point arising from the appeal of the plaintiff-appellant is concerned, I am of opinion that the learned District Judge was not right in reducing the rent payable by the defendants-respondents. It is no doubt true that the malikana in the present case appears to have been fixed at about 49 per cent. of the land revenue and it cannot also be denied that land revenue was partly remitted during the years in question; but if the defendants-under-proprietors wanted to get their rent reduced on account of a reduction in the land revenue, they ought to have proceeded under S. 101, Land Revenue Act, which lays down:

> When the revenue assessed on land held in the Agra Province by an inferior proprietor, or in Oudh by a person to whom the provisions of S. 79 apply has been reduced or in part suspended or remitted the Collector may, subject to rules made under S. 234, make a proportionate reduction, suspension or remission in the amount payable by such inferior proprietor or such person for such land.

This Section clearly provides a specific procedure for claims to reductions in under-proprietary rent based on a reduction in revenue and confers jurisdiction in the matter upon the Collector only. That jurisdiction cannot to my mind be exercised by each and every Court of revenue while dealing with a suit for arrears of under-proprietary rent. Therefore the defendants not having proceeded under Section 101, Land Revenue Act, cannot in my opinion be allowed to put up as a defence to a suit for

arrears of rent the plea that they are entitled to remission of rent proportionate to the remission made in revenue. Further, the written statement of the defendants-respondents shows that they did not base their claim for reduction in their rent on a remission of revenue but said in para. 8 of their written statement :

> Since 1339-F there has continuously been a remission of three annas in the rupee in rent and the contesting defendants are also entitled to a reduction of three annas in the rupee in their rent.

This plea of theirs cannot however be accepted as there is nothing to show that any reduction was made by the Local Government or any other competent authority in the rent payable by under-proprietors. On the other hand, G. O. No. 2457 dated 8th December 1933, a certified copy of which has been filed, dealing with a particular case, clearly says :

> The Governor-in-Council thinks that the malikana fixed at settlement at Rs. 595 should not be altered on account of the remission in revenue for slump in prices.

The learned counsel for the respondents relies on Section 2, U. P. Regularization of Remissions Act (14 of 1938) but all that that Section lays down is that an order of the Local Government or of any authority empowered by the Local Government remitting rent on account of any fall in the price of agricultural produce whether passed before or after the commencement of the Act shall not be called in question in any Civil or Revenue Court. In the present case the legality or otherwise of any such order is not challenged by any party. S. 2 therefore has no application to the present case. It was argued that according to the definitions of 'rent' and 'under-proprietor' contained in the Oudh Rent Act the amount payable by the under-proprietor to the superior proprietor is rent and that therefore under-proprietors should have remissions in rent like any other tenant. The reply to this is that though rent includes under-proprietary rent yet the Local Government do not appear to have contemplated by their executive orders a reduction of under-proprietary rent on account of a fall in prices as the G. O. referred to above clearly shows, and this being so S. 2, U. P. Regularization of Remissions Act, cannot help the respondents, who have not been able to show that they were entitled to a reduction in their rent under any order that could be covered by Sec. 2 of the Act. I am therefore of opinion that the learned Judge of the lower Appellate Court was not right in making a reduction in the malikana payable by the defendants.

The defendants in their cross-objections contend that they are liable to pay local rates only under Cl. 1 of S. 8, Local Rates Act (1 of 1914). It is however admitted that according to the revenue papers on the record, the rural police rate payable under the U. P. Local and Rural Police Rates Act of 1906 in respect of the land in question was wholly recoverable from the defendants. If that is so, the defendants are clearly liable to pay the rate not only at the rate mentioned in Part 1 of S. 8 but also according to that mentioned in Cl. (a) of that Section. The finding of the learned District Judge on this point is perfectly correct. The result is that the appeal of the plaintiff is decreed with costs and the cross-objection of the defendants dismissed with costs.

D.S./R.K. *Appeal allowed.*
Cross-objection dismissed.

A. I. R. 1939 Oudh 45

YORKE J.

Bans Gopal and others — Applicants.
v.
Emperor.

Criminal Revn. No. 125 of 1938, Decided on 30th November 1938, from order of Sess. Judge, Fyzabad, D/- 30th August 1938.

(a) Penal Code (1860), Sec. 447 — Person ejected from land retaining possession illegally —Person rightfully entitled to possession entering on land when empty — Ejected person enforcing supposed right of possession by entering upon land held guilty of offence under S. 447.

If a person is ejected from certain lands and formal possession is given to the rightful owner, the maintenance or the attempted maintenance of physical possession of the land by the ejected person is wholly illegal until such time as such person may get himself restored by process of law : *A I R 1924 All 762, Foll.* [P 47 C 1]

If, while the ejected person is so illegally retaining possession, the rightful owner enters upon the land when it is empty and if in such circumstances the ejected person enforces his supposed right of possession by entering upon the land, he commits an offence under S. 447. The primary intention in such case is to intimidate and the secondary object is to enforce possession and so the ejected person cannot defend his act by reliance on his ultimate intention : *A I R 1933 Oudh 179, Disting.* [P 47 C 1, 2]

(b) Criminal P. C. (1898), S. 106 — Scope— In order to proceed under S. 106 there must be finding that breach of peace has occurred.

In order to justify the passing of an order under S. 106 against any person it is not sufficient that he should have committed the offence of criminal intimidation, but it is necessary, as is clear from the Section itself, that he should have been convicted of that offence. The words 'involving a breach of peace' in the Section require that a breach of the peace should be an ingredient of the offence proved, and before the Section can be put in force, there must be a finding that a breach of the peace has occurred : *A I R 1932 Oudh 33, Foll.; 29 Mad 190, Ref.* [P 47 C 2]

Hakimuddin — *for Applicants.*

Krishna Nath Kaul — *for the Crown.*

Order. — This is an application in revision by Bansgopal Singh and three other persons who were convicted by a Second Class Magistrate of Fyzabad of an offence under S. 447, I. P. C., and sentenced to pay various amounts of fine, out of which it was directed that Rs. 30 should be paid to the complainant Ambika Prasad by way of compensation. This case related to a plot formerly in the possession of the applicant Bansgopal. Bansgopal was ejected and formal possession or dakhaldehani was given on 13th April 1937. The document in question is Ex. 6. The prosecution case was that even after this ejectment Bansgopal, whether by force or otherwise, retained possession of this plot and cultivated therein a kharif crop. On 7th April and 15th April he made payments in respect of the arrears of rent which were the foundation of the ejectment decree. It may be that he had made these payments in the hope of avoiding actual ejectment, but nonetheless it is clear that ejectment and formal delivery of possession had taken place, and that thereafter the maintenance of physical possession over the land by Bansgopal was illegal unless he was actually restored to possession by the Manager of the Deara estate in which the plot was situated. So far from this being the case, on 4th June 1937, as appears from the judgment of the trial Court, (the date is apparently wrongly stated as 28th June 1937 in para. 5 of the revision application in this Court) the Special Manager gave a lease of the plot in dispute to Bhagwati Prasad, brother of Ambika Prasad, complainant. Bhagwati Prasad is said to have sought to take possession but to have had no success. He filed a complaint under Sec. 107, Criminal P. C., which I am told was dismissed on 7th July 1937. Subsequently his brother Ambika Prasad in September 1937 filed an application under S. 145, Criminal P. C., but this was also dismissed. On 23rd September Ambika Prasad filed a complaint against Bansgopal in connexion with the paddy crop, which had been grown on the plot in question, alleging an offence under S. 379, I. P. C. That case was pending at the date of the occurrence with which we are concerned in the present case. It ultimately on 23rd January 1938 resulted in an acquittal, the Court taking the view that as Bansgopal had actually sown that crop, he could not be held guilty of theft in respect of it.

On 22nd October 1937 Ambika Prasad filed the present complaint alleging that on 18th October he had gone to this plot, which was lying fallow, with the intention of sowing gram and that offences under Secs. 323, 447 and 379, I. P. C., had been committed against him. The learned Second Class Magistrate found the evidence insufficient to justify the framing of a charge under Sec. 323, I. P. C. He framed charges under Sec. 20, Cattle Trespass Act, under S. 379, I. P. C., and under S. 447, I. P. C. He held that the evidence was not sufficient to prove the offences of theft and cattle trespass, but he was satisfied that the charge under Sec. 447, I. P. C., was clearly made out and he convicted the applicant accordingly. The case went in appeal to the District Magistrate of Fyzabad who discussed the matter in this form. He said:

On the day of occurrence the complainant came on to the land which (by virtue of his lease) he had a right to possess and was ousted therefrom by the accused. Does this constitute an offence under S. 447, assuming the necessary ingredients ? In my mind it clearly does. The possession of the land during the kharif season can give no possible right to possession thereafter. An argument (was put forward) that possession was retained while the land was empty. If the accused, as I hold, were ejected in law and in fact and subsequently regained possession without any claim of right, and if while the land was empty, the complainant, having a proper title to the land through the Court of Wards, entered upon the land when it was empty and the accused were absent, and if in these circumstances the accused were to enter upon the land with a purpose given in Sec. 441, I. P. C., then in my view an offence under S. 447, I. P. C., is committed.

The matter was then taken in revision to the Sessions Judge who remarks on this point :

I understand that Ambika Prasad's story was accepted by the trying Magistrate and by the District Magistrate, who heard the appeal to the extent of finding that the applicants had come and forcibly ousted Ambika Prasad from the land.

He went on to accept the view that Ambika Prasad was in possession of the

land on 18th October and that he was forcibly ousted and an offence was thereby committed under Sec. 447, I. P. C., and he further remarked that the lower Appellate Court had found that the applicants came with the intention of intimidating and annoying the complainant, and on the facts stated he thought that there could be no doubt that this finding was justified. Learned counsel for the applicants has contended that by disregarding the formal delivery of possession and continuing cultivatory possession during the kharif season the applicant Bansgopal obtained a fresh possessory title and was entitled to resist the attempt of Bhagwati Prasad to take possession of the plot on the basis of his lease or rather had the right to oust Bhagwati Prasad or his brother, Ambika Prasad, after they had taken possession of the plot under that lease.

To my mind the suggestion that Bansgopal acquired any fresh rights by forcibly cultivating the plot during the kharif season is completely without force. As a learned Judge of the Allahabad High Court said in 83 I C 719[1] :

> After the formal possession the maintenance or attempted maintenance of physical possession of the land is wholly illegal until such time, if any, as the person ejected may get himself restored by process of law.

(I am not, of course, quoting the words exactly as they are found in the ruling.) It follows that I am in full agreement with the Courts below that on 18th October Ambika Prasad was in rightful possession of the plot when he went to it with the object of sowing a crop thereon. Learned counsel puts forward as a secondary contention the plea that no offence was committed under S. 447, I. P. C., bearing in mind the wording of S. 441. He argues that the primary intent in the present case was to enforce the possession which Bansgopal had been exercising previously and that this enforcement was based on a bona fide belief in Bansgopal's own rights. He argues in fact that the primary intent was not to intimidate but to enforce a supposed right of possession. In my opinion there is no force in this argument at all. The primary intent in such case is to intimidate and the secondary object is to enforce possession, and anyone who enters on property in the possession of another with intent to intimidate cannot defend his act by reliance on his ultimate intention. An attempt has been made to support this argument by reliance on a ruling of a single Judge of this Court reported in 10 O W N 266,[2] but the learned counsel has omitted to note that the important point in that case was that there was no finding of the first Appellate Court that the accused did trespass with intent to intimidate, insult or annoy the person in possession and the finding of the trial Court was to the effect that the intention of the accused primarily was to take possession of the field in dispute. That statement in itself puts that case upon a different footing.

In my opinion the applicants were rightly convicted of an offence under Sec. 447, I. P. C., and it cannot possibly be said that the sentences inflicted were at all severe. I accordingly reject this application.

In disposing of the appeal the learned District Magistrate remarked that :

> These struggles over the possession of land constitute a menace to law and order, and it is clear that bitter feeling exists. I therefore, under S. 106, Criminal P. C., order the accused to execute personal bonds of Rs. 200 each to keep the peace for a period of one year.

The learned Sessions Judge has made a reference recommending that this order should be set aside on the view that an offence under S. 447, I. P. C., is not one involving a breach of the peace within the meaning of S. 106. He has relied on the case in 8 O W N 1286[3] in which it was held that :

> In order to justify the passing of an order under S. 106, Criminal P. C., against any person it is not sufficient that he should have committed the offence of criminal intimidation, but it is necessary, as is clear from the Section itself that he should have been convicted of that offence. An offence punishable under S. 504, I. P. C., cannot be said to be one involving a breach of the peace and if a conviction takes place under Sec. 504, I. P. C., and no other Section, an order under S. 106, Criminal P. C., cannot properly be made. The words 'involving a breach of the peace' in the Section require that a breach of the peace should be an ingredient of the offence proved, and before the Section can be put in force, there must be a finding that a breach of the peace has occurred.

This view was partly based on a ruling of the Madras High Court in 29 Mad 190.[4]

1. Govind Ram v. Naubat, (1924) 11 A I R All 762=83 I C 719=26 Cr L J 159.
2. Bishan Dayal v. Brij Behari, (1933) 20 A I R Oudh 179=1933 Cr C 390=145 I C 625 = 34 Cr L J 1014=10 O W N 266.
3. Sadho Ram v. Emperor, (1932) 19 A I R Oudh 33=1932 Cr C 65 = 135 I C 691 = 33 Cr L J 193=7 Luck 573=8 O W N 1286.
4. Muthia Chetty v. Emperor, (1906) 29 Mad 190 =3 Cr L J 461.

In the present case it is quite clear that there might easily have been a breach of the peace, but there is no finding that there actually was a breach of the peace, and in these circumstances it seems to me that I am clearly bound by this Bench decision and must therefore accept the reference and set aside the order under S. 106, Criminal P. C. I order accordingly.

N.S./.R.K. *Application dismissed; Reference accepted.*

A. I. R. 1939 Oudh 48

THOMAS C. J.

Chandra Bhan Singh — Appellant.

v.

Hubba — Respondent.

Second Rent Appeal No. 60 of 1936, Decided on 4th February 1938, against order of District Judge, Rae Bareli, D/-4th July 1936.

Civil P. C. (1908), S. 100—Question of law—Whether character of grove land has changed is question of law.

The nature and quantum of evidence required to prove that what was once grove land has ceased to retain that character is a question of law. Where a Court has misdirected itself on this point, it is impossible to maintain its finding as a finding of fact. [P 48 C 2]

P. N. Chaudhri — *for Appellant.*

Ganesh Prasad — *for Respondent.*

Judgment. — This is a plaintiff's appeal under S. 119 (B), Oudh Rent Act, against a judgment and decree of the learned District Judge of Rae Bareli, dated 4th July 1936, upholding the decree passed by the learned Assistant Collector, First Class, of the same place dated 29th November 1935, dismissing the plaintiff's suit. The plaintiff admittedly is the proprietor of Mahal Beni Bahadur Singh in which the disputed plot No. 180 is situated. The area of the said plot is 6 bighas and one biswa. The plaintiff brought the suit for possession by ejectment from a part of plot No. 180 only measuring three bighas. The defence was that the land in suit was the grove of the defendant.

The sole question for decision in the appeal is whether the plot in dispute is or is not a grove land. Both the lower Courts have held that the land in dispute had not lost its character as such. The proceedings of 27th August 1935 show that the defendant admitted that there were eight mango and two babul trees on the plot in dispute. The defendant further admitted that three biswas was under cultivation while according to the plaintiff three bighas was under cultivation. The number in dispute in the first, second and third settlements is entered as a talab. It is further clear from the statement of the defendant that the area of the talab which is under water is 2½ or 3 bighas.

The contention of the learned counsel for the appellant is that where there are only ten trees on an area of six bighas and one biswa, it should be considered that the grove in question has lost its character as such. On the other hand, it has been contended by the learned counsel for the respondent that whether or not the grove in question has lost its character as such is a question of fact. I do not agree with this contention. The nature and quantum of evidence required to prove that what was once grove land has ceased to retain that character is a question of law. Where a Court has misdirected itself on this point, it is impossible to maintain its finding as a finding of fact. The case therefore stands thus: That we have eight mango and two babul trees standing on an area of six bighas and one biswa. I have not the slightest doubt that the babul trees must be self grown. The question is whether the grove has lost its character as such. The evidence of the defendant is vague. In his cross-examination he clearly stated that he could not say how many trees stood on the three bighas for which the suit was brought. He further admitted that he had brought three biswas of land under cultivation. This fact by itself is not sufficient to hold that a grove has lost its character as such; but in view of the area and the number of trees it seems to me impossible to hold that the grove has not lost its character as such. I accordingly hold that the grove has lost its character as such and that the mere fact that the defendant has planted some new trees does not help him. The plaintiff being the proprietor of the mahal in which the disputed land is situated is entitled to the relief which he has claimed. I accordingly allow the appeal and set aside the decree of the lower Courts with costs.

N.S./R.K. *Appeal allowed.*

A. I. R. 1939 Oudh 49

ZIAUL HASAN AND YORKE JJ.

Zahid Khan and others — Appellants.

v.

Emperor.

Criminal Appeal No. 339 of 1938, Decided on 12th December 1938, against order of Addl. Sess. Judge, Kheri, D/- 31st October 1938.

Penal Code (1860), Ss. 302, 304 and 325—Death caused by single blow on head with lathi—Other injuries on body not indicating determination to beat deceased to death—Case does not come under S. 302 but would come under second part of S. 304 — But where it is not known which of several persons actually struck fatal blow, case would properly come under S. 325.

Where death has been caused by a single blow with a lathi on the head and the other injuries found on the body of the deceased do not indicate a determination to beat the deceased to death it is not possible to hold that death was caused by doing an act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death, but it may be held that death was caused by the doing of an act with the knowledge that by such act the person who did it was likely to cause death and the case would thus come under S. 304, part 2. Where however the injury has been caused by one of several persons and it is not known which of the persons concerned actually struck the fatal blow, it is not possible by the application of S. 34 to convict any of the persons taking part of an offence under the second part of S. 304, I. P. C., and the appropriate Section in view of the wording of S. 34 is S. 325, I. P. C. [P 53 C 1, 2 ; P 54 C 1]

Dr. J. N. Misra and Rauf Ahmad — *for Appellants.*

Govt. Advocate — *for the Crown.*

Judgment.—This is an appeal by Zahid Khan, Chhutai Khan, Pathans, aged 22 and 25 years, and Ram Dayal Brahman, aged 50 years, all residents of Piparia Kaptan, police station, Mohamdi, District Kheri, who have been convicted by the Additional Sessions Judge of Kheri of an offence under Sec. 302, I. P. C., and sentenced to death. The case is also before us on a reference by the learned Additional Sessions Judge for confirmation of the sentence.

The prosecution story in this case is to the effect that one Ram Sarup, who was the victim and who died as a result of the injuries received in the incident in question in this case, was on his way back from Majhgawan to Raghunathpur at some time not long before midday on 21st May 1938, in the company of Hemraj Barhai (P. W. 1) of Raghunathpur. The distance between Majhgawan and Raghunathpur is about two miles. On the way back to Piparia Kaptan they were joined by Jagannath (P. W. 2), who is said to have been going to Raghunathpur to realize rents from his debtors. Between Piparia Kaptan and Raghunathpur there is a grove called Banyon-ka-Bagh and at this grove, according to the prosecution story, four men, Zahid Khan, Chhutai Khan, Paragi and Ram Dayal jumped down from a tree and warned Ram Sarup that they were going to attack him; the meaning perhaps was that they had got him and they meant to beat him. Ram Sarup took to his heels and was pursued by these four men, who knocked him down and beat him after he had fallen. It was said that while this beating was going on a light bullock-cart or addha was seen approaching at a distance of 250 or 300 paces with four men sitting in it. When this bullock-cart came within ten or fifteen paces, three of the occupants jumped down (these are Pullu, P. W. 4, Chhutkunnu or Chhutkai, P. W. 3, and another man Babu Ram, who has disappeared and was not produced as a witness) and ran up to the scene of the beating whereupon the assailants ran off towards the east. After this Hemraj and Jagannath started to take Ram Sarup to his house at Raghunathpur but Hemraj, who was carrying him, found him too heavy and had to put him down, and Jagannath then went and brought a bed from Raghunathpur on which Ram Sarup was carried to his house which was less than half a mile away. Thereafter, for reasons which we will explain later, Ram Sarup was taken to police station Khutar in the Shahjahanpur District and a first information report was made there by Hemraj, who was accompanied by Sheodayal, brother of Ram Sarup and Nokhey, chaukidar of Raghunathpur.

Khutar police station is eight or nine miles away from Raghunathpur but as Raghunathpur is situated in the Mohamdi circle the first information report should have been made at police station Mohamdi, which is about 12 miles away. It is said that the reason why the report was made by Hemraj at police station Khutar was that Ram Sarup was not on good terms with the police of police station Mohamdi. The police of that station were prosecuting a case under S. 110, Criminal P. C., against what is called Bhabhuti Lal and Gopal Ram's gang and among the accused in that

case was the prosecution witness Jagannath. Ram Sarup had been called as a prosecution witness having of course previously agreed to give evidence in support of the police case. When however he was called, he declined to give evidence and presumably was taking sides with Bhabhuti Lal and Gopal Ram and their associates. On the other hand, Zahid Khan's uncle, Zafar Ali Khan, had been called as a prosecution witness in the 110 case as also had Sadho Ram, father of the appellant Ram Dayal. Sadho Ram had given evidence as a prosecution witness on 17th May and Zafar Ali Khan had given evidence on 18th May, while as noted above the occurrence took place on 21st May 1938. Thus on the date of this occurrence we may take it that as Ram Sarup was siding with Bhabhuti Lal's gang, there was a direct cause of enmity between the members of that gang on the one side and the prosecution witnesses of that case on the other, and that fact is further evidenced by the fact that as far back as 26th July 1937, a year before this case under S. 110 was actually proceeding in Court, Zafar Ali Khan, mukhia of Piparia Kaptan, Zahid Khan and several others made an application to the Deputy Commissioner to the effect that they had gone to attend a local enquiry evidently directed to ascertaining whether there was evidence against the members of this gang, that on arrival at the place of the enquiry they had found Gopal Ram and Bhabhuti Lal present and that they had been threatened in case they should say anything against the members of the gang.

These facts would evidence hostility on the part of the members of the gang against the family of Zahid Khan and Ram Dayal. On the other hand, there is an allegation in the evidence of Sheo Dayal, brother of the deceased Ram Sarup, that in Sawan of 1937 there was a fight between Zahid Khan, Chhutai Khan, Paragi and others on the one side and Ram Sarup and Sheo Dayal and a number of others on the other side on the west side of Raghunathpur in which the members of Zahid Khan's party received injuries while the members of Ram Sarup's party were unhurt. Hence, it is suggested that in order to get even Zahid Khan, Chhutai, Paragi and Ram Dayal made this attack on Ram Sarup and were also ready to give evidence. Sheo Dayal admits that so far as he knows no report was made about this incident and there is no corroboration of Sheo Dayal's statement. So far as facts which are well proved go, therefore there was considerably more reason for Bhabhuti Lal, Gopal Ram and the members of the gang to desire to take vengeance on Zafar Ali Khan, uncle of Zahid Khan, and Sadho Ram, father of Ram Dayal, than there was for Zahid Khan and Ram Dayal for attacking Ram Sarup. On the other hand, it may well be that the readiness of Zahid Khan and these other persons to give evidence against Bhabhuti Lal, Gopal Ram etc., was that they were supporters of Ram Sarup and Sheo Dayal. We may now turn back to the actual occurrence and the evidence which has been led to support the prosecution story. Ram Sarup was brought back to his house in Raghunathpur and from there he was taken as mentioned above to the Khutar police station, where the first information report was made by Hemraj. In the first information report the story which we have given above was related and the name of the driver of the addha was given as Behari, a tenant of Majhgawan. The names of the other three persons who had been travelling in this addha were not mentioned. One other point worth mentioning is that the persons who attacked Ram Sarup were said to have been armed with spears and lathis, although no injury caused by a spear was proved on Ram Sarup's body.

A very curious feature of this case has next to be considered. Hemraj having gone with Ram Sarup to police station Khutar, P. W. 6, Chunni, chaukidar of Piparia Kaptan, went to police station Mohamdi and made a first information report of this incident, which is on the record as Ex. 2. Chunni deposed that he received the information of this attack on Ram Sarup from Jagannath and was told that Ram Sarup had been beaten in Banyon-ka-Bagh. He went there and saw blood on the ground and he went on to Ram Sarup's house in Raghunathpur. Ram Sarup was lying wounded and when he called him he only opened his eyes and did not speak. Chunni says he asked Sheo Dayal to take Ram Sarup to Mohamdi but Sheo Dayal said that he intended to take him to police station Khutar. Chunni accordingly, as it was his duty to do, went to police station Mohamdi to report the incident and this he did at 8 P. M. In this report he gives the names of the assailants as Zahid Khan, Chhutai Khan, Paragu and Nokhey Brahman, that is

to say we get the name of Nokhey Brahman instead of the name of Ram Dayal, but the suggestion for the prosecution is that Nokhey's name was substituted by the Mohamdi police for that of Ram Dayal because Ram Dayal's father, Sadho Ram, had given evidence in support of the prosecution in the case under S. 110, and the fact that Ram Sarup was lying unconscious was similarly omitted and the report was recorded as one under Sec. 323, I. P. C., although the report contained a statement that the skull had been fractured at two places. Actually the wording of this statement is that "*Khopri doi tir phoot gai hai*," which really means no more than that there were two contused wounds on the head. The report gives the time of the occurrence correctly as a little before noon and recites as witnesses Jagannath Brahman and Hemraj Barhai, and the rest of the story is told in much the same way as it is in the report made at police station Khutar, for instance, it is mentioned that the four assailants jumped down from a tree, and it is further stated that Ram Sarup had gone to police station Khutar to make a report. On the other hand, there is no mention of Behari's cart and its occupants and those persons are not mentioned in the list of witnesses.

This report, although it is not in evidence as a first information report, is valuable. Chunni has admitted that he had no personal knowledge of the enmities mentioned in it but the report does afford some support to the statement of Sheo Dayal because it mentions that in Sawan, Ram Sarup Ahir had beaten Zahid Khan. It also mentions a quarrel between Ram Sarup's brother and Paragu about taking cattle to the pound. It is a curious feature of the prosecution evidence of the present case that there is an attempt to suggest that there is something suspicious about Chunni going to make this report. Chunni had given the source of his information as Jagannath and Sheo Dayal. Sheo Dayal said that he did not see Chunni chaukidar in the village before he went to police station Khutar while Jagannath similarly denied having ever met Chunni chaukidar and told him anything about the occurrence. We are clearly of opinion that there is no good reason for suspicion in regard to the circumstances in which Chunni made his report. Chunni went to the police station in the ordinary course of his duties to make a report of an incident which had taken place in his circle. Considering the nature of the report, we do not find any adequate reason for supposing that the police of Mohamdi police station would have substituted the name of an unknown person for the name of the accused Ram Dayal, and we are supported in this view by certain points of suspicion in regard to the prosecution case. It is clear that there was no good reason for Chunni to omit a mention of the coming on the scene of the addha driven by Behari, who was accompanied by Pullu, Chhutkai and Babu Ram. The story told by the prosecution in regard to this cart and its occupants arriving on the scene and witnessing what took place does not carry conviction. The medical evidence shows that Ram Sarup had on him two contused wounds on the head and 12 contusions on the body.

All these contusions were on the back and they are clearly the result of lathi blows as they vary in length from 3″ to 4¾″ and in width from ¾″ to an inch. It is clear that Ram Sarup was knocked down by two blows on the head, one of which resulted in a fracture of the skull and was then belaboured as he was lying on the ground. None of the blows given to him after he fell down was however sufficient to cause any fracture or serious injury at all. The whole beating of Ram Sarup could not have taken more than a minute or two. The attack on Ram Sarup had begun when the addha was first seen 250 or 300 paces away and yet it is supposed to be still going on up to the time when the addha stopped 10 or 15 paces away and three of its occupants jumped down and ran to rescue Ram Sarup. Then again, we find that after the assailants had run away and it was necessary to take the injured man back to his house at Raghunathpur the occupants of this addha including the driver Behari took no further interest whatsoever but at once drove off leaving Hemraj to attempt to carry Ram Sarup back to his house. Now an examination of the evidence of Behari, Pullu and Chhutkai shows that Behari, who it may be noted is a resident of Bhabuti Lal and Gopal Ram's village Majhgawan, was not in a particular hurry to get anywhere with his addha and is very much of a chance witness, as also is Pullu, while Chhutkai and Babu Ram had been picked up quite casually by Behari not very far away

case was the prosecution witness Jagannath. Ram Sarup had been called as a prosecution witness having of course previously agreed to give evidence in support of the police case. When however he was called, he declined to give evidence and presumably was taking sides with Bhabhuti Lal and Gopal Ram and their associates. On the other hand, Zahid Khan's uncle, Zafar Ali Khan, had been called as a prosecution witness in the 110 case as also had Sadho Ram, father of the appellant Ram Dayal. Sadho Ram had given evidence as a prosecution witness on 17th May and Zafar Ali Khan had given evidence on 18th May, while as noted above the occurrence took place on 21st May 1938. Thus on the date of this occurrence we may take it that as Ram Sarup was siding with Bhabhuti Lal's gang, there was a direct cause of enmity between the members of that gang on the one side and the prosecution witnesses of that case on the other, and that fact is further evidenced by the fact that as far back as 26th July 1937, a year before this case under S. 110 was actually proceeding in Court, Zafar Ali Khan, mukhia of Piparia Kaptan, Zahid Khan and several others made an application to the Deputy Commissioner to the effect that they had gone to attend a local enquiry evidently directed to ascertaining whether there was evidence against the members of this gang, that on arrival at the place of the enquiry they had found Gopal Ram and Bhabhuti Lal present and that they had been threatened in case they should say anything against the members of the gang.

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A very curious feature of this case has next to be considered. Hemraj having gone with Ram Sarup to police station Khutar, P. W. 6, Chunni, chaukidar of Piparia Kaptan, went to police station Mohamdi and made a first information report of this incident, which is on the record as Ex. 2. Chunni deposed that he received the information of this attack on Ram Sarup from Jagannath and was told that Ram Sarup had been beaten in Banyon-ka-Bagh. He went there and saw blood on the ground and he went on to Ram Sarup's house in Raghunathpur. Ram Sarup was lying wounded and when he called him he only opened his eyes and did not speak. Chunni says he asked Sheo Dayal to take Ram Sarup to Mohamdi but Sheo Dayal said that he intended to take him to police station Khutar. Chunni accordingly, as it was his duty to do, went to police station Mohamdi to report the incident and this he did at 8 P. M. In this report he gives the names of the assailants as Zahid Khan, Chhutai Khan, Paragu and Nokhey Brahman, that is

to say we get the name of Nokhey Brahman instead of the name of Ram Dayal, but the suggestion for the prosecution is that Nokhey's name was substituted by the Mohamdi police for that of Ram Dayal because Ram Dayal's father, Sadho Ram, had given evidence in support of the prosecution in the case under S. 110, and the fact that Ram Sarup was lying unconscious was similarly omitted and the report was recorded as one under Sec. 323, I. P. C., although the report contained a statement that the skull had been fractured at two places. Actually the wording of this statement is that "*Khopri doi tir phoot gai hai*," which really means no more than that there were two contused wounds on the head. The report gives the time of the occurrence correctly as a little before noon and recites as witnesses Jagannath Brahman and Hemraj Barhai, and the rest of the story is told in much the same way as it is in the report made at police station Khutar, for instance, it is mentioned that the four assailants jumped down from a tree, and it is further stated that Ram Sarup had gone to police station Khutar to make a report. On the other hand, there is no mention of Behari's cart and its occupants and those persons are not mentioned in the list of witnesses.

This report, although it is not in evidence as a first information report, is valuable. Chunni has admitted that he had no personal knowledge of the enmities mentioned in it but the report does afford some support to the statement of Sheo Dayal because it mentions that in Sawan, Ram Sarup Ahir had beaten Zahid Khan. It also mentions a quarrel between Ram Sarup's brother and Paragu about taking cattle to the pound. It is a curious feature of the prosecution evidence of the present case that there is an attempt to suggest that there is something suspicious about Chunni going to make this report. Chunni had given the source of his information as Jagannath and Sheo Dayal. Sheo Dayal said that he did not see Chunni chaukidar in the village before he went to police station Khutar while Jagannath similarly denied having ever met Chunni chaukidar and told him anything about the occurrence. We are clearly of opinion that there is no good reason for suspicion in regard to the circumstances in which Chunni made his report. Chunni went to the police station in the ordinary course of his duties to make a report of an incident which had taken place in his circle. Considering the nature of the report, we do not find any adequate reason for supposing that the police of Mohamdi police station would have substituted the name of an unknown person for the name of the accused Ram Dayal, and we are supported in this view by certain points of suspicion in regard to the prosecution case. It is clear that there was no good reason for Chunni to omit a mention of the coming on the scene of the addha driven by Behari, who was accompanied by Pullu, Chhutkai and Babu Ram. The story told by the prosecution in regard to this cart and its occupants arriving on the scene and witnessing what took place does not carry conviction. The medical evidence shows that Ram Sarup had on him two contused wounds on the head and 12 contusions on the body.

All these contusions were on the back and they are clearly the result of lathi blows as they vary in length from 3″ to 4¾″ and in width from ¾″ to an inch. It is clear that Ram Sarup was knocked down by two blows on the head, one of which resulted in a fracture of the skull and was then belaboured as he was lying on the ground. None of the blows given to him after he fell down was however sufficient to cause any fracture or serious injury at all. The whole beating of Ram Sarup could not have taken more than a minute or two. The attack on Ram Sarup had begun when the addha was first seen 250 or 300 paces away and yet it is supposed to be still going on up to the time when the addha stopped 10 or 15 paces away and three of its occupants jumped down and ran to rescue Ram Sarup. Then again, we find that after the assailants had run away and it was necessary to take the injured man back to his house at Raghunathpur the occupants of this addha including the driver Behari took no further interest whatsoever but at once drove off leaving Hemraj to attempt to carry Ram Sarup back to his house. Now an examination of the evidence of Behari, Pullu and Chhutkai shows that Behari, who it may be noted is a resident of Bhabuti Lal and Gopal Ram's village Majhgawan, was not in a particular hurry to get anywhere with his addha and is very much of a chance witness, as also is Pullu, while Chhutkai and Babu Ram had been picked up quite casually by Behari not very far away

from the scene of the occurrence. There does not seem to be any good reason why these persons should not have offered to carry Ram Sarup to his house on the addha. Then again, Behari is said to be a sub-tenant of Bhabuti Lal and even if the evidence on that point is not convincing he is at any rate a resident of Bhabuti Lal's village. Pullu is also a resident of Majhgawan and there is a curious discrepancy between the evidence of Behari and Pullu, each of them claiming to have been driving the cart at the time of the occurrence. Chhutkai is a resident of Karonda, a village which adjoins Majhgawan, and his presence at the scene of the occurrence was a matter of complete chance, as he was on his way back to Karonda from a village 12 miles away. This witness is one of that curious type of witnesses, who having witnessed a brutal assault on some one claims to have remained completely silent on the subject after his return to his home. The fourth occupant of the cart curiously enough has disappeared but he also is admitted to have been a temporary resident of Majhgawan.

There is another curious feature about the story of the cart. If as a fact this cart and its occupants did come on the scene, then we should have expected to find the names of all the occupants of the cart mentioned in Hemraj's report. Instead we find the name of Behari only which suggests that the person making the report was retaining a free hand as to whom he should put in as witnesses to support Behari. In this connexion the evidence of Hemraj is most suggestive. Hemraj deposed in cross-examination that he knew all these occupants of the cart before and said that he did not give the names of the other occupants of the cart because the head-muharrir did not ask him for them. He said that on the very next day, i. e. 22nd May 1938, he gave those names to the Sub-Inspector. Further, on he was faced with the fact that in his statement to the Sub-Inspector he had said that Behari came with a cart in which were sitting three men whose names he did not know. He then produced the story that he had learned the names of the persons two days later from Behari and this again he corrected by saying that he learned these names from Behari two days after he had been questioned by the Circle Inspector. In our opinion the cumulative effect of the omission of any mention of this cart in the report made by Chunni, the omission of the names of the other persons in it in the first information report made by Hemraj and the other suspicious points to which we have drawn attention, make it inevitable that the evidence of Behari, Pullu and Chhutkai should be discarded entirely.

It is obvious that the discarding of the evidence of these witnesses very seriously affects the case against the appellant Ram Dayal. Had it been possible to rely on these witnesses, it might have been possible to disregard the discrepancy between the report made by Hemraj and the report made by Chunni Chaukidar which contains the story told to him immediately after the occurrence by one of the eye-witnesses Jagannath. Jagannath in his evidence not only denied meeting Chunni and giving him any information but he said that he had never made any statement about meeting Chunni to the investigating officer. Jagannath was accordingly faced with a copy of his statement to the Sub-Inspector and he denied having ever made the statement recorded by that officer in which he said he saw Chunni Chaukidar at his door and at Chunni's enquiry told him that Ram Sarup had been beaten by four persons, but the chaukidar did not enquire the names of the four persons, nor did he mention their names as he was feeling distressed by the hot weather. The Sub-Inspector was in due course called to prove that this statement had been made by Jagannath. It was doubtless for these reasons that the Mohamdi police did not ultimately prosecute Ram Dayal for participation in this occurrence and that it became necessary for Sheo Dayal to file a complaint against Ram Dayal in the Magistrate's Court. There is another point about the case against Ram Dayal which is very suggestive. Hemraj was examined by the police on 25th May and he then made a statement which was recorded by the police and was put to him in cross-examination. In this statement Hemraj stated :

> I do not know Sadho Ram and Ram Dayal either. I saw four men in the occurrence. Zahid Khan, Chhutai Khan and Paragi were known to me and the fourth man was not known to me. I do not know Nokhey Lal. The fourth man was of sallow complexion, round face, thick built, average stature, age about 30 years. When I was about to go to make the report Babhuti Lal of Majhgawan and Gopal Ram of Piparia told me that the fourth man was Ram Dayal son of Sadho Ram. As they mentioned Ram Dayal's name I got his name recorded in the report.

It was open to Hemraj when faced with this statement to deny having made it and to convey the suggestion that this was part of the trickery of the Mohamdi police intended to save Sadho Ram's son Ram Dayal from prosecution. Instead of doing this Hemraj deposed that he made this statement to the Sub-Inspector because the Sub-Inspector forced him to make it by beating and abusing him. There is of course no need whatsoever to beat and abuse anybody with the object of getting him to make a particular statement in an investigation. If a Sub-Inspector desires to do so, he can always record a witness as having made a statement whether he has made it or not and it serves no purpose to beat a witness in order to get him to make a particular statement from which he will in due course resile. Taking the whole of the facts to which we have referred above we are in no way satisfied that the evidence to establish the participation of Ram Dayal in the beating of Ram Sarup is reliable, and we accordingly allow his appeal, set aside his conviction and sentence and direct that he be released without delay.

The case against Zahid Khan and Chhutai Khan rests on a different footing. (After considering some evidence the judgment proceeded further.) On a full consideration of the whole of the evidence in this case we find no sufficient reasons for doubting the truth of the prosecution story that Zahid Khan and Chhutai Khan did take part in the attack on the deceased Ram Sarup.

It remains to consider whether these two appellants have been rightly convicted of an offence under Sec. 302, I. P. C., and if not of what offence they are guilty. We have already drawn attention to the injuries inflicted on the deceased. His death was undoubtedly due to a single lathi blow on the top of the head which caused a linear fracture of the frontal bone along the fronto-parietal suture continuing on both sides to the temporal bones which were also fractured. The base of the skull was also injured, there being a fracture of the right middle fossa, one inch long and of the left middle fossa 2¼″ in length. Death was due to the fracture of the skull with compression of brain hæmorrhage and shock therefrom. We are of opinion that in a case of this kind where death has been caused by a single blow with a lathi, and the other injuries found on the body of the deceased do not indicate a determination to beat the deceased to death, such as is indicated in many cases, it is not possible to hold that death was caused by doing an act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death, but it may be held that death was caused by the doing of an act with the knowledge that by such act the person who did it was likely to cause death (*vide* S. 299, I. P. C.). In such a case the act of the striker can similarly only be brought within the provisions of clause *fourthly* in S. 300, which clause is based not upon intention, but upon knowledge. We however hesitate to apply that clause to the facts of the present case and would therefore have held that the act of the actual striker fell within the purview of the second part of S. 304, I. P. C. Where however the injury has been caused by one of several persons, and it cannot be said by which of those persons it has been caused, the persons concerned can all of them only be convicted by the application either of the abetment Sections or by the application of Sec. 34. It does not appear to us to be easy to apply the abetment Sections in a case of this kind (*vide* the wording of Section 107, I. P. C.). We have therefore to fall back on the provisions of S. 34, which provides that when a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

In interpreting S. 34 we have to remember that it has been held that the essential question in such cases is what was the common intention and further held that the common intention must be to commit the offence actually committed. It is not difficult to infer from the facts proved in the present case that the common intention was to cause hurt, which might extend to causing grievous hurt, to the deceased Ram Sarup. All the persons, who took part in the beating of Ram Sarup, would therefore be liable to conviction under Sec. 325, read with Sec. 34, I. P. C., but in a case where the offence would be otherwise construed as one under S. 304 by the application of Cl. 3 of S. 299, the difficulty arises that in such a case the person who has done the act falls within the scope of that Section not by reason of intention, but by reason of knowledge. In consequence, it is for practical purposes impossible to convict persons

under S. 304 read with S. 34, if the case is one which falls within the knowledge clause of Sec. 299, and the same is true of a case under Sec. 302 falling within the clause *fourthly* of S. 300. In the present case we are of opinion first that the case is not really a case under S. 302 at all and that even if it could have been established who the person was who inflicted the fatal blow, the case would more properly have fallen under the second part of Sec. 304 and not under Sec. 302, I. P. C. We are further of opinion that where it is not known which of the persons concerned actually struck the fatal blow, it is not possible by the application of S. 34 to convict any of the persons taking part of an offence under the second part of S. 304, I. P. C., and the appropriate Section in view of the wording of S. 34 is S. 325, I. P. C.

We accordingly allow this appeal to this extent, that we alter the conviction from one under Sec. 302, I. P. C., to one under S. 325 read with S. 34, I. P. C. Bearing in mind the fact that the persons who knocked down and beat and caused the death of Ram Sarup clearly lay in wait for him. We think that a sentence of five years rigorous imprisonment will be proper and we sentence the appellants Zahid Khan and Chhutai Khan accordingly.

D.S./R.K. *Appeal partly allowed.*

A. I. R. 1939 Oudh 54

ZIAUL HASAN AND YORKE JJ.

Emperor

v.

Som Nath and others — Opposite Party.

Criminal Revn. No. 80 of 1938, Decided on 23rd November 1938, from order of Dist. Magistrate, Sultanpur, D/- 26th April 1938.

Criminal Trial—Revision — Enhancement of sentence—High Court will not entertain applications for enhancement of sentences on behalf of private parties.

The High Court will not entertain applications for enhancement of sentences on behalf of private parties. It is the part of the Crown and not of the individuals to ask the Court for enhancement of the sentences. In dealing with applications for enhancements of sentences the High Court will have regard to, what those responsible for maintenance of peace and order think of the matter and when the application has been rejected by the District Magistrate, it would all the more refuse to interfere : *A I R 1927 Oudh 321 and A I R 1933 Oudh 421, Rel. on; A I R 1928 All 419 and A I R 1929 Cal 340, Not approved.* [P 54 C 2; P 55 C 1]

Asst. Govt. Advocate — *for the Crown.*

P. N. Chaudhry — *for Applicant.*

K. P. Misra — *for Opposite Party.*

Order. — This is an application for revision of an order of the learned District Magistrate of Sultanpur. The applicants prosecuted the opposite parties under Ss. 147, 323 and 324, I. P. C. They were tried by a Bench of Honorary Magistrates and all of them except Somnath and Parbhu Nath were convicted under Ss. 147/323 and sentenced to a fine of Rs. 7 each. Somnath and Parbhunath were convicted under Ss. 147/324 and were fined Rs. 8 each. The applicants applied in revision to the learned District Magistrate and prayed that a recommendation be made to this Court for enhancement of the sentences of the opposite parties. This application was disallowed by the learned District Magistrate, who said that the trying Magistrates had given good reasons for not sentencing the accused to imprisonment. It was against this order rejecting their application for revision that the present application has been brought.

The learned counsel for the applicants has referred us to some cases in which it has been held that the High Court has power to enhance the sentence of an accused on the application of a private person. This is a proposition that can hardly be disputed. The question however is whether or not we should entertain an application by private parties for enhancement of sentences. Some of the High Courts have sometimes issued rules for enhancement of sentence on the application of private individuals and have even enhanced sentences on such applications, e. g. 30 Cr L J 219[1] and 33 C W N 395,[2] but this Court has consistently refused to entertain applications for enhancement of sentences on behalf of private parties. In 4 O W N 699[3] it was said that it is the part of the Crown and not of individuals to ask Courts to enhance sentences passed on criminal offenders. Similarly in 10 O W N 903[4]

1. Debi Singh v. Ram Charan Singh, (1928) 15 A I R All 419=113 I C 768=30 Cr L J 219.
2. Pramatha Nath Basu v. Ganga Charan, (1929) 16 A I R Cal 340=118 I C 894=30 Cr L J 979=56 Cal 964=33 C W N 395.
3. Jadunandan Brahman v. Emperor, (1927) 14 A I R Oudh 321=104 I C 242=2 Luck 605=28 Cr L J 802=4 O W N 699.
4. Hanuman Prasad v. Mathura Prasad, (1933) 20 A I R Oudh 421=1933 Cr C 1294=146 IC 577=35 Cr L J 118=10 O W N 903.

another Bench of this Court held that it is the part of the Crown and not of individuals to ask Courts to enhance sentences and refused to entertain an application of a private individual for enhancement of sentence. We prefer to follow the decisions of our own Court which appear to us to be based on a very sound principle, if we may say so with respect, namely that Courts should not be allowed to become tools in the hands of members of the public in giving vent to their private animosities. There is yet another consideration which keeps us in the present case from entertaining the present application. In dealing with applications for enhancement of sentences, the High Court will have regard to what those responsible for maintenance of peace and order in the locality think of the matter and in the present case the fact that the applicants' application for enhancement of the opposite parties' sentences was rejected by the learned District Magistrate, the head of the Magistracy in the district, shows that an enhancement of the sentences of the present accused was not considered necessary in the interests of justice. We therefore dismiss this application.

R.M./R.K. *Application dismissed.*

A. I. R. 1939 Oudh 55

THOMAS C. J.

Wazirey — Defendant — Appellant.

v.

Mathura Prasad, Plaintiff and another, Defendant — Respondents.

Second Appeal No. 263 of 1936, Decided on 30th November 1938, against decree of Civil Judge, Lucknow, D/- 26th May 1936.

(a) Insolvency—Annulment of adjudication—Object and effect of—Insolvent's property sold by receiver with Court's sanction before annulment—Receiver has power to execute sale deed after annulment.

The annulment of the adjudication under the conditions defined under S. 43, Provincial Insolvency Act, is intended as a punishment to the insolvent and cannot be used in his favour. The protection conferred on him by reason of adjudication is withdrawn but it does not necessarily follow that he is to get back from the control of the Court his assets. Where therefore insolvent's property is sold by receiver with the sanction of the insolvency Court before the order of adjudication was annulled, the receiver has power to execute the sale deed even after the annulment : *AIR 1938 Mad 752, Approved; A I R 1936 Mad 915, Dissent.* [P 56 C 1, 2]

(b) Transfer of Property Act (1882), S. 2 (d) — Sale by Official Receiver falls under S. 2 (d) — If the sale is sanctioned by Court, sale deed is not necessary.

Official Receiver's sale falls under S. 2 (d). It is in the nature of a court sale and its validity really depends on the order of the Insolvency Court vesting the property in the Official Receiver and thus authorizing him to sell. Therefore such a sale if held with the sanction of Court does not necessitate a sale deed : *A I R 1927 Mad 1 (F B), Disting.* [P 56 C 2]

Brij Bahadur — *for Appellant.*

B. K. Dhaon and Ganesh Prasad — *for Respondent 1.*

Judgment.—This is a second appeal on behalf of defendant 1 (Wazirey) against the judgment and decree of the learned Civil Judge of Lucknow dated 26th May 1936, reversing the decree of the learned Munsif of Havali, Lucknow, dated 14th November 1935. Wazirey, appellant, was declared insolvent on 31st October 1927, and an Official Receiver was appointed to take charge of the assets of the insolvent. The Official Receiver on 5th July 1928 put in an application before the Insolvency Judge that he had put up to sale the two houses belonging to the insolvent and that the highest bid was of Rs. 100 which may be accepted (*vide* Ex. 2). The Court on 23rd August 1928 passed an order that the sale was approved (*vide* Ex. 3). It appears that on 11th October 1928, the order of adjudication was annulled (*vide* Ex. A-1), but no order was passed as to what would become of the assets of the insolvent. The receiver executed the sale deed on 17th March 1929 (*vide* Ex. 1). It was registered on 29th March 1929. Mathura Prasad, respondent 1, filed the present suit on 31st July 1935 for possession of the two houses. The suit was contested on the grounds inter alia that the defendant was not bound by the sale deed executed by the receiver as he had no power to do so and that the houses belonged to his wife and mother. The trial Court dismissed the suit on the ground that as the sale deed was executed after the order of annulment, it was invalid under S. 37, Provincial Insolvency Act (5 of 1920). On appeal the learned Judge disagreed with this view of the learned Munsif.

The learned counsel on behalf of the appellant has raised the following two points : (1) that as the sale deed was executed after the order of annulment the receiver had no power to execute the sale deed; and (2) that under the provisions of S. 54, T. P.

Act, the transaction was only a contract for sale and it did not create any interest or charge on such property. In my opinion there is no force in either of these arguments. Under S. 37, Provincial Insolvency Act, where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore done by the Court or receiver shall be valid. I am of opinion that where the bankruptcy is annulled, the authority of the Court will survive so far as may be necessary to complete the acts which were incomplete at the date when the order of annulment was passed. In my opinion the Court had jurisdiction over the proceedings notwithstanding the annulment of bankruptcy.

The learned counsel on behalf of the appellant has relied on the case in A I R 1936 Mad 915,[1] in which it was held that the effect of the annulment of adjudication under S. 43 is that the provisions of S. 37 apply immediately an order of adjudication is annulled and that on an annulment of adjudication without any order vesting the properties in the Official Receiver the Official Receiver ceases to have any right or authority to deal with the properties of the insolvent. The learned counsel on behalf of the respondents has relied on the case in 1938 M W N 455,[2] in which it was held that where the adjudication of the insolvents had been annulled and there was an order within a month of the annulment re-vesting the right, title and interest of the insolvents in the Official Receiver to sell the same and distribute the proceeds among the creditors, that order was not without jurisdiction because it was not passed simultaneously with the order of annulment but some time later. In my opinion there is no conflict in the case reported in A I R 1936 Mad 915,[1] and relied on by the appellant. In the body of the judgment the learned Judge has stated as follows :

> Even now the Advocate appearing for the Official Receiver is not in a position to state that there was an order vesting the properties in the receiver along with or after the annulment of the adjudication or any order imposing any conditions on the reversion of the estate to the debtor.

In case there is any conflict I am of opinion that the view laid down in 1938 M W N 455[2] is the correct view. Under S. 43, Provincial Insolvency Act, if the debtor does not appear on the day fixed for hearing his application for discharge or on such subsequent day as the Court may direct, or if the debtor does not apply for an order of discharge within the period specified by the Court, the order of adjudication shall be annulled. In my opinion the annulment of the adjudication under the conditions defined under S. 43 is intended as a punishment to the insolvent. This is clear from Cl. (2) of S. 43. The protection conferred on him by reason of his adjudication is withdrawn but it does not necessarily follow that he is to get back from the control of the Court his assets. An order of annulment may be made in a variety of circumstances, for instance, (1) when a composition is approved by the Court or (2) when the insolvent fails to apply for discharge in time or to prosecute his application etc. I am therefore of opinion that the punishment provided in S. 43, Provincial Insolvency Act, cannot be used in favour of the insolvent.

With regard to the second contention, the learned counsel on behalf of the appellant relies on the provisions of S. 54, T. P. Act. The point no doubt is a controversial one but I am of opinion that the case is covered by S. 2 (d), T. P. Act. The words of the Section applicable are "transfer by order of a Court of competent jurisdiction." I am of opinion that the Official Receiver's sale falls within the words. It is in the nature of court sale and its validity really depends on the order of the Insolvency Court vesting the property in the Official Receiver and thus authorizing him to sell. The learned counsel on behalf of the appellant relies on the case in A I R 1927 Mad 1[3] in which it was held that

> the Official Receiver is not an agent of the Court transferring an application for adjudication for disposal within the meaning of the Contract Act so as to enable the Court to ratify any unauthorized acts done by the agent, and therefore a sale by Receiver of insolvent's properties before a vesting order in his favour is invalid and it cannot be validated by Court subsequently ratifying the sale.

In my opinion, this case is distinguishable because no sanction of the sale had been obtained in this case but in the case before me there was a report by the Official Receiver (Ex. 2) and the Court sanctioned the sale. Therefore I am of opinion that

1. Baluswami Naidu v. Official Receiver, Madura, (1936) 23 A I R Mad 915=165 I C 207.
2. Baluswami Naidu v. Official Receiver, Madura, (1938) 25 A I R Mad 752=(1938) 1 M L J 824=1938 M W N 455.
3. Sankaram v. Ganapati, (1927) 14 A I R Mad 1=99 I C 8=50 Mad 135=51 M L J 529 (F B).

the sale was complete and no sale deed was really necessary. I accordingly dismiss the appeal with costs.

N.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Oudh 57

ZIAUL HASAN J.

Brahma Din — Defendant — Appellant.

v.

Sangam Lal and others, Plaintiffs and others, Defendants — Respondents.

Second Appeal No. 132 of 1936, Decided on 7th December 1938, against decree of Dist. Judge, Gonda, D/- 23rd January 1936.

Limitation Act (1908), Art. 132 — Under-proprietary rent is not malikana — Suit to recover such rent does not fall under Art. 132 but is governed by S. 132, Oudh Rent Act.

The rent payable by an under-proprietor in Oudh is not malikana as referred to in explanation to Art. 132. A suit to recover such rent from the under-proprietor does not therefore fall under Art. 132 but is governed by S. 132, Oudh Rent Act, and must be brought within three years : *Case law distinguished.* [P 59 C 2]

R. B. Lal and M. Manohar Lal — *for Appellant.*

H. Husain — *for Respondents 1 to 5.*

Judgment. — These connected appeals arise out of a suit for recovery of under-proprietary rent brought by Sangam Lal and others (appellants in Appeal No. 138) against the defendants, appellants in Appeals Nos. 132 and 133. The defendants are admittedly under-proprietors of village Gajadharpur, Tendwaujar and Patti Barisalpur which were at one time under the superior proprietorship of Syed Ali Hyder. In 1927 Syed Ali Hyder sold his rights to one Laigham Ali. The present plaintiffs pre-empted that sale and obtained a decree in 1928. They also obtained possession of the property in pursuance of the pre-emption decree. The plaintiffs sued the defendants for recovery of Rs. 109-3-0 as haq-i-malikana and prayed that if the defendants should not pay the amount within the time to be fixed by the Court, their under-proprietary rights specified in the plaint be sold for recovery of the amount of the decree. Their allegation was that the defendants as under-proprietors in the villages in question were liable to pay 10% of the land revenue and abwab to the plaintiffs as under-proprietary rent or haq-i-malikana. The rent claimed related to the years 1334 to 1339.

The defendants raised a number of pleas in defence on which the learned trial Court framed ten issues. One of the issues, namely Issue 6, was whether or not the suit was cognizable by the Civil Court. This issue was decided by the trial Court, the learned Munsif of Kaisarganj, in the negative and accordingly he ordered the plaint to be returned to the plaintiffs for presentation to the proper Court. The plaintiffs appealed to the District Judge against this order but the learned First Civil Judge of Bahraich who heard the appeal concurred with the finding of the trial Court that the suit was cognizable by the Revenue Court only. The plaintiffs' appeal was accordingly dismissed. The plaintiffs filed a second appeal in this Court and on 1st December 1933 the then learned Chief Judge allowed the appeal and in view of the provisions of Ss. 124-B, 124-C and 124-D, Oudh Rent Act, remanded the case to the Court of the District Judge of Gonda for rehearing the appeal and deciding it according to law. As the suit had been decided by the trial Court on the question of jurisdiction only and no evidence had been taken, the learned District Judge sent back the case to the trial Court for disposal of the issues other than that of jurisdiction. The learned Munsif after recording evidence held that the plaintiffs were the transferees of the rights of Ali Hyder, that Syed Ali Hyder as superior proprietor was entitled to recover 10% of the land revenue and cesses from the under-proprietors defendants as haq-i-malikana, that the defendants were paying Rs. 85-5-4 as land revenue and cesses for Gajadharpur, Rs. 68-10-0 for Tendwaujar and Rs. 25-7-4 for patti Barisalpur, that the plaintiffs were entitled to interest on the rent claimed at the rate of 1% per mensem claimed by them, that the claim for the years 1334 and 1335F was barred by limitation but that the plaintiffs were entitled to haq-i-malikana for 1336 to 1339F. On these findings the suit of the plaintiffs was decreed for Rupees 71-2-6 with proportionate costs and interest at 1% per mensem up to the date of the decree and future interest at 6% per annum.

Both parties appealed against this decree of the learned Munsif but the learned District Judge upheld that decree and dismissed both the appeals. Appeal No. 132 of 1936 has been brought by one of the defendants, Appeal No. 133 of 1936 by all the defendants and Appeal No. 138 of 1936

has been brought by the plaintiffs. I will take up Appeal No. 132 first. Only one ground has been urged in this appeal, which has been filed against the decree of the learned District Judge passed in appeal No. 64 of 1935 brought by the plaintiffs, namely that the lower Appellate Court has erred in allowing the respondents costs of the original suit amounting to Rs. 46-8-0. That decree provides :

> The respondents have incurred no costs in this Court of appeal. The plaintiff's proportionate costs of the original suit amounting to Rs. 46-8-0 are to be paid by the defendants to the plaintiffs.

In the other appeal (No. 61 of 1935) brought by the defendants Rs. 5-8-0, costs of the plaintiffs-respondents, were awarded against the defendants-appellants. The learned counsel for the defendant-appellant contends that as Appeal No. 64 of the plaintiffs was dismissed, no costs should have been awarded to them by the decree in that appeal. I do not think there is any force in this contention. The decree of the trial Court was superseded by that of the Appellate Court and as that decree was confirmed and it provided for payment by the defendants of the plaintiffs' proportionate costs of the suit, the order for payment of the plaintiffs' proportionate costs should naturally have found place in the Appellate Court's decree. Perhaps it would have been more proper if this order had been inserted in the decree prepared in the defendants' appeal but the insertion of it in the plaintiffs' appeal (No. 64) cannot be said to be illegal. Now, as the decrees of the lower Appellate Court stand, the plaintiffs cannot recover this amount from the defendants twice. Appeal No. 132 of 1936 has therefore been brought unnecessarily and must be dismissed.

In their Appeal No. 133 of 1936, the defendants have raised two points before me. The first is that the amount found by the trial Court as having been paid by the defendants on account of land revenue and cesses included also the haq-i-malikana. In other words, their contention is that the amount shown in the khewats of the three villages (Exhibits 26, 27, and 28) as that of abwab is really the amount not of cesses but of the haq-i-malikana payable by the defendants. In the lower Courts the contention also was that the defendants are liable to pay ten per cent. of the land revenue only and not of the abwab; but this position has now been abandoned and all that is urged is that the use of the word "munafa" in Exs. 26 and 27 (pukhtedari khewats of Gajadharpur and Tendwaujar respectively) shows that the amount shown as munafa is really haq-i-malikana. No such plea was however raised by the defendants in their written statement. Moreover, the findings of the Courts below of the aforesaid amounts being the amounts of land revenue and of abwab are pure findings of fact and cannot be questioned in this Court. Further, there is no good reason to suppose that the amounts shown as 'munafa' represent the haq-i-malikana payable by the defendants. On the other hand, there are good reasons for holding that those amounts represent the abwab. In the first place they occur in the column relating to abwab. In the second in three of the khatas mentioned in Ex. 26 the word 'munafa' is coupled with the word 'sewai' and the omission of that word from khata No. 4 in question seems to be merely an accidental omission. The next point urged is that the plaintiffs are not entitled to any interest on the amount claimed. This plea too has no force whatever. As the amount claimed by the plaintiffs is undoubtedly 'rent' as defined in the Oudh Rent Act and as the learned counsel for the defendants himself was at pains to show in his reply to the plaintiffs' appeal, there is no reason whatever why the plaintiffs should not get interest on the rent claimed by them. This appeal too has therefore no force.

I now come to the plaintiffs' Appeal No. 138 of 1936. This appeal is against the decision of the lower Courts that the suit relating to the years 1334 and 1335 F was barred by limitation. It is argued that the amount payable by the defendants was a charge on the property and that therefore the limitation for recovery of that amount was twelve years and not three years. Reliance is placed on Article 132, Sch. 1, Limitation Act, and particularly on Explanation (a) to that Article. The Article read with Cl. (a) of the Explanation would read as follows :

To enforce payment of money charged upon immovable property.	12 years.	When the money sued for becomes due.

Explanation.—For the purposes of this Article:

(a) the allowance and fees respectively called malikana and haqqs . . . . . shall be deemed to be money charged on immovable property.

It is argued that the money claimed by the plaintiffs comes under the malikana mentioned in the Explanation to Art. 132.

'Malikana' has not been defined in the Limitation Act or in any other Act but after a careful consideration of the cases relied on by the learned counsel for the plaintiffs I have come to the conclusion that the term cannot be applied for purposes of Article 132, Limitation Act, to under-proprietary rent. The learned counsel for the plaintiffs has relied on the following cases: 5 Cal 921,[1] 9 All 591,[2] 41 All 259,[3] 10 Cal 697,[4] 10 C W N 151,[5] A I R 1934 Pat 44,[6] A I R 1938 Pat 16,[7] 7 O C 108,[8] 18 O C 380[9] and 19 O C 49.[10]

Almost all these cases hold that a claim to malikana can be brought within twelve years, but none of them is an authority for the view that the rent payable by an under-proprietor in Oudh comes within the term 'malikana' occurring in the Explanation to Article 132, Limitation Act. In the first of these cases the judgment is very short and does not show what was the nature of the money claimed in that case. In the second what was claimed as malikana was the amount which the vendee of certain immovable property contracted to pay annually to the vendor. In the third the facts were that in 1938 the proprietors of a certain village refused to accept the settlement offered to them under the orders of Government. They were therefore excluded from the settlement and a settlement was offered to the cultivators of the village and a malikana charge of 12½ per cent. on the land revenue was fixed for the proprietors who had refused to accept the settlement and had been excluded. Malikana in this case was therefore more in the nature of nankar than of under-proprietary rent. In the fourth case also, the nature of the malikana claimed was far from anything like the rent payable by an under-proprietor. The judgment in the fifth case does not show the nature of the malikana claimed. The same remark applies to the sixth case. The seventh case does not refer to malikana at all and all that was held was that where a mortgagor mortgages his right to recover rent from the tenant in respect of a certain holding, the mortgage though merely a right to recover rent is really a mortgage of an interest in immovable property. The last three cases of Oudh are clearly cases of nankar and not of under-proprietary rent. I am not therefore prepared to accept the learned counsel's contention that the under-proprietary rent payable by the defendants is malikana as referred to in the Explanation to Art. 132.

On the other hand, it is quite clear from the provisions of the Oudh Rent Act that the intention of the Legislature was that the haq malikana payable by an under-proprietor should be sued for within three years. According to Sec. 3 (5), 'rent' means money or the portion of the produce of land payable on account of the use or occupation of land or on account of any right in land or on account of use of water for irrigation. According to Sec. 3 (8) 'under-proprietor' means any person possessing heritable and transferable right of property in land for which he is liable or but for a contract or decree would be liable to pay rent. 'Landlord' according to Sec. 3 (11) means any person to whom an under-proprietor or tenant is liable to pay rent. Further, S. 108 which bars the jurisdiction of Courts other than Courts of Revenue in relation to certain classes of suit provides in Cl. (2), "for arrears of rent." From all this it is quite clear that what an under-proprietor is liable to pay to the superior proprietor is rent and that a suit for recovery of it must be brought in the Revenue Court under S. 108 (2), Oudh Rent Act. Now S. 132 of the Act, provides :

> A suit for the recovery of an arrear of revenue or rent . . . . shall . . . be instituted within three years from the last day of the month of Jeth of the Fasli year in which the arrear fell due.

As the case is fully governed by the provisions of the Oudh Rent Act those provisions must necessarily apply to it even though it be assumed that the rent payable by an under-proprietor can be called malikana referred to in the Explanation to Art. 132, Limitation Act. I am therefore of

1. Hurmuzi Begum v. Hirdaynarain, (1880) 5 Cal 921=6 C L R 133.
2. Churaman v. Balli, (1887) 9 All 591 = 1887 A W N 121.
3. Nathu v. Ghansham Singh, (1919) 6 A I R All 331=49 I C 737=17 A L J 177 = 41 All 259.
4. Gopi Nath Chobey v. Bhugwat Pershad, (1884) 10 Cal 697.
5. Jagarnath Pershad Singh v. Kharach Lal, (1906) 10 C W N 151.
6. Padhum Lal v. Tribeni Singh, (1934) 21 A I R Pat 44=154 I C 1013.
7. Ramzan Ali v. Babu Lal Singh, (1938) 25 A I R Pat 16=173 I C 64=18 P L T 801.
8. Raja Mohammad Mumtaz Ali Khan v. Wazir Khan, (1904) 7 O C 108.
9. Ram Jiwan v. Jadunath, (1916) 3 A I R Oudh 176=33 I C 555=18 O C 380.
10. Deputy Commissioner, Fyzabad v. Jagjiwan Bakhsh Singh, (1916) 3 A I R Oudh 129=33 I C 461=19 O C 49.

opinion that the Courts below rightly dismissed the plaintiffs' suit for the years 1334 and 1335-F. The result is that all the three appeals are dismissed. Parties will bear their own costs in this Court.

N.S./R.K. *Appeals dismissed.*

A. I. R. 1939 Oudh 60

THOMAS C. J. AND ZIAUL HASAN J.

Chhab Nath Kuar — Applicant.

v.

Setraj Kuar — Opposite Party.

Application No. 20 of 1937, Decided on 4th November 1938, for leave to appeal to His Majesty in Council, against decision of this Court, in F. A. No. 121 of 1935.

Civil P. C. (1908), S. 110—Question whether party has succeeded in proving family custom is not a substantial question of law.

The question whether a party has succeeded in proving the family custom set up by her is not a substantial question of law within the meaning of S. 110: *A I R 1927 P C 110, Disting.* [P 60 C 2]

M. Wasim and Ali Hasan — *for Applicant.*

Haider Husain — *for Opposite Party.*

Order.—This is an application for leave to appeal to His Majesty in Council against the decision of this Court in First Civil Appeal No. 121 of 1935. The parties to the case are both widows of Rai Chhab Narain Singh of Rae Bareli District, the plaintiff opposite party being the junior widow and the defendant-applicant the senior widow. The plaintiff brought the suit from which this application arises for recovery of one-half of the property left by her husband. The defence was that according to a family custom the defendant as the senior widow was entitled to possession of two-thirds of the property and the plaintiff as the junior widow to only one-third. It was further pleaded that under a family arrangement also the defendant was given a two-thirds share of the property. The trial Court overrules the pleas raised in defence and decreed the plaintiff opposite party's suit and this decree was confirmed by a Bench of this Court on 1st October 1937. The present application has been brought by the defendant for leave to appeal against the decree of this Court. So far as the value of the subject-matter of the suit and the appeal is concerned, the case fulfils the requirements of the law; but as this Court affirmed the decree of the trial Court, the question arises whether or not the case raises a substantial question of law.

After hearing the learned counsel for parties we have come to the conclusion that the case does not involve a question of law within the meaning of S. 110, Civil P. C. The learned counsel for the applicant relies on the case in 54 I A 126,[1] but all that was decided in that case was that the words "some substantial question of law" do not mean that the question of law involved must be of general importance and that the condition is satisfied if there is a substantial question of law between the parties. In that case the question between the parties rested on the construction to be put on a will which was a document of title. In the present case however the real question was whether or not the custom set up by the defendant had been proved, though the proof of the alleged custom was practically confined to the two documents Exs. A-1 and A-2. The following quotation from the judgment of this Court will show what was actually the question for decision in the case :

> After a careful consideration of the evidence in the case we have come to the conclusion that neither is there any custom in the family by which the defendant-appellant should get two-thirds of Chhab Narain Singh's property, nor was there any family arrangement between her and the respondent entitling the appellant to a two-thirds share.

The applicant herself in para. (a) of her proposed grounds of appeal says :

> That their Lordships erred in holding that the custom of succession of the senior widow to the extent of a two-third share in the property of her deceased husband has not been proved.

It will thus be seen that though the applicant challenges this Court's interpretation of Exs. A-1 and A-2, the real question in the case is not the interpretation of those documents but whether she has succeeded in proving the custom set up by her. It cannot therefore be said that the case involves a substantial question of law. The application is therefore dismissed with costs.

N.S./R.K. *Application dismissed.*

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1. Raghunath Prasad Singh v. Deputy Commissioner, Partabgarh, (1927) 14 A I R P C 110= 102 I C 889= 2 Luck 93=54 I A 126 (P C).

A. I. R. 1939 Oudh 61

THOMAS C. J. AND ZIAUL HASAN J.

Bidurramji — Plaintiff — Appellant.

v.

Kesho Ramji — Defendant — Respondent.

Misc. Appeal No. 98 of 1938, Decided on 14th November 1938, against order of Civil Judge, Fyzabad, D/- 17th September 1938.

(a) Civil P. C. (1908), O. 40, R. 1 — Power conferred by O. 40, Rule 1 should be exercised with great care — Power of Court to appoint receiver is limited to cases where it appears just and convenient.

The power conferred by O. 40, Rule 1 should be exercised with great care and caution and only in cases in which the applicant for the appointment of receiver has proved a prima facie title to the property. O. 40, Rule 1 limits the power of a Court to appoint a receiver to cases where it appears both just and convenient that such appointment should be made. [P 62 C 1]

The plaintiff, who claimed to be appointed the mahant of a religious institution (asthan) by a duly qualified committee, brought a suit for a declaration that he was the duly constituted mahant and was entitled to possession of two kothris within the precincts of the asthan together with the moveables, cash and record which were in possession of the defendant. The kothris in dispute had been attached by a Criminal Court under Sec. 145, Criminal P. C., and proceedings in that case were pending. The defendant has been in peaceful possession of the asthan and the property in dispute for about 15 years without the least objection on behalf of anybody. The plaintiff did not even allege in his application that the property was in danger of being wasted by the defendant and the only ground on which he wanted the appointment of a receiver was that as the kothris would remain closed on account of the attachment, the articles and documents kept therein might be spoiled :

Held that the plaintiff had not made out a good case for appointment of receiver and appointment of receiver would not be proper under the circumstances of the case. Possession of the Criminal Court attaching the property was to be deemed to be the possession of the defendant : *A I R 1937 Oudh 280; 16 OC 238 and (1850-53) 4 H L 997, Rel. on.* [P 62 C 2]

(b) Appeal—Appellate Court — Powers of— Appellate Court should not interfere with discretion of trial Court unless it has been exercised illegally or improperly.

In matters which lie within the discretion of the trial Court the Appellate Court should not interfere with the discretion of the trial Court unless it has been exercised illegally or improperly. [P 61 C 2]

M. Wasim and Ali Hasan — *for Appellant.*

Radha Krishna and C. P. Lal — *for Respondent.*

Judgment.—This is a miscellaneous appeal against an order of the learned Civil Judge of Fyzabad refusing to appoint a receiver on the application of the appellant. The facts are these : In Ajudhia there is a religious institution of the Hindus known as the Asthan of Ranopali of which the defendant-respondent is the managing mahant. The plaintiff-appellant in this case claims to have been appointed mahant of this Asthan on 27th May 1938, by a duly qualified committee which, it is said, had also power by custom to depose the defendant from the mahantship. On 23rd July 1938 the appellant brought a suit in the Court of the Civil Judge, Fyzabad, for a declaration that as a duly constituted mahant of Asthan Ranopali in Ajudhia, he is entitled to possession of two kothris within the precincts of the Asthan proper together with moveables, cash and records, which may be found in the said kothris and that the defendant has no right whatsoever in and is not entitled to possession of the said property. On the same day he filed the present application for the appointment of a receiver of the property in dispute. It may be mentioned that as there was a dispute between the parties, the kothris in dispute were attached by the Criminal Court under Sec. 145, Criminal P. C., and that proceedings in that case were pending when the appellant brought his application for the appointment of a receiver. The learned Civil Judge came to the conclusion that the plaintiff had failed to make out a case for the appointment of a receiver and dismissed the application. The plaintiff brings this appeal against the order of the learned Civil Judge.

We have heard the learned counsel for parties on this appeal at length and have come to the conclusion that the appeal cannot be allowed. In the first place, it is a well-established rule of law that in matters which lie within the discretion of the trial Court the Appellate Court should not interfere with the trial Court's discretion unless that discretion has been exercised illegally or improperly. In the second place we are ourselves of opinion that the present is not a fit case for the appointment of a receiver. The asthan in question is admitted to have been founded by one Baba Sangat Bakhsh more than one hundred years ago. He was succeeded by his chela Baba Madhoram and the latter in his turn by his chela Baba Narain Ram Das. Narain

Ram Das is said to have made a will in respect of the entire property in favour of the present respondent in the year 1912 and to have nominated him as his successor. Narain Ram Das died in 1923 and was succeeded by the respondent who has been in possession since then. According to the plaintiff-appellant his appointment to the mahantship of the asthan was in accordance with a custom prevailing in the asthan. On the other hand, the defendant's case is that no such custom exists or could exist as no mahant was ever removed from mahantship since the foundation of the asthan.

Courts are agreed that the power conferred by O. 40, Rule 1, Civil P. C., should be exercised with great care and caution and only in cases in which the applicant for the appointment of a receiver has proved a prima facie title to the property. In 1937 O W N 197[1] where the defendant had been put in possession of the property in dispute by the Revenue Court, it was held that it would not be just and convenient to deprive him of that possession and to appoint a receiver in his place to manage the property. In the present case the defendant had been in peaceful possession of the asthan and the property in dispute for about 15 years without the least objection on behalf of anybody and we do not think that it would be in the interests of justice to deprive him of his possession. In 16 O C 238,[2] it was held that O. 40, R. 1, Civil P. C., limits the power of a Court to appoint a receiver to cases where it appears to be both just and convenient that such appointment should be made, and that the convenience of the decree-holder is not a sufficient consideration to justify such an appointment, for what may be convenient to the decree-holder may not be just to the judgment-debtor. The learned Judges quote with approval the following passage from the judgment of Lord Cranworth in (1850-53) 4 H L 997[3] at p. 1031 :

> In such cases the Court must of necessity exercise a discretion as to whether it will or will not interfere by this kind of interim protection of the property. Where indeed the property is as it were *in medio* in the enjoyment of no one, the Court can hardly do wrong in taking possession. It is the common interest of all parties that the Court should prevent a scramble. Such is the case when a receiver of a property of a deceased person is appointed pending a litigation in the Ecclesiastical Court as to the right of probate or administration. No one is in the actual lawful enjoyment of property so circumstanced, and no wrong can be done to any one by taking it and preserving it for the benefit of the successful litigant. But, where the object of the plaintiff is to assert a right to property of which the defendant is in the enjoyment, the case is necessarily involved in further questions. The Court by taking possession at the instance of the plaintiff may be doing a wrong to the defendant, in some cases an irreparable wrong.

Applying the principle contained in this passage, we cannot hold that the appellant has succeeded in making out a good case for the appointment of a receiver. We may mention that the plaintiff does not even allege in his application that the property is in danger of being wasted by the defendant and the only ground on which he wants the appointment of a receiver is that as the kothris have been attached by the Criminal Court :

> It is very probable that on account of the kothris remaining closed for a long time, the articles and the documents in them might be spoilt.

This is another reason why the appointment of a receiver would not be proper in this case. The learned counsel for the appellant has contended that the property in dispute should be considered to be *in medio*, but we do not agree with him. The possession of the Criminal Court which has attached property under the provisions of the Code of Criminal Procedure must in this case be deemed to be the possession of the defendant-respondent, who was admittedly in possession before the plaintiff appeared on the scene and began to disturb his possession. As to the bona fides of the plaintiff's suit, we do not wish to say anything as it would not be proper on our part to pre-judge his case, and it is sufficient to say that after a consideration of all the facts and circumstances of the case, we are clearly of opinion that the learned Judge of the Court below was right in rejecting the prayer for the appointment of a receiver. The appeal is therefore dismissed with costs.

R.M./R.K. *Appeal dismissed.*

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1. Ali Raza Khan v. Nawazish Ali Khan, (1937) 24 A I R Oudh 280=166 I C 983=1937 O W N 197.
2. Muhammad Husain Khan v. Amar Chand Paul, (1913) 16 O C 238=21 I C 283.
3. Owen v. Homan, (1850-53) 4 H L 997=10 E R 752=17 Jur 861=94 R R 516.

A. I. R. 1939 Oudh 63

ZIAUL HASAN J.

Ambica Dutt Ram — Defendant — Appellant.

v.

Nawab Shams Ara Begam — Plaintiff Respondent.

Second Rent Appeal No. 66 of 1936, Decided on 4th January 1939, against decree of Dist. Judge, Lucknow, D/- 27th July 1936.

U. P. Land Revenue Act (3 of 1901), Secs. 143 and 184 — Assignee of land revenue can claim interest on arrears of land revenue due to him.

Section 143, Land Revenue Act, deals with an arrear of land revenue due to Government and not to one due to an assignee of land revenue. There is no provision in the Oudh Rent Act disentitling an assignee of land revenue to claim interest on the arrears of land revenue due to him. On the other hand the analogy of Sec. 184, Land Revenue Act, and S. 225, Agra Tenancy Act, clearly shows that the intention of the Legislature was that an assignee of land revenue should get interest on the arrears due to him : *A I R 1934 Oudh 259, Rel. on; A I R 1938 P C 67, Expl.* [P 64 C 1]

Hakimuddin — *for Appellant.*

H. H. Zaidi — *for Respondent.*

Judgment.—This second appeal against a decision of the learned District Judge of Lucknow arises out of a suit brought under S. 108 (18), Oudh Rent Act, by an assignee of land revenue against the defendant zamindar for recovery of arrears of land revenue from Rabi 1339F to Kharif 1342F. The defence was that the defendant had paid up the revenue for 1340 and 1341F and that the plaintiff was not entitled to costs and interest on a sum of Rs. 134-13-6 for which a cheque was sent to him by the defendant but was returned uncashed by the plaintiff. The trial Court decided both the points against the defendant and decreed the suit. The defendant appealed and the learned District Judge agreed with the trial Court's finding with regard to the sum of Rs. 179-10-0 said to have been paid in respect of 1340 and 1341F but allowed the appeal to the extent of deduction of costs and interest in respect of the sum of Rs. 134-13-6. The defendant brings this second appeal and the two questions argued before me are : (1) whether the sum of Rupees 179-10-0 paid by the defendant by cheque in March 1935 should be credited towards the land revenue for 1340 and 1341F, and (2) whether or not the plaintiff should get interest on arrears of land revenue. With regard to the cheque for Rs. 179-10-0 the allegation in the defendant's written statement was that it was sent in respect of land revenue for "1340F, etc." In the course of pleadings in Court dated 30th September 1935, it was stated that this amount was sent for the dues for Rabi 1339F and parts of 1340 and 1341F. In evidence Dirgaj Singh, mukhtar-i-am of the defendant, stated that it was sent for the land revenue of 1340 and 1341F. On behalf of the plaintiff it was denied that any direction was sent along with this cheque and it was said that the amount of the cheque was credited towards a decree of this Court held by the plaintiff against the defendant. The trial Court was of opinion that the defendant had no right to ask the plaintiff to appropriate the amount towards land revenue for 1340 and 1341F when the revenue for 1339F was already in arrears. The lower Appellate Court thought that the oral evidence of Dirgaj Singh was inadmissible as secondary evidence of the contents of the letter containing the direction about appropriation of the amount said to have been sent along with the cheque as the letter was not summoned from the plaintiff. The judgments of both the lower Courts show that both of them were doubtful about the truth of the story that the defendant while sending the cheque for Rupees 179-10-0 directed the plaintiff to appropriate the amount towards the land revenue for any specified years; and in view of the contradiction on the point in the defendant's case as noted above and of the evidence on record I am not also prepared to believe that any direction was sent to the plaintiff along with the cheque. Moreover as land revenue for 1340F and 1341F amounted to Rupees 177-12-3 and Rs. 265-1-9 respectively the sum of Rs. 179-10-0 could not have covered the land revenue due for these two years. I am therefore of opinion that the Courts below were right in rejecting the defendant's plea about the cheque for Rupees 179-10-0.

The next point is whether or not the plaintiff is entitled to recover interest on arrears of land revenue due to him. The point was raised between the parties in a previous suit in the case reported in 11 O W N 754[1] and a learned Judge of this Court held that the plaintiff was entitled

1. Shams Ara Begam v. Ambica Dutt Ram, (1934) 21 A I R Oudh 259=149 I C 901 = 11 O W N 754.

to interest on arrears of land revenue due to him. Reliance is placed on S. 143, Land Revenue Act, which says that no interest shall be demanded on any arrear of revenue, but I am in perfect agreement with Nanavutty J. in holding that S. 143, Land Revenue Act, deals with an arrear of land revenue due to Government and not to one due to an assignee of land revenue. As was pointed out by Nanavutty J. in the case referred to above, there is no provision in the Oudh Rent Act, disentitling an assignee of land revenue to claim interest on the arrears of land revenue due to him. On the other hand the analogy of Sec. 184, Land Revenue Act, and Sec. 225, Agra Tenancy Act, clearly shows that the intention of the Legislature was that an assignee of land revenue should get interest on the arrears due to him. Sub-s. (2) of Sec. 225, Agra Tenancy Act, provides :

> Revenue or profits not paid on the day on which they fall due become on the following day arrears, and the lambardar or co-sharer or muafidar or assignee of revenue or taluqdar or superior proprietor, as the case may be, entitled to realize such dues shall be entitled to claim interest on such arrears at one per cent. per mensem.

It is inconceivable that the same Legislature which clearly provided for payment of interest to an assignee of land revenue on arrears of revenue in the province of Agra should have intended to deprive him of that interest in the Province of Oudh. The learned counsel for the appellant relies on the case in 1938 C W N 261[2] but in that case their Lordships of the Judicial Committee clearly held that interest for the period prior to the date of the suit may be awarded under the provisions of any substantive law entitling the plaintiff to recover interest and I have already referred to the provisions of law which appear to entitle an assignee of land revenue to recover interest on arrears due to him. I am therefore of opinion that there is no force in the contention that the plaintiff is not entitled to interest on the arrears due to him. The appeal fails and is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

2. B. N. Rly. Co. Ltd. v. Ruttanji Ramji, (1938) 25 A I R P C 67=173 I C 15 = 32 S L R 374 = I L R (1938) 2 Cal 72 = 65 I A 66 = 1938 O W N 261 (P C).

A. I. R. 1939 Oudh 64

ZIAUL HASAN AND YORKE JJ.

Har Govind Prasad — Claimant — Appellant.

v.

Mt. Mahraj Kunwar and others — Creditors — Respondents.

First Appeal No. 8 of 1938, Decided on 26th September 1938, against order of Addl. Special Judge, First Grade, Barabanki, D/- 15th December 1937.

U. P. Encumbered Estates Act (25 of 1934), Sec. 11—Claim under Sec. 11 analogous to suit under O. 21, R. 63, Civil P. C. — Order passed on such claim held declaratory decree—Appeal from decree — Court-fee must be paid as on appeal from declaratory decree.

A claim under S. 11 was made and was analogous to a suit under O. 21, R. 63, Civil P. C. An order was passed on the claim :

Held that the order was a declaratory decree and in an appeal from the order the appellant was liable to pay court-fee as on an appeal from a declaratory decree. [P 64 C 2]

Radha Krishna — *for Appellant.*

Judgment.—We have heard the learned counsel for the appellant on the office report. The claim of the appellant was under S. 11, Encumbered Estates Act, but it was dismissed by the lower Court. Sub-s. 4 of Sec. 11 lays down that any order passed by the Special Judge under this Section shall be deemed to be a decree of a Civil Court of competent jurisdiction, so that the order passed by the lower Court in this case was undoubtedly a decree of a Civil Court, but we are of opinion that the decree was a declaratory decree. The claim of the appellant was analogous to a suit under R. 63 of O. 21, Civil P. C. We hold, therefore, that the appellant is liable to pay court-fee as on an appeal from a declaratory decree and as the appellant has already paid Rs. 10, there is no deficiency in the court-fee.

D.S./R.K. *Order accordingly.*

A. I. R. 1939 Oudh 65

HAMILTON J.

Chandra Dhar Tewari and others — Plaintiffs.

v.

Deputy Commissioner, Lucknow — Defendant.

Civil Misc. Appln. No. 955 of 1938, Decided on 29th November 1938.

(a) Evidence Act (1872), S. 124 — Object of —Meaning of word 'disclose' explained—Section does not apply when once disclosure has been made to member of public.

Section 124 is designed to prevent the knowledge of official papers, that is to say papers in official custody beyond that circle which would obtain knowledge of them in confidence whether the confidence was express or implied. It would normally include all officers including clerks of superior officers and might also apply to non-officials to whom such papers were disclosed on the understanding, express or implied, that the knowledge should go no further. The word 'disclose' means the first disclosure of communication made in official confidence and does not apply to disclosure in a Court of law of what has already been disclosed outside it. The Section has therefore no application when once there has been disclosure to a member of the public to whom the contents of such papers have not been made known in confidence. [P 66 C 1, 2]

(b) Evidence Act (1872), Sec. 124 — Official confidence—Demi-official letters.

Demi-official letters addressed by one officer by name to another officer by name are written in official confidence. [P 66 C 2]

(c) Evidence Act (1872), S. 124—Public officer is to decide whether public interest would suffer by disclosure—But Court has to decide if communication is made in official confidence.

It is in the power of the public officer concerned and not in the power of the Court to decide whether disclosure of the contents of a document would be detrimental to the public interests : *A I R 1915 Mad 1133; A I R 1918 Oudh 225; A I R 1925 Oudh 540 and A I R 1922 All 37, Ref.* [P 65 C 2]

But it is for the Court to decide whether the communications are made in official confidence. [P 66 C 1]

(d) Evidence Act (1872), S. 124—Public officer—Meaning of—Officer of Court of Wards is public officer.

A public officer is an officer with public as opposed to private duties who receives communications made to him in official confidence of such a nature that disclosure in certain cases would injure the public interests. The Court of Wards for the purposes of Sec. 124 is a Government office and the officer of the Court of Wards is therefore a public officer within the meaning of S. 124 : *Case law discussed.* [P 68 C 1]

(e) Evidence Act (1872), S. 124 — Privilege should be claimed after considering particular document.

It is not proper for an authority claiming privilege to claim privilege without considering particular papers and then coming to a decision whether privilege should or should not be claimed. [P 68 C 1]

Order.—In an application undated but presented on 16th November 1938 the plaintiffs in Original Suit No. 4 of 1937 have asked that certain documents be exhibited. The documents are ten in number—the first three being from a file there described as "Release File," and two are from what is called the "Succession File" both being files which have been submitted to this Court under a sealed cover by the Court of Wards. The remaining five are in a file described as 'Assumption and Allowance of Rani's file from D. C.'s office' and they are in a file which has also come under a sealed cover from the Deputy Commissioner of Lucknow. Objection has been raised both on behalf of the Court of Wards and on behalf of the Deputy Commissioner claiming privilege under S. 124, Evidence Act, on the ground that the public interest would suffer by disclosure of these documents. I must point out at once that the first three and the last five documents are in files which the plaintiffs have been allowed to inspect by the Court of Wards and the Deputy Commissioner respectively and the plaintiffs are therefore aware of what is contained in the papers which they seek to make exhibits. This does not apply to the fourth and fifth documents which in this application appear under Nos. 45 and 46.

It has been urged on behalf of the Court of Wards and the Deputy Commissioner that the sole judge as to whether disclosure will harm the public interests is the public officer concerned and in this respect 39 Mad 304,[1] 5 O L J 294,[2] 2 O W N 422[3] and 44 All 360[4] have been quoted. S. 124, Evidence Act, itself states that when the public officer considers that the public interest would suffer by the disclosure, he cannot be compelled to disclose communications made to him in official confidence and I therefore agree with the contention of the counsel that it is not for me to decide whether public interests would or would

1. Nagaraja Pillai v. Secretary of State, (1915) 2 A I R Mad 1113=26 I C 723=39 Mad 304.
2. Tribhawan Nath Singh v. Deputy Commr., Fyzabad, (1918) 5 A I R Oudh 225 = 47 I C 225=5 O L J 294.
3. Emperor v. Nanda Singh, (1925) 12 A I R Oudh 540=89 I C 387 = 26 Cr L J 1347 = 2 O W N 422.
4. Collector of Jaunpur v. Jamna Prasad, (1922) 9 A I R All 37=44 All 360 = 20 A L J 140.

not suffer. Learned counsel has admitted that it is for the Court to decide whether the communications were made in official confidence and it appears to me that it is beyond doubt that it is for the Court to decide what is the meaning of the words 'disclose' and 'disclosure.' Learned counsel on behalf of the plaintiffs has urged that there cannot be disclosure within the meaning of S. 124, Evidence Act, now as there already has been disclosure when the plaintiffs are allowed to examine two out of the three files. He further urges that Sec. 124, specially the words "made to him in official confidence" applies only to communications by an official to another official in confidence, not communications made by a non-official to an official in which case some such words as "received in confidence" would appear in the Section instead of the words 'made in official confidence.' Learned counsel also urges that the Court of Wards, as at present constituted, is not a "public officer" within the meaning of Section 124.

Possibly the fact that two of these files have been disclosed may also be a guide to the Court as to whether the communications there contained were made in official confidence as presumably if they were so made permission to inspect the files would not have been given. In my opinion, S. 124, is designed to prevent the knowledge of official papers, that is to say papers in official custody beyond that circle which would obtain knowledge of them in confidence whether the confidence was express or implied. It would normally include all officers including clerks of superior officers and might also apply to non-officials to whom such papers were disclosed on the understanding, express or implied, that the knowledge should go no further.

It has been urged by counsel supporting this application for privilege that S. 124, Evidence Act, applies to disclosure in Courts and therefore privilege can be claimed even if there has been disclosure outside the Court. I am not able to attach this restricted meaning to the Section, for I hold that the object is to prevent the disclosure of things not known outside that circle which is in confidence and this Section has no application when once there has been disclosure to what I might call a member of the public to whom the contents of such papers have not been made known in confidence. To hold otherwise would be to place Courts in an unfavourable position, while actually the Courts are favoured in the sense that they have the power to order the productions of documents which an ordinary individual has not. Even if the propagation of this knowledge is contrary to the public interests, the person who has been allowed to obtain knowledge of the contents of such documents can make known to any person what he himself has come to know, and the mischief therefore is done. I do not see that the public interests in the contemplation of the framers of the Evidence Act would suffer by promulgation in a Court of law and not by promulgation outside it. As regards these documents therefore, I am of opinion that the word "disclose" means the first disclosure of communications made in official confidence and does not apply to disclosure in a Court of law of what has already been disclosed outside it. Therefore I hold that S. 124, Evidence Act, does not apply to any of these documents other than Nos. 45 and 46 in the application and privilege cannot be claimed.

There remain then two documents: No. 45 in the application is a letter of the Commissioner of Lucknow to the Secretary of the Board of Revenue dated 14th November 1918; and paper 46 is described as a letter of Mr. MacLeod, dated 25th February 1919. I have examined the files which have been submitted, and I find that there is no letter by Mr. MacLeod but only what purports to be a copy of it. This application is for exhibiting the original and I cannot take it to refer to the copy and further it has not been shown that this copy can legally be admitted in evidence in the place of the original. I have also examined that letter of the Commissioner of Lucknow. This is a "demi-official" letter addressed by one officer by name to another officer by name and in view of the reasons for which "demi official" letters are usually written, I have no hesitation in holding that this letter was written in official confidence. It is in a file, inspection of which has not been given and therefore it has not yet been disclosed. I have already stated that it is in the power of the public officer concerned and not in the power of the Court to decide whether disclosure of the contents of such a document would be detrimental to the public interest once a Court has found the communication to have been made in official confidence and not to have been disclosed before.

There remains then to be decided whether the Court of Wards as at present constituted is "a public officer" or whether the President of the Court of Wards is such officer for the purposes of S. 124, Evidence Act. Various decisions have been cited before me by the learned counsel for the Court of Wards and the Deputy Commissioner. 3 O C 205[5] is a case where it was decided that public documents including khasras prepared by a patwari, who was not appointed by Government but by the talukdar, who did not receive his remuneration from Government but from the talukdar, whom the Deputy Commissioner could not suspend, dismiss, or punish for neglect of duty but on whom it was incumbent to perform certain duties prescribed for him under the provisions of the Oudh Land Revenue Act, amongst such duties being the preparation of khasras, were public documents. It was also held that such a patwari was a public officer as he was a person upon whom a special duty had been conferred by authority and for a public purpose. In 7 Cal 499,[6] the Official Trustee was held to be a public officer and in 50 Bom 716[7] a school master in a Native State was held to be public officer. In A I R 1928 Sind 76[8] it was held that the Court of Wards was a public officer. In 21 All 127[9] the manager of the Court of Wards was held to be a public servant on the ground that the Board of Revenue was a department of the Government. At that time the Court of Wards was differently constituted from the present time and in fact the Board of Revenue was the Court of Wards and at the same time the Board of Revenue was of course a department of the Government. On the other hand in 55 I C 515[10] a learned Judge of the Calcutta High Court held that the manager of the Court of Wards is not a public servant within the meaning of S. 2, Cl. 17, Civil P. C. In A I R 1930 Mad 844[11] the Municipality was held not to be a public officer for purposes of the Code of Civil Procedure. In 6 O W N 937[12] the question whether a Station Master in a State Railway was a public officer within the meaning of S. 124, Evidence Act, was left undecided. The learned Judge said that he was certainly a public servant for the purposes of Ch. 9, I. P. C., under the provisions of Sec. 137, Act 9 of 1890, Railways Act, but it would not follow from that that he was a public officer within the meaning of S. 124, Act 1 of 1872. There is therefore a divergence of opinion as to whether the Court of Wards and officers of the Courts of Wards and similar bodies are or are not public officers with regard to the definition of 'public officer' elsewhere than under S. 124, Evidence Act.

The Court of Wards now is composed of ten members of whom only one is nominated by the Local Government, the President who is among these ten being appointed by the Governor (not by the Government), the Secretary too is appointed by the Governor and not by the Government. On the other hand, the supervision and control of the Court of Wards by the Government is great and under S. 8 read with Sec. 12, Court of Wards Act, the Government can compel the Court of Wards to assume superintendence of the property of certain females and certain persons declared by the local Government to be incapable to manage or unfitted to manage their own property. It seems to me that the most reasonable construction of the term 'public officer' in Sec. 124 is to be partly derived from the Section itself. He is an officer with public as opposed to private duties who receives communications made to him in official confidence of such a nature that disclosure in certain cases would injure the public interests. I can conceive the possibility of communications of a confidential nature being made to the Court of Wards specially in view of the fact that Collectors and Commissioners often have to do Court of Wards work. In the majority of cases the communications would only injure private interests if at all, but there may be cases in which they would injure public interests also. The connexion between the Court of Wards and certain Government servants and the Court of Wards and the Government must necessarily be so close

5. Daljit v. Partab Narain, (1900) 3 O C 205.
6. Shahebzadee Shahunshah Begum v. Fergusson, (1881) 7 Cal 499.
7. Bhanudas Narayanboa v. Krishnabai, (1927) 14 A I R Bom 11=99 I C 307=50 Bom 716=28 Bom L R 1225.
8. Vishnomal v. Court of Wards, (1928) 15 A I R Sind 76=105 I C 729=22 S L R 63.
9. Queen-Empress v. Mathura Prasad, (1898) 21 All 127=1898 A W N 205.
10. Nanda Lal Bose v. Ashutosh Ghose, (1920) 7 A I R Cal 167=55 I C 515.
11. Vasudeva Rao v. Municipal Council, Anantapur, (1930) 17 A I R Mad 844=59 M L J 690.
12. Emperor v. Bhagwati Prasad, (1929) 16 A I R Oudh 543=1929 Cr C 677=123 I C 222=31 Cr L J 479=5 Luck 297=6 O W N 937.

that there is considerable possibility that confidential communications would contain matters of public interest the disclosure of which would injure those public interests. The nature of a public officer has been exhaustively discussed in A I R 1928 Sind 76[8] and the reasons there given together with that which I have just given have led me to the conclusion that the Court of Wards for the purposes of S. 124 should be considered a Government office. I therefore allow the claim of privilege as to appeal No. 45 in the application.

I would however add certain observations necessary on the facts here. The plaintiffs summoned three files and not particular papers in those files and the claim of privilege was made as regards the three complete files without any attempt to discriminate which papers there might, if disclosed, injure the public interests and it appears to me obvious that certain papers there, if disclosed, cannot injure the public interests. For instance, one paper is nothing more than a copy of the notification that the Court of Wards has released the Sissendi Estate and that notification must have appeared in the Gazette. Another is a slip of paper which runs as follows: 'D. C. I think all points have got settled. Deposit file now.' It is not proper for an authority claiming privilege to claim privilege without considering particular papers and then coming to a decision whether privilege should or should not be claimed. A further question which may arise here is whether in view of my refusal to grant privilege to eight papers the public interests are likely to suffer by the disclosure of this ninth document. I would therefore request the authority that has claimed privilege to examine it and then to decide whether it will continue to claim privilege or not. I do not say this in any way intending to put pressure on the authority to withdraw the claim of privilege, but because what I have stated above shows that privilege was claimed about all papers indiscriminately and secondly because a new situation has arisen owing to my refusal to grant privilege to other papers. I need hardly say that my decision is purely on the question of privilege under Sec. 124, Evidence Act, and has nothing to do with whether the documents are or are not admissible independently of S. 124, Evidence Act.

N.S./R.K. *Order accordingly.*

A. I. R. 1939 Oudh 68

YORKE J.

Ram Bharosey —
Plaintiff — Appellant.
v.
Mt. Sheo Dei and others —
Defendants — Respondents.

Second Appeal No. 216 of 1936, Decided on 8th December 1938, against order of Dist. Judge, Unao, D/- 19th March 1936.

Restitution of conjugal rights — Suit by Hindu husband—Court should consider entire conduct of parties — Husband guilty of continued neglect and desertion—Suit should be dismissed — Conduct on part of husband in making charges of theft and immorality against his wife constitutes matrimonial offence of objectionable kind—It can be raised as defence to suit, especially when there have been physical acts of violence—It also throws grave doubts on bona fides of plaintiff.

In a suit for restitution of conjugal rights by a Hindu husband, the Courts should consider the entire conduct of the parties so as to be able to judge whether the plaintiff deserves at the hands of the Court the relief which he seeks and whether such a relief is not unreasonable in the particular case against the defendant. The Court should, in each case, consider the entire conduct of the parties and if it comes to the conclusion that the husband has been guilty of continued neglect of the wife and has deserted her and the suit has not been instituted bona fide, the suit should be dismissed. [P 71 C 2; P 72 C 1]

The history of the marital relations of the parties indicated the growth of unsatisfactory relations between them from 1929 onwards. The husband had been guilty of physical violence on at least three occasions and the marital relations were broken off more than two years prior to the date of the suit The wife alleged that she had been turned out of the house. The husband had more than once made charges of theft and immorality against the wife The plaintiff did not institute any suit for restitution of conjugal rights until his wife had actually obtained against him an order for maintenance under S. 488, Criminal P. C., and even when that order was sought by her he repeated his accusation of immorality :

Held that the plaintiff was not entitled to a decree. The conduct of the plaintiff in making charges of theft and immorality against his wife constituted a matrimonial offence of a very objectionable kind, such as could be raised as a defence to the suit, particularly when there were also acts of physical violence. It also threw grave doubts on the bona fides of the plaintiff in instituting the suit. It was likely that if a decree was given against the wife and she went back to her husband, there would be serious danger to her health and safety by reason of her so doing : *A I R 1927 Bom 264 ; A I R 1935 Lah 386; A I R 1935 Mad 616 ; A I R 1924 All 391 and A I R 1937 Rang 506, Rel. on ; 13 All 126, Commented upon.; Case law discussed.* [P 72 C 2 ; P 73 C 1]

K. P. Misra — *for Appellant.*

L. S. Misra — *for Respondents.*

Judgment.—This is a second appeal by one Ram Bharose Brahman, plaintiff, whose suit for restitution of conjugal rights against his wife, Mt. Sheo Dei, was dismissed by the Munsif of Safipur at Unao, whose decision was maintained in appeal by the learned District Judge of Unao.

The parties to this suit were married as far back as 1915 when the plaintiff was a member of a Hindu joint family. Separation took place in that family in 1920 after which the plaintiff-appellant and the respondent lived separately from the rest of the family. It appears that troubles began between husband and wife from about the year 1929. In that year the appellant filed a report at the police station alleging that his father Sheo Narain had kidnapped his wife and that his wife, Mt. Sheo Dei, had committed theft of his property. This report was followed up in 1930 by a complaint against the wife under Ss. 323, 392 and 384, I. P. C. In 1932 a second report of theft was made against Mt. Sheo Dei by the plaintiff-appellant and in 1933 it is said that a third report was made against Mt. Sheo Dei and other persons. It is alleged that on several occasions previously the plaintiff-appellant had beaten his wife and that on this occasion in 1933 he beat her and turned her out of his house. Early in 1935, Mt. Sheo Dei filed an application under S. 488, Criminal P. C., and obtained on 18th April 1935 an order for payment of Rs. 6 monthly as maintenance. The defence which was put forward by the present appellant in the Magistrate's Court was that Mt. Sheo Dei was immoral but this was also accompanied by an offer to take her back. That offer was regarded by the Criminal Court as not having been made bona fide but merely as a reply to the claim for maintenance. Finally, in July 1935 the plaintiff-appellant instituted the present suit on the allegation that Mt. Sheo Dei had gone to her own home in 1933 and had since then refused to return. Hence he claimed restitution of conjugal rights.

The defence put forward by Mt. Sheo Dei was that she had been treated cruelly and had been falsely accused of theft and immorality. The learned Munsif framed a single issue:

> Is the plaintiff not entitled to a decree for restitution of conjugal rights for reasons alleged in para 8 of the defendants' written statement?

In a careful judgment he came to the conclusion first of all that the only reliable witness of the defendants was counterbalanced by that of the equally reliable witness of the other. He then went on to consider the evidence of the defendant herself and the plaintiff and he concluded by saying:

> Now if we read the statements of defendant 1 and the plaintiff together I think there is hardly left any room for doubt about the alleged cruel treatment of the plaintiff towards his wife, defendant 1.

This is clearly a finding of fact that the plaintiff-appellant was guilty of cruel treatment towards his wife in this way that as mentioned by the respondent he had beaten the defendant on two or three occasions. The learned Munsif went on in the very next sentence of his judgment to say:

> Even if the story of the plaintiff beating defendant 1 as narrated by the latter be supposed for a moment to be untrue, I think it has been abundantly proved that the plaintiff has been guilty of legal cruelty towards defendant 1.

The wording of this sentence itself clearly indicates that the Munsif was himself convinced of the truth of the charges of physical ill-treatment and he was only proceeding on the argumentative hypothesis that this was to be regarded as unproved. He then proceeded to come to the conclusion that the plaintiff-appellant by accusing his wife of theft and adultery and immoral living was guilty of legal cruelty. Finally, he remarked that the suit had clearly been filed simply with a view to get rid of the maintenance decree and was therefore not a bona fide suit at all and he dismissed it accordingly. When the case came in appeal before the learned District Judge of Unao, he seems to have thought that the trial Court had not relied on the oral evidence for the defendant in regard to physical cruelty and he proceeded to examine the evidence and held that the defendant had proved physical cruelty on the part of the plaintiff. This is a finding of fact which cannot be assailed in second appeal as such. He also went on to hold that the plaintiff had been guilty of legal cruelty and that in these circumstances the plaintiff-appellant was disentitled from obtaining the relief of restitution of conjugal rights. Learned counsel has argued in the first place that the case reported in 4 O W N 247[1] relied upon by the two lower Courts is not applicable to the present case because the parties to that suit were Mahomedans. I would not be prepared to accept

1. Maqboolan v. Ramzan, (1927) 14 A I R Oudh 154=101 I C 261=2 Luck 482=4 O W N 247.

that contention entirely. What was said in 4 O W N 247[1] was doubtless in connexion with a case between Mahomedans but the manner in which the principles were applied is stated at the top of p. 250 where the learned Judges remarked:

> It seems to us that the principles of justice, equity and good conscience not inconsistent with any positive rule of Mahomedan law may well be applied in determining the ground on which a claim for restitution of conjugal rights may be refused by the Courts of justice.

The learned Judges went on to refer to sub-s. (g) of S. 3 of the Oudh Laws Act, and to say:

> As observed by their Lordships of the Judicial Committee in the case quoted above, 11 M I A 551,[2] an Indian Court might well admit defences founded on the violation of marital rights.

They went on to quote an observation of Lord Herschell L. C. in (1895) A C 384,[3] where he said:

> It is certain that a spouse may, without having committed an offence which would justify a decree of separation, have so acted as to deserve the reprobation of all right-minded members of the community. Take the case of a husband who has heaped insults upon his wife but has just stopped short of that which the law regards as *saevitia* or cruelty; can he, when his own misconduct has led his wife to separate herself from him, come into Court, and avowing his misdeeds, insist that it is bound to grant him a decree of adherence? . . . .
>
> Might not the Court refuse its aid to one who had so acted, and regard his conduct as a bar to his claim to relief? . . . .
>
> It is not a notion strange to our law that the Court should refuse its aid to one who does not come into it with clean hands.

It seems to me that the principles stated in this case are of general application and not limited to cases of restitution of conjugal rights where the parties are Mahomedans. Learned counsel went on to argue that although doubtless there was a finding of physical cruelty, which is a finding of fact, that finding required to be reconsidered in its legal aspects, that is to say that it, as stated above, is a finding of fact only in regard to the actual acts of cruelty. He contended that a Hindu husband has a right to inflict corporal punishment on a wife with a light instrument and that the finding in the present case was that during 20 years of married life the wife had only been beaten on three occasions, on two of which she was beaten with fists and kicks only, and it was contended that the plaintiff was justified in inflicting this corporal punishment because the wife was declining to leave the appellant's village Makhi and go to live with him at the various places where as a District Board School Master he was posted. It was contended that a Hindu husband is entitled to demand obedience and that three beatings for disobedience could not be regarded as amounting to habitual cruelty so that a restitution of conjugal rights would involve a danger to safety of the wife. In this connexion learned counsel referred to Dwarka Nath Mitter's book, "The Position of Women in Hindu Law", pp. 309 following, where he has remarked that "such defences are open to her as are possible under the principles of natural justice, read in the light of the Hindu law of marriage" and he has actually referred to the case in 11 M I A 551[2] to which I have just referred above. In subsequent pages the writer has referred to several cases which have been quoted before me, in which it has been held that there may be cases where conduct, though short of legal cruelty, on the part of the husband may bar a suit for restitution. Further on, he mentions several defences, which would not be considered adequate to such a suit as for instance, the marrying of a second wife, the mere making of an assault on wife, or unkindness or neglect short of cruelty. At page 317 he remarks "Unfounded imputations upon the wife's chastity would also be no good defence to a suit for restitution," this remark being based on the Bombay ruling reported in 1 Bom 164[4] in which the learned Judges remarked:

> But we do not think that we should be justified under Hindu law, any more than under English law, in holding that an unfounded imputation upon a wife's chastity, however gross an outrage, is by itself sufficient to constitute legal cruelty: *vide* page 173.

The important words here however are the two words "by itself." Learned counsel has further based his arguments on "The Hindu Law of Marriage and Streedhana by Banerjee, (The Tagore Law Lectures for 1878)," where the relations of husband and wife are discussed in Lecture IV on the legal consequences of marriage. At p. 128 the writer mentions the rule of Manu that a wife may be corrected when she commits faults with a rope or a small shoot of cane, but the writer goes on to say that the weight of Manu's authority is almost balanced by a text of high authority,

2. Moonshee Buzloor Ruheem v. Shumsoonnissa Begam, (1866-67) 11 M I A 551=8 W R 3=2 Suther 59=2 Sar 259 (P C).
3. Mackenzie v. Mackenzie, (1895) A C 384.
4. Yamunabai v. Narayan Moreshvar, (1875) 1 Bom 164.

which says: "Strike not even with a blossom a wife guilty of a hundred faults," and he proceeds to point out that the Penal Code makes no exception in favour of the husband's right to chastise the wife. In my opinion the fact that the appellant chastised the wife only three times in 20 years cannot be defended on the basis of Hindu law in regard to the rights of husbands to punish their wives. Learned counsel for the appellant based his arguments on a number of rulings, beginning with the case reported in 1 Bom 164,[4] just mentioned. He also referred to the cases reported in 5 Cal 500,[5] 19 Cal 84[6] and 34 Cal 971.[7] It does not appear to me that any of these cases is really particularly helpful in the present case. In the last of these cases it was held that the husband would not be entitled to succeed even if his conduct did not amount to cruelty but constituted a grave matrimonial offence. That was also a case where there was a considerable doubt whether the action was instituted bona fide in order to obtain the return of the wife for cohabitation. Another case relied on was 13 All 126,[8] but again, I doubt if this case is really helpful to his argument. At page 160, for example, Mahmood J. remarked:

> The general principles of humanity upon which our Courts act in such matters have however led to a long course of decisions which recognize the rule that legal cruelty of the husband would be a sufficient cause for refusing restitution of conjugal rights, or otherwise affect the claim,

and commenting upon 1 Bom 164,[4] he remarked that:

> In that case the Bombay High Court laid down that the Hindu law on the question, what constitutes legal cruelty sufficient to bar a claim for restitution of conjugal rights, would not differ materially from the English law; that to constitute legal cruelty there must be actual violence of such a character as to endanger personal health or safety, or there must be reasonable apprehension of it, and that mere pain to mental feelings, such for instance as would result from an unfounded charge of infidelity, however wantonly caused or keenly felt, would not come within the definition of legal cruelty.

With great respect, I doubt whether this is exactly what was laid down in the Bombay case[4] and I think that the words "by itself" have perhaps been lost sight of. At the close of his judgment Mahmood J. said:

> I do not think that past cruelty any more than past adultery of the husband would constitute a sufficient defence under the Hindu law to such a suit, and I hold that in cases between Hindus, whilst past cruelty would furnish good reason for apprehending cruelty in the future, a Court would not be justified in dismissing a suit for conjugal rights where the circumstances would warrant the conclusion that no cruelty in the legal sense is to be apprehended, and the welfare and the safety of the wife can be secured even if the suit is decreed.

On behalf of the respondents reliance has been placed on a number of recent rulings, which indicate the progress of opinion such as might be expected from the seed sown in many of the above older rulings relied upon by the counsel for the plaintiff-appellant. In 51 Bom 329[9] it was held by a Bench of the Bombay High Court that in a suit for restitution of conjugal rights by a Hindu husband, the husband is not necessarily entitled to a decree in the absence of a plea of cruelty by the wife, and that where the wife has pleaded desertion and want of bona fides she should be allowed to lead evidence so that the Court may be in a position to judge whether the relief sought for by the husband should be granted or not, and if so on what conditions if any. It was pointed out in more than one place that although the Hindu law lays down the duty of the wife of implicit obedience and return to her husband, it has laid down no such sanctions or procedure as compulsion by the Courts to force her to return against her will and that the remedy and procedure had been adopted by the British Indian Courts from the English Ecclesiastical Courts by various analogies such as to consider them as a species of suit for specific performance. Madgavkar J. in his judgment in this case pointed out that the Courts have not assented to the proposition that actual physical cruelty is necessary to enable the wife to resist such a suit and he remarked:

> In the absence of legislation it appears therefore on the whole that the Courts desire to consider the entire conduct of the parties so as to be able to Judge whether the plaintiff deserves at the hands of the Court the relief which he seeks, and whether such a relief is not unreasonable in the particular case against the defendant.

5. Jogendranundini Dossee v. Hurry Doss Ghose, (1880) 5 Cal 500=5 C L R 65.
6. Matangini Dasi v. Jogendra Chunder, (1892) 19 Cal 84.
7. Dular Koer v. Dwarka Nath, (1907) 34 Cal 971.
8. Binda v. Kaunsilia, (1891) 13 All 126=1891 A W N 18.
9. Jivi Bai v. Narsingh Lalbhai, (1927) 14 A I R Bom 264=101 I C 403=51 Bom 329=29 Bom L R 332.

In 16 Lah 892[10] it was held that under Hindu law a suit by the husband for restitution of conjugal rights can be defeated on the ground of the desertion of the wife for a long period and continued disregard of his marital obligations towards her; it is not necessary to prove actual physical cruelty. A Court should, in each case, consider the entire conduct of the parties and if it comes to the conclusion that the husband has been guilty of continued neglect of the wife and has deserted her and the suit has not been instituted bona fide, the suit should be dismissed. Reliance was placed in this case on a number of cases to which I have referred earlier. Similarly in a recent case of the Madras High Court reported in A I R 1935 Mad 616[11] it was stated as follows :

The Hindu law is silent as regards the right of the husband to obtain the help of the Court in securing the company of his wife; though the Hindu law prescribes the duty of obedience and also contains provisions regarding the right of the wife to claim maintenance, a suit for restitution of conjugal rights is really not contemplated by the Hindu law proper, and such suits have been allowed on the analogy of similar suits in England which were dealt with originally under the Ecclesiastical jurisdiction. There is no stringent rule that in every case, unless actual cruelty is established, a husband is entitled to a decree for restitution of conjugal rights. Whether he is so entitled or not must be decided after a consideration of all the circumstances of the case ; in other words, what is sought in such a suit is an equitable relief, and equitable considerations cannot be ignored even when they are in favour of a Hindu wife.

These decisions seem to me to indicate the line of development, which has taken place in the views of the High Courts on this subject. In the light of these rulings it is necessary to consider the history of the marital relations between the parties as found by the Courts below. They indicate the growth of unsatisfactory relations between the husband and wife from 1929 onwards. He has been guilty of physical violence on at least three occasions and it is clear that marital relations were broken off more than two years prior to the date of the suit. Mt Sheo Dei alleged that she was turned out of the house and in the light of the various reports made by the plaintiff against his wife this seems to be highly probable. In my opinion the conduct of the plaintiff in making charges of theft and immorality against his wife certainly constitutes a matrimonial offence of a very objectionable kind such as can be raised as a defence to a suit for conjugal rights, particularly when there are also acts of physical violence. It also throws grave doubt on the bona fides of the plaintiff in instituting the present suit. The plaintiff stated in his evidence that he was anxious to live with his wife despite her immorality and despite the injury to the family honour caused thereby. In this connexion I may refer to two rulings quoted by learned counsel for the respondents. The first of these is reported in 46 All 210.[12] The head-note runs as follows :

The plaintiff, who was a Brahman, had many years ago turned his wife out of doors because he suspected her chastity. The wife went to live with her uncle, who supported her. Later on, she applied for and obtained an order for maintenance under S. 488, Criminal P. C., against her husband. During these proceedings the husband still refused to take his wife back, stating at the time that he suspected her chastity. When however the wife began to execute her decree for maintenance, the husband proceeded to file a suit for restitution of conjugal rights. It was held that in the above circumstances the inference was legitimate that the defendant would have a reasonable apprehension of bodily injury if she returned to her husband, and that the Court below was right in refusing the plaintiff a decree.

Similarly in A I R 1937 Rang 506[13] it was held in a suit for restitution of conjugal rights that the suit was really intended to avoid payment of separate maintenance which the wife was receiving, and she had reasonable cause for refusing to go to her husband. That also was a case in which there was an order of maintenance under S. 488, Criminal P. C. It seems to me that a similar state of affairs is to be found in the present case. The plaintiff did not institute any suit for restitution of conjugal rights until his wife actually obtained against him an order for maintenance under S. 488, and even when that order was sought by her he repeated his accusations of immorality. A man who in defence to such an application accuses his wife of immorality disentitling her to an order for maintenance, can hardly expect to be believed when in the same breath he says that he is willing to take her back, nor can he at a later date expect that a Court will regard his suit for restitution of conjugal

10. Ude Singh v. Mt. Daulat Kuar, (1935) 22 A I R Lah 386=158 I C 223=16 Lah 892=37 P L R 864.
11. Rukmani Ammal v. T. R. S. Chari, (1935) 22 A I R Mad 616=157 I C 968=69 M L J 210.
12. Babu Ram v. Mt. Kokla, (1924) 11 A I R All 391=79 I C 634=46 All 210=22 A L J 68.
13. Maung Saw Pe v. Ma Dan Sein, (1937) 24 A I R Rang 506=174 I C 121.

rights as a bona fide suit, and in the circumstances that the suit is not a bona fide one it is reasonable to hold that if a decree is given against the wife and the wife in obedience to that decree goes back to the husband there will be serious danger to her health and safety by reason of her so doing. In my opinion in the state of the law as it now stands the two lower Courts rightly dismissed the plaintiff's suit for restitution of conjugal rights. This appeal accordingly fails and is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1939 Oudh 73

YORKE J.

Sita Ram and others — Appellants.

v.

Chheda and another, Plaintiffs and others, Defendants — Respondents.

Second Appeal No. 310 of 1936, Decided on 16th December 1938, against order of Dist. Judge, Hardoi, D/- 26th May 1936.

Oudh Rent Act (22 of 1886), S. 30-A — Finding under Sec. 30-A of Deputy Commissioner is not res judicata and suit in Civil Court to set aside same is maintainable.

The finding of the Deputy Commissioner arrived at while making an order in what is practically an executive matter under S. 30-A cannot operate as res judicata, and a suit in a Civil Court, whose object is to set aside such an order which a Revenue Court alone had jurisdiction to make, is maintainable.

[P 73 C 2 ; P 74 C 1]

K. N. Tandon — *for Appellants.*

P. N. Chaudhri — *for Respondents Nos. 1 and 2.*

Judgment.—This is a second appeal by Sita Ram and others, defendants, in a suit for declaration. This suit has arisen out of proceedings under S. 30-A, Oudh Rent Act. That Section relates to the acquisition of land by a landlord for certain purposes and provides that :

A Deputy Commissioner shall, unless there are reasonable grounds to the contrary, on the application of a proprietor or under-proprietor who is the landlord of a holding, authorize the acquisition of the holding or part thereof for certain purposes.

The present plaintiffs, Chheda and Bhola, made two applications under this Section with reference to plots Nos. 223-C, 317-B and 612-A, all situated in patti Bhawani of khata khewat No. 2 of village Bhithayeen in which the applicants were cosharers. The applicants themselves in their application had admitted that there were other cosharers in the patti, but alleged private partition according to which the plots in dispute were said to belong to their share. In order presumably to decide whether the applicants could be held to be the landlords of the holding in question, the learned Deputy Commissioner framed an issue :

Whether there is a private partition between the applicants and the other cosharer and whether the plot in dispute belongs to the share of the applicants ?

I am not concerned with the question whether any such issue was really necessary, which question depends on whether it has been held that to be entitled as the landlord of a holding the applicant must be in exclusive possession as landlord. At any rate this was the issue and on this issue the learned Deputy Commissioner arrived at the finding that private partition was not proved and therefore the plots in dispute could not be said to belong to the share of the applicants, and he accordingly dismissed the application. The applicants then instituted the present suit in the Civil Court for a declaration that the said three plots situated in patti Bhawani, mahal Nanga, village Bhithayeen, were in the exclusive possession (maqbuza khas) of the plaintiffs, and that the order in question of the Deputy Commissioner had no adverse effect upon the rights of the plaintiffs.

It will be convenient here to dispose of the first ground argued in the present appeal, namely that the Civil Court had no jurisdiction to decide the present suit. This question was raised in the trial Court which decided it in favour of the plaintiffs and against the defendants. It was again raised in the lower Appellate Court but was not apparently argued as no mention is made of the point in the judgment. It has been argued again with some force in this Court on the basis that this is a suit to set aside the order of the learned Deputy Commissioner, and that a suit in the Civil Court, whose object is to set aside an order which a revenue Court alone had jurisdiction to make, is not maintainable. In my opinion there is no force whatever in this contention. For the purposes of making an order, in what is practically an executive matter under S. 30-A, Oudh Rent Act, the Deputy Commissioner arrived at certain findings but those findings cannot operate as 'res judicata', and learned counsel has not been able to point out to me anything which would otherwise bar the present suit to obtain a declaration that these plots were in the exclusive possession of the

plaintiffs under a private partition, and that their rights as zamindars in exclusive possession of those plots are not adversely affected by the incidental finding of the learned Deputy Commissioner.

The next question, which arises, goes to the merits of the case. The question for decision was whether the plots in suit appertained exclusively to the share of the plaintiffs, that share having been separated from the only other share in the patti by a private partition. The decision of this question involves an examination of the previous history of the property as a whole, but I am of opinion that the ultimate decision of the matter is a decision on points of fact and nothing else, and that it is not therefore a decision which can be assailed in second appeal. It appears from the record that the property of patti Bhawani, which amounts to 2½ biswas share out of 20 biswas in mahal Nanga, was originally owned by one Hulli, on whose death it was owned by his sons, Ram Din, Bhawani, Dhanna, Nanda and Parmoon, in equal shares. It is said that Parmoon died issueless about 1880 or earlier, and his share was mutated in the name of his widow. This lady however disappeared within two years and has not been heard of since, but no steps were taken for mutation of the share recorded in her name. In fact however it was owned by the four remaining sons of Hulli in equal shares. It was alleged that there was a private partition between these four sons, and these particular plots now in suit were allotted to the share of Nanda. On the death of Nanda his son Gobrey sold his one-fourth share to plaintiffs 1 and 2 who are the successors-in-interest of Ram Din and Bhawani. These plaintiffs thus became the owners of three-fourth share in the whole patti Bhawani. It was inaccurately mentioned in the plaint that Dhanna sold his share to the father of defendant 5, Maharaj Singh, but it has been shown as a fact that what happened was that he mortgaged his one-fourth share in favour of Maharaj Singh, who got a foreclosure decree in October 1896, and ultimately foreclosed and came into possession of the share. It has been clearly established by reference to the documents that the share mortgaged and foreclosed amounted to one-fourth of the whole patti Bhawani. Defendant 5, Shiama Kumar Singh, was in possession of that share. In defence defendants 1 to 4 who are recorded as cosharers of one-twentieth in the patti, and defendants 6 to 8, who were the tenants in possession of the plots, pleaded that the plots in suit were owned by the plaintiffs jointly with defendants 1 to 4 and the tenant defendants paid part of their rent to the plaintiffs and part to defendants 1 to 4. It was also alleged that the suit was not cognizable by a Civil Court and a plea of res judicata was taken. That plea is however no longer pressed. The learned Munsif relying on oral and documentary evidence held that there had been a private partition between Ram Din, Bhawani, Dhanna and Nanda and the plots in suit had been allotted to Nanda, from whom they had come to the plaintiffs, hence the plaintiffs besides being the zamindars or owners were exclusively in possession of the plots in suit.

The learned District Judge discussed at some length the question whether there had been a partition as alleged and whether the plots in suit were allotted to Nanda. He has not discussed separately the question of the allotting of these plots to Nanda which presumably was not argued before him, but after considering the arguments on this question of partition he held that the oral evidence about the alleged partition, that is the actual act of partition was worthless and could not form the basis of a finding that there was a partition between the four brothers and the said plots fell to the share of one of them. He however agreed with the finding of the Munsif which was based on the fact that Dhanna, the grandfather of defendants 1 to 4, owned not more than a one-fourth share in the patti and mortgaged the whole of that one-fourth share which was foreclosed in favour of defendant 5, Shiama Kumar Singh, with the result that Dhanna had no remaining share in the patti. It was proved by evidence on the record that the whole of the cultivatory share of Dhanna was in the tenancy of one Meharban, from whom alone defendant 5 collected rent. Defendant 5 had no connexion with the other cultivatory plots situated in the patti and it must necessarily follow that such cultivatory plots, whether they were tenancy plots or in the personal cultivation of the zamindars, were in the exclusive possession of the plaintiffs. It seems to me that although the lower Appellate Court has not stated the point in very clear terms, it has quite clearly mentioned the finding of fact that there was a private partition, and

that it was as the result of that private partition that Dhanna mortgaged the whole of his share, and Shiama Kumar Singh came into exclusive possession of that share. It followed that defendants 1 to 4 had no subsisting interest whatever in the patti and defendants 6 to 8 could not be heard to say that they were the tenants of defendants 1 to 4 as well as of the plaintiffs. The statement that they paid rent to defendants 1 to 4 was evidently rejected. In my opinion this was certainly a finding of fact which cannot be assailed in second appeal, but I may deal with the chief argument put forward by learned counsel. His argument was based on a misreading of the plea of defendant 5. Defendant 5 stated that the whole of his cultivatory land was in the tenancy of Meharban. The khetauni entries however show the area of Meharban's tenancy land as 2 bighas 19 biswas out of 3 bighas 15 biswas which is the area of the whole share. Hence learned counsel contended that 16 biswas land are not accounted for as having been mortgaged by Dhanna, but the very papers to which he has referred show that there are 15 biswas of grove land entered in the name of Shiama Kumar Singh, and it is clear that this area represents the balance of the area corresponding to the one-fourth share of the original mortgagor Dhanna.

The only other point suggested by him is that Dhanna was not competent to mortgage the whole one-fourth share because the widow of Parmoon had disappeared, but the fact remains that he did do so, and that defendants 1 to 4, who are the only persons who could make any claim in respect of this act of Dhanna, admitted that Dhanna had mortgaged the whole of his one-fourth share. The defendants-appellants, as it seems to me, can derive no inference in their favour from an argument based on the effectiveness or otherwise of the mortgage by Dhanna to dispose of the whole of the property covered by it. That mortgage has in fact effectively disposed of that property and the appellants are not concerned with that fact. On the merits also therefore it appears to me that the lower Appellate Court rightly dismissed the appeal of the defendants. There is no force in this appeal which therefore fails and is dismissed with costs.

S.G./R.K. *Appeal dismissed.*

A. I. R. 1939 Oudh 75

HAMILTON AND YORKE JJ.

Pt. Ramsagar Prasad — Debtor — Appellant.

v.

Mt. Shayama and another, Creditors-Claimant and others, Debtors — Respondents.

First Appeals Nos. 126 and 128 of 1936, Decided on 3rd January 1939, against decree of Special Judge, Bara Banki, D/- 14th August 1936.

U. P. Encumbered Estates Act (25 of 1934), Ss. 14 (a) and 15—Under S. 15 Special Judge has to see whether Civil Court that passed decree could have passed it if that Court had to comply with provisions of S. 14 — Fact that interest on loan plus pendente lite and future interest exceeds unpaid principal is no ground for reducing it.

The provisions in S. 15 that when there has been a decree, the Special Judge must accept the findings of the Court which passed the decree except in so far as they are inconsistent with the provisions of S. 14, mean that he has to see whether the Civil Court that passed the decree could have passed the decree which it did pass if that Court had had to comply with the provisions of S. 14. If the Civil Court at the time that it passes a decree had been bound by Sec. 14 it could have given a decree for the unpaid principal, for interest directly due on the bond or mortgage deed, that is to say on contract not exceeding the principal and in addition it could have given interest pendente lite and future interest. Hence, when a Special Judge proceeds under S. 15 and he finds that the interest on a loan up to the time when the suit comes before a Civil Court together with interest pendente lite and future interest granted by that Court comes to more than the unpaid principal, it cannot be held that the total interest must be reduced so as not to exceed the unpaid principal.

[P 76 C 2; P 77 C 1]

G. Hasan and I. Husain — *for Appellant.*

Ali Zaheer and Nasirullah Beg — *for Respondents 1 and 2 respectively.*

Judgment. — There are two appeals Nos. 126 and 128 against a decision of the Special Judge, Bara Banki, in proceedings under the Encumbered Estates Act, the applicant in those proceedings being Pt. Ram Sagar Prasad. In both appeals the same point of law is raised and a question of fact is also raised in Appeal No. 128 and we shall deal with it at once. The question here was whether the principal was Rupees 2644 or whether the principal was only Rs. 1800. The creditor alleged that Rupees 2644 were advanced in cash while Ram Sagar Prasad, the applicant under the Encumbered Estates Act proceedings, alleged that he received Rs. 1100 in cash and had

previously received Rs. 700 in cash for which he had executed a pronote and the interest on that Rs. 700 had amounted to Rs. 200 so that there was a promissory note for Rs. 2000 and as interest had again not been paid on 4th April 1925, a pronote for Rs. 2644 was executed, but as we have explained above only Rupees 1800 of this amount was principal and the rest was interest. The creditor admitted that there had been an earlier pronote for Rs. 700 but alleged that Rs. 900, that is to say the principal of Rs. 700 plus interest, had been paid off and the transaction had been closed. He asserted that no promissory note for Rs. 2000 was executed at all, but Rs. 2644 had been taken in cash and the promissory note dated 4th April 1925 for Rs. 2644 had consequently been executed.

The debtor applicant produced in support of his allegation himself and a karinda in the witness-box and he had also produced a book of accounts with an entry that he executed a promissory note for Rs. 2000 which was composed of Rs. 1100 advanced in cash and Rs. 900 due as principal plus interest on an earlier pronote of Rs. 700. Exs. A-1, A-2 and A-3, a bond and two pronotes, have been filed by him dated 4th April 1925, 23rd February 1928 and 6th February 1931. This last one was a bond on which the creditor obtained a decree. It is clear therefore that the two earlier pronotes which had been paid off by the execution of this bond were returned to the debtor and the presumption therefore is that had an earlier pronote for Rs. 2000 been in existence it would have been returned to the debtor and would have been in his possession but he has filed no such pronote, though he filed the account book in which there is an entry of a pronote for Rs. 2000. This book of accounts shows that entries for several days and sometimes for as long as a week were entered at one time. This book of accounts called "sahi" comes abruptly to an end on 31st August 1922 though only a small portion of the book contained writing. The pages are also not numbered. The learned Special Judge therefore did not attach any great value to this book of accounts. On the other hand, account books of the creditor, Janki Prasad, predecessor-in-interest of the present creditor, were produced and on p. 54 of Ex. L there is an entry that a pronote dated 12th November 1919 for Rs. 700 was executed by Ram Sagar Prasad, but in a later book of accounts, Ex. M, there is an entry at p. 24 to the effect that it had been paid off by a payment of Rs. 900 in cash made by Ram Sagar Prasad, on 5th August 1922. There is of course no entry of any promissory note of Rs. 2000 for in view of the entry of Rs. 900 it could not have been there. The learned Special Judge has preferred this account framed on the mahajani system with entries regularly made day after day and the striking of a daily balance to that sahi of the debtor applicant and his evidence and the evidence of his karinda. It is impossible for us to say that in doing so the learned Special Judge was not justified and we find no force in the appeal therefore on the question of fact which has been raised before us.

The point of law which is the same in both appeals is given as follows in the grounds of appeal of Appeal No. 126 :

> Because the learned Special Judge erred in law in holding that the claim in respect of interest awarded by the decree from the date of the decree to the date of the application is not covered by S. 14, sub-s. 4 (a), Encumbered Estates Act.

Actually however we have to consider not merely S. 14, sub-s. 4 (a) but also S. 15, Encumbered Estates Act. What the learned counsel urges before us is that when a Special Judge proceeds under S. 15 and he finds that the interest on a loan up to the time when the suit comes before a Civil Court together with interest pendente lite and future interest granted by that Court comes to more than the unpaid principal, the total interest must be reduced so as not to exceed the unpaid principal. This means that the Special Judge treats a loan to which S. 15 applies exactly as a loan to which S. 14 applies. In other words, he sees what the unpaid principal is, what the interest is up to the date of the application and if the interest exceeds the principal he reduces it so as to make it not more than the principal; we think that if this was the intention of the Legislature it would have been very easy to say in Sec. 14 that the Section applied to claims whether they had or had not been the subject of a decree. When however there has been a decree, the Special Judge must under S. 15 accept the findings of the Court which passed the decree except in so far as they are inconsistent with the provisions of S. 14. This, in our view, means that he has to see whether the Civil Court that passed the decree could have passed the decree which it did pass if that Court had had to comply with

the provisions of S. 14, or to put it in other words, the Special Judge has to say to himself:

> If I under Sec. 14 had then had to give a decree would the decree that I could have given under S. 14 correspond with the decree which the Civil Court has in fact given ?

The Special Judge passes a simple money decree under S. 14 (7) for an amount composed of principal and interest and also for costs which he may allow and pendente lite and future interest at a rate not greater than rates specified in S. 27. The amount of interest on the loan which he is entitled to grant must not exceed that portion of the principal found due on the date of the application. It seems clear to us therefore that if there was a claim in which the interest due on the bond, that is to say on contract, exceeded the principal he would reduce that interest so as to be not more than the principal and he would grant pendente lite and future interest with the ultimate result that the three classes of interest would exceed the portion of the principal still found due. If the Civil Court at the time that it passes a decree had been bound by S. 14 it could have given a decree for the unpaid principal, for interest directly due on the bond or mortgage deed, that is to say on contract, not exceeding the principal and in addition it could have given interest pendente lite and future interest. It may be that in giving pendente lite and future interest it would not have been entitled to exceed the rates specified in S. 27, but we do not feel called upon to decide this point as it has not been urged in these appeals that the decision of the Special Judge is incorrect in view of S. 14 (7) but that it is incorrect in view of S. 14, sub-s. 4 (a).

Both parties are however agreed that the Special Judge has in his judgment not correctly applied the principles that he himself has laid down. In the suit which has given rise to Appeal No. 126, the decree for Rs. 2961-6-6 is composed as follows :

		Rs.	as.	p.
Principal amount	...	1400	0	0
Rate of interest per cent. per mensem 1 12 0				
Period 19th August 1930 to 8th July 1934				
Interest	...	1140	12	6
Costs of the suit	...	420	10	0

It was admitted by the parties for reasons not given in the judgment that the principal sum due was Rs. 1310 and not Rs. 1400 and this sum has accordingly been taken as principal by the learned Special Judge and must be so taken by us. The interest therefore given can no longer be Rs. 1140-12-6. Rs. 73-5-0 must be deducted making interest Rs. 1067-7-6. List A attached to the written statement by the creditor has further entries as follows regarding the period after the Civil Court decree:

		Rs.	as.	p.
Principal amount	...	2961	6	6
Rate of interest 6 per cent. per annum				
Period 8th July 1934 to 7th February 1936				
Interest	...	282	0	0
Realised	...	200	0	0

The Special Judge has given these figures as the sum due to the creditors :

		Rs.	as.	p.
Principal	...	1310	0	0
Interest	...	1310	0	0
Portion of the unpaid costs of the suit as awarded by the decree		220	0	0
Interest awarded by the decree as calculated by the parties		183	8	6

There is obviously an error in giving the interest as Rs. 1310, for, even on Rs. 1400 it was not more than Rs. 1140-12-6 and on Rs. 1310 it was only Rs. 1067-7-6. Rs. 220 is the cost minus the realization of Rs. 200 and it is correct. Rs. 183-8-6 is the interest awarded by the decree as calculated by the parties. Now, the yearly interest at six per cent. per annum on Rs. 2961, the total including costs of the decree, would amount to Rs. 178 but the period is given as 8th July 1934 to 7th February 1936, that is to say, one year and seven months; so how this sum of Rs. 183-8-6 which was agreed upon by the parties as correct was arrived at we do not know. Consequently, we must accept it as correct as the parties have agreed upon it. We have already stated that in the view we take, the fact that interest on the loan itself plus pendente lite and future interest exceeds the unpaid principal is no reason for reducing it and had the calculations been correct we would have dismissed this appeal. In view however of the fact that the parties agreed that Rs. 1310 is the principal, the interest in the account given by the Special Judge is inexplicable and incorrect, and we must modify this decree by reducing this interest to Rs. 1067-7-6 with the result that the decree given by the learned Special Judge is reduced to Rupees 2781-10-0 in Appeal No. 126.

Turning now to Appeal No. 128, we find the valuation of the suit given there as Rs. 6879-12-6 and the valuation of the appeal as Rs. 6129-4-0, that is to say, the decision of the Special Judge is not disputed only as to Rs. 750-8-6. In the replication of the appellant, dated 1st July 1936, paras. 12 and 13 of which are referred to in the memorandum of appeal, the present appellant admitted that the principal amount was not more than Rs. 1800 and the total amount to which the opposite party was entitled could not be more in any case than Rs. 3600. In view of the provisions of S. 14, sub-s. 4 (a) quite apart from the question of the amount given as costs the appellant therefore did not dispute Rs. 3600 out of Rs. 6879-12-6 so that the valuation of the appeal as Rs. 6129-4-0 is quite inexplicable. The grounds of appeal apart from that point of fact which we have dealt with in the beginning of our judgment are that the Special Judge erred in holding that S. 14, sub-s. 4 (a), Encumbered Estates Act does not apply to claims based on decrees already passed. This is the same ground of appeal as is contained in appeal 126 and we have dealt with it.

The last ground of appeal is that the learned Special Judge erred in holding that the amount of costs or future interest awarded under the previous decree cannot be varied by the Court. There is nothing to show us that this point was ever raised in the Court of the Special Judge nor has it been raised before us and therefore it is outside our consideration. The learned Special Judge has held as follows:

> The claimant is entitled to Rs. 2644 on account of principal, to a like sum on account of interest due till the date of the present application, to Rs. 499-8-0 on account of the costs awarded by that decree. This comes to Rs. 5787-8-0. To Rs. 341-12-0 on account of future interest awarded by the previous decree. The claim is accordingly decreed for a total sum of Rs. 6129-4-0 and proportionate costs. The decretal amount shall carry future interest from 30th July 1935, till realization at Rs. 4-4-0 per cent. per annum.

Even the applicant in his replication of 1st July 1936, stated the costs to be Rs. 999-8-0 so it appears that there is some clerical mistake by which the creditor is losing Rs. 500 of his costs but he filed no appeal about this. As the original sum found due was Rs. 2644 and the decree apart from the costs given by the Civil Court was Rs. 5692 so that interest was more than the principal, that interest must be reduced to the amount of the principal, which has been done by the learned Special Judge. The learned Special Judge finds Rupees 341-12-0 to be the future interest awarded by the previous decree. The date of the previous decree was 2nd June 1934, and the date of the application under the Encumbered Estates Act was 7th February 1936, that is to say, twenty months after that decree. As the rate of the decree was six per cent, twenty months at six per cent. equal ten per cent. and even on the finding that the amount on which such interest should be calculated is Rs. 5787-8-0 the interest would be Rs. 578-9-0 instead of Rs. 341-12-0. The correct decree would therefore really be for Rs. 5288 principal plus interest on the loan up to the Civil Court case, Rs. 999-8-0 for costs and Rs. 578-9-0 for interest after the period between the decree and the application under the Encumbered Estates Act forming a total of Rs. 6866-1-0, but this decree is only for Rs. 6129-4-0 so it cannot be varied in favour of the appellant nor in favour of the respondent because the latter has filed no cross-appeal.

This appeal is therefore dismissed. As the contention of the appellant in both appeals has failed although we have had to make a modification in one owing to a miscalculation by the Special Judge, we give the respondents their costs in both the appeals.

D.S./R.K. *Order accordingly.*

A. I. R. 1939 Oudh 78

THOMAS C. J. AND ZIAUL HASAN J.

P. Suraj Narain — Plaintiff — Appellant.

v.

Mt. Ram Devi and others—Defendants — Respondents.

First Appeal No. 5 of 1936, Decided on 30th November 1938, against order of Addl. Civil Judge, Hardoi, D/- 13th November 1935.

Hindu Law— Widow—Waste—Reversioners cannot interfere unless there is danger to property — Specific acts of waste must be alleged and proved — Realization of money or failure to keep accounts by widow does not raise presumption of waste.

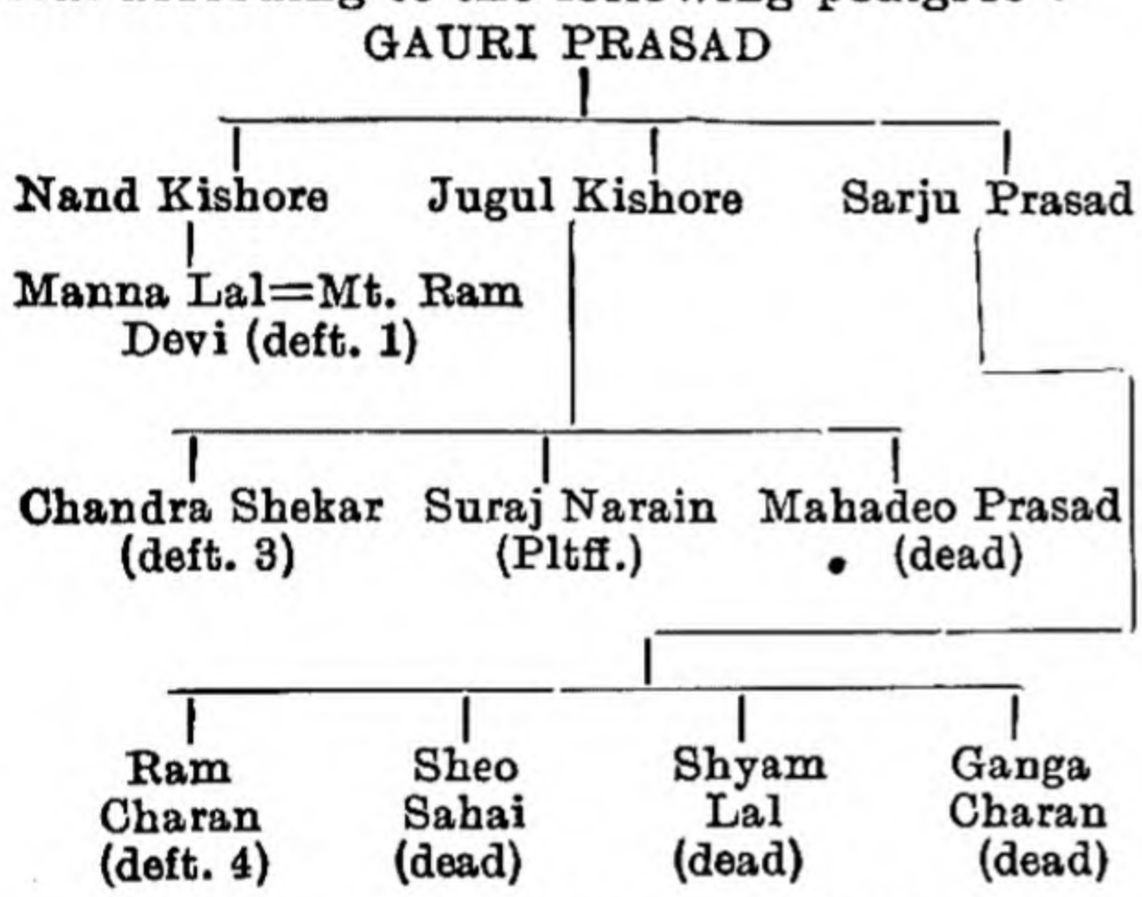
When a Hindu widow inherits the property upon the death of her husband, the reversioners cannot interfere with her management unless there is danger to the estate from the manner in which she is dealing with it. Therefore specific acts of waste or of mismanagement, or other mis-

conduct must be alleged and proved. Unless this is done the widow can neither be prevented from getting the property into her possession nor can any orders be given to her by anticipation as to the mode in which she is to use or invest it. The mere fact that the widow realized money on a mortgage made in favour of her husband or that she failed to keep accounts does not raise a presumption of waste : *15 O C 223 and A I R 1936 Oudh 4, Disting.* [P 80 C 1, 2]

Shankar Sahai Srivastava — *for Appellant.*

Sri Ram and L. S. Misra — *for Respondents 1 and 2.*

Judgment.— This is a plaintiff's first appeal against a decree of the learned Additional Civil Judge of Hardoi. The plaintiff-appellant claimed along with defendants 3 and 4 to be the reversionary heir of Manna Lal according to the following pedigree :



It appears that Manna Lal held a mortgage of a five biswa share of village Birianazirpur, belonging to a certain Debi Prasad and Bhagwan Das by a deed (Ex. 18) dated 18th September 1926, executed for a sum of Rs. 7400. On 11th April 1933, the mortgagors sold their equity of redemption in the aforesaid five biswas to Pandit Debi Shankar, defendant-respondent 2. The suit which has given rise to this appeal was brought by the plaintiff against Manna Lal's widow, Mt. Ram Devi, defendant 1, and Pandit Debi Shankar, defendant 2, for a declaration that the plaintiff and defendants 3 and 4 are the owners of the mortgage money due under the mortgage deed of 18th September 1926, for Rs. 7400 as next reversioners and that defendants 1 and 2 have no right to allow or make redemption of that mortgage without the consent and consultation of the plaintiff and defendants 3 and 4. It was alleged in the plaint that defendants 1 and 2 are conspiring to enable defendant 2 to redeem the mortgage and misappropriate the money by accepting a smaller sum than was due on the mortgage deed.

The suit was contested by defendant 1 who denied the allegations contained in the plaint and contended that nothing has been settled in respect of redemption of the mortgage in question, that the entire amount due on the mortgage belongs to her and that nobody has a right to lay claim to that amount during her lifetime. The following issues were framed in the case :

1. Are the plaintiff and defendants 3 and 4 the next reversioners of Manna Lal ?

2. Did defendant 1 intend or propose to allow redemption of the mortgage in suit for a lesser amount as alleged ?

3. Are the plaintiff and defendants 3 and 4 owners of the mortgage money in suit and is defendant 1 not entitled to allow redemption without consulting them as alleged ?

4. To what relief, if any, is plaintiff entitled against the defendants ?

5. Is the plaintiff not entitled to sue as alleged?

Issues 1 and 5 were decided by the learned Judge in favour of the plaintiff, but the others against him. Eventually the suit was decreed, "for only this declaration that defendant 1 has got no right to spend or utilize the mortgage money of Ex. 18 or any other corpus of her husband's estate without legal necessity." The rest of the plaintiff's suit was dismissed. The plaintiff was ordered to bear his own costs and to pay those of defendant 1. The plaintiff brings this appeal and challenges the lower Court's findings on Issues 2 and 3 and also the order about costs.

On the question whether defendant 1 was intending to allow redemption of the mortgage in suit for a lesser amount than actually due, the only evidence on record is the statement of the plaintiff himself. The learned Judge has disbelieved that statement not only because the plaintiff is the most interested person but also because his evidence did not impress him favourably. We have also gone through his evidence and agree with the learned Judge that the question cannot be decided in favour of the plaintiff on the strength merely of that interested statement. We therefore hold that the plaintiff has failed to prove that there exists any collusion between defendants 1 and 2 or that defendant 1 is intending to accept a smaller amount than actually due for redemption of the mortgage in question. The next question is, what is the nature of defendant 1's interest in the property left by her husband and what

are the plaintiff's reversionary rights. At p. 166 of Mulla's Principles of Hindu Law, 8th Edn., it is said :

A widow or other limited heir is not a tenant for life, but is owner of the property inherited by her, subject to certain restrictions on alienation, and subject to its devolving upon next heir of the last full owner upon her death. The whole estate is for the time vested in her and she represents it completely. As stated in a Privy Council case 43 I A 207,[1] 'her right is of the nature of a right of property; her position is that of owner; her powers in that character are however limited; but . . . . . so long as she is alive, no one has any vested interest in the succession'.

Again at page 215 it is said :

'A widow, like a manager of the family, must be allowed a reasonable latitude in the exercise of her powers provided . . . she acts fairly to the expectant heirs.' The Court will not interfere with her management unless there is danger to the estate from the manner in which she is dealing with it.

As regards the plaintiff's right to bring a suit of the nature of the present suit we are of opinion that there is no cause of action for a reversioner unless he can prove waste against the widow. On this question, Mayne in his Treatise on Hindu law and Usage refers to the following remark of Sir Lawrence Peel in Sevestre's Rep 661[2] as laying down the correct law

The Hindu female is rather in the position of an heir taking by descent until a contingency happens, than an heir or devisee upon a trust by implication. Therefore a bill filed by the presumptive heir in succession against the immediate heir who has succeeded by inheritance must show a case approaching to spoilation.

and says further :

She must appear not merely to be using but to be abusing her estate. Therefore specific acts of waste or of mismanagement, or other misconduct must be alleged and proved. Unless this is done the female heir can neither be prevented from getting the property into her possession nor from retaining it in her hands nor compelled to give security for it, nor can any orders be given her by anticipation as to the mode in which she is to use or invest it.

The last mentioned remark disposes of the contention of the learned counsel for the appellant that defendant 1 be ordered to use only the usufruct of the amount in question and deposit the principal in some bank. No act of waste has been alleged, much less proved by the plaintiff. It was said that defendant 1 had realized money on another mortgage deed, a copy of which is on the record as Ex. 3, but has not accounted for it; but from the mere fact that the money was realized by respondent 1 no presumption of waste can be raised against her, particularly when there is not a word in the plaint to show that any waste was committed or was being committed by her. Then, it was said that according to the evidence of the defendants' own witness and mukhtar-i-am no accounts are kept by the widow but to our minds no presumption of waste can be made even from the absence of accounts. At any rate the plaintiff is not, in our opinion, entitled to argue on the widow's realization of money on Ex. 3 when no question whatever on the point was put by him to the widow's brother and agent, D. W. 1. The learned counsel for the appellant relies on 15 O C 223[3] in which it was held that where a reversioner is a party to the suit, he is entitled to ask the Court to safeguard his interests against possible acts of waste by the widow provided always that he can show reasonable grounds for apprehending the same In the present case however no reasonable grounds exist for apprehending waste at the hands of the widow. Reliance was also placed on the case in 1935 O W N 1122,[4] but in that case a Hindu widow got the bonds standing in her deceased husband's name renewed in her own name and the recitals of the new bonds showed as if consideration was paid in cash and it was in these circumstances that it was held that it amounted to waste on the part of the widow and the reversioner had a right to sue to restrain such waste. No such considerations arise in the present case.

Lastly, it was contended that the Court below ought to have saddled the plaintiff with the costs of the contesting defendant but the learned Judge has given good reasons for doing so when he says that :

He (plaintiff) had filed his suit in fact without any cause of action and the suit as launched by him has been practically dismissed.

We have ourselves held that on the facts proved no cause of action can really be said to have arisen to the plaintiff. The appeal is therefore dismissed with costs and the lower Court's decree confirmed.

N.S./R.K. *Appeal dismissed.*

1. Janaki Ammal v. Narayanaswami Aiyar, (1916) 3 A I R P C 117=37 I C 161=39 Mad 634=43 I A 207 (P C).
2. Harrydoss v. Rungunmoney, Sevestre's Rep 661.
3. Kailasha v. Bitto, (1912) 15 O C 223=16 I C 471.
4. Sheo Das v. Ramkali, (1936) 23 A I R Oudh 4=158 I C 301=11 Luck 508=1935 O W N 1122.

A. I. R. 1939 Oudh 81

ZIAUL HASAN J.

Muneshwar Bux Singh — Applicant.

v.

Emperor.

Criminal Revn. Appln. No. 143 of 1938, Decided on 13th December 1938, from order of Addl. Sess. Judge, Sitapur, D/- 31st October 1938.

(a) Penal Code (1860), S. 351 —Apprehension of use of criminal force must be from person making gestures and not from others.

According to the definition of assault under Sec. 351 the apprehension of the use of criminal force must be from the person making the gesture or preparation; and if that apprehension arises not from such person but from somebody else it does not amount to assault so that even if the accused's followers moved a little forward at the gesture from him, it cannot amount to assault by the accused. [P 82 C 2]

(b) Penal Code (1860), Ss. 47 and 349—Word 'animal' in S. 47 does not include human being—Causing change in position of another human being is not criminal force.

The word 'animal' in S. 47 does not include a human being. It follows that an accused by causing change in the position of another person who advances forward brandishing his lathi at the Magistrate cannot be said to have used force within the meaning of S. 349. Therefore the accused cannot be held guilty of any offence under S. 353. [P 83 C 1]

(c) Penal Code (1860), S. 224—Essentials of S. 224 stated—Magistrate without power to arrest accused ordering arrest—Sub-Inspector of Police putting his hand on shoulder of accused to effect arrest without explaining the reason of his arrest — Accused escaping — Accused held not guilty under S. 224.

For Sec. 224 to apply, it is necessary that the accused who is charged under it must have been lawfully apprehended or detained in custody which in its turn depends on whether the Magistrate ordering the arrest of the accused has power to do so. [P 83 C 1]

The Magistrate ordered the arrest of the accused for an alleged offence under S. 353 and the Sub-Inspector of Police put his hand on the shoulder of the accused or caught hold of his wrist in order to effect the arrest without the least intimation to him for what offence he was being arrested, and the accused wrenched himself free and escaped, but the alleged offence under S. 353 was ultimately found to be not proved :

Held that it could not be said that the accused was charged with an offence and the Magistrate had power to cause his arrest and hence the accused could not be convicted under S. 224. [P 83 C 2]

(d) Criminal P. C. (1898), S. 128—Scope of.

Section 128 though authorizes arrest under certain circumstances has nothing to do with the general powers of arrest possessed by a Magistrate, but only lays down circumstances in which an assembly may be legally dispersed by force. [P 83 C 2]

Dr. J. N. Misra and Azizuddin — *for Applicant.*

Asst. Govt. Advocate — *for the Crown.*

Order. — This is an application by Thakur Muneshwar Bakhsh Singh for revision of an order of the learned Sessions Judge of Sitapur dismissing his appeal against his convictions and sentences under Ss. 353 and 224, I. P. C. The applicant and four others were prosecuted under Ss. 143/341, 353 and 224/225, I. P. C., in the Court of the Sub-divisional Magistrate, Misrikh.

The case for the prosecution was as follows: On 15th March last while a fair known as Paikarma fair was going on in Misrikh, Babu Kamta Prasad, Joint Secretary of the Mela, came to the Sub-divisional Magistrate, Mr. Mohammad Husain, P. W. 7, who was in camp in the Mela, at about 11 P. M. and informed him that a band of rogues was molesting women and that the Thakur of Baniamau (namely the present applicant) with his followers armed with lathis had completely blocked up one of the mela lanes and that there was a danger of a breach of the peace. The Sub-divisional Magistrate ordered the second officer of the Thaka, who was present, to go and look into the matter. Mr. T. N. Kaul, I. C. S., an Assistant Magistrate who had been deputed to the mela by the District Magistrate to take cognizance of cases of petty offences in the mela, was also present. He volunteered to go with the Sub-Inspector to the place where, according to Babu Kamta Prasad's statement, there was danger to public peace. He was taken to a square on the eastern side of which was a lane in which there was a gathering of some forty persons armed with lathis, who had completely obstructed the way. Kamta Prasad also pointed out to Mr. Kaul the present applicant who was settling a bargain about a ring at a jeweller's shop. The men armed with lathis informed Mr. Kaul that they were sepoys of the Raja of Baniamau. He asked them to move on and not to obstruct the way but was told that they would move from the place if ordered to do so by the Raja of Baniamau. The Naib Tahsildar who was also with Mr. Kaul asked the present applicant to remove his men from the place but the applicant retorted, "Who are you to threaten me?" Mr. Kaul then himself went up to the applicant and asked him to remove his lathbands from the place as they were a danger

to the peace owing to their carrying their lathis in an unusual manner. The applicant however replied: "I don't care for anyone." Then the Naib Tahsildar for the first time brought to the notice of the applicant that the person who was speaking to him was the Joint Magistrate and told him to be polite in his speech. To this the applicant replied: "You are threatening me."

According to the evidence of Mr. Kaul each time that the applicant said that he was being threatened by the Naib Tahsildar or by him (Mr. Kaul), he (the applicant) beckoned to his men and they advanced a little, brandishing their lathis. Mr. Kaul apprehending an immediate breach of the peace directed the Sub-Inspector to arrest the present applicant, whereupon Hasib Khan, Sub-Inspector, immediately laid his hand upon the applicant's shoulder and also seized him by the wrist but the Thakur wrenched himself free and being surrounded by his followers, escaped from the mela. The authorities and the police constables followed him to some distance but the applicant disappeared. Mr. Kaul went back to the Sub-divisional Magistrate and informed him of the incident. Then they all went to the applicant's camp in the mela and arrested some persons there. Subsequently the applicant and four others were prosecuted for the offences mentioned above. The trying Magistrate acquitted three out of the five persons but convicted the present applicant and one Raja Pande of all the charges brought against them. They were also ordered under S. 106, Criminal P. C., to execute bonds to keep the peace for the period of one year. Both of them appealed to the Sessions Judge and the learned Judge while acquitting Raja Pande altogether acquitted the present applicant of the charges under Ss. 143/341, I. P. C. He however maintained the convictions of the applicant under Ss. 353 and 224, I. P. C., but made the sentences of six months rigorous imprisonment, awarded by the Magistrate under each of the charges, concurrent. The fine of Rs. 250 imposed under each Section was maintained. Nothing was said by him as to the order made by the trying Magistrate under S. 106, Criminal Procedure Code.

It is contended on behalf of the applicant that no offence under Sec. 353 or S. 224, Penal Code, has been made out against the applicant. The charge against all the accused was as follows :

> Firstly, that you on or about 15th March last at about 10-30 p. m. did obstruct a public right of way in the fair at Misrikh and thereby committed an offence punishable under Ss. 143/341, Penal Code, and within my cognizance. Secondly, that you having on the same occasion been duly directed by the Assistant Magistrate present to clear the said public way did seek to deter him from his duty by show of criminal force and thereby committed an offence punishable under S. 353, Penal Code, and within my cognizance. Thirdly, that you on or about 15th March last on the same occasion upon one of your number, namely Muneshwar Bakhsh Singh, being arrested by the Sub-Inspector present did with intent assist the said Muneshwar Baksh Singh when he knowingly resisted his legal apprehension and thereby committed an offence punishable under Ss. 224/225, Penal Code, and within my cognizance.

The applicant has been acquitted under Ss. 143 and 341, Penal Code, as mentioned above and the question is whether or not he was guilty under Ss. 353 and 224, Penal Code. The learned Assistant Government Advocate bases the applicant's conviction under S. 353 on the following portion of Mr. Kaul's evidence :

> Then the Naib Tahsildar pointing to me said 'You must speak politely to the Joint Magistrate.' This further infuriated him (the present applicant) and he again said to the Naib Tahsildar 'You are threatening me' and again beckoning his men caused them to advance another foot brandishing their lathis.

It is argued that the applicant was guilty of an assault on Mr. Kaul with intent to prevent or deter him from discharging his duty of dispersing the crowd by beckoning to his followers and causing them to move brandishing their lathis. 'Assault' under S. 351, Penal Code, is defined thus :

> Whoever makes any gesture or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person is said to commit an assault.

According to this definition the apprehension of the use of criminal force must be from the person making the gesture or preparation and if that apprehension arises not from that person but from somebody else, it does not amount, in my opinion, to assault on the part of that person, so that even if the applicant's followers moved a little forward at a gesture from him, it cannot to my mind amount to an assault by the applicant. This is further clear from S. 349, Penal Code, which defines "using force" to another. That Section runs as follows :

> A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or

cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling; Provided that the person causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion or cessation of motion in one of the three ways hereinafter described :

First. By his own bodily power. *Secondly*. By disposing any substance in such a manner that the motion or change or cessation of motion takes place without any further act on his part, or on the part of any other person. *Thirdly*. By inducing any animal to move, to change its motion or to cease to move.

As under S. 47 of the Code the word 'animal' does not include a human being, it follows that according to S. 349 force cannot be said to be used by one person to another by causing change in the position of another human being. Therefore, as nothing is said to have been done by the applicant himself which could come under the definition of 'assault' he was not guilty of any offence under S. 353, Penal Code.

Now remains the alleged offence of the applicant under S. 224, Penal Code. That Section runs as follows :

Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself for any offence with which he is charged or of which he has been convicted, or escapes or attempts to escape from any custody in which he is lawfully detained for any such offence shall be punished. . . .

For this Section to apply it is necessary that the applicant, who was charged under it must have been lawfully apprehended or lawfully detained in custody and this in its turn depends on whether or not Mr. Kaul had power to order the applicant's arrest. The learned Assistant Government Advocate relies on S. 64, Criminal P. C., which lays down that when an offence is committed in the presence of a Magistrate within the local limits of his jurisdiction, he may himself arrest or order any person to arrest the offender and may thereupon, subject to the provisions contained in the Code as to bail, commit the offender to custody. The learned counsel for the applicant argues that under this Section it was the Sub-divisional Magistrate and not Mr. Kaul who should have arrested or ordered the arrest of the applicant but in view of the Deputy Commissioner's order deputing Mr. Kaul to the mela I cannot accept this contention. The material portion of that order which is dated 23rd February is as follows :

Mr. T. N. Kaul, I.C.S., Assistant Magistrate will be the Paikarma mela Magistrate . . . . . He will dispose of all petty cases on the spot that may come up in connexion with the Paikarma fair. . . .

In the face of this order it cannot be said that the mela was not within the temporary jurisdiction of Mr. Kaul. It appears to me however that an offence under S. 224, Penal Code, too has not been made out against the applicant. In the first place, it is very doubtful if the applicant can be said to have been 'charged' with any offence in the present case. The mere fact that the Sub-Inspector of Police put his hand on the applicant's shoulder or caught hold of his wrist without the least intimation to the applicant for what offence he was being arrested can hardly amount to the applicant being "charged" with any offence. In the second place, the only offence which is said to have been committed by the applicant in the presence of Mr. Kaul is said to have been one under S. 353, Penal Code; but it has already been held that no offence under that Section was committed by him. In these circumstances Mr. Kaul cannot be said to have had power to arrest the applicant or cause him to be arrested. He himself says that he arrested him under S. 128, Criminal P. C., but that Section has nothing to do with the general power of arrest possessed by a Magistrate and only lays down the circumstances in which an assembly may legally be dispersed by force. No doubt it authorizes arrest in certain cases, namely when the assembly on being commanded does not disperse or conducts itself in such a manner as to show determination not to disperse, but nothing of the kind occurred in the present case.

For reasons given above, I am of opinion that no offence was committed by the applicant either under S. 353, Penal Code, or S. 224, Penal Code. I therefore set aside the applicant's convictions and sentences. The order under S. 106, Criminal P. C., will be automatically set aside.

S.G./R.K. *Conviction set aside.*

A. I. R. 1939 Oudh 83

HAMILTON AND YORKE JJ.

Ganga Bakhsh Singh and others — Applicants.

v.

Mt. Pohoop Kuer — Opposite Party.

Civil Ref. No. 1 of 1938, Decided on 9th January 1939, made by Dist. Judge, Hardoi.

U. P. Encumbered Estates Act (25 of 1934), Ss. 4 and 6 — Special Judge cannot question entertainment of application by Collector under Section 4.

Under S. 4 it is the Collector who has the power to entertain an application and it is for him to decide whether such application should be entertained or not ; the Special Judge cannot sit as a Court of appeal or revision on decisions, decrees or orders of the Collector, and hence he cannot determine whether an application under S. 4 should or should not be entertained by the Collector : *A I R 1937 All 769 and A I R 1938 All 75, Rel. on.* [P 84 C 1, 2]

H. H. Zaidi — *for Applicants.*

Mohan Lal — *for Opposite Party.*

Order.—This is a reference made by the District Judge of Hardoi and the point referred is as follows :

Can a Special Judge to whom an application under S. 4, Encumbered Estates Act, has been forwarded by the Collector under S. 6 of the Act, determine the maintainability of the application on an objection being taken by creditors opposite party ?

The learned District Judge gives as his own view that the Special Judge has jurisdiction to determine such an objection, but he has not referred to any Section of the Act as giving the Special Judge this power. He has, on the other hand, pointed out that in 1937 A L J 867[1] and again in another case 1937 A L J 1207[2] it was held that the Special Judge could not question the Collector's jurisdiction to entertain the application and had to proceed according to the various provisions of the Encumbered Estates Act. He has also pointed out what is the view held by the Board of Revenue, namely that if a creditor objects that the application before the Collector could not be maintained, he must file his objection before the Collector who will then refer the case to the Board of Revenue for the exercise of revisional powers.

We have no difficulty in agreeing with the view expressed by the Allahabad High Court. Under S. 4 of the Act the Collector is the authority who has the power to entertain an application and that Section sets out in what cases the Collector can or cannot entertain it. Under S. 6 when the application is entertained the Collector forwards it to the Special Judge and when the Special Judge has received it he has to proceed in accordance with S. 8 and other subsequent Sections. It is therefore for the Collector to decide whether the application should or should not be entertained. Any decision or decree or order of a Collector is subject to appeal only under S. 46 and the appellate authority is the Board of Revenue. If no appeal lies nevertheless the Court which has power under S. 45 to hear an appeal may pass certain orders under S. 46, that is to say, if the admission of an application by the Collector under S. 4 cannot be questioned in appeal, the Board of Revenue can pass orders about it under S. 46. The Special Judge has no power to sit as a Court of appeal or of revision on decisions, decrees or orders of a Collector and therefore he cannot determine whether an application under S. 4 should have been entertained or not by the Collector. The learned District Judge thinks that if the Special Judge has no such powers difficulties will arise because the Board of Revenue cannot interfere with the proceedings in the Court of the Special Judge taken under S. 8 or any other Section of the Act, and so the Special Judge will have to proceed. We do not think that this difficulty is a real one. When a creditor considers that an application has been wrongly entertained by the Collector he can represent the matter to the Collector and at the same time he can ask the Special Judge to postpone further proceedings in his Court on the ground that he is going to object to the Collector in order that under S. 46 the Board of Revenue may act in revision. It is within the powers of the Special Judge to fix dates for the cases in his Court and he can pass suitable orders to avoid proceeding with the case when there is a probability that the whole matter may come to an abrupt ending because the order entertaining the application is set aside by the Board of Revenue.

Our answer to the question referred to us is therefore to the effect that it is not for the Special Judge to question the entertainment of an application by a Collector under S. 4, Encumbered Estates Act. Costs in accordance with the rules in this reference are granted to the applicants. Let the reference be returned to the District Judge.

S.G./R.K. *Answer accordingly.*

1. Jodha Singh In re, (1937) 24 A I R All 769 = 172 I C 32=I L R (1937) All 963=1937 A L J 867.
2. Brahma Nand, In re, (1938) 25 A I R All 75= 173 I C 344=1937 A L J 1207.

A. I. R. 1939 Oudh 85

ZIAUL HASAN J.

Jumman Khan—Plaintiff—Appellant.

v.

Jagannath and another — Defendants — Respondents.

Second Appeal No. 440 of 1936, Decided on 6th January 1939, against order of Civil Judge, Unao, D/- 30th September 1936.

(a) Transfer of Property Act (1882), Secs. 53-A, 107 — Doctrine of part performance is applicable even to lease.

Section 53-A applies to contracts of transfers as well as to transfers, and hence the doctrine of part performance would equally apply to a lease, and defects if any of the requirements of S. 107 would be cured by S. 53-A. [P 86 C 1]

(b) Stamp Act (1899), S. 36 — Document once admitted in evidence cannot be rejected for insufficiency of stamp.

Where an unregistered document purporting to be a lease is admitted in evidence though on a stamp of Re. 0-8-0 and no objection is raised to its admission on the ground of insufficiency of stamp in the lower Courts, such objection cannot be entertained in the second appeal: *178 I C 338, Foll.* [P 86 C 1, 2]

H. Husain and H. H. Zaidi — *for Appellant.*

M. Wasim — *for Respondent.*

Judgment. — This is a second appeal against a decree of the learned Civil Judge of Unao upholding a decree of the learned Munsif of that place dismissing the plaintiff-appellant's suit for possession of a house and for rent for two months. The house in question is situated in the town of Unao and bears No. 139. It originally belonged to certain Akbar Khan and Wazir Khan. On 5th October 1918, Akbar Khan and Wazir Khan mortgaged it with possession to Munawar Khan. In October 1931 Munawar Khan mortgaged his mortgagee rights in the house to one Paragi Lal. Paragi Lal sued on his sub-mortgage and obtained a foreclosure decree on 21st May 1934. On 18th February 1935, Paragi Lal transferred his decree to the present plaintiff-appellant who put the decree in execution and obtained delivery of possession on 4th July 1935. The present suit for possession of the house and rent for two months was brought by the plaintiff-appellant on 9th July 1935, on the allegation that the defendants were lessees of the house on behalf of Munawar Khan on a rent of Rs. 10 a month, that at the time of delivery of possession to the plaintiff the defendants had agreed either to settle the rent with the plaintiff or to vacate the house but that they did neither. In defence the defendants set up an agreement between themselves and Munawar Khan (Ex. A-1 dated 12th October 1931), by which it was provided that the house in question would be used by the defendants for the purpose of a flour mill on a rent of Rs. 5 per mensem and that the lessor would not be entitled to eject them from the house.

Both the Courts below have upheld the defendants' plea and dismissed the suit holding that the defendants are protected by the doctrine of part performance. The agreement Ex. A-1 is unregistered and is on a stamp of Re. 0-8-0 only. It is argued on behalf of the appellant that the doctrine of part performance may cure the defect of non-registration but that the document is inadmissible in evidence not only because it does not comply with the requirements of Sec. 107, T. P. Act, but also because it is insufficiently stamped. In support of this proposition reliance is placed on the following remarks of their Lordships of the Judicial Committee in 58 I A 91[1]:

> Whether an English equitable doctrine should in any case be applied so as to modify the effect of an Indian statute may well be doubted ; but that an English equitable doctrine affecting the provisions of an English statute relating to the right to sue upon a contract, should be applied by analogy to such a statute as the Transfer of Property Act and with such a result as to create without any writing an interest which the statute says can only be created by means of a registered instrument, appears to their Lordships, in the absence of some binding authority to that effect, to be impossible: *vide* page 101.

The case appears to me however to be governed by the present S. 53-A, T. P. Act. That Section so far as it is applicable to the present case may be quoted as follows:

> Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,
> and the transferee has, in part performance of the contract, taken possession of the property or any part thereof . . . . ,
> and the transferee has performed or is willing to perform his part of the contract,
> then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any

1. Ariff v. Jadunath Majumdar, (1931) 18 A I R P C 79=131 I C 762=58 I A 91=58 Cal 1235 (P C).

right in respect of the property of which the transferee has taken . . . possession, other than a right expressly provided by the terms of the contract.

This Section on the face of it applies primarily to contracts of transfer but the words "where there is an instrument of transfer" show that it applies to transfers also. Mulla in his commentary of the Transfer of Property Act, (1936 Edition, p. 264) says :

The case of an instrument of transfer is put in the alternative. The amendment to S. 49, Registration Act shows that the Section applies although there is not a distinct and saparate contract in writing. The instrument itself is treated as the contract in writing as was done by Jenkins C. J. in 18 C W N 445.[2]

Therefore whether Ex. A-1 is regarded merely as an agreement as contended by the learned counsel for the appellant or is considered a lease as argued on behalf of the respondents, the doctrine of part performance would equally apply. It purports to be an agreement and is also on a stamp of 8 annas only but at the same time it recites that the house has been let out on rent to Jagannath Prasad and Manni Lal on a rent of Rs. 5 a month and provides that the lessors would be put in possession on 12th November 1931 by which date the building would be completed for the purpose of a flour mill. If the document be treated as an agreement only, the objections raised on behalf of the appellant cannot hold good as in that case there would be no deficiency in stamp nor would there be any question of the requirements of S. 107, T. P. Act, not being complied with. If on the other hand the document be regarded as a lease, the only question will remain whether the insufficiency of stamp would prevent its being admitted in evidence. The defect of the requirements of S. 107 not being complied with, will be cured by the provision in S. 53-A :

That the transfer has not been completed in the manner prescribed therefor by the law for the time being in force.

So far as the deficiency in stamp in case the document be regarded as a lease is concerned, I am of opinion that that deficiency will not at this stage stand in the way of the document being considered. S. 36, Stamp Act, provides :

Where an instrument has been admitted in evidence such admission shall not, except as provided in S. 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped,

and in 1938 O W N 1085[3] it was held by a Bench of this Court that once a document has been admitted in evidence under S. 36, Stamp Act, the admission cannot be called in question at any stage of the suit or proceeding and that the document cannot be rejected as inadmissible in evidence. In the present case the fact that no objection on the score of insufficiency of stamp was raised by the plaintiff in any of the Courts below is a further reason why the objection cannot be entertained in second appeal. In any view of the case therefore there is no bar to the document in question being admitted and considered and to the applicability of the doctrine of part performance and the Courts below were in my opinion right in dismissing the plaintiff-appellant's suit on account of the provisions of S. 53-A, T. P. Act. The appeal is therefore dismissed with costs. As the respondents themselves treat Ex. A-1 as a lease they shall pay the requisite duty and penalty in respect of it within a month from this date. In case of default the document will be impounded.

S.G./R.K. *Appeal dismissed.*

2. Puchha Lal v. Kunj Behari Lal, (1914) 1 A I R Cal 21=20 I C 803=19 C L J 213=18 C W N 445.

3. Avadh Singh v. Randhir Singh, (1938) O W N 1085=178 I C 338.

A. I. R. 1939 Oudh 86

YORKE J.

C. D. Lincoln — Garnishee — Appellant.

v.

R. W. Anderson, Decree-holder and another, judgment-debtor — Respondents.

Execution of Decree Appeal No. 19 of 1938, Decided on 14th December 1938, against order of Dist. Judge, Lucknow D/- 21st March 1938.

(a) Civil P. C. (1908), O. 21, R. 104 (Oudh) —Rule 104 does not involve any question of attachment.

Rule 104 and following do not involve any question of attachment at all. The effect of notice under R. 104 is to give a warning to the garnishee that if he pays money owing by him to the original judgment-debtor his creditor, an order may be made against him to pay whatever debt was due to his creditor from him to the creditor's creditor. [P 87 C 1, 2]

(b) Civil P. C. (1908), O. 21, R. 104 (Oudh) —"Debt"—Meaning explained.

A debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation. In other words the question

whether the granishee is indebted to the judgment-debtor means whether or not there was a debt owing or accruing to the judgment-debtor at the date of the service of the garnishee order nisi. The debts owing or accruing include debts *debita in præsenti solvendæ in futuro*. The distinction must be borne in mind between the case where there is an existing debt, payment where of is deferred, and the case where both the debt and its payment rest in the future. In the former case there is an attachable debt; in the latter case there is not. If, for instance, a sum of money is payable on the happening of a contingency, there is no debt owing or accruing. But the mere fact that the amount is not ascertained does not show that there is no debt : *(1915) 3 K B 499, Rel. on.*

[P 89 C 2 ; P 90 C 1]

J. Jackson and M. L. Saksena — *for Appellant.*

D. N. Bhattacharji and Ganesh Prasad — *for Respondents 1 and 2.*

Judgment.—This is a second appeal in an execution case arising out of garnishee proceedings. A decree was obtained by Mr. Anderson against Mr. Olliff Lee on 12th August 1936 amounting to some Rs. 500 odd. This decree was transferred to the Court of the Civil Judge, Lucknow, for execution, and on 26th November 1936 an application was made for execution referring to O. 21, R. 46 and O. 21, R. 104, Civil P. C., against Mr. Olliff Lee and against the Carlton Hotel in the capacity of garnishee. The allegation under which this application was made was that the Carlton Hotel had employed Mr. Olliff Lee as a consulting engineer in connexion with the construction of a restaurant at the Lucknow Exhibition and owed him money in respect of the work done by him in that connexion. The first point which arose in connexion with this application was whether there ever had been a proper attachment under the provisions of O. 21, R. 46, and it has been held by the lower Appellate Court that inasmuch as notice was served only upon the Carlton Hotel and not upon the judgment-debtor, Mr Olliff Lee also, there was no proper attachment under R. 46. There is no doubt upon that point, and it has not been sought on behalf of the respondent to argue otherwise. We have to take it therefore that this is not a case of attachment under O. 21, R. 46 at all and the question is as to the validity of the proceedings under O. 21, R. 104 following.

Learned counsel began by arguing this appeal as if the question of attachment had some importance with relation to the proceedings under Rule 104. In my opinion Rule 104 and following do not involve any question of attachment at all. The effect of notice under Rule 104 is to give a warning to the garnishee that if he pays money owing by him to the original judgment-debtor his creditor, an order may be made against him to pay whatever debt was due to his creditor from him to his creditor's creditor. R. 104 provides that

the Court may, in the case of any debt due to the judgment-debtor, issue a notice to any person (hereinafter called the garnishee) liable to pay such debt, calling upon him to appear before the Court and show cause why he should not pay or deliver into Court the debt due from him to such judgment-debtor or so much thereof as may be sufficient to satisfy the decree and the cost of execution.

Rule 105 provides that

if the garnishee does not forthwith or within such time as the Court may allow, pay or deliver into Court the amount due from him to the judgment-debtor or so much as may be sufficient to satisfy the decree and the costs of execution, and does not dispute his liability to pay such debt or deliver such moveable property, or if he does not appear in answer to the notice, then the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue as though such order were a decree against him.

By Rule 106,

if the garnishee disputes his liability the Court, instead of making such order, may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit, and upon the determination of such issue shall pass such order upon the notice as shall be just.

Rule 112 further provides that

where the liability of any garnishee has been tried and determined under these rules, the order shall have the same force, and be subject to the same conditions as to appeal or otherwise as if it were a decree,

and hence his first appeal.

It is in the light of these Rules that we have to consider the nature of the debt in respect of which the notice was issued and which is apparently under the provisions of Rule 107 to be regarded as attached or sought to be attached. As has been pointed out by the learned District Judge a notice was first issued on 2nd December and served on the Manager of the Carlton Hotel on 4th December 1936 when it was returned endorsed by the manager with the remark that the hotel owed no money to Mr. Olliff Lee, but Mr. Olliff Lee owed money to the hotel. On the return of this notice and failure to appear on the date fixed in the notice, the Court was competent to pass an order under R. 105 without further ado. The Court instead of doing this, issued a fresh notice on 10th Decem-

ber fixing 21st December and calling on the Carlton Hotel to prove that nothing was due from it. This notice was endorsed by the proprietor, Mr. Lincoln, with the remark that Mr. Olliff Lee owed the Carlton Hotel about Rs. 800, and no one put in an appearance on behalf of the garnishee on 21st December. Again it was clearly competent for the Court on that date to have passed a final order under Rule 105. The Court treated the appellant with unusual and, I would say, unnecessary consideration by issuing a further notice for 16th January 1937 which was served on 12th January. In this the Carlton Hotel was ordered to produce account-books and to show that nothing was owing from it. An appearance was put in on 16th January and a defence was made. The case dragged on up to 18th March when a written statement was filed on behalf of the hotel in which it was alleged that according to Mr. Olliff Lee's contract, he was to get 6 per cent. on the settled bill for the construction of the pavilion at the exhibition and that the bill had not yet been settled, but the fee or commission would not come to more than Rs. 800 whereas it was alleged that Mr. Olliff Lee owed to the hotel a bill of Rs. 1382-3-0. The work which Mr. Olliff Lee had been engaged to do was supervision, etc. of the building of a pavilion in the exhibition, the work of construction being done by Frizzoni & Co. Frizzoni & Co.'s bill was for Rs. 20,189-12-6, but this was disputed and the amount adjudged due by Mr. Olliff Lee was only Rs. 11,067-7-3.

The matter is said to have remained in dispute for a long time but was finally settled early in 1938 at Rs. 16,000 on which Mr. Olliff Lee's commission would have been Rs. 960. He was however also entitled to costs of transport and he himself put in a bill dated 9th February 1937 for Rs. 1563 based on 6 per cent. on Rs. 15,909-13-6 with an expense account of Rs. 591. This expense account, which is dated 13th January is Ex. 6, includes Rs. 141 for taxi hire, Rs. 30 for one visit to legal adviser and Rs. 420 described as services involved by the failure of the contractor to complete his contract, at the rate of Rs. 30 per visit for 14 visits from 15th to 31st December 1936. On 12th February 1937 Mr. Olliff Lee wrote a business letter Ex. A-2 referring to this bill for Rs. 1563 and asking Mr. Lincoln to implement without delay an alleged promise of part payment of Rs. 300 made the previous day. On the same day in a private letter he stated that his personal account against this sum of Rs. 1563 stood at Rs. 1121 made up of Rs. 100 receipt given, Rs. 300 described as cheques given as receipt (this was an euphemism by which dishonoured cheques were to be treated as receipts for cash advances), and Rs. 721 supplies, etc., given. This referred to hotel bills for drink etc., not including board which was free as part of the terms of the contract between Mr. Olliff Lee and the hotel, though not mentioned in that contract. It was shown and found on the record as a fact that against this demand of Rs. 1563 two payments were made to Mr. Olliff Lee of Rs. 300 and Rs. 200. Rs. 300 was paid by a cheque dated 25th February 1937 and Rs. 200 by a cheque dated 5th March 1937. Some attempt was made by the hotel to explain away these two cheques but that attempt has been rejected and it has been found as a fact that these two payments were made to Mr. Olliff Lee as stated. The learned District Judge examined the demands made against Mr. Olliff Lee in the bills of the hotel and he held that the hotel had heavily overstated its demands by alleging that according to the hotel the amount due on account of the supplies was Rs. 1382-3-0. This amount was stated in the copies of bills, Ex. A-1 and was made up of bills for supplies amounting to Rs. 800-11-0, cash on dishonoured cheques Rs. 380, a small item of Re. 1-8-0 and a sum of Rs. 200 described as paid by cheque on 5th March 1937, that date being subsequent to the date at the head of the bill which is 17th February 1937.

Even if all the other items were taken to be correct, the total amount could not be more than Rs. 1182-3-0 as this sum paid by cheque could not possibly be regarded as on the same footing as cash advances taken on dishonoured cheques given by Mr. Olliff Lee. These bills for supplies amounting to Rs. 802-3-0 further included bills No. 1165 and 1129 of a Mr. A. Holmes amounting to Rs. 108-2-0 which had been thrown in with Mr. Olliff Lee's bill on the allegation that Mr. Olliff Lee himself had authorized this procedure, the bills being bills for drinks, etc., supplied to Mr. Holmes who was said to have been Mr. Olliff Lee's assistant. It has been contended that Mr. Olliff Lee never disputed inclusion of this sum in his bill, but on the other hand it appears to me that what Mr. Olliff Lee

did do was only to agree to his bills so far as they were supported by vouchers. It has not been shown that he ever agreed to the inclusion of a bill of Mr. Holmes in his bill except by the evidence of an hotel clerk. Had this been a bill for the board and lodging of Mr. Holmes, I would not have thought it improbable that Mr. Olliff Lee might have sanctioned its being included in his bill, but on examination it is not the kind of bill for which the head of a firm would accept responsibility on behalf of an assistant. It seems therefore that the total amount properly due from Mr. Olliff Lee, according to this account, was really Rs. 1074-1-0 as against the account of Rs. 1563 for which he had put in a bill a week earlier.

This is one view of the state of account as between the parties and the learned District Judge seems to have acted on this view of the account in his final decision, but I am in some doubt whether he was justified in so doing. He himself says at page 6 of the typed copy of his judgment :

> We have to consider not what was the state of account between Mr. Olliff Lee and the Carlton at the time when the Carlton finally condescended to put in an appearance in Court but at the time when the first notice was served upon the Carlton under O. 21, R. 104. This was on 4th December 1936.

He goes on to say, as I think quite rightly, that the Carlton had no right to make any payments to Mr. Olliff Lee after that date in respect of the debt due to him. The contention which is put forward on behalf of the appellants is that on 4th December 1936 there was no debt due to Mr. Olliff Lee from the Carlton Hotel. Learned counsel has contended that the first date at which it could possibly be said that there was a debt due was at the date on which the pavilion was handed over to the Carlton Hotel and the work of Mr. Olliff Lee completed. In my opinion however the District Judge was in error on this point. Each of the three notices served on the hotel begins with the phrase, "whereas it is alleged that a debt of Rs. . . . . is due from you to Olliff Lee, the judgment-debtor," and the respondent is entitled to rely on whichever of these notices suits his case best. If the appellant says that no debt was due on 4th December and that the debt, if any, arose on 15th December, he is still faced with the notice of 17th December and so far as the actual bill put in by Mr. Olliff Lee on 9th February is concerned, this is entirely for work done prior to 4th January 1937, and therefore prior to the notice dated 9th January and served on 12th January and any payments made against that bill of Rs. 1563 after service of the notice on that date, are payments made in the face of the notice and therefore the amounts paid under them are claimable by the decree-holder and an order may be made for the payment of those amounts to the decree-holder despite the fact that they have been paid by the garnishee to his own creditor, the judgment-debtor.

On the other hand learned counsel for the appellant strongly contends that until a debt is ascertained, it cannot be called a debt within the meaning of R. 104 of O. 21. Learned counsel relied on the notes to Mulla's Civil Procedure Code (Edn. 10), p. 220, which however is a note on S. 60 with reference to attachment and sale of debts, and particularly on the remark that :

> Money that has not yet become due does not constitute a debt, for there is no obligation to pay that which has not yet become due. The word "debt" in this Section means an actually existing debt, that is a perfected and absolute debt.

It appears to me very doubtful if there is anything in the notes under this Section which is really helpful to the appellant's case. According to Chitaley, Vol. I, p. 517, Note 7 :

> A "debt" is a sum of money which is now payable or will become payable in the future by reason of a present obligation. In other words, it means an actually existing debt, that is a perfected and absolute debt.

Reliance was placed on 1934 A L J 713[1] but that ruling is not, in my opinion, applicable to the circumstances of the present case, and the claim which was one for the unpaid portion of the mortgage money was dismissed on the view that it was not a debt due to the mortgagor in the hands of the mortgagee, and it was open to the mortgagor to sue the mortgagee for recovery of damages on account of the failure of the mortgagee to perform his part of the contract. For the respondent reference was made to 3 K B 499[2] at page 516 where it was remarked :

> The question whether the garnishees were "indebted to the judgment-debtor" means whether or not there was a debt owing or accruing to the

1. Khunni Lal v. Bankey Lal, (1934) 21 A I R All 449=154 I C 542=1934 A L J 713.
2. O'Driscoll v. Manchester Insurance Committee, (1915) 3 K B 499=85 L J K B 83 = 113 L T 683=79 J P 553=31 T L R 532=59 S J 597=13 L G R 1156.

judgment-debtor at the service of the garnishee order nisi.

It is well established that "debts owing or accruing" include debts *debita in præsenti solvenda in futuro*. The matter is well put in the Annual Practice 1915, page 808 : "But the distinction must be borne in mind between the case where there is an existing debt, payment whereof is deferred and the case where both the debt and its payment rest in the future. In the former case there is an attachable debt, in the latter case there is not." If, for instance, a sum of money is payable on the happening of a contingency, there is no debt owing or accruing. But the mere fact that the amount is not ascertained does not show that there is no debt.

Applying the principles which are to be derived from the above notes and rulings it appears to me that so far as can be inferred from the appellant's own bills the amount due to the hotel from Mr. Olliff Lee up to 15th January 1937 was Rupees 796-3-0 less Rs. 108-2-0, i. e. Rs. 688-1-0, which in the light of the case reported in 38 Bom 631[3] the garnishee was entitled to set off against any amount due by the hotel to Mr. Olliff Lee. On the other hand there was due from the hotel to Mr. Olliff Lee an amount claimed by Mr. Olliff Lee to amount to Rs. 1563 and which by the very admission of the appellant amounted to at least Rs. 500 more than the amount which was due by Mr. Olliff Lee to the hotel. I say advisably "by admission" in the light of the fact that the hotel actually made payments by cheques of those amounts to Mr. Olliff Lee. Not only was there Rs. 500 due but there was a considerably larger amount as can be inferred from the fact that this sum of Rs. 500 was paid in face of the fact that five cheques totalling in all Rs. 380 given to the hotel by Mr. Olliff Lee had been dishonoured and had therefore been added to the amount of his account.

Learned counsel for the respondent has contended that it is a finding of fact that Rs. 300 and Rs. 200 were paid towards the existing debt and I am in full agreement with that contention. He has further argued that it is a finding of fact that the money claimed by the decree-holder was due to the judgment-debtor from the garnishee on 4th December 1936. I am doubtful whether this is really a finding of fact as it depends on the legal question as to the stage at which Mr. Olliff Lee's claim would become a debt, but I am quite clear in my mind that at the date of the third notice which was just as good a notice under O. 21, R. 104, as either of the preceding notices, there was a debt due from the hotel to Mr. Olliff Lee amounting to approximately Rs. 880. The lower Appellate Court was therefore fully justified in making the order that the garnishee appellant would pay into Court the sum of Rs. 500 for payment to the decree-holder Mr. Anderson. I hold that the judgment-creditor's appeal was rightly allowed by the learned District Judge. This appeal therefore fails and is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

3. Tayaballi Ghulam Husein v. Atmaram Sakharam, (1914) 1 A I R Bom 299 = 25 I C 375= 38 Bom 631=16 Bom L R 520.

A. I. R. 1939 Oudh 90

ZIAUL HASAN AND YORKE JJ.

Parmeshur Din and others —
Plaintiffs — Appellants.
v.
Hargobind Prasad and others —
Defendants — Respondents.

First Appeal No. 67 of 1938, Decided on 16th November 1938, against order of Addl. Civil Judge, Bara Banki, D/- 17th February 1938.

Court-fees—Suit for partition of joint family property dismissed — Appeal — Court-fee of Rs. 15 is sufficient.

A suit for partition of what was alleged to be joint family property was dismissed on the ground that the property was not joint family property. The plaintiff appealed against this decree :

Held that the court-fee of Rs. 15 paid by the appellant was sufficient : *8 Cal 757 ; A I R 1934 Lah 563 and A I R 1930 All 443, Expl.*

[P 90 C 2; P 91 C 1]

Bhagwati Nath and P. L. Varma —
for Appellant.

Judgment. — This is an office report to the effect that the court-fee paid by the plaintiffs-appellants in this Court is deficient by a sum of Rs. 1905. The suit was for partition of what was alleged to be joint family property. The trial Court accepting the plea of the defence held that the property was not joint family property but was the self-acquired property of the defendants. On this ground the suit of the plaintiffs was dismissed. They are now appealing against this decree and the office reports that they should pay ad valorem court-fee on the value of the shares sought to be partitioned.

We have heard the learned counsel for the appellants and are of opinion that the

court-fee of Rs. 15 paid by the appellants in this Court is sufficient. We have seen the cases referred to by the office but none of them appears to us to be in point. In fact 8 Cal 757[1] goes against the office report. In A I R 1934 Lah 563[2] which was decided by a Full Bench it was held that in a suit for partition of joint property where the plaintiff alleges that he is in actual or constructive possession thereof, the court-fee payable would be under Art. 17 (vi), Sch. 2, Court-fees Act. In this case no doubt the question arose as to the amount of court-fee payable on the plaint but the case remains the same in appeal so far as its nature is concerned. In A I R 1930 All 443[3] in which also the trial Court had held that the plaintiff was not in possession and the suit was dismissed for want of payment of the proper court-fee a learned Judge of the Allahabad High Court held that the plaintiff was not liable to make good the alleged deficiency in the court-fee until the question of joint possession was not finally settled in appeal. We therefore reject the office report and hold that the court-fee paid by the appellants in this case is sufficient.

D.S./R.K. *Report rejected.*

1. Kirti Churn Mitter v. Aunath Nath Deb, (1882) 8 Cal 757=11 C L R 95.
2. Asa Ram v. Jagannath, (1934) 21 A I R Lah 563=150 I C 994=15 Lah 531=36 P L R 48 (F B).
3. Jai Pratap Narain Singh v. Rabi Pratap Narain Singh, (1930) 17 A I R All 443=124 I C 708=52 All 756=1930 A L J 984.

A. I. R. 1939 Oudh 91

YORKE J.

Raghubar and others — Applicants.

v.

Emperor.

Criminal Revn. No. 115 of 1938, Decided on 23rd November 1938, against order of Addl. Sess. Judge, Bahraich, D/- 9th August 1938.

Penal Code (1860), Ss. 149, 147 and 324 — S. 149 does not create an offence by itself but enlarges area of guilt in cases falling under S. 147 — Accused convicted under S. 147 and S. 324 read with S. 149 — Separate sentences passed in respect of both offences held legal.

Section 149 itself is not a Section which creates an offence in the same sense as does for example S. 147. It does create an offence but only in the sense that it creates in all the persons who have taken part in a riot, the same offence as is committed by the particular individuals who cause hurt, or grievous hurt or commit murder or commit any other crime in furtherance of the common object. It does not mean that the Section creates a separate offence composed partly of rioting and partly of the offence constructively committed. Sec. 149 in fact enlarges the area of guilt under S. 323 or S. 325 or whatever the Section may be in cases to which S. 147 applies : *A I R 1934 Mad 388, Dissented.; A I R 1925 P C 1, Expl.; 9 All 645 and 16 Cal 442, Ref.* [P 93 C 2]

Where therefore the accused are convicted under S. 147 of being members of an unlawful assembly and under Ss. 324/149 by reason of hurt caused by one of them and are sentenced to separate terms of imprisonment in respect of both the offences, the sentences are legal and no exception can be taken to them : *A I R 1914 Oudh 205 and 97 I C 804, Foll.; A I R 1934 Mad 388 and A I R 1924 Cal 771, Not foll.* [F 93 C 1]

Nasirullah Beg — *for Applicants.*

Asst. Govt. Advocate — *for the Crown.*

Order. — This is an application in revision in a case under Ss. 147, 325 and 148, I. P. C. For the purposes of this case it is scarecely necessary to go into the merits at all. It has been found that the applicants were members of an unlawful assembly and in prosecution of the common object of that assembly they attacked one Chandrika and caused him grievous hurt. They were convicted by the Magistrate of offences under Ss. 147 and 325, I. P. C., and sentenced under the former Section to undergo four months rigorous imprisonment and under the latter to undergo six months rigorous imprisonment each and also to pay a fine of Rs. 10 each with six months further rigorous imprisonment in default. One of the applicants, Muneshar, was further convicted under S. 148, I. P. C. and sentenced to undergo four months' rigorous imprisonment. The substantive sentences were ordered to run concurrently. The applicants went in appeal to the Additional Sessions Judge of Gonda at Bahraich by whom their appeals were dismissed.

The first point raised in this application is that the frame of the charges is not correct. The charges were as follows :

I, M. Altaf Husain Khan, Magistrate, First Class, Bahraich, charge you Raghubar, Muneshar, Goli, Gauri Shankar, son of Tulshi Ram, Gauri Shankar, son of Nand Lal, Dhonrey, Ori Lal, Ram Shankar and Bharosey : Firstly, that you, on or about the 16th day of October 1937, at village Raipur Karnia before sunrise were member of an unlawful assembly and in prosecution of the common object of such assembly to beat Chandrika, committed the offence of rioting, and thereby committed an offence punishable under S. 147, I. P. C.

The wording of this charge seems to me to be entirely adequate and lucid. The second charge was :

That you, on or about the 16th day of October 1937 at village Raipur Karnia before sunrise were member of an unlawful assembly the common object of which was to beat Chandrika and that while you were member of such an unlawful assembly another member of the same voluntarily caused grievous hurt to Chandrika and thereby committed an offence punishable under Ss. 325/149, Penal Code.

It is clear that this charge like the first charge, is addressed to each individual of the nine persons whose names appear at the top of the page, and the only improvement which could have been made upon this charge might have been the addition of the words "you or" before the words "another member of the same", but the omission of these words does not appear to me to be such as could lead to any doubt in the minds of the applicants or any prejudice to them in the defence of their case.

The second point, which arises out of the first point, is that the charges having been framed as stated, the learned Magistrate convicted the applicants as stated by me above. Learned counsel has referred to a number of rulings in which it has been held that if an accused person is charged with "constructive" grievous hurt under S. 325, I. P. C., read with S. 149, I. P. C., he cannot be convicted of the substantive offence under S. 325, I. P. C., such a course not being warranted by the provisions of Secs. 236, 237 and 238, Criminal P. C. I might have attached some importance to this contention, had it appeared from the judgment that the applicants had actually been convicted of the substantive offence under S. 325 and not of what has been called the constructive offence under that Section by the application of S. 149, I. P. C. The judgment however shows that this was not a case in which after framing a charge of constructive commission of an offence under S. 325, I. P. C., the accused were convicted of the substantive offences. What appears to have happened in the present case is that the Magistrate has merely in his judgment omitted mention of S. 149 in connexion with the conviction under S. 325. The point does not seem to have been raised at all in the argument of the appeal before the learned Sessions Judge.

The third point which has been urged and pressed with considerable force is that in view of the provisions of S. 71, I. P. C., although it is not illegal to convict in such a case as the present one of an offence under S. 147 and also of an offence under S. 325 read with S. 149, I. P. C., it is illegal to inflict separate sentences for the two offences, on the view not that the offence under S. 325 is one of the parts which go to make up the offence under S. 147 but that the offence of rioting is a part of the offence under S. 325 read with S. 149. In this connexion reference has been made to a decision of the Madras High Court reported in A I R 1934 Mad 388.[1] The same view has been taken in 51 Cal 79,[2] where one of the learned Judges remarked:

> In my judgment the learned Judge had no jurisdiction to sentence the accused in this case for both offences. If he had thought that it was necessary that the accused should be punished with a sentence of three years' rigorous imprisonment, he could have inflicted a sentence for that period under S. 325 read with Sec. 149 and he need not have passed any sentence under S. 147.

It was also remarked that the Court, that is the High Court, was not necessarily obliged to maintain the sentence passed first in point of time and to set aside the one that comes next. On the other hand in 17 O C 184[3] Mr. Lindsay, Judicial Commissioner, held that where the applicants were convicted under S. 147 of being members of an unlawful assembly and under Ss. 324/149 by reason of hurt caused by one of them and were sentenced to separate terms of imprisonment in respect of both the offences, the sentences were legal and no exception could be taken to them, and that view was followed by Sir Louis Stuart C. J. in 3 O W N Sup 92.[4] It has been suggested that the decision reported in 17 O C 184[3] is based on a distinguishing of the Calcutta case based on the fact that one of the members of the unlawful assembly in question in the Oudh case was actually proved to have committed an offence punishable under S. 324, I. P. C. It appears to me that that was a distinction without a difference. It is true that in that case a single member of the unlawful assembly was convicted of a substantive offence under S. 324 and on the ground of that conviction the other members were convicted by the application of

1. Ponniah Lopes v. Emperor, (1934) 21 A I R Mad 388 = 1934 Cr C 684=150 I C 977=57 Mad 643=35 Cr L J 1226=66 M L J 572.
2. Keamuddi Karikar v. Emperor, (1924) 11 A I R Cal 771=81 I C 593=25 Cr L J 945= 51 Cal 79=28 C W N 347.
3. Mahpal Singh v. Emperor, (1914) 1 A I R Oudh 205 = 25 I C 633 = 15 Cr L J 625=17 O C 184.
4. Sheo Nath v. Emperor, (1926) 3 O W N Sup 92=97 I C 804=27 Cr L J 1172.

S. 149, I. P. C. In the present case we have it that a large number of injuries was inflicted by some one or other of the persons who have been convicted of rioting, and it does not appear to me that the inability to convict any one of them of a substantive sentence under S. 325 makes any real difference in principle to the correctness of sentencing all these persons separately for the offences under Ss. 147 and 325 read with S. 149, I. P. C. The point is almost of an academic nature in most cases but the question whether S. 71 really is or is not a bar to the infliction of separate sentences is by no means free from difficulty. That point was scarcely discussed either by Mr. Lindsay or by Sir Louis Stuart, but the fact does remain that so far as there is any current of rulings in this Court it is to the effect that such sentences are legal and I do not find any sufficient reason for taking a different view.

I might observe in this connexion that as appears from the Madras case reported in A I R 1934 Mad 388,[1] the view of that Court, in which the view taken by Tottenham J. in 16 Cal 442[5] and the view taken by the Bench of the Allahabad High Court in 9 All 645[6] were dissented from, was based on an interpretation of the decision of their Lordships of the Privy Council in 52 I A 40.[7] Tottenham J. had said in regard to the question whether the offence under S. 325 read with S. 149 was a separate offence from the offence of rioting and punishable separately, that he was unable to adopt the view of the majority and he added :

> I could perhaps do so if S. 149 defined and made punishable any specific offence ; but it does not do this. It simply declares that under certain circumstances every person, who is a member of an unlawful assembly, is guilty of the offence committed by some other member of it, whatever that offence may be ; and, if he is guilty, I apprehend he is liable to be punished for it.

In the same way in 9 All 645,[6] the Bench of the Allahabad High Court took the view that Sec. 149 created no offence, but was merely declaratory of the principles of common law which had prevailed at any rate in England. The learned Judges of the Madras High Court went on to say that the Privy Council has now held in 52 I A 40[7] that Sec. 149 creates a specific offence and deals with the punishment of that offence. They proceeded to treat it as creating another offence of which the offence under S. 147, for which the appellants had also been convicted, was a part, on the same line of reasoning as was adopted in the Calcutta cases. Now the dictum of their Lordships of the Privy Council arose out of an argument in connexion with Secs. 114, 149 and 34 and it was said :

> The other part of the appellant's argument rests on Ss. 114 and 149, and it is said that, if Sec. 34 bears the meaning adopted by the High Court, these Sections are otiose. Sec. 149 however is certainly not otiose, for in any case it creates a specific offence and deals with the punishment of that offence alone.

With the greatest possible respect for the opinion of the learned Judges of the Madras High Court I would suggest that the interpretation given by them to this remark of their Lordships of the Privy Council goes far beyond the true meaning of the remark. The Section itself is not a Section which creates an offence in the same sense as does for example S. 147. It does create an offence but only in the sense that it creates in all the persons who have taken part in a riot, the same offence as is committed by the particular individuals who cause hurt, or grievous hurt or commit murder or commit any other crime in furtherance of the common object; but as I understand it their Lordships did not mean to say that it created a separate offence composed partly of rioting and partly of the offence constructively committed. Sec. 149 in fact enlarges the area of guilt under Sec. 323 or S. 325 or whatever the Section may be, in cases to which S. 147 applies. In my opinion therefore the dictum of their Lordships of the Privy Council does not render erroneous the dissentient view expressed by Tottenham J. in 16 Cal 442[5] or the view of the Bombay High Court in 17 Bom 260.[8] There is therefore the more justification for continuing to follow the previous Oudh cases to which I have referred.

The only question which remains is the question of sentence. Learned counsel has urged that in any case the sentence of four months is sufficient to meet the ends of justice, and he has sought to support this argument by a reference to points of doubt in regard to the facts. So far as the findings of fact go, I am not prepared to go into

5. Nilmony Poddar v. Queen-Empress, (1889) 16 Cal 442 (F B).
6. Queen-Empress v. Bisheshar, (1887) 9 All 645 =1887 A W N 149.
7. Barendra Kumar Ghosh v. Emperor, (1925) 12 A I R P C 1=85 I C 47=26 Cr L J 431=52 Cal 197=52 I A 40 (P C).
8. Queen-Empress v. Bana Punja, (1893) 17 Bom 260 (F B).

them in revision. The real point for consideration in regard to the sentence is the nature of the injuries inflicted on the wounded man Chandrika. This man had no less than six penetrating wounds, 15 contusions, and one abrasion on different parts of his body. One of the penetrating wounds fractured the nasal bone on the left side of the bridge of the nose. Both bones of the left forearm were broken as also were both bones of the right forearm. It is clear from an examination of the injuries that Chandrika was the victim of a peculiarly brutal assault, and in these circumstances I find it impossible to accept the view that the sentences inflicted are too severe. This application therefore fails and is dismissed.

N.S./R.K. *Application dismissed.*

A. I. R. 1939 Oudh 94

ZIAUL HASAN AND YORKE JJ.

Bisheshar Singh — Applicant.

v.

Jadunath Singh and others — Opposite Party.

Misc. Appln. Nos. 943 and 1011 of 1938, and F. A. No. 125 of 1938, Decided on 19th December 1938.

Receiver — Appointment — Principle upon which Court to exercise discretion in appointing receiver — When property is "in medio" Court may appoint receiver—When rights of parties with regard to property are decided, property cannot be said to be "in medio."

The appointment of a receiver must be on the principle of preserving property pending the litigation which is to decide the right of the litigant parties. In such cases the Court must of necessity exercise a discretion as to whether it will or will not take possession of the property by its officer. No positive unvarying rule can be laid down as to whether the Court will or will not interfere by this kind of interim protection of the property. Where indeed the property is as it were in medio, in the enjoyment of no one, the Court can hardly do wrong in taking possession. It is the common interest of all parties that the Court should prevent a scramble. No one is in the actual lawful enjoyment of the property so circumstanced, and no wrong can be done to anyone by taking and preserving it for the benefit of the successful litigant : *(1853) 4 H L C 997, Rel. on.* [P 95 C 1]

But where there has been a decision on the merits deciding the rights of the parties in the respective properties concerned, the property cannot be said to be any longer "in medio", and the unsuccessful party while appealing against such decision cannot rely on the above principle in asking for the appointment of a receiver : *A I R 1927 Pat 220 and A I R 1926 Oudh 504, Disting.* [P 95 C 2]

Haidar Husain and Iftikhar Husain — *for Applicant.*

Ram Bharosey Lal, R. N. Shukla, Niamatuallah and Bishun Singh — *for Opposite Party.*

Order. — These are two applications by Chaudhri Bisheshwar Singh, defendant-appellant, and Chaudhri Ram Bijai Bahadur Singh, another party to First Civil Appeal No. 125 of 1938, asking this Court by the application of O. 40, R. 1, Civil P. C., to appoint a receiver of certain property during the pendency of that appeal. This is an appeal in a taluqdari case decided by Hamilton J., on 17th November 1938 sitting on the Original Side of this Court. By the decision in this case the suit of the plaintiff Chaudhri Jadunath Singh for declaration in respect of the entire taluqdari property has been decreed, and in respect of the non-taluqdari property a decree has been made distributing that property between the plaintiff, defendant 1 appellant, and defendant 3. Defendant 1 has now appealed, his main ground of appeal being that his ancestor Guman Singh was the elder brother of Sheo Bakhsh Singh, ancestor of the plaintiff, whereas the learned Judge has decided that Sheo Bakhsh Singh was the senior of the two brothers. The main question in issue in the appeal is a pure question of fact. During the pendency of the suit in the trial Court the whole of the property in dispute came first into the custody of the Deputy Commissioner of Rai Bareli on the death of the last holder, Chaudhrain Mitthan Kuar, on 6th July 1936, but subsequently it was entrusted to two Receivers, both of them advocates of this Court, and it remained in their custody and management pending the disposal of the suit. At the time of the disposal of the suit it was ordered that they should be discharged and should make over possession to the parties in the terms of the decree. It is now sought that this receivership, which came to an end by the order of 17th November 1938, should be continued until the final decision of the appeal by this Court.

Learned counsel for the applicant has laid a great deal of stress on the contention that the property is at the present moment, as he describes it, in medio, and he puts forward this contention largely with the object of being able to rely on the well known decision in (1853) 4 H L 997,[1] in

1. John Owen v. Sarah Homan, (1853) 4 H L C 997=10 E R 752.

which the Court made the following remarks which are of general application :

> The receiver, if appointed in this case, must be appointed on the principle on which the Court of Chancery acts, of preserving property pending the litigation which is to decide the right of the litigant parties. In such cases the Court must of necessity exercise a discretion as to whether it will or will not take possession of the property by its officer. No positive unvarying rule can be laid down as to whether the Court will or will not interfere by this kind of interim protection of the property. Where indeed the property is as it were in medio, in the enjoyment of no one, the Court can hardly do wrong in taking possession. It is the common interest of all parties that the Court should prevent a scramble. Such is the case when a receiver of a property of a deceased person is appointed pending a litigation in the Ecclesiastical Court as to the right of probate or administration. No one is in the actual lawful enjoyment of the property so circumstanced, and no wrong can be done to anyone by taking and preserving it for the benefit of the successful litigant. But where the object of the plaintiff is to assert a right to property of which the defendant is in the enjoyment, the case is necessarily involved in further questions.

The question is whether when there has been a decision on the merits deciding the rights of the parties in the respective properties concerned, the property can be said to be any longer 'in medio.' Learned counsel referred to a number of cases, as for example A I R 1927 Pat 220,[2] but that is not a case at all on all fours with the present case. A reference was also made to a well-known case of this Court, A I R 1926 Oudh 504.[3] In that case Stuart C. J and Misra J. accepted the appeal and retained the Deputy Commissioner as receiver of the property till the disposal of the suit. This was a case in which the Deputy Commissioner, who was acting as receiver, was discharged by a Judge of this Court sitting on the Original Side and in appeal the Court decided to retain the Deputy Commissioner as receiver of the property till the conclusion of the suit. This was not a case of continuing the receivership pending the disposal of the appeal. It has been stated before us that in fact the receivership was continued right up to the time of the final disposal of the suit by their Lordships of the Privy Council but we have not before us any order passed at the same stage of the case as is present here. Incidentally it may be noted that the Bench of this Court remarked that they wished to make it absolutely clear that this was an exceptional case and they referred to the principles laid down in (1853) 4 H L C 997[1] and remarked that they did not consider that they were acting in any way contrary to those principles in retaining the Deputy Commissioner as receiver in the case, and in any case they further provided that although they were depriving the defendant-respondent of the power to select his own manager, they were not prepared to deprive him of the income to which he was entitled from the estate owing to the fact that he had been declared in possession of it by the Revenue Court and that his name had been entered in the revenue papers. In our opinion it is no longer possible to say that property is any longer 'in medio' after a declaratory decree has been passed as in the present case.

The further question pressed on behalf of the applicant-appellant is that there is a danger of waste, and as he says irreparable loss, in case he is successful in his appeal. Learned counsel for the opposite party very aptly put forward the suggestion that if this was the attitude of the applicant, he should be prepared to pay the cost of receivership during the pendency of the appeal, which would otherwise be a dead loss to the successful plaintiff. This suggestion met with no response whatever. It is true that possession will necessarily be handed over by the receivers in accordance with the terms of the declaratory decree, but we are not impressed with the contention that this may entail irreparable loss to the appellant in case of his success. The suggestion made is that the respondent may cut trees and make transfers to financier and divide up the estate. It is possible that there might be some cutting of trees but transfers would all be pendente lite and could not constitute irreparable loss. In fact no suggestion was made in the application as to what this irreparable loss could be. We are in no way satisfied that in respect of the zamindari property, there could be any question of irreparable loss. We find no force in the application of the defendant-appellant and so far as it relates to the zamindari property we dismiss it.

As regards the application of Chaudhri Ran Bijai Bahadur Singh, this relates only to certain cash sums. The claim of this defendant and defendant 5 was made under a will which mentioned a sum of Rs. 5000 but implied that that was not a fixed sum.

2. Nilambar Das v. Mabal Behari Das, (1927) 14 A I R Pat 220=101 I C 640.
3. Muhammad Ali Khan v. Nisar Ali Khan, (1926) 13 A I R Oudh 504=95 I C 561.

Those defendants claimed Rs. 58,000 and have been given Rs. 25,000 by the learned Judge of this Court. It is said that this cash amount of Rs. 58,000 and ornaments, the value of which is not certain, are in the Court's own custody and deposited in the Imperial Bank where the cash sum has been invested in fixed deposit. Learned counsel suggests that if this money is made over to the persons to whom it will go under the decision of the trial Court, there will be some difficulty about its restitution and possibly S. 144, Civil P. C., might not be found applicable, hence he asks that this be retained in custody, and he places some reliance on the provisions of O. 39, R. 7, Civil P. C. In the alternative he prays that if this money is to be paid over, security may be taken from the persons concerned. In this connexion he lays some stress on the fact that his client will suffer equally with the successful plaintiff because he will be unable to withdraw the sum of Rs. 25,000 which has been adjudged to him. In our opinion there is some force in the contentions put forward, and in any case there is no question of real deprivation to anybody by making an order that the ornaments be retained in the Court's own custody pending the disposal of the appeal, and that persons wishing to withdraw the cash deposits may only do so on furnishing security to the satisfaction of the Court. We order accordingly.

N.S./R.K *Order accordingly.*

A. I. R. 1939 Oudh 96

HAMILTON J.

Raghubir Singh and others — *Plaintiffs* — Appellants.

v.

Thakurain Sukhraj Kuar — *Defendant* — Respondent.

Second Appeal No. 189 of 1936, Decided on 13th December 1938, against order of Civil Judge, Sultanpur, D/- 9th April 1936.

(a) Evidence Act (1872), S. 90—Court can make presumption of fact about genuineness of original document if such presumption is justified by proved facts and circumstances of case —Appellate Court ought not to interfere with discretion of trial Court with regard to genuineness of document when reasons given by it are prima facie sound.

Although no presumption of law can be made under S. 90, Evidence Act, as regards the genuineness of a document the original of which has not been produced in Court, yet the Court can make presumption of fact about its genuineness if such presumption is justified by the proved facts and circumstances of the case. The same will of course apply to an original when it applied to a copy. The raising of a presumption under S. 90, Evidence Act, as to the genuineness of an old document is a matter eminently within the discretion of the trial Court and an Appellate Court ought not to interfere with the discretion of the trial Court if the reasons given by it are not prima facie unsound: *A I R 1936 Oudh 87; A I R 1935 Oudh 482 and A I R 1935 Oudh 289, Rel. on.* [P 97 C 2]

(b) Deed—Execution—Mortgage executed in Oudh in such old time as year 1822 bearing expression 'Sahi' instead of signature of executant can be held to be valid.

Under S. 2 (52), General Clauses Act, the mark is something done by a person who cannot write and it is therefore very doubtful whether it includes any writing such as the word 'Sahi,' and hence the writing of a word such as 'Sahi' cannot be considered to be a mark made by a person who is unable to write his name in the absence of any proof that in fact that particular person is unable to write his own name. However the fact that in Oudh in such old times as the year 1822 documents not infrequently bore an expression like 'Sahi' instead of the signature of executant entitles one to presume that documents so executed were valid documents and consequently a mortgage deed with expression 'Sahi' can be held to be a valid mortgage deed: *A I R 1931 Cal 596 and A I R 1935 Oudh 289, Ref.* [P 99 C 1]

Bhagwati Nath Srivastava — *for Appellants.*

P. N. Chaudhri — *for Respondent.*

Judgment.—This is an appeal by the plaintiffs against a decision of the Civil Judge of Sultanpur who modified against the appellants a decision of the Munsif of Sultanpur. The suit of the plaintiffs was that they were in possession of the land in suit on a mortgage dated 2nd Badi Asarh 1229, that is to say 1822, and they asked for a declaration that they had become owners of the property as the usufructuary mortgage had now become irredeemable. The learned Munsif decreed the suit, but in appeal the plaintiffs were only declared mortgagees of the land in suit by adverse possession starting from 1884. The learned Civil Judge held, if I understand his decision correctly, that the plaintiffs were tenants up to 1884, that they then obtained mutation, that subsequently they treated the property as if mortgaged to them and in 1934 the defendant admitted that the plaintiffs were mortgagees. I have not to consider here whether, on the facts found by the learned Civil Judge to exist, the plaintiffs were entitled to the decree which he has given but only whether they are entitled to more than he gave them, namely

to be declared as full owners for reasons stated above. There are four pieces of evidence which have to be considered.

(1) The mortgage deed. A copy of the mortgage deed has been filed and it shows that it was executed on 2nd Badi Asarh 1229-F, that the scribe was Ishwari Prasad, that there were attesting witnesses, that Drigpal Singh is mentioned in the body as mortgagor, that the executant instead of signing his name wrote the word "sahi" and that there was a paramsana of Rs. 29. Paramsana is the amount which the mortgagee must yearly pay to the mortgagor from the profits of the property after deducting that amount which he is entitled to keep in lieu of interest on the consideration money of the mortgage deed. As this document is more than 30 years old the learned Munsif presumed it genuine under S. 90, Evidence Act, but the learned Civil Judge, for reasons which I shall consider later, held that it was not proved.

(2) Exs. 9, 5 and 6 papers of the first settlement in 1865 which show that the ancestor of the plaintiffs was entered as a tenant of the plots in dispute at a rental of Rs. 51.

(3) In 1884 the plaintiffs applied for mutation and in their application referred to a mortgage deed, dated Sudi 2 Asarh 1239 and stated the paramsana to be Rs. 106-9-3, but the sum of Rs. 29 is entered and cut out. "Sudi" for "Badi" is obviously a mistake and the learned Civil Judge himself calls it a slight mistake and the fact that there was entered the sum of Rs. 29 which was then cut out and replaced by the sum of Rs. 106-9-3 also shows that the mortgage so relied upon was the mortgage in suit.

(4) In 1934 the defendant brought a suit for arrears of rent against the plaintiffs alleging the rent to be Rs. 106-9-3, that is to say the same rent stated in the mutation application of the plaintiffs and that certain defendants in the suit, that is to say the plaintiffs here, were mortgagees and other defendants were sub-mortgagees.

It is not the case of either party that there is any other mortgage than the one of 1822 and consequently this suit brought by the defendant in 1934 is really a recognition that what was stated in the mutation application was correct, and the mutation application was based on the very mortgage deed filed in the present suit. The learned Civil Judge has therefore failed to realize that there is this evidence to show that the mortgage deed in suit is genuine. It has been held in 1935 O W N 1376[1] that although no presumption of law can be made under S. 90, Evidence Act, as regards the genuineness of a document the original of which has not been produced in Court, yet the Court can make presumption of fact about its genuineness if such presumption is justified by the proved facts and circumstances of the case. The same will of course apply to an original when it applied to a copy. It has been held in 1935 O W N 845[2] that the raising of a presumption under S. 90, Evidence Act, as to the genuineness of an old document is a matter eminently within the discretion of the trial Court and an Appellate Court ought not to interfere with the discretion of the trial Court if the reasons given by it are not prima facie unsound. This was also held in 1935 O W N 387[3] where it was stated that an Appellate Court would be slow to interfere with the discretion exercised by a lower Court in the matter of raising a presumption under S. 90, Evidence Act, but the discretion allowed by the Section is a judicial discretion which has to be exercised on sound legal principles and after due regard to all the evidence and circumstances.

There is nothing suspicious in the mortgage deed itself. The learned Civil Judge regards it as not being genuine for the following reasons: It is not signed nor thumb-marked and an incomplete and invalid document in the hands of an unscrupulous person might be validated by the mere writing on it of the word "sahi." I do not see any great force in this argument because it would be just as easy to put a thumb mark of any one—the chances of finding a specimen of the genuine thumb-mark of the person alleged to be the executant being practically nill after 100 years have elapsed. It would therefore be, if anything, easier for the purposes of forgery to put a thumb mark instead of writing the word "sahi" as there is more chance of finding some writing of the alleged executant than another thumb-mark. There would be no greater difficulty in forging the signature of the alleged executant than in writing the word

1. Shamsunnissa Bibi v. Ali Asghar, (1936) 23 A I R Oudh 87=1935 O W N 1376.
2. Radhe Kishun v. Basdeo Lal, (1935) 22 A I R Oudh 482=156 I C 983=1935 O W N 845.
3. Special Manager, Court of Wards, Balrampur v. Tirbeni Prasad, (1935) 22 A I R Oudh 289 = 154 I C 965=1935 O W N 387 = 11 Luck 35.

"sahi." If there was no writing of his in existence there would be nothing to compare either the signature or the word "sahi" and if there was any writing of his it would be no more difficult to imitate it in writing his name than in writing the word "sahi." As regards the argument that the signatures of the attesting witnesses or of the scribe are not proved, the answer is that if everything was proved there would be no need to presume anything.

The last reason given is that the genuineness is placed in great suspicion by the fact that at the first settlement no attempt was made by the alleged mortgagee to get the mortgage recorded and, on the other hand, he was shown as tenant at the rate of Rs. 51 and this entry could not have been made except on a verification from the tenant and the landlord. The learned Civil Judge states that the mortgagee accepted his position as a tenant and had the rent determined at the rate of Rs. 51, while the paramsana in the mortgage was said to be Rs. 29 and it was not till 1884 that an application was made for mutation and then the paramsana was entered as Rs. 106-9-3. It is true that no application was made by the mortgagee to be entered as such, but the entry as tenant is, I think, explicable. There is no doubt that under the mortgage deed paramsana had to be paid and it is undoubted that the price of grain has increased considerably after 1882. The amount payable as interest on the other hand, remained the same hence one would naturally expect the amount to be paid by the mortgagee to the mortgagor to increase as the value of the produce of the land increased and this would explain why from Rs. 29 it became Rs. 51 and finally became Rs. 106-9-3. In 1934, although the defendant herself sued for arrears of rent alleging it was paramsana, she got a decree in the Revenue Court, that is to say the Court then considered paramsana to be a tenant's rent which could be recovered in an ordinary suit for arrears of rent. I do not by any means say that such a payment would be a payment of rent, but if it was, then the entry made at settlement about the payment of paramsana in no way disproved the existence of the mortgage. Even if this view is incorrect and such paramsana cannot be recovered in a suit for arrears of rent, there is nothing strange if the Settlement Officer and the parties themselves held the same view as was held by the Revenue Court in 1934. This entry therefore of tenancy in the circumstances of the case is no strong argument against the genuineness of the mortgage. Against this we have the fact that mutation was claimed and obtained on the very basis of this mortgage in 1884, and presumably the defendant had notice and the learned Civil Judge evidently thought she had notice because he held that the adverse possession by mortgage started from the time that this application for mutation was filed. There was therefore a silent recognition by the alleged mortgagor of the existence of this mortgage. In 1934 there was the clearest recognition of this mortgage by the suit brought by the defendant on the allegation that the present plaintiffs were her mortgagees and were liable to pay the same paramsana rent as was entered in the application for mutation.

In these circumstances therefore the learned Munsif acted in no way arbitrarily in exercising the discretion which he was entitled to exercise under S. 90, Evidence Act, and the learned Civil Judge should not have interfered with the exercise of that discretion. There remains one point whether that mortgage was valid or invalid. It was in former times not unusual for the executant of a mortgage, specially if he was a person of some position, to write the word "sahi" instead of his signature and instead of, or in addition to, an impression of his seal. An example of this appears in 58 Cal 686[4] and other examples occur in 1935 O W N 387.[3] The documents in this case were not held to be genuine, but even if these documents were not genuine, the writing of the word "sahi" shows that this was a recognized way of executing a document. I have also myself come across documents with the word "sahi" or "likha sahi" in the place of the signature. In 58 Cal 686[4] where the actual words were "shree sahi" the words were held to be "a sort of symbolic writing which is to be taken to be the signature in the absence of proof to the contrary." With all due respect to the learned Judges who decided that case, I do not feel able to go so far. Under S. 2 (52) General Clauses Act,

'sign' with its grammatical variations and cognate expressions, shall, with reference to a person who is unable to write his name, include 'mark' with its grammatical variations and cognate expressions.

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[4] Shailendranath v. Girijabhushan, (1931) 18 A I R Cal 596=133 I C 696=58 Cal 686.

The mark is therefore something done by a person who cannot write and it appears to me therefore very doubtful whether it includes any writing such as the word "sahi", and I find it difficult to presume that if a person can write the word "sahi" he is nevertheless unable to write his own name. Therefore I am not able to consider the writing of a word such as "sahi" to be a mark made by a person who is unable to write his name in the absence of any proof that in fact that particular person is unable to write his own name. This document however purports to have been executed in the year 1822 in Oudh which was then no part of British India, and therefore for valid execution it was not subject to the rules existing then or later in British India. What were the requirements in 1822 in Oudh to execute a valid mortgage deed I do not know, nor can learned counsel tell me, but the fact that at that time documents not infrequently bore an expression like "sahi" instead of the signature entitle one, in my opinion, to presume that documents so executed were valid documents and consequently this mortgage deed was a valid mortgage deed. Once it was a valid mortgage deed no question of adverse possession arises, and the plaintiffs are entitled to their decree. Even if this mortgage deed was not valid, if the possession of the defendants arose from that day and continued throughout on the basis of that deed, they have established their allegation of adverse possession since 1822 and are consequently entitled to the decree asked for. Apart from those entries in the papers of 1865, there is no reason for holding that the possession of the plaintiffs was due to anything other than this mortgage deed, and I have already said that the application for mutation was an allegation that that mortgage deed had been acted upon and this allegation was not denied in 1884 and was actually, in my opinion, admitted by the suit for paramsana rent in 1934.

Therefore I find that the plaintiffs hold this land on a valid usufructuary mortgage deed dated 1822 and therefore the decision of the learned Munsif was correct, and even if the mortgage was invalid they have held this land on that invalid mortgage since 1822 and have now acquired full title by adverse possession. I therefore set aside the decision of the learned Civil Judge and restore that of the original Court decreeing the suit. The plaintiffs are entitled to their costs throughout.

D.S./R.K. *Suit decreed.*

A. I. R. 1939 Oudh 99

HAMILTON J.

Ram Harakh and another—Appellants.

v.

Radhika Dutt, Plaintiff and others — Respondents.

Second Appeal No. 282 of 1936, Decided on 26th January 1939.

(a) Oudh Rent Act (22 of 1886), S. 3 (9)—Birt rights, nature of.

Birt rights are under proprietary rights. [P 100 C 1]

(b) Oudh Rent Act (22 of 1886), S. 5—Word "proprietor" includes a subordinate proprietor.

It is not only a person who has lost proprietary rights in the sense of superior proprietary rights that becomes an occupancy tenant under Sec. 5, Oudh Rent Act, but the word "proprietor" in the Section includes a subordinate proprietor also: *Jwala Prasad's Rent Act Rulings No. 49 and 2 O L J 714, Foll.; A I R 1928 Oudh 41 and A I R 1931 Oudh 352, Ref.; A I R 1934 Oudh 264, Disting.* [P 100 C 1, 2]

(c) Oudh Rent Act (22 of 1886), S. 5—Once occupancy rights are created under Sec. 5 they are such under S. 5 and no decree of a Settlement Court can confer them.

If all the conditions of S. 5 necessary to confer occupancy rights are created and there is a Settlement Court decree passed subsequently, such decree does not confer occupancy rights which are already in existence under S. 5, though it may at most confer in addition certain other occupancy rights. [P 101 C 1]

K. N. Tandon for Suraj Narain — *for Appellant.*

Krishna Prasad — *for Respondent 1.*

Judgment. — This is an appeal against an appellate decision of the Civil Judge of Gonda decreeing a suit for possession as mortgagee. The plaintiff Radhika Dutt brought a suit alleging that he was the heir of Shiv Narain, mortgagee, who was in possession till his death on 26th September 1932. He alleged that defendants 1 and 2, Ram Harakh and Gajadhar, had taken possession on the death of Shiv Narain and he impleaded Som Nath and Pandohi, defendants 3 and 4, as heirs of the original mortgagor. Defendants 3 and 4 admitted the plaintiff's claim but defendants 1 and 2 alleged that the plaintiff was not the heir of Shiv Narain and though they admitted Shiv Narain to be mortgagee they said the mortgage was invalid as it was a mortgage of occupancy rights conferred under Sec. 5, Oudh Rent Act. The original Court found the mortgage to be invalid and found that the plaintiff had not proved that he was

the heir of Shiv Narain and therefore dismissed the suit. The learned Civil Judge found the plaintiff to be the heir of Shiv Narain and found that the land was occupancy land under a Settlement Court decree but not occupancy land under S. 5, Oudh Rent Act, so that the mortgage was not invalid but voidable only at the instance of the superior proprietor. Consequently, he allowed the appeal. The finding that the plaintiff is the heir of Shiv Narain is a finding of fact which cannot be reopened here.

The learned counsel for the defendant-appellants has however urged that the lower Appellate Court was incorrect in holding that the mortgage was valid. The learned Civil Judge has not stated clearly why he considered that this land was not occupancy land under S. 5, Oudh Rent Act, but from his reference to certain decisions to the effect that birt rights are not superior proprietary rights, I understand him to mean that in his view a person must have had and lost superior proprietary rights before he could become an occupancy tenant under S. 5, Oudh Rent Act, in view of the use of the word "proprietor" in the second part of that Section. The learned counsel for the respondent has argued that a person must lose proprietary rights and not under-proprietary or subordinate-proprietary rights in order to become an occupancy tenant under S. 5, Oudh Rent Act, and has not urged that birt rights are not under-proprietary rights.

It may be said that in most cases birt rights have been recognized as being under-proprietary rights. They would apparently be so in this case because the predecessors of the mortgagee were given birt rights over the whole village. In 1870 on the strength of that birt grant they applied in the Settlement Court for under proprietary rights but the Court held that they had lost them at a certain time, and therefore dismissed the claim for under-proprietary rights. It however held that in certain land, including the land now in suit, they had never lost possession, but did not give them under-proprietary rights over this land but only occupancy rights heritable but not transferable. I cannot agree with the view of the learned Civil Judge that only a person who has lost proprietary rights in the sense of superior proprietary rights becomes an occupancy tenant under Sec. 5, Oudh Rent Act. The word "proprietor" in S. 5, Oudh Rent Act, has been held to include a subordinate proprietor in Jwala Prasad's Rent Act Rulings No. 49, a decision of the Judicial Commissioner of Oudh. This was also held in 2 O L J 714,[1] a decision of the Board of Revenue. I agree with these decisions, and the use of the words "proprietary rights, whether superior or subordinate" at the beginning of S. 5, in my opinion, show that the word "proprietor" later in the Section means a person who had proprietary rights whether superior or subordinate. It is not disputed that if the word "proprietor" be read in this sense the ancestors of the mortgagors had fulfilled all the conditions laid out in S. 5 which conferred occupancy rights.

The learned counsel for the plaintiff-respondent however urges that because the rights were conferred by a Settlement Court decree of 1870, the mortgage was not invalid but voidable only at the instance of the landlord, and he has further urged that as these rights as shown by the decree were granted on an agreement with the landlord they come under the proviso to S. 5. He has quoted in this respect the following decisions: 4 O W N 1033[2] where it was held that occupancy rights were conferred by a settlement decree subsequent to the year 1868 as the result of an agreement between the landlord and the tenant so that the tenancy was one covered by the proviso to S. 5. It is not stated in that judgment whether the agreement was in writing or not but as an agreement in the proviso to S. 5 has to be in writing, I presume that it was in writing. Another case that he quoted is 8 O W N 785[3] where qabzadari rights were conferred in a Settlement Court based on a compromise. The compromise was presumably in writing and therefore, an agreement under the proviso.

There is nothing to show whether that agreement in the Settlement Court which is referred to in the decree of 1870 was oral or in writing and as it is not shown to be in writing I cannot hold that the qabzadari rights come under the proviso to S. 5. There then remains to be considered whe-

1. Babu Jagdeo Singh v. Karam Ali, (1915) 2 O L J 714.
2. Abdul Ghafoor v. Karamat Khan, (1928) 15 A I R Oudh 41=106 I C 126=4 O W N 1033.
3. Gaya Prasad v. Beni Madho, (1931) 18 A I R Oudh 352 = 134 I C 472 = 7 Luck 111 = 8 O W N 785.

ther the decree of 1870 conferred qabzadari rights or not. No decision has been quoted to me showing that if all the conditions of S. 5 necessary to confer occupancy rights had been complied with but there was a Settlement Court decree the occupancy rights should be deemed to be conferred by the decree. It would appear from 11 O W N 1032[4] that in that case there was a decree and the Court considered whether the defendant or his predecessor-in-title had acquired occupancy rights under the provisions of S. 5, Oudh Rent Act. On the facts the Court found that he had not, because it was not proved that his ancestors had been in possession of proprietary rights within the period mentioned in the Section. The question was nevertheless gone into although there was a decree of the Settlement Court and it would appear therefore that had the Court found that all the conditions of S. 5 had been fulfilled it would have held that occupancy rights had been acquired under the Section and not by virtue of the decree. In my opinion one must consider whether the decree of the Settlement Court has conferred occupancy rights which had not been acquired under S. 5 because the necessary conditions had not been complied with or whether the decree recognized the acquisition of occupancy rights owing to the fulfilment of the conditions of Sec. 5.

Once the conditions have been fulfilled, occupancy rights have been created and a decree passed after that date cannot confer occupancy rights, for they are already in existence, or at most can confer in addition certain other occupancy rights but not in substitution of those under Sec. 5. I hold therefore that in the present case the occupancy rights are occupancy rights under S. 5 and therefore the transfer was altogether invalid.

The plaintiff has sued as mortgagee and if there is no valid mortgage he is not the mortgagee though he is the son of Shiv Narain because Shiv Narain did not hold on a valid mortgage. The contesting defendants themselves got mutation on the mortgage in favour of Shiv Narain but as the mortgage is invalid they are not mortgagees in law. The plaintiff has not sued in the alternative on the ground that he is entitled to possession as the heir of Shiv Narain whether Shiv Narain was a mortgagee in law or not, and he has never applied for amendment on the allegation that he is entitled to possession as the heir of Shiv Narain even if Shiv Narain was not in law a mortgagee. He stands or falls on his case according to whether the mortgage in favour of Shiv Narain is valid or not, that is to say, he must prove his right to possession as mortgagee to oust the contesting defendants. This he has failed to do and therefore his suit must fail. I therefore allow the appeal and dismiss the suit with costs throughout.

S.G./R.K. *Appeal allowed.*

4. Tikam Singh v. Bhagwan Din, (1934) 21 A I R Oudh 264 =11 O W N 1032.

A. I. R. 1939 Oudh 101

THOMAS C. J.

Gajadhar — Applicant

v.

Emperor.

Criminal Revn. No. 141 of 1938, Decided on 6th January 1939.

Criminal P. C. (1898), Ss. 4 (h), 250 — Applicant making application to the Hon'ble Premier that certain police officers had committed offences under I. P. C. — Application forwarded to District Magistrate — District Magistrate directing Sub-Divisional Magistrate to take statement of applicant on oath—Applicant making statement on oath repeating allegations — Police officers tried and acquitted of offences with which they were charged—Complaint found to be false and applicant directed to pay compensation under S. 250—Order held proper—Statement made by applicant on oath held amounted to complaint.

An application that a certain police officer and two constables had committed offences under Ss. 161, 347, 323, I. P. C., being forwarded to the District Magistrate by Hon'ble the Premier, the District Judge forwarded it to the Sub-Divisional Magistrate to take the statement of the applicant on oath. The Sub-Divisional Magistrate sent for the applicant and took his statement on oath and the applicant reiterated the allegations made in the application. The District Magistrate holding that it amounted to a complaint retransferred it to the Sub-Divisional Magistrate for disposal. The police officer and the constables were tried and were acquitted of the offences with which they were charged and the complaint was found to be false and the applicant was directed to pay compensation under S. 250, Criminal P. C. :

Held that the order was justified. That the statement made by the applicant on oath before the Sub-Divisional Magistrate was a complaint as defined by S. 4 (h). That the statement on oath by the applicant came under the words "upon information given to a Magistrate" in S. 250.

[P 102 C 2]

H. N. Misra and Dr. J. N. Misra — *for Applicant.*

Asst. Govt. Advocate — *for the Crown.*

Order. — This is an application in revision against the order of the learned Sessions Judge of Gonda dated 29th Sep-

tember 1938, upholding the order of a First Class Magistrate of the same place dated 22nd June 1938 awarding compensation of Rs. 100 to the accused under S. 250, Criminal P. C. It appears that Gajadhar, applicant, sent an application on 23rd August 1937 to the Hon'ble Premier against Sub-Inspector, Pt. Radhe Shiam, Officer in Charge of the Police Station Andhiari, and two constables, Sheo Shankar and Suraj Bakhsh Singh, charging them of offences under Ss. 161, 347 and 323, I. P. C. The Hon'ble Premier sent the application to the District Magistrate of Gonda who forwarded it to the Sub-Divisional Magistrate with the following order : "Please send for the applicant and ask him to make a statement on oath; if he does so, send on."

The Sub-Divisional Magistrate sent for the applicant and took his statement on oath. Gajadhar reiterated what he had said in his application to the Hon'ble Premier. The Sub-Divisional Magistrate after recording the statement of Gajadhar on oath submitted it to the District Magistrate who endorsed as follows : " This amounts to a complaint. Retransferred to S. D. O., Mankapur for disposal."

The Sub-Divisional Magistrate summoned the Sub-Inspector and the two constables, and after a careful and protracted trial acquitted them holding that the complaint was false and frivolous. He accordingly issued notice to the complainant to show cause why he should not be made to pay compensation under S. 250, Criminal P. C. After hearing the accused Gajadhar the Sub-Divisional Magistrate awarded against the accused Gajadhar Rs. 50 compensation to the Sub-Inspector and Rs. 25 to each of the two constables. The learned Sessions Judge on appeal held that the application sent to the Hon'ble Premier did not amount to a complaint but the statement made on oath by Gajadhar on 1st November 1937, before the Sub-Divisional Magistrate, amounted to a complaint. He accordingly dismissed the appeal as in his opinion the order passed by the Sub-Divisional Magistrate was justified.

In this revision the sole point which has been raised by the learned counsel on behalf of the applicant is that the statement made by Gajadhar before the Sub-Divisional Magistrate did not amount to a complaint as the applicant was sent for by the Sub-Divisional Magistrate and therefore he had to make that statement. I do not agree with this contention. It was open to the applicant not to have made any such statement. He could have simply said that he did not wish to support the application on oath, and I have not the slightest doubt that under those circumstances the matter would have been dropped.

Under S. 250, Criminal P. C., if in any case instituted upon information given to a Magistrate, one or more persons is or are accused of any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits the accused, and is of opinion that the accusation against them or any of them was false and either frivolous or vexatious, the Magistrate may award compensation. I have not the slightest doubt that the statement on oath made by Gajadhar comes under the words "upon information given to a Magistrate". The word "complaint" is defined in S. 4 (h), Criminal P. C., and it means the allegation made orally or in writing to a Magistrate with a view to his taking action under this Code that some person has committed an offence. I therefore hold that the information given by Gajadhar on oath amounts to a complaint as defined in Sec. 4 (h), Criminal P. C. The view taken by the learned Sessions Judge is correct, and I accordingly dismiss the application.

R.M./R.K. *Application dismissed.*

A. I. R. 1939 Oudh 102

THOMAS C. J. AND YORKE J.

Brij Manohar and others — Appellants.

v.

Ramanand and another—Respondents.

Misc. Appeal No. 89 of 1936, Decided on 26th January 1939.

(a) Civil P. C. (1908), O. 1, R. 10, O. 43, R. 1 and S. 115 — Order adding person as party to suit is not appealable nor one open to revision.

An order under O. 1, R. 10 (2) adding a person as a party to a suit is not appealable nor is it one which can be assailed in revision being merely an interlocutory order : *A I R 1932 P C 146, Disting.; A I R 1932 Cal 448, Expl.* [P 103 C 2]

(b) Civil P. C. (1908), O. 43, R. 1, O. 41, Rr. 23 and 25, S. 151—Order of remand made in exercise of inherent powers of Court is not appealable — Court merely sending back case for retrial without revising any order of trial Court — Order of remand does not fall under O. 41, R. 23 or R. 25 — It is one passed under inherent powers of Court.

An order of remand made in exercise of the inherent powers of the Court is not appealable under O. 43, R. 1. Where the Court merely sends back a case for retrial without coming to any decision on the soundness or otherwise of the trial Court's decision, the order of remand, as it does not reverse any order of the trial Court, does not

come under O. 41, R. 23, nor is it an order of remand under O. 41, R. 25 and that being so it must be held to be one passed under the inherent powers of the Court. [P 103 C 2]

G. D. Khare and K. Krishna — *for Appellants.*

B. P. Misra — *for Respondents.*

Judgment. — This is a miscellaneous appeal purporting to be an appeal under the provisions of O. 43, R. 1 (u), Civil P. C., from an order of remand. The present plaintiffs-appellants are the mortgagees of certain property which includes plots Nos. 87 and 90 said to have been mortgaged by the Mahant Hari Saran Das as proprietor. The plaintiffs alleged that the defendants being riayas in the village had built a house on these plots without their permission and thereby their security had been diminished, and they sought to recover possession of the plots by demolition of the house. The main plea of defendant 1, Ramanand, was that the house in suit was built with the permission of the late Mahant Har Narain Das. The trial Court accepted this plea of permission and dismissed the plaintiffs' suit on 31st October 1935. The lower Appellate Court added certain issues and remanded the case apparently under the provisions of O. 41, R. 25. Under this order the trial Court recorded a finding on the issues remitted and returned the case to the lower Appellate Court.

On this case coming up again for hearing on 12th August 1936, two applications were made to the Court, one by defendant 1, Ramanand, to the effect that he wanted the mortgagor, Bhaiya Hari Saran Das, whom he calls the real owner of the property to be added as a party and the other by the same Bhaiya Hari Saran Das who applied to be made a party. In both these applications it was stated that Bhaiya Hari Saran Das did not desire the house to be demolished. The learned Civil Judge thereupon passed an order dated 30th October 1936 against which the present appeal is filed. In this order he did two things, first of all he made Bhaiya Hari Saran Das a party to the suit under the provisions of O. 1, R. 10 (2), read with S. 107, Civil P. C., and secondly he remanded the suit to the trial Court for retrial with Bhaiya Hari Saran Das as defendant 2.

Learned counsel for the appellants argues that the order making Bhaiya Hari Saran Das a party was an improper order and should be got rid of by the setting aside of this order of remand. In the first place we are of opinion that the order making Bhaiya Hari Saran Das a party is not appealable as it could only be appealable as an order and an order under O. 1, R. 10, is not appealable as it does not find a place in O. 43, R. 1. It is also not one which can be assailed in revision because it is clearly an interlocutory order. Learned counsel for the appellants has referred us to the case in A I R 1932 P C 146,[1] but we do not consider that this case is of any help to him. The case in A I R 1932 Cal 448[2] seems to be rather a support for the procedure adopted by the learned Civil Judge than to be a sound basis for attacking that procedure.

The second question which arises is whether the order of remand made by the learned Civil Judge is one which can be assailed in appeal. It is quite clear that it is not one to which the provisions of O. 41, R. 23, are applicable because this is not a case in which the lower Appellate Court has reversed the order of the trial Court. On the contrary he has sent the case back for retrial without coming to any decision on the soundness or otherwise of the trial Court's decision. Similarly, it is not an order of remand under the provisions of O. 41, R. 25. In these circumstances it is impossible to hold that the remand has been made otherwise than in the exercise of the inherent powers of the Court, and it has been held by this Court as by other Courts in a series of cases that an order of remand made in the exercise of the inherent powers of the Court is not appealable under the provisions of O. 43, R. 1. It might also be remarked that the present order of remand may well be regarded as rather more favourable to the appellants than otherwise since the case goes back for decision on the merits with all the parties to the matter in dispute present before the Court, and the decree of the trial Court which dismissed their suit therefore no longer stands in their way, although it has not been actually reversed. We are clearly of opinion that the order under appeal is one against which no appeal lies. This appeal accordingly fails and is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

1. Tuan Man v. Che Som, (1932) 19 A I R P C 146=136 I C 632 (P C).
2. Banbihari Mukherji v. Bhejnath Singh, (1932) 19 A I R Cal 448=138 I C 104=59 Cal 329.

A. I. R. 1939 Oudh 104

HAMILTON AND YORKE JJ.

Balraj Kishore — Appellant.

v.

Mahraj Kishore — Respondent.

Misc. Appeal No. 94 of 1936, Decided on 9th January 1939.

Civil P. C. (1908), Ss. 104 (1) (f), 104 (b), O. 41, Rr. 23, 25, Sch. 2, Para. 20—Application by plaintiff to have award filed dismissed —Appeal against order of dismissal allowed by Appellate Court and case remanded to trial— No appeal lies against order of Appellate Court according to S. 104 (b) — Order of remand is not one made under O. 41, R. 23 but one under inherent powers of Court and is not appealable.

Where an application by a plaintiff in a suit, to have an award made by arbitrators filed and a decree passed in accordance with it, is dismissed by the Court, and on appeal under S. 104 (b) by the plaintiff against the order dismissing his application the Appellate Court allows the appeal and remands the case, no appeal lies from the order of the Appellate Court. The order of the trial Court under S. 104 (1) (f) is not a decree but merely an order and no appeal lies according to Sec. 104 (b) from an appellate order made under the provisions of S. 104 (1) (f). Moreover, the remand order passed by the lower Appellate Court, since it does not arise out of a decree is not an order of remand under the terms of O. 41, R. 23 and as it does not fall within the provisions of O. 41, R. 25 it can be nothing other than a remand made in the exercise of the inherent powers of the Court and an order of remand made in the exercise of inherent powers is not appealable. [P 104 C 2 ; P 105 C 1]

Radha Krishna — *for Appellant.*

B. K. Dhaon — *for Respondent.*

Judgment. — Balraj Kishore, defendant, appeals from an order of the District Judge of Rai Bareli allowing the appeal of the opposite party, plaintiff Mahraj Kishore, and setting aside the order of the Civil Judge of Partabgarh who had dismissed the plaintiff's application to have an award made by arbitrators filed and a decree passed in accordance therewith. This was a case which fell within the provisions of paras. 20 and 21 of Sch. 2, Civil P. C. The plaintiff Mahraj Kishore applied under para. 20 that the award be filed in Court and notice was directed to be given to the other parties. The opposite party defendant objected and a number of issues were framed by the Civil Judge, who however decided only Issues 1 and 2, and held thereon that the award was vitiated by the misconduct of the arbitrators. He accordingly dismissed the application to have the award filed. Thereupon the plaintiff appealed under the provisions of S. 104 (1) (f), Civil P. C., to the District Judge of Rai Bareli, who took a different view on Issue 1 and held that the award had not been vitiated by the misconduct alleged in Issue 1. He accordingly remanded the case to the Civil Judge for the decision of the other issues. Against this decision the present appeal is filed by the defendant-appellant.

A preliminary objection is taken that no appeal lies on the view that this is a case of appeal from order and that in the first place Cl. (2) of S. 104 in the ordinary way bars an appeal from an appellate order made under the provisions of S. 104, Cl. (1) (f), and secondly that if this be taken to be an order of remand, then it is not covered by the provisions of O. 43, R. 1 (u), as at present framed by this Court.

Order 43, R. 1 (u), as it now stands for this Court, provides that

an appeal shall lie from the following orders under the provisions of S. 104, namely :

(u) an order under R. 23 of O. 41, remanding a case, where an appeal would lie from the decree of the Appellate Court.

The question that arises is whether this is a remand under the provisions of O. 41, R. 23 at all. That Rule has been modified by this Court and now runs as follows :

Where an Appellate Court has reversed a decree and all questions arising in the case have not been decided, it may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit ; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

We have given careful consideration for the wording of the definitions of "decree" and "order" in Cls. 2 and 14 of S. 2, Civil P. C., and we are clearly of opinion that the order made by the learned Civil Judge in the present case comes under the scope of the definition of "order" and not within that of 'decree'. Cl. 2 of S. 2 provides that :

'Decree' means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the right of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within S. 47 or S. 144, but shall not include — (a) any adjudication from which an appeal lies as an appeal from an order, or (b) any order of dismissal for default.

It is clear that by the expression "any adjudication from which an appeal lies as an appeal from an order," reference is being made to S. 104, which deals with appeals from orders, and it follows clearly that an order under S. 104 (1) (f) cannot by any

possibility be treated as a decree. It follows that the remand order made by the lower Appellate Court since it does not arise out of a decree is not an order of remand under the terms of O. 41, R. 23, and as it does not fall within the provisions of O. 41, R. 25, it can be nothing other than a remand made in the exercise of the inherent powers of the Court. It has been held in numerous cases that an order of remand made in the exercise of inherent powers is not appealable. We are therefore of opinion that the preliminary objection raised on behalf of the respondent must succeed. This appeal accordingly fails and is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1939 Oudh 105

ZIAUL HASAN J.

Suraj Narain — Accused — Appellant.

v.

Municipal Board, Lucknow — Complainant — Respondent.

Criminal Ref. No. 62 of 1938, Decided on 24th January 1939.

U. P. Prevention of Adulteration Act (6 of 1912), S. 4 — Second part of S. 4 does not require purchaser to be prejudiced—Mere fact that the substance offered for sale is not purely the same for which license is given is sufficient to hold accused guilty.

If the substance exposed for sale by the accused is not purely the one for which he is given a license, he is undoubtedly guilty of an offence under the second portion of S. 4 which can apply even without there being a purchaser who need not be prejudiced. The expression "to the prejudice of the purchaser" goes with the first part and not with the second. [P 105 C 2]

Raj Bahadur Srivastava—*for Appellant.*

Mohammad Ahmad — *for Respondent.*

Order. — This is a reference by the learned Sessions Judge of Lucknow recommending that the conviction and sentence of Suraj Narain under S. 4 of Act 6 of 1912 be set aside. Suraj Narain is a licensed vendor of vegetable oil. On 20th December 1937, an inspector took a sample of the vegetable oil that he had exposed for sale at his shop. This sample was sent to the Public Analyst for examination and he reported that it contained a small proportion of fat or oil foreign to pure vegetable oil. A duplicate sample of the same substance which had been left sealed and signed with the vendor was sent to the Chemical Examiner and he reported that it was grossly adulterated ghi, the adulterant being a vegetable oil. Thereupon Suraj Narain was prosecuted under Section 4, U. P. Prevention of Adulteration Act of 1912. He was tried summarily by a Magistrate of the first class and sentenced to a fine of Rs. 100. He filed an appeal against his conviction and sentence in the Court of the Sessions Judge but as it was found that no appeal lay in the case, the appeal was heard by the learned Judge as an application for revision. The learned Judge has recommended that Suraj Narain's conviction be set aside as it cannot be said that mixing ghee with vegetable oil can be to the prejudice of the purchaser. I am of opinion that the learned Judge's reading of Sec. 4 (1) of the Act is not correct. That Section runs as follows:

> Whoever sells to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance or quality of the article or drug demanded by such purchaser, or sells or offers or exposes for sale or manufactures for sale any article of food or any drug which is not of the nature, substance or quality which it purports to be or which is sold or exposed for sale in a manner contrary to any regulations issued by the local Government under sub-ss. 14 (f) (g), or (h) of S. 14 shall be punished for the first offence with fine which may extend to two hundred rupees and for a second or any subsequent offence with fine which may extend to one thousand rupees, or imprisonment of either description not exceeding three months or both.

The expression "to the prejudice of the purchaser" clearly goes with the first portion of the Section only and not with the second which is

> or sells or offers or exposes for sale or manufactures for sale any article of food or any drug which is not of the nature, substance or quality which it purports to be.

The first portion of the Section applies to a case where the article has actually been sold to a purchaser, while the second portion can apply even while the article is offered or exposed for sale or is manufactured for sale without there being a purchaser. In the latter case there can be no prejudice to the purchaser in fact and for the second portion of the Section to be applicable all that is necessary is that an article of food not of the nature, substance or quality which it purports to be, should either have been sold or offered or exposed for sale or manufactured for sale. In the present case as the substance exposed by Suraj Narain for sale was not pure vegetable oil for which he had a license he was undoubtedly guilty of an offence under the second portion of S. 4 of the Act. None of the Cls. (a) to (d) mentioned in the Proviso to the Section applies to the present case nor was any of them made the basis of his

defence by Suraj Narain. He tried to prove that he received the substance in the same condition in which it was found by the inspector, but apart from the fact that the evidence on the point was not believed by the trying Magistrate, the other necessary matters that should have been proved according to the proviso to S. 6 of the Act were not proved.

I am of opinion that the learned Magistrate was right in his interpretation of S. 4 of the Act and that Suraj Narain was rightly convicted. The reference is therefore rejected. Let the record be returned.

S.G./R.K. *Reference rejected.*

A. I. R. 1939 Oudh 106

ZIAUL HASAN J.

Mathura Prasad — Appellant.

v.

Uma Datt — Respondent.

Second Rent Appeal No. 49 of 1936, Decided on 19th January 1939.

Oudh Rent Act (22 of 1886), S. 127 — Liability to pay rent—Person entered as tenant bila tasfiya cannot claim title by adverse possession — But person in possession under bona fide claim of title and proved not to be trespasser is not liable to rent under S. 127.

When the defendant sets up a bona fide claim of title or when adverse proprietary title of the land in suit is claimed by the defendant against the landlord and such claim appears to be a probable one, the defendant cannot be treated as a person coming under the provisions of S. 127 : *1 O L J 707; A I R 1918 Oudh 122; A I R 1927 Oudh 219; A I R 1931 Oudh 401 and 135 I C 376, Rel. on.* [P 106 C 2]

The claim of a person to proprietary title by adverse possession cannot be accepted if he has been entered in the revenue papers as a tenant bila tasfiya : *A I R 1925 Oudh 442 and A I R 1932 Oudh 140, Rel. on.* [P 106 C 2]

Where however a person is in possession of land under a bona fide claim of title as a guzardar and it is proved that such person is not a trespasser the person is not liable for rent under S. 127 : *12 Luck 126, Foll.* [P 107 C 1]

H. Husain and H. H. Zaidi — *for Appellant.*

S. N. Srivastava for Radha Krishna — *for Respondent.*

Judgment.—This is a plaintiff's second appeal against a decree of the learned District Judge of Fyzabad in a suit brought under S. 127, Oudh Rent Act. The appellant sued the respondent under S. 127, Oudh Rent Act, for arrears of rent for 1339 to 1341-F and for ejectment. The defence was that the defendant was holding the land in dispute as guzaradar and further that he had acquired title to the land by adverse possession. The learned Assistant Collector held that the defendant was holding the land as guzaradar and dismissed the suit. In view of his decision on the main defence in the case he did not go into the question of adverse possession. The plaintiff appealed and the learned District Judge was of opinion that the learned Assistant Collector "went too far when he gave a specific finding as to the character of the defendant's possession." He however held that there was ample evidence for coming to the conclusion that the defendant was not holding the land as a trespasser. He therefore agreed with the trial Court in dismissing the plaintiff's suit. The plaintiff has brought this appeal and it is contended that the finding of the trial Court that the defendant was holding the land as guzaradar of the plaintiff having been set aside by the learned District Judge, the suit ought to have been decreed.

I have heard the learned counsel for parties and considered the facts of the case. As a result I have come to the conclusion that the decree of the learned District Judge should be maintained. It has been held in various cases that when the defendant sets up a bona fide claim of title or when adverse proprietary title of the land in suit is claimed by the defendant against the landlord and such claim appears to be a probable one, the defendant cannot be treated as a person coming under the provisions of S. 127, Oudh Rent Act : *vide* 1 O L J 707,[1] 5 O L J 455,[2] 1 L C 76,[3] 8 O W N 849[4] and 8 O W N 1101.[5] In the present case the claim of the defendant to proprietary title by adverse possession cannot be accepted as he has been entered in the revenue papers as a tenant bila tasfiya. In 12 O L J 160[6] it was held that the entry of a person's name in the revenue papers as a tenant can be regarded as evidence of tenancy and not of the defendant putting forward adverse possession as against the landlord. Similarly in 9 O W N 17[7] it was

1. Raja Bhagwan Bakhsh Singh v. Ch. Shafiquzzaman, (1914) 1 O L J 707=26 I C 709.
2. Sheo Gobind v. Ambika Prasad, (1918) 5 A I R Oudh 122=47 I C 930=5 O L J 455.
3. Sheo Dularey v. Sheo Shunkar Bux, (1927) 14 A I R Oudh 219=101 I C 849=1 L C 76.
4. Krishnapal v. Rameshwar Bakhsh, (1931) 18 A I R Oudh 401=132 I C 770=8 O W N 849.
5. Sri Autar v. Court of Wards, Berwa Estate, Gonda, (1931) 135 I C 376=8 O W N 1101.
6. Nageshar Singh v. Baldeo Singh, (1925) 12 A I R Oudh 442=87 I C 183 = 28 O C 325= 12 O L J 160=2 O W N 148.
7. Sitla Bakhsh Singh v. Subadar, (1932) 19 A I R Oudh 140=136 I C 700=9 O W N 17.

held that where a person is in possession of a certain plot of land as tenant his possession cannot become adverse to the original proprietor merely because he is entered as tenant bila tasfiya in the village papers and has held the land for more than twelve years. There can however be no doubt that the defendant is claiming the land bona fide as a guzaradar. In 1936 O W N 352[8] it was held that S. 127, Oudh Rent Act, does not apply where the defendants are in possession under a bona fide claim of title and have made out a strong prima facie case that they are not trespassers. In the present case, the trial Court has found that the defendant and his predecessors have been in possession of the land for over thirty-two years and the Court in fact held the defendant to be a guzaradar. The learned District Judge also held that the defendant was not holding the land as a trespasser. In these circumstances there can hardly be any doubt that the claim of the defendant to hold the land as a guzaradar is a bona fide one.

The learned counsel for the appellant referred to the fact that in four suits under S. 127, Oudh Rent Act, brought by the plaintiff against the defendant, the latter set up the plea of his holding the land as a guzaradar but his plea was rejected in every case and from this he argued that the defendant's plea in the present case also cannot be said to be bona fide. These suits however related to lands other than that in suit in the present case and no conclusion can be drawn from the decision in those cases about the defendant's claim in the present case being bona fide or otherwise. Indeed there can hardly be a better proof of the defendant's bona fides than the fact that his plea was accepted by the trial Court. I therefore hold that the learned District Judge was right in dismissing the plaintiff's suit and I dismiss this appeal with costs.

N.S./R.K. *Appeal dismissed.*

8. Brij Bhushan v. Collector of Allahabad, (1936) 12 Luck 126=161 I C 821=1936 O W N 352.

A. I. R. 1939 Oudh 107

THOMAS C. J. AND ZIAUL HASAN J.

Sheikh Pudai — Plaintiff — Applicant.

v.

Mt. Bilasi and another—Defendants — Opposite Party.

Civil Revision Appln. No. 94 of 1936, Decided on 17th January 1939.

(a) Promissory Note — Form and contents — Attested document containing promise to pay on demand — Document held intended to be treated as pro-note.

Where a document which was attested by witnesses contained the words "whereas a certain sum has been borrowed with a promise to pay the same on demand":

Held that the words in the document showed that it was intended to be treated as a pro-note in spite of the fact that it was attested by witnesses: *A I R 1927 Cal 472 and A I R 1927 Nag 195, Disting.* [P 108 C 2]

(b) Promissory Note—Liability—*A* executing note to *B* who sold it to *C* for consideration — Suit by *C* against *A* and *B*—Note proved to be executed by *A* without consideration — *C* held entitled to recover amount from *A* and *B*.

Whenever one of two persons must suffer by the act of a third, he who has enabled that third person to occasion the loss must sustain it himself.

A executed a promissory note to *B*. *B* sold it to *C* for consideration. *C* brought a suit on the note against *A* and *B*. It was in evidence that the pro-note was executed by *A* without consideration :

Held that *C* was entitled to recover from *A* and *B* the amount due on the note even though it was originally made without consideration. [P 108 C 2]

Iftikhar Husain — *for Applicant.*

Ali Zaheer — *for Opposite Party 1.*

Order. — This is an application under S. 25, Small Cause Courts Act, against the judgment and decree dated 27th July 1936, passed by the learned Munsif of Kunda at Partabgarh, decreeing the plaintiff's suit. The plaintiff brought a suit to recover the sum of Rs. 27-2-0 on the basis of a document, which has been held to be a bond by the trial Court. It was executed by Mt. Bilasi, defendant 1. The original creditor was Nageshwar, defendant 2, who sold it to the plaintiff. Defendant 2 admitted the claim, but defendant 1 pleaded want of consideration and denied the sale in favour of the plaintiff. The trial Court held that the plaintiff was the purchaser of the bond in suit, that the bond was without consideration and that the question of estoppel did not arise in the case. He accordingly decreed the suit against defendant 2 and dismissed it against defendant 1.

The sole question for decision in this application is whether the document in question is a promissory note or a bond. A "promissory note" as defined under the Negotiable Instruments Act (26 of 1881) is an instrument in writing, containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument. The "holder" of a promissory note, as defined under Sec. 8, Negotiable Instruments Act,

means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto. Under S. 43, Negotiable Instruments Act, a negotiable instrument made, drawn, accepted, endorsed or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction. But if any such party has transferred the instrument with or without endorsement to a holder for consideration, such holder, and every subsequent holder deriving title from him, may recover the amount due on such instrument from the transferor for consideration or any prior party thereto. The document in dispute is as follows:

(I am) Mt. Bilasi, wife of Autar Gadaria, resident of Dohri Takia.

Whereas Rs. 20, half of which comes to Rs. 10, bearing interest at Rs. 2 per cent. per mensem, have been borrowed from Nageshwar, son of Bachchu Murari, resident of Dohri Takia, on account of family necessity with a promise to pay the same on demand, so these few presents by way of ruqqa have been reduced to writing to serve as an authority.

The sale of this document (Ex. 1) in favour of the plaintiff was effected by means of a sale deed. The contention of the learned counsel on behalf of the applicant is that the document in question is a promissory note though it is attested by witnesses, while the contention of the other side is that it is a bond because it is attested by witnesses. The word "bond" is not defined in the Negotiable Instruments Act but is defined under S. 2 (5), Stamp Act, (2 of 1899). It means that it includes

(a) any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be;

(b) any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another.

Under Cl. 22 of the said Section a promissory note is defined to mean a promissory note as defined by the Negotiable Instruments Act, 1881. It is contended on behalf of the opposite party that the document (Ex. 1) contains an unconditional undertaking, signed by the maker, to pay on demand to the person, in whose favour it is executed, a certain sum of money and it is attested by witnesses and is not payable to order or bearer, and therefore it is a bond and not a promissory note. Reliance is placed on the case in 54 Cal 445.[1] Reliance is also placed on the case in 100 I C 794,[2] in which it was held that if an instrument, whereby a person obliges himself to pay money to another, is attested by a witness and the amount due thereunder is not payable to order or bearer, it is a bond as defined in S. 2 (5), Stamp Act, and not a promissory note as defined in S. 2 (22) of the Act. It was urged that the document was not "negotiated" but a sale deed was executed. The above two cases relied on by the learned counsel on behalf of the opposite party are under the Stamp Act with which we have nothing to do in the present case. The words in Ex. 1 are "with a promise to pay the same on demand." We have not the slightest doubt that the intention of the executant was to treat the document as a promissory note in spite of the fact that it was attested by witnesses. We are therefore of opinion that the document though attested by witnesses, is one to which the provisions of the Negotiable Instruments Act apply. This being so, under S. 37, Negotiable Instruments Act, the maker of the promissory note is liable to its purchaser, who is a "holder" within the meaning of Sec. 8 of the Act, and the latter can recover the amount due on it, even if it was originally made without consideration. We are further of opinion that the purchaser can recover the amount on the principle that whenever one of two persons must suffer by the act of a third, he who has enabled that third person to occasion the loss must sustain it himself. We therefore allow the application and decree the plaintiff's suit with costs against both the defendants.

N.S./R.K. *Application allowed.*

1. Khetra Mohan Saha v. Jamini Kanta, (1927) 14 A I R Cal 472=100 I C 630=54 Cal 445.

2. D. Rozario v. Hariballabh Onkarjee, (1927) 14 A I R Nag 195=100 I C 794.

A. I. R. 1939 Oudh 108

ZIAUL HASAN J.

Bhagwan Prasad Singh — *Objector* — Appellant.

v.

Mt. Abhairaji and another — Opposite Party.

Second Appeal No. 243 of 1936, Decided on 19th January 1939.

U. P. Land Revenue Act (3 of 1901), S. 111 (1), Cl. (c)—When appeal to Civil Court lies stated—In partition proceedings opponent filing objection—Revenue Officer relying upon former judgment between parties and dismissing objection without going into merits—Appeal from order lies to Revenue Court and not to Civil Court.

A decision by the partition officer can be appealed against in the Civil Court only when the partition officer has decided to determine the question of title himself and has passed an order in the course of such determination. But, where during the partition proceedings, an objection is filed by the opponent disputing the applicant's right to claim partition and the Revenue Officer does not inquire into the merits of the objection but relies upon the copy of a decree in a previous litigation between the parties and overrules the objection and orders the suit to proceed, the order cannot be said to be one passed under S. 111 (1), Cl. (c) and an appeal from such order therefore lies not to the Civil Court but to the higher Revenue Court : *A I R 1928 Oudh 503 and 7 O C 161, Foll. ; 2 All 839, Ref.* [P 109 C 2]

S. N. Roy — *for Appellant.*

Ghulam Imam — *for Respondent.*

Judgment.—This is an appeal against a decision of the learned District Judge of Gonda dismissing the appellant's appeal against an order of the Revenue Court. It appears that Mt. Abhairaji, respondent, applied for partition of certain property to the Revenue Court. In a previous litigation between the parties, in the Court of the Judicial Commissioner of Oudh, there had been a compromise by which Abhairaji was allowed to remain in possession of the entire property then in suit which had belonged to her father-in-law, for her lifetime without power of alienation. She was in possession of the property in pursuance of that compromise. The present appellant's objection was that under the aforesaid compromise, Mt. Abhairaji's rights in the property were no better than those of a guzaradar and that therefore she was not entitled to apply for partition. The learned Assistant Collector overruled this objection and ordered the partition case to proceed. Against this order the present appellant appealed to the District Judge and he upheld the order of the Revenue Court. This appeal has been filed against the District Judge's order.

A preliminary objection is taken by the respondent that no appeal lay in the case to the Civil Court and that the appeal should have been filed in the higher Revenue Court. I have heard the learned counsel for the appellant in reply to this objection but I am of opinion that the objection is well founded. In 5 O W N 897[1] it was held that where in the course of the partition proceedings, an objection is filed under S. 111, U. P. Land Revenue Act, and the Revenue Court does not proceed to inquire into the merits of the objection itself, the only thing that it does, being that it refers to a mutation order in favour of the opposite party and to a judgment of the Civil Court dismissing the objector's suit and on the strength thereof rejects the objector's objection, the order rejecting the objection is one passed under the first portion of sub-s. (1) of S. 111 and not under Cl. (c) of sub-s. (1) of the said Section and in such a case the appeal does not lie to the Civil Court but to the Revenue Court. At page 902 the learned Judges say :

> It appears to us to be clear from the wordings of the Section (S. 111) quoted above that where in a partition case an objection is raised by a recorded cosharer to the partition on the ground that a certain question has already been decided by a competent Court and the partition officer accepts the said objection he cannot be deemed to have decided himself the question of title raised in the objection. In our opinion, if a party to the partition is dissatisfied with such an order of the partition officer his remedy lies by appealing to the higher Revenue Courts since a decision by the partition officer can be appealed against in the Civil Court only when the partition officer has decided to determine the question of title himself and has passed the said order in the course of such determination.

In 7 O C 161[2] it was held that it is only when the Revenue Court goes into the merits of the objection that its order dealing with the objection is appealable as a decree. A similar view was taken by the Allahabad High Court in 2 All 839.[3] In the present case the partition officer's order ran as follows :

> The copy of order incorporating the compromise does not say that Abhairaji is a guzaradar. She is a recorded cosharer with limited rights restricted to her lifetime and without power of alienation. She can thus sue for partition. The suit will proceed. Objection is dismissed.

This clearly shows that the question of title was not decided by the Revenue Court on the merits. The order cannot therefore be said to be one under Cl. (c) of sub-s. (1) of S. 111, U. P. Land Revenue Act. The preliminary objection is therefore allowed and the appeal dismissed with costs. The appellant is granted permission to appeal under S. 12 (2), Oudh Courts Act.

N.S./R.K. *Appeal dismissed.*

1. Saira Bibi v. Chandrapal Singh, (1928) 15 A I R Oudh 503=114 I C 120=4 Luck 159=5 O W N 897.

2. Mohammad Shahamat Khan v. Mt. Azizunnissa, (1904) 7 O C 161.

3. Asghar Ali Shah v. Jhanda Mal, (1879) 2 All 839.

A. I. R. 1939 Oudh 110

THOMAS C. J. AND ZIAUL HASAN J.

Sunder Lal and others — Creditors — Appellants.

v.

Mt. Kaniz Zohra Begam — Debtor — Respondent.

First Appeal No. 124 of 1936, Decided on 16th January 1939.

U. P. Encumbered Estates Act (25 of 1934), S. 14 (5)—Word 'course' explained—Contract made in course of transaction does not mean contract made at the time of transaction.

The use of the word 'course' shows that what was intended was that the contract by which a certain amount of interest should have been converted into principal should have been made at a time subsequent to the original transaction, while that transaction was in force but before 31st December 1916. Therefore the expression "any contract made in the course of the transaction" does not mean a contract made at the time of the transaction, because the very idea of the word "course" is of progress and not of a particular point. [P 111 C 1]

Radha Krishna, B. N. Khanna and C. P. Lal — *for Appellants.*

Ali Zaheer and Habib Ali Khan — *for Respondent.*

Judgment.—This is a creditors' appeal under Sec. 45, U. P. Encumbered Estates Act, against a decree passed by the Special Judge, First Class, Bara Banki, under S. 14 (7) of the Act. The claims of the appellants against Mt. Kaniz Zohra, defendant-respondent, rested on two transactions. The first was a mortgage made by her in lieu of a sum of Rs. 6500 on 10th June 1913, in favour of Dip Chand, predecessor-in-interest of Sundar Lal and Lal Chand, appellants, and Mahesh Prasad, predecessor-in-interest of Amar Nath, appellant. The other was a promissory note for Rs. 1000 executed by the lady on 19th January 1925, in favour of Sundar Lal, appellant, and Mahesh Prasad, father of Amarnath, appellant. The learned Civil Judge gave the appellants a decree for Rs. 15,877-9-0 in respect of the mortgage transaction and of Rs. 2297-7-6 on account of the debt due on the promissory note. With the latter portion of the decree we are not concerned as the appeal relates only to the decree passed in respect of the mortgage. It appears that the appellant got a decree on foot of the mortgage on 20th August 1926, for Rs. 27,802-0-3 and Rs. 1475-1-9 costs. Mt. Kaniz Zohra appealed against that decree but the appeal was dismissed and a sum of Rs. 594-15-0 was awarded to the mortgagee as costs of the appeal. Eventually a final decree for sale was passed for Rs. 28,923-11-6 and Rs. 8-9-0 as costs. The mortgaged property was sold and a sum of Rs. 10,234 was realized by the mortgagees by the sale. The mortgagees obtained a personal decree under O. 34, R. 6, Civil P. C., for Rs. 27,155-13-3 on 22nd October 1932, and the appellants put forward this sum together with interest as the amount of their claim before the Special Judge.

The learned Judge held that under S. 14 (4) (a), Encumbered Estates Act, the appellants could not get by way of interest more than that portion of the principal which was unpaid on the date of the application and that as the principal sum advanced was Rs. 6500 the appellants were entitled to only that amount as interest due till the date of the application under the Encumbered Estates Act. He further held that they were entitled to Rupees 1475-1-9 on account of the costs of the first Court in the mortgage suit, Rs. 798-15-3 on account of interest awarded by the decree on costs, Rupees 594-15-0 on account of the costs awarded by the Court of Appeal and Rupees 8-9-0 on account of costs of the preparation of the final decree for sale, total Rupees 15,877-9-0.

The learned counsel for the appellants contends that the principal amount should not have been taken to be Rs. 6500 originally lent by the appellants to the respondent but that amount together with interest up to 10th December 1916. It may be mentioned that the terms of the mortgage deed provided for payment of interest at 1 per cent. per mensem with six monthly rests. The learned counsel relies on sub-sec. 5 of S. 14, Encumbered Estates Act, which runs as follows :

For the purpose of ascertaining the principal under Cl. (a) of sub-s. (4), the Special Judge shall treat as principal any accumulated interest which has been converted into principal at any statement or settlement of account or by any contract made in the course of the transaction before 31st December 1916.

Sub-section 4 is to the following effect :

In examining each claim the Special Judge shall have and exercise all the powers of the Court in which a suit for the recovery of the money due would lie and shall decide the questions in issue on the same principles as those on which such Court would decide them subject to the following provisions namely

(a) the amount of interest held to be due on the date of the application shall not exceed that portion of the principal which may still be found to be due on the date of the application ;

(b) the provisions of the Usurious Loans Act, 1918, will be applicable to proceedings under this Act ;

(c) the provisions of the United Provinces Agriculturists' Relief Act, 1934, shall not be applicable to proceedings under this Act.

The argument of the learned counsel is that the words occurring in sub-s. 5 "any contract made in the course of the transaction" mean no more than "any contract made at the time of the transaction."

He therefore argues that as according to the contract for payment of compound interest, interest was converted into principal for the last time before 31st December 1916, on 10th December 1916, all the compound interest that accumulated up to that date should be treated as principal. We are unable to accept the interpretation put by the learned counsel on the expression "any contract made in the course of the transaction."

If the intention of the Legislature had been that compound interest on every debt that had accumulated up to 31st December 1916, should be treated as principal, nothing was easier for them than to say so in clear and unambiguous terms. On the other hand the use of the word "course" shows that what was intended was that the contract by which a certain amount of interest should have been converted into principal should have been made at a time subsequent to the original transaction, while that transaction was in force but before 31st December 1916. The following are the meanings, among others, of the word "course" in Webster's International Dictionary :

"The act of running; progress; passage" "Motion, considered as to its general or resultant direction or its goal;" "Line of progress or advance." "Progress considered with regard to time ;" "Motion considered with reference to manner ; orderly progress." "Customary or established sequence of events."

Keeping all the above meanings in view it cannot, we think, be contended with reason that the expression "any contract made in the course of the transaction" means a contract made at the time of the transaction, because the very idea of the word "course" is of progress and not of a particular point. It appears to us that sub-s. 5 of S. 14 contemplates not only a statement or settlement of account but also a contract subsequent to the original transaction provided that the statement or settlement of account or contract is made before 31st December 1916. This provision is analogous to proviso (i) to sub-s. (1) of S. 3, Usurious Loans Act, as amended by the Local Legislature by Act 23 of 1934. In the Imperial Act that proviso runs as follows :

Provided that in the exercise of these powers the Court shall not reopen any agreement purporting to close previous dealings and to create a new obligation which has been entered into by the parties or any persons from whom they claim at a date more than twelve years from the date of the transaction.

By the Local Act 23 of 1934 the word "twelve" was substituted by "seventeen." This amending Act and the Encumbered Estates Act were passed at the same time and were published in the Gazette on the same date and as the amended proviso (i) to S. 3 (1), Usurious Loans Act, shows that the intention was that subsequent contract beyond seventeen years of the date of the original transaction were not to be interfered with, similarly by sub-sec. 5 of S. 14, Encumbered Estates Act, the intention was that only those subsequent contracts should be given effect to which were made some nineteen years before the passing of the Act and not those which were made within that period. In other words both proviso (i) to S. 3 (1), Usurious Loans Act, and sub-s. 5 of S. 14, Encumbered Estates Act, deal with renovations of contract and not with the original contracts. We therefore agree with the learned Judge of the Court below that only Rs. 6500 should be taken as the principal in this case as no subsequent statement or settlement of account or contract by which the interest should have been converted into principal is proved or alleged in the case. As this was the only point argued in the appeal, the appeal is dismissed with costs.

N.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Oudh 111

THOMAS C. J. AND ZIAUL HASAN J.

Pratap Narain and another —
Plaintiffs — Applicants.

v.

Bhagwati Singh and others —
Defendants — Opposite Party.

Civil Revn. Appln. No. 192 of 1936, Decided on 16th January 1939, from order of Civil Judge, Fyzabad, D/- 11th August 1936.

Civil P. C. (1908), O. 9, R. 13—Final decree passed in absence of defendant is ex parte decree.

A final decree passed in the absence of the defendant is an ex parte decree and as such the provisions of O. 9, R. 13 are applicable to it : *A I R 1929 All 279, Foll.* [P 112 C 1]

T. R. Srivastava — *for Appellant.*

Radha Krishna — *for Opposite Party.*

Order.—This is an application for revision of an order of the learned Civil Judge of Fyzabad setting aside a final decree for foreclosure passed in favour of the plaintiffs-applicants in the absence of the defendants-opposite parties. The preliminary decree in the case was passed on 5th March 1935. On 28th September 1935 the plaintiffs applied for the decree being made absolute. Notices were issued to the defendants two or three times but every time service was effected by the notices being affixed to the residences of the defendants. Finally on the application of the plaintiffs substituted service was ordered on 9th December 1935 and on 21st December 1935 the decree was made absolute. Delivery of possession was made to the plaintiffs on 24th March 1936. On 27th March 1936 some of the defendants applied for setting aside the final decree on the ground that they were not aware of the date fixed in the case. The application of the defendants was contested by the plaintiffs who alleged that after their filing the application for passing of the final decree for foreclosure, the defendants came to them in order to settle the matter out of Court. Evidence was given by both parties and the learned Judge of the Court below disbelieving the plaintiffs' allegation held that the defendants were not aware of the date fixed for disposal of the plaintiffs' application for final decree. He accordingly set aside that decree and allowed the defendants' application with costs.

The learned counsel for the applicants has vehemently challenged the finding of the Court below that it was necessary under the law to give notice to the defendants of the date fixed for the disposal of the application for preparation of a final decree and has relied on various cases in support of his contention. We think however that it is not necessary in this case to decide whether or not notice to the defendants was necessary. It cannot be denied that as remarked in 51 All 634,[1] a final decree passed in the absence of the defendant is an ex parte decree and as such the provisions of O. 9, R. 13, Civil P. C., are applicable to it. Now under O. 9, R. 13, an ex parte decree can be set aside if the defendant satisfies the Court that the summons was not duly served on him or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing and a Proviso to this Rule has been added by this Court to the effect that no ex parte decree shall be set aside on the ground that the summons was not duly served if the Court is satisfied that the defendant had information of the date of hearing sufficient to enable him to appear and answer the plaintiff's claim. In the present case the learned Judge of the Court below has held on the evidence before him that the defendants were prevented from appearing by their ignorance of the date fixed in the case and he has disbelieved the plaintiffs' allegation which was calculated to show that the defendants had knowledge of the date. These findings of the Court below have not been challenged before us nor can they be under S. 115, Civil P. C.

On the finding of the Court the application for setting aside the final decree was not also barred by time. The learned counsel for the applicants relies on the case in 8 O W N 845,[2] but in that case which was an application for revision of a decree of a Judge, Small Cause Court, the question was of service of notice and a learned Judge of this Court considered the evidence on the record and held that the order for substituted service was made for good reasons, and that therefore the application was time-barred. As the decree was an ex parte decree the Court below had jurisdiction to set it aside under O. 9, R. 13, Civil P. C., and no illegality or irregularity was committed by it in the exercise of that jurisdiction. The present application therefore has no force. It was also urged that the Court below should not have awarded costs of the application to the defendants-opposite parties against the plaintiffs; but we do not think that the Court exercised its discretion on the question of costs improperly, seeing that the application of the defendants was allowed in spite of the plaintiffs' contest. We therefore see no reason to interfere with the lower Court's order about costs also. The application is dimissed with costs.

N.S./R.K. *Application dismissed.*

1. Awadh Bihari v. Fahiman, (1929) 16 A I R All 279 = 119 I C 246 = 51 All 634 = 1929 A L J 37.

2. Thakur Prasad v. Bharati Lal, (1931) 18 A I R Oudh 369 = 132 I C 778 = 8 O W N 845.

A. I. R. 1939 Oudh 113

ZIAUL HASAN AND HAMILTON JJ.

Nemi Chand — Defendant — Appellant.

v.

Santosh Chand — Plaintiff — Respondent.

First Appeal No. 111 of 1937, Decided on 9th February 1939, against decree of Civil Judge, Malihabad, Lucknow, D/- 31st July 1937.

(a) Jains—Adoption—Sonless widow of Jain of any sect can adopt without authority from husband or consent of kinsmen.

A sonless Jain widow is competent to adopt a son to her husband without authority from her husband or the consent of his kinsmen. In this respect there is no material difference in the custom of the Agarwala, Chooreewala, Khandelwal and Oswal sects of Jains : *Case law discussed ; 9 O C 125, Expl. and not followed.* P 114 C 2]

(b) Custom—Proof—Judicial decisions.

Judicial decisions recognizing a custom constitute the most satisfactory evidence that can be produced about the custom : *A I R 1938 Nag 391 and A I R 1918 P C 81, Rel. on.* [P 115 C 2]

(c) Jains—Adoption—Effect of—Adopted son acquires rights of natural born son in matters of succession to property of adoptive father.

Adoption among the Jains confers on the adopted son all the rights of a natural born son and he succeeds to all the property of his adoptive father. The adoption has thus the effect of taking away from the other coparceners the interest of the deceased father and vesting it in the adopted son where the family remains joint till adoption : *A I R 1932 Lah 426 and A I R 1936 All 641, Rel. on ; A I R 1925 P C 118, Disting.* [P 116 C 1]

Radha Krishna, D. K. Seth and G. D. Khare — *for Appellant.*

Makund Behari Lal and Manik Chand Jain — *for Respondent.*

Judgment.—This is a first appeal against a decree of the learned Civil Judge of Malihabad, Lucknow. The following pedigree will elucidate the facts of the case:

KHUSHAL CHAND

- Sonpal, defendant
  - Nemi Chand, appellant
- Tajpal died in 1923
  - Harish Chandra died in 1924 = Ratna Bai
    - Santosh Chand Plaintiff-Respondent.

It is admitted that Sonpal, Tajpal and Harish Chandra were members of a joint Hindu family. The plaintiff-respondent claims to be the adopted son of Harish Chandra and brought the present suit for partition of a half share of the joint family property. The property in suit was mentioned in lists A and B attached to the plaint. List A comprised immovable property and list B moveables. By a compromise arrived at between the parties during the pendency of the suit, the plaintiff withdrew his claim in respect of moveables and the suit continued about the properties of list A only. The parties are Jains of the Khandelwal sect and though it was stated in the plaint that Ratna Bai adopted the plaintiff on 15th December 1936, after permission was given to her by her husband, yet it was also contended that among Jains a widow could adopt a son even without the authority or permission of her husband. The defendant Sonpal raised various pleas in defence which will appear from the following issues framed by the trial Court.

1. Whether Harish Chandra gave any permission to his widow to adopt a son as alleged by the plaintiff ?
2. Whether there is any custom among Digambari Khandelwals where a widow can adopt without the permission of the husband ?
3. Whether under Jain law or customary law of the Jains (if any) the adoption of the plaintiff by Ratna Bai is valid ?
4 (a) Whether the plaintiff was adopted by Ratna Bai ?
(b) If so, is that adoption invalid as alleged in paras. 18 and 19 of the written statement ?
5. Which property is available for partition ?
6. Whether this suit for partition does not lie without seeking for possession ?
7. To what relief, if any, is the plaintiff entitled ?

The first issue was decided against the plaintiff as there was no evidence on the point. On the second and third issues the learned Civil Judge held that as under the customary law of Digambari Khandelwal Jains a widow can adopt without the permission of her husband, the plaintiff's adoption by Ratna Bai was valid. Issue 4 (a) was decided in the affirmative and 4 (b) in the negative. On Issue 5, it was held that only the immovable properties were liable to be partitioned. Issue 6 was also decided in favour of the plaintiff and in the affirmative. Eventually the Court gave the plaintiff a decree for partition of his half share in the immovable properties of list A of the plaint with proportionate costs. The defendant appears to have died after the trial Court passed its decree and the present appeal has been brought by his son Nemi Chand. The main point urged before us was that the lower Court was wrong in holding that a widow of the Khandelwal Jains sect has power to adopt a son without authority from her husband. We are of

opinion however that there is no force in this contention. We think it is now well settled that a Jain widow can adopt without authority from her husband and the consent of his collaterals. S. 66 (2) of Gour's Hindu Code is as follows:

> The Jain widow is entitled to make an adoption without the express or implied authority of her husband; or of his kinsmen, and irrespective of whether the property she has inherited from her husband was his self-acquired or ancestral property.

Similarly, Mulla in his Principles of Hindu Law (Edn. 8, page 632) says:

> Amongst the Agarwala Banias of the Sarogi sect, a sonless widow may by custom adopt without the permission of her husband or the consent of her husband's sapindas.

It is not disputed that Sarogi is synonymous with Jain. Mayne in his book, Hindu Law and Usage, Edn. 10, says at p. 209:

> Among the Jains, except in the Madras Presidency, a sonless widow can adopt a son to her husband without his authority or the consent of his sapindas.

This customary law of the Jains has also been established by judicial decisions beginning as far back as 1833. The first reported case on the point is 5 S D A 276.[1] The same view was held in 8 S D A 636.[2] In 1878 their Lordships of the Judicial Committee held in 5 I A 87[3] that a sonless widow of Sarogi Agarwalas enjoys the right of adoption without the permission of her husband or the consent of his heirs. In 8 All 319[4] decided in 1866, their Lordships of the Allahabad High Court remarked:

> It is true that the powers of a Jain widow in the matter of adoption are of an exceptional character, namely that she can make an adoption without the permission of her husband or the consent of his heirs, and that she may adopt a daughter's son; and further that no ceremonies or forms are necessary.

It was conceded that this was a case of Khandelwal Jains. The custom in question was recognized by the Calcutta High Court in 1889 in 17 Cal 518[5] and it was held that the custom which enables a Jain widow of the Oswal caste to adopt a son without the express or implied authority of her husband will not be affected by the conversion of the family to Vaishnaism. Again in 1899 their Lordships of the Calcutta High Court held in 27 Cal 379[6] that the custom that a sonless Jain widow was competent to adopt a son to her husband without his permission or the consent of his kinsmen was sufficiently established and further that in this respect there was no material difference in the custom of the Agarwala, Chooreewala, Khandelwal and Oswal sects of Jains. This decision was arrived at on evidence which consisted partly of judicial decisions and partly on oral testimony. In 1907, a Bench of the Allahabad High Court again held in 29 All 495[7] that according to the law and the custom prevailing among the Jain community, a widow has power to adopt a son to her deceased husband without special authority to that effect. The question arose in the Allahabad High Court again in 1908 in 30 All 197,[8] and again it was held that according to the law and custom prevailing amongst the Jain community a widow has power to adopt a son to her deceased husband without any special authority to that effect. Coming to the Punjab, we find that in 1909 the Punjab Chief Court held in 4 I C 844[9] that the widow of a deceased Jain may adopt without authorization from her husband. In 1917 a Bench of the Nagpur Judicial Commissioner's Court also held that the permission of the husband is not necessary in the case of a Jain widow adopting a son: *vide* 56 I C 65.[10] This decision was affirmed by their Lordships of the Privy Council in 61 I C 481,[11] where their Lordships held that among the Sitambari Jains the widow of a sonless Jain can legally adopt to him a son without any express or implied authority from her deceased husband to make an adoption. In the Punjab the custom in question was again affirmed in 1932 in A I R 1932 Lah 426,[12] in which Tek Chand and Monroe JJ. of the Lahore High Court held that though under the

1. Govind Nath v. Gulal Chand, 5 S D A 276.
2. Mt. Chunnee Baee v. Mt. Gubboo Baee, 8 S D A 636.
3. Sheo Singh Rai v. Mt. Dakho, (1880) 1 All 686 =5 I A 87=3 Sar 807=3 Suth 529=2 C L R 193 (P C).
4. Lakhmi Chand v. Ghatto Bai, (1886) 8 All 319 =1886 A W N 118.
5. Manik Chand v. Jagat Settani, (1890) 17 Cal 518.
6. Harnabh Pershad v. Mandil Dass, (1900) 27 Cal 379.
7. Manohar Lal v. Banarsi Das, (1907) 29 All 495=4 A L J 407=1907 A W N 121.
8. Asharfi Kunwar v. Rup Chand, (1908) 30 All 197=5 A L J 200=1908 A W N 79.
9. Manak Chand v. Munna Lal, (1909) 95 P R 1909=4 I C 844=168 P W R 1909.
10. Jiwraj v. Sheokuwarbai, (1920) 7 A I R Nag 164=56 I C 65.
11. Sheokuwarbai v. Jivraj, (1921) 8 A I R P C 77 =61 I C 481=16 N L R 170 (P C).
12. Sundar Lal v. Baldeo Singh, (1932) 19 A I R Lah 426=138 I C 151=14 Lah 78=33 P L R 501.

Mitakshara a widow cannot make an adoption to her husband without express or implied authority from him, yet among the Agarwala Jains of Delhi, Hindu law has been varied to this extent that for adopting a son to her deceased husband a widow need not possess express or implied authority from him, nor is the consent of the kinsmen necessary for the purpose. The last case on the point is that in A I R 1936 All 641[13] in which it was held that by a custom prevailing among Jains, a Jain widow is competent to adopt without authority from her husband or permission of his kinsmen. It will thus be seen that the custom set up by the plaintiff-respondent has been well-established by judicial decisions and it is we think idle on the part of the defendant-appellant to deny it.

Reliance was placed on some cases, e. g. 2 C W N 154,[14] in which it was held that unless a custom be proved to the contrary, Jains are governed by the Hindu law, but we have already said that the custom in question has been established by an overwhelming string of decisions of the various High Courts in India and of their Lordships of the Judicial Committee, so that there cannot now be any question of the Hindu law of adoption being modified so far as regards Jains to this extent that no permission of the husband is necessary for adoption by a Jain widow. We cannot also accept the argument that it has not been established in this case that the custom upheld by the decisions referred to above is applicable to the Khandelwal sub-sect of Jains. It may be mentioned that the Jains are divided into two main sects of Swetambaris and Digambaris and that while the Oswal and Srimal are branches of the Swetambari sub-sect, Agarwal and Khandelwal are the main divisions of the Digambaris. We have seen however that most of the decisions lay down that the custom in question is common to all the Jains. Moreover the case in 8 All 319[4] was a case of Khandelwal Jains like the present. Further, we have seen that in 27 Cal 379[6] their Lordships held that there was no difference as regards the custom in question among the different sub-sects of the Jains. Apart from this, it is not disputed that the family of Khushal Chand, ancestor of the parties, migrated from the Jaipur State to this province and the plaintiffs has filed a certified copy of a decision of the Jaipur Chief Court (Ex. 4) in which the custom set up by the present plaintiff was upheld by that Court also. The case related no doubt to Agarwala Jains but the learned Judges of the Jaipur Chief Court referred to four other cases of their Court in all of which it was "decided that a Jain widow can make a valid adoption without the consent of her husband or of her husband's reversionary heirs," so that there is no substance in the argument that the decision proceeded on anything peculiar to the Agarwal sub-sect.

It was also argued that in some of the cases referred to above, the custom was held to be proved on the strength of the evidence that was produced in those cases. This is no doubt true but in A I R 1918 P C 81[15] their Lordships of the Privy Council said at p. 83 :

> When a custom or usage whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case.

So that the custom in question can now be taken to be fully established. It cannot, in our opinion, be doubted as remarked by a Bench of the Nagpur High Court in A I R 1938 Nag 391,[16] that judicial decisions recognizing a custom constitute the most satisfactory evidence that can be produced about the custom. In the present case there is the evidence of a witness (P. W. 2) also to support the existence of the alleged custom. The learned counsel for the appellant has relied on the case reported in 9 O C 125.[17] A certified copy of the judgment is on the record and in it the learned Judicial Commissioners of Oudh held that the custom that a widow can adopt without authority from her husband was not established among Agarwala Sarogis throughout India. We are unable to follow this decision after having seen the overwhelming number of decisions to the contrary. Moreover, one of the reasons given by the learned Judicial Commissioners for their decision was that the parties to the case before them were Sarogis of Nawabganj and it had not been shown that they were in any way connected

13. Banarsi Das v. Sumat Prasad, (1936) 23 A I R All 641=164 I C 1047=1936 A L J 1237=58 All 1019.
14. Mt. Mandit Koer v. Phool Chand Lal, (1898) 2 C W N 154.
15. Venkata Mahipati Gangadara Rama Rao v. Raja of Pittapur, (1918) 5 A I R P C 81 = 47 I C 354=41 Mad 778=45 I A 148 (P C).
16. Tulsiram Khirchand v. Chunnilal Panchamsao, (1938) 25 A I R Nag 391=178 I C 825.
17. Chunni Lal v. Srimandir Das, (1906) 9 O C 125.

with the Sarogis of Delhi to whom mostly the evidence produced in the case related. In the present case however we have seen that the custom was recognized in the Jaipur State itself from where the parties to the case before us migrated to Oudh. We are in full agreement with the Court below in holding that the custom set up by the plaintiff-respondent has been established.

The only other point urged on behalf of the appellant was that as among the Jains adoption has no religious significance but is made for a secular purpose, namely to find a successor to property, the plaintiff could not divest the defendant of the property to which he succeeded by survivorship on the death of Harish Chandra. A similar objection was considered by the Lahore and the Allahabad High Courts in A I R 1932 Lah 426[12] and A I R 1936 All 641[13] referred to above, and it was held that adoption among the Jains confers on the adopted son all the rights of a natural born son and he succeeds to all the property of his adoptive father. In the Lahore case also the adoption was made by the widow, as in the present case, several years after the death of her husband and it was held that the adoption had the effect of taking away from the other coparceners the interest of the deceased husband and vesting it in the adopted son where the family remains joint till adoption. S. 618, Mulla's Principles of Hindu Law, which we quoted above only in part runs as follows :

Amongst the Agarwala Banias of the Sarogi sect a sonless widow may by custom adopt without the permission of her husband or the consent of her husband's sapindas. If the family is joint he becomes a coparcener. There is no such custom in the Madras Presidency.

We do not therefore think that merely because the customary law of adoption among the Jains is different from the ordinary Hindu law to the extent that no permission of the husband is necessary no other rules of the Hindu law of adoption would apply to a Jain adoption. The learned counsel has in support of his argument relied on the following passage from the judgment of their Lordships of the Judicial Committee (occurring at p. 242) in 52 I A 231[18]:

Their Lordships have no doubt on the evidence that the story about the regular Hindu or, rather, Brahminical adoption in 1903, was invented with the object of giving to an ordinary Agarwala adoption the rights of collateral succession, and with the same object the statement had been put forward that the defendant had been adopted by both brothers, Joharmal and Ramdhan, which is held to be illegal under the Hindu law.

No doubt this seems to imply that an adopted son in a Jain family has no right to collateral succession but the question which arises before us in the present case, namely whether or not an adopted son among the Jains can divest the survivors of a joint family of the joint family property was not directly before their Lordships in the case referred to above, and we do not feel justified in going against the decisions of the Lahore and Allahabad High Courts and the law as enunciated by the late Sir D. F. Mulla in his book on Hindu law. We decide this point also against the appellant. The appeal therefore fails and is dismissed with costs.

N.S./R.K. *Appeal dismissed.*

18. Dhanraj Joharmal v. Soni Bai, (1925) 12 AIR P C 118 = 87 I C 357 = 52 Cal 482=52 I A 231=21 N L R 50 (P C).

A. I. R. 1939 Oudh 116

THOMAS C. J. AND YORKE J.

Pt. Jai Dayal —
Judgment-debtor — Appellant.

v.

Pt. Jagdeo Narain and others —
Respondents.

Execution of Decree Appeal No. 24 of 1938, Decided on 6th February 1939, against order of Addl. Civil Judge, Unao, D/- 9th April 1938.

Civil P. C. (1908), S. 51, O. 21, Rr. 11 and 30, O. 40, R. 1—Provisions of O. 21, R. 30 are not exclusive and do not override provisions of S. 51 or O. 21, R. 11 in connexion with execution of decree for payment of money by means of appointment of receiver under O. 40, R. 1 which gives very wide powers to Court which can do so when just and convenient.

Appointment of receiver is one of the recognized modes of executing a decree and the wording of O. 40, R. 1 which deals with the appointment of a receiver, is of such a nature as to give a Court very wide powers and does not contain any exclusion; and in case of a decree for payment of money the provisions of O. 21, R. 30 are not exclusive and cannot be conceived to override or exclude all such other modes as may be found contained in Sec. 51 or O. 21, R. 11. It is proper for the Court to order execution of a decree for the payment of money by means of appointment of a receiver when it is just and convenient from the point of view, both of the decree-holder as well as judgment-debtor : *A I R 1931 Oudh 307 and A I R 1936 Lah 239, Rel. on.* [P 117 C 2; P 118 C 1]

R. B. Lal and M. Lal — *for Appellant.*

Rajeshwari Prasad and Raj Bahadur — *for Respondents Nos. 1, 2, 3, 4 and 5.*

Judgment.— This is an execution of decree appeal under S. 96 read with O. 43, R. 1 (s) from an order of the Additional

Civil Judge of Unao dated 9th April 1938, appointing a receiver of the property of the judgment-debtor appellant in three villages on the execution application of the decree-holders.

The decree in question arose out of a murder case. The appellant Jai Dayal had two step brothers, Jai Kishen and Jai Deo. Jai Deo was murdered and Jai Dayal filed a first information report implicating his other step-brother Jai Kishen, Jado Nandan and others, and these persons were prosecuted on a charge of murder. Jai Kishen and Jado Nandan were acquitted and a suit for damages for malicious prosecution was instituted. In that suit on 23rd February 1929 a compromise decree was made, the details of which were given in the present application for execution. Put shortly, the defendant Jai Dayal was to deposit Rupees 3500 in Court by 23rd August 1929, and failing his doing so, the plaintiffs were to have the power to realize that amount from the defendant through Court and to deposit it in the District Board, Unao, for the construction of a school building which was to be called the "Jai Deo Jai Kishen School." The defendant was further to get this school constructed completely by 30th June 1930, and if he failed to get the said building or any portion thereof completed up to the date fixed, the plaintiffs were to have the power to realize Rs. 4500 from the defendant through Court and to deposit the same in the District Board, Unao, for the construction of the said building or buildings. The defendant judgment-debtor seems to have made no attempt whatever to comply with the provisions of the compromise. It is said that two prior applications for execution were without result, and in consequence the present application was made on 1st March 1938 for execution of the decree by the appointment of a receiver of three out of six villages in which the judgment-debtor has landed property in the Unao district. On this application a notice was issued which was served by affixation only, the report being that the judgment-debtor had gone to Lucknow and it was not known when he would be back. He did not appear and on 9th April the Court appointed a receiver fixing his pay and directing him first of all to pay up the Government revenue and then to deposit the rest of his collections in the Court and to submit an account every three months. The judgment-debtor did not move the Court to set aside the ex parte order, but filed this appeal in which the point of non-service has not been taken.

Learned counsel for the appellant puts forward as his main contention that the appointment of a receiver was not a proper method of executing the decree. It is, of course, clear that the execution of decrees is governed in the first instance by S. 51, Civil P. C. That Section sets out the powers of a Court to enforce execution and the modes by which it may do so, and these are further to be found set out in O. 21, R. 11 which is based on S. 51. Both in the Section and in the Rule we find a reference to the following methods of execution, namely (1) delivery of property specifically decreed; (2) attachment and sale or sale without attachment of a property; (3) arrest and detention in prison; (4) the appointment of a receiver, and (5) such other manner as the nature of the relief granted may require, for example demolition or the like. Learned counsel for the appellant however contends that in the case of a decree for the payment of money, the specific provision contained in O. 21, R. 30 is to be conceived to override or exclude all such other modes as may be found contained in S. 51 or O. 21, R. 11. O. 21, R. 30 provides that:

> Every decree for the payment of money, including a decree for the payment of money as the alternative to some other relief, may be executed by the detention in the civil prison of the judgment-debtor, or by the attachment and sale of his property, or by both.

Learned counsel is prepared to concede that where there is a provision in, for example, a compromise decree, then execution may be made in accordance with that provision but subject to that exception he seeks to contend that the provisions of O. 21, R. 30 are in a way exclusive, and that it is not proper for a Court to order execution of a decree for the payment of money by means of the appointment of a receiver. It is, we think, significant that there is no provision anywhere in O. 21 except as mentioned in R. 11 (2) (j) (iv) for the appointment of a receiver. For the appointment of a receiver, we have to go to O. 40, R. 1, and we do not find in O. 40, R. 1 any exclusions such as are suggested in the argument of learned counsel. On the contrary, the wording of O. 40, R. 1 (1) is of such a nature as to give a Court a very wide power. A reference to the notes to O. 40, R. 1 on the subject of the appointment of a receiver in execution proceedings both in Chitaley's Code of Civil Procedure

and the latest edition of Katju and Das's Code of Civil Procedure makes it quite clear that there is no such principle as the one suggested by learned counsel. On the contrary the appointment of a receiver is one of the recognized modes of executing a decree. There have been a number of cases of different Courts on the subject. By some Courts it has been held that this is an equitable execution, but nonetheless it is not always necessary that legal execution should be exhausted before equitable execution by this mode is resorted to. It has been held that where the decretal debt will be equally and as surely satisfied by the appointment of a receiver as in any other way and at the same time the judgment-debtor will be saved from great prospective loss, the Court can appoint a receiver and that such an appointment can also be made where the interests of both the decree-holder and the judgment-debtor can be safeguarded, and where such appointment appears to be the only way in which the decree-holder can hope to realize any appreciable part of his dues. Learned counsel for the decree-holders has contended that the estate of the appellant is heavily encumbered and that the usual mode of execution by bringing the property to sale would lead to a series of difficulties and very likely ultimately be almost infructuous, whereas by the appointment of a receiver the dues can be realized. He further points out that the judgment-debtor has landed property in six villages and that execution is being sought by the appointment of a receiver in only three of them, hence it cannot possibly be said that the judgment-debtor will be deprived of the whole of his income. Learned counsel for the appellant has not been able to refer us to any case in support of his view. On the other hand we have been referred to a case of this Court, A I R 1931 Oudh 307,[1] in which such an appointment was made. That also was a case of a compromise decree, and it was remarked that

> the relief for taking out execution against the person of the judgment-debtor certainly left open to the decree-holder the right of applying for execution of his decree otherwise than by sale of the hypothecated villages. This right embraces within it the relief of an appointment of a receiver.

The application was ultimately dismissed, but not on an acceptance of the view put forward on behalf of the appellant in the present case. It was held instead that it would not be just and convenient in that particular case to grant such a relief. In A I R 1936 Lah 239[2] execution was ordered by the appointment of a receiver to receive the earnings from a theatre. We are quite clear that there is no force in the contention put forward on behalf of the appellant, and that the only question requiring serious consideration is whether the appointment of a receiver is just and convenient in the present case. On this point learned counsel for the appellant has really had almost nothing to say. He suggested with some hesitation that Cl. (2) of R. 1 of O. 40 might be applicable, but we are clear that that sub-clause has no application to a party to the case.

It is true that the learned Civil Judge has omitted to discuss all these points in his order, but in the light of the arguments, which have been put before us, we are satisfied that this was a case in which the appointment of a receiver was just and convenient from the point of view both of the decree-holders and the judgment-debtor, and that the application has been opposed by the judgment-debtor with the sole object of trying to put off the evil day, if not entirely to avoid compliance with the compromise decree to which he originally submitted. We find no force whatever in this appeal and dismiss it accordingly with costs.

S.G./R.K. *Appeal dismissed.*

1. Shambhu Nath Bakhsh Singh v. Balmukand Dikshit, (1931) 18 A I R Oudh 307 = 132 I C 349=7 Luck 203=8 O W N 677.

2. Balkishen v. Narain Dass-Chela Ram, (1936) 23 A I R Lah 239=162 I C 861.

A. I. R. 1939 Oudh 118

HAMILTON AND YORKE JJ.

Pearey Lal and another — Plaintiffs — Appellants.

v.

Sheo Saran and another — Defendants — Respondents.

Execution of Decree Appeal No. 32 of 1936, Decided on 21st February 1939, against order of Addl. Sub-Judge, Lucknow, D/- 29th July 1935.

Limitation Act (1908), Art. 182—Decree in April 1927 — Execution in July 1929 — Application consigned to record room in September 1930 — On 7th May 1932 application under S. 39, Civil P. C., for transfer of decree to another Court—Application returned by Court on 9th May 1932, to file list of accounts and copy of decree within three days—Order not complied with — Another application under S. 39, for transfer of decree, on 5th July 1934

—Application of 1932 made under S. 39, Civil P. C., held valid application and even if it was rejected by final order, application of 1934 under S. 39, Civil P. C., was in time.

The decree-holders obtained their decree on 2nd April 1927 and on 26th July 1929 made their first execution application which was consigned to the record room on 10th September 1930. On 7th May 1932 they made another application on a printed form used for applications under O. 21, Rule, 11, Civil P. C., but the application was really one under S. 39, Civil P. C., for the decree being sent for execution to another Court. The application was returned by the Court on 9th May 1932 to be re-submitted after three days after amending it by filing a list of accounts and after supplying a copy of a decree. The decree-holder did not comply with the orders, but on 5th July 1934 made another application for transfer of the decree under S. 39:

Held that the application under S. 39 made in 1932 although made on a printed form for applications under O. 21, Civil P. C., was in order and was a valid application, so that even if it was rejected by a final order, the application of 1934 under Sec. 39 was in time. The order of 1932 directing that the other papers asked for should be supplied within three days, could not however be considered to be a final order and if the order was not complied, the application could be rejected and there being no order to the effect that the application was rejected, the application of 1932 was to be considered as pending and the decree-holders were entitled to have the application of 1934 treated as a request that the application of 1932 be proceeded with : *A I R 1926 All 473 ; A I R 1937 All 397 and 4 Oudh & Agra L R 614, Rel. on.* [P 120 C 1, 2]

M. L. Tiwari — *for Appellants.*

Hakimuddin and Naziruddin — *for Respondents.*

Judgment. — This is an appeal against an appellate decision of an Additional Civil Judge of Lucknow who upheld a decision of the Munsif, North Lucknow, that an execution application was time-barred.

The decree-holders appellants obtained their decree on 2nd April 1927, and on 26th July 1929 they made their first execution application which was consigned to the record room on 10th September 1930. On 7th May 1932, they made another application on a printed form which is used for applications under O. 21, Rule 11, Civil P. C., but the request was really one under S. 39, Civil P. C., that the decree might be sent for execution to the District Judge of Pilibhit. The Munsif on 9th May 1932 returned this application to be re-submitted within three days after amending it by filing a list of accounts and after supplying a copy of the decree. This list of accounts was subsequently submitted on 1st September 1932, but a duplicate list was asked for and the copy of the decree had not been submitted, so an order was passed that within three days a duplicate list should be submitted as well as the copy of the decree. This application was returned although this appears to have been unnecessary as there was no alteration to be made in anything, but only two additional papers were required. As this application was one under S. 39, Civil P. C., the Court apparently required those papers in view of O. 21, R. 6, though even so, a duplicate of the list seems to have been unnecessary. The decree-holders never complied with the order, but on 5th July 1934 made another application for transfer of the decree under S. 39, Civil P. C. No reference was made in this application to the prior application of 1932, and the office pointed out that the last execution proceeding had been consigned to the record room on 10th September 1930, and this new application was filed after the expiry of three years, but there was on the record a certificate under O. 21, R. 2 duly verified by the Court on 14th October 1933, which made this application within time. As this application also contained a request for substitution of certain persons as judgment-debtors, notice was sent under S. 50, Civil P. C., with the result that objection was made that the alleged payments of 1933 had in fact never been made and this application was time-barred. On 1st December 1934 the decree-holders referred to the application of 1932 and asked that the present application might be treated as part of the former application of 1932 or if not, that the former application might be regarded as a step-in-aid.

The learned Munsif held that it was too late for the decree-holders to come in with the execution application of 1932 after more than one and a half-years when only three days had been granted for supplying the additional papers, and he referred to the new rule under O. 21, Rule 17 which authorized a Court to reject an application if the defect was not remedied within the prescribed period. He failed to notice however that the application of 1932 although presented on a printed form for applications under O. 21, was an application under S. 39, Civil P. C.

The learned Civil Judge also took it for granted that the applications of 1932 and that of 1934 were under Order 21 although they were under Sec. 39, Civil P. C., and came to the conclusion that as in 1932 the decree-holders had not obeyed the order to produce certain papers within three days,

that application should be deemed to have been rejected and so the present application could not be considered to be part of it. He held that as a result of the amendment of Art. 182, Limitation Act, materially defective applications for execution have ceased to be treated as a step-in-aid of execution, consequently the application of 7th May 1932 could not be considered to be an application for execution nor could it be considered to be a step-in-aid of execution. There then appears in the decision of the learned Civil Judge the following sentence :

> At the same order the order for the return of the application for correction could not be a final order.

Presumably he meant "at the same time" and not "at the same order". He held that the present application for execution was therefore time-barred. As he has stated earlier in his order that the application of 7th May 1932 should be deemed to have been rejected, it is not quite clear how at the end of his order he came to the conclusion that the order for the return of the application for correction could not be a final order. It was held in A I R 1926 All 473[1] that an application made under Sec. 39 is not an application for execution within the meaning of O. 21, R. 10 but an application to take a step-in-aid of execution. The same was held in A I R 1937 All 397[2] where it was pointed out that an application for transfer need not be in any particular form and sufficient particulars of the decree sought to be transferred are enough and a mere clerical error in writing the name of the party does not make that application invalid. In 4 Oudh & Agra L R 614,[3] an Additional Judicial Commissioner of Oudh held that an applicant for transfer of a decree for execution in another district was not required to supply a certified copy of the decree but it was the duty of the Court to prepare an official copy of the decree pasting on it the necessary stamp which was to be supplied by the decree-holder.

We are not aware of any rule which requires two copies of the statement of accounts. The application under S. 39 made in 1932 was therefore in order and was a valid application so that even if it was rejected by a final order this present application under S. 39 would be within time. We are however unable to hold that the last order of 1932 that the other papers asked for should be supplied within three days can be considered a final order to the effect that if the order was not complied with, the application was rejected. For all, we know, had those papers been supplied one or two days late, the Court might have condoned the delay, and there was certainly no order to the effect that the application was rejected. We do not think that the fact that the application remained in the hands of the decree-holders instead of remaining in the possession of the Court has any bearing on the point of limitation and had it remained in the custody of the Court and through forgetfulness or otherwise no final order had been passed, the application would have remained pending. We consider therefore that the application of 1932 must be considered to be still pending and the appellants therefore are entitled to have this present application treated as a request that the application of 1932 be proceeded with. As we have said, even if that order that the papers be submitted within three days is to be read as one meaning that the application was to be deemed as rejected if the order was not complied with, it was an application which was, as originally filed, valid and the present application is therefore within the period of limitation.

We therefore allow the appeal and order the original Court to proceed with this application treating it as it is in fact an application under Sec. 39, Civil P. C., and as part of the application of 1932. The appellants are granted their costs throughout.

R.M./R.K. *Appeal allowed.*

1. Mt. Shahodra v. Bhagwan Das, (1926) 13 AIR All 473=94 I C 482.
2. Hafeez Uddin v. Ram Chander Das, (1937) 24 A I R All 397=169 I C 225=1937 A L J 278.
3. Iqbal Narain v. Ram Ratan, 4 Oudh & Agra L R 614.

A. I. R. 1939 Oudh 120

THOMAS C. J. AND ZIAUL HASAN J.

Ram Charan — Defendant—Applicant.

v.

Nanhey — Plaintiff — Opposite Party.

Civil Revn. Appln. No. 51 of 1936, Decided on 17th January 1939, from order of Addl. Civil Judge, Unao, D/- 30th April 1936.

Limitation Act (1908), Art. 64 — Accounts stated — Essence of account stated is that parties must agree on taking accounts that balance only is payable—There must be mutual consideration to support promises so as to constitute

new cause of action — Defendant who had dealings with plaintiff going through accounts and signing acknowledgment of his liability for certain sum in plaintiff's account books—Entry held amounted to accounts stated.

The essence of an account stated is not the character of the items on one side or the other, but the fact that there are cross items of account and that the parties mutually agree the several accounts of each and, by treating the items so agreed on the one side as discharging the items on the other side pro tanto, go on to agree that the balance only is payable. Such a transaction is in truth bilateral and creates a new debt and new cause of action. There are mutual promises, the one side agreeing to accept the amount of the balance of the debt as true and to pay it, the other side agreeing the entire debt as at a certain figure and then agreeing that it has been discharged to such and such an extent, so that there will be complete satisfaction on payment of the agreed balance. Hence, there is mutual consideration to support the promises on either side and to constitute the new cause of action. In determining whether there can be an account stated, it is not material whether the balance of indebtedness is throughout in favour of one side nor whether the debt in favour of the final creditor was created at the outset by one large payment or consisted of several sums of principal and several sums of interest; nor can it matter in this connexion, whether the only payments made on the other side were simply payments in reduction of such indebtedness or were payments in respect of other dealings. In any event, items must in the same way be ascertained and agreed on each side before the balance can be struck and settled : *A I R 1934 P C 144 and A I R 1934 P C 147, Foll.*

[P 122 C 1, 2]

D who used to have money dealings with plaintiff went through the account on a certain date and signed an acknowledgment of his liability to the extent of a specified sum in the plaintiff's lekha bahi and also agreed to pay interest on the debt :

Held that the entry of the acknowledgment amounted to an account stated within the meaning of Art. 64. [P 122 C 2]

K. P. Misra — *for Applicant.*

Radha Krishna—*for Opposite Party.*

Order.—This is an application for revision of a decree of the learned Judge, Small Cause Court, Unao. The suit of the plaintiff, opposite party, was for recovery of Rs. 246 based on what is said to be an account stated between the parties on Aghan Sudi 15, 1919 Sambat corresponding to 1st December 1933. It was alleged that the defendant used to have money dealings with the plaintiff and that on the date mentioned he went through the account and signed an acknowledgment of his liability to the extent of Rs. 200 in the plaintiff's lekha bahi and affixed a one anna stamp to the entry. It was also said that the defendant agreed to pay interest on the debt at Re. 1 per cent. per mensem, hence the claim for Rs. 246. The defendant-applicant denied his signature under the entry in question and further pleaded that a mere acknowledgment of a debt did not give a fresh start to limitation. As the alleged stated account was beyond three years of the original debt, the plaintiff tried to prove two later payments of interest but the learned Judge of the Court below did not believe the alleged payments of interest and held that the signatures of the defendant under the endorsements of those payments were not genuine. He however held that the acknowledgment in question was signed by the defendant and amounted to an account stated and that therefore the plaintiff was entitled to sue on the basis of that acknowledgment. He therefore decreed the claim.

The learned counsel for the applicant contends that the entry in question is a mere acknowledgment of a debt and as that acknowledgment was made more than three years after the original debt, it does not save limitation under Ss. 19 and 20, Limitation Act. On behalf of the opposite party on the other hand it is contended that the entry in question is an account stated within the meaning of Article 64, Limitation Act, and that therefore it could validly be made the basis of a suit. The generally accepted view of what constituted an account stated used to be that the account must be mutual and for it to be mutual, there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations. The law on the point has however been settled by their Lordships of the Judicial Committee in two cases both reported in 11 O W N. One is 11 O W N 997[1] and the other is 11 O W N 1003.[2] In the former their Lordships at page 1000 say :

An account stated may only take the form of a mere acknowledgment of debt, and in those circumstances, though it is quite true it amounts to a promise and the existence of a debt may be inferred, that can be rebutted, and it may very well turn out that there is no real debt at all, and in those circumstances there would be no consideration and no binding promise.

But on the other hand, there is another form of account stated which is a very usual form as

1. Siqueria v. Noronha, (1934) 21 A I R P C 144 =151 I C 90=11 O W N 997 (P C).
2. Bishun Chand v. Girdhari Lal, (1934) 21 A I R P C 147=150 I C 6=11 O W N 1003= 56 All 376=61 I A 273 (P C).

between merchants in business in which the account stated is an account which contains entries on both sides, and in which the parties who have stated the account between them have agreed that the items on one side should be set against the items upon the other side and the balance only should be paid; the items on the smaller side are set off and deemed to be paid by the items on the larger side, and there is a promise for good consideration to pay the balance arising from the fact that the items have been so set off and paid in the way described.

In this case the plaintiff had been employed by the defendant from about 1913 upto 1928. In the books of the business there were accounts of the plaintiff's drawings from time to time but there was no account on the other side in respect of salary which had not been fixed. In 1928 the account was drawn up and signed by the defendant's manager showing credits for salary and debits for drawings and ending in a balance in the plaintiff's favour. The account had throughout been in the plaintiff's favour and Lord Atkin held that it was an account stated involving a promise to pay the balance for good consideration. The facts of the other case were similar to those before us in the present case. In that case the suit was brought as on an account stated evidenced by entries in the plaintiff's ledger. In the ledger on the debit side there was the following entry :

Balance due to be received after adjusting the account upto Kunwar Sudi 9 Sambat 1982, Rs. 16,043-8-9.

Below this entry was written by one of the defendants :

Balance due to be paid after adjusting the account upto Kunwar Sudi 9 Rs. 16,043-8-9.

The latter entry was signed by both the defendants. Their Lordships of the Judicial Committee held that the entries constituted an account stated. At page 1008 they observed :

Indeed the essence of an account stated is not the character of the items on one side or the other, but the fact that there are cross items of account and that the parties mutually agree the several amounts of each and by treating the items so agreed on the one side as discharging the items on the other side pro tanto, go on to agree that the balance only is payable. Such a transaction is in truth bilateral and creates a new debt and a new cause of action. There are mutual promises, the one side agreeing to accept the amount of the balance of the debt as true (because there must in such cases be, at least in the end, a creditor to whom the balance is due) and to pay it, the other side agreeing the entire debt as at a certain figure and then agreeing that it has been discharged to such and such an extent, so that there will be complete satisfaction on payment of the agreed balance. Hence, there is mutual consideration to support the promises on either side and to constitute the new cause of action.

At another place their Lordships say :

Nor can it be material, as it seems, in determining whether there can be an account stated, whether the balance of indebtedness is throughout, as it must be at the end, in favour of one side. Equally it seems irrelevant whether the debt in favour of the final creditor was created at the outset by one large payment or consisted of several sums of principal and several sums of interest ; nor can it matter in this connexion, whether the only payments made on the other side were simply payments in reduction of such indebtedness or were payments in respect of other dealings. In any event, items must in the same way be ascertained and agreed on each side before the balance can be struck and settled.

Further on, it is said :

It is clearly involved in these observations that there can in law be a settlement of account as between banker and customer, and that this is the law, is constantly assumed and acted upon in practice, but in such cases the dealings are purely financial on each side and consist of money credits and debits in the course of which one side may never be able to sue the other for a demand or claim because he is always in debt to the other, though, if sued for the whole debt, he could avail himself of payments he has made in partial reduction of the debt on running account, though merely by way of set-off or counter-claim. The customer in such cases may have had a continuous overdraft and be in this respect in the same position as the respondents (in the case before their Lordships) on the account in question but it would be an unfortunate restraint on legitimate and ordinary business relations if the law were to say that an account could not be mutually stated and agreed between parties in such relationship.

In view of the above exposition of the law by their Lordships of the Privy Council, there can be no doubt that the account in question is an account stated within the meaning of Art. 64, Limitation Art, since the original debt being of Rs. 200 only and the balance struck being of the same amount, there must have been intermediate payments by the defendant-applicant. We are therefore of opinion that the suit was rightly decided by the learned Judge of the Court below and dismiss this application with costs.

N.S./R.K. *Application dismissed.*

A. I. R. 1939 Oudh 122

YORKE J.

Natha — Plaintiff — Appellant.

v.

Thakur and another — Defendants — Respondents.

Second Appeal No. 451 of 1936, Decided on 14th February 1939, against order of Civil Judge, Bara Banki, D/- 31st August 1936.

(a) Minor—Limitation—Guardian alienating minor's property—Minor on attaining majority assigning same property to third person—Suit by assignee in respect of that property after 3 years from assignor becoming major is barred, right to sue having extinguished.

As assignee or vendee from the ex-minor cannot have any higher rights than those which his own assignor would have had, and as the right of a minor to challenge alienations made by his guardian during his minority is limited to a suit within three years of the attainment of majority, a suit filed by the assignee more than three years after the attainment of majority by the minor in respect of the property assigned must fail on the ground that the right to sue has come to an end with the expiry of that period : *A I R 1925 Bom 292 ; 32 All 392 and A I R 1929 All 879, Ref.* [P 124 C 2]

(b) Transfer of Property Act (1882), S. 3—'Actionable claim' does not include right in immovable property.

The term "actionable claim" as defined in the Transfer of Property Act does not include a right in immovable property. [P 125 C 1]

(c) Transfer of Property Act (1882), Ss. 6 (e) and 131—Alienation of minor's property during minority not challenged by him within 3 years of his attaining majority—Ex-minor transferring same property to stranger after 3 years of his becoming major—Transfer is not of immovable property or of actionable claim but merely of right to sue.

Where an ex-minor, instead of challenging within three years on his attaining majority alienation of property made during his minority by the guardian, transfers the same property to a third person after the expiry of the said period of three years, the transfer is of nothing more than a mere right to sue and therefore without effect. Such a transfer is neither an actionable claim nor a transfer of immovable property because the ex-minor transferor had at the time of transfer ceased to have any rights in the property which he was capable of transferring. [P 125 C 1]

S. C. Dass — *for Appellant.*

B. K. Dhaon — *for Respondents.*

Judgment.—This is a second appeal from a judgment of the Civil Judge of Bara Banki, upholding the order of the Munsif of Bara Banki who had dismissed the plaintiff Natha's suit for possession of a house situated in Mohalla Gularia Garda of Bara Banki town. The facts are quite simple and free from dispute. The house in question originally belonged to one Cheda who died leaving a widow Mt. Gulaba, and a son, Thakur, defendant 1, said to have been born in July 1912. On 24th April 1930, Mt. Gulaba as his natural guardian sold this house to one Sheo Parsan Singh, who was benamidar for Dhani, defendant 2 of the present case, for Rs. 150. On 5th May 1932, Sheo Parsan transferred this house to Dhani for a nominal consideration of Rs. 100. On the assumption that Thakur was born in July 1912 he would have become major in July 1930, and he would have had available to him a period of three years within which he must file a suit to set aside the transfer of the house made by his mother purporting to act as his guardian. Thakur never instituted any suit at all, but on 9th September 1935 he executed a sale deed in favour of the plaintiff Natha whereby he purported to transfer the same house to the plaintiff for Rs. 200. The plaintiff, having failed to obtain possession of the house, instituted the present suit on 2nd November 1935 for possession. The defences put forward were that the transfer made by Mt. Gulaba was for legal necessity and therefore that transfer could not be avoided. This defence was negatived by the trial Court and is not now for consideration. The second defence put forward was that the suit was barred by limitation under Art. 44, Limitation Act, as not having been instituted within three years of the attaining of majority by Thakur. This plea was upheld by the trial Court. When the case came to the lower Appellate Court the learned Civil Judge remarked that though exception was taken in the memorandum of appeal to all the findings of the trial Judge that were against appellant, only two of the findings were actually challenged in the argument of the appeal. In the first place it was contended that Mt. Gulaba did not act on behalf of her son when she executed the deed of sale in favour of Sheo Parsan Singh. On this point he held that there was no force in the contention which did not appear to have taken before the trial Court in the form in which it was urged before him. He pointed out that in the sale deed Mt. Gulaba described herself not only as the widow of Cheda but also as the mother and natural guardian of Thakur minor. It was therefore clear that she made the transfer as the mother and natural guardian of Thakur and in doing so was acting on his behalf. Learned counsel has not taken this point again and he concedes that the transfer must be taken to have been so made on Thakur's behalf but was voidable on a suit by Thakur instituted within three years of his attaining majority as provided by Art. 44 of Sch. 2, Limitation Act.

The second point taken before the lower Appellate Court was that Art. 44, Limitation Act, was not applicable. The learned Civil Judge remarked (and that is of course clear) that this was not a suit by the ward

to set aside a transfer made by the guardian but a suit by the ex-ward's transferee, and he held that it was difficult to hold that Art. 44 applied to the present case, but he proceeded to decide the case on another ground, namely that after the sale by Mr. Gulaba nothing was left to the minor in the shape of a right or title in the property. In effect what he was saying was that as the transfer by Mt. Gulaba was not void but only voidable, the transfer was a good transfer unless the ex-minor could show grounds for its being avoided. It would follow that if the minor took no steps to get the transfer avoided within three years from his attaining majority, then under the provisions of S. 28, Limitation Act, the right to the property would be extinguished and hence when Thakur purported to make this transfer of the property to the plaintiff, he was transferring something which he did not possess. Putting the case at its highest, he considered that what was transferred was a mere right to sue and such a transfer was prohibited by S. 6 (e), T. P. Act, hence the plaintiff had obtained no interest in the property by his sale deed and was not entitled to maintain his suit for possession.

Learned counsel for the appellant first argued the question as to what Article of Sch. 2, Limitation Act, was applicable to the present case. He very naturally accepts the finding of the lower Appellate Court that Art. 44 was not applicable, and he contends that the Article applicable is either Art. 120 which provides that for a suit for which no period of limitation is provided elsewhere in this Schedule, the period of limitation is six years from the date when the right to sue accrues, or it is Art. 144, the residuary Article in cases of suits for possession of immovable property. He has pressed the point that Art. 144 is the Article applicable, and in support of that contention has relied on 49 Bom 309[1] in which it was held that Art. 44, Limitation Act, could not apply to an assignee from the minor who had attained majority, and on 32 All 392[2] in which it was held that

> in the case of a suit to set aside an alienation of the plaintiff's property made during his minority by his guardian, the limitation applicable is as prescribed by Art. 144 of Sch. 2, Limitation Act.

1. Hanmant Gurunath v. Ramappa Lagamappa, (1925) 12 A I R Bom 292=86 I C 879=49 Bom 309=27 Bom L R 211.
2. Bachchan Singh v. Kamta Prasad, (1910) 32 All 392=5 I C 585=7 A L J 337.

On further examination, however, it has come to light that another Bench of the Allahabad High Court has dissented from this latter case in A I R 1929 All 879,[3] in in which it was held that Art. 44 is applicable in every case in which a ward on attaining majority impugns the transfer made by his or her guardian during his or her minority, and it was further held that there is no warrant for restricting the application of that Article to cases of transfers made by a certificated guardian, and that the word "guardian" is of general import and includes natural and testamentary guardians and guardians appointed by Court. 32 All 392[2] has also been dissented from by the High Courts of Calcutta and Lahore in cases which it is in the circumstances unnecessary for me to quote. As to the Bombay case to which I have just referred, that was also a case of a suit by an assignee from the minor who had attained majority, and it was held that

> the claim not having been filed within 12 years from the date of alienation by the guardian so far as the plaintiff was concerned, the claim was time-barred.

It is clear therefore that although the Bombay High Court did not regard a suit by the assignee as coming within the scope of Art. 44, they were in no way prepared to give the assignee any advantage from that fact. It seems to me that whatever view may be taken as to the specific applicability of Art. 44, Limitation Act, one point is clear, namely that the plaintiff as assignee or vendee from the ex-minor cannot have any higher rights than those which his own assignor would have had, and as the right of the minor was limited to a suit within three years of the attainment of majority, a suit filed by the assignee more than three years after the attainment of majority by the minor must fail on the ground that the right to sue has come to an end with the expiry of that period. The suit was therefore rightly dismissed by the learned Munsif and the appeal might also have been dismissed by the lower Appellate Court for the same reason as that given by the trial Court.

In these circumstances it is scarcely necessary for me to consider at any length the further question raised as to whether the learned Civil Judge was right in holding that the plaintiff was not entitled to maintain the suit since all that he had

3. Dip Chand v. Munni Lal, (1929) 16 A I R All 879=122 I C 680=52 All 110=1929 A L J 1248.

obtained by his purchase was a mere right to sue. Learned counsel for the appellant contends that what was transferred to him was not a mere right to sue but an actionable claim, and he has referred to Chap. 8, T. P. Act, relating to transfers of actionable claims and specifically to S. 130 of the Act. On a consideration of that Section however, it appears to me that learned counsel has put himself on the horns of a dilemma. He has himself argued that what was transferred was not a mere right to sue to recover the property but the property itself. An actionable claim on the other hand so far as I am able to infer from Ss. 130 to 132, T. P. Act, cannot by any stretch include a right in immovable property. According to Mulla's Transfer of Property Act,

actionable claims include claims recognised by the Court as affording grounds for relief either,

1. as to unsecured debts, or
2. as to beneficial interests in moveable property not in possession, actual or constructive—whether present or future, conditional or contingent.

In the old Sec. 131 the definition of "actionable claim" had been held to cover suits relating to immovable property also, but it is said by Mulla in these notes that all these difficulties have been removed by the amended definition. Debts secured by a mortgage of immovable property or by a pledge of moveable property are excluded from the definition. These are now transfers not of claims to property but of the property itself.

That is to say when learned counsel at the same time tries to urge that this is a transfer of the property itself and a transfer of an actionable claim, he is putting forward a self-contradictory proposition. To my mind, it is quite clear that the plaintiff's transfer from Thakur was not a transfer of an actionable claim, and it could not be a transfer of immovable property because the minor transferor, not having himself instituted a suit within the period of three years provided by Art. 44, had ceased to have any rights in the property which he was capable of transferring. The lower Appellate Court was therefore right in coming to the conclusion that at best the transfer on which the plaintiff's suit was founded was not a transfer of anything more than a right to sue and was therefore without effect in view of the bar of S. 6 (e), T. P. Act. On this view the plaintiff's suit was rightly dismissed by the lower Appellate Court. There is no force in the present appeal which also fails and is dismissed with costs.

N.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Oudh 125

ZIAUL HASAN AND YORKE JJ.

Baij Nath Singh — Plaintiff — Appellant.

v.

Thakurain Sri Nath Kuar and another — Defendants — Respondents.

First Appeal No. 101 of 1936, Decided on 19th January 1939, against decree of Civil Judge, Sultanpur, D/- 15th September 1936.

Court-fees Act (1870), S. 7 (iv) (c)—Suit for declaration that plaintiff is entitled to property and defendant 2 a beneficiary under will had no right to property — Declaration virtually asking for consequential relief of cancellation of will—Plaintiff held liable to pay ad valorem court-fee under Sec. 7 (iv) (c).

One *R* who died leaving a widow, was said to have made a will in favour of defendant 2 by which his property was to go to defendant 2. Plaintiff in a suit filed by him attacked the will as being void and also challenged it in the alternative as being voidable on account of its having been brought about by undue influence. Plaintiff prayed for declaration that after the death of widow of *R*, plaintiff was entitled to the property alleged to be bequeathed to defendant 2 and that no right of any sort had accrued to defendant 2 under any circumstance. He treated the suit as for two declarations only without any consequential relief and paid court-fees accordingly :

Held that plaintiff was liable to pay ad valorem court-fee under S. 7 (iv) (c) as part 2 of the declaration sought, virtually asked for a cancellation of the will and must therefore be deemed to involve a consequential relief: *A I R 1934 Oudh 505, Rel. on.* [P 126 C 1, 2]

H. Husain and P. N. Chaudhry — *for Appellant.*

M. P. Srivastava — *for Respondent 1.*

Judgment.—This is an office report to the effect that the court-fee paid on this appeal is deficient by Rs. 3577-8-0. The plaintiff-appellant filed a suit in the Court of the Civil Judge, Sultanpur, in which he prayed that a declaratory decree be passed in his favour against the defendants to the effect that the plaintiff after the death of defendant 1 is entitled to the property in suit noted in lists A to C and no right of any sort accrued to defendant 2 under any circumstance. Defendant 1 is the widow of Rudr Pratab Singh, who was the heir of a taluqdar, and defendant 2 is a distant relation of Rudr Pratab Singh who is said to have made a will in favour of defendant 2 by which his property is to go to defendant 2 after the death of defendant 1. The plaintiff paid a court-fee of Rs. 30 in the Court below treating his suit as one for two declarations without consequential relief.

The learned Civil Judge was of opinion that one of the declarations sought involved a consequential relief and asked the plaintiff to pay ad valorem court-fee under Sec. 7 (iv) (c) Court-fees Act. This order was not complied with and the plaintiff-appellant's plaint was thereupon rejected. It is against the rejection of this plaint that the plaintiff is appealing. The appeal has been filed on a court-fee stamp of Rs. 30 and the office has reported that the appellant should pay ad valorem court-fee on Rs. 390,000, the valuation put on the appeal.

We have heard the learned counsel for the appellant and also the counsel for the respondents and have come to the conclusion that the office report is correct. In 11 O W N 1292[1] the suit ostensibly was for a mere declaration of title but the learned Judges who decided the case held that the plaintiff was virtually seeking the cancellation of the deed of waqf and the will executed by one Janki Sahu and that the plaint was for a declaration with consequential relief within the meaning of Sec. 7 (iv) (c), Court-fees Act. In the present case the second portion of the relief claimed by the plaintiff virtually asks for the cancellation of the will executed by Rudr Pratab Singh in favour of defendant 2 and must be deemed, in our opinion, to involve a consequential relief. In fact it was not disputed that if the plaintiff's suit be deemed to ask for cancellation of the will, the case would fall under Sec. 7 (iv) (c), Court-fees Act. It was however contended that as the will is challenged by the plaintiff on the ground of its not being genuine and not being registered under the law, it was not necessary for the plaintiff to ask for its cancellation. This argument would perhaps have held good if the plaintiff had attacked the will as void only ; but he also challenges it, in the alternative, as being voidable on account of having been brought about by undue influence, and the fact that the plaintiff was not content to challenge it on the ground of its being void, itself shows that he is not sure of the will being void as he alleges. In any case there is the allegation in the plaint that the will was brought about by undue influence and therefore voidable against the plaintiff. This being so a relief for cancellation of the will should in our opinion be read into the relief sought and the plaintiff must pay ad valorem court-fee under S. 7 (iv) (c), Court-fees Act, on the valuation put by him on the appeal. We accordingly accept the office report and give the plaintiff-appellant a month's time from this date to make good the deficiency in court-fee on the appeal.

N.S./R.K. *Order accordingly.*

1. Mathura Prasad v. Ram Lal, (1934) 21 A I R Oudh 505=152 I C 312=11 O W N 1292.

A. I. R. 1939 Oudh 126

THOMAS C. J. AND YORKE J.

Shyam Sundar — Judgment-debtor — Appellant.

v.

Mt. Chandan Devi — Decree-holder — Respondent.

Execution Decree Appeal No. 45 of 1936, Decided on 8th February 1939, against order of the Addl. Civil Judge, Gonda, D/- 26th September 1936.

Civil P. C. (1908), O. 34, R. 14 — Word 'mortgagee' explained—In suit upon mortgage of ancestral property sons challenging validity of mortgage—Mortgagee giving up security and obtaining money decree against mortgagor—In execution mortgagee held entitled to bring mortgage property to sale—O. 34, R. 14 held did not apply as mortgage no longer subsisted.

The word "mortgagee" in R. 14 of O. 34 is intended to mean the holder of a subsisting and effective mortgage which could still be set up by the mortgagee against the purchaser or would-be purchaser of the mortgaged property. [P 128 C 1]

A mortgage of ancestral property was executed by the father. In a suit by the mortgagee upon the mortgage the sons challenged the validity of the mortgage on the ground that it was not executed for legal necessity. The mortgagee thereupon gave up the mortgage security and only obtained a simple mortgage decree against the mortgagor on the basis of the personal covenant in the mortgage deed. In execution of the money decree mortgagee sought to bring the mortgaged property to sale :

Held that O. 34, Rule 14 did not apply as the mortgage no longer subsisted and the mortgagee was therefore entitled to put the property to sale : *A I R 1935 All 507, Ref. ; 30 All 146 ; A I R 1914 All 98 and A I R 1935 Rang 132, Disting. ; 2 A L J 256, Not foll.* [P 128 C 1, 2]

H. D. Chandra — *for Appellant.*

K. N. Tandon — *for Respondent.*

Judgment.—This is a judgment-debtor's appeal arising out of execution proceedings against the order of the learned Additional Civil Judge of Gonda dated 26th September 1936, upholding the order of the learned Munsif of the same place dated 12th March 1936 dismissing the appellant's objections. The judgment-debtor Shyam Sundar executed a mortgage deed in favour of Mt. Chandan Devi on 8th December 1923, in respect of two groves and two residential

houses. Mt. Chandan Devi brought a suit on the basis of the mortgage on 9th December 1930. On 4th February 1931 the two sons of Shyam Sundar applied to be made a party, and the Court ordered that they should be made. They challenged the validity of the mortgage on the ground that the mortgaged property was the joint ancestral property of the father and the sons, and that there was no legal necessity for executing the mortgage deed. It was stated on behalf of the plaintiff that she wanted a simple money decree against Shyam Sundar, defendant 1, only upon the personal covenant to pay and that the other defendants be discharged. The sons, who were defendants 4 and 5, objected, but the Court disallowed their objection. On 9th April 1931, a simple money decree was passed against Shyam Sundar. It appears that the decree-holder and the judgment-debtor then entered into a compromise, and filed an application in the Court under O. 20, R. 11, Civil P. C., under which the decretal amount was made payable by instalments. The decree was accordingly allowed to be amended in accordance with the terms of the compromise. Under the amended decree the judgment-debtor was allowed to pay by monthly instalments of Rs. 10 and in case of default the decree-holder was entitled to recover the whole amount by execution of her decree. The judgment-debtor paid some instalments but there was a default, and the decree-holder put her decree into execution and attached the same property which had been mortgaged to her. The judgment-debtor filed an objection on the ground that under O. 34, Rule 14, the property was not liable to attachment and sale in execution without instituting a suit for sale in enforcement of the mortgage.

The learned Munsif held that the mortgage was not subsisting because the plaintiff-decree-holder had given up the mortgage security and the decree was passed on the basis of the personal covenant contained in the mortgage deed. The learned Additional Civil Judge on appeal disagreed with this view of the learned Munsif, and held that there was no extinguishment of the mortgagee rights of the plaintiff and therefore the mortgage subsisted. In dismissing the appeal he relied on the terms of the compromise in which it was stated that in case of default of any instalment the decree-holder was entitled to recover the decretal amount by getting a warrant issued against the judgment-debtor or in any other manner she may choose—*jistarah se chahen bazariye ijra wasul karlewenge.* He was of opinion that this provision clearly gave a right to the decree-holder to recover his money in any manner she liked by execution. The contention of the learned counsel on behalf of the appellant is that in view of the provisions of O. 34, R. 14 the decree-holder is not entitled to attach and sell the property without instituting a suit for sale in enforcement of the mortgage. The Rule runs as follow :

> Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage and he may institute such suit notwithstanding anything contained in Order 2, Rule 2.

Reliance has been placed by the learned counsel on behalf of the appellant on the following cases: (1) 2 All L J 356[1] in which it was held that a mortgagee, who disclaims all interest under the mortgage and obtains a simple money decree upon the personal covenant to pay, cannot attach and sell the mortgaged property except by a suit under the provisions of S. 67, T. P. Act. The relinquishment of the mortgage lien does not prevent the property from being mortgaged property and the mortgagor cannot be deprived of the rights conferred upon him of redemption and time for payment. (2) 30 All 146[2] in which it was held that though the mortgagee disclaims all interest in his mortgage and asks for and obtains a simple money decree he is precluded by S. 99, T. P. Act, 1882, from bringing the mortgaged property to sale in execution of the simple money decree. (3) 36 All 264.[3] In this case certain mortgagees sued for a simple money decree in respect of their mortgage debt stating that they had relinquished their claim under the mortgage and obtained a decree as prayed. The decree in this suit stated that the plaintiff would not be entitled to bring to sale the property mortgaged in the bond sued on. This decree was not satisfied and the plaintiffs mortgagees proceeded to put their mortgage into Court and prayed for a decree for sale on it. Held that the former proceedings were no bar to the present suit.

1. Madho Prasad Singh v. Baij Nath Tewari, (1905) 2 A L J 356=1905 A W N 152.
2. Kishan Lal v. Umrao Singh, (1908) 30 All 146 =5 A L J 121=1908 A W N 49.
3. Indarpal Singh v. Mewa Lal, (1914) 1 A I R All 98=23 I C 429=36 All 264=12 A L J 374.

(4) 157 I C 363.[4] In this case in a suit by a mortgagee for a money decree he stated in the plaint that he surrendered the mortgage security but in execution he applied for leave to execute the decree against the property which under the mortgage was security for the loan for the payment of which he had obtained the money decree. It was held that the mortgagee's rights were not extinguished by the mere averment in the plaint that he had given up the security. We may mention that S. 99, T. P. Act, has been repealed and re-enacted as R. 14 of O. 34. We have carefully gone into the decisions cited by the learned counsel on behalf of the appellant and are of opinion that they do not support his contention. The only case which to some extent is helpful to the appellant is the case in 2 All L J 356.[1]

We are of opinion that the provisions of O. 34, R. 14 cannot apply to the facts of this case because the mortgagee seeing the force of the objection raised by the sons of the judgment-debtor that the mortgage was not enforceable had to abandon his claim and rest content with a simple money decree. The effect of that objection was that the mortgagee only obtained a simple money decree against the mortgagor. In our opinion there is no subsisting mortgage, and it is not open to the mortgagee to bring a separate suit for the enforcement of such a mortgage as provided for in O. 34, R. 14. He is clearly entitled to attach the interest of the mortgagor and put it up for sale. The word "mortgagee" in R. 14 of O. 34, Civil P. C., is intended to mean the holder of a subsisting and effective mortgage which could still be set up by the mortgagee against the purchaser or would-be purchaser of the mortgaged property. We are of opinion that no such subsisting mortgage exists in the present case. In A I R 1935 All 507[5] it was held that

> where a suit is brought on a mortgage on joint family property executed by the father and the mortgage is found to be not for legal necessity to a certain extent and the mortgage is declared invalid but a simple money decree for such amount is passed against the father, the decree-holder can in execution of the decree so obtained attach and sell the property covered by the mortgage and O. 34, R. 14 is no bar to his so doing.

We are therefore of opinion that as there is no subsisting mortgage the decree-holder can put the property to sale in execution of his decree. We accordingly dismiss the appeal with costs.

N.S./R.K. *Appeal dismissed.*

4. Administrator-General, Burma v. R. O. Tewary, (1935) 22 A I R Rang 132=157 I C 363=13 Rang 292.
5. Hurmat Singh v. Ganga Narain, (1935) 22 A I R All 507=157 I C 1010.

A. I. R. 1939 Oudh 128

THOMAS C. J. AND YORKE J.

Pt. Jai Dayal — Objector — Appellant.

v.

Pt. Jagdeo Narain and others — Respondents.

Execution Decree Appeal No. 23 of 1938, Decided on 31st January 1939, against order of Addl. Civil Judge, Unao, D/- 27th April 1938.

U. P. Temporary Postponement of Execution of Decree Act (10 of 1937), S. 6—S. 6 does not apply to decrees for damages for malicious prosecution.

A money decree in a suit founded on plaint in which damages for malicious prosecution are claimed is certainly a decree for damages for tort and comes within the mischief of Sec. 6, and the judgment-debtor cannot claim protection of the Act. [P 129 C 1]

R. B. Lal and M. M. Lal — *for Appellant.*

Rajeshwari Prasad and Raj Bahadur Srivastava — *for Respondent 1.*

Judgment. — This is an execution of decree appeal by one Pandit Jai Dayal judgment-debtor-objector. It arose originally out of a murder case. One Jai Deo, who had a full brother Jai Kishen and a step-brother Jai Dayal, was murdered. Jai Dayal filed a first information report implicating Jai Kishen, Jado Nandan and others as responsible for the murder. Jai Kishen among others was prosecuted on a charge of murder. Jai Kishen was acquitted and instituted a suit for damages for malicious prosecution. In the course of that suit there was a compromise decree under which the judgment-debtor-appellant, Jai Dayal, was to make certain payments for the building of a school. This decree was passed as far back as 1929. Certain former applications for execution appear to have been infructuous, but on the present application for execution an application was made for appointment of a receiver which is the subject of a connected Appeal No. 24 of 1938. In the present case the judgment-debtor filed objections under Sec. 47, Civil P. C., read with S. 3, Temporary Postponement of Execution of Decree Act (U. P. Act 10 of 1937). The only point which arises in this appeal is whether the execution of the

decree is to be postponed under the provisions of that Act. Learned counsel for the appellant contends that this is a mere money decree passed on a compromise. For the respondents it is contended, as it was contended in the lower Court, that the decree in suit comes within the mischief of S. 6 of the Act. That Section provides:

> Nothing herein contained shall (a) . . . . or (b) apply to decrees for money arising out of claims relating to trusts or for maintenance or for profits in favour of a co-tenant or co-owner, or for mesne profits, or for damages for tort, or for contribution between co-tenants of agricultural land.

Learned counsel argues that this Section is to be read, so far as this case is concerned, as meaning that nothing in the Act shall apply to "decrees for damages for tort," and he contends that this was not a decree for damages for tort. It is however clear that it is a money decree passed in a suit founded on a plaint in which damages for tort were claimed, and we are of opinion that in these circumstances the decree in question is certainly to be construed as a decree for damages for tort. In any case we would not have been prepared to accede to this contention because we do not read the Section as learned counsel has sought to read it. We are of opinion that Section is to be read not as suggested but as laying down that "nothing herein contained shall apply to decrees for money arising out of claims for damages for tort." Reading the Section in this way, it is quite clear that the present case comes within the mischief of S. 6 of the Act and the judgment-debtor cannot claim the protection of the Act.

Learned counsel for the respondents has further pointed out that there is a second reason why the judgment-debtor cannot claim the protection of the Act. S. 3 gives protection to an agriculturist judgment-debtor only if such judgment-debtor does not pay more than Rs. 250 as land revenue or rent. The appellant himself filed khewats from which it appeared that the land revenue payable by him and his two sons is Rs. 755. Even if this were divided into three shares, the share of each would be more than Rs. 250, but in fact one of the appellant's two sons has been adopted into another family and has no longer any share. It follows that this amount of land revenue is to be divided by two and not by three and therefore the amount of land revenue which the appellant pays, is nearly Rs. 400, and he is therefore debarred from claiming the protection of the Act. In these circumstances we are quite clear that the objection of the appellant was rightly rejected by the lower Court. There is no force in this appeal which therefore fails and is dismissed with costs.

S.G./R.K. *Appeal dismissed.*

*** A. I. R. 1939 Oudh 129**

ZIAUL HASAN AND HAMILTON JJ.

Badri Nath — Appellant.

v.

Ram Chandra and another — Respondents.

Misc. Appeal No. 66 of 1936, Decided on 23rd January 1939, against order of Dist. Judge, Gonda, D/- 6th July 1936.

(a) Provincial Insolvency Act (1920), Sec. 41 (2)—Discretion under—If insolvent cannot be granted absolute discharge, Court should consider whether conditional order of discharge should be passed.

Sub-section (2) of S. 41 gives discretion to the Court to grant or refuse an absolute order of discharge but does not give the same discretion to pass or refuse to pass an order of conditional discharge. An application by an insolvent for an order of discharge should not ordinarily be entirely rejected, and if the Court is of the opinion that the insolvent should not be granted an absolute order of discharge, it should consider whether a conditional order of discharge should not be passed or whether an order of discharge, with a provision that its operation be suspended for a specified time, should not be made: *A I R 1935 Lah 919, Rel. on.* [P 130 C 1, 2]

*** (b) Civil P. C. (1908), O. 33 — Official Receiver appointed under Insolvency Act whether can be allowed to sue as pauper** *(Quære).*

Whether the word "person" in O. 33, means a natural person, that is a human being and includes a juridical person such as a receiver and whether a receiver appointed under the provisions of the Insolvency Act can therefore be allowed to sue as a pauper: *A I R 1930 Rang 259; A I R 1918 Mad 362; A I R 1928 Mad 66; A I R 1927 Cal 309; A I R 1935 Nag 209 and A I R 1937 Mad 549, Ref.* [P 130 C 2]

(c) Revision—Application of Official Receiver for permission to sue as pauper—Court following ruling of other High Court and disallowing application in its jurisdiction—No ruling of its own High Court on the point — Revision does not lie from such order though Court may have taken wrong view of law.

When a Court which has jurisdiction either to allow or disallow an official liquidator's application for permission to sue as a pauper, disallows that application in exercise of the jurisdiction following a ruling of other High Court, there being no ruling of its High Court on the point, it cannot be said that the Court acted illegally in following such other Court's ruling, and therefore even if the Court in disallowing the application has taken a wrong view of law in the matter, that would not give jurisdiction to High Court to entertain an application in revision against such order: *11 Cal 6 (P C) and A I R 1917 P C 71, Rel. on.* [P 131 C 1]

H. Husain and H. H. Zaidi — *for Appellant.*

H. D. Chandra — *for Respondent 2.*

Judgment. — These are two connected cases. In one Badri Nath insolvent appeals against an order of the learned Dist. Judge of Gonda refusing to grant him an order of discharge and in the other the Official Receiver in charge of Badri Nath insolvent's estate applies under S. 115, Civil P. C., for revision of an order of the learned Civil Judge of Gonda dismissing his application for permission to sue as a pauper. The Official Receiver wanted to bring a suit to get it declared that the partition between Badri Nath insolvent and his father Ram Harakh was collusive and that Badri Nath was possessed of property not shown by him in his application. We take up the insolvent's appeal first. The appellant was adjudged an insolvent on 1st June 1933, and was given one year's time to apply for his discharge. The application for discharge was made on 9th May 1934 and was objected to by the creditors. Thereupon the District Judge disallowed the application for discharge mainly on the ground that he had been informed that a suit had been filed to have it declared that the insolvent still owns considerable property and that in the circumstances the insolvent should not in his opinion be given a discharge, absolute or conditional. We are of opinion that the order of the learned Judge absolutely refusing to grant a discharge was bad. S. 41 (2), Provincial Insolvency Act, provides :

> Subject to the provisions of this Section, the Court may, after considering the objections of any creditor and, where a receiver has been appointed the report of the receiver
>
> (a) grant or refuse an absolute order of discharge; or
>
> (b) suspend the operation of the order for a specified time; or
>
> (c) grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the insolvent, or with respect to his after-acquired property.

It seems to us clear that this sub-section gives discretion to the Court to grant or refuse an absolute order of discharge but does not give the same discretion to pass or refuse to pass an order of conditional discharge. On the other hand Cls. (b) and (c) provide that the operation of the order of discharge may be suspended for a specified time or an order of discharge may be granted subject to certain conditions. We therefore hold that an absolute refusal to grant an order of discharge is not justified by S. 41 of the Act. We are supported in this opinion by the case in A I R 1935 Lah 919[1] in which it was held that an application by an insolvent for an order of discharge should not ordinarily be entirely rejected, and that if the Court is of the opinion that the insolvent should not be granted an absolute order of discharge, it should consider whether a conditional order of discharge should not be passed or whether an order of discharge, with a provision that its operation be suspended for a specified time should not be made. The learned counsel for the respondents has not been able to refer us to any authority justifying an absolute refusal to grant an order of discharge. We are of opinion that the appellant should have been granted a conditional order of discharge as was prayed for by him in his subsequent application dated 18th May 1936.

We now take up the Official Receiver's application in revision. The learned Civil Judge refused to give permission to the applicant to sue in forma pauperis on the strength of the ruling of the Rangoon High Court in A I R 1930 Rang 259 = 126 I C 650[2] in which it was held that the word "person" in O. 33, Civil P. C., means a natural person, that is a human being and does not include a juridical person such as a receiver and that therefore a receiver appointed under the provisions of the Insolvency Act cannot be allowed to sue as a pauper. The learned counsel for the applicant argues that the learned Civil Judge did not consider the rulings of the Madras High Court and of the Nagpur Judicial Commissioner's Court in which a contrary view was taken and it was held that an Official Receiver of the estate of an insolvent could sue in forma pauperis as a juridical person. He has referred us to the cases in 41 Mad 624,[3] A I R 1925 Mad 765,[4] A I R 1928 Mad 66,[5] 100 I C 264,[6] A I R 1935

1. Bhag Mal v. Parshotam Singh, (1935) 22 A I R Lah 919=160 I C 529.
2. S. M Mitra v. Corporation of the Royal Exchange Assurance, (1930) 17 A I R Rang 259=126 I C 650.
3. Perumal Koundan v. Thirumalarayapuram Jananukoola Dhanasekhara Sangha Nidhi Ltd., (1918) 5 A I R Mad 362 = 45 I C 164= 41 Mad 624=34 M L J 421.
4. Sivagami Ammal v Gopalaswami Odayar, (1925) 12 A I R Mad 765=87 I C 372=48 M L J 390.
5. Ammakannammal v. V. K. Damodara Mudaliar, (1928) 15 A I R Mad 66=109 I C 258.
6. Mabia Khatun v. Sheikh Satkari, (1927) 14 A R Cal 309=100 I C 264=45 C L J 68.

Nag 209[7] and I L R (1937) Mad 784.[8] On behalf of the opposite party, it is contended that in the circumstances of the case no revision lies. We are of opinion that this objection is well founded. In 11 I A 237[9] at p. 239 their Lordships of the Judicial Committee held that when a Court has jurisdiction to decide a question and decided it whether rightly or wrongly, there can be no revision under S. 115, Civil P. C., as even if the Court decided the question wrongly, it did not exercise its jurisdiction illegally or with material irregularity. Similarly, in 44 I A 261[10] their Lordships of the Judicial Committee referring to S. 115, Civil P. C., observed at p. 267 :

> It will be observed that the Section applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The Section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved.

In the present case the Court below had jurisdiction either to allow or disallow the applicant's application for permission to sue as a pauper, and has exercised that jurisdiction following the ruling of a High Court. As admittedly there is no ruling of this Court on the point, the learned Judge cannot be said to have acted with irregularity in following the Rangoon High Court's ruling, which, we may mention, is supported by a ruling of the Calcutta High Court reported in A I R 1938 Cal 745.[11] It is not necessary for us in this case to express an opinion which view is correct but even if the learned Judge of the Court below had taken a wrong view of the law in the matter, that would not have given jurisdiction to this Court, according to the pronouncements of their Lordships of the Privy Council, to entertain an application in revision against his order. We are therefore of opinion that no revision lies in the present case. We decree Badri Nath's appeal with costs and setting aside the order of the learned District Judge grant him an order of discharge on condition that in case on a suit by the Official Receiver or the creditors the insolvent be declared to hold some property, that property will be available to the creditors and that half of whatever may be his earnings or income during the next three years will also be distributed among the creditors. The application of the Official Receiver is dismissed with costs.

N.S./R.K. *Order accordingly.*

7. Shankarji Maharaj v. Mt. Godavaribai, (1935) 22 A I R Nag 209=158 I C 660 = 31 N L R 413.
8. Swaminathan v. Official Receiver of Ramnad, (1937) 24 A I R Mad 549=170 I C 37=I L R (1937) Mad 784=(1937) 1 M L J 727 (F B).
9. Raja Amir Hassan Khan v. Sheo Baksh Singh, (1885) 11 Cal 6=11 I A 237 (P C).
10. Balakrishna Udayar v. Vasudeva Aiyar, (1917) 4 A I R P C 71=40 I C 650=40 Mad 793=44 I A 261 (P C).
11. Bharat Abhyudoy Cotton Mills, Ltd. v. Kameswar Singh, (1938) 25 A I R Cal 745 = 178 I C 977=42 C W N 1164.

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* * A. I. R. 1939 Oudh 131

FULL BENCH

THOMAS C. J., ZIAUL HASAN AND YORKE JJ.

Mohammad Yusuf — Applicant.

v.

Imtiaz Ahmad Khan—Opposite party.

Criminal Misc. Appln. No. 70 of 1938, Decided on 20th February 1939.

(a) Criminal Trial—Evidence — After giving evidence in support of charge, witness in examination-in-chief making statement to prejudice Court against accused by showing that accused was attempting to force withdrawal of case — Statement held should be disallowed *(Per Ziaul Hasan and Yorke JJ., in the Order of Reference).*

After the witness had given evidence in support of the charge of offence, he made a statement in examination-in-chief with the object of prejudicing the Court against the accused by showing that he had been attempting to force the withdrawal or compromise of the case :

Held that the Court should have disallowed the statement. [P 132 C 2]

(b) Contempt of Courts Act (1926) — Act creates no fresh powers at all but merely recognises fact that such powers already exist.

The Contempt of Courts Act is an Act which creates no fresh powers at all, but merely recognises the fact that such powers already do exist but seeks to define and limit them. [P 136 C 1]

(c) Contempt of Courts Act (1926), S. 2 — Operative portion of Act is S. 2 and not heading and Preamble of Act.

It is not to be doubted that both the heading and the Preamble are to be taken into consideration in interpreting the clauses of the Act, but they are not the operative portion of the Act. The operative portion of the Act which the Court has to interpret is contained in S. 2. [P 137 C 1]

(d) Contempt of Courts Act (1926) — Act is not described as codifying and consolidating Act.

The Contempt of Courts Act is not described as a codifying and consolidating Act and if it is construed to be a codifying and consolidating Act, it is remarkably defective. Whatever the original intention may have been, that was not the result. [P 137 C 2]

(e) Contempt of Courts Act (1926), S. 2 (1) — S. 2 (1) does not define powers of High Courts in respect of contempts of themselves at all.

Sub-clause (1) of S. 2 read with S. 3 does not define the powers of the High Courts in respect of contempts of themselves at all, but merely speaks vaguely of the jurisdiction, powers and authority which the High Courts already have and exercise in respect of such contempts. [P 137 C 2]

(f) Contempt of Court — Inherent power of High Court to punish contempt of Courts can be taken away or curtailed by legislation.

The inherent power of High Court to punish contempt of Courts can certainly be curtailed or even taken away by legislation enacted by an authority competent to enact it. [P 138 C 2]

*** * (g) Contempt of Courts Act (1926), Sec. 2 (2)—Chief Court of Oudh has jurisdiction in respect of contempt of Courts subordinate to it** (Per *Full Bench*).

The Chief Court of Oudh is, by virtue of the Oudh Courts Act and the Government of India Act, the High Court of Oudh and the one and only Court of Record, and by virtue of its position it is a superior Court of Record with a position akin to that of the Court of King's Bench. It is therefore to be conceived from its being the one and only Superior Court of Record and from its enacted power of superintendence over all inferior Courts whether criminal or civil, to have an inherent power and authority to protect its subordinate Courts and to prevent interference with the course of justice in any way which may be necessary. Its powers in that respect are defined and limited by the Contempt of Courts Act of 1926. That Act is silent as to the powers of the Chief Court to deal with contempts of Courts subordinate to it but such a power cannot be negatived by silence and is to be inferred from the wording of the sub-cl. (2) of S. 2 in which the words "subject to the provisions of sub-s. (3)" would otherwise be meaningless, and in fact contradictory. It is in the highest degree necessary that the Chief Court should have such authority and should in proper circumstances not hesitate to exercise it : *Case law discussed.* [P 139 C 1]

R. F. Bahadurji and S. C. Dass *for Applicant.*

G. G. Chatterji and N. U. Beg— *for Opposite Party.*

H. S. Gupta *amicus curiæ.*

ORDER OF REFERENCE

Ziaul Hasan and Yorke JJ. — This is an application under Sec. 2, Contempt of Courts Act (12 of 1926). On 25th October 1936 one Haji Mohammad Ismail Khan filed a complaint under Ss. 420 and 406, I. P. C., against Imtiaz Ahmad Khan, opposite party of the present application, Mushtaq Ahmad Khan and Sheo Narain Bajpai. One Nur Mohammad was examined as a prosecution witness on 16th August 1937. The subsequent history of the case is that on 29th September 1937 a charge-sheet was framed against Imtiaz Ahmad Khan alone, the other two accused being discharged. An application in revision came before this Court in respect of this order of discharge and on 29th August 1938 the order of discharge in the case of Mushtaq Ahmad was set aside. On 7th February 1938, while the case against him was held up by the applications against the discharge of his co-accused, Imtiaz Ahmad Khan filed a complaint against Nur Muhammad under S. 500, I. P. C., in respect of certain statements made by Nur Mohammad in his statement in examination-in-chief on 16th August 1937. In consequence the present application has been filed by one Mohammad Yusuf, wife's brother of the original complainant, who was allowed to carry on the case after the death of the Haji. In this application it is contended that the complaint made by Imtiaz Ahmad Khan under S. 500, I. P. C., while the case under Ss. 420 and 406, I. P. C., was still pending, was made with the object of putting pressure on Nur Mohammad and the other witnesses for the prosecution in that case and therefore constitutes an interference with the administration of justice and amounts to contempt of Court within the meaning of the Contempt of Courts Act. It is therefore prayed that Imtiaz Ahmad be summoned and dealt with according to law and that the proceedings in the case under S. 500, I. P. C., be ordered to be consigned to the record room by quashing the complaint.

Learned counsel has urged before us with some vehemence that the whole object of this complaint was to overawe Nur Mohammad and the other prosecution witnesses and must be construed therefore as an interference with the course of justice. Learned counsel for the opposite party has put forward the position that his client was compelled by the behaviour of Nur Mohammad not only in Court in August 1937 but outside Court subsequent to that date to take action in the matter. We have looked into the statement of Nur Mohammad and the circumstances in which it was made. It was a statement made in examination-in-chief after the witness had given evidence in support of the charge of cheating and misappropriation, and we are clearly of opinion that it was evidence which the witness should not have been asked to give and which the Court should have disallowed. We are given to understand that a protest was made at the time but the Court allowed the evidence to be given. It appears to us that the evidence was clearly intended to prejudice the Court against the opposite party, and the only suggestion put forward is that it was evi-

dence given to indicate the circumstances in which the accused of that case were able to commit the offences alleged against them. In the paragraph in which the statements which are the subject of the complaint under S. 500 occur, Nur Mohammad stated as follows :

Mohammad Yunus Khan, Asad Ali Khan Peshkar, Fazal Rab told me that the accused Imtiaz Ahmad had told them he had filed a false case against me so that I may either withdraw from the pairwi of this case or I might have the matter compromised. The accused spoke similarly to Mirza Abid Hussain, Ali Mirza, Fazal Ahmad Khan and others whose names I do not recollect at present. The false case referred to is the case brought by Rahim Khan under Sec. 497, I. P. C., against me and which was dismissed. The accused also said to those people named above that he would have hundreds of cases instituted against me and would see me in jail.

This statement could have no other object than to prejudice the Court against Imtiaz Ahmad by showing that he had been attempting to force the withdrawal or compromise of the case. It was after this statement that the witness Nur Mohammad went on to make the statements which formed the subject of the complaint under S. 500, I. P. C. He said :

Haji Saheb was always afraid of Imtiaz Ali Khan because he (I. A. K.) twice committed criminal breach of trust with regard to municipal money in his possession. The money was paid by Haji Saheb, and so no proceedings were taken against him by the Municipal Board. Imtiaz Ali Khan was once caught for stealing water-melon and was being taken to the thana when Haji Sahib got him released.

Learned counsel for Imtiaz Ahmad Khan alleges, and has read out the complaint in the case under Sec. 500, I. P. C., with the object of showing that the charge in respect of the statement in evidence was only one of the charges contained in the complaint. He says that his client was forced into Court because Nur Mohammad was going about bringing him into disrepute with the public and with his own superior officers. He contends that the present application made by Mohammad Yusuf on behalf of Nur Mohammad is not a genuine one, but only intended to deprive Imtiaz Ahmad Khan of the right to defend himself. As regards his client's bona fides he points out that all the witnesses for the prosecution in the case under Ss. 420 and 406 have given their evidence and his client has not filed any complaint against any of them except Nur Mohammad. There can be no question, he says, of any attempt to put pressure on the prosecution witnesses at this stage of their evidence, and indeed we feel that there is some force in this contention. The only idea that can be suggested is that the threat of prosecution might lead the witnesses to say something favourable to Imtiaz Ahmad Khan in their cross-examination. There is not very much likelihood of this in view of the fact that it would expose the witnesses themselves to danger of prosecution for perjury in case they should go back on the statements made by them in examination-in-chief.

Learned counsel for Imtiaz Ahmad Khan has also suggested that there is some room for doubt about the power of this Court to take action under S. 2, Contempt of Courts Act, in view of the wording of sub-cl. (2) of that Section which does not give to a Chief Court the power to take action in respect of contempt other than contempt of itself. We were inclined to take the view that as a result of the provisions of Ss. 219 and 220, Government of India Act, 1935, this Court had the same powers in regard to contempt of inferior Courts which the High Courts have always exercised. S. 219, para. (1) provides that for the purposes of this Act, the Chief Court in Oudh shall be deemed to be a High Court. S. 220, Cl. (1) provides that every High Court shall be "a Court of record." There is some support for the view that it is in the capacity of superior Courts of record that the High Courts have claimed to exercise jurisdiction to deal with cases of contempt of Court both of themselves and of inferior Courts. We are however very doubtful if this view can be sustained. The subject has been discussed at considerable length in 46 Bom 592[1] at pp. 606 following and 41 Cal 173[2] at pp. 202 following, and put shortly the conclusion seems to be that superior Courts of record have as such the power to deal summarily with contempts of themselves but the power to deal with cases of contempt of inferior Courts is one which in England rests with the Court of King's Bench as the guardian and protector of public justice throughout the Kingdom, and has been, so to speak, inherited therefrom by High Courts of Judicature established by Letters Patent in this country. A reference to Halsbury's Laws of England,

1. Emperor v. Bal Krishna Govind, (1922) 9 A I R Bom 52=65 I C 753=23 Cr L J 177=46 Bom 592=24 Bom L R 16.

2. Legal Remembrancer v. Matilal Ghose, (1914) 1 A I R Cal 69 = 20 I C 81= 41 Cal 173=18 C L J 452=17 C W N 1253 = 14 Cr L J 321 (S B).

Edn. 2, lends support to this view. In Vol. 7, Part I, page 2, para. 2, it is stated that :

The superior Courts have an inherent jurisdiction to punish criminal contempt by the summary process of attachment or committal in cases where indictment or information is not calculated to serve the ends of justice.

In para. 36, at page 23, it is stated :

The King's Bench Division has a general superintendence over all crimes whatsoever, and watches over the proceedings of inferior Courts, not only to prevent them from exceeding their jurisdiction or otherwise acting contrary to law, but also to prevent persons from interfering with the course of justice in such Courts.

The King's Bench Division will punish as contempt disobedience to a Crown Office subpoena to attend and give evidence at quarter sessions, but not disobedience to a subpoena issued by quarter sessions.

The Court will also punish as contempt acts amounting to an interference with the course of justice in connexion with an enquiry into a criminal offence pending before Magistrates, even though it is uncertain whether the accused will, if committed, be sent to trial to the assizes or to quarter sessions.

In Vol. 8, Part. I, there is some explanation of what is meant by "Courts of record," in para. 1169 which forms part of sub-s. 2 relating to "classification." The passage runs :

Another manner of division is into Courts of record and Courts not of record. Whether a Court is a Court of record or not depends on whether it has power to fine and imprison, whether for contempt of itself or for other substantive offences. Courts of record are such as have been expressly made so by statute or by implication of a statute, that is by having statutory power to fine and imprison, and Courts of record at Common law . . . . . All Courts of record, with the exception of the Courts of the counties palatine, are Courts of the King. . . . The proceedings of a Court of record preserved in its archives are called records, and are conclusive evidence of that which is recorded therein.

It may be noted in passing that there is a great distinction between superior Courts of record and inferior Courts of record such as Borough and Local Courts of Record described in Part 16 of the same volume. From the above remarks it would appear that prima facie this Court does not, by virtue of being a Court of record, possess the power to deal with contempts of Courts other than itself, and that is, as we have already indicated, the very inference which is to be drawn from the wording of sub-clause 2 of Sec. 2, Contempt of Courts Act. There is another reason for thinking that the Government of India Act does not put Chief Courts in any different position from that which they held under the Contempt of Courts Act of 1926 in the fact that the Contempt of Courts Act is not one of those which have been included in the Government of India Act (Adaptation of Indian Laws) Order, 1937, made by the King in Council under S. 293, Government of India Act, 1935. Had it been intended by Ss. 219 and 220, Government of India Act, to put Chief Courts in the same category as High Courts in regard to contempt of Courts by making them Courts of record, the Contempt of Courts Act would presumably have been one of those which would have found place among the Acts requiring adaptation along with the adaptations made therein, immediately after the Naturalization Act (Act 7 of 1926) and before the Trade Unions Act (Act 16 of 1926).

In our opinion, then, it is prima facie doubtful whether this Court really has the power to deal with cases of contempt of inferior Courts. This is however a point of very considerable general importance and not one on which we would like to express a confident opinion without the matter being put before a Full Bench of this Court and decided after a full argument and full consideration of all aspects of the matter. We would, accordingly under Sec. 14 (1), Oudh Courts Act, refer for the decision of the Full Bench the question whether this Court has jurisdiction in respect of contempt of Courts subordinate to it.

OPINION

Yorke J. — The question which has been referred to this Full Bench for decision is, whether this Court has jurisdiction in respect of contempt of Courts subordinate to it. This point was argued before the referring Bench but not very fully argued, in fact not as fully argued as would appear from the order of the Bench by which the reference was made. We have now had the advantage of hearing a full argument on this question both from learned counsel representing the parties and also from the learned Government Advocate. On behalf of the applicant Mohammad Yusuf, who has moved this Court for the summoning of the opposite party to answer a charge of contempt of Court, it has been contended that despite the apparent difficulty arising from the Contempt of Courts Act (Act 12 of 1926), this Court has got the power to deal with contempts of the Courts subordinate to it. Learned counsel has referred to the discussions on this question in the well-known English cases in (1903)

2 K B 432,[3] (1906) 1 K B 32[4] and (1921) 2 K B 732,[5] whereby the Court of King's Bench has been established to have the power of punishing summarily contempts of subordinate Courts in England. He has further referred to the Indian decisions in 12 Cr L J 525,[6] a Madras case of 1911, 41 Cal 173,[2] 46 Bom 592[1] in the year 1922 and the two Allahabad cases in 48 All 711,[7] a case of 1926 and 52 All 619[8] which is a Full Bench case of 1930. These cases and the Lahore case in 1936 reported in 18 Lah 69,[9] and a Nagpur case reported in A I R 1935 Nag 46[10] cover practically the whole historical field of decisions on this matter. In the earliest case of 1911, the Madras High Court held that it had the power to deal with contempts of subordinate Courts. In the Calcutta case a Bench of three Judges, after a very full discussion of the state of the law at that time, negatived the existence of such a power or jurisdiction. They held that such a power could not be derived from the historical origin of the Court, and that there was no such inherent power. In 46 Bom 592,[1] the learned Chief Justice, Sir Norman Macleod, took an opposite view while the other member of the Bench, Shah J., adopted the same line of reasoning as had been adopted in the Calcutta case. The opinion of the Chief Justice prevailed and the person thus found guilty of contempt of Court was admonished by the Court. The view taken by Macleod C. J. in this case was that

> the High Court possesses the same powers of punishing for contempt as the Court of the King's Bench Division by virtue of the Common law of England.

The view taken by Shah J. was that "the High Court has no power to punish contempts of Criminal Courts subordinate to it." He was of opinion that it was difficult to hold that because a contempt of Court is punishable under the English Common law, it is punishable as such in India even though the Indian law does not make it punishable. It would be in effect creating a new offence to hold that a contempt of a subordinate Court as such is punishable. The High Court, he thought, had no power with reference to the contempts of other Courts similar to those of the King's Bench in England which it exercises under the Common law of England. It had no powers such as the Court of King's Bench in England has as being the *custos morum* of all the subjects of the realm under the Common law of the land. The mere fact that the High Court has powers of superintendence over the subordinate Courts does not give it any such jurisdiction. The same question came before a Full Bench of three Judges of the Allahabad High Court in the case reported in 48 All 711[7] and it was held that

> the High Court as a Court of Record and as the protector of public justice throughout its jurisdiction has power to deal with contempts directed against the administration of justice, whether those contempts are committed in face of the Court or outside it, and independently of whether the particular Court is sitting or not sitting, and whether those contempts relate to proceedings directly concerning itself or whether they relate to proceedings concerning an inferior Court, and in the latter case whether those proceedings might or might not at some stage come before the High Court.

In the Allahabad High Court there was present a feature common to this Court, namely that the jurisdiction of the High Court to deal with cases of contempts of subordinate Courts could not be argued to be based on any kind of inheritance of those powers from a Court which had existed at a prior date. In his judgment in this case Walsh J. held that the High Court is a Court of record and has general power of superintendence and control over the Courts subordinate to it, and he accordingly took the view that the High Courts in India have the power to punish contempts committed against Courts subordinate to them. Sulaiman J. in his judgment said that he preferred to leave the question of contempts of the inferior Criminal Courts because that question did not arise in the case which was before the Bench, and he noted certain differences in the aspect of the matter as regards Criminal Courts and Civil Courts. He relied on the Madras case in 12 Cr L J 525[6] and the Bombay case of

3. Rex v. Parke, (1903) 2 K B 432=72 L J K B 839=89 L T 439=52 W R 215=67 J P 421=19 T L R 627.
4. Rex v. Davies, (1906) 1 K B 32=75 L J K B 104=93 L T 772=54 W R 107=22 T L R 97.
5. Rex v. Editor of the Daily Mail, (1921) 2 K B 732=90 L J K B 871=125 L T 63=37 T L R 310.
6. Venkat Rao In re, (1911) 12 I C 293 = 12 Cr L J 525=21 M L J 832.
7. Abdul Hasan Jauhar In re, (1926) 13 A I R All 623=97 I C 108=48 All 711 = 24 A L J 849 (S B).
8. Shantanand Gir v. Basudevanand Gir, (1930) 17 A I R All 225=125 I C 477=52 All 619=1930 A L J 402 (F B).
9. Harkishen Lal v. Emperor, (1937) 24 A I R Lah 497=170 I C 375=I L R (1937) 18 Lah 69=39 P L R 733=38 Cr L J 883 (S B).
10. Mt. Hirabai v. Mangalchand, (1935) 22 A I R Nag 46=156 I C 666=31 N L R 154.

1920 in 22 Bom L R 368[11] for the view that power existed in India as in England to protect the Civil Courts of inferior jurisdiction. He considered the Calcutta view and conceded that there was no statutory provision under which the power to punish for contempt of inferior Civil Courts had been expressly conferred on the High Court and noted that the new Contempt of Courts Act did not come into force till after the publication of the pamphlet. He then went on to remark that

> although it might be true that every Court of Record need not possess such power (an inherent power to punish for contempts of Courts), for example, the Court of Quarter Sessions, Mayor's Court and County Court in England do not possess such powers, it cannot be equally true that a Court of record, which is the highest Court in the land, does not also possess such powers.

The view he took was that the High Court from its very constitution had certain inherent powers which it could exercise over the districts within its jurisdiction, and on the following page (727) he went on to say that

> the question which one has to consider is whether power to protect its inferior Courts is not coeval with its very foundation and institution, and a necessary incident to every High Court of justice,

and this was the view which he ultimately maintained remarking that he could not properly allow his mind to be influenced by the American authorities on such questions as was done by a learned Judge in the Calcutta case. In concluding his judgment he remarked :

> I might add that the new Contempt of Courts Act has been enacted in order to remove doubts which had arisen as to the powers of a High Court. That enactment does not imply that the Legislature has recognized that no such power did in fact exist.

I am of opinion that so far from the enactment implying a recognition that no such power had in fact previously existed, the contempt of Courts Act is an Act which creates no fresh powers at all, but merely recognizes the fact that such powers already do exist but seeks to define and limit them. Learned counsel for the applicant, Mohammad Yusuf, has adopted the view expressed by Sulaiman and Walsh JJ. in this case and has drawn our attention to the wording of Ss. 8 and 9, Oudh Courts Act (U. P. Act No. 4 of 1925), by which this Court was established. S. 8 provides that

> the Chief Court shall be deemed for the purposes of all enactments for the time being in force to be the highest Civil Court of appeal and revision.

Section 9 provides that "the Chief Court shall be the highest Court of criminal appeal and revision." S. 18 provides that,

> the general superintendence and control over all other Civil Courts shall be vested in, and all such Courts shall be subordinate to the Chief Court.

Clause (2) of this Section provides that

> the Chief Judge of the Chief Court or a Judge of the Chief Court appointed by him shall from time to time visit and inspect the proceedings of the Courts subordinate to the Chief Court and shall give such directions in matters not provided for by any law as may be necessary to secure the due administration of justice.

It is to be noted that there is no such provision in regard to the superintendence and control of subordinate Criminal Courts, but apart from the provisions of the Code of Criminal Procedure in regard to appeal, reference and revision contained in Chapters 31 and 32 of the same Code, S. 561-A of the Code provides that

> nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

Learned counsel has further referred to Ss. 219, 220 and 224, Government of India Act, 1935. S. 219 (1) provides that

> the following Courts shall in relation to British India be deemed to be High Courts for the purposes of this Act, that is to say, the High Courts in Calcutta, Madras, Bombay, Allahabad, Lahore and Patna, the Chief Court in Oudh . . . . . .
> (2) the provisions of this chapter shall apply to every High Court in British India.

By S. 220, Cl. (1) "every High Court shall be a Court of record." S. 224 gives to every High Court superintendence over all Courts in India for the time being subject to its appellate jurisdiction, and provides that the High Court may do any of the following things, that is,

> (a) call for returns ;
> (b) make and issue general rules and prescribe forms for regulating the practice and procedure for such Courts ;
> (c) prescribe forms . . . . . .
> (d) settle tables of fees . . . . . .

Sub-clause (2) of this Section provides that

> nothing in this Section shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision.

Learned counsel for the applicant has further contended referring to these provisions of the Oudh Courts Act and the Government of India Act that this Court is not only a High Court but it is in every way the highest Court of the province, having both civil and criminal, partial revenue jurisdiction and combining in its jurisdic-

11. Mohandas Karamchand Gandhi, In re, (1920) 7 A I R Bom 175=58 I C 915=21 Cr L J 835 =22 Bom L R 368.

tion matters which would come in England not only before the Court of King's Bench but also before any of the other divisions of the High Court, as for instance Divorce and Admiralty, Chancery, etc. He contends that in the light of this fact it is impossible to suppose that this Court has not got inherent jurisdiction to deal with all cases of interference with the course of justice whether the interference takes place in reference to proceedings in the High Court, that is the Chief Court itself, or in reference to proceedings in a subordinate Court.

Learned counsel for the opposite party, Imtiaz Ahmad Khan, contends that whatever view might have been taken of this matter prior to 1926, the whole situation has been altered by the enactment of the Contempt of Courts Act of 1926, and that there is no longer any scope for going outside the limits laid down in that Act. The Contempt of Courts Act is described in the heading as " an Act to define and limit the powers of certain Courts in punishing contempts of Courts, " and the Preamble runs as follows :

Whereas doubts have arisen as to the powers of a High Court of Judicature to punish contempts of Courts.

And whereas it is expedient to resolve these doubts and to define and limit the powers exercisable by High Courts and Chief Courts in punishing contempts of Court; it is hereby enacted as follows :

It is not to be doubted that both the heading and the Preamble are to be taken into consideration in interpreting the clauses of the Act, but they are not the operative portion of the Act. The operative portion of the Act which we have to interpret is contained in S. 2. Sub-cl. (1) of that Section provides that :

Subject to the provisions of sub-s. (3) the High Courts of Judicature established by Letters Patent shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice in respect of contempts of Courts subordinate to them as they have and exercise in respect of contempts of themselves.

(2) Subject to the provisions of sub-sec. (3), a Chief Court shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempt of itself as a High Court referred to in sub-s. (1).

Sub-section (3) provides that :

No High Court shall take cognizance of a contempt alleged to have been committed in respect of a Court subordinate to it where such contempt is an offence punishable under the Penal Code.

Learned counsel, who has had the support in this line of argument of the learned Government Advocate, contends that the Contempt of Courts Act is to be construed as a codifying and consolidating Act like, for example, the Legal Practitioners Act (Act 20 of 1853), and is intended to consolidate the law on the subject of contempts of Courts. I note that it is not so described and that if it is construed to be, as suggested, a codifying and consolidating Act, it is remarkably defective. Whatever the original intention may have been, that was not the result. It is said that sub-cl (1) of S. 2 read with S. 3 defines and limits the powers of the High Court. In the first place it does not define the powers of the High Courts in respect of contempts of themselves at all, but merely speaks vaguely of the jurisdiction, powers and authority which the High Courts already have and exercise in respect of such contempts. In the second place, sub-s. (2), which relates to Chief Court, contains what appears to me to be a patent inconsistency. Ex hypothesi on the argument which has been addressed to us on behalf of the opposite party, this Act is to be understood as negativing the jurisdiction, powers and authority of a Chief Court with respect to contempt of Courts subordinate to it, yet this sub-section refers to sub-s. (3) of the same Section which provides that :

No High Court shall take cognizance of a contempt alleged to have been committed in respect of a Court subordinate to it where such contempt is an offence punishable under the Penal Code.

Sub-clause (2) provides that a Chief Court shall have and exercise its jurisdiction, powers and authority subject to the provisions of sub-s. (3), but if a Chief Court has no jurisdiction to take cognizance of contempts alleged to have been committed in respect of Courts subordinate to it, then the reference to sub-s. (3) in sub-s. (2) was unnecessary. Thus the mere inclusion of the words " subject to the provisions of sub-sec. (3) " would seem to be an answer to the argument that by this Act a Chief Court is denied power to deal with contempts of Courts subordinate to it.

In support of the view which he propounds, of the proper interpretation of the Contempt of Courts Act, learned counsel has referred to the two cases mentioned earlier as reported in 18 Lah 69[9] and 52 All 619.[8] In the Lahore case, Din Mohammad J., who pronounced the judgment of the Special Bench, at pages 74 and 75 attempted an analysis of the Contempt of Courts Act and remarked :

In the matter of the Chief Court, the Act confers upon it the same jurisdiction, power and

authority in accordance with the same procedure and practice in respect of contempts itself as is possessed by a High Court. It is significant that the Act does not confer any power on the Chief Court to punish contempt of Courts subordinate to it and limits its power to punish contempt of itself alone. It is for this reason that the words 'Chief Court' find no place in either sub-s. (1) of S. 2 or sub-s. 3 of the same Section.

It is, of course, to be noted that this expression of opinion was entirely obiter and unnecessary for the decision of the matter before the Court which related to the extent to which the power of a High Court was limited by the Act. In the Allahabad case referred to, the majority of the Full Bench summed up their conclusions at pp. 686 and 687 and among these conclusions we find :

I. 1 (c) No power to punish for contempt of an inferior Court now exists independently of the Penal Code and the Contempt of Courts Act.

Again I have to note that the High Court was concerned with the position of a High Court as it stood after the enactment of the Contempt of Courts Act, and not with the position of a Chief Court. In the Nagpur case the view taken was that the Court of Judicial Commissioner had no jurisdiction in respect of contempts of subordinate Courts, but that again is not a decision which is in any way binding on us, or indeed strictly speaking relevant. There are in the course of the judgments, both the minority and the majority of the Full Bench in the Allahabad case, remarks which seem to me to lend a strong support to the view that the Contempt of Courts Act cannot be held to negative the existence of an inherent jurisdiction in this Court to deal with contempts of subordinate Courts. In the judgment of the minority the view as expressed, page 631, was that the High Court had inherent powers to punish contempt of Court committed either against it or a Court subordinate to it and had power to inflict a punishment of fine or imprisonment. At page 633 it was remarked :

It is clear from the authorities that a jurisdiction existing in a Court can only be taken away by the use of precise and distinct words in a statute or, as some authorities have held, by necessary implication of the words used.

At page 641 it was further stated :

It being our view that the inherent powers exist, as stated by us, in this Court by virtue of its being a Court of Supreme Jurisdiction, it is unnecessary to consider further whether we have powers co-extensive with the inherent powers exercised by the Court of King's Bench in England, those powers being conferred on us by statute (that is the old High Courts Act).

In the majority judgment of Sulaiman Banerji and Sen JJ., it was remarked that it could not be seriously denied that even an inherent power could be curtailed in this way, that is to say by a specific clause of the Letters Patent, and I would further concede that an inherent power can certainly be curtailed or even taken away by legislation enacted by an authority competent to enact it. They went on to remark that even this inherent power to deal with contempt of Courts had now been defined and limited by the Contempt of Courts Act and the High Court must exercise its jurisdiction in accordance with the same procedure and practice as it exercises in respect of contempt of itself. It cannot take cognizance of a contempt which is an offence under the Penal Code, and the only punishment which it can impose under Sec. 3 is imprisonment or fine, and the latter is limited to Rs. 2000. It is a curious fact in this judgment that the conclusion (c) at page 687, to which I have referred earlier, finds no place in the judgment of the majority Bench and is apparently in the nature of a translation of the statement contained in para. 1 of p. 656. The discussion of the subject of codification and consolidation by Niamatullah J. at pages 672 to 674 of his judgment in this case seems to me to deserve careful consideration. The view he has expressed is that the Legal Practitioners Act is an example of codification and consolidation, and he remarks :

It would be contrary to all canons of construction if summary power in the name of 'inherent power' is exercised in disregard of the machinery contemplated by the Act. If I am right in taking the view that the Legal Practitioners Act is an exhaustive enactment as regards pleaders, there is no room left for any inherent power in matters for which provision is expressly made by the Act. To concede power outside the Act would be to stultify its provisions.

It being clear from the remarks which I have made earlier that the Contempt of Courts Act is far from being an exhaustive enactment and indeed contains provisions consistent with the view that it does not negative the powers and authority of this Court to deal with contempts of inferior Courts, it cannot be said that it would be contrary to the canons of construction for summary powers to be exercised in the name of inherent powers in disregard of the machinery contemplated by the Act. I have not considered it necessary to discuss above the effect of this Court having been made a Court of Record by S. 220, Government of India Act. The subject of Courts of Records was discussed at some length in

the reference order dated 9th September 1938. In that order it was remarked that

prima facie this Court does not, by virtue of being a Court of record, possess the power to deal with contempts of Courts other than itself,

but it was further noted in that order that there are Courts of record of different grades and it is a further fact that while there were a number of superior Courts of record in England all of the same grade, yet the power to punish for contempt of inferior Courts was apparently reserved to the Court of King's Bench. It was, as it seems to me, not only in the capacity of a Court of record that the Court of King's Bench exercised the power and authority to punish for contempts of inferior Courts, but it was also apparently partly by reason of its being a Court of record. I am inclined to the view that it was partly with this idea in mind that the High Courts in India were declared to be Courts of record, that is with the idea that, all the powers of the superior Courts of record in England being in each province or, as in the United Provinces, in each of the two subdivisions of the Province concentrated in a single High Court, that High Court would be the one Supreme Court of Record and exercise the powers natural to such a Court.

To sum up the whole position, as it appears to me, this Court is by virtue of the Oudh Courts Act and the Government of India Act the High Court of Oudh and the one and only Court of Record, and by virtue of its position it is a superior Court of record with a position akin to that of the Court of King's Bench. It is therefore to be conceived from its being the one and only superior Court of record and from its enacted power of superintendence over all inferior Courts whether Criminal or Civil, to have an inherent power and authority to protect its subordinate Courts and to prevent interference with the course of justice in any way which may be necessary. Its powers in that respect are defined and limited by the Contempt of Courts Act of 1926. That Act is silent as to the power of this Court to deal with contempts of Courts subordinate to it but such a power cannot be negatived by silence and is to be inferred from the wording of sub-cl. (2) of Sec. 2 in which the words "subject to the provisions of sub-s. (3)," would otherwise be meaningless, and in fact contradictory. It is needless to say that it is in the highest degree necessary that this Court should have such authority and should in proper circumstances not hesitate to exercise it. On a full consideration of all the arguments, which have been put before us and the relevant Sections of the Acts which have been quoted to us, I would have no hesitation in answering the question referred to the Full Bench for decision in the affirmative.

Ziaul Hasan J.—I have nothing to add to what has been said by my learned brother Yorke J. with which I fully agree.

Thomas C. J.—The following question has been referred to the Full Bench: "Whether this Court has jurisdiction in respect of contempt of Courts subordinate to it." S. 2, Contempt of Courts Act (Act 12 of 1926), is as follows:

2. (1) Subject to the provisions of sub-s. (3), the High Courts of Judicature established by Letters Patent shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempts of Courts subordinate to them as they have and exercise in respect of contempts of themselves.

(2) Subject to the provisions of sub-s. (3), a Chief Court shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempt of itself as a High Court referred to in sub-s. (1).

(3) No High Court shall take cognizance of a contempt alleged to have been committed in respect of a Court subordinate to it where such contempt is an offence punishable under the Penal Code.

Section 219 (1), Government of India Act, 1935, provides that for the purposes of this Act, the Chief Court in Oudh shall be deemed to be a High Court. S. 220 (1) provides that every High Court shall be a "Court of Record." The contention of the learned counsel on behalf of Mohammad Yusuf is that in spite of certain difficulties arising from the Contempt of Courts Act, this Court has got power to deal with contempt of Courts subordinate to it because, (1) it is the highest Court; (2) it is a Court of record; (3) it has power of superintendence, and (4) it has an inherent power. This Court has undoubtedly criminal and civil jurisdiction in respect of all the Courts in Oudh, and by virtue of this position, it is a superior Court of record with a position akin to that of the Court of King's Bench Division which protects and has power to deal with the cases of contempt of the inferior Courts.

The phrase "contempt of Court" has been in use in English law for centuries and the offence is as old as the law itself, for no Court can function properly unless it has the power to enforce discipline within its precincts and punish those who fail to

comply with its orders. The learned counsel on behalf of Mohammad Yusuf has referred to the discussions in the well-known English cases, namely (1903) 2 K B 432[3] and (1906) 1 K B 32[4] whereby the Court of King's Bench has been established to have the power of punishing summarily contempts of the subordinate Courts in England. The other important cases bearing on the point are: 12 Cr L J 525,[6] 41 Cal 173,[2] 46 Bom 592,[1] 48 All 711,[7] 52 All 619,[8] 18 Lah 69[9] and A I R 1935 Nag 46.[10]

In the case reported in 12 Cr L J 525,[6] it was held that in dealing with cases of the contempt of the lawful authority of the Civil and Criminal Courts subordinate to a High Court, the High Court possesses the same jurisdiction as the old Court of King's Bench in England, but no such jurisdiction has been conferred on the High Court by virtue of S. 15, Charter Act. In the case reported in 41 Cal 173,[2] a Bench consisting of three Hon'ble Judges (Jenkins C. J., Stephen and Mookerjee JJ.) held that the High Court had no inherent power or jurisdiction. Mookerjee J. in his judgment has stated that:

> It is plain that the reasons thus assigned do not indicate that a Court of record has inherent power to punish for contempt of an inferior Court over which it exercises a power of superintendence and which is subject to its appellate and revisional jurisdiction . . . . . There is consequently no foundation laid by the Crown for the theory that this Court as a Court of record has authority to punish for contempt of the Court of the Magistrate of Barisal merely because this Court is a Court of record which exercises power of superintendence over that Court or because that Court is subject to its appellate and revisional jurisdiction.

In the case reported in 46 Bom 592,[1] the learned Chief Justice held that the High Court possessed the same powers of punishing for contempt as the Court of the King's Bench Division by virtue of the Common law of England, while Shah J. followed the view in the case reported in 41 Cal 173[2] and held that the High Court has no power to punish contempts of criminal Courts subordinate to it. In the case reported in 48 All 711,[7] it was held that the High Court as a Court of record and as the protector of public justice throughout its jurisdiction has power to deal with all contempts directed against the administration of justice. Walsh J. in his judgment held that the High Court was a Court of record and had general power of superintendence and control over the Courts subordinate to it. Sulaiman J. at p. 723 said that he preferred to leave the question of contempts of inferior criminal Courts still open, for that question did not arise in the case.

The learned Government advocate has contended that whatever might have been the divergence of opinion prior to the year 1926, the matter has been settled by the enactment of the Contempt of Courts Act of 1926. He referred to the heading in which it is said that it is "an Act to define and limit the powers of certain Courts in punishing contempts of Courts." I am of opinion that the Preamble and the heading have to be taken together and they are not the operative portion of the Act. What we have to construe is sub-cls. (2) and (3) of S. 2, and in this I agree with the construction which has been put by my learned brother Yorke J. The learned counsel on behalf of Mohammad Yusuf further drew my attention to the provisions of Ss. 8 and 9, Oudh Courts Act (U. P. Act 4 of 1925) and to S. 561-A, Criminal P. C. S. 8 provides that the Chief Court shall be deemed for the purposes of all enactments for the time being in force to be the highest Civil Court of appeal and revision. S. 9 provides that the Chief Court shall be the highest Court of criminal appeal and revision.

Section 561-A, Criminal P. C., provides that nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. I have already pointed out that under S. 219, Government of India Act of 1935, this Court is a High Court. I am therefore of opinion that this Court is the highest Court of record with a position akin to that of the Court of King's Bench. It has its power of superintendence over all inferior Civil and Criminal Courts, and it has power to protect its subordinate Courts from improper interference in the administration of justice. In my opinion, it will be absurd to think that this Court, which is the custodian and protector of public justice throughout the province, has no power to deal with the contempt of subordinate Courts. It is absolutely necessary that this Court should have such power and authority and exercise it. I entirely agree with the view taken by my learned brother Yorke J. I therefore answer the reference in the affirmative.

D.S./R.K. *Answered in affirmative.*

*** A. I. R. 1939 Oudh 141**

THOMAS C. J. AND YORKE J.

Zaman Khan — Applicant.

v.

Ram Asre — Opposite Party.

Civil Revn. No. 89 of 1936, Decided on 31st January 1939.

(a) Provincial Small Cause Courts Act (1887), S. 25—Powers of High Court are discretionary and are to be exercised simply and solely to prevent miscarriage of justice or gross illegalities and are not intended in effect to give a right of appeal.

Under S. 25, though the High Court has powers to interfere even upon point of fact, it cannot be intended to be nor can possibly undertake the duties of a Court of First Appeal. These powers are discretionary and it behoves it to exercise them simply and solely for the purpose of preventing miscarriage of justice or gross illegalities and are not intended to give in effect a right of appeal in all small cause cases either on law or fact.

[P 141 C 2]

*** (b) Limitation Act (1908), S. 20—Words "paid as such" are not superfluous, but provide that payment must be of interest paid "as interest" and distinctly stated to be so at the time of payment to save limitation.**

The words "paid as such" in Sec. 20 are not superfluous, but provide that the payment by debtor to creditor must be a payment of interest paid "as interest", and the mere crediting of interest by creditor in his account books is not enough to satisfy the provisions of the statute to save limitation, but must be interest paid as "interest" and distinctly stated to be so at the time of payment: *A I R 1935 Mad 101, Not foll.; A I R 1937 Pat 583; A I R 1937 Lah 820; A I R 1937 Sind 95 and A I R 1935 All 946 (F B), Rel. on.*

[P 142 C 1, 2]

K. N. Tandon — *for Applicant.*

B. K. Dhaon — *for Opposite Party.*

Order. — This is an application under S. 25, Small Cause Courts Act, against the judgment and decree of the learned Munsif of Bahraich exercising small cause court powers dated 31st August 1936. The plaintiff brought the suit to recover a sum of Rs. 81 on the basis of a bond dated 16th March 1930. The amount was payable by 2nd May 1931. The plaintiff alleged that the defendant paid only Rs. 12 towards the debt on Baisakh Sudi 2, 1341 Fasli corresponding to 15th April 1934. The defendant denied the payment of Rs. 12 as alleged by the plaintiff and further pleaded that the suit was barred by limitation. The learned Munsif held that the payment of Rs. 12 was proved, but he dismissed the suit relying on the case reported in 1935 A L J 1029[1] holding that the payment did not save limitation.

1. Udeypal Singh v. Lakshmi Chand, (1935) 22 A I R All 946=159 I C 387=1935 A L J 1029 (F B).

The application raises an important question of law, namely whether the payment of a sum of money by the debtor without specifying whether the payment was made towards interest or towards principal can save limitation under S. 20, Limitation Act. The endorsement on the back of the bond is as follows:

Miti Doij Sudi Baisakh San 1341 Fasli ko babat tamasuk ke Rs. 12 wasul pai, (i. e. received Rs. 12 towards the bond on 15th April 1934), Sd. Ram Asre.

It may be mentioned that the plaintiff in his plaint does not say whether he paid this sum of Rs. 12 towards the principal or interest. The contention of the learned counsel on behalf of the applicant is that the circumstances are such that it should be assumed that the amount was paid towards the interest, and therefore the finding of the trial Court that the suit was barred by limitation is wrong. S. 20, Limitation Act, is as follows:

Where interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorized in this behalf . . . . . a fresh period of limitation shall be computed from the time when the payment was made.

A large number of cases have been cited by the learned counsel on behalf of the applicant, but we are of opinion that in an application under S. 25 of the Act, no High Court can be intended to be or can possibly undertake the duties of a Court of First Appeal from decisions of a Small Cause Court Judge. While the High Court has the power to interfere even upon a point of fact, it behoves it to exercise this power simply and solely for the purpose of preventing miscarriage of justice or gross illegalities. The powers conferred by Section 25 are purely discretionary. It is not intended by S. 25 to give in effect a right of appeal in all small cause court cases either on law or fact. The learned counsel on behalf of the applicant has tried to argue this application as an appeal. In our opinion, the learned trial Court has decided the case sensibly and intelligently. There was no direct decision of this Court on the point for its guidance and he relied on a Full Bench decision of the Allahabad High Court for his guidance which he was entitled to do. These observations are sufficient to dispose of this application.

We may however briefly consider the contention of the learned counsel on behalf of the applicant. His contention is that the words "paid as such" in S. 20, Limitation Act are redundant and that a payment of

interest is a payment of interest and it is no more payment of interest if the words " as such " are added. It was held in the Allahabad case, 1935 A L J 1029,[1] that :

Where money is paid by a debtor without specifying whether the payment is towards interest or towards principal, leaving it to the option of the creditor to appropriate it as he likes, and the creditor appropriates it towards interest. *Held* (by majority) that there is neither a payment of interest as such nor a part payment of the principal within the meaning of S. 20, Limitation Act. (Headnote.)

We do not agree with this contention. In our opinion, the words " paid as such " are not superfluous. The Section provides that it must be payment as interest by the debtor to the creditor though the form of payment may differ. Mere crediting of interest by the creditor in his own account books is not enough to satisfy the provisions of the statute. It must be interest paid " as interest " and distinctly stated to be so at the time of payment.

The learned counsel for the applicant relied on the case reported in 58 Mad 418[2] at p. 426, in which it was held that when a part payment is evidenced by a writing which is signed by the person making the same, it makes no difference whether the payment is held to be for interest or for principal or for both. This case undoubtedly supports the contention of the learned counsel for the applicant. The view of the Bombay, Allahabad (majority of Judges), Patna and Lahore High Courts and of the Judicial Commissioner's Court of Sind is that where money is paid by a debtor without his specifying whether the payment is towards interest or towards principal leaving it to the option of the creditor to appropriate it as he likes, and the creditor appropriates it towards interest, there is neither a payment of interest " as such " nor a part payment of the principal within the meaning of S. 20, Limitation Act : *vide* 40 Bom L R 968,[3] A I R 1937 Pat 583,[4] A I R 1937 Lah 820,[5] A I R 1937 Sind 95[6] and 1935 A L J 1029.[1]

We are of opinion that so far as the payment of interest is concerned, the acknowledgment in writing must be of the payment of interest " as such." The word "payment" in the proviso refers back to the Section which it qualifies, and the words " as such " occur in relation to the payment of interest in the Section itself. We are therefore of opinion that the view taken by the trial Court is correct, and we accordingly dismiss the application with costs.

S.G./R.K. *Application dismissed.*

2. Lakshmi Naidu v. Gunnamma, (1935) 22 A I R Mad 101=154 I C 1053=58 Mad 418=68 M L J 470.
3. Havabu Bai v. Isup Musa Patil, (1938) 25 AIR Bom 467=178 I C 844=40 Bom L R 968.
4. Idan Sadagar v. Premsukhdas Ramchandra, (1937) 24 A I R Pat 583=167 I C 244.
5. Lal Chand v. Ramanshah, (1937) 24 A I R Lah 820=172 I C 455=39 P L R 622.
6. Hariram Dowlatram v. Ram Singh Gopal Singh, (1937) 24 A I R Sind 95=168 I C 820=31 S L R 68.

A. I. R. 1939 Oudh 142

THOMAS C. J. AND YORKE J.

Zaman Khan — Plaintiff — Applicant.

v.

Ganga and another — Defendants — Opposite Party.

Civil Revn. No. 123 of 1936, Decided on 31st January 1939

Evidence Act (1872), Ss. 91 and 92—Plaintiff suing for balance of principal and interest—Plaintiff alleging payment of interest — Payment endorsed on the back of bond — Defendant denying payment and pleading limitation — Plaintiff applying for permission to examine witnesses to prove fact of payment towards interest — Oral evidence held not admissible and payment held did not save limitation.

The plaintiff sued on a bond for the recovery of the balance of the principal and interest due thereon but alleged payment of interest which was endorsed on the back of the bond. The defendant denied payment and pleaded limitation. The plaintiff applied for permission to examine certain witnesses to prove the fact that the payment was towards interest :

Held that oral evidence was not admissible : *A I R 1937 All 640 and A I R 1918 Cal 891, Disting.* [P 143 C 2]

K. N. Tandon — *for Applicant.*

B. K. Dhaon — *for Opposite Party.*

Order. — This is an application in revision against the judgment and decree of the learned Munsif of Bahraich exercising Small Cause Court powers dated 27th October 1936. The plaintiff brought the suit to recover a sum of Rs. 81 on the basis of a bond dated 16th March 1930, on the allegation that defendant 2 paid Rs. 12 on account of interest on 15th April 1934, which payment was endorsed on the back of the bond. The plaintiff's suit related to the balance of principal and interest due on the bond. The defendant denied the payment of Rs 12 and further pleaded that the suit was barred by limitation. The trial Court relying on the Full Bench decision of the Allahabad High Court reported in 1935 A L J 1029[1] dismissed the suit holding that it was barred by limitation.

1. Udeypal Singh v. Lakshmi Chand, (1935) 22 A I R All 946=1935 A L J 1029 (F B).

This application was heard along with Section 25 Application No. 89 of 1936* and the question of law involved in this application is the same as that involved in Application No. 89 of 1936. We are of opinion that the question of law decided by the learned Munsif for the reasons given by us in S. 25 Application No. 89 of 1936 is correct. There was an additional argument advanced in this case, namely that the trial Court was wrong in not allowing the applicant to produce oral evidence in the case. It appears that on 5th October 1936 the applicant filed an application before the learned Munsif praying that he may be permitted to examine certain witnesses to prove the fact that the payment was made towards the interest. The learned Munsif dismissed the application holding that the oral evidence to prove such payment was not admissible. The learned counsel for the applicant has relied on A I R 1937 All 640[2] and 44 Cal 567.[3]

In the Allahabad case referred to above, it was held that Secs. 91 and 92, Evidence Act, do not preclude evidence being given to show that at the time when the payment was made the debtor expressly stated that it should be appropriated towards interest. If therefore it is proved on evidence that the payment was towards interest, such endorsement saves limitation. We have carefully considered this decision. It appears that in this case oral evidence had been produced without any objection in the trial Court and no objection as to its admissibility or non-admissibility was raised in the High Court. In the case reported in 44 Cal 567,[3] it was held that where payments are made towards a debt, but there is nothing to show whether they had been made in respect of principal or interest, the Court is entitled to find out on the evidence for what purpose the payments were made. No question of oral evidence was involved in this case. S. 91, Evidence Act, lays down that

> when the terms of a contract . . . . . have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract . . . . or of such matter except the document itself. . . . .

Section 92 of the same Act lays down that

> when the terms of any such contract . . . . or any matter required by law to be reduced to the form of a document, have been proved according to the last Section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument . . . . . for the purpose of contradicting, varying, adding to, or subtracting from, its terms.

We are therefore of opinion that the trial Court was right in rejecting the plaintiff's application of 5th October 1936. We accordingly dismiss the application with costs.

S.G./R.K. *Application dismissed.*

* Zaman Khan v. Ram Asre, *Reported in* (1939) 26 A I R Oudh 141.

2. Peare Lal v. Mohammad Yusuf, (1937) 24 A I R All 640 = 171 I C 422 = I L R (1937) All 782=1937 A L J 792.

3. Hem Chandra v. Purna Chandra, (1918) 5 A I R Cal 891=35 I C 638=44 Cal 567 = 22 C W N 190.

A. I. R. 1939 Oudh 143

ZIAUL HASAN AND HAMILTON JJ.

Badri Nath — Applicant.

v.

Sheophal — Complainant —

Opposite Party.

Criminal Revn. No. 110 of 1938, Decided on 7th February 1939, from order of Dist. Magistrate, Partabgarh, D/- 5th July 1938.

U. P. Village Panchayat Act (6 of 1920), S. 71—Panchayat is not Court—Proceedings of Panchayat or Collector under S. 71 are not subject to revisional jurisdiction of High Court.

There is nothing in the U. P. Village Panchayat Act, to indicate that a panchayat is in any way to be regarded as a Court of law. It corresponds more closely to a caste panchayat. It is not a Court "constituted under any law other than this Code" as defined under Sec. 6, Criminal P. C. Hence the proceedings of a panchayat or of a Collector under S. 71 are not magisterial proceedings, that is to say, not proceedings of a Criminal Court and hence they are not subject to revisional jurisdiction of High Court: *A I R 1926 All 27, Dissent.* [P 144 C 2]

I. A. Abbasi — *for Applicant.*

Asst. Govt. Advocate —

for Opposite Party.

Order.—This is an application in revision against an order of the District Magistrate of Partabgarh dismissing under S. 71, Panchayat Act, an application made to him by Badri Nath who had been found guilty of an offence under S. 426, I. P. C., by a village panchayat and had been ordered to pay a fine of Rs. 7. Although the District Magistrate described himself as such, he was really acting as Collector in view of S. 71, Village Panchayat Act. The first point for decision is whether an application in revision lies to this Court. The learned counsel for the applicant has referred us to 48 All 23.[1] In considering

1. Emperor v. Kamlapati Panth, (1926) 13 A I R All 27=91 I C 51=27 Cr L J 19=48 All 23 =23 A L J 897.

whether they had jurisdiction, the learned Judges made certain observations while stating that they were not unaware that they would be in the nature of obiter dicta. They held that they would have little hesitation in coming to the opinion that a village panchayat constituted and held under Local Act 6 of 1920 was a "Court" and when dealing with a case with regard to an offence, that it was a Criminal Court. They held that S. 53, which provided that there was no appeal or no revision except as provided in Ss. 49 and 71 of the Act, dealt only with civil suits and there was no provision in the Act declaring that the Collector's order under S. 71 in criminal proceedings should be final.

With all due respect to the decision of the learned Judges, we are unable to hold that a panchayat under this Local Act is a Court over which we have any jurisdiction. We do not think that the mere fact that a panchayat consists of a number of individuals who decide matters of a criminal nature in itself constitutes such a panchayat a "Court." It is well-known that a caste panchayat, for instance, does punish members of that community for what we might perhaps term "moral offences" which are also offences under the Penal Code. They deal therefore with certain criminal matters, but it cannot possibly be said that such a panchayat is a Court over which we would have any jurisdiction. In this connexion it may be interesting to refer to the U. P. Village Courts Act of 1892 which has been abolished by the U. P. Village Panchayat Act in such areas as it functions. The very title of the Act of 1892 contains the word "Court" and the Presiding Officer is called a "Village Munsif." Revision lies from him to the District Judge. Although the Civil Procedure Code, the Provincial Small Cause Courts Act and the Court-fees Act are excluded, yet that Act contains many Sections dealing with procedure which are based on the Civil Procedure Code. In the Village Panchayat Act, on the other hand, the panchayat is never styled a Court and such interference with its decision as is possible under S. 71, is not by a District Magistrate in criminal matters nor by the District Judge in civil matters but by the Collector obviously not as a Revenue Court but in his executive capacity. We may note that under S. 71 (3), when an order has been passed by the Collector under sub-s. (1) in respect of any case, proceedings in respect of the same offence may be instituted in the Court of a Magistrate having jurisdiction. Under sub-s. (1) a Collector may—(a) cancel the jurisdiction of a panchayat, (b) quash any proceedings of a panchayat at any stage, and (c) cancel any order passed by a panchayat.

If a panchayat as a Criminal Court convicted a person of an offence and the Collector as a Criminal Court set aside that order, the case might be a "summons case" under the Criminal Procedure Code and the order of the Collector would amount to an acquittal in which case there could be no further proceedings before any Magistrate. This makes it clear, in our opinion, that the proceedings of a panchayat or of a Collector under S. 71 are not magisterial proceedings, that is to say, not proceedings of a Criminal Court which would be subordinate to our criminal jurisdiction. We may further note that under S. 43 a panchayat is bound by no laws of evidence or procedure other than the procedure prescribed by or under this Act and this seems to be nothing more than keeping some very simple registers. Under S. 52 no order of a panchayat can be called in question in any Court on the ground that it was passed without jurisdiction. We could not therefore, if we claimed to exercise revisional powers, do so either on the ground of usurpation of jurisdiction by the panchayat or on the ground that it violated any law of evidence or law of procedure so that practically we could not interfere in any case in any way.

We may also note that a panchayat under Ch. 6 of the Act also deals with sanitary and other local matters which have nothing to do with criminal or civil matters. In short, we find nothing in the Act to indicate that a panchayat is in any way to be regarded as a Court of law, but it corresponds more closely to a caste panchayat. We therefore are of opinion that it is not a Court "constituted under any law other than this Code" as defined under S. 6, Criminal P. C., and is therefore not a body subject to the revisional jurisdiction of this Court. We therefore dismiss this application.

D.S./R.K. *Application dismissed.*

A. I. R. 1939 Oudh 145

THOMAS C. J. AND YORKE J.

Debi Dayal and another — *Plaintiffs* — Appellants.

v.

Sri Radha Krishna — *Defendant* — Respondent.

First Appeal No. 46 of 1936, Decided on 9th March 1939, against order of Addl. Civil Judge, Sitapur, D/- 27th January 1936.

(a) Hindu Law—Alienation—Widow — Consent of reversioners—Validity—Widow alienating property inherited from her husband— No legal necessity for transfer or legal necessity to a degree out of all proportion to transfer—Consent by presumptive reversioners, which amounts to nothing more than promise without consideration to treat alienation valid at some future date, does not validate transfer otherwise bad—Reversioners concerned or persons claiming through them are not bound by consent and they are not precluded from subsequently impugning transaction — Nature of such consent pointed.

Where, in the case of an alienation, by a Hindu widow, of property inherited by her from her deceased husband, there is no legal necessity for the transfer or legal necessity, if at all, only to a degree out of all proportion to the extent of the transfer actually effected, a consent by a presumptive reversioner, which amounts to nothing more than a promise without consideration to treat the alienation as valid at some future date, does not validate a transfer otherwise bad and the consenting reversioners or those who claim through them are not bound by it. Where the transfer is one for pious purposes, which can extend only to a small portion of the estate, a transfer of 3/4th of the estate cannot be validated by such a consent and the consenting reversioners are not precluded by their consent from subsequently impugning the validity of the transaction. The principle of surrender does not come in at all in such a case when the consent is not the consent of the whole body of presumptive reversioners existing at the date of the transfer. What the consent amounts to is nothing more than a promise without consideration to treat the deed of gift as valid at some future date. It does not come within the doctrine of estoppel or the doctrine of election or the doctrine of ratification, and the only doctrine, within the scope of which it can be brought is the doctrine of definitive election: *Case law discussed.* [P 154 C 1, 2]

(b) Hindu law— Alienation—Widow—Extent to which widow can alienate property inherited from her husband for pious and charitable purposes conducing to spiritual benefit of her husband is limited to small portion only.

The extent to which a Hindu widow is entitled to alienate the property inherited by her from her deceased husband for pious or charitable purposes, which conduce to the spiritual benefit of the deceased, is limited to a small portion only of the estate. The expense that is allowed as regards this class of acts must be limited by a due regard to the entire bulk of the estate and may even be totally disallowed where it is not warranted by the circumstances of the family. [P 154 C 2; P 155 C 1]

In the case of an estate with a value of Rupees 40,000 the share which can reasonably be regarded as capable of being considered to be a small portion, having regard to the entire bulk of the estate, would be a one-twentieth portion of the estate. A dedication of ¾th of the estate cannot be said to be a dedication of a reasonable portion of the property and such a transfer is voidable at the instance of the reversioners on the death of the widow: *A I R 1924 Lah 429 and A I R 1928 Lah 58, Disting.* [P 155 C 1]

(c) Election—Applicability of doctrine—Doctrine does not apply to case where person has consented to deed of gift and has merely given undertaking without any consideration that he will not contest it.

The doctrine of election is not applicable to cases, where a person has consented to a deed of gift and has merely given a kind of undertaking without any consideration that he will accept the transfer and not contest it at some future date. [P 149 C 2]

(d) Deed — Construction — Application to Deputy Commissioner by a person containing expressions to the effect that his wife shall be heir to his properties after his death—Held on construction of the document that it was not a will but merely an application to protect widow of applicant against production of forged will.

An application was addressed by a person to the Deputy Commissioner which contained a summary in which it was said that "the applicant is ill and has no issue or near relation, and that Mt. Umrai Kuar, the wedded wife of the applicant is his heir. In case of the applicant's death, the said Mt. Umrai Kuar shall be the heir and entitled to the proprietary possession and occupation of the entire moveable and immovable property left by the applicant." In the body of the deed it was said, "the applicant has not up to this time executed any document in favour of any person, nor will he do so. The facts are that the applicant has neither any issue nor any near relation. Mt. Umrai Kuar, the wedded wife of the applicant, is his heir, who shall, after the applicant's death, be the lawful heir and entitled to the proprietary possession and occupation of the entire moveable and immovable property left by the applicant. All this is the self-acquired property of the applicant and is not ancestral. Therefore if the applicant dies and any person of his caste produces any deed in support of his claim to the property left by the applicant as against the applicant's wife, or alleges his title in some other manner, then it be deemed void and unentertainable." It was contended that the document was intended to be a will :

Held that the document was not a will. The application to the Deputy Commissioner was merely intended to protect the widow against the production of a forged will by which she might have been deprived of her widow's estate. [P 147 C 2]

(e) Civil P. C. (1908), O. 31, R. 1—Whether O. 31 applies to suit against idol, which is not suit by or against trustees, executors or administrators *(Quaere).*

It is doubtful whether O. 31 applies to a suit against an idol, which is not a suit by or against

trustees, executors or administrators as it cannot be said in such a case that the property is vested in a trustee, executor or administrator.

[P 147 C 2; P 148 C 1]

(f) Civil P. C. (1908), O. 1, R. 9, S. 99—Suit against idol — Sarbarahkar managing property belonging to idol impleaded as defendant—It is not necessary to join trustees, if any, as parties —Case is covered by O. 1, R. 9 — Plaintiff is entitled to protection of S. 99.

Where in a suit against an idol the sarbarahkar managing the property of the idol is impleaded as defendant, it is not necessary to join the trustees, if any, as defendants to the suit. The idol is sufficiently represented by the sarbarahkar, and the case is covered by O. 1, Rule 9. In any case the plaintiff is entitled to the protection of S. 99 if the misjoinder or non-joinder has not affected the merits of the case or jurisdiction of the Court.

[P 148 C 1]

Mohammad Wasim and Ali Hasan — *for Appellants.*

Sridhar Misra — *for Respondent.*

Judgment.—This is a first appeal arising out of a suit for declaration that the plaintiffs are the owners of the property in suit and that the deed of gift or wakf executed by Mt. Umrai Kuar in favour of the defendant, Sri Radha Krishna, under the management of Bala Din, sarbarahkar, on 2nd July 1932 is invalid, void and ineffectual as against the plaintiffs. The property in suit was originally in the ownership and possession of one Ram Adhin, husband of Mt. Umrai Kuar, who is said to have died on 2nd August 1888. He was succeeded by his widow, Mt. Umrai Kuar who died on 11th December 1933. This lady on 2nd July 1932 executed a deed of gift of the entire mohal Khalispur in favour of the idol of Sri Radha Krishna. Subsequent to the death of Mt. Umrai Kuar, there was a dispute in the mutation Court, and it is said that Bala Din applied unsuccessfully for mutation of names in favour of Sri Radha Krishna under his own management in the Courts of the Sub-Divisional Officer, Sidhaul, the Deputy Commissioner of Sitapur and the Commissioner of Lucknow, but was successful in the last Court of Appeal, that is the Board of Revenue, in which an order for mutation of names was made in favour of Bala Din as manager of the trust on 22nd August 1935. The plaintiffs claimed that they were in possession of the property in suit, and that in view of these proceedings it became necessary for them to bring a suit for declaration that the deed of wakf was invalid, void and ineffectual as against them.

The plaintiffs put forward a pedigree which has been found to be correct subject to one false statement whereby it was sought to make out that one of the two branches of the family of the propositus Pitambar Dass were the children of an unwedded wife. That attempt has failed, and the point is no longer in dispute. The plaintiffs clearly realized the weakness of the contention that one branch of the family descended from an unwedded wife because they obtained deeds of transfer from the surviving members of that branch of the family, who belonged to a generation one stage higher than themselves, namely Sangli, Rameshwar and Sukhpal benami on 8th, 9th and 10th February 1934. They further, on 15th September 1934, obtained a deed of relinquishment from the benamidars.

In the trial Court a large number of issues were framed arising out of the pleadings of the parties. On these issues the learned Civil Judge held that the plaintiffs were not themselves the next reversioners of Ram Adhin but were assignees of the next reversioners, Sangli, Sukhpal and Rameshwar, and therefore entitled to maintain the suit. On Issue 2 he held that Jawahir and Nilkanth, ancestors of the plaintiffs' transferors, were not the children of an unwedded wife of Pitambar Dass. On Issue 3 he held that Ram Charan alone was not the nearest reversioner to Ram Adhin on the date of the deed of wakf, but that Ram Charan, Sangli, Sukhpal and Rameshar were all reversioners at that time ; but that at the date of Mt. Umrai Kuar's death Ram Charan had died. On Issue 4 he held that Sangli and Sukhpal did consent to the execution of the deed of wakf. On Issue 5 he held that Ram Adhin did not on 12th July 1888 make a will in favour of Mt. Umrai Kuar. This issue arose out of the plea that an application made by Ram Adhin to the Deputy Commissioner on 12th July 1888 was to be construed as a will, and that as a result of the will Mt. Umrai Kuar became absolute owner of the property and did not hold it with a widow's estate only. On Issue 6, the plea of adverse possession on the part of Mt. Umrai Kuar was negatived. On Issue 7 it was held that Mt. Umrai Kuar executed the deed of wakf in favour of the defendant intelligently and on Issue 8 it was held in a somewhat equivocal manner that Mt. Umrai Kuar could make an endowment by wakf of the property constituting half of the entire estate. In this connexion the learned Judge remarks :

As to the said sufficiency of the endowment, I may explain myself thus, that the endowed property is about three-fourths of the entire property. . . . and so by the exclusion of the one-third share of one reversioner, which comes to one-third of three-fourths or one-fourth, the endowed portion remains one-half of the entire property and as against the legally permissible " small portion, " it is evidently no small share but quite sufficient.

It certainly was no small share and was much more than sufficient. On Issue 9, he held that a suit for mere declaration was maintainable and that the other trustees were not necessary parties as alleged in para. 22 of the written statement. In the event he decreed the suit for declaration with reference to one-third share of the property in suit, that being the one-third share belonging to the plaintiffs' transferor Rameshwar, and dismissed the suit for the remaining two-thirds of the property.

Learned counsel for the appellants does not contest any of the findings of fact, but he contested the finding under Issue 4 that some endowment could be validly made by Mt. Umrai Kuar for the spiritual benefit of her deceased husband, that the consent of the next presumptive reversioners to that endowment was with consideration, and that when succession opened on the widow's death, the said consenting reversioners and their transferees were estopped from challenging the endowment. On the other hand in supporting the decision of the trial Court learned counsel for the respondent has attempted to establish that the findings on Issue 5 relating to the alleged will of Ram Adhin and Issue 9 (B) relating to the omission of the plaintiffs to make the other trustees parties to the suit were wrong, and he sought to have those decisions upset, the result of which would necessarily be that the suit would fail. It would fail if the decision on Issue 5 is reversed because in that case Mt. Umrai Kuar was competent to dispose of the whole of the estate as she liked, and it would fail on the other issue because if the argument was successful, the whole suit would be held to be liable to dismissal. We propose therefore to dispose of these two points before dealing with the main issue in the appeal. As regards the question whether the document of 12th July 1888 can be construed as a will of Ram Adhin, the document in question was an application addressed by Ram Adhin to the Deputy Commissioner of Sitapur, and contains a summary in which it is said that

the applicant is ill and has no issue or near relation, and that Mt. Umrai Kuar, the wedded wife of the applicant is his heir. In case of the applicant's death, the said Mt. Umrai Kuar shall be the heir and entitled to the proprietary possession and occupation of the entire moveable and immovable property left by the applicant.

In the body of the deed it is said:

The applicant has not up to this time executed any document in favour of any person, nor will he do so. The facts are that the applicant has neither any issue nor any near relation. Mt. Umrai Kuar, the wedded wife of the applicant, is his heir who shall after the applicant's death, be the lawful heir and entitled to the proprietary possession and occupation of the entire moveable and immovable property left by the applicant. All this is the self-acquired property of the applicant and is not ancestral. Therefore if the applicant dies and any person of his caste produces any deed in support of his claim to the property left by the applicant as against the applicant's wife, or alleges his title in some other manner, then it be deemed void and unentertainable.

For the respondent, stress is laid on the use of the word "malik," and it is contended that this document is intended to be a will and that by it an intention is expressed that after Ram Adhin, his wife shall be the absolute proprietor of his estate. Reliance has been placed on 20 O C 360,[1] but we are clear that no support for the argument can be derived from the analogy of the wills of talukdars expressed in the form of letters in reply to a notice from the Commissioner at the time of the grant of "sanads" to talukdars of Oudh. We are clearly of opinion that this application to the Deputy Commissioner was merely intended to protect Mt. Umrai Kuar against the production of a forged will by which she might have been deprived of her widow's estate. We see no reason whatever to differ from the finding of the trial Court on Issue 5.

As regards Issue 9 (B) the learned Civil Judge held that the other trustees were represented by their president, and this not being a suit under the Trusts Act, it was not necessary that they should all be made parties to the suit. Learned counsel has referred to O. 31, R. 2 and certain cases reported in 55 All 687=A I R 1934 All 1[2] and A I R 1922 Mad 405.[3] As regards O. 31, R. 2, it seems to us doubtful whether this order has any application to the present case. This is not a suit by or against trustees, executors or administrators, but a suit against the idol of Sri Radha Krishna.

1. Balraj Kuar v. Mahadeo Pal Singh, (1918) 5 A I R Oudh 125=44 I C 59=20 O C 360.
2. Ram Ghulam v. Shyam Sarup, (1934) 21 A I R All 1=149 I C 849=55 All 687=1933 A L J 1393.
3. Adiraju Arasu v. Pattu, (1922) 9 A I R Mad 405=77 I C 942.

It cannot be said that in a case like the present case, the property is vested in a trustee, executor or administrator. The case reported in 55 All 687[2] was one instituted under S. 92, Civil P. C., and was clearly within the mischief of O. 31. In the Madras case the judgment is so short that it is impossible to be certain whether that was not also a suit under S. 92. In these circumstances, we are of opinion that the point is covered by R. 9 of O. 1. We do not think that there was any non-joinder of parties, but even if there was, we are of opinion that the plaintiffs were protected by that rule, which provides that:

No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

In this case the idol was before the Court sufficiently represented by Bala Din. In any case the plaintiffs would now be entitled to the protection of S. 99, Civil P. C., since it is clear that this misjoinder could not have affected the merits of the case or jurisdiction of the Court.

Before we come to the main question of the effect, if any, of the consent of Sukhpal and Sangli to the deed of wakf executed by Mt. Umrai Kuar, we have first to consider the question of the extent to which it is competent for a Hindu widow to make a wakf of her husband's property. The learned Civil Judge has held without any discussion of the point that as a Hindu widow, Mt. Umrai Kuar could alienate a small portion of the property by way of dedication for the spiritual benefit of her husband, and he referred to the decision of the Privy Council in 49 I A 383.[4] In that case their Lordships distinguished between two objects of transfer for religious purposes, divided into essential expenditure such as expenditure on the obsequies of the deceased and optional expenditure as gifts by way of dedication which, though not for the performance of an essential observance, were considered to be for the spiritual benefit of the deceased husband, and they held that the gift in question, which was of property amounting to 1-75th of the whole property, was not improper and must be held valid. Their Lordships said:

In their Lordships' opinion the Hindu law recognizes the validity of the dedication or alienation of a small fraction of the property by a Hindu female for the continuous benefit of the soul of the deceased owner. It is clear in this case that the act, which the Rani did, was fully in accordance with Hindu religious sentiment and religious belief, and was not therefore in excess of her powers having regard to the fact that the dedication related to 1-75th of the property made specially for the creation of a permanent benefit.

This case has been followed in a case of this Court reported in 2 Luck 713[5] where the property endowed came to about 1-55th of the entire property left by the husband of the donor. It might be noted here that the person who drafted the deed of endowment, evidently had an eye to the decisions of the Courts because it is stated in the document that the lady "hereby creates an endowment of a reasonable portion of the zamindari property of her husband." We are however clearly of opinion that it would be very difficult to hold that the dedication of 3/4ths of the estate of the deceased, which is found in the present case, could possibly be supported on the view that it was a dedication of a reasonable portion of the property. Had it been possible to say that that was the case, the question of the effect of consent would hardly have called for consideration.

We come now to the main question in the case. It will, of course, be clear that if this transfer is not one which is protected by the principle just referred to, namely that it was only a transfer of a reasonable portion of the estate, the transfer is one which would ordinarily be voidable at the option of the reversioners on the death of the widow of the last owner. The main argument on behalf of the respondent is that because two of the reversioners consented to this deed of gift as shown by the endorsements below the signature of the executant, they could not be permitted to question the transfer at a later date, and therefore their transferees, the plaintiffs, have no "locus standi" now to contest this deed of wakf. At the foot of the deed, we find the thumb impression of Sangli and the signature of Sukhpal, and against each there is the following note:

The executant has signed in my presence. I attest this deed with full knowledge of the contents and knowing them to be true, and I give my consent.

It is not now in dispute that at the time in question Sangli and Sukhpal were two of the four nearest reversioners, all of equal standing, and the argument is that on

4. Sardar Singh v. Kunj Behari Lal, (1922) 9 A I R P C 261=69 I C 36=49 I A 383=44 All 503 (P C).

5. Indar Bux Singh v. Sheo Naresh Singh, (1927) 14 A I R Oudh 450=104 I C 676=2 Luck 713=4 O W N 820.

whatever footing the effect of consent is put, that is whether it was on the footing of an estoppel, election or ratification, the present plaintiffs are bound by it. Learned counsel for the respondent has relied mainly on two rulings of this Court reported in 4 O W N 903[6] and 4 O W N 1101,[7] and the cases reported in 52 Mad 556,[8] 51 Bom 475[9] and 45 All 339.[10] In 4 O W N 903[6] a Bench of this Court in 1927 discussed the law on the subject of the consent of the husband's kindred to a gift of the husband's property by the widow. They considered the view of the Privy Council in the case in 8 M I A 529[11] and remarked:

We interpret their Lordships to lay down here a rule which affects all alienations and not only alienations which purport to be for necessity or religious or charitable purposes. We cannot interpret the word 'an alienation by her which would not otherwise be legitimate' as so narrow as not to include an alienation by gift. Therefore we interpret the latter portion of this passage to mean that a gift made by a Hindu widow, which is a form of alienation which she is not ordinarily competent to maae, can become a valid alienation if made with the consent of her husband's kindred.

We note that they further remarked at page 907:

That is to say, an alienation which, if challenged, would be set aside, is a good alienation if the whole body of persons constituting the next reversion assent to it.

We further note, however, in connexion with this case that as stated in para. 2 of the headnote what happened in this case was that no attempt was made to challenge the gift by the widow until no right of challenge legally remained. The case is therefore in no sense on all fours with the present case. Learned counsel also relied on the case in 4 O W N 1101.[7] The decision in that case was based on that in 4 O W N 903[6] and reference made to 54 I A 396,[12] another case of the year 1927 which will be considered later on. In 52 Mad 556[8] it was held in 1928 that

if the next presumptive male reversioner consents, though for no consideration, to an alienation without necessity by a Hindu widow (e. g. a gift as in this case), the transaction will be binding on him when he actully succeeds to the estate.

In this case the Full Bench of the Madras High Court which followed the Allahabad and Bombay decisions reported in 45 All 339[10] and 51 Bom 475[9] discussed the doctrines of estoppel, election and ratification. They concluded that no question of estoppel could arise in such a case,

for the essence of the doctrine of estoppel is that a person who acts on a representation of fact made to him by another person and is thereby damnified, is entitled to say that the person, who made that representation, cannot be heard to contest the truth of the facts which he himself asserted. The essence of the doctrine is that the person, who acted on the faith of the assertion, was damnified by so acting, and that feature is altogether absent in this case.

They went on to discuss the doctrine of election and they quoted from a leading case in this connexion the following words:

Election is the obligation imposed upon a party by Courts of Equity to choose between two inconsistent or alternative rights or claims in cases where there is a clear intention of the person from whom he derives one that he should not enjoy both. Every case of election therefore presupposes a plurality of gifts or rights, with an intention, express or implied, of the party who has a right to control one or both that one should be a substitute for the other. The party who is to take has a choice, but he cannot enjoy the benefit of both.

Learned counsel for the appellant has put it to us that election presupposes a plurality of benefits, etc.; it suggests alternative benefits and incorporates a doctrine of compensation. The person, who is put to election, has in fact to choose between two benefits of which he can have either but not both. In the ordinary sense therefore the doctrine of election does not seem to be applicable to cases of this kind, where a person has consented to a deed of gift and has merely given a kind of undertaking without any consideration that he will accept the transfer and not contest it at some future date. The judgment goes on to discuss the doctrine sometimes spoken of as election and sometimes as ratification and to refer to the Privy Council case reported in 46 I A 72[13] to which we shall have occasion to refer later, and the learned Judges proceed to include among persons who are to be construed as bound by this doctrine a person who, although no one has

6. Mt. Jumna Kuar v. Madari Singh, (1927) 14 A I R Oudh 469=106 I C 828=4 O W N 903.
7. Gaya Din Singh v. Madho Singh, (1927) 14 A I R Oudh 558 = 107 I C 180 = 4 O W N 1101.
8. Ramakottayya v. Viraraghavayya, (1929) 16 A I R Mad 502=119 I C 156=52 Mad 556=56 M L J 755 (F B).
9. Akkawa v. Sayadkhan Mithekhan Mulgund, (1927) 14 A I R Bom 260=102 I C 232 = 51 Bom 475=29 Bom L R 386 (F B).
10. Fateh Singh v. Rukmini Ramanji Maharaj, (1923) 10 A I R All 387 = 72 I C 8 = 45 All 339=21 A L J 235 (F B).
11. Collector, Masulipatam v. Cavaly Vencata Narrainapah, (1859-61) 8 M I A 529=2 W R 61 (P C).
12. Ramgouda Annagouda v. Bhausaheb, (1927) 14 A I R P C 227=105 I C 708=52 Bom 1=54 I A 396 (P C).
13. Rangasami Gounden v. Nachiappa Gounden, (1918) 5 A I R P C 196=50 I C 498=46 I A 72=42 Mad 523 (P C).

been damnified so as to call in the doctrine of estoppel and although he has taken no pecuniary benefit to himself within the meaning of the strict doctrine of election (as in cases where there has been a kind of family settlement between the widow and the reversioners) "has nevertheless positively and definitively chosen to announce his intention" and in fact agreed to abide by the act of the widow. It seems that in this judgment the learned Judges contemplate that a person, who has positively and definitively announced his intention and given a kind of undertaking without consideration to abide by the act of the widow, will be bound by his act at some future date after the reversion has opened, even though the undertaking is of the nature of a *nudum pactum*. This view is in accordance with the view of the Full Bench of the Allahabad High Court as expressed in 1923 in 45 All 339,[10] in which it was held that

> a reversioner to the estate of a deceased separated Hindu, who has expressly assented to an alienation of property forming part of the estate made by the widow in possession, cannot, on succeeding to the estate after the widow's death, repudiate his action and sue for possession of the property alienated by the widow, and that the position of such reversioner was in no way affected by the fact that a co-reversioner, who had not consented to the alienation, had sued for and obtained a declaratory decree in respect of half the property alienated by the widow.

In the judgment of the majority of the members of the Full Bench, reliance was placed on the words used in the judgment of their Lordships of the Privy Council in 46 I A 72[13] at p. 86 in which it was said that a presumptive reversionary heir was not bound to challenge an alienation by the widow in possession of the estate as soon as it came to his knowledge, but was entitled to wait till "the death of the widow has affirmed his character," but then followed the words: "Of course something might be done even before that time which amounted to an actual election to hold the deed good" and the Full Bench proceeded on the basis of this remark to hold that it was possible for a reversioner even by what was something like a declaration or undertaking or consent to make what they called an election to hold the transfer good. It is clear from the judgment of Walsh J. that this document was described as a deed of relinquishment and amounted to an undertaking to recognize and be bound by this particular transfer. The other case relied upon on behalf of the respondent is 51 Bom 475[9] where, reasoning on similar lines, that Court in 1927 held that where the plaintiff had actually joined in the deed by which the property in question was alienated, it was a clear election to hold the transaction as valid. Reference was made to the Allahabad case just referred to and to a previous case of the Bombay High Court, 46 Bom 292,[14] but that case was decided on the ground of estoppel, a ground which is clearly not applicable in the present case. Learned counsel for the appellants has traced the development of the law relating to the consent of reversioners to an alienation by a Hindu widow, and he contends that the development of the doctrine, which has found favour with the Allahabad, Madras and Bombay High Courts, is based in the main on a misunderstanding in 35 I A 1[15] and of the words quoted earlier from 46 I A 72[13] that "something might be done even before that time which amounted to an actual election to hold the deed good," and he contends further that that view has not found favour with this Court as shown by certain recent decisions to which we shall refer later.

He asks us first to consider the position of a reversioner. It is clear that he has no vested interest and it has been held in numerous cases that his right is no more than a "spes successionis" or possibility of inheriting and is not transferable: *vide* for example 45 I A 35[16] and 50 I A 239.[17] It is in the light of the very limited nature of the reversioner's right that the value of consent by him has had to be assessed.

Turning now to the position of the Hindu widow and her power to alienate the estate of her deceased husband, it is settled law that she can transfer the whole of her interest in the estate to the nearest reversioner and can efface herself. It is further settled law that she can transfer a part of or even the whole of the estate for legal necessity and that the consent of the reversioners is not in any way necessary. The question is, what is the effect of her having

14. Basappa v. Fakirappa, (1922) 9 A I R Bom 102 = 64 I C 214 = 46 Bom 292 = 23 Bom L R 1040.
15. Bajrangi Singh v. Manokamika Bakhsh Singh, (1908) 30 All 1=35 I A 1=11 O C 78=5 A L J 1 (P C).
16. Amrit Narayan Singh v. Gaya Singh, (1917) 4 A I R P C 95=44 I C 408=45 I A 35=45 Cal 590 (P C).
17. Annada Mohan Roy v. Gour Mohan Mullick, (1923) 10 A I R P C 189=74 I C 499=50 I A 239=50 Cal 929 (P C).

obtained the concurrence or consent of the nearest reversioners at the time of such a transfer? The effect of numerous decided cases appears to be no much more than that the consent of the nearest reversioners raises presumption that there was a legal necessity for the transfer. That is a presumption which is clearly rebuttable where the reversioner at the time of the death of the widow is not the same person who had consented; where however it is the same person, that person is precluded from saying that there was no legal necessity at all. On the other hand, it seems prima facie reasonable to suppose that where on an examination of a transaction it is clear that it goes beyond the bounds of legal necessity or pious obligation or whatever it may be called as decided in cases bearing on that particular aspect of the matter, even the consenting reversioner himself would not be precluded from saying that although there was some legal necessity, the legal necessity did not extend to so large a transfer of property as has been actually effected. In the specific case of transfers for legal necessity in the shape of gifts of the kind found in the present suit, that is transfers for religious purposes, the case which is generally referred to as the leading case is the case in 8 M I A 529[11] referred to above, in which it was said at page 551 that:

For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she (the Hindu widow) has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity. On the other hand, it may be taken as established that an alienation by her, which would not otherwise be legitimate, may become so if made with the consent of her husband's kindred. . . . . The exception in favour of alienation with consent may be due to a presumption of law that where that consent is given the purpose for which the alienation is made must be proper.

This was one of the numerous cases considered in 40 Cal 721.[18] Jenkins C. J. summed up at p. 752 the result of his examination of the previous cases as follows:

The result then of the authorities binding on us appears to me to be this. To uphold an alienation by a widow of her deceased husband's estate where she is his heir it should be shown (i) that there was legal necessity, or (ii) that the alienee, after reasonable inquiry as to the necessity, acted honestly in the belief that it existed, or (iii) that there was such consent of the next heirs as would raise a presumption, either of the existence or necessity, or of reasonable inquiry and honest belief as to its existence, or (iv) that there was a consent of the next heirs to an alienation capable of being supported by reference to the theory of the relinquishment of the widow's entire interest and consequent acceleration of the interest of the consenting heirs. Where anyone of the first three positions is established, the alienation may be of the whole or any part of the husband's estate, but where the fourth alone is proved, then the alienation must be of the whole.

In his judgment Mookerjee J. at p. 781 summed up the matter in very similar terms and remarked at the foot of p. 781 under head (iii):

When a Hindu widow has alienated, in whole or in part, the estate inherited by her from her husband, with the consent of the reversionary heirs, such consent may raise the presumption that the transfer was for legal necessity or that the transferee had made proper and bona fide inquiries and had satisfied himself as to the existence of such necessity. The quantum of consent necessary to raise this presumption depends upon the facts of each particular case, and in all cases, the presumption raised by such concurrence on the part of the reversioners is rebuttable.

It would seem that if the transfer goes far beyond the limits of legal necessity for a transfer of the particular kind, to that extent the presumption raised by the concurrence on the part of the reversioners is rebutted, and that is one of the points for consideration in the present case. In a series of cases the nature and the effect of consent of reversioners has been considered and the binding effect of such consent has in different cases been based, as already indicated upon estoppel under Sec. 115, Evidence Act, upon election and upon ratification. Learned counsel has pointed out that the case in 35 I A 1[15] has led to differences of opinion. In that case a widow made a series of transfers to her son-in-law, and at a subsequent date a number of the then nearest reversioners executed for consideration deeds confirming the sales by the widow to the son-in-law and disclaiming all title to the property in dispute. Later, after the death of the widow, the reversioners, some of whom were the descendants of the consenting reversioners, instituted suits to set aside the transfers made by the widow. It was held that the consent of the then reversionary heirs was sufficient (presumably to establish that the transfers made by the widow were for legal necessity) and that it was immaterial that it was given after the execution of the sale deeds. The question which has arisen since is what was the real ratio of this decision bearing in mind that the consent was given by those reversioners before the reversion

18. Debi Prosad Chowdhury v. Golap Bhagat, (1913) 40 Cal 721=19 I C 273=17 C L J 499=17 C W N 701.

opened and could not therefore come within the ambit of the theory of ratification. Similarly, it could not come within the ambit of estoppel, as by no stretch could the provisions of S. 115, Evidence Act, be considered applicable. The case was therefore interpreted by some High Courts as justifying the view subsequently expressed in the Allahabad case in 45 All 339[10] that it was a case of election of a peculiar kind, since again it did not come within the ordinary scope of the doctrine of election, in view of the fact that at the time at which the consent was given (and it was clearly given for consideration) the rights of the consenting reversioners were not transferable rights. This was considered in 1918 in 46 I A 72,[13] and in conclusion it was remarked that

> the judgment affirmed the Calcutta as against the Allahabad view, but it did not particularize on what exact ground the alienation was supported,

and their Lordships did not at any stage come to a clear conclusion as to the ratio of that particular case. Their Lordships proceeded on p. 84 to lay propositions in regard to alienations by the widow of her deceased husband's estate remarking that these propositions were substantially the same as those laid down by Jenkins C. J. and Mookerjee J. in 40 Cal 721.[18] The case which they were discussing was a case which they held to be a case of a deed of gift, and they remarked at page 85 :

> Being a deed of gift it cannot possibly be held to be evidence of alienation for value for purposes of necessity. It follows therefore that the deed, taken by itself, cannot stand.

They proceeded to hold that there was no room for the doctrine of estoppel, and in that connexion referred again to 35 I A 1.[15] Thereafter they referred to the doctrine of ratification which ratification is also expressed in some cases as "election to hold the deed good." They went on to remark :

> But it is well settled that though he who may be termed a presumptive reversionary heir has a title to challenge an alienation at its inception, he need not do so, but is entitled to wait till the death of the widow has affirmed his character, a character which up to that date might be defeated by birth or by adoption. The present plaintiff raised these proceedings immediately after his title was confirmed. Of course something might be done even before that time which amounted to an actual election to hold the deed good.

Their Lordships went on to hold that what the appellant of that case had done did not amount to such an actual election. It is these two lines in 46 I A 72[13] which left room for the extension of the doctrine of election found in 45 All 339.[10] The question is what sort of acts were contemplated by their Lordships when they made this remark. Learned counsel for the appellants contends that they had in contemplation such cases as the case in 45 I A 118,[19] 24 C W N 105,[20] 54 I A 396[12] and possibly 35 I A 1.[15] In 45 I A 118[19] the appellant had entered into and taken the benefit of a compromise, and he was held precluded from claiming as reversioner. He had not actually taken a share under the compromise but he was thereby recognized as the adopted son of another deceased uncle and subsequently obtained by relinquishment possession of the share of the property allotted to that uncle's widow. In 24 C W N 105[20] it was held

> that the plaintiff, who was a party to the arrangement made to divide the property at a time when the rights of the widow and the daughters were in doubt, could not be allowed to repudiate the same and to impeach a sale made on the faith of it.

This was a case bordering upon an estoppel. In 54 I A 396[12] there were three deeds executed and registered on the same day, and it was held that the three deeds were to be regarded as forming one transaction entered into by all the persons interested in the properties, and that the then reversioner, who had taken a sale of half the property from the widow, and consequently the plaintiffs (his sons and grandsons) were precluded from disputing the two alienations now sought to be set aside, the alienations being by the widow were voidable and not void, and the consenting reversioner being precluded from questioning them, it was not necessary to consider whether he could validly deal with his reversionary interest.

This decision was interpreted by a Bench of this Court in 4 O W N 1101[7] referred to above, as laying down the simple principle that a deed of gift executed by a Hindu widow with the consent of her husband's nearest heir is an alienation justified by law, but an examination of the case suggests that this conclusion is based on rather a cursory reading of it. It appears rather to come within the scope of the two lines so frequently quoted from 46 I A 72,[13] and to be a border line case attributable to an extension of the doctrine of estoppel. Learned counsel for the appellants referred

19. Kanhai Lal v. Brij Lal, (1918) 5 A I R P C 70 =47 I C 207=45 I A 118=40 All 487 (P C).
20. Mt. Hardei v. Bhagwan Singh, (1919) 6 A I R P C 27=50 I C 812=24 C W N 105 (P C).

us to the Privy Council case in 46 I A 1[21] as a case which, as he argues, illustrates the limitations of the theory of estoppel by consent, and particularly brings out the point that consent by a reversioner will not validate a transaction otherwise bad. In this case one Hanuman Sahai (father of Gur Narayan, plaintiff), who subsequently came to own certain properties by purchase from the immediate reversioners at the time of the death of the widow, had been not merely a consenting party but an actual party to a transfer by the widow having joined in the conveyance executed by her. It was held that :

> A person joining in the conveyance is not estopped from denying the vendor's power to convey more than her life interest, unless the purchaser has thereby been misled. Except in that case, therefore, the conveyance does not operate upon an interest acquired after the vendor's death by the person so joining.

There is however an important distinction between that case and the cases of consent which we have to consider in connexion with the present case. In that case Hanuman Sahai was not a presumptive reversioner at the time when he joined in the conveyance, and that was a fact which must have been known to the purchaser from the widow. As remarked on p. 13 :

> Hanuman Sahai's interest, if it can be so called, in either view of the facts, was a mere expectancy, contingent, firstly on his mother surviving Mahasundar, and secondly on his surviving his mother. His association in the deed of sale was, in their Lordships' opinion, wholly futile and had no legal effect in validating the transaction if otherwise invalid.

This case, as is clear from remarks at a number of places in the judgment, had been decided on the footing of estoppel, and their Lordships held that no case of estoppel under S. 115, Evidence Act, could possibly arise. In these circumstances, we are of opinion that this case is not really helpful. Coming to more recent cases we have to consider first the two cases of this Court reported in 4 O W N 903[6] and 4 O W N 1101[7] referred to earlier. These two cases came before a Bench consisting of Stuart C. J. and Raza J. in 1927, and we have already remarked that bearing in mind the circumstances in 4 O W N 903[6] we find it difficult to apply it to the present case, and we are inclined to think that the generalizations on the subject of consent, both in this case and the later case, go considerably further than anything contemplated in the decisions of their Lordships of the Privy Council. The subject came up again in 1929 before another Bench of this Court in 4 Luck 622.[22] In this case it was held, after consideration of the law on the subject as a whole, that

> there can be no case of alienation by a Hindu widow unless the alienation is made for legitimate purposes, which may be proved either "aliunde" or by raising a presumption in favour of it, which presumption may, if not rebutted by contrary proof, be based on the consent of reversioners. Obviously therefore a transfer by way of gift in favour of a stranger is not an alienation to which the presumption of its being legitimate founded on the consent of the reversioners can be applicable.

Reliance was placed on 46 I A 72[13] and reference was made to the case in 54 I A 396[12] and the opinion expressed that this decision did not lay down the proposition that a pure gift by a Hindu widow of her husband's estate in favour of a stranger can hold good, if it is supported with the proof of consent of the reversioners. In this case therefore the Bench clearly dissented from the view expressed in 4 O W N 1101.[7] They further in the course of their judgment remarked :

> As a pure proposition of law we are not prepared to state it as broadly as it has been done by the learned Judges of the High Court at Allahabad in 45 All 339[10] mentioned above,

that is to say that for practical purposes they rejected the theory that an election to hold a transfer good not coming within the bounds of estoppel or election more properly so described, would be binding upon the reversioner after the death of the widow. The subject has been again carefully considered by a Bench of this Court consisting of Raza and Smith JJ. in 1931 in 7 Luck 360[23] in which it was held that

> where an alienation by way of gift by a Hindu widow of property forming part of her husband's estate is consented to by the next presumptive male reversioner, who receives consideration for giving such consent or has benefited by the transaction, the transaction is binding on the consenting reversioner and persons claiming through him, if he succeeds to the estate after the death of the widow.

The proposition laid down was stated in clear terms at p. 378 where it was stated :

> In our opinion it is now settled law that where a reversioner has unequivocally manifested his intention to abide by the act of the widow, e. g. by joining in the deed of the widow during her lifetime, and has benefited by the transaction, he is personally debarred from resiling from it and impugning its validity. Those who claim under or

21. Gur Narayan v. Sheo Lal Singh, (1918) 5 A I R P C 140=49 I C 1=46 I A 1=46 Cal 566 (P C).

22. Bindeshwari Singh v. Har Narain Singh, (1929) 16 A I R Oudh 185=127 I C 20=4 Luck 622=6 O W N 233.

23. Babu Singh v. Rameshwar Bakhsh Singh, (1932) 19 A I R Oudh 90 = 135 I C 881 = 7 Luck 360=8 O W N 1400.

through him have no better title to succeed in a suit brought by them after his death than he himself had.

This appears to us to be a case of the type contemplated by their Lordships in those two lines quoted from the case in 46 I A 72[13] where there is something approximating to a real election because a benefit has been taken. Per contra it would seem to follow that where there has been no more than a consent which might be described as nothing more than a promise to recognize the transfer as valid at some future date, it would be difficult to hold that the consenting reversioner is debarred from resiling from the transaction and impugning its validity, unless it were the case that presumptive proof of legal necessity was sufficient for the purpose of the particular transaction in question. Where as here the transfer is one for pious purposes, and it is the consistent view of Courts that such a transfer or dedication can only extend to a "small portion" of the estate, the transfer of 3/4th of the whole estate could not possibly be held to be validated by such a consent and the consenting reversioners could not be held precluded by their consent from subsequently impugning the validity of the transaction.

Putting the case in another way we do not find that there is any Privy Council case in which a consenting reversioner, who has given a consent to a transfer by way of gift, such as is found in the present case, without any consideration therefor, the gift being one which could not, if it stood by itself, be validated on the ground of legal necessity to its full extent or anything like its full extent, has been held bound by that consent. The principle of surrender does not come in at all in this case and further the consent is not the consent of the whole body of presumptive reversioners existing at the date of the transfer. What this consent therefore amounts to is nothing more than a promise without consideration to treat the deed of gift as valid at some future date. It does not come within the doctrine of estoppel or the doctrine of election or the doctrine of ratification, and the only doctrine, within the scope of which it can be brought, is the doctrine of definitive election, the best example of which is to be found in the Allahabad decision in 45 All 339[10] and Bombay, 51 Bom 475,[9] and Madras, 52 Mad 556,[8] cases referred to above, (a case of sale and a case of gift), an extension of the doctrine of election which has been expressly dissented from, though perhaps to some extent obiter, in 4 Luck 622[22] at p. 631. We are therefore of opinion that where, as here, there is no legal necessity, or, if legal necessity at all, only to a degree quite out of proportion to the extent of the transfer actually effected, such a consent or promise cannot validate a transfer otherwise bad, and the consenting reversioners and those who claim through them cannot be held bound by it.

The only question which remains is as to the extent to which the transfer effected by the widow in the present case can be held to be valid. There is no very satisfactory basis for arriving at a decision on this point. In two cases to which we have referred earlier, such a transfer of shares amounting to 1.55th and 1-75th were held to be good. The property which has been the subject of transfer in the present suit, has been valued for the purposes of jurisdiction at Rs. 30,000, and as this property is said to represent about 3-4ths of the entire property of the deceased Ram Adhin, the value of the entire property would seem to be roughly Rs. 40,000. Learned counsel for the respondent referred us to two Lahore cases reported in A I R 1924 Lah 429[24] and A I R 1928 Lah 58[25] in both of which a gift of one-fourth of the total estate was held to be reasonable, but an examination of those cases shows that they are not applicable in the present case. These are both cases of gifts made on the occasion of the marriage of a daughter which have been held to be valid under Hindu law and afford no guidance for what are the proper limits in a case of gift for pious purposes.

The subject is discussed in Mulla's Principles of Hindu Law (Edn. 8 at page 178, para. 181-A). The learned author says that alienation for religious or charitable purposes may be for purposes which are divisible into two classes, those which are essential such as the obsequies of the deceased or the payment of his debts, and those not indispensable or obligatory are still pious purposes which conduce to the benefit of the soul of the deceased. As regards this second class it is stated that the widow can alienate "a small portion only" of the estate for the pious or charitable purpose she

24. Jowala Ram v. Hari Kishen Singh, (1924) 11 A I R Lah 429=80 I C 690=5 Lah 70.
25. Wazir Chand v. Mt. Jiwan Devi, (1928) 15 A I R Lah 58=103 I C 353.

may have in view ; the expense that is allowable as regards this class of acts must be limited by a due regard to the entire bulk of the estate, and may even be totally disallowed where it is not warranted by the circumstances of the family.

We are inclined to think that in the case of an estate with a value of Rs. 40,000, the largest share which can reasonably be regarded as capable of being considered to be a small portion, having regard to the entire bulk of the estate, would be a one-twentieth portion of the estate, that is such share in the property in dispute as has a value of Rs. 2000, that is to say a one-fifteenth share in the property which was the subject of the deed of wakf executed by Mt. Umrai Kuar. On this view we allow the appeal of the plaintiffs, and grant a declaration that the deed in suit is invalid to the extent of 14-15th share and the suit will stand dismissed for the remaining one-fifteenth share. The plaintiffs-appellants will get their costs from the defendant-respondent in both Courts to the extent of 14-15ths and the defendant-respondent will get his costs from the plaintiffs-appellants to the extent of 1-15th only.

R.M./R.K. *Appeal allowed.*

A. I. R. 1939 Oudh 155

ZIAUL HASAN AND YORKE JJ.

Raghunath Singh and another — *Judgment-debtors* — Appellants.

v.

Subedar Singh — *Decree-holder* — Respondent.

Execution of Decree Appeal No. 48 of 1936, Decided on 31st January 1939, against order of Addl. Civil Judge, Hardoi, D/- 3rd October 1936.

(a) Civil P. C. (1908), O. 22, R. 4—Suit for partition—Of two respondents, father and son, if father dies, appeal does not abate as son is already on record though no application for substitution is made.

In appeal arising out of a suit for partition, of the two respondents, father and son, the father died and no application for substitution of names within the prescribed period was made :

Held that as the son was already a respondent, the appeal did not abate at all : *A I R 1929 Mad 152 and A I R 1926 Lah 607, Foll.* [P 155 C 2]

(b) Limitation Act (1908), Art. 182 — Step-in-aid—Compromise decree providing for final decree—Decree-holder applying for final decree — Court dismissing application on ground that decree being under O. 23, R. 4, Civil P. C. could be executed — Decree-holders applying for execution — Applications for final decree held steps-in-aid of execution.

Where a compromise decree for partition provided for a final decree for which decree-holder applied but the Court dismissed the application on the ground that the decree being under O. 23, R. 4, Civil P. C. could be executed in the execution department; and so an application was made for the execution of the decree :

Held that equity was on the side of the decree-holder and that his applications for the decree being made absolute were steps-in-aid of execution: *A I R 1926 All 95; A I R 1929 All 677; A I R 1934 Bom 113 and A I R 1932 Oudh 148, Expl.; A I R 1928 Mad 38, Foll.* [P 156 C 2]

K. N. Tandon — *for Appellants.*

Judgment. — This is an appeal against an order of the learned Additional Civil Judge of Hardoi dismissing the appellants' objection to execution of a decree. The appeal was originally filed against two respondents Chet Singh and Subedar Singh. Of these Chet Singh died but no application under O. 22, Rule 4, Civil P. C., was made for substitution of names within the prescribed period. On 9th November 1937, an order was passed by the Hon. Chief Judge declaring that the appeal had abated as regards Chet Singh and leaving the question whether the entire appeal had abated or not to be decided at the hearing of the appeal. In view of the fact that Subedar Singh, son of the deceased, was already a respondent in the appeal, we do not think that the appeal can be said to have abated altogether or in fact at all: *vide* 51 Mad 347[1] and A I R 1926 Lah 607.[2]

The facts are that in February 1930 the predecessor-in-interest of the respondents brought a suit for partition of joint family property against the predecessor-in-interest of the appellants. On 25th July 1930 the parties to the suit entered into a compromise by which it was provided that a decree would be passed in favour of the plaintiff for partition of landed property and some houses and for mesne profits the amount of which would be determined through a commissioner at the time of passing of the final decree. The plaintiff put in an application on 25th October 1930, for the passing of the final decree but this application was dismissed for default on 24th January 1931. On 27th July 1932 he again put in an application for getting the decree made absolute. To this application the judgment-debtors objected and the Court

1. Achutan Nair v. Manavikraman, (1929) 16 A I R Mad 152=109 I C 372=51 Mad 347 = 54 M L J 675.

2. Gopal Das v. Mulchand, (1926) 13 A I R Lah 607=98 I C 960=7 Lah 399=27 P L R 688.

on 24th November 1932, passed the following order:

The application for final decree is dismissed as the decree having been passed under O. 23, R. 3, Civil P. C. is itself final. It can now be executed in execution department. The applicant to bear his costs.

Thereafter the present application which has given rise to the present appeal was filed on 20th November 1935, for execution of the decree. The judgment-debtors objected on the ground that it was barred by time. The learned Judge of the Court below has however held that limitation has been saved by the previous applications made by the decree-holders. The question therefore is whether or not the applications of 25th October 1930 and 27th July 1932 can be said to have been steps-in-aid of execution of the decree. The learned counsel for the appellants has relied on the cases in A I R 1926 All 95,[3] A I R 1929 All 677,[4] A I R 1934 Bom 113[5] and 9 O W N 209[6] but the question what is a step-in-aid of execution did not arise in any of those cases in the manner and circumstances in which it arises in the case before us, so that what was held in those cases cannot strictly be applied to the facts of the present case. On the other hand the case in A I R 1928 Mad 38[7] relied on by the learned Civil Judge is on all fours with the present case. There too the decree was passed on a compromise and the decree-holder first applied for preparation of a final decree several times and then put in an application for execution of the decree. It was held that the previous applications were steps-in-aid of execution for the decree-holder was asking the Court to make an order which was thought necessary before taking out actual execution of the decree and as the ultimate object of those petitions was to hasten the actual realization of the decree amount. In 9 O W N 209[6] also relied on by the learned counsel for the appellant it was said:

3. Sheo Prasad v. Mt. Naraini Bai, (1926) 13 A I R All 95=90 I C 938 = 48 All 468 = 24 A L J 137.
4. Maqbul Ahmad v. Pateshri Partab Narain Singh, (1929) 16 A I R All 677=118 I C 670 =1929 A L J 976.
5. Ratan Chand Bhalchand v. Chandulal J. Doshi, (1934) 21 A I R Bom 113=150 I C 866 =36 Bom L R 115.
6. Ram Bharose v. Ramman Lal, (1932) 19 A I R Oudh 148=137 I C 768=7 Luck 590= 9 O W N 209 (F B).
7. Kunhammad Hajee v. Chathoth Parkum Kozhuvammal, (1928) 15 A I R Mad 38=106 I C 395.

If the facts of a particular case show that the proceeding in question has the effect of facilitating or advancing the execution to any extent or removing some obstacle from the way of execution, it may well be regarded as step-in-aid of execution.

We think therefore that the learned Judge of the Court below was right in dismissing the appellants' objection. We may observe that equity is also on the side of the decree-holder-respondent. As the compromise itself contemplated that a final decree would have to be prepared, the decree-holders were not unjustified in applying for preparation of the final decree in the first instance. Moreover, the judgment-debtors who objected to the application for preparation of the final decree should not, in our opinion, be allowed now to turn round and object to the application for execution on the ground of limitation. We therefore dismiss the appeal with ex parte costs as the respondent has not appeared before us.

S.G./R.K. *Appeal dismissed.*

A. I. R. 1939 Oudh 156

ZIAUL HASAN J.

Brij Kishore — Applicant

v.

Emperor.

Criminal Revn. No. 168 of 1938, Decided on 16th February 1939, from order of Sess. Judge, Rae Bareli, D/- 19th November 1938.

Criminal Trial—Appreciation of evidence — Case for prosecution appearing ab initio impossible and enmity existing between parties — There being strong element of doubt, conviction must be set aside even in revision in spite of concurrent findings of fact.

Where a case seems ab initio impossible and there is enmity between the parties, the element of doubt is so very strong therein, that the conviction must be set aside even in revision notwithstanding the concurrent findings of fact by the Courts below: *16 I C 520 & 19 I C 1008, Rel. on.* [P 157 C 1, 2]

Nasirullah Beg — *for Applicant.*

Assistant Govt. Advocate—*for the Crown.*

Order. — This is an application in revision against an order of the learned Sessions Judge of Rae Bareli, dismissing the applicant's appeal against his conviction and sentence of one and a half year's rigorous imprisonment under Sec. 436, I. P. C. The case against the applicant and his brother Gaya Prasad was that on the night of 24th February 1938, while the applicant set fire to a thatch in the house of Pirthipal Singh, P. W. 1, Gaya Prasad abetted the offence under S. 436. Gaya Prasad was

acquitted by the learned Assistant Sessions Judge who tried the case but the applicant was convicted. The learned Judge relying on the evidence of the prosecution witnesses held the applicant guilty.

No doubt both Courts below have believed the evidence of Pirthipal Singh, Debi Kali and Kandhai in holding the accused guilty but it appears to me that the case was not at all free from doubt. In the first place, it is not easy to accept the story of the prosecution that while on the night in question at about 11 P. M. Pirthipal Singh heard foot steps on the roof of his dalan, he woke up and sent his sons Jageshar and Jagdeo to collect neighbours in order to catch the thief or thieves who he believed had entered his house and while help arrived in the persons of Debi, Kali and Kandhai, the applicant was waiting to set fire to the thatch in order to be seen by all the prosecution witnesses. If the applicant had actually come to set fire to Pirthipal Singh's thatch, he would have accomplished his purpose and disappeared long before Pirthipal Singh and the other prosecution witnesses had an opportunity of seeing him. In the second place, I do not find any motive for the applicant to burn Pirthipal Singh's thatch. On the other hand, the fact that Pirthipal Singh had to pay about Rs. 11 to the canal department on account of a complaint made by the applicant against him is a reason for Pirthipal Singh being inimical to the applicant. In the third place, there was undoubtedly delay in making the report to the police. It was made at 10 A. M. on the next day. The explanation given by Pirthipal Singh that the delay was caused by the fact that he was engaged in putting out the fire during the whole night is not very satisfactory, and even if the whole night was spent by him in extinguishing the fire, there was no reason for him to wait till 10 in the morning for going to the thana which was only two miles away from his village. In the fourth place, the witnesses claim to have recognized the accused by the light of the burning thatch but in the natural course of events, the accused would have fled immediately after setting fire to the thatch before a sufficient portion of the thatch could be burnt to spread light.

I am not, in short, satisfied of the truth of the prosecution story. In 16 I C 520[1] it was held by the Punjab Chief Court that when a case seems ab initio improbable and there is enmity between the parties, the element of doubt is so very strong therein that the conviction must be set aside even on revision notwithstanding the concurrent findings of fact by the Courts below. The same Court in another case, 19 I C 1008,[2] held that where with reference to the first report at the thana and other circumstances, the case against an accused person is very doubtful, the benefit of the doubt should be given to the accused and in such cases even the concurrent findings of fact of the lower Courts are liable to be set aside on revision. I quite agree with the principle of these decisions. I accept this application and set aside the conviction and sentence of the applicant.

R.M./R.K. *Application allowed.*

1. Boori v. King-Emperor, (1912) 16 I C 520=13 Cr L J 712=28 P W R 1912 Cr.

2. Kisar Singh v. Emperor, (1913) 19 I C 1008= 14 Cr L J 320 = 152 P L R 1913 = 5 P W R 1913 Cr.

A. I. R. 1939 Oudh 157

HAMILTON AND YORKE JJ.

Mt. Umrai and another — *Defendants* — Appellants.

v.

Rahim Bux and others — *Plaintiffs* — Respondents.

Second Appeal No. 255 of 1936, Decided on 15th February 1939, against order of Civil Judge, Gonda, D/- 22nd May 1936.

Civil P. C. (1908), O. 41, R. 23—For remand to be under R. 23 there must have been decree and something left undecided by original Court.

The words used in R. 23 of O. 41, as amended make it quite clear that for a remand to be under this rule there must have been a decree and there must have been something left undecided by the original Court. [P 158 C 1]

Where the remand is made by lower Appellate Court on the ground that one or both parties had been prejudiced and though everything had been decided it had been decided improperly, the remand is not under O. 41, R. 23, and hence no appeal lies. [P 158 C 1, 2]

Krishna Prasad — *for Appellants.*

S. C. Das — *for Respondents 1 and 2.*

Judgment.—This is an appeal against a decision of the Civil Judge of Gonda, who set aside a decree of the Munsif of Gonda and remanded the case for a fresh trial. This appeal was referred to a Bench of two Judges by the late Mr. Justice Smith on the ground that it gave rise to several difficult points of law. A preliminary objection has been raised that no appeal lies

on the ground that this is not a remand under O. 41, Rule 23, Civil P. C., but a remand under the inherent powers of the Court which is not open to an appeal in view of a decision of this Court reported in 1939 O W N 128.[1] A remand under O. 41, R. 23 is made "Where an Appellate Court has reversed a decree and all questions arising in the case have not been decided." Admittedly, a decree has been reversed and the question is whether all questions arising in the case have not been decided. O. 41, R. 23 before it was amended by this Court began as follows :

> Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case.

The Rule as now amended is wider as under the Rule the Court's power of remand is not confined to a case which has been disposed of upon a preliminary point and all that is required is that all questions should not have been decided, that is to say, something was left undecided by the Court of first instance which the lower Appellate Court could not or did not think proper to decide on appeal so that it was compelled to remand the case to the lower Court. The learned counsel for the appellants has argued that even if the original Court had decided all questions, but the Appellate Court had not and remanded the case the remand was under this Rule. In fact his argument amounts to this, that any remand when there has been a decree is a remand under O. 41, R. 23 but when there is no decree the remand is under the inherent powers of the Court. The words used in the Rule as amended make it, in our opinion, quite clear that for a remand to be under this Rule there must have been a decree and there must have been something left undecided by the original Court. The remand in this case was not because in the opinion of the learned Civil Judge the learned Munsif had left something undecided which the Appellate Court could not decide but because the pleadings had not been made clear, proper issues had not been framed and facts had been gathered from evidence, mainly oral, without giving the parties full opportunity to rebut them with the result that the trial Court had made out a case totally different from the one arising out of the pleadings; in other words the learned Civil Judge came to the conclusion that one or both parties had been prejudiced and though everything had been decided it had been decided improperly. We are therefore of opinion that no appeal lies and the appeal is therefore dismissed with costs.

D.S./R.K. *Appeal dismissed.*

1. Balraj Kishore v. Mahraj Kishore, (1939) 26 A I R Oudh 104=179 I C 799=1939 O W N 128.

A. I. R. 1939 Oudh 158

HAMILTON J.

Raja Syed Mohammad Saadat Ali Khan — Defendant — Appellant.

v.

Raja Mohammad Amir Ahmad Khan, Plaintiff and another, Defendant — Respondents.

Second Appeal No. 376 of 1936 Decided on 8th March 1939, against order of First Civil Judge, Kheri, D/- 17th July 1936.

Landlord and Tenant—Groves—Proprietor is entitled to possession if grove holder abandons grove — Abandonment may be by voluntary transfer or by auction-sale and relinquishing possession subsequent to such sale — In places where custom does not exist, if document by grove holder contains terms on which groves are held under custom, owner of grove has same rights as he would have under custom.

There is a general custom in Oudh that when a grove holder abandons the grove the village proprietor is entitled to possession : *A I R 1926 Oudh 139 and A I R 1925 Oudh 319, Rel. on.* [P 160 C 1]

If once it is proved that there is abandonment whether the abandonment be by an immediate voluntary act, namely by transferring the grove and handing over possession or by acquiescence in the sale and relinquishing possession subsequent to that auction sale, does not materially alter the position. In places where custom as to groves does not exist, if the document executed by the grove holder contains the terms on which groves are held in Oudh under custom when such custom exists, it is implied, that the owner of the grove would have the same rights as he has where the custom exists : *Case law discussed.* [P 160 C 1]

M. H. Kidwai — *for Appellant.*

Ali Zaheer — *for Respondent 1.*

Judgment. — This is an appeal by a defendant against an appellate decision of the first Civil Judge of Kheri who himself dismissed an appeal against a decision of the Additional Munsif of Kheri. The facts are that the taluqdar of Mahmudabad gave some land to one Hazari Lal, father of defendant 2, for starting a grove and a document was executed on 20th June 1877, by Hazari Lal to the effect that on his application the taluqdar on 1st November 1876 had given him land to start a grove on certain conditions which included that

the ownership of the trees and land would be in the talukdar and Hazri Lal would have no power of sale or mortgage. There was no condition of re-entry stated. Hazri Lal died and subsequently the appellant obtained a decree against Maiku Lal, the son, and purchased at auction the grove. Maiku Lal raised no objection and possession passed to the auction-purchaser. Then the taluqdar of Mahmudabad filed this suit for possession of the grove and succeeded in the trial and first Appellate Court.

The learned counsel for the appellant has urged that Maiku Lal as successor of Hazari Lal did not violate the conditions on which his father was given this land to plant a grove as he executed no voluntary transfer and also as there was no condition of re-entry the plaintiff could not obtain ejectment. The learned counsel quoted the following cases in support of his contention. 17 Cal 826[1] was a case where there was a permanent maurasi lease with a stipulation that the lessee would not transfer the land and if he did so the sale was void. There was a sale by a Court and it was held that the plaintiffs could not eject as there was no clause giving a right of re-entry or making the lease void in case of a breach of contract against alienation. The condition against transfer could not be said to be for the benefit of the lessor and under S. 10, Act 4 of 1882, it was void. Further there was no breach entitling the lessor to re-entry as there was no voluntary transfer. In 21 Bom 195[2] it was held that no suit of ejectment lay when there was a kabuliat by which there was an undertaking not to sell or mortgage and a statement that mortgage or sale, if made, would be void, but there was no clause of re-entry. In 28 All 400,[3] there was a lease under which the lessee and his heirs would not be competent to transfer by sale or mortgage. The property was alienated and the lessor brought a suit for possession which was however dismissed. In 43 Mad 503[4] there was a perpetual lease of agricultural land with the following provision:

> When you do not require this property it should be delivered back to us and you shall have no right to alienate the same to anybody in any way.

The assignment of the lease was held operative. The decision of the Courts below has been supported by learned counsel for the respondents on the strength of various Oudh decisions. 28 O C 119[5] was a case of transfer of a house with site and the wajib-ularz established the custom that the transferor had no right to sell the house with site. It was held that there was a genaral custom that in the absence of a special contract to the contrary there was in the Province a mere right to use the house as long as the house was maintained and as long as the person in possession did not abandon the house by leaving the village. The occupier therefore had no interest which he could sell or which could be sold in execution of a decree except the interest in the timber, roofing and woodwork. This view was held by following 20 All 248.[6] Apart from that however the learned Judge held that the plaintiff being admittedly the owner of the land her ownership embraced within it the right to possession. Consequently, the transferor having died and the plaintiff being the owner of the land on which the house stood was entitled to recover possession unless the defendants established a right of occupancy. The transfer having been found to be invalid, the defendants' occupation of the plaintiff's land was rank trespass and without any further ado they must vacate. 28 O C 133[7] being about a grove is more in point. It was held there that the sale of one-half of a grove by a tenant who is not the owner amounted to an abandonment of the grove to that extent and the landlord is entitled to eject the purchasers in pursuance of the usual custom prevailing in Oudh that the grove reverts to the landlord when it is abandoned by the tenant.

In 1938 O W N 176[8] it was held that where on the basis of a wajib-ul-arz the only right which the grove-holders had was to enjoy the fruits and every other incident of property in the trees belonged to the talukdar, the grove holders had no right to sell the trees. If they sold the trees the sale amounts to abandonment and as the purchaser gets nothing by an

1. Nil Madhab Sikdar v. Narattam Sikdar, (1890) 17 Cal 826.
2. Madar Saheb v. Nabawa Gajaransha, (1897) 21 Bom 195.
3. Netrapal Singh v. Kalyan Das, (1906) 28 All 400=3 A L J 196=1906 A W N 60.
4. Udipi Seshagiri v. Seshamma Shettati, (1920) 7 A I R Mad 1006=61 I C 658=43 Mad 503=39 M L J 128.
5. Azmat-un-nisa v. Ganesh Prasad, (1925) 12 A I R Oudh 262=83 I C 51=28 O C 119.
6. Sri Girdharji Mahraj v. Chhote Lal, (1898) 20 All 248=1898 A W N 27.
7. Mahabir Prasad v. Uman Shankar, (1925) 12 A I R Oudh 319=85 I C 527=28 O C 133=2 O W N 22.
8. Iqbal Husain v. Kesho Dayal, (1938) 25 A I R Oudh 91=173 I C 289=1938 O W N 176.

invalid purchase, the talukdar was entitled to get possession of the grove so sold. In 2 O W N 944[9] it was held that according to the usual custom prevailing in Oudh a tenant is debarred from selling a grove held by him and if he does so, the landlord can treat it as abandonment and sue for recovery of possession from the transferee. It was urged that there could be no custom in that case inasmuch as the grove in suit was planted after the annexation and that therefore there had not been time for a custom to grow up. The learned Judge stated that the terms under which the tenant held the grove must be a matter of contract between him and his landlord. Where however a general custom exists with regard to groves it is obvious that every person who plants a grove must, in the absence of any agreement to the contrary, be held to have acted in accordance with the custom. The Court below held in this case that there was no general custom prevailing in the village because the wajib-ul-arz which gave in detail the right of grove-holders dealt only with such groves as existed in 1863. The conditions however were similar to those contained in Ex. 1, the document in the present case.

These Oudh cases which have been quoted were all cases of transfers by the grove-holder and not sales by a Court, but I do not think that that materially alters the position once it is held that there was abandonment, whether the abandonment be by an immediate voluntary act, namely by transferring the grove and handing over possession or by acquiescence in the sale and relinquishing possession subsequent to that auction-sale. Maiku Lal has acquiesced in the sale to the defendant-appellant who is now in possession. It is true that there was no custom as to groves in this village in the sense that the wajib-ul-arz dealt only with the groves there specified, and similarly this document Ex. 1 has no mention of a general custom but it appears to me that it contains the terms on which groves are held in Oudh under custom when such custom exists and it was implied therefore that the taluqdar would have the same right as he has where the custom exists. It has been held both in 28 O C 133[7] and 2 O W N 944[9] that there is a general custom in Oudh that when a grove holder abandons the grove the village proprietor is entitled to possession. The decisions quoted by the learned counsel for the appellant do not refer to Oudh and do not refer to groves and therefore can be distinguished from those Oudh decisions. It should be remembered that Ex. 1, dated 20th June 1877, was not drawn up till some seven months after the land was given for the planting of a grove and so I consider it reasonable to infer that when this land was given it was given on condition which included the recognition of the general custom in Oudh that abandonment entitled the landlord to recover possession of the grove. I think therefore that the decisions of the Courts below are correct and I therefore dismiss the appeal with costs.

N.S./R.K. *Appeal dismissed.*

9. Ganesh v. Suraj Bakhsh Singh, (1926) 13 AIR Oudh 139=91 I C 1021=2 O W N 944.

A. I. R. 1939 Oudh 160

HAMILTON J.

Emperor

v.

Chhedi Singh—Accused.

Criminal Ref. No. 6 of 1939, Decided on 9th March 1939, made by Dist. Magistrate, Gonda.

Criminal P. C. (1898), S. 195 (1) (a)—Object of S. 195 (1) (a) explained — "Public servant concerned" means officer holding post when complaint is to be made.

The object of S. 195 (1) (a) is that the person best qualified to decide whether a complaint should or should not be made should have the power to make a complaint. Whether a complaint should or should not be made depends on circumstances existing at the time that it has to be decided whether a complaint should or should not be made and it is therefore the person who is then on the spot who can decide and not the person who originally passed the order who may be in some other district where he cannot possibly say whether a complaint should or should not be made. Hence the words "public servant concerned" in Sec. 195 (1) (a) do not mean a particular individual but the personat the time holding a particular post: *A I R 1930 Rang 292, Rel. on.* [P 161 C 1, 2]

Asst. Govt. Advocate — *for the Crown.*

Kashi Prasad — *for Accused.*

Order.—This is a reference by the District Magistrate of Gonda who recommends that a conviction and sentence under Sec. 188, I. P. C., be set aside on the ground that there was no proper complaint as is required under S. 195 (1) (a), Criminal P.C. An order under S. 144, Criminal P. C., had been passed by the then Sub-Divisional Magistrate of Tarabganj who soon after left the district on transfer. A report was made by the station officer of police station Colonelganj that the order under S. 144 had

been disobeyed and after consideration of the report of this station officer the new Sub-Divisional Magistrate of Tarabganj filed a complaint purporting to be under S. 195 (1) (a), Criminal P. C. The learned District Magistrate has made this reference because in his opinion "the public servant concerned" who can make a complaint under that Section means the particular individual who passed the order under S. 144, Criminal P. C., which had been disobeyed so that an offence under S. 188, I. P. C., had been committed. I am unable to agree with the meaning attached to these words by the learned District Magistrate. It has been held in 146 I C 653,[1] a decision of a Bench of the Rangoon High Court, that the words "public servant concerned" in S. 195 (1), Criminal P. C., do not mean a particular individual but the person at the time holding a particular post. Under S. 195 (1) (a), Criminal P. C., a complaint must be made either by the public servant concerned or some other public servant to whom he is subordinate. In the present case, the Sub-Divisional Magistrate who passed the order under S. 144 had been transferred to some other district so he was no longer subordinate to the Deputy Commissioner of Gonda and therefore if the view held by the District Magistrate who has made the reference is correct there would be no one in Gonda district competent to make a complaint, but there would be in some other district the individual officer who had passed the S. 144 order and some superior. It would obviously be ridiculous that more than one officer in a district other than that where the offence was committed, should have the power to make or to refuse to make a complaint while no one in the district where the offence is alleged to have been committed any longer had the power. The object of S. 195 (1) (a) appears to me to be that the person best qualified to decide whether a complaint should or should not be made should have the power to make a complaint. Whether a complaint should or should not be made depends on circumstances existing at the time that it has to be decided whether a complaint should or should not be made and it is therefore the person who is then on the spot who can decide and not the person who originally passed the order who may be, and indeed in this case is, in some other district where he cannot possibly say whether a complaint should or should not be made. I am in full agreement with the decision in 146 I C 653,[1] and as in this case the Sub-divisional Magistrate of Tarabganj passed the order under Sec. 144, it is the Sub-divisional Magistrate of Tarabganj who is the public servant concerned under S. 195 (1) (a), even if he be not the same individual who passed the order under S. 144, Criminal P. C. The reference therefore is rejected.

N.S./R.K. *Reference rejected.*

1. P. D. Patel v. Emperor, (1933) 20 A I R Rang 292=1933 Cr C 1123=146 I C 653=35 Cr L J 131.

A. I. R. 1939 Oudh 161

ZIAUL HASAN AND YORKE JJ.

Moinul Mulk Matinuzzaman Khan and others — Plaintiffs — Appellants.

v.

H. Hunter, Liquidator, Bank of Upper India Ltd., and others — Defendants — Respondents.

First Appeals Nos. 55, 56, 89, 97, 99, 131, 132 and 133 of 1936, Decided on 31st March 1939, against decree of Addl. Sub-Judge, Lucknow, D/- 28th March 1936.

(a) Trust—Trustee—Trust does not fail for want of trustee.

It is well established principle of equity that no trust shall fail for want of trustees. The law of trusts in India also contemplates that no trust should be defeated for want of a trustee. [P 169 C 2 ; P 170 C 1]

(b) Mortgage—Equity of redemption—Proper representation—Mortgagor creating trust for paying debts including that on mortgages—Trustees subsequently discharged, debtor having taken possession of properties — Debtor declared insolvent — Suit by mortgagee on mortgages against debtor, his son and receiver —Equity of redemption held not represented in mortgage suit.

In mortgage suit it is the manifest duty of the mortgagee to bring on record persons representing the equity of redemption. If he fails to do so, the decree obtained by him is nullity as against those who represent the equity of redemption : *32 Cal 296 (P C), Rel. on.* [P 169 C 2 ; P 170 C 2]

The rule that upon discharge of the trustees, the properties revest in the disposer who by operation of law becomes the trustee for the purposes of the trust is applicable only as between the beneficiaries and the settlor in whom the property has vested and not between the latter and third party and cannot therefore be availed of by a mortgagee who brings his suit as a third party and not as a beneficiary under the trust. [P 170 C 2]

A proprietor of certain villages executed mortgages of those villages for big amounts. Subsequently he executed a deed of trust for the payment of his debts including that on the mortgages. He divested himself of all properties which thereafter became vested in the trustees. The debtor (author of trust) however took back possession of all properties and the trustees were discharged. The debtor was subsequently declared an insolvent and the

receiver took possession of all the properties. The receiver had filed a suit for declaration that the 'trust' was void but during proceedings that were taken by the son of the debtor, the trust was declared to be valid. The mortgagee then filed a suit upon his mortgages and made the debtor, his son and the receiver as parties to the suit and obtained a decree:

Held that the equity of redemption was not represented in the suit. Neither the debtor nor the receiver whose interests were clearly adverse to those of the trust could be said to have represented the equity of redemption and although there were no trustees in existence at the time when the suit on the mortgages was brought, as the mortgagee himself was a beneficiary under the trust, he could have applied for appointment of new trustees and have made them parties to his suit to represent the equity of redemption : *A I R 1934 Bom 178 ; A I R 1927 Oudh 27 and A I R 1914 P C 136, Disting.* [P 171 C 2]

(c) Transfer of Property Act (1882), S. 52—Trust—Property vesting in trustees—Trustees discharged author of trust taking back property—During mortgage suit new trustees appointed—By appointing trustees author held did not "transfer or otherwise deal with" trust property.

Appointment of trustee relates back to the date on which trust is created. [P 172 C 2]

After the execution of a mortgage of certain properties, the mortgagor executed a trust deed in respect of all his properties which thereafter became vested in the trustees. Subsequently, the trustees were discharged as the author of trust took possession of all the properties comprised in the trust. Mortgagee brought suit upon his mortgage. In the meanwhile the author appointed new trustees :

Held that by appointing the new trustees the author cannot be said to have "transferred or otherwise dealt with" the trust properties within the meaning of Section 52. [P 172 C 1, 2]

(d) Trusts Act (1882), S. 9—Scope—S. 9 is enabling Section.

Section 9 is an enabling and not a disabling provision. It recognizes the possibility of a beneficiary desiring to renounce his interest under the trust and suggests two modes by which this can be done. It does not mean that in every case in which a beneficiary sets up a claim which can be regarded as inconsistent with the trust, he loses thereby all his rights under the trust. The use of the word 'may' repudiates this argument altogether, and is only consistent with the Section being construed as an enabling Section. [P 173 C 1]

(e) Trusts Act (1882), S. 11—Discretion of trustees—Creditors not specified in trust deed are not entitled to be paid by the trustees—What is proper course for such creditors stated.

The discretion of the trustees is restricted by S. 11 to the manner in which trust is to be executed. They cannot therefore make any payments beyond those specified in the deed of trust as it would amount to breach of trust on their part to do so. Therefore, creditors not specified in the deed of trust are not entitled to be paid by the trustees. The remedy of such creditors who claim more than has been mentioned in Schedule of trust deed as due to them lies not under the trust deed but by proceeding against the person of the author of trust or his property, if any, other than that comprised in the deed of trust. [P 173 C 2; P 174 C 1; P 175 C 2]

(f) Transfer of Property Act (1882), S. 128—Trust of whole property created by debtor for payment of debts—Trustees are not personally liable for debts of author of trust.

The case of a gift is clearly different from that of a trust created by a debtor for the payment of his debts in which the trustees get no benefit for themselves, and even if the deed of trust comprises all the property of a debtor, the author of the trust, the trustees would not be personally liable for any debt due from author of the trust. [P 174 C 1]

(g) Trusts Act (1882), S. 11, Explanation—Scope of—Trust making no provision for payment of interest on debts specified therein—Creditors are not entitled to claim interest.

The Explanation to Sec. 11 no doubt implies that interest can be paid on debts which bear interest, but it cannot be inferred from the language used that it is incumbent on the trustees in every case to pay interest on interest-bearing debts. Moreover, the sentence "unless a contrary intention to be expressed" is very important and shows that the provision contained in the Explanation is subject to the terms of the deed of trust. Hence where the deed of trust makes no provision for payment of any interest on the debts specified in it, the Explanation to Sec. 11 will not in any case entitle the creditors to claim interest : *(1751) 28 E R 233 and (1854) 69 E R 307, Not foll.* [P 175 C 1 ; P 176 C 2]

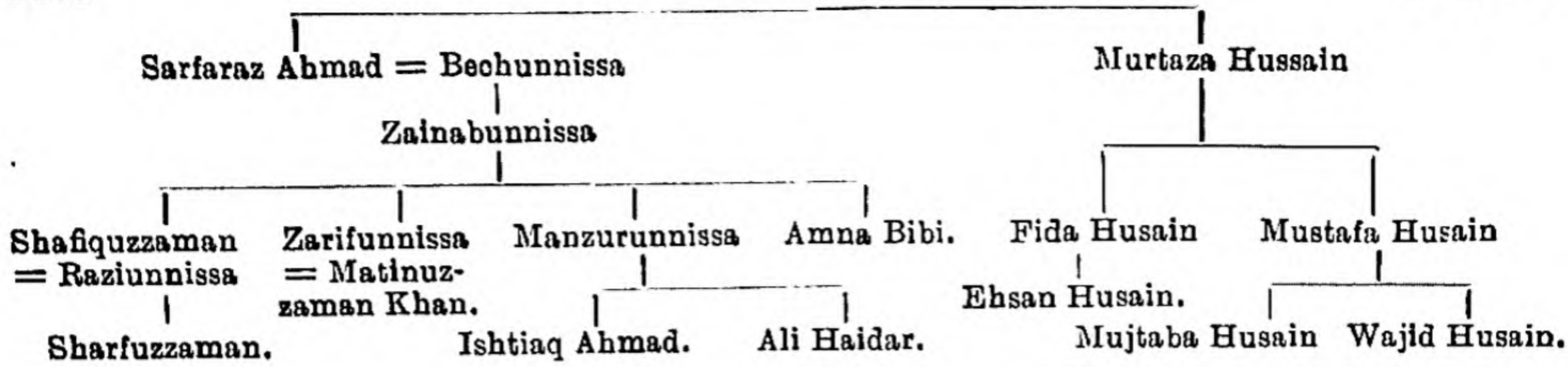
M. Wasim, Niamatullah, Siraj Husain and I. A. Abbasi — *for Appellants.*

J. Jackson, R. B. Lal and Murli Manohar — *for Respondent 1.*

Judgment. — These eight appeals arise out of two suits (Nos. 2 and 3 of 1935), filed on the Original Side of this Court but transferred to and decided by a learned Civil Judge specially deputed for the purpose. Appeal No. 55 arises out of Suit No. 3 while all the remaining seven appeals arise out of Suit No. 2. The dispute in these cases relates to the taluka of Bhilwal which came to Shafiquzzaman, shown in the pedigree, in 1907.

(For pedigree see next page.)

Sharfaraz Ahmad was a talukdar and possessed the three estates of Bhilwal, Khanpur and Shikandarpur. On his death there was a dispute about the property left by him between his wife Bechunnissa and his brother Murtaza Husain but by an award of arbitrators the taluka of Bhilwal was given entirely to Bechunnissa and the other two talukas were divided equally between Bechunnissa and Murtaza Husain. After Bechunnissa's death her daughter Zainabunnissa succeeded to her property. She died in 1907 and the property devolved on her son Shafiquzzaman. The property was then under the management of the



Court of Wards but it was released in 1909 and came into the possession of Shafiquzzaman. As soon as the property came into his possession he began to contract debts of large amounts. On 16th September 1910, he executed a deed of simple mortgage for Rs. 60,000 in favour of the Bank of Upper India Ltd., Lucknow Branch. He also executed three other mortgage deeds of Rupees 1,20,000, Rs. 1,50,000 and Rs. 2,00,000 in favour of the Bank on 8th October 1910, 25th August 1911 and 30th December 1911, respectively. All these mortgages carried interest at 9 per cent. per annum compoundable every six months and included all the 52 villages of the Bhilwal estate and some other property. Some of his friends and relations, seeing that he was contracting improvident debts which were likely to swallow up all the property, tried to prevent this and at last succeeded in prevailing upon him to execute a deed of trust for liquidation of his debts and for the benefit of his son Sharfuzzaman. This deed (Ex. 1) was executed by him on 30th January 1912, by which he appointed five trustees, namely (1) Mr. Mohammad Nasim, Advocate, Judicial-Commissioner's Court, (2) Chaudhuri Fida Husain, talukdar of Khanpur, (3) Mr. Matinuzzaman, then a Deputy Collector in the United Provinces, (4) Chaudhri Wajid Husain, also a Deputy Collector and (5) Maulvi Nizamuddin Hasan, a retired Deputy Collector of the Central Provinces. The gist of the deed of trust is contained in para. 15 which is reproduced in extenso.

That the said trustees shall from the date of this indenture enter upon and take possession of all the estates and properties mentioned in Sch. A and at once apply for and obtain mutation in their names in place of mine in all the revenue records and shall out of the rents and profits of the said estates and properties after deducting therefrom the cost of management, the Government revenue and other public charges payable in respect thereof and the expenses of litigation, if any, incurred in instituting or defending suits in respect of the property aforesaid or in contesting liability for any debt and the necessary repairs of houses, maintenance of private roads and the improvements in respect of the aforesaid properties such as sinking of wells, constructing of aqueducts and other improvements which the trustees may in their discretion consider necessary for the improvement and preservation and enhancement of rent of any land or lands in the aforesaid estates and properties, apply the balance to the payment of monthly allowance of (1) Rs. 400 to me for my personal use and expenses which shall be payable to me during the natural term of my life, (2) Rs. 200 to my aforesaid wife Mt. Raziunnissa, during the term of her natural life for her personal use and expenses, (3) Rs. 100 for the education and bringing-up of my aforesaid son, Sharfuzzaman during the continuance of the trust. But the trustees shall be at liberty to spend more money on the education of my aforesaid son either in India or abroad, (4) Rs. 80 to my sister Mt. Zarifunnissa during the term of her natural life, (5) Rs. 50 to Chaudhri Ehsan Hussain, the son of my eldest sister, deceased, during the term of his natural life, (6) Rs. 50 to Ali Haidar and Ishtiaq Ahmad the sons of my sister Mt. Manzurunnissa, deceased, for the terms of their natural lives jointly or the survivor of them, and other petty allowances which the estate may be liable to pay and the balance to be applied towards the liquidation of my debts and liabilities chargeable upon the estate as specified in Sch. B and others not so charged as specified in Sch. C aforesaid in the manner and the order the trustees may consider proper and beneficial to the estate.

Almost all the property possessed by him was thus transferred by Shafiquzzaman to the trustees and in para. 16 of the deed the trustees were authorized to transfer the whole or part of the property, except the villages of Bhilwal and Subeha, by sale, mortgage, zar-i-peshgi or other lease in case the annual profits be insufficient for payment of the debts and liabilities mentioned in para. 15. Sch. B referred to in para. 15 comprised secured debts due to the Upper India Bank and to one Mir Bunyad Husain to the extent of Rupees 7,19,000, while Sch. C enumerated fourteen unsecured debts of the total amount of Rs. 1,65,649-3-0. In para. 31, it was said that the settlor had executed a mortgage bond for Rs. 2,27,000 in favour of the Bank of Upper India which had not been registered till then and the trustees were authorized to get the bond registered and to realize the consideration from the Bank to be applied to the purposes of the trust. Para. 34 provided that the trust would come to an end on payment of all the debts and liabilities specified in Schs. B and C or when the settlor's son Sharfuzzaman

should attain the age of 25 years, whichever event happened later. The mortgage bond referred to in para. 31 had been executed by Shafiquzzaman for Rs. 2,00,000 only on 30th December 1911, and it was registered on 31st January 1912. The trustees also executed a mortgage deed in favour of the Bank for Rs. 22,940 on 9th August 1912, (Ex. A-5) for carrying out the purposes of the trust. The two trustees, Chaudhri Wajid Husain and Shaikh Matinuzzaman, being in Government service did not accept the trust. The other three trustees took possession of the estate and appointed a manager. On 13th June 1912, however Shafiquzzaman turned on the manager appointed by the trustees and took possession of the estate. Proceedings were instituted under Sec. 145, Criminal P. C., by the trustees with the result that the Magistrate took possession of the estate under S. 146, Criminal P. C. On 2nd and 31st July 1912 the trustees applied under S. 72, Trusts Act (Exs. A-429 and A-430), to the District Judge to be discharged and on 13th August 1912 the District Judge allowed their application and discharged them (Exhibit A-431). The learned Judge remarked :

So far therefore as can be seen the effect of their (trustees') discharge will be simply to leave the trust without trustees. There is, as I have said, no use whatever in appointing fresh trustees in their places and in default of such trustees the trust becomes incapable of execution and its purpose incapable of fulfilment. Under S. 77 of the Act, this condition of affairs involves the extinction of the trust and in their second application dated 31st July, the trustees state categorically that they have no objection to the extinction of the trust provided that the Court of Wards will consent to undertake the management of the estate. As I have said above, I have no power to make any conditional order accepting the resignation of the trustees conditional upon the Court assuming charge of the estate, but the order accepting their resignation involving the extinction of the trust will make it possible for the estate to be taken over without being burdened with the conditions of trust which has become unworkable.

The trustees should make over the management of the estate within a fortnight to the author of the trust and their office will be vacated from the date on which they so make it over.

On 15th December 1913 a creditor of Shafiquzzaman, the firm of Chhanga Mal Amarnath of Cawnpur, mentioned in Sch. C of the trust deed, applied to the Insolvency Court, Lucknow, for Shafiquzzaman being declared an insolvent (Ex. R-20) and on 27th January 1914, Shafiquzzaman was declared an insolvent, the Deputy Commissioner of Bara Banki was appointed receiver in insolvency and the estate was taken possession of by him. In 1914 Shafiquzzaman's sister Zarifunnissa filed a suit in the Court of the Subordinate Judge, Lucknow, claiming half of the Bhilwal estate. To this suit Shafiquzzaman, Sharfuzzaman, the Bank of Upper India and the receiver in insolvency were parties. The suit was dismissed and the dismissal was maintained by the Judicial Commissioner of Oudh and finally by their Lordships of the Privy Council. Chaudhri Mustafa Husain, nephew of Sarfaraz Ahmad, also brought a suit claiming the entire Bhilwal estate and this suit was also finally dismissed by their Lordships of the Privy Council: *vide* 5 O W N 565.[1] In 1915 and 1916, the receiver in insolvency out of the profits of the Bhilwal estate distributed a sum of Rs. 34,805-11-0 as dividend at the rate of one anna in the rupee, among the creditors and maintenance holders mentioned in the deed of trust. The Bank of Upper India, Ltd., went into liquidation and Mr. H. Hunter was appointed liquidator in 1917. On 22nd July 1918 Sharfuzzaman, son of Shafiquzzaman, filed a suit in the Court of the District Judge, Lucknow, for a declaration that the trust created by Shafiquzzaman on 30th January 1912 was valid and binding on the defendants who included Shafiquzzaman, the receiver in insolvency, the Bank of Upper India, Ltd., Mir Bunyad Husain and some other creditors of Shafiquzzaman, for the appointment of new trustees and for due execution of the trust (*vide* Ex. 2). The suit was dismissed by the District Judge on 12th August 1920, but on appeal by Sharfuzzaman the suit was finally decreed by the Judicial Commissioners of Oudh on 18th September 1922 (Ex. 8). The operative portion of the judgment runs as follows:

Accordingly we order that a decree be prepared in favour of Chaudhri Sharfuzzaman under the guardianship of Chaudhri Ehsan Husain, declaring that the taluqdari and non-taluqdari property mentioned in the plaint is comprised in a trust created under the deed of settlement of 30th January 1912. The plaintiff's prayer for the appointment of new trustees to carry out the terms of the trust deed cannot be granted by this Court and is accordingly rejected.

In their earlier order of 25th May 1922, by which certain issues had been remanded to the trial Court for findings, the learned Judicial Commissioners had said :

1. Deputy Commissioner of Bara Banki v. Receiver of Shafiq-uz-Zaman's Estate, (1928) 15 A I R P C 202=113 I C 113=55 I A 303=5 O W N 565=3 Luck 372 (P C).

The jurisdiction of the District Judge acting as he was under S. 72, Trusts Act, was limited to discharging the trustees from office. By directing the trustees to hand over the estate to Shafiquzzaman he did not end the trust but made Shafiquzzaman himself the trustee. The rule of equity is that a trust will never be allowed to fail for want of a trustee. The trust will fasten upon the conscience of whoever holds the property . . . . But he cannot ask for this (the appointment of trustees) in the present suit which is one for declaration and not one filed under S. 74, Trusts Act : *vide* Ex. 30.

On 9th May 1921, the liquidator of the Bank of Upper India filed a suit in the Court of the Subordinate Judge, Lucknow, on foot of the five mortgage deeds mentioned above. This suit was brought against Shafiquzzan, the Deputy Commissioner of Bara Banki as receiver in insolvency and one Babu Aditya Prasad, vakil. The suit was for recovery of Rs. 12,51,544-4-3 (*vide* Ex. 4). It was decreed for Rs. 12,46,544-4-3 on 31st May 1923 with proportionate costs and future interest at 6 per cent. per annum (*vide* Exs. 6 and 7). The decree was made absolute on 11th March 1924, for a sum of Rs. 15,75,980-15-11. It may be mentioned that on 21st May 1921 the plaintiff-liquidator put in an application (Ex. A-397) stating that Shafiquzzaman had executed a deed of trust for the benefit of his son Sharfuzzaman, that the trustees were all discharged and Sharfuzzaman's suit to enforce the trust was dismissed but that an appeal preferred by Sharfuzzaman was pending before the Judicial Commissioners, and praying that Sharfuzzaman, Mr. Mohammad Nasim, advocate, and Maulvi Nizamuddin Hasan, trustees, may be made parties. The application also contained a prayer for certain other persons who claimed interest in the mortgaged property being made parties. Both Mr. Mohammad Nasim and Maulvi Nizamuddin stated that they had no interest in the property in suit and had been discharged by the District Judge. Accordingly the plaintiff's prayer for making these two gentlemen parties was disallowed (*vide* Exs. A-398 and A-399). The others were made parties. In 1923, the Deputy Commissioner of Bara Banki as receiver in insolvency made an application under S. 53, Provincial Insolvency Act, to the Insolvency Court for getting the deed of trust declared void against him. The Insolvency Court declared the deed void but on appeal by Sharfuzzaman a Bench of the Judicial Commissioners set aside the order of the Insolvency Court on 14th April 1924 (Ex. 12) holding that

the deed of transfer of 30th January 1912 is a transfer made in favour of a purchaser in good faith and for valuable consideration and is not voidable as against the receiver.

The judgment is reported in 27 O C 392.[2] On 1st August 1924, the liquidator applied for execution of the mortgage decree (Ex. A-408) and on 15th October 1924 the decree was transferred for execution to the Collector (Ex. A-409). On 8th August 1924, Shafiquzzaman appointed new trustees, namely the appellants in Appeal No. 55 of 1936, to carry out the purposes of the trust and on 16th August 1924 the new trustees applied to the District Judge of Lucknow (Ex. 10) under S. 11, Trusts Act, praying for possession of the trust property and of all the moneys and securities in the custody of the receiver in insolvency being made over to them and for the receiver and creditors of Shafiquzzaman being made to refund to the applicants all payments made in the course of insolvency proceedings. On 19th February 1925 this application was disallowed by the District Judge (*vide* Ex. A-437). The trustees filed an application for revision of this order in the Court of the Judicial Commissioner but on 19th May 1925 the application was dismissed: *vide* 2 O W N 543.[3] On the very next day the new trustees made an application (Ex. 32) for the same reliefs to the Insolvency Court but that Court also dismissed their application (*vide* Ex. 33). The trustees filed an appeal against the Insolvency Court's order and this Court (which had in the meantime succeeded the Court of the Judicial Commissioner) dismissed the appeal on 3rd August 1926 (Ex. 11). On 27th September 1926, the sale of the property took place in execution of the Bank's decree and the property was purchased by the liquidator of the Bank for Rs. 13,49,216-15-0 leaving a balance of Rupees 324,227-14-0 out of the decretal amount. On 30th July 1927, the liquidator obtained possession of the property purchased by him.

The liquidator made an application to the Subordinate Judge of Lucknow for a decree under O. 34, Rule 6, Civil P. C., for recovery of the balance remaining due on his decree, but the learned Subordinate Judge, by his order dated 15th December 1927 (Ex. 22), dismissed the application on the ground that he had no jurisdiction to entertain the application which in his opinion should have been made to the

2. Sharfuzzaman v. D. C. of Barabanki, (1925) 12 A I R Oudh 28=79 I C 888=27 O C 392.
3. Maqbul Husain v. Shafiquzzaman, (1926) 13 A I R Oudh 28=89 I C 225=2 O W N 543.

Insolvency Court. He was also of opinion that the liquidator's claim for a personal decree was barred by time but did not reject the application on this ground. On 1st August 1927, the liquidator applied to the Insolvency Court for permission to prove for the balance remaining due on his decree and for some other reliefs. This application was opposed by the trustees, by Sharfuzzaman and by some creditors of Shafiquzzaman. The application was dismissed by the Insolvency Court on 15th November 1928. The liquidator's appeal was allowed by the District Judge on 29th January 1929 in so far as to allow the liquidator to prove for the balance. The appeal was dismissed with regard to the other prayers contained in the liquidator's application. Against this order of the District Judge, three appeals were filed in this Court, one by Rani Kaniz Abid, a creditor, another by Pandit Piare Lal, also a creditor, and the third by Sharfuzzaman and the trustees. All these appeals were dismissed by this Court on 15th October 1929 (*vide* 6 O W N 982[4]), but this judgment was set aside by their Lordships of the Judicial Committee on appeals by Rani Kaniz Abid and Sharfuzzaman in the insolvency case on 28th February 1935 : *vide* 1935 O W N 610.[5]

On 3rd November 1927, while the application of the liquidator for proving the balance of his debt was pending in the Insolvency Court, the trustees made another application to that Court praying (1) that the receiver be ordered to handover to them possession of all such properties as were neither mortgaged to the Bank of Upper India nor sold in execution of its decree, (2) that the receiver be ordered to handover the sums of money in his hands to the applicants, (3) that in case relief 2 be not granted, the receiver may be directed not to make any payments of money to any creditors unless and until decrees against the applicants trustees have been obtained from a proper Court and regular execution proceedings have been taken, and (4) that in no case should the receiver make payments to any such creditor who is not mentioned in the schedules annexed to the deed of trust. On 14th December 1927 the Insolvency Court disposed of this application rejecting the first three prayers and holding on the fourth that the creditors not mentioned in the schedules of the deed of trust could not get any relief from the Insolvency Court after the deed of trust had been held valid. It was further directed that

> as soon as all the debts mentioned in the deed of trust are satisfied, the receiver will have to make over whatever property or money may remain with him to the trustees, for, it will be the property of the cestui que trust Chaudhri Sharfuzzaman and not of the insolvent. The other creditors of the insolvent can have no claim to it : *vide* Ex. 18.

This order was appealed against to the District Judge by the trustees as well as by two creditors of Shafiquzzaman. The trustees' appeal was dismissed by the District Judge on 17th April 1928 (Ex. 19), but in the appeal of the creditors the learned Judge held that :

> The money equal to the aggregate of the debts mentioned in the deed of trust should be set apart and the rest should be handed over to the trustees free from the claim of all the creditors. But I am of opinion that so far as the amount of money in the hands of the receiver equal to the aggregate of the debts mentioned in the deed of trust goes the creditors not mentioned in the deed of trust are also entitled to participate . . . . . I accordingly allow this appeal and modify the lower Court's order as above : *vide* Ex. 20 dated 18th May 1928.

Both the trustees and the creditors appealed to this Court against the learned District Judge's order and this Court on 20th December 1928 dismissed the appeal holding that : .

> The trustees could not get possession from the receiver of the properties left with him nor of the money that he had collected.

But the Court ordered the Insolvency Court to prepare a scheme as to the management of the immovable property then left and the satisfaction of all legitimate debts including debts stated in the deed of trust which had remained unpaid. It was also ordered that the creditors should be called upon to state their case in writing and the Court should pronounce decision on the validity and propriety of each claim and that if the scheme is accepted the Court should further determine the order of payment among the creditors (*vide* Ex. 21). This judgment is one of the twelve that were set aside by their Lordships of the Privy Council on 28th February 1935. When the Insolvency Court drew up a scheme according to the judgment just referred to, it disallowed the claims of those creditors whose names were not mentioned in the deed of trust (*vide* Ex. 24 dated 22nd April 1929). This judg-

4. Sharfuzzaman v. Hunter, (1930) 17 A I R Oudh 20=121 I C 903=6 O W N 982.
5. Hunter v. Rani Kaniz Abid, (1935) 22 A I R P C 104=155 I C 426=1935 O W N 610 (P C).

ment was reversed in appeal by the District Judge on 2nd January 1930 (Ex. 25) and the learned Judge held that all the creditors irrespective of whether their names were entered in the said deed of trust or not were entitled to prove their claims. The matter was brought to this Court which on 4th August 1930 modified the order of the District Judge of excluding claims arising after the execution of the deed of trust and remanded the case to the Insolvency Court for preparing a list for the use of this Court of all the debts incurred by the insolvent prior to the date of the deed of trust, irrespective of whether such debts were due to persons named in the deed of trust or to persons who were not so named (*vide* Exihibit 26). This judgment was the subject of an appeal to their Lordships of the Privy Council by the trustees and was also set aside on 28th February 1935.

On 3rd September 1930, the Insolvency Court ordered the proof of debts incurred by the insolvent prior to the deed of trust by affidavits. On 13th September 1930, the liquidator filed three affidavits in proof of a total debt of Rs. 3,00,904-1-9 and on 4th November 1930 the Insolvency Court admitted his claim to prove for a total debt of Rs. 3,00,329-7-4 (*vide* Ex. 27). Three appeals were filed in this Court against this order, one by Rani Kaniz Abid and others, another by Messrs W. R. Draper, Ltd. and others and the third by Chaudhrain Razi-unnissa and others. These appeals were allowed by this Court on 22nd December 1930 (*vide* Ex. 28). This Court rejected the liquidator's claim on the ground that the claim represented interest after the date of bankruptcy and ordered that the liquidator's name be removed from the list of creditors entitled to prove in insolvency. As this order was common to all the three appeals, the liquidator filed three appeals against it to His Majesty in Council. These appeals were also heard on 28th February 1935 and this Court's order dated 22nd December 1930 set aside. Their Lordships in the course of their judgment of 28th February 1935 said :

> . . . . the greater part of this unfortunate litigation which has lasted for so many years is due to the failure to recognize the true position when once it had been established that the deed of 30th January 1912 was a valid and effective deed of trust. By that deed the insolvent's interest in the mortgaged properties became vested in the trustees to be held and administered by them on the trusts mentioned in the deed, which trusts included payment of certain specified creditors, one of whom was the Bank.
>
> After the execution of the said trust deed the insolvent had no interest in the properties covered by the mortgages and consequently the said properties never vested in the receiver in insolvency and were not subject to be administered by him on behalf of the general body of creditors. Nor had the receiver in insolvency any right to administer the assets in accordance with the terms of the trust, as seems to have been the view at one period of this litigation ; such proposition is altogether untenable.

Their Lordships further said :

> Their Lordships are of opinion (1) That a declaration should be made that having regard to the validity of the trust deed of 30th January 1912, and in the events which have happened, the rents and profits received by the receiver from the trust properties since the date of the adjudication of insolvency (A) are held by him as trustee for the trustees of the said deed and accordingly are subject to the provisions of the trust deed and in particular to the provisions of Cl. 15 thereof, and (B) do not form part of the estate of the insolvent and accordingly do not fall to be administered under the Provincial Insolvency Act. (2) That the orders and decrees set forth in the schedule attached to this judgment should be set aside, except in so far as they deal with costs. (3) That upon the liquidator undertaking forthwith to institute a suit for the administration of the trust in the appropriate Court in India having jurisdiction in that behalf and to apply to the Insolvency Court for a transfer to the Court of administration of the funds in the hands of the receiver and for the necessary accounts, if any, no further order on these appeals should be made and they will humbly advise His Majesty accordingly: *vide* 1935 O W N 610[5] at page 618.

It was in accordance with the undertaking given by the liquidator to their Lordships of the Privy Council that he filed a suit (No. 2 of 1935) for administration of the trust and in which the reliefs sought were as follows :

> For a decree for the amount still due to him, viz. Rs. 4,64,570-7-0 with future interest at 6 per cent. on the principal sum of Rupees 3,24,227-14-0 till realization, that an account be taken of what is due to the other beneficiary creditors after payment of the plaintiff's claim, and for the balance if any to be paid to the ultimate beneficiary, or to any other persons who may be entitled thereto. For such further and other relief as the circumstances require. For the costs of the suit. For the appointment of a receiver to collect the above mentioned assets of the trust and to hold the same for disposal as ordered by the decree in suit.

To this suit which was brought on 1st April 1935, Chaudhri Shafiquzzaman, his son Chaudhri Sharfuzzaman, the four trustees and various creditors of Shafiquzzaman, were made defendants. On 29th April 1935, the trustees also instituted a suit against the liquidator of the Bank of Upper India, Chaudhri Shafiquzzaman and Chaudhri Sharfuzzaman in which after setting out the history of the trust and of

the previous litigation in regard to the trust they claimed the following reliefs :

(a) That this Hon'ble Court be pleased to pass a decree against defendant 1 for possession of all the immovable properties specified in Sch. 2 of the plaint in favour of the plaintiffs as trustees to enable them to administer the trust for the benefit of all the beneficiaries mentioned in the trust deed.

(b) That defendant 1 be called on to furnish account of moneys legally recoverable from the trustees and those realized by him from the commencement of the mortgage transactions up to the date of this suit.

(c) That if upon the taking of the accounts this Hon'ble Court thinks that any sum is still due to defendant 1, the Court may be pleased to issue directions to the plaintiffs accordingly.

(d) That at all events, it be declared that the properties in Sch. 2 are subject to the rights of all the beneficiaries entered in the deed of trust aforesaid.

This suit was hotly contested by the liquidator and by him alone and the following issues were framed on the pleas raised by him :

1. (a) Are the plaintiffs entitled to treat the preliminary and final decrees dated 31st May 1923 and 11th March 1924, respectively and purchased by defendant 1 in his mortgage suit as not binding on them ? (b) Was the equity of redemption properly represented in the mortgage suit brought by defendant 1 ?

2. Is the suit barred by res judicata ?

3. Does the decision of the Court of the Judicial Commissioner of Oudh in First Appeal No. 63 of 1920 referred to in para. 7 of the written statement of defendant 1, operate as res judicata as pleaded in para. 7 of the written statement of defendant 1 ?

4. Are the plaintiffs transferees pendente lite as alleged in para. 39 of the written statement of defendant 1 ? If so are they not bound by the sale in execution of the decree absolute for sale referred to in paragraph 36 of the written statement of defendant 1 ?

5. If Issue 1 is decided in favour of the plaintiffs, are they entitled to the possession of the properties in suit without redemption ? If so on what terms ?

6. Are the beneficiaries under the deed of trust entitled to share in the rents and profits of the properties in suit in the possession of defendant 1 ?

7. Is the plaintiffs' suit frivolous and vexatious and is defendant 1 entitled to get special costs under S. 35-A, Civil P. C.?

8. To what relief, if any, are the plaintiffs entitled ?

Issues 2, 3, 4 and 7 were decided by the learned Civil Judge in favour of the plaintiffs-trustees but the suit was dismissed on Issue 1 (a) and (b) on which he held that the equity of redemption was properly represented in the mortgage suits brought by the liquidator and that the decree passed in that suit is binding on the plaintiffs-trustees. The plaintiffs have filed Appeal No. 55 of 1936 against the dismissal of their suit and the main point for decision in that appeal is whether the equity of redemption was represented in the liquidator's mortgage suit, though the learned counsel for the respondent liquidator has also challenged the Court's finding on the issues decided in favour of the plaintiffs. We shall refer to the objections in due course. The liquidator's suit No. 2 of 1935 was contested by various defendants but chiefly by the trustees. The following 24 issues were framed in the case :

1. (a) Are defendants 3 to 6 entitled to treat the preliminary and final decrees dated 31st May 1923 and 11th March 1924, respectively and purchased by the plaintiff in his mortgage suit as not binding on them ? (b) Was the equity of redemption properly represented in the mortgage suit brought by plaintiff ?

2. Can the plaintiff maintain the present suit without bringing in the trust properties in his possession and without accounting for rents and profits realized by him during the period he has been in possession of the said properties ?

3. Can the present suit proceed before the rights of the plaintiff against the property mortgaged to him have been adjudicated on ?

4. What amount, if any, is the plaintiff entitled to claim as a beneficiary ?

5. Is the plaintiff's claim for any payment barred by the rule of (1) res judicata, or (2) by limitation ?

6. (a) Has the plaintiff ignored or repudiated the trust ? If so is he estopped from claiming as a beneficiary ? (b) Has he obtained an unconscionable advantage to the detriment of the trust estate and the beneficiaries ? If so what is the effect ?

7. Have the mortgages merged in the decree of the Subordinate Judge of Mohanlalganj at Lucknow dated 31st May 1923, and is the claim based on them not maintainable against the trust property ?

8. What was the amount actually advanced by the Bank of Upper India to Chaudri Shafiquzzaman and what amount is the plaintiff entitled to in this suit ?

9. (a) Are defendants 2, 7, 8, 28, 27, 31 and 32 liable to bring into Court the amount of the trust estate alleged by the plaintiff in his plaint and replications to be in their possession ? (b) If so by what proceeding ?

10. (a) Which of the defendant creditors is entitled to prove his claim against the trust estate and what, if any, amount is due to each one of them? (b) Which of the aforesaid claims of the said defendants are barred by limitation ? (c) Which of the other claimants, if any, are entitled to prove their claims against the trust estate and what are the amounts due to each one of them ?

11. (a) Is the plaintiff's present claim a first charge on the remaining trust estate ? (b) If not how are the claims of the creditors and beneficiaries entitled to payment from the trust estate to be dealt with ?

12. (a) Can the money paid by way of dividends by the receiver in insolvency to creditors of defen-

dant 1 who are not entered for any payment in the trust deed be recovered from them ? (b) If so by what proceedings ?

13. (a) Can defendant 29 claim any dower in this suit ? (b) If so what is the amount of dower ?

14. (a) Has defendant 29 spent a sum of Rupees 10,000 on the marriages of the two daughters, and Rs. 12,000 on the education of defendant 2 in England ? (b) If so can she claim the amount in this suit ?

15. (a) Are the trustees debarred from resisting the claims of the creditors specified in the deed of trust ? (b) Can the creditors specified in the deed of trust get more than the sums entered in their names in the deed of trust ? (c) Are not the creditors entitled to any interest ?

16. Are the creditors not specified in the deed entitled to be paid out of the trust estate ?

17. (a) Are the trustees entitled to the benefit of Agriculturists' Relief Act of 1934 ? (b) If so to what extent ?

18. (a) Are the debts of defendants 7, 8, 20, 27, 28 and 31 mentioned in the deed of trust? (b) Have the said defendants received any amount from the Insolvency Court ? (c) Is there any balance due from them to the trust estate ? If so what amount ?

19. Are the maintenance allowances granted to defendants 2, 6, 29, 33, 34 and 35 under the deed of trust dated 30th January 1912 a first charge on the properties in suit ?

20. What is the amount of arrears of the said maintenance allowances due to each one of the aforesaid defendants ?

21. Are the claims of the said maintenance holders to have priority over the claims of the creditors mentioned in the said deed of trust in the distribution of the assets of the trust ?

22. Are the said maintenance holders entitled to have provision made for regular payment of their allowances to them in future out of trust properties ?

23. To what relief, if any, is the plaintiff entitled ?

24. Whether the present suit is maintainable when the liquidator's application under O. 34, R. 6, Civil P. C., was dismissed ?

It will be seen that Issue 1 in this case is the same as Issue 1 in the trustees' Suit No. 3 of 1935. The issue was decided against the trustees in this suit also. It was however held that as the liquidator plaintiff repudiated the trust and obtained an unfair advantage to the detriment of the trust estate and the beneficiaries he was not entitled to succeed in the suit and that the suit was not maintainable also because his application under O. 34, R. 6 was dismissed. The Court however passed a preliminary decree declaring that "the trust property available at present consists of, as alleged by the plaintiff in his plaint, the cash money in the hands of the Court and certain immovable properties called pattis which are in the possession of defendant 2 and two houses one at Bilwal and the other at Subeha which are in the possession of defendant 29" directing the trustees to take possession of the patties and houses and realize rents and profits of these properties and apply them to the purposes of the trust. The decree gives directions to the trustees how to administer the trust and adjudicates upon the rights of the various creditors of Shafiquzzaman who are defendants to the suit. Against the decree passed in the liquidator's Suit No. 2 of 1935, Appeal No. 66 has been brought by the liquidator himself, Appeal No. 89 by Sheikh Tajammul Husain, son of Wajid Husain, original defendant 30, Appeal No. 97 by Rani Kaniz Abid, defendant 31, Appeal No. 99 by Babu Aditya Prasad, defendant 18, Appeal No. 131 by B. Krishna Chand, defendant 28, Appeal No. 132 by Babu Ram Chandra, son of Babu Gopal Das defendant 8, now deceased, and Appeal No. 133 by Babu Raj Narain, defendant 7. We first take up Appeal No. 55 of 1936 brought by the trustees.

As mentioned above, the main question for decision in this appeal is whether the equity of redemption was properly represented in the liquidator's suit on mortgages so as to bind the trustees. After giving careful consideration to all the circumstances of the case, and to the arguments of the learned counsel for the liquidator, we have come to the conclusion that it is impossible to hold that the trust was represented in the suit brought by the liquidator on the mortgages. It is true that at the time when the suit was brought the original trustees had been discharged by the District Judge and the present trustees had not been appointed. It is also true that the learned District Judge in his order discharging the trustees wrongly came to the conclusion that "the condition of affairs involves the extinction of the trust," but it is a well-established principle of equity that no trust shall fail for want of a trustee. The same appears from the scheme of the Trusts Act. S. 44 of the Act provides that where there are several trustees and one of them disclaims or dies, the authority to deal with the trust property may be exercised by the continuing trustees. S. 59 even provides for the contingency where no trustees are appointed or all the trustees die, disclaim or are discharged or where for any other reason the execution of a trust by a trustee is or becomes impracticable and gives the beneficiaries a right to institute a suit for the execution of the trust by the

Court until the appointment of a trustee or new trustees. S. 60 lays down that the beneficiaries have a right (subject to the provisions of the instrument of trust) that the trust property shall be properly protected and held and administered by proper persons and by a proper number of such persons. S. 73 prescribes how a new trustee may be appointed when the trustee originally appointed disclaims or any trustee who was originally appointed or substituted dies or is absent from British India or is declared an insolvent, or refuses to act or becomes unfit or incapable to act. Lastly, Sec. 74 provides a summary procedure by which on the occurrence of any vacancy or disqualification in the office of trustee a trustee or a new trustee may be appointed by the Court on an application made for the purpose by the beneficiary. It is thus clear that the law of trusts in India also contemplates that no trust should be defeated for want of a trustee.

As on the execution of the deed of trust by Shafiquzzaman he was divested of the equity of redemption in the mortgaged property, which became vested in the trustees, it was incumbent on the liquidator to see that the equity of redemption was properly represented in his suit. No doubt there were no trustees in existence at the time when the suit on the mortgages was brought, but as the bank itself was a beneficiary under the trust, the liquidator could have applied to the District Court under S. 74, Trusts Act, for appointment of new trustees and have made them parties to his suit to represent the equity of redemption. Nothing of the kind was however done. On the other hand the trust was ignored altogether. The mortgaged property was treated as "property belonging to Chaudhri Shafiquzzaman" and the Deputy Commissioner was impleaded as receiver in possession of "his (Shafiquzzaman's) property." All mention of the trust was deliberately suppressed, and all that was said about the mortgage of 9th August 1912, which was executed by the trustees was that Mr. Mohammad Nasim, Maulvi Nizamuddin and the late Hafiz Fida Husain "were duly authorized" by the mortgagor to borrow money on the security of his property. It is said that owing to the discharge of the trustees, the property revested in Shafiquzzaman and that Shafiquzzaman was therefore a constructive trustee and he was a party to the suit. In this connexion reliance is placed by the learned counsel for the liquidator on paras. 121 and 181 of Halsbury's Laws of England, Vol. 28, pages 64 and 85.

Paragraph 121 runs as follows :

> A person who, after having made a settlement or other disposition of property which is complete in law, obtains possession of the property himself, holds it in trust for the purposes of the settlement or disposition and must account for it in equity accordingly.

Paragraph 181 is as follows :

> A disclaimer or refusal to act in the trust takes effect *ab initio* and vests the trust property as from the date when the trust disposition came into operation, exclusively in the trustees who consent to act. If all the trustees disclaim, the property re-vests in the disposer, or, if he is dead, in his legal representative, who becomes, by operation of law, the trustee thereof for the purposes of the trust.

The expressions "for the purposes of the settlement or disposition" and " must account for it in equity" in para. 121 and "for the purposes of the trust" in para. 181 clearly show that the rule of law laid down in these two paragraphs is applicable only as between the beneficiary and the settlor in whom the property has revested and not between the latter and a third party. They cannot therefore be availed of by the liquidator who brought his mortgage suit as a third party and not as a beneficiary under the trust. Moreover, Shafiquzzaman could not be regarded as a trustee for more reasons than one even though there were no trustees in existence at the time. In the first place he had tried to extinguish the trust by taking forcible possession of the property and ousting the trustees and had thus shown himself to be hostile to the trust. In the second place he had been declared an insolvent and an insolvent is not a proper trustee under S. 60, Trusts Act. In these circumstances he cannot, in our opinion, be considered to have properly represented the trust. Next it was argued that the receiver in insolvency, in whom the property had vested, was made a defendant to the suit and that therefore the equity of redemption was represented by him. We are unable to accept this argument also. The learned counsel for the liquidator respondent relies on paras. 190, 193 and 197 of Halsbury's Laws of England, Vol. 28, pages 87, 88 and 91. These paragraphs run as follows :

> *190.* A trust of property follows the legal estate wherever it goes and constitutes any holder of it who is not duly constituted an express trustee a constructive trustee, except when it comes into the hands of a purchaser for valuable consideration without notice of the trust.

193. Where a person whether gratuitously or for valuable consideration acquires property or an interest in property which is subject to a subsisting trust, he becomes a trustee of it for the purposes of the trust, if he has either actual or constructive notice of the trust.

197. A person who, not being a trustee and not having authority from a trustee, takes upon himself to intermeddle with trust matters or to do acts characteristic of the office of trustee, makes himself a trustee de son tort a trustee of his own wrong, or as it is also termed a constructive trustee. The responsibility which attaches to a trustee may extend in equity to a person who is not properly a trustee, if he either makes himself a trustee de son tort or actually participates in any fraudulent conduct of a trustee to the injury of the cestui que trust.

All these paragraphs also show that a constructive trustee or a trustee de son tort is liable as a trustee to the beneficiary and not to a third person and we have already said that the liquidator's suit on the mortgages was brought not as a beneficiary but as a third person. Apart from this, the receiver in insolvency also had, like Shafiquzzaman, shown his hostility to the trust. He not only contested Sharfuzzaman's suit of 1918 to have the trust declared valid but actually applied to the Insolvency Court to have the trust set aside under Section 53, Provincial Insolvency Act. The receiver was managing the property for the benefit of all the creditors of Shafiquzzaman and his interests were consequently antagonistic to those of the beneficiaries under the trust who included maintenance holders and some of the creditors. In these circumstances the receiver in insolvency cannot by any stretch of the imagination be said to be representing the trust. Moreover, as we have already said neither Shafiquzzaman nor the receiver in insolvency was sued by the liquidator as representing the trust. In this connexion the learned counsel for the liquidator has referred to some cases, (e. g. 58 Bom 348,[6] 2 Luck 288[7] and 36 All 383,[8]) in which it was held that if the manager of a joint Hindu family sues or is sued in his capacity as such manager, it is not necessary that the plaint should express in clear terms that he was suing or being sued in that capacity. These decisions are in our opinion wholly inapplicable to the present case for the simple reason that while in the case of a joint Hindu family it can reasonably be inferred that the suit was brought by or against the manager in that capacity, nobody who reads the liquidator's plaint in the mortgage suit can have the least idea that the suit was in respect of any trust property or that defendants 1 and 2 were being sued as constructive trustees of the property. Moreover in his defence to Sharfuzzaman's suit in 1919, the liquidator clearly stated in para. 19 of his written statement (*vide* Ex. 3) that:

> The trust has become extinct and the deed of trust has ceased to be operative under the order of the District Judge, Lucknow, dated 13th August 1912.

And it is idle on his part to contend now that Shafiquzzaman and the receiver were impleaded by him as representing the trust. We are therefore of opinion that the receiver in insolvency was neither the proper person to represent the trust nor was he sued as such by the liquidator in the mortgage suit. It is no argument to say that nobody put up the plea in the liquidator's mortgage suit that the trust was not represented, or that the suit was strenuously contested by the receiver in insolvency or that the new trustees could not have defended the suit better than the receiver in insolvency did if they had been made parties. It was to our minds the manifest duty of the plaintiff liquidator to take steps to bring on record the equity of redemption but not having done so the decree obtained by him in his suit is a nullity as against those who represent the equity of redemption. This is too obvious a proposition to require any authority in support of it but if any were needed it will be found in the judgment of their Lordships of the Judicial Committee in 32 I A 23[9] in which it was held that a Court has no jurisdiction to sell an equity of redemption unless the mortgagors are parties to the decree or the proceedings which led to it, or are properly represented on the record, and that as regards those mortgagors who are not parties thereto such sales are without jurisdiction and therefore nullities and may be disregarded without any proceedings to set them aside. We therefore decide this point in favour of the appellants trustees and hold that the decree obtained by

6. Madhgouda Babaji v. Halappa, (1934) 21 A I R Bom 178 = 151 I C 370 = 58 Bom 348 = 36 Bom L R 327.

7. Pirthipal Singh v. Rameshwar, (1927) 14 A I R Oudh 27 = 99 I C 154 = 2 Luck 288 = 3 O W N 954.

8. Sheo Shankar Ram v. Mt. Jaddo Kunwar, (1914) 1 A I R P C 136=24 I C 504 = 36 All 383=41 I A 216 (P C).

9. Khiarajmal v. Daim, (1905) 32 Cal 296 = 32 I A 23 = 8 Sar 734= 9 C W N 201=1 C L J 584 (P C).

the liquidator in the mortgage suit is a nullity against them as the equity of redemption was not properly represented in that suit.

The next point argued before us was whether the trustees' suit was barred by the principle of res judicata. This issue was decided by the learned Civil Judge in the negative and in favour of the plaintiffs, but the learned counsel for the liquidator challenged its correctness before us. The plea that the judgment in the liquidator's mortgage suit operates as res judicata in the present suit is mainly based on the assumption that either Shafiquzzaman or the receiver in insolvency represented the trust. As the point has been decided against the liquidator, the plea of res judicata has no force. The learned counsel for the liquidator respondent also pleaded the judgment of the Judicial Commissioners of Oudh dated 25th May 1922 (Ex 30) as a bar of res judicata on account of the fact that in that judgment the learned Judicial Commissioners remarked that

> by directing the trustees to handover the estate to Shafiquzzaman he (the District Judge) did not end the trust but made Shafiquzzaman himself the trustee.

The question whether or not Shafiquzzaman was a trustee was not before the Judicial Commissioners in the case before them and the remark just quoted cannot be said to be a finding on any issue arising in the case. Lastly, the case in 119 I C 733[10] was relied on in support of the argument that the decision of an Insolvency Court under Sec. 4 operates as res judicata between the parties and that therefore the rejection of the trustees' claim by the Insolvency Court bars the present suit. This plea hardly needs any consideration as by their judgment of 28th February 1935 their Lordships of the Judicial Committee have held all the proceedings in the Insolvency Court to have been ultra vires. We therefore agree with the learned Judge of the Court below that the trustees' suit is not barred by the principle of res judicata. Next, it was contended that the plaintiffs trustees being transferees pendente lite are bound by the decree in the mortgage suit. This plea too has no force whatever in our opinion. By appointing the plaintiffs as trustees Shafiquzzaman cannot be said to have "transferred or otherwise dealt with" the trust property within the meaning of S. 52, T. P. Act. Shafiquzzaman had been divested of the property in 1912 when he executed the deed of trust and under S. 75, Trusts Act, the appointment of the plaintiffs as trustees must date back to 1912. We uphold the lower Court's finding on Issue 4 also. Lastly it was urged that the defendant liquidator was entitled to special costs under S. 35-A, Civil P. C. This contention cannot be accepted for a moment in view of our finding on the main issue in the case. We therefore allow the appeal of the trustees (No. 55 of 1936) and decree their suit with costs according to reliefs (a), (b) and (c) of the plaint. Defendant 1 will file accounts mentioned in relief (b) of the plaint in the lower Court within two months from this date for the preparation of final decree in Suit No. 2 of 1935.

We now take up the liquidator's appeal (Appeal No. 66 of 1936) in Suit No. 2 of 1935. As mentioned above, the liquidator in this suit prayed for recovery of the balance remaining due on his decree on the ground of his being a beneficiary under the trust. The Court below held that the plaintiff liquidator was not entitled to the amount claimed by him as he had repudiated the trust and as his application under O. 34, Rule 6, Civil P. C., was dismissed. As we have decreed the trustees' appeal for possession of the trust property and for an account being drawn up of what is due to the liquidator from the trustees it is not necessary to decide the points raised by the liquidator in this appeal; but though the learned counsel for the trustees who is himself a trustee, has conceded before us that in spite of what is called repudiation of the trust by the creditors generally and by the liquidator particularly the trustees are prepared to treat the creditors and the liquidator as beneficiaries and to extend to them the benefits of the trust provided the property is returned to them, the question of the so-called repudiation deserves some consideration by reason of the fact that it was stressed by the learned counsel for Sharfuzzaman. It was argued that the creditors, including the liquidator, who had notice of the trust, set up claims inconsistent with the trust by bringing suits against Shafiquzzaman and had thereby lost their rights under the trust under S. 9, Trusts Act. Now, in the first place, it is doubtful if the creditors other than the liquidator can be said to have had notice of the trust, the evidence of Mahmdul Hasan, D. W. 4 being of

10. Shib Narain v. Lachhmi Narain, (1929) 16 A I R Lah 761=119 I C 733=30 P L R 533.

doubtful veracity, and the only circumstance from which a presumption of notice on the part of the creditors can arise being that almost all the suits were brought against Shafiquzzaman very soon after the execution of the deed of trust by him and most of the decrees were passed in July 1912 about a month after the trustees' dispossession by Shafiquzzaman. In the second place the interpretation put upon the latter portion of S. 9 by the learned counsel is not in our view correct. That portion of the Section runs as follows :

> A proposed beneficiary may renounce his interest under the trust by disclaimer addressed to the trustee, or by setting up, with notice of the trust, a claim inconsistent therewith.

This is to our minds an enabling and not a disabling provision. It recognizes the possibility of a beneficiary desiring to renounce his interest under the trust and suggests two modes by which this can be done. It does not in our opinion mean that in every case in which a beneficiary sets up a claim which can be regarded as inconsistent with the trust he loses thereby all the rights under the trust. The use of his word "may" seems to us to repudiate this argument altogether, and is only consistent with the Section being construed as an enabling Section. Further, in view of the fact that no restrictions were placed on the creditors by the deed of trust and no condition inserted against their right to bring suits for recovery of their debts it is doubtful if they can be said to have set up a claim "inconsistent with the trust." We are not therefore prepared to hold that the creditors have lost their rights under the trust by having brought suits against Shafiquzzaman. We decree this appeal, but as the trustees' opposition to the liquidator's suit was not unjustified, we make no order as to costs. The liquidator will, as a result of what we have said above, be entitled to get the money due on the mortgages in favour of the Bank from the trustees.

We now come to Appeal No. 89 of 1936 filed by Shaikh Wajid Husain, original defendant 32 and now represented by his son Shaikh Tajammul Husain, appellant. It appears that Wajid Husain claimed some money from Shafiquzzaman as the price of goods supplied to him before the execution of the deed of trust by him. He obtained a decree against Shafiquzzaman in 1912 and proved his debt in the Insolvency Court in 1913. He was paid two sums of Rs. 3693-15-4 and Rs. 249 in the insolvency proceedings, but as Wajid Husain's name was not mentioned in Sch. C of the deed of trust the Court below held that he was not entitled to get anything in execution of the deed of trust, and directed the trustees to take steps to recover the amounts paid to him by the Insolvency Court. It is against this order that Wajid Husain filed this appeal. It is contended that merely from the fact that the appellant's name was not mentioned in Sch. C of the deed of trust, it cannot be argued that Shafiquzzaman intended that the money due to him should not be paid. In support of this contention reliance is placed on para. 21 of the deed of trust in which it is said that after payment and discharge of "all debts and liabilities" the trustees shall, if there are surplus profits, increase the monthly allowance and shall invest any surplus remaining in Government promissory notes etc., on the note at the foot of Sch. C which runs as follows :

> To the best of my knowledge and belief the above are the only approximate actual debts due by me up to the execution of this deed of settlement,

and on Shafiquzzaman's statement as D. W. 2 (at p. 179) to the following effect:

> When I executed the deed of trust I intended that the debts due from me might be discharged. As I did not remember at the date of the deed all my debts or their exact amounts, I appended a note at the bottom that the amounts and debts entered were approximate.

The learned Judge of the Court below was, in our opinion, right in holding that the creditors not specified in the deed of trust are not entitled to be paid by the trustees. The deed of trust clearly shows that it was executed for payment of specified debts. So far as the payment of debts was one of the purposes of the trust not only were the debts specified in Schs. B and C but the total of the debts as given in cl. 5 of the deed comes exactly to the total of the debts mentioned in Schs. B and C, namely Rs. 8,84,649-3-0. This being so, it cannot be argued with reason that the trust was made for the purpose of the payment of all the debts due from Shafiquzzaman, in spite of what Shafiquzzaman may be induced to say in Court, and the words "payment of all debts and liabilities" in para. 21 of the deed must be taken to mean payment of all debts and liabilities specified in the deed of trust. S. 11, Trusts Act, clearly lays down :

> The trustee is bound to fulfil the purpose of the trust, and to obey the directions of the author of the trust given at the time of its creation except as

modified by the consent of all the beneficiaries being competent to contract,

and illustration (a) to that Section is as follows :

A, a trustee, is simply authorized to sell certain land by public auction. He cannot sell land by private contract.

When the trustees' discretion is thus restricted to the manner in which the trust is to be executed it is impossible to hold that the trustees can make any payments beyond those specified in the deed of trust, and in view of the duty cast on the trustees by this Section, it would clearly be a breach of trust on their part if they went out of their way to make payments to creditors not specified in the deed of trust. Then, it was argued on behalf of the appellant that the appellant was entitled to be paid the amount due to him under S. 128, T. P. Act, which runs as follows :

Subject to the provisions of S. 127 where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by and liabilities of the donor at the time of the gift to the extent of the property comprised therein,

but the case of a gift is clearly different from that of a trust in which the trustees get no benefit for themselves, and even if the deed of trust had comprised all the property of Shafiquzzaman which is contested by the trustees, we do not think the trustees would have been personally liable for any debt due from Shafiquzzaman. We uphold the findings of the learned civil Judge and dismiss the appeal of Shaikh Tajammul Husain, No. 89 of 1936, with costs.

Next comes Appeal No. 97 of 1936 filed by Rani Kaniz Abid, defendant 31, who claims on three promissory notes executed by Shafiquzzaman. The first of these was executed by him in favour of Moolchand for a sum of Rs. 15,000 on 26th August 1911, the second was executed by him on 7th October 1911 in favour of Raja Bhagwan Baksh, also for a sum of Rs. 15,000. Both these promissory notes were purchased by Raja Abul Hasan Khan, predecessor-in-interest of the appellant, who brought suits on them against Shafiquzzaman and obtained decrees. The third promissory note was executed by Shafiquzzaman in favour of one Said Ahmad for Rs. 11,000 on 4th January 1912. Said Ahmad himself obtained a decree on this promissory note and subsequently transferred this decree to Raja Abul Hasan Khan on 4th November 1913. Moolchand's and Raja Bhagwan Baksh's debts are mentioned in Sch. C of the deed of trust but not that of Said Ahmad. The Court below has held that Rani Kaniz Abid, appellant, is entitled only to the debts due to Moolchand and Raja Bhagwan Baksh to the extent mentioned in Sch. C and as Raja Bhagwan Baksh's debt was due on four promissory notes out of which only one was purchased by Raja Abul Hasan, the other three remaining with his widow, the Court below has, out of the amount mentioned in Sch. C, allowed to the appellant a sum proportionate to the entire debt due.

The learned counsel for Rani Kaniz Abid contends that his client is entitled also to the debt standing in favour of Said Ahmad and that if any reduction is to be made in the amount actually due to Raja Bhagwan Baksh, it should be made in the debts due on the other three promissory notes. As to the first contention we have already held that debts not mentioned in Schs. B and C cannot be paid by the trustees. With regard to the second also, we see no good reason why the reduction should be made in the debts due to Raja Bhagwan Baksh's widow and not in all the four debts proportionately. The learned counsel for the appellant has also relied on the word "approximate" occurring in the note at foot of Sch. C but we agree with the Court below in holding that the word "approximate" could only mean that the amounts of the debts mentioned in the schedule have been shown within a few rupees of the correct amounts and that it cannot be taken to mean that debts other than those mentioned in the schedules can also be paid by the trustees. The learned counsel also relies on the words "in contesting liability for any debt" occurring in cl. 15 of the deed of trust and argues that these words show that the amounts mentioned in Sch. C were not really the actual amounts, but this does not in our opinion help the appellant. It was because Shafiquzzaman used to give promissory notes for very much higher amounts than those actually received by him that the trustees were authorized to contest the liability for any debt that they may consider not to be genuine. At any rate the liability of the trustees as we have held above is only to the extent mentioned in the deed of trust and no more. The learned counsel for the appellant also challenges the lower Court's finding that the creditors mentioned in Sch. C are not entitled to recover interest over and above the amount mentioned in that schedule. We do not think that the

Court below was wrong in its finding on this point as the trustees cannot in our opinion pay anything beyond the sums mentioned in Sch. C consistently with the provisions of S. 11, Trusts Act.

The lower Courts findings on Issues 19 and 21 were also challenged and it was argued that the lower Court was wrong in holding that the claims of maintenance holders have priority over those of the creditors. It was said that the only argument advanced by the Court below in support of its finding is that the maintenance holders have been mentioned in the deed of trust before the creditors, but this in our opinion is not correct. The learned Judge of the Court below has given due weight to the contents of para. 15 of the deed of trust in which it is clearly laid down that the trustees should, after deducting out of the rents and profits of the property the cost of management, Government revenue and other public charges and expenses of litigation, if any, incurred, and defraying the expenses of repairs to houses, maintenance of roads and making improvements in respect of the properties, apply the balance to the payment of the monthly allowances mentioned and that whatever might remain after paying those allowances should be applied towards liquidation of the settlor's debts. It is thus clear that the monthly allowances were intended to take precedence of the debts and the learned Judge was right in holding so. This appeal too has no force and is dismissed with costs.

Appeal No. 99 of 1936 has been brought by Babu Aditya Prasad, defendant 18, who represents his father Lala Achampat Lal, deceased. The debt due to Lala Achampat Lal was on three promissory notes but we are concerned in this case with the claim on only one of the promissory notes (Ex. R-1) executed by Shafiquzzaman on 24th September 1911, for Rs. 30,000. Achampat Lal on 30th July 1912 obtained a decree (R-4) on this promissory note for a sum of Rs. 36,130-8-6 with future interest at 12 per cent per annum. The amount of Achampat Lal's debt shown in Sch. C is Rs. 21,776. The learned counsel for Babu Aditya Prasad relies on Ex. R-24, the list of debts filed by Shafiquzzaman in the Insolvency Court, on Ex. R-12, the list of debts prepared by the Insolvency Court and on Ex. R-13, a judgment of this Court dated 22nd December 1930, in which Achampat Lal's claim was allowed to the extent of Rs. 29,694-14-0. In view of what we have said above as regards the trustees' duty under S. 11, Trusts Act, we regret we cannot allow to this appellant anything more than the sum specified in Sch. C of the trust deed. The remedy of the creditors who claim more than has been mentioned in Sch. C as due to them lies not under the trust deed but by proceeding against the person of Shafiquzzaman or his property, if any, other than that comprised in the deed of trust. We therefore dismiss this appeal with costs.

Appeal No. 131 of 1936 has been brought by Krishna Chandra, defendant 28. His claim is based on a promissory note executed by Shafiquzzaman on the 1st October 1910, in favour of Bansidhar and Amarnath for Rs. 5000, carrying interest at 24 per cent per annum. The debt is mentioned at No. 9 in Schedule C, "Changamal" being a mistake for Bansidhar. Bansidhar and Amarnath obtained a decree for over Rs. 7000 with future interest at 12 per cent per annum on 8th July 1912. Amar Nath sold his share of the decree to Girdhari Lal, defendant 27, and Bansidhar on his death was succeeded by his son the present appellant. The Court below has held that out of the sum of Rs. 6800, shown as due to Bansidhar and Amarnath in Sch. C, defendants 27 and 28 are entitled to Rs. 3400 each. The learned counsel for defendant 28 however relies on the decree obtained by Bansidhar and Amarnath for Rs. 7000 with future interest and on the list of debts filed by Shafiquzzaman in the Insolvency Court (Ex. R-24) in which Shafiquzzaman showed the amount of the debt due to Bansidhar and Amarnath as Rs. 9400-10-7. In view however of what we have said above, we cannot hold that this list is binding on the trustees or that they are liable to pay anything more to the appellant than half of the debt shown in Sch. C, as due to Bansidhar and Amarnath. This appeal also fails and is dismissed with costs.

Appeals Nos. 132 and 133 are connected and may be disposed of together. Appeal No. 132 has been brought by Ram Chandra, son of Gopal Das, original defendant 8, and Appeal No. 133 by Raj Narain, defendant 7. Both these appellants claim under the same transaction, namely a loan of Rs. 22,300, taken by Shafiquzzaman in 1911 from Bishambhar Nath and Gopal Das by means of four promissory notes carrying interest at 24 per cent per annum. Each of the creditors had a half-share in the debt. This debt is shown in Sch. C, at No. 2 and the amount given

is Rs. 12,000. Bishambhar Nath and Gopal Das filed a suit on the basis of the promissory notes in their favour and obtained a decree (Ex. G-3) for Rs. 26,512-12-6 with future interest at 12 per cent. per annum, on 8th July 1912. On 6th August 1922, Bishambhar Nath sold his share of the decretal debt to Shambhu Nath, father of Raj Narain appellant in Appeal No. 133. Both these appellants have received from the receiver in insolvency amounts in excess of Rupees 12,000 mentioned in Sch. C and the lower Court has directed the trustees to take proceedings for recovery of the excess amount from them. The list of creditors (Ex. R-24 of suit No. 2) filed by Shafiquzzaman in the Insolvency Court is relied upon in these appeals also. They also rely on a petition of compromise (Ex. H-8 of Suit No. 2) filed on 1st October 1929, by the trustees, Sharfuzzaman and some creditors of Shafiquzzaman including Bishambhar Nath and Gopal Das by which provision was made for some payments being made to the creditors on certain conditions. It appears to us however that neither the list of creditors filed by Shafiquzzaman nor the petition of compromise filed in the Insolvency Court can override the duties of the trustees under the provisions of the Trusts Act and for reasons already given, we are unable to hold that the appellants in Appeals Nos. 132 and 133 are entitled to anything more than Rs. 12,000 shown in Sch. C of the deed of trust. Raj Narain also claims a debt which his father's transferor Bishambhar Nath claimed in addition to the debt referred to. As that debt was not mentioned in Sch. C, Raj Narain cannot claim to recover it from the trustees. The learned counsel for Ram Chandra and Raj Narain also argued that the trustees themselves have paid some debts that were not mentioned in Sch. C and in support of this argument reliance was placed on a letter (Ex. A-236 dated 17th February 1912) sent by the trustees to the Agent, Bank of Upper India, Lucknow. It was said that the trustees by this letter acknowledged payments made by the Bank to Ram Kishore Bhargava, Khalil Ahmad and Salimullah, none of whom is mentioned in Sch. C. It is wrong to say that this letter shows any payment made by the trustees after the execution of the deed of trust by Shafiquzzaman. The letter on the other hand shows that the creditors mentioned in it had been paid by the Bank out of a loan of Rs. 2,00,000 taken by Shafiquzzaman on 30th December 1911. Moreover even if it be supposed for a moment that the trustees made any unauthorized payments, that cannot alter the directions given in the deed of trust and should not lead to a further breach of trust.

On the question of interest, the learned counsel for the appellants contends that by the debt due to the present appellants being entered in a schedule of the deed of trust, the debt has become a specialty debt and must as such be repaid with interest. In support of this proposition he relies on the case in (1751) 28 E R 233.[11] With regard to this case, Lewin on the Law of Trusts says at p. 551 of his book (Edn. 13) :

> Again it was said by Lord Hardwicke that if a man by deed in his life creates a trust for payment of his debts, annexes a schedule of some debts, and creates a trust term for the payment, as that is in the nature of a specialty, it will make these, though simple contract debts, carry interest. But this dictum also is not in conformity with the law as now established and cannot be maintained ;

and reference has been made to the case in (1854) Kay 721.[12] Some other English cases were also referred to by the learned counsel but we do not think them very relevant to the question before us. Moreover, the law in India as regards trusts is contained exhaustively in the Indian Trusts Act and we must abide by the provisions of that Act. The learned counsel also relied on the Explanation to Sec. 11, Trusts Act, which runs as follows :

> Unless a contrary intention be expressed, the purpose of a trust for the payment of debts shall be deemed to be (a) to pay only the debts of the author of the trust existing and recoverable at the date of the instrument of trust, or, when such instrument is a will, at the date of his death, and (b) in the case of debts not bearing interest, to make such payment without interest.

The Explanation no doubt implies that interest can be paid on debts which bear interest but it cannot in our opinion be inferred from the language used that it is incumbent on the trustees in every case to pay interest on interest bearing debts. Moreover, the sentence "unless a contrary intention be expressed" is very important and shows that the provision contained in the Explanation is subject to the terms of the deed of trust and we have already held that the deed of trust makes no provision for payment of any interest on the debts specified in it, so that the Explanation to S. 11 will not in any case entitle the creditors to claim interest in the present case.

11. Barwell v. Parker, (1751) 2 Ves Sen 364=28 E R 233.
12. Stone v. Van Heythuysen, (1854) Kay 721=69 E R 307.

We therefore dismiss these appeals also with costs. The result is that we modify the decree of the lower Court in Suit No. 2 of 1935 to this extent as to include the appellant in Appeal No. 66 among the creditors in respect of whom the Court below will pass a final decree showing the claims and liabilities of the various beneficiaries. All the appellants in this suit will bear their own costs and all except the appellant in Appeal No. 66 will pay those of the trustees, respondents 3 to 6.

N.S./R.K. *Order accordingly.*

A. I. R. 1939 Oudh 177

ZIAUL HASAN J.

Riasat Ram Nagar — Applicant.

v.

Soember Singh and others —

Opposite Party.

Civil Revision Appln. No. 113 of 1936, Decided on 30th March 1939, against order of Sub-Divisional Officer, Fatehpur, District Bara Banki, D/- 4th March 1936.

Civil P. C. (1908), S. 115—Powers of High Court—Collector executing decree for under-proprietary rent is not subordinate to High Court and latter Court cannot act in revision.

No Court of revenue is subordinate to High Court in a matter in which no appeal lies to the High Court; and hence the Collector to whom a decree for under-proprietary rent is sent for execution is not subordinate to the High Court and the latter Court has no jurisdiction to act under S. 115: *A I R 1929 Oudh 389 (F B), Rel. on.*

[P 177 C 2; P 178 C 1]

Ram Prasad Varma and Bishun Singh — *for Applicant.*

Akhlaque Husain — *for Opposite Party.*

Judgment.—This is an application for revision of an order of an Assistant Collector, first class, passed in execution proceedings. It appears that a decree for arrears of under-proprietary rent was passed on 28th September 1923, by the Sub-Divisional Officer, Fatehpur, in favour of the applicant. On the decree being put in execution the case was transferred to the Collector on 28th September 1935, as the property against which execution was sought was ancestral property. On 22nd November 1935 it was found by the sale officer that four of the judgment-debtors had died and the decree-holder was directed to apply to the Court which passed the decree to have the legal representatives of the deceased judgment-debtors brought on the record. Accordingly, on 30th November 1935, the decree-holder applied to the Sub-Divisional Officer of Fatehpur for substitution of names. This application was dismissed for default of the decree-holder on 30th January 1936. On 1st February 1936, the decree-holder applied for restoration of the application and it was restored on 4th February 1936. On 3rd March 1936, the decree-holder was again absent and the application was again dismissed. He again applied for restoration of the application but by his order dated 4th March 1936, the learned Assistant Collector refused to restore it. It is against this order that the present application has been filed.

A preliminary objection to the hearing of this application is raised on behalf of the opposite parties on the ground that no revision of the order in question lies to this Court and on hearing the learned counsel for parties I am of opinion that this objection is well-founded and must prevail. In 6 O W N 661[1] it was held by a Full Bench consisting of five Judges of this Court that the Court of the District Judge is not subordinate to this Court when he hears and decides appeals from Courts of Revenue, the main reason for this being, as said by the late Misra J. in his judgment at p. 673, that the provisions of the Code of Civil Procedure are applicable under S. 135, Oudh Rent Act, to suits and proceedings under that Act only in so far as they are not inconsistent with the provisions of the Act and under S. 108 of the Act no Court other than a Court of Revenue can deal with suits of the description mentioned in the Section except by way of appeal. As a suit for recovery of arrears of under-proprietary is also covered by the suits specified in Sec. 108 it is clear that the only manner in which a Court other than a Court of Revenue can deal with suits of that kind or of proceedings arising from those suits is by way of an appeal as prescribed by the Oudh Rent Act. The order complained of is not an order against which an appeal can lie to this Court under the provisions of the Oudh Rent Act. Therefore according to the decision of the Full Bench referred to above, no Court of Revenue can be said to be subordinate to this Court in a matter in which no appeal lies to this Court. Moreover, when a District Judge while dealing with revenue cases has been held to be not subordinate to this Court, a Court of Revenue is *a fortiori* not subordinate to this Court. Under S. 115, Civil P. C., this Court has jurisdiction to call for

1. Gaya Prasad v. Kalapnath, (1929) 16 A I R Oudh 389=119 I C 357=4 Luck 539=6 O W N 661 (F B).

the record of a case which has been decided by any Court subordinate to this Court but as the learned Assistant Collector who passed the order complained of was not subordinate to this Court this Court has no jurisdiction to act under S. 115, Civil P. C. The preliminary objection is therefore allowed and the application for revision dismissed with costs.

S.G./R.K. *Application dismissed.*

*** A. I. R. 1939 Oudh 178**

ZIAUL HASAN J.

Mt. Anandei —Defendant — Appellant.

v.

Lala Ram — Plaintiff — Respondent.

Second Appeals Nos. 429 and 430 of 1936, Decided on 31st March 1939, against order of Dist. Judge, Lucknow, D/- 30th July 1936.

*** (a) Civil P. C. (1908), O. 21, Rr. 58 and 63 and S. 64—Order for release from attachment—Subsequent suit by decree-holder under O. 21, R. 63 to establish his right to attach property decreed in his favour—Private transfer by claimant made after order of release is void against rights of decree-holder under attachment, even if transferees are not made parties to suit under O. 21, R. 63.**

The order for release from attachment in a case under O. 21, R. 58 does not put an end to the attachment so as to leave the claimant free to deal with the property as he likes and if a suit is brought by the decree-holder under O. 21, R. 63 to establish a right to attach the property and a decree is passed in his favour, the effect of the decree is to set aside the order of release and to maintain uninterrupted the attachment originally made. The result is that any private transfer of property by the claimant, though made after an order releasing the property from attachment, will be void under S. 64, if the right to attach is subsequently established by suit under R. 63. S. 64 would have effect even if transferees had not been made parties to the decree-holder's suit under O. 21, R. 63 : *A I R 1921 Cal 101, Rel. on.* [P 179 C 1, 2]

(b) Transfer of Property Act (1882), S. 52—Order releasing property from attachment in claim proceeding under O. 21, R. 58, Civil P. C.—Transfer made after it and before disposal of suit under O. 21, R. 63 to set aside that order is affected by lis pendens.

A suit brought under O. 21, R. 63, Civil P. C., is a mere continuation of the proceedings in a claim petition and all alienations during the continuance of the proceedings originated by the claim petition till the disposal of the suit brought to set aside the order passed on the claim petition are affected by the doctrine of lis pendens : *A I R 1915 Mad 495, Rel. on.* [P 179 C 2]

Radha Krishna and Hargobind Dayal—*for Appellant.*

L. S. Misra and Rameshwar Dayal — *for Respondent.*

Judgment. — These are appeals against decrees of the learned District Judge of Lucknow in two suits filed by the two respondents to the two appeals respectively, each claiming possession of a house and a declaration that the house was not liable to attachment and sale in execution of the decree of the present defendant-appellant against defendant 4. Both the suits were tried together and decreed by the trial Court. The appeals brought by the present appellant were also disposed of together by the learned District Judge who confirmed the decrees of the trial Court. I have also heard both the appeals together and this judgment will govern both of them.

The facts of the case are that one Mt. Ramdei was owner of the two houses in question in the present suits. On 12th November 1929 she made a gift of these houses to her daughter Mt. Ram Piari, respondent 4 in Appeal No. 430. On 3rd January 1931 Ram Piari obtained a loan of Rs. 1000 from the present appellant, Mt. Anandei, on a promissory note. On 1st March 1932 Mt. Anandei obtained a money decree for Rs. 1055 and costs against Ram Piari on foot of the promissory note. On 2nd September 1932 Ram Piari transferred the houses back to her mother, Mt. Ramdei. On 5th November 1932 the houses were attached by Mt. Anandei in execution of her decree and Ramdei brought an objection under O. 21, R. 58, Civil P. C. This objection was allowed by the Munsif, North Lucknow, on 7th January 1933. Two days later Ramdei sold both the houses to Gur Prasad, respondent 2 of Appeal No. 430. Gur Prasad sold one of the houses to Shiam Lal, respondent 1 of Appeal No. 430, on 19th January 1933 and the other to Lala Ram, respondent in Appeal No. 429, on 6th September 1933.

On 19th August 1933 Anandei, appellant, brought a suit under O. 21, Rule 63 against Ram Piari and Ramdei for a declaration that the houses were liable to attachment and sale in execution of her decree against Ram Piari. In this suit Gur Prasad, Shiam Lal and Lala Ram were not impleaded. The suit was decreed on 3rd October 1933. Thereafter Anandei put the houses to sale and purchased them herself. Shiam Lal and Lala Ram objected to delivery of possession to the purchaser but their objections were dismissed and possession delivered to Mt. Anandei. Thereupon the suits which have given rise to these appeals were filed by Shiam Lal and Lala Ram. In fact Lala Ram brought his suit on 20th July 1935, a week before delivery

of possession to Mt. Anandei, and he prayed that the order of the Munsif dismissing his objection and ordering delivery of possession to the auction purchaser be cancelled. Shiam Lal's suit was brought on 23rd August 1935.

The trial Court holding that the decree obtained by Mt. Anandei on the basis of the promissory note against Ram Piari and the decree obtained by Mt. Anandei in the suit under O. 21, R. 63 were both collusive, decreed both the suits. Mt. Anandei appealed to the District Judge and the learned Judge while disagreeing with the findings of the trial Court about the collusive nature of the decrees dismissed the appeals and upheld the trial Court's decree in favour of the plaintiffs on the ground that as the plaintiffs were not made parties to the suit brought by Anandei under O. 21, R. 63, Civil P. C., their rights were not affected. Mt. Anandei brings these appeals against the decrees of the learned District Judge.

I am of opinion that both these appeals must be decreed. The learned District Judge has relied on a remark made by their Lordships of the Calcutta High Court in A I R 1921 Cal 101[1] to the effect that a person who has derived title to the disputed property from the claimant (under O. 21, R. 58) subsequent to the order of release (of attachment) must also be made a party (to a suit under R. 63) if it is intended to bind him by the result of the suit. The question however is not whether or not the plaintiffs-respondents are bound by the decree obtained by Mt. Anandei in her suit under O. 21, R. 63, but the real question is whether they can claim title to the houses in suit by virtue of their purchases from Gur Prasad as against the appellant auction purchaser. On this point S. 64, Civil P. C., and S. 52, T. P. Act, are both against them. It is not disputed that as held in A I R 1921 Cal 101,[1] relied on by the learned counsel for the respondents himself, the order for release from attachment in a case under O. 21, R. 58, Civil P. C., does not put an end to the attachment so as to leave the claimant free to deal with the property as he likes, and that if a suit is brought by the decree-holder to establish a right to attach the property and a decree is passed in his favour, the effect of the decree is to set aside the order of release and to maintain uninterrupted the attachment originally made. This being so, the transfer of the house by Ramdei to Gur Prasad and by Gur Prasad to the present respondents would be void under the provisions of Sec. 64, Civil P. C., against the claims of the present appellant under the attachment. The argument of the learned counsel for the respondents that Sec. 64 of the Code would have effect only in case the plaintiffs-respondents had been made parties to her suit by Mt. Anandei is to my mind absolutely without force. Mulla in his commentary on O. 21, R. 60 also says :

> But in the case of immovable property if a suit is brought by the decree-holder to establish his right to attach the property and the decree is in his favour, it has the effect of setting aside the order of release and of maintaining the attachment originally made. The result is that any private transfer of property by the claimant, though made after an order under this rule releasing the property from attachment, will be void under Sec. 64, if the right to attach is subsequently established by suit under Rule 63.

Then the lis commenced by Ramdei bringing an objection under O. 21, R. 58, Civil P. C., cannot to my mind be said to have terminated before Anandei's declaratory suit was decided so that the transfers made by Ramdei and Gur Prasad contravened the provisions of Sec. 52, T. P. Act, also. This is, to my mind, clear from the Explanation attached to Sec. 52, T. P. Act, and I am supported in this view by the decision of their Lordships of the Madras High Court in 38 Mad 535[2] in which it was held that a suit brought under O. 21, R. 63, Civil P. C., is a mere continuation of the proceedings in a claim petition and all alienations during the continuance of the proceedings originated by the claim petition till the disposal of the suit brought to set aside the order passed on the claim petition are affected by the doctrine of lis pendens.

In view of what I have said above, the learned District Judge was not right in holding that the plaintiffs-respondents could claim a valid title to the houses in dispute as against the appellant-decree-holder. I therefore decree both the appeals with costs, and setting aside the decrees of the learned District Judge dismiss both the suits with costs.

D.S./R.K. *Appeals decreed.*

1. Protap Chandra v. Sarat Chandra, (1921) 8 A I R Cal 101 = 62 I C 348=25 C W N 544 = 33 C L J 201.

2. Krishnaappa Chetty v. Abdul Khader Sahib, (1915) 2 A I R Mad 495 = 25 I C 11 = 38 Mad 535 = 26 M L J 449.

A. I. R. 1939 Oudh 180

ZIAUL HASAN AND YORKE JJ.

Mahabir Prasad — Applicant.

v.

C. B. Gupta — Opposite Party.

Criminal Misc. Appln. No. 112 of 1938, Decided on 24th April 1939.

(a) Contempt of Court — Private letter to Magistrate — Ill feelings between villagers and ziledar — Proceedings under S. 107, Criminal P. C., instituted by S. D. M. against villagers— During pendency of proceedings, pleader for villagers writing letter to S. D. M. requesting him to take immediate steps against ziledar and not to proceed with cases against villagers — Letter held amounted to contempt of Court.

It is in the highest degree dangerous to write a letter of any kind to a Magistrate seized of a case which can possibly be construed as calculated in any way to influence him in his handling and disposal of that case. [P 182 C 1, 2]

Certain villagers who had ill-feelings about the ziledar of the zamindar of those villages, approached a pleader and told him all their grievances. The pleader wrote to the D. S. P., D. C. and S. D. M. about the grievances informing them that the ziledar had once been previously suspended and requested that necessary steps might be taken as would enable the villagers to live in peace. In the meantime some trouble arose between the ziledar and the villagers when Naib Tahsildar visited the villages for realization of revenue. As a result, proceedings under S. 107, Criminal P. C., were instituted against the villagers. During the pendency of those proceedings the pleader for the villagers again wrote to the S. D. M. before whom the proceedings were pending. In this letter after stating that in spite of the last letter no steps were taken the pleader requested that such steps might be taken immediately and that the proceedings pending against the villagers under S. 107 should not be proceeded with :

Held that the second letter to the S. D. M. clearly amounted to contempt of Court. [P 180 C 2]

(b) Contempt — Contempt of Subordinate Courts — Courts receiving letters amounting to contempt must bring this to notice of High Court.

It is the duty of all Magistrates who receive letters amounting to contempt of Court or upon whom any attempt is made to bring improper influence to bear in connexion with their magisterial work, to bring the fact to the notice of the High Court. [P 181 C 2]

Govind Dayal Srivastava — *for Applicant.*

R. F. Bahadurji — *for Opposite Party.*

Order. — This is an application under S. 2, Contempt of Courts Act, read with Ss. 219 and 220, Government of India Act, by one Mahabir Prasad against Mr. C. B. Gupta, an advocate of this Court and a member of the Legislative Assembly, arising out of the following circumstances: In July 1938 there is said to have been some ill-feeling between the tenants of villages Nayagaon and Kampta on the one hand and Mahabir Prasad, the present applicant, who is the ziledar of Chaudhri Gajadhar Prasad, zamindar of those villages, on the other. The villagers, we are told, approached the opposite party Mr. C. B. Gupta and in consequence he wrote to the Superintendent of Police a letter dated 26th July 1938 of which he sent copies to the Deputy Commissioner and the Sub-divisional Officer for information and necessary action mentioning the complaints made by the villagers against Mahabir Prasad, and further stating that he had information that a previous Sub-divisional Officer of the Lucknow tahsil had on some previous occasion got the said Mahabir Prasad suspended. The request in this letter to the Superintendent of Police was that he should take such steps as were necessary and as might enable the tenants of that locality to live peacefully. Our information on this point is derived from Mr. Gupta himself. It appears from the record that on the previous day, 25th July, the Naib Tahsildar of Lucknow had gone to the same villages of Nayagaon and Kampta, and on the occasion of this visit, which was in the performance of his official duties in connexion with the realization of revenue, there was some trouble, as a result of which a report was made by the tenants at police station, Mandiaon, at 3 A. M. on 26th July, and a report made by the Naib Tahsildar to the Tahsildar on the same day, and subsequently proceedings under S. 107, Criminal P. C. were instituted against some of the tenants. These proceedings were pending in the Court of the Sub-divisional Officer, Lucknow, Rai Sahib Mr. Anand Swarup, when on 6th September 1938 the opposite party, Mr. Gupta, wrote the letter which is the subject of the present proceedings. This letter is headed "urgent" and runs as follows :

Dear Mr. Anand Swarup,

On 26th July 1938 I sent a letter to Mr. Parkin, the Superintendent of Police, complaining against the conduct of one Mahabir Prasad, ziledar of Ch. Gajadhar Prasad, zamindar of the villages, Kampta and Nayagaon, in the Lucknow district. A copy of that letter was sent to the Deputy Commissioner, Lucknow, as well, which I think must have been sent to you for necessary action. I did not hear anything since then as to the steps that were taken in the matter.

This morning an army of villagers, residents of villages Kampta and Nayagaon, have raided my house and are bitterly complaining against the action of the authorities in having prosecuted tenants under S. 107 without caring to investigate into the complaint alleged against the ziledar

Mahabir Prasad. This is very strange. I know it for certain that the said Mahabir Prasad was suspended for his misbehaviour on the recommendation of the previous Sub-divisional Officer, Mr. Sapru, who had investigated certain facts against the said gentleman. It pains me to find that the authorities have not taken any steps against Mahabir Prasad and instead have issued orders for binding down some 20 tenants of the said village. I shall request you therefore to take immediate steps against the said Mahabir Prasad and not proceed with the cases under S. 107, Criminal P. C. I am forwarding a copy of this letter to the Deputy Commissioner as well.

Hoping to hear soon from you on the subject.

Yours sincerely,
(Sd). C. B. Gupta.

On a reading of this letter, particularly on putting it side by side with the letter dated 26th July 1938, a copy of which has been furnished to us by Mr. Gupta himself, we are of opinion that the writing of this letter grossly offends against the law of contempt of Court. It is in the clearest terms an attempt to prejudice the mind of the Magistrate in regard to the trial of the case pending against the tenants under S. 107, Criminal P. C., in which Mahabir Prasad was a witness for the prosecution. It assumes that the writer without having made any complaint in Court against Mahabir Prasad has a right to request a Magistrate to take immediate steps against Mahabir Prasad in respect of his conduct, whatever that conduct may be, and it assumes that the writer is entitled to direct the Magistrate not to proceed with the cases under S. 107. It is, and indeed it is no longer denied to be, a clear case of contempt of Court. Learned counsel for Mr. Gupta has urged before us that this application against Mr. Gupta is not a bona fide application but has been filed by Mahabir Prasad in revenge for the attacks made on him by Mr. Gupta in these two letters. We are not really concerned with the question of the bona fides of Mahabir Prasad but with the question whether the letter written by Mr. Gupta is or is not an offence against the law of contempt of Court. The fact relied upon by learned counsel that the letter was not brought to our notice by the Magistrate himself does not seem to us to be a fact at all helpful to learned counsel's client. It may be that the Magistrate thought that as he was not at all swayed by the remarks of Mr. Gupta in this letter, it was unnecessary for him to take any action in regard to it. We would however point out that in our opinion it was the bounden duty of the Magistrate (and of the Deputy Commissioner, if, as would appear from the concluding remarks in this letter, he actually received a copy of it) to bring this matter to the notice of this Court, and we would like to emphasize very strongly the point that it is the duty of all Magistrates who receive such letters or upon whom any attempt is made to bring improper influence to bear in connexion with their magisterial work to bring the fact to the notice of this Court. When this matter came up for disposal on 6th April 1939 learned counsel for Mr. Gupta, who was not himself present, put before us a petition by way of apology from his client. In this petition he says, after reciting facts which we have mentioned earlier in this order:

In order to remind the authorities of my previous letter dated 26th July I wrote a letter to Mr. Anand Swarup in his capacity as Sub-divisional Officer within whose jurisdiction the tenants were residing. The letter was written with the solitary view of bringing to his notice the grievances of the tenants against the ziledar.

We regret that we are unable to accept this as a true statement of facts. He goes on to say:

At the time when this letter was dictated by me to my steno-typist I was in a great hurry to proceed to the Council Chamber to attend to some business. The letter of 6th September was dictated in a great hurry and I signed it without reading it over again.

Again we have to regret that Mr. Gupta's statement in this connexion is not true. An examination of the original letter on the file of the proceedings under S. 107, Criminal P. C., shows that Mr. Gupta corrected this letter in his own handwriting in the middle and near the end. It is quite clear that these corrections could not have been made without his having read over what he had dictated and read it with some care. Mr. Gupta tells us that the explanation of this admittedly incorrect statement made by him is that he made it by a reference to the copy which he had in his possession which showed these corrections in the handwriting of his clerk, and that the explanation therefore of his making an incorrect statement is that he had forgotten that he had in fact read over the letter. We accept his explanation but we do not think that Mr. Gupta, who is an advocate of this Court, being in the position of having to furnish an explanation of a letter written by him, should have put before the Court an explanation based on facts not properly verified by him. The petition of 6th April 1939 continues as follows:

It was never my intention to interfere with the administration of justice and at that time I little

thought that by writing this letter I would be committing contempt of Court. The letter was dictated in absolutely good faith. I am sorry that in the letter I have addressed to Mr. Anand Swarup I have been led unconsciously to use certain sentences contrary to my intention which I am informed brings me within the provisions of the Contempt of Courts Act. I had not the slightest intention to prejudice the Sub-divisional Officer in arriving at true conclusions. Now I know that I have committed a mistake and I must suffer for it. I leave the matter in the hands of the Court.

In view of the facts in regard to this explanation and apology to which we have drawn attention above, we indicated to learned counsel appearing for Mr. Gupta that we were not satisfied with the apology and on 9th April Mr. Gupta, who was again not present, added a rider to his previous written statement in the following terms :

I express my sincere regret and apology to the Hon'ble Court, for having committed contempt of Court and I undertake not to repeat the same in future.

As Mr. Gupta was not himself present in Court to explain the matters mentioned above, we postponed the final disposal of the matter until 19th April and requested counsel to produce his client on that date. Mr. Gupta has appeared before us and we have heard what he had to say in explanation of the incorrect statement about not reading over the letter again contained in his first apology. Mr. Gupta has again pressed before us the point that he did not realize that he was committing an offence of contempt of Court because he regarded himself as writing to Mr. Anand Swarup in the latter's executive capacity of a Sub-divisional Officer and not as the Magistrate trying a case under S. 107, Criminal P. C. We think it is a pity he made this statement because it is in fact contradicted by his request to the Magistrate not to proceed with the cases under S. 107 which were pending in his Court. If Mr. Gupta's statement is true that he, an advocate of this Court, is incapable of realizing that after a Magistrate has started proceedings in a case under Sec. 107 and has issued notices under S. 112, it is impossible to address to him in connexion with those cases a letter of the type of Mr. Gupta's letter of 6th September 1938, it is quite time that both he and any other persons who may be likely to be under a similar misapprehension should realize fully that it is in the highest degree dangerous to write a letter of any kind to a Magistrate seized of a case which can possibly be construed as calculated in any way to influence him in his handling and disposal of that case. The question, which remains for consideration, is whether we should act under Proviso 1 to S. 3, Contempt of Courts Act, which provides that

the accused may be discharged or the punishment awarded may be remitted on apology being made by it to the satisfaction of the Court,

or whether we should compel Mr. Gupta to purge his contempt by payment of a fine or the undergoing of a sentence of imprisonment. The only case of a similar nature to which we have been referred in this connexion is 1939 A L J 99.[1] In that case the gentleman concerned immediately on the issue of the notice appeared in Court and made a very complete apology and gave an undertaking, and in consequence the apology was accepted. In the present case the Court did not insist on the personal appearance of Mr. Gupta, and Mr. Gupta never did appear until we called on his counsel to produce him personally before us. Further than this the first apology which he tendered was unsatisfactory as we have made clear earlier in this order and it was only when we pressed his learned counsel in the matter that a full and proper apology and undertaking was furnished to the Court. Moreover, Mr. Gupta though he has not been practising recently, is an advocate of this Court according to his own statement of some ten years' standing and became a pleader as long ago as 1925. He is the last person therefore who should have allowed himself to be guilty of an offence of this kind. In these circumstances we do not feel that we should be justified in accepting his apology as fully meeting the requirements of justice, and we think it is necessary to sentence him according to law. We accordingly direct that Mr. C. B. Gupta shall pay a fine of Rs. 200. In default he will undergo one month's simple imprisonment. We allow one week for deposit of the fine.

N.S./R.K. *Order accordingly.*

1. Emperor v. Gajadhar Prasad, (1939) 26 A I R All 247=1939 A L J 99.

A. I. R. 1939 Oudh 182

ZIAUL HASAN AND YORKE JJ.

Ram Shankar — Applicant.

v.

V. N. Shukla — Opposite Party.

Criminal Misc. Appln. No. 109 of 1938, Decided on 17th April 1939.

Contempt of Court—Private letter to officer—Letter to Magistrate containing request to take steps in executive capacity for ensuring peaceful celebration of certain ceremonies likely to be obstructed by certain people—No prayer that such persons should be bound down under Sec. 107, Criminal P. C.—No judicial proceedings pending against those persons when letter received by Magistrate — Writer of letter held not guilty of contempt of Court.

An application was sent to the Sub-Divisional Magistrate in which it was stated that the applicant while taking a certain religious procession previous year was obstructed by certain people and prayed that as he was taking similar procession again, necessary arrangements be made and suitable proceedings be taken for the safe celebration of the procession. In a police inquiry that was subsequently ordered a written undertaking was taken from persons causing obstruction that they would not disturb the procession. The police recommended that those persons should also be bound down under S. 107, Criminal P. C. In the meantime the applicant's son sent a private letter to the Magistrate requesting him to take necessary steps in his executive capacity to ensure the peaceful celebrations of the ceremonies organized by his father by making necessary arrangements. The letter however did not contain any prayer that the persons causing obstruction should be bound down under S. 107, Criminal P. C. In fact notices under Sec. 107 were issued to those persons upon recommendation by the police some time after the Magistrate received the letter :

Held that as no judicial proceedings were pending against those persons when the letter was received by the Magistrate and as the writer of the letter did not intend to influence the Magistrate by means of the letter, he was not guilty of contempt of Court. [P 183 C 1; P 184 C 1, 2]

S. C. Das — *for Applicant.*

R. F. Bahadurji and Radha Krishna — *for Opposite Party.*

Order. — This is an application by one Ram Shankar Brahmin praying that the opposite party, V. N. Shukla, who, he says, has been guilty of contempt of Court be suitably dealt with. The facts are that in 1938 the opposite-party's father, Pandit Bhoop Narain Shukla, who is a resident of village Bawan in the Hardoi District, wanted to take out a religious procession on the occasion of the Janma Ashtmi festival and on 20th July 1938, he put in an application before the Sub-Divisional Magistrate alleging that he had been taking out the Janma Ashtmi procession for many years but that in the previous year Ram Shankar (the present applicant), Ram Saran and others who were people of bad character and inimical to him obstructed him in taking it out and showed readiness to commit a breach of the peace. He prayed in his application that "necessary arrangements be made and suitable proceedings be taken." The Sub-Divisional Magistrate on receiving this application called for a report from the kotwali police, and on 4th August 1938 the Station Officer submitted his report. He took an undertaking in writing from the present applicant and certain others, Ram Saran, Gajraj Prasad and Sadanand, that they would not obstruct any procession that Pandit Bhoop Narain should take out. In forwarding this undertaking along with his report the Sub-Inspector suggested that if the undertaking be not considered sufficient, the signatories to it be bound over under Sec. 107, Criminal P. C. This report reached the Sub-Divisional Magistrate's Office on 8th August and on 12th August, the learned Magistrate ordered the issue of notices under Sections 107/112, Criminal P. C. Finally the proceedings were dropped on 22nd August as the celebrations had by that time passed off peacefully. In the meantime, on 9th August 1938, the opposite party sent a letter to the Sub-Divisional Magistrate, Hardoi, in the following terms :

My dear respected Deputy Sahib,

I am sorry I could not see you again yesterday as your honour was very busy at 4 P. M. and my train was due to arrive at 4-15. I do not want to present my anxieties and troubles again before your honour. Those were well-mentioned in my respected S. D. O. Mahihabad's letter.

I however submit the programme of our Krishna Janma Ashtmi festival and hope your honour will kindly take necessary steps for saving our religion and culture well.

Sir, my father Pandit Bhoop Narain Shukla of Bawan is an old man of about 70. He is a true devotee of Lord Krishna and has a good faith in him. He was much shocked last year when certain troubles regarding Dadhi procession were created and when as a result that was stopped. Being in services here I cannot help him. He is a peace loving gentleman and this is why that he last year preferred it well to stop his procession and seek police help than to join in a hand to hand fight. Hundreds of devotees go there from the near-by villages and if any trouble will arise from the side of the goondas who have some malice against us, it would be very difficult to pacify them and have an immediate control over them.

Now I hope your honour will do the needful and oblige.

Yours obediently,
V. N. Shukla,
Assistant Station Master,
Rahimabad, Dist. Lucknow.

It is on the basis of this letter that the present application has been brought and it is said that the letter constitutes interference with the administration of justice and amounts to contempt of Court. The reply of the opposite party is that he never intended by the letter in question to

interfere with the course of justice and that all that he meant was that the Magistrate should take steps in his executive capacity to ensure a peaceful celebration of the ceremonies organized by his father. After hearing the counsel for parties we have come to the conclusion that it is very doubtful that the opposite parties intended by the letter of 9th August to influence the learned Magistrate in his judicial capacity. In fact there are indications to the contrary and in support of the opposite party's reply.

In the first place the application of the opposite party's father dated 20th July 1938 does not contain any prayer that the persons named therein be bound over under S. 107, Criminal P. C. On the other hand the application is headed "Informatory application for the arrangement of the Uthsav of Janma Ashtmi and Dadh in village Bawan thana kotwali, Hardoi" and the prayer is merely that necessary arrangements be made and proper steps be taken. It is also noteworthy that in this application the applicant did not name all the persons against whom he wanted steps to be taken but mentioned them as "Ram Shankar, Ram Saran and others." If the applicant's intention had been that the persons complained against should be bound over to keep the peace he would naturally have named and described each and everyone of those persons. It is true that proceedings under Sec. 107, Criminal P. C., were started against the applicant and some others but that was on the report of the police and not on account of any prayer on the part of Pandit Bhoop Narain. Then again those proceedings were started as already noted on 12th August 1938, and the letter in question was written by the opposite party on 9th August so that when that letter was written, no judicial proceedings were pending before the learned Magistrate to whom the letter was addressed. Of course every private communication to a Judge for the purpose of influencing his decision upon a pending matter is contempt of Court as tending to interfere with the course of justice (*vide* Halsbury's Laws of England, Vol. 7, p. 7), and if at the time that the opposite party wrote the letter in question proceedings under Sec. 107, Criminal P. C., had been pending before the learned Magistrate and if the intention of the opposite party had been to influence the Magistrate by means of that letter, he would undoubtedly have been guilty of contempt of Court. We are of opinion however that there was no such intention on the part of the opposite party. Nor were proceedings under S. 107 pending at that time. We therefore accept the explanation of the opposite party and reject this application.

N.S./R.K. *Application rejected.*

A. I. R. 1939 Oudh 184

ZIAUL HASAN AND YORKE JJ.

Lal Baijnath Singh and others — Debtors—Appellants.

v.

Lala Tulshi Ram — Claimant — Respondent.

First Appeal No. 62 of 1937, Decided on 21st March 1939, against decree of Special Judge, First Class, Partabgarh, D/- 16th February 1937.

U. P. Encumbered Estates Act (25 of 1934), Ss. 14 (4), 15 — Nature of power of Special Judge under S. 15 explained — Power is not affected by Proviso (ii) to S. 3 (a) of Usurious Loans Act.

The phrase in S. 15 "shall accept the findings of the Court which passed the decree except in so far as they are inconsistent with the provisions of S. 14" should be interpreted in a wider sense meaning that the Special Judge should consider whether those findings are inconsistent with Cl. (4) (a), (b) and (c) of S. 14. This, in other words, means that he should see whether the Civil Court that passed the decree could have passed the decree which it did pass if that Court had had to comply with the provisions of S. 14: *A I R 1939 Oudh 75, Rel. on.* [P 185 C 2]

This power given to the Special Judge is not in any way taken away by the proviso (ii) to S. 3 (a), Usurious Loans Act. [P 186 C 1]

Kashi Prasad Srivastava — *for Appellants.*

M. L. Saksena — *for Respondent.*

Judgment.—This is an appeal from the judgment of the Special Judge, first class, Partabgarh, decreeing the claim of Tulshi Ram, creditor, under Ss. 9 and 14, Encumbered Estates Act, against Lal Baij Nath Singh and the trustees of the said Lal Baij Nath Singh for Rs. 3369-2-0 with costs and future interest at Rs. 4-4-0 per cent. per annum from 19th June 1935 till the date of realization. This was a claim for the amount due on the basis of a loan which had been the subject of a decree. The debtor Lal Baij Nath Singh borrowed Rs. 2000 from the claimant Tulshi Ram on 3rd October 1931 and executed a pronote providing at the rate of Rs. 2 per cent. per mensem simple interest. Tulshi Ram in due course instituted a suit on foot of the

pronote, and on 5th October 1934 obtained a decree for Rs. 3039, with costs amounting to Rs. 202 and future interest at Rs. 6 per cent. per annum. In this suit the rate of interest was reduced from Rs. 2 per cent. per mensem to Re. 1-8-0 per cent. per mensem and the claim decreed on that basis. In the present proceedings under the Encumbered Estates Act it was contended on behalf of the debtor that the interest allowed by the Court which passed the decree was excessive and that it should be further reduced under the provisions of the Usurious Loans Act. It was contended in reply that under the provisions of the Usurious Loans Act the Court could not do anything which would affect any decree of the Court, and the learned Special Judge has based his decision partly on that argument and partly on his reading of the provisions of S. 15 and S. 14 (4), Encumbered Estates Act, and has declined to interfere with the existing decree except in so far that he has reduced the rate of future interest to Rs. 4-4-0 per cent. per annum with effect from 19th June 1935, that being the date on which the application under S. 4, Encumbered Estates Act, was made in the Court of the Deputy Commissioner of Partabgarh. The first question is whether the learned Special Judge has correctly interpreted the provisions of Ss. 14 and 15, Encumbered Estates Act. S. 14 (4) of that Act provides that

> in examining each claim the Special Judge shall have and exercise all the powers of the Court in which a suit for the recovery of the money due would lie and shall decide the questions in issue on the same principles as those on which such Court would decide them, subject to the following provisions, namely (a) the amount of interest held to be due on the date of the application shall not exceed that portion of the principal which may still be found to be due on the date of application; (b) the provisions of the Usurious Loans Act 10 of 1918 will be applicable to proceedings under this Act; (c) the provisions of the United Provinces Agriculturists' Relief Act of 1934 shall not be applicable to proceedings under this Act.

Prima facie in view of the reference to the powers of the Court in which a suit for the recovery of the money would lie, these provisions relate to the examination and disposal of claims for the recovery of money for which no decree has yet been obtained. Sec. 15 is headed: "Saving in respect of existing decrees," but the Section really deals with the manner in which the Special Judge is to approach the determination of claims based on existing decrees. The Section runs as follows:

> In determining the amount due on the basis of a loan which has been the subject of a decree the Special Judge shall accept the findings of the Court which passed the decree except in so far as they are inconsistent with the provisions of S. 14.

There is a Proviso which however does not call for consideration in the present case. Now interpreting the phrase "shall accept the findings of the Court which passed the decree except in so far as they are inconsistent with the provisions of S. 14" in its widest possible sense, this may be taken to mean that the Special Judge will consider first whether those findings are inconsistent with Cl. (4) (a), that is whether the amount of interest allowed by the decree was in excess of the portion of the principal found still to be due at the date of the suit or decree; secondly he will have to consider whether the provisions of the Usurious Loans Act have or have not been applied in the previous case, and thirdly he will have to consider whether in the previous case the Court has applied the provisions of the United Provinces Agriculturists' Relief Act. In the present case no question of inconsistency with provisions (a) and (c) arises, and prima facie there can be no inconsistency with provision (b) since in fact the Court which granted the decree did apply the provisions of the Usurious Loans Act in order to reduce the rate of interest. The argument put forward on behalf of the appellant is that although the Court which gave a decree against Lal Baij Nath Singh in the pronote suit clearly did apply the provisions of the Usurious Loans Act, it was not in a position to apply the provisions of the Usurious Loans Act 10 of 1918 referred to in Cl. (4) (b), Encumbered Estates Act, because at that date the Usurious Loans Act 10 of 1918 had not as yet been amended by the Usurious Loans (United Provinces) Amendment Act No. 22 of 1934 which only received the Governor-General's assent on 10th April 1935. In our opinion there is no force whatsoever in this argument. That would amount to giving retrospective effect to the amended Usurious Loans Act inconsistently with the provisions of Sec. 1, sub-cl. (2) which provides that

> the provisions of this Act shall apply to all suits instituted after the passing of this Act to which the Usurious Loans Act of 1918 hereinafter referred to as the principal Act would apply.

To accept this argument would also involve rejecting the view taken by a Bench of this Court of which one of us was a

member in 1939 O W N 118.[1] In that case it was said:

When however there has been a decree the Special Judge must under Sec. 15 accept the findings of the Court which passed the decree except in so far as they are inconsistent with the provisions of S. 14. This, in our view, means that he has to see whether the Civil Court that passed the decree could have passed the decree which it did pass if that Court had had to comply with the provisions of S. 14, or, to put it in other words, the Special Judge has to say to himself 'if, I, under Sec. 14 had then had to give a decree would the decree that I could have given under S. 14 correspond with the decree which the Civil Court has in fact given ?

We have been shown no sufficient reason for thinking that that view was other than a correct view. The point which has weighed very strongly with the learned Special Judge is that by Proviso (ii) to Sec. 3 (1), Usurious Loans Act, it is laid down that in the exercise of its powers under the earlier provisions of that Section the Court shall not do anything which affects any decree of a Court. The learned Special Judge was of opinion that as under this provision the Court cannot do anything which might affect the decree of a Court, it follows that the Special Judge, in reopening so far as is permitted the decree of the previous Court, could not by applying the provisions of the Usurious Loans Act, do anything which might affect that decree. We are of opinion that this is not a correct reading of the provisions of Sec. 15. The Special Judge, when acting under S. 14 (4) and applying the provisions of the Usurious Loans Act, is by the very provisions of S. 14 read with S. 15 empowered to interfere with the findings of the Court which passed the decree in certain specific circumstances, and we do not think that this power could be taken away by the application of the Proviso on which reliance has been placed by the learned Special Judge. The learned Special Judge is also of opinion that the only case in which it is possible for the findings of the Court which passed the decree to be inconsistent with the provisions of Sec. 14 is one in which the amount of interest decreed is in excess of the portion of principal still found to be due on the date of the suit or decree. The point is an interesting one but we do not think that for the purposes of the present appeal it is necessary to decide it in view of the fact that the inconsistency suggested on behalf of the appellant does not exist since in fact the provisions of the Usurious Loans Act were applied by the Court which granted the decree. The lower Court has therefore rightly refused to make any further reduction in the rate of interest. There is no force in the present appeal which accordingly fails and is dismissed with costs.

N.S./R.K. *Appeal dismissed.*

1. Pt. Ramsagar Prasad v. Mt. Shayama, (1939) 26 A I R Oudh 75= 179 I C 630 = 1939 O W N 118.

A. I. R. 1939 Oudh 186

THOMAS C. J. AND ZIAUL HASAN J.

Chaudhri Khaliquzzaman—Defendant — Appellant.

v.

Miss A. H. Parakh and another — Plaintiffs — Respondents.

First Appeal No. 102 of 1936, Decided on 21st February 1939, against order of Civil Judge, Lucknow, D/- 26th May 1936.

Sale of Goods Act (1930), S. 59 (1)—Breach of warranty—Measure of damages stated.

In case of breach of warranty by the seller the measure of damages is not the full consideration which has passed from the buyer. Any benefits received by him under the contract must be taken into consideration and the damages recoverable will be the excess only of the value of the one over the other; the measure of damages is the difference between the actual value of the property and its value if the property had been what it was represented to be: *(1920) 3 K B 475, Ref.*

[P 188 C 1, 2]

M. Wasim and Ali Hasan — *for Appellant.*

R. F. Bahadurji and J. K. Tandon — *for Respondents.*

Judgment.—This is an appeal against a judgment and decree of the learned Civil Judge of Lucknow in a suit for recovery of money. The plaintiffs are three ladies, who have obtained probate of the will of the late Mr. E. H. Parakh, better known as Mr. Eduljee, who was proprietor of the firm of Messrs. Eduljee & Co. of Lucknow. The claim was for Rs. 5238-2-0 consisting of part price of a Graham Page motor car supplied to the appellant, price of petrol, charges for repairs of the said car and another car and price of car parts supplied. It appears that in May 1930 the appellant purchased a new Morris Cowley car for Rs. 3900 from Mr. Eduljee. After using the car for about two years, the appellant was prevailed upon by Mr. Eduljee to get his Morris Cowley car exchanged for a Graham Page car. The terms were that the appellant should pay Rs. 3500 more in cash besides giving the Morris Cowley car in exchange. The exchange price of the latter car was fixed at Rs. 1500 so that

the Graham Page car was sold to the appellant for Rs. 5000. This sum of Rupees 3500 is included in the plaintiffs' claim. The defence to the suit was that the Graham Page car was purchased on Mr. Eduljee's assurance that it was a 1932 model, that it had an engine of 25 horse power and that it would do 20 miles per gallon of petrol. It was also said that Mr. Eduljee contracted to give free service for a year. The defendant's case was that the car began to give trouble almost immediately after he took delivery of it, that it had to be sent for repairs several times to Mr. Eduljee's workshop, that Mr. Eduljee assured the defendant that the car would give no trouble after it had run five hundred miles, that in spite of this assurance the car continued to give trouble and when the defendant at last protested very strongly, Mr. Eduljee promised to give him a new car in exchange for the Graham Page but that only two weeks later Mr. Eduljee died. The defendant went on to say that when after the death of Mr. Eduljee he spoke to the manager of the firm about Mr. Eduljee's promise, he said he could do nothing in the matter. The defendant further said that the car was subsequently found to be of 1930 model and it never did more than eleven miles per gallon of petrol. It was pleaded that the transaction was brought about by misrepresentation on the part of Mr. Eduljee and that the damages suffered by the defendant on account of the said misrepresentation and breach of warranty on the part of Eduljee & Co. came to more than the amount claimed by the plaintiffs and that therefore nothing was due from the defendant to the plaintiffs. It was also contended that the suit was barred by time.

The learned trial Judge held that the suit was not barred by time and though holding that there was misrepresentation on the part of Eduljee & Co. alleged by the defendant, he was of opinion that as the defendant had means of ascertaining the year in which the car was manufactured and its model he was not entitled to the benefit of S. 19, Contract Act. Out of the various items claimed, he found a sum of Rs. 4997-2-0 proved but was of opinion that the defendant should be given a credit for Rs. 261-0-6 for repairs done by Eduljee & Co., Rs. 250 for repairs done by a private mistri in May 1933 and Rs. 46 paid by the defendant to the U. P. Motor Car Co. on account of repairs done to the car by that Company. Finally he gave the plaintiffs a decree for Rs. 4681-1-6 against the appellant.

The first point urged on behalf of the appellant was that the learned trial Judge was wrong in holding that the defendant was not entitled to avoid the contract under S. 19, Contract Act. This argument was based on two grounds: (1) that it is wrong to say that the defendant had any means of knowing the year of manufacture and model of the car, and (2) that the Exception to S. 19, Contract Act, did not apply to the present case. It is not in our opinion necessary to decide whether or not the Exception to S. 19 of the Contract Act applies to the case or whether the defendants had or had not any means of knowing the truth with ordinary diligence because the appellant does not want to avoid the contract altogether. He merely claims damages for breach of warranty. The case is really governed by the provisions of the Sale of Goods Act of 1930. We agree with the findings of the Court below, (a) that Mr. Eduljee assured the appellant that the Graham Page car was of 1932 model, (b) that he also assured him that the car would do twenty miles to the gallon of petrol, (c) that he further told him that the engine of the car was of 25 horse power, (d) that the car was really of 1930 model, (e) that it did not do more than eleven miles per gallon, (f) that the horse power of the engine was found to be 23.43, and (g) that Mr. Eduljee promised to give free service for one year from the date of sale of the car. (a) and (c) are proved by Exhibit D. W. 2/1, copy of the application for registration of the car, in which the year of manufacture of the car is shown as 1931 and the horse power as twenty-five. We agree with the learned Judge of the Court below in believing the defendant's statement that all the entries in this application with the exception of the first two were made by Eduljee & Co. With regard to (b) there is no documentary evidence on the record but we see no reason to disbelieve the statement of Mr. Khaliquzzaman, defendant, who is an advocate of this Court, that Mr. Eduljee assured him that the car would do twenty miles to the gallon. With regard to (d) and (f) we have Exs. A-3 and A-2, the former being a letter from Pearey Lal & Sons of Delhi to the French Motor Car Co. of Lucknow dated 28th September 1935, and the latter a letter from the French Motor Car Co. of Lucknow to Mr. Khaliquzzaman dated 18th October 1935.

These exhibits are corroborated by the evidence of Mr. Bhomask, engineer of the French Motor Car Co. and by that of Mr. Khaliquzzaman. On (e) and (g) we again agree with the trial Court in accepting the evidence of the defendant-appellant. Having found the facts as mentioned above, we proceed to apply the law to those facts.

Section 12, Sale of Goods Act, gives the difference between a condition and a warranty. A condition is defined as a stipulation in a contract essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated; while a warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated. Messrs. Aiyar and Iyer in their commentary on the Indian Sale of Goods Act at page 53 of the book describe a warranty in terms of the case in (1920) 3 K B 475[1] as follows:

> It denotes a stipulation which the law regards as collateral to the main purpose of the contract. A breach therefore does not entitle the buyer to reject the goods but only to claim damages. Suppose that a man buys a particular horse, which is warranted quiet to ride and drive. If the horse turns out to be vicious the buyer's only remedy is to claim damages unless he has expressly reserved a right to return it. But if instead of buying a particular horse a man applies to a dealer to supply him with a quiet horse and the dealer supplies him with a vicious one, the stipulation is a condition. The buyer can either return the horse or keep it and claim damages.

It is clear that there was a breach of warranty on the part of Edulji & Co. in this case. S. 59 (1), Sale of Goods Act, provides as follows:

> Where there is breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may
> (a) set up against the seller the breach of warranty in diminution or extinction of the price or
> (b) sue the seller for damages for breach of warranty.

It is Cl. (a) of this sub-section under which the defendant-appellant claims reduction of the price of the car and the question is, what should be the measure of damages. At p. 511 of Kerr on Fraud and Mistake, Edn. 6 it is said:

> In actions of deceit the measure of damages is not the full consideration which has passed from the defrauded party. Any benefits received by him under the contract must be taken into consideration and the damages recoverable will be the excess only of the value of the one over the other: the measure of damages is the difference between the actual value of the property and its value if the property had been what it was represented to be.

We have therefore to see what was the actual value of the car supplied to the appellant. Ex. D. W. 1/1 is a copy of the entry in the plaintiff's stock book relating to the car in question. It shows that the car actually cost Eduljee & Co. a sum of Rs. 3355-1-0 in December 1929 when it was received. To this we may add a sum of Rs. 150 as railway freight from the port to Lucknow. The total cost would therefore come to Rs. 3505-1-0. It is urged on behalf of the appellant that the car remained unsold in the company for a period of two years and seven months, up to August 1932 when it was sold to the appellant, that it must have been used in the interval and that at any rate it must have depreciated in value during this period of two years and seven months. We are of opinion that this contention is well founded. It is a matter of common knowledge that every purchaser of a new motor car wants to purchase the latest model and not an old model. At any rate the car in question could certainly not have been sold in 1932 for what it could have been sold in 1929 or 1930. We think it would by no means be unfair to either party if we put the depreciation in the car up to 1932 at Rs. 1200. Therefore deducting this amount from Rs. 3505-1-0 we get the actual value of the car in 1932 at Rs. 2305-1-0. From this amount must be deducted certain amounts which the appellant had to spend over repairs to the car during one year from the date of purchase. The learned Judge of the Court below has fixed this amount at Rs. 557-0-6 as follows: Rs. 261-0-6 for repairs done by Eduljee & Co., Rs. 250 for repairs done by a private mistri in 1933. Rs. 46 paid to the U. P. Motor Car Co. on account of repairs. With regard to the first item it was agreed by the learned counsel for parties before us that the correct amount is Rs. 88 only and it was also conceded by the learned counsel for the appellant that the last item of Rs. 46 could not be taken into account as these repairs were done by the U. P. Motor Car Co. after the lapse of a year from the purchase of the car by the appellant. Therefore the correct amount to be deducted comes to Rs. 338 only. This leaves a balance of Rs. 1967-1-0

1. Hartley v. Hymens, (1920) 3 K B 475=90 L J K B 14=124 L T 31=36 T L R 805=25 Com Cas 365.

to which the plaintiffs-respondents are in our opinion entitled.

The plaintiffs-respondents have filed a cross-objection contesting the findings of the trial Court, that there was a contract of free service for one year and objecting to the items of repairs which the trial Court found to be Rs. 557-0-6. With regard to the first we have already held that we agree with the learned trial Judge in believing Mr. Khaliquzzaman when he says that Eduljee & Co. contracted to give free service for one year. As regards the items of repairs we have already said that the correct amount according to the counsel for both sides is Rs. 338 and not Rs. 557-0-6. We therefore accept the appeal and the cross-objection in part and modifying the decree of the trial Court, give the plaintiffs-respondents a decree for Rs. 1967-1-0 plus Rs. 1426-10-6, price of petrol and accessories, total amount Rs. 3393-11-6. Parties will pay and receive costs in both Courts in proportion of success and failure.

N.S./R.K. *Order accordingly.*

A. I. R. 1939 Oudh 189

ZIAUL HASAN AND HAMILTON JJ.

Commissioner, Lucknow Division, and others — Defendants — Appellants.

v.

Mt. Bitana — Plaintiff — Respondent.

Second Appeal No. 368 of 1936, Decided on 28th March 1939, against order of Dist. Judge, Sitapur, D/- 11th August 1936.

Landlord and Tenant — Under-proprietary right—Shankalap—Rent consisting of revenue and some percentage — Decree granting heritable but non-transferable right, amount payable by tenant being revenue and 20 per cent. as haq taluqdari—Taluqdar referring to decree as having given "haq matahat"—On considering entries in remarks column of settlement, wajib-ul-arz and other circumstances decree held did not grant under-proprietary right.

Shankalap is not always an under-proprietary right : *A I R 1923 Oudh 27, Rel. on.* [P 192 C 1]

Where claim is based on Shankalap the fact that rent payable by the tenant is land revenue plus some percentage has by itself no value although taken in connexion with other facts it may give an indication that under-proprietary rights are conferred. [P 192 C 1]

A person claimed in the settlement Court rights on the basis of a Shankalap. The rights which were actually given to him by the decree were heritable but non-transferable rights and the amount payable by him to the taluqdar was the amount of the land revenue plus 20 per cent. as haq taluqdari. The words used in the decree were "Muddai ko is zamin men haq qabil wirasat wo naqabil intikal hasil rahega." In the application by taluqdar for assessment of rent, reference was made to the decree as having given haq matahat. Entries in the remarks column of that settlement recited that under-proprietary rights were not given and wajib-ul-arz made this fact still clearer. In the later settlement the person holding the land was described as occupancy tenant. Upon a question as to the rights conferred by the decree having arisen :

Held that the decree did not grant under-proprietary rights to the tenant, who was therefore only an occupancy tenant; the word 'matahat' was not used by the taluqdar as recognition of the under-proprietary rights but only indicated that a subordinate tenure was created, the nature of which had been clearly set out in the decree : *1938 O W N 1091, Rel. on ; A I R 1918 P C 77 and A I R 1937 Oudh 473, Disting.* [P 192 C 2]

M. Wasim and Ali Hasan — *for Appellants.*

R. N. Shukla — *for Respondent.*

Judgment. — This is a second civil appeal against a decision of the District Judge of Sitapur who dismissed an appeal against a decision of the Civil Judge of Kheri. The appellants are the legal representatives of the original defendant, the taluqdaria of the Khairigarh Estate, against whom a suit was brought by Munnu Lal and Mt. Bitana for possession of 57·88 acres and for mesne profits. The plaint alleges that plaintiff 2, Mt. Bitana, on behalf of herself and plaintiff 1 entered into possession as plaintiff 1 who was a minor, was descended from one Ganga Prasad and as such was entitled to possession of the property, but the defendant got the name of plaintiff 2 entered as occupancy tenant and having filed a suit for arrears of rent obtained a decree and ejected her. Plaintiff 1 was found to have no status, but the suit was decreed in favour of plaintiff 2 on the ground that she was an under-proprietor in respect of the land in suit.

It is common ground that Ganga Prasad, the predecessor in title of Mt. Bitana, obtained a decree Ex. A-9 on 26th September 1871. He claimed in the settlement Court rights on the basis of a shankalap and the rights which were actually given by him by the settlement Court were heritable but non-transferable rights, the amount payable by him yearly to the taluqdar being the amount of land revenue plus 20 per cent. as haq taluqdari. The words used in the decree are "*muddai ko is zamin men haq qabil wirasat wo naqabil intikal hasil rahega.*" On 2nd July 1872, by an application Ex. 3, the taluqdar asked for the assessment of rent using the following words : "*arzi dawa tasfiya lagan arazi degree shuda*" and also in the body of that application he referred to the decree as

having given "haq matahat." It is on these two words that counsel for the respondent places great stress as indicating, according to him, the recognition that the decree had conferred under-proprietary rights. By Ex. 6 the Assistant Commissioner fixed the rent in accordance with the terms of the decree. The learned District Judge has referred to the heading of this order containing the words "*shankalap matahat sir*" as evidence to show that under-proprietary rights had been given, but we find that the full heading is as follows : "*naqal faisla az misil maqadma No. 2 . . . shankalap matahat sir*" which, in our opinion merely means that Case No. 2 was a case in which under-proprietary rights were claimed as being based on a shankalap even if we presume that the words "matahat sir" were employed to mean under-proprietary rights, and the heading certainly does not show in itself that the decree was understood by the Assistant Commissioner to be one which granted under-proprietary rights. In Ex. 9, a khetauni of the settlement of about the year 1873, this land appears in a column the heading of which is "*nam maliq wa haqdar matahat*" but the remarks column has a note which refers to the decree as given heritable but non-transferable rights. In Ex. 10, a khasra of the same settlement, the land appears in a column which bears the heading "*qabiz darmiani*," but again in the remarks columan there is a reference to the decree as giving heritable but non-transferable rights. The learned District Judge has not referred to the contents of the remarks column in these two exhibits and the entries in these columns were certainly put there to make clear the fact that the rights were heritable but non-transferable to contrast them with under-proprietary rights which are transferable. The wajibularz which is Ex. A-2 in para. 12 states that no under-proprietary rights were given in this village as all claims for them had been dismissed. In para. 13 it states that Ganga Prasad in his shankalap land had obtained a decree for heritable but non-transferable rights. In the present settlement the khetauni Ex. A-1 shows that the plaintiff was entered as an occupancy tenant, and in the year 1932 when the taluqdar filed a suit for rent against Mt. Bitana he described her as "*kashtakar kabzadar*" by which he presumably meant an occupancy tenant and he certainly did not mean an under-proprietary tenant.

The learned District Judge has held that as the decree conferred a heritable right and the amount of rent fixed was land revenue plus 20 per cent. as haq taluqdari, the right granted was an under-proprietary right and consequently the provisions of non-transferability could not be enforced as they detracted from the under-proprietary right which had been conferred. Although the learned District Judge has not referred to 21 O C 180[1] in this connexion he parhaps had it in mind and we think it advisable to show that there is a vital difference between the facts of the two cases. In that case the plaintiff and the defendant were closely related and the taluqa of Rajapur was settled with the father of the defendant in 1859. In 1861, in the course of the regular settlement, the plaintiff applied for a settlement of a half-share on the ground that he was jointly entitled to the estate with the defendant's father and as he was directed to bring a claim at the time of settlement, six years later, he applied to have his name recorded as a co-owner in respect of a moiety of the taluqa. The parties effected a compromise and in the petition to the settlement Court the plaintiff prayed that a decree for under-proprietary rights of the entire village Daulatpur be passed in favour of the plaintiff. The actual words used were "kabiz darmiani" and it was undisputed that they were correctly rendered as meaning an "under-proprietor."

On 1st November 1867 the Extra Assistant Commissioner made an order that the under-proprietary rights in respect of the lands within his jurisdiction should be decreed in terms of the compromise and as regards Daulatpur which apparently lay outside his jurisdiction, the petition should be referred for final orders to the Settlement Officer. The Settlement Officer on 14th June 1869 passed a final order granting an under-proprietary right in mouza Daulatpur without right of transfer subject to an annual payment of Rs. 461-4-0 and subject also to the other conditions contained in the deed of compromise. On 21st October 1872 there was a further agreement between the father of the defendant and the plaintiff who described themselves as "the proprietor and under-proprietor" of village Daulatpur. Their Lordships of the Privy Council decided that as an under-proprietary right had clearly been given by the compromise and by the decree, the

1. Sripat Singh v. Basant Singh, (1918) 5 A I R P C 77=47 I C 424=21 O C 180 (P C).

words "without right of transfer" could not take away the under-proprietor's right to transfer his interest which was a necessary incident of his legal status. 1937 O W N 959[2] was a very similar case which was decided by a Bench of which one of us was a member. There too there was an agreement between the parties and it was stated in it, "the said Raja may get my name entered in the column of under-proprietor. If by chance I, the executant, and my heirs refrain from obeying Raja Sahib then the under-proprietary right enjoyed by me and my heirs be taken to be null and void." In the settlement decree there was a condition in restraint of alienation, but it was held that as under-proprietary rights had been created under the compromise the condition against alienation was void : 21 O C 180[1] was referred to in this connexion. In the present case the decree gave no under-proprietary rights — in fact it refused such a right — because it gave nothing more than a heritable right without the power of alienation. There is therefore no contradiction between any two parts of that decree, and the papers of that settlement made it clear by entries in the remarks column that under-proprietary rights were not given and the wajib-ul-arz if possible made it clearer still.

The learned District Judge also thinks that the fact that rent was land revenue plus 20 per cent. of haq talukdari is an indication that under-proprietary rights were conferred. The learned counsel for the respondent supports the view of the learned District Judge by a reference to 9 O L J 618.[3] The plaintiffs there filed a suit on the basis of a shankalap koshist for a declaration that they were under-proprietors. At the first regular settlement in 1877, the predecessor-in-interest of the defendant moved the settlement Court for assessment of rent on the entire land held by the predecessors-in-interest of the plaintiffs and a decree was passed as follows :

> Declaratory decree in favour of the plaintiff who is declared to have a right as talukdar to demand rent from the defendants shankalapdars on bighas 131.4, such rent being calculated at the incidence of the Government demand plus 10 per cent. or Rs. 197 per annum during the currency of present regular settlement.

The Additional Judicial Commissioner who decided this case held that the method of assessment of rent was, to his mind, a clear indication of the holding having been treated as an under-proprietary tenure because in R. 7, sub-r. 3, of the rule laid down in the Schedule of the Oudh Sub-Settlement Act of 1866 it was stated that in no case could the amount payable during the currency of the settlement by the under-proprietor to the talukdar be less than the amount of the revised demand, with the addition of ten per cent. It may be that in certain cases the fixing of rent of the land revenue plus a percentage may be a useful indication. We think it however advisable to utter a word of caution to prevent the danger of too much importance being given to this. In some cases when claims were made on the basis of shankalap or other similar tenures, revenue had not yet been assessed. It was only fair that whether the tenure was an under-proprietary one or something less the proprietors should receive a reasonable sum besides being relieved from the payment of revenue, and until it was known what the revenue would be it was impossible to calculate what would be a fair rent for the fixing of any figure might result in a rent either too low or too high. The practical way of getting over this difficulty was therefore to make the rent payable the amount of land revenue plus a fair percentage.

Both in this connexion and as regards the papers in which these entries occur, we would refer to Ss. 32 and 79, Land Revenue Act. Under S. 32 (c) there is one register of all under-proprietors in a mahal, other than those who hold any sub-settlement, and of all lessees, whose rents have been fixed by a Settlement Officer or other competent authority. Under S. 79, in Oudh, after declaring the assessment of a mahal, the Settlement Officer shall, in accordance with the provisions of the Oudh Sub-Settlement Act, 1866, so far as they are applicable, and subject to rules made under S. 234, determine the rent to be paid by all under-proprietors and by all holders of heritable, non-transferable leases holding under a judicial decision. The Board's Circular 2-1 contains rules under S. 234, and in Cl. 9 it refers to leases which were decreed or ratified by a decree at the last settlement, or were created by an agreement made before or at the time of the last settlement. In such cases, if the rent was fixed in a definite proportion to the revenue, paras. 4 and 5 of those rules would apply. Paras. 4 and 5 refer also to

2. Man Singh v. Bindeshwari Bakhsh Singh, (1937) 24 A I R Oudh 478 = 170 I C 595 = 1937 O W N 959=13 Luck 409.
3. Babu Manohar Lal v. Achhutanand, (1923) 10 A I R Oudh 27=74 I C 340=9 O L J 618.

cases of sub-settlement where the rent was fixed at Government demand plus a definite percentage thereon. The corresponding provisions of the earlier Rent Act are Ss. 56 and 40. The Deputy Commissioner had to prepare a list of under-proprietors and lessees whose rent had been fixed by a Settlement Officer. Under S. 40 lessees were to be assessed like under-proprietors in the absence of a contract to the contrary as S. 7, Oudh Sub-Settlement Act, was to be applied. It is clear therefore that the same method of assessing rent was followed by the Settlement Officer in the cases of under-proprietors and in the cases of lessees with heritable but non-transferable rights, and both classes were entered in the same register. Indeed, under the earlier Act even occupancy rights were entered there. It was therefore apparently an entry in the remarks column which made it clear when a person entered in the register was not an under-proprietor.

The learned counsel for the respondent argues that the decree conferred under-proprietary rights as understood at the time because the rent was revenue plus a certain percentage and because the claim was based on a shankalap, and Ex. 3, the application of the taluqdar, made it clear that under-proprietary rights were conferred by the decree. We have already shown that the fact that the rent was revenue plus a certain percentage by itself has no value although taken in connexion with other facts it may give an indication. Even if the claim was one for an under-proprietary right because it was based on a shankalap, shankalap is not always an under-proprietary right. That was pointed out in 9 O L J 618[3] on which the learned counsel relies, and it is also made clear in Sykes' Compendium of Oudh Taluqdari Law at page 179 and following pages. It should be remembered that in the case of grants made before the annexation of Oudh, whether the grants were shankalap, birt, nankar or anything else, the grantor was not trying to confer certain rights recognized by statutes of British India as those statutes were not in existence. The grantor conferred certain rights, and the Settlement Officer had to interpret those rights in terms of the new Oudh Revenue Statutes, and in doing so he had to look either into the terms of the grant, if that was clear, or examine the parties or see what the terms implied and then come to a conclusion whether the right created was an under-proprietary right or something less. It is clear that in the present case the Settlement Officer came to the conclusion that the right conferred was not an under-proprietary right but a hereditary non-transferable right, which because it was non-transferable, was not and could not be an under-proprietary right. It does not therefore help the respondent to say that because he claimed on the basis of shankalap he obtained an under-proprietary right. The nature of his shankalap was looked into by the Settlement Officer who decided that this shankalap was not one which constituted an under-proprietary right. As regards Ex. 3, the application of the taluqdar, the word "matahat" must be read in connexion with the rest of the contents of that application where the decree is expressly referred to, and this shows that the word "matahat" was not intended to be used by the taluqdar as a recognition that the decree had granted an under-proprietary right but merely that it had created a subordinate tenure the nature of which had been clearly set out in the decree. In many ways what has been said in 1938 O W N 1091[4] will apply to the facts in the present case both as regards the signification of entries in revenue papers and what constitutes a recognition by the superior proprietor in view of his subsequent conduct. As Ex. 3 must be read as a whole, we find nothing to show that the plaintiff's predecessors-in-title have been treated as under-proprietors by the superior proprietor.

In short the decree did not confer under-proprietary rights simultaneously with any limitation which detracted from those rights. The plaintiff's predecessor-in-interest was not recognized as an under-proprietor by entries in revenue papers, and the superior proprietor has not treated him or any successor-in-interest as an under-proprietor. The claim of the plaintiff therefore fails and we allow the appeal and dismiss the suit with costs throughout.

N.S./R.K. *Appeal allowed.*

4. Mahomed Amir Ahmed Khan v. Mahdei, (1938) O W N 1091.

A. I. R. 1939 Oudh 193

HAMILTON AND YORKE JJ.

Ram Prasad — Defendant—Appellant.

v.

Ram Bharose, Plaintiff and others, Defendants — Respondents.

Misc. Appeal No. 93 of 1936, Decided on 11th January 1939, against order of Civil Judge, Partabgarh, D/- 19th October 1936.

Oudh Laws Act (18 of 1876), Ss. 6, 7 and 9 — Plaintiff, sole under-proprietor in village, suing talukdar and proprietor of village for pre-emption of under-proprietary rights alleged to have been created by him and transferred to certain persons — Village having only single proprietor in 1876 — No under-proprietor in village till twelve years prior to suit, when under-proprietary rights were obtained by plaintiff — There being no under-proprietary village community and hence no right on custom of pre-emption plaintiff held not entitled to pre-emption — Plaintiff held not entitled to fall back upon presumption provided by S. 7.

The proprietary village community in any given village is something quite separate from the under-proprietary village community of the same village. An under-proprietor has no right to pre-empt a transfer of proprietary tenure and the right of a proprietor to pre-empt a transfer of under-proprietary tenure arises not because of the provisions of Sec. 7 but because of the provisions "fourthly" in S. 9. An under-proprietor who is not a member of an under-proprietary village community within the meaning of S. 7 is not entitled to pre-empt the transfer of an under-proprietary tenure in the village. A single under-proprietor in a village cannot constitute a village community within the meaning of S. 7. [P 195 C 2]

The plaintiff, who was the sole under-proprietor in a village brought a suit for pre-emption of under-proprietary right against the talukdar and superior proprietor of the village, alleging that the latter had created a further under-proprietary right in the village and had transferred it to certain persons in derogation of the plaintiff's preferential rights. At the time of passing of the Oudh Laws Act in 1876, there was only a single proprietor in the village, the village being a talukdari village, and there had never been any under-proprietor in the village till some twelve years prior to the date of the suit, when the under-proprietary rights were obtained by the plaintiff :

Held that there being no under-proprietary village community in existence in 1876, S. 7 did not create a presumption that there was any right of pre-emption in respect of a transfer of under-proprietary tenure in the village at the time and the plaintiff was not entitled to fall back upon the presumption provided by Sec. 7. That there being no under-proprietary village community in the village there could be no right or custom of pre-emption claimed by the plaintiff and the plaintiff could not therefore claim any right of pre-emption: *A I R 1934 P C 153, Rel. on ; A I R 1929 P C 259, Ref.* [P 194 C 1, 2; P 196 C 1]

Radha Krishna — *for Appellant.*

B. K. Dhaon — *for Respondents.*

Judgment. — This is an appeal from an order of remand under the provisions of O. 43, R. 1, cl. (u), Civil P. C., in a suit for pre-emption. The plaintiff-respondent Ram Bharose is admittedly an under-proprietor in village Mahdaiya in the Partabgarh District, and it is not disputed that he obtained his rights as such in or about the year 1922. This was stated in the written statement filed by defendants 1, 2 and 3 one of whom was the present appellant Ram Prasad, and has not been contested by the filing of any replication. The plaintiff's case was that on 5th March 1935, defendant 3, Thakurain Gajraj Kuar, who is the talukdar and superior proprietor of village Mahdaiya, made a transfer of under-proprietary rights in favour of defendants 1 and 2, Ram Prasad, appellant, and Ram Dular, without issuing any notice to him as provided by Sec. 10, Oudh Laws Act (Act 18 of 1876). This he alleged to have been done in order to deprive him of his preferential right to purchase this property. He further alleged that the deed of transfer had been framed in the form of a perpetual lease in order to defeat his right of pre-emption. The learned Munsif framed a number of issues in regard to the nature of the deed of transfer, the price paid and certain other points, but decided only Issue 3 which was in the following terms :

Can plaintiff not pre-empt because he is an under-proprietor of 14 years standing only, and hence is not a member of the village community ?

This issue was based on para. 12 of the written statement in which it was stated that

the plaintiff has got under-proprietary rights in certain plots in the same village for about 12 years. Prior to it no one had any under-proprietary right of any sort in village Mahdaiya rather defendant 3 and her ancestors alone remained in possession and occupation of the said village as taluqdars during the British Rule as well as from the Shahi times. In the said village there was no village community 'ala ya adna' as provided in Act 18 of 1876, and so no person can have any right of pre-emption in the village regarding any transfer.

The learned Munsif after considering the decision of this Court reported in 1 Luck Cas 10[1] the *Cookenagar case*, and the judgment of the Privy Council in the same case reported in 6 O W N 763[2] held as follows:

From the documentary evidence on the record it is perfectly clear that the village in dispute has been owned by a single proprietor and the first

1. Pratap Narain Singh v. Muhammad Mumtaz Ali Khan, (1927) 14 A I R Oudh 227 = 102 I C 307=1 L C 10.
2. Pratap Narain Singh v. Sita Ram, (1929) 16 A I R P C 259 = 119 I C 627=4 Luck 421= 56 I A 356 = 6 O W N 763 (P C).

under-proprietor, who came on the scene was the plaintiff and he came in only 14 years ago. Plaintiff has not given any evidence, documentary of course (because the learned Munsif had not taken any oral evidence and indeed oral evidence would not in the circumstances have had any real value) which may have shown that there was any other proprietor or under-proprietor in the village so as to constitute any village community. That being so, it is clear that in the village in suit there was no village community in 1876, or for the matter of that till recently when the plaintiff acquired the right of an under-proprietor. Consequently there could be no right of pre-emption possible in this village when Act 18 of 1876 was passed.

He went on to hold that as there could be no village community and hence no right or custom of pre-emption was possible in 1876 in consequence the plaintiff could not claim any such right, and he accordingly dismissed the suit with costs. The learned Civil Judge of Partabgarh took a different view. He remarked that in the present case it was not disputed that at the time of transfer the appellant, being an under-proprietor in the village, was a member of the village community; and he was entitled to pre-empt the transfer if it could be pre-empted at all, and if he could avail of the presumption permissible under S. 7, Oudh Laws Act. He referred to two rulings of this Court and held that S. 7 raised a presumption of law that the right of pre-emption exists in all village communities, and that it arises in favour of the persons named in cl. (a), Sec. 7 which includes all the members of village communities. He went on to say that the right having accrued at the date of the transfer in question and the appellant being a member of the village community at the time of the transfer the appellant could rely on the pre-emption arising in his favour under Sec. 7, Oudh Laws Act. He therefore took the view that the existence of the right of pre-emption should be presumed in favour of the plaintiff who was a member of a village community at the time of the transfer in question, and he accordingly remanded the suit to the trial Court for disposal according to law.

It is to be noted in considering the present appeal that there is no dispute in regard to the findings of fact of the trial Court to which we have referred earlier, namely that at the time of the passing of the Act in 1876 there was only a single proprietor in the village, the village being a taluqdari village and there was never any under-proprietor in the village until some 12 years prior to the date of suit. What the taluqdar had done according to the plaintiff pre-emptor was to create a further under-proprietary right and transfer it to the defendants in derogation of his preferential right to purchase the under-proprietary estate so transferred. The relevant Sections of the Oudh Laws Act are Ss. 6, 7 and 9. Sec. 6 defines the right of pre-emption as follows :

The right of pre-emption is a right of the persons hereinafter mentioned or referred to to acquire in the cases hereinafter specified immovable property in preference to all other persons.

By Section 7 :

Unless the existence of any custom or contract to the contrary is proved, such right shall, whether recorded in the settlement record or not, be presumed :

(a) to exist in all village communities however constituted, and whether proprietary or under-proprietary, and in the cases referred to in S. 40, Oudh Land Revenue Act, and

(b) to extend to the village site, to the houses built upon it, to all lands and shares of lands within the village boundary, and to all transferable rights affecting such lands.

Section 9 lays down the order in which various persons are entitled to claim the right in the following terms :

If the property to be sold or foreclosed is proprietary or under-proprietary tenure, or a share of such a tenure, the right to buy or redeem such property belongs in the absence of a custom to the contrary.

1stly to cosharers of the sub-division (if any) of the tenure in which the property is comprised; in order of their relationship to the vendor or mortgagor;

2ndly, to cosharers of the whole mahal in the same order;

3rdly, to any member of the village community; and

4thly, if the property be an under-proprietary tenure, to the proprietor.

Where two or more persons are equally entitled to such right, the person to exercise the same shall be determined by lot.

The interpretation of these Sections has been discussed in numerous rulings. Both the Courts below have referred at length to the decision in the *Cookenagar case*[1] in which a Division Bench of this Court remarked :

An examination of Ch. 2 of Act 18 of 1876 appears to us to disclose that the Act did no more than declare what its framers believed to be the custom prevailing in certain village communities in Oudh. We do not understand that the Act in any sense purported to create a right of pre-emption. We understand Sec. 7 to mean that a right of pre-emption in the opinion of the Legislature existed by custom in a large number of the village communities in Oudh . . . . but such right of pre-emption could only exist where there was a village community . . . . The first essential was that there would be a village community.

In that particular case they went on to say that they considered that there was no village community in 1876 in Cookenagar

and that there was no custom of pre-emption possible.... Mr. Cooke could certainly not be considered a village community. As to who are members of a village community it was said that it is clear that in Oudh all persons who have an interest in the village estate, whether as proprietors or under-proprietors were members of the village community and that they would not be the less members of the village community because they did not reside in the village.

The question of the interpretation of this Section has come up more than once since the decision of the *Cookenagar case*.[1] The matter was not dealt with by their Lordships of the Privy Council who decided the case on the view that there had been a waiver of the right of pre-emption, if any such right did indeed exist. An attempt was made at a later date to treat the provisions of S. 7 in a somewhat unrestrictive manner, and as a result it was held by a Bench of this Court in 11 O W N 430[3] that a person having rights even inferior to the rights of an under-proprietor might be allowed to pre-empt a transfer of proprietary rights. The implications of this decision were however clearly overruled by the ruling of their Lordships of the Privy Council in 11 O W N 843[4] in which their Lordships expressly considered the meaning of the phrase "the village community." They remarked :

There is no definition of "the village community" in the Act, and consequently the meaning of those words must depend upon the true construction of the terms of S. 7 (a), having regard to any light which may be thrown upon that Section by the terms of the following Sections.

In the first place, it appears clear to their Lordships that having regard to the words " whether proprietary or under-proprietary" the village community contemplated by Sec. 7 (a) must refer to persons having proprietary or under-proprietary rights in the village, and that it was not intended to include anyone who happened to reside in the village and who had no proprietary interest therein.

In the second place, their Lordships are of opinion that the Section contemplates a proprietary village community as distinguished from an under-proprietary village community.

They went on to point out further on :

Further if the construction of the Sections on which the plaintiff-respondents rely, were to be adopted, it seems clear that the provision contained in cl. 4 of Sec. 9 would be redundant, because if the property to be sold or foreclosed were an under-proprietary tenure, and if, as contended on behalf of the plaintiff-respondents, a proprietor would be entitled to buy or redeem the under-proprietary tenure in his capacity of a member of the village community there would be no necessity for the provision contained in clause 4.

We have to take it then that it is now the view of their Lordships of the Privy Council that the proprietary village community in any given village is something quite separate from the under-proprietary village community of the same village. An under-proprietor has no right to pre-empt a transfer of proprietary tenure and the right of a proprietor to pre-empt a transfer of under-proprietary tenure arises not because of the provisions of S. 7, but because of the provision "Fourthly" in Sec. 9. In the present case therefore the plaintiff pre-emptor could only succeed if it were to be held that he was a member of an under-proprietary village community within the meaning of S. 7, Oudh Laws Act.

Now as regards the effect of the presumption laid down by S. 7, the first clause with reference to proof of the existence of any custom or contract to the contrary, that is negativing the existence of a right of pre-emption, has no application to the present case. The Section therefore may be taken to provide that such a right shall, whether recorded in the settlement record or not, be presumed to exist in all village communities however constituted and whether proprietary or under-proprietary. It is obvious first of all that in view of the fact that there was no under-proprietary village community in existence in 1876, this Section did not create a presumption that there was any right of pre-emption in respect of a transfer of under-proprietary tenure in the village at that time.

The next question is whether the Section as it stands can be considered to create a presumption of right of pre-emption in case at any future date an under-proprietary village community should come into existence. The learned Judges who decided the *Cookenagar case*[1] were of opinion that the Act did not create for the first time a right of pre-emption irrespective of former custom, and we are not disposed to disagree with that view, but even if we felt any doubt upon that point, we should find it impossible to hold in the present case that there was even now in existence any village community. In our view a single person cannot constitute a community. Learned counsel for the respondent has sought to argue in answer to this

3. Bindeshwari Prasad v. Krishna Murari, (1934) 21 A I R Oudh 145=149 I C 550=11 O W N 430.
4. Birendra Bikram Singh v. Brij Mohan Pande, (1934) 21 A I R P C 153=151 I C 74=9 Luck 407=61 I A 285=11 O W N 843 (P C).

contention on behalf of the appellant that the pre-emptor is a member of a village community because he does not stand by himself but is a member of a joint Hindu family, and he asks us to remit an issue to the trial Court on this point, but a reference to the pleadings shows that the plaintiff's case has never been rested upon this footing. He claims that he himself has got under-proprietary rights and not that he has those rights as a member of a joint Hindu family. In these circumstances, we are clearly of opinion that there never has been up to the present day an under-proprietary village community in village Mahdaiya, and in consequence there cannot ever have been any such custom as is alleged by the plaintiff, nor can the plaintiff be allowed to fall back on the presumption provided by S. 7, Oudh Laws Act.

In our view the learned Munsif rightly held that there was no right of pre-emption in the village and the plaintiff could not claim any right of pre-emption. The learned Civil Judge has accordingly erred in remanding the case to the trial Court for decision of the remaining issues. We therefore allow this appeal with costs, set aside the order of the lower Appellate Court and restore the decision of the trial Court.

R.M./R.K. *Appeal allowed.*

A. I. R. 1939 Oudh 196

THOMAS C. J. AND YORKE J.

Parma Sah and another — Plaintiffs — Appellants.

v.

United Provinces and others — Respondents.

First Appeal No. 92 of 1936, Decided on 6th April 1939, against order of Civil Judge, Lucknow, D/- 18th May 1936.

(a) Transfer of Property Act (1882), S. 6—Applicability—S. 6 is not applicable to cases where property in respect of which right to damages is claimed is itself transferred.

A right to sue for damages is a mere right to sue and not an actionable claim and therefore in the ordinary way it is not transferable; but the bar of S. 6 is not applicable to cases where the whole of his rights in the property acquired by the owner in respect of which damages are claimed by the transferee is transferred by the owner. [P 202 C 1]

(b) Civil Procedure Code (1908), O. 22, R. 1—One of plaintiffs transferring all his rights to his co-plaintiff—Death of former during pendency of suit—Suit does not abate and decree is not nullity.

Where in a suit for a declaration in respect of property sold by one of the plaintiffs to the other co-plaintiffs the former dies during the hearing of the case, he having transferred all his rights to his co-plaintiffs, so far as the defendants are concerned, he no longer has any right of any kind in the property and subsequent to his sale deed in favour of the co-plaintiffs, he is not a necessary party to the suit and the decree passed does not become a nullity by reason of the fact that he had died during the pendency of the suit. [P 203 C 1]

(c) Civil Procedure Code (1908), S. 80—Notice by transferor, one of co-plaintiffs is enough for continuance of suit by other transferee co-plaintiff after former's death—Decree passed is not a nullity.

Where one of the plaintiffs who serves notice on the Secretary of State under Sec. 80, and subsequently along with his transferees as co-plaintiffs files a suit, dies during the pendency of the same, the suit does not fail on the ground of want of notice by the continuing plaintiffs and the decree passed does not become a nullity. [P 202 C 2]

(d) Easements Act (1882), S. 52—Licence—Transaction held amounted only to license and not transfer of land.

The Secretary of State for India acting through the Chairman of the Lucknow Improvements Trust as agent in consideration of the surrender, sale and transfer made by one of the plaintiffs of his cinema theatre agreed to transfer to the latter some freehold estate in a certain piece of land and also to build and erect for him on the said land another theatre and a restaurant at his own cost to grant a right of way over a piece of land, to attach electric wires with lamps to the roof which would be built over this piece of land and in the event of a portico being erected in front of the land to place on the said portico a signboard electric or otherwise to be approved by the Improvement Trust. The agreement further provided that in case the portico was not erected within two years, the plaintiff should have a further right to construct a portico according to a plan to be approved by the Improvement Trust and to place thereon a signboard as mentioned above :

Held that there was no intention on the part of the Secretary of State to transfer the land on which the portico was to stand to the plaintiff, but it was a grant of a license to construct a portico and a right to keep a signboard thereon: *A I R 1923 Oudh 114; A I R 1933 All 735 (FB) and A I R 1933 All 911, Not foll.; A I R 1930 Cal 739, Rel. on.* [P 204 C 1]

(e) Easements Act (1882), S. 60 (a)—License and transfer of property must have reference to same property and be coupled together.

Section 60 relates to licenses and not to easements and the license and the transfer of property must necessarily have reference to the same property and be coupled together, both properties being the properties of the grantor. This is the test in cases falling under the Section. Where the Secretary of State transfers some land to the licensee who is also allowed to build a porch on another piece of land, the license with regard to the portico is not irrevocable by reason of the application of S. 60 (a): *A I R 1927 Bom 240 and A I R 1915 All 382, Expl.; (1845) 13 M & W 838, Ref.* [P 204 C 2; P 205 C 1]

(f) Crown Grants Act (1895), S. 3—Conditions in grant ordinary legal conditions—Interpretation and application to be according to ordinary provisions of law.

The effect of the provisions of the Act is that the conditions of a grant by the Crown must be given effect to even if they are contrary to the provisions of some other laws, but where the conditions laid down in the grant are ordinary legal conditions they are to be interpreted and applied in accordance with the ordinary provisions of law. [P 205 C 1]

(g) Easements Act (1882), S. 64— Licensee —Rights of, on revocation.

Where the licensor revokes a licence and installs a fresh licensee, the original licensee has no cause of action against any one except his licensor who evicts him whether for damages for breach of contract or for compensation under the provisions of S. 64. [P 205 C 2]

(h) Evidence Act (1872), S. 115 — Estoppel by acquiescence—Requirements of.

In order that acquiescence may amount to estoppel, it must amount to fraud the requisites of which are that the person who pleads acquiescence must have made mistake as to his legal rights and spent some money and have done some act on the faith of the mistaken belief. Thirdly the person against whom a right is claimed must know the existence of his own right which is inconsistent with the right claimed against him. He should also know the mistaken belief of right claimed against him by another person and lastly he must have encouraged such other person in his expenditure of money or in other acts which he has done: *A I R 1930 Oudh 235, Foll.; A I R 1934 Oudh 178; A I R 1937 Oudh 263 and A I R 1937 Oudh 226, Ref.* [P 206 C 2]

Radha Krishna and S. N. Srivastava — *for Appellants.*

H. S. Gupta (Government Advocate) and H. K. Ghosh and Raj Narain, and R. F. Bahadurji and J. K. Tandon — *for Respondents 1, 2 & 3 respectively.*

Judgment. — This is a first appeal by Lala Parma Sah and Lala Shib Lal Sah from the judgment and decree of the Civil Judge of Lucknow declaring that the plaintiffs have a right to fix a signboard electric or otherwise on the portico built by the defendant 3 (forming part of the buildings of the Plaza Cinema) but otherwise dismissing their suit with costs. This suit came about in the following circumstances: In or about the year 1922, the Secretary of State for India in Council, defendant 1, wished to take over from plaintiff 1 now deceased, Mr. George Dixon Bevan, the property known as the Rink Theatre, situated on land partly owned and partly leased by the said Mr. Bevan, for the purpose of building what is now the General Post Office in Lucknow. The Secretary of State had for disposal certain plots of land on the north side of Hazratganj and an agreement, Ex. P. W. 1/1, between the Chairman, Lucknow Improvement Trust, acting as agent of the Secretary of State for India in Council on the one hand and Mr. G. D. Bevan on the other was executed on 12th January 1923. By this agreement it was laid down that in consideration of the surrender, sale and transfer made by Mr. Bevan, the purchaser, that is the Secretary of State (1) would pay to Mr. Bevan the sum of Rs. 15,000, (2) would transfer to Mr. Bevan the freehold estate in a certain piece of land situated at Hazratganj and would also build and erect for Mr. Bevan on the said land a theatre and restaurant at his own (The Secretary of States') expense, (3) would grant a right of way over a piece of land marked B on the plan and permit Mr. Bevan to attach electric wires with lamps to the roof which would be built over this piece of land and (4) in the event of a portico being erected in front of the land marked B, would give permission to Mr. Bevan to place on the said portico a signboard electric or otherwise provided always that the design be approved by the Lucknow Improvement Trust. Para. 5 of this agreement further provided that in the event of the aforesaid portico not being erected within two years (ex hypothesi by the Secretary of State or his agent), Mr. Bevan should have the right to construct the portico according to a plan to be approved by the Lucknow Improvement Trust and to place thereon a signboard electric or otherwise subject to the same conditions as mentioned already.

It is important to note a fact familiar to all residents of Lucknow that the piece of land transferred to Mr. Bevan and on which the Secretary of State was to construct a cinema or theatre for him was situated at some distance from the road in Hazratganj and was separated from Hazratganj by certain other plots which would be disposed of by the Trust at a subsequent date, hence the provision for a right of way and a portico and a signboard standing on the Hazratganj Road to indicate to the public that this was the entrance to the theatre standing behind.

In the course of the next two years the Secretary of State did construct a cinema theatre, and on 15th January 1926, when the period of two years for the construction of a portico had already elapsed and the right of constructing a portico had already accrued to Mr. Bevan, an indenture or deed of transfer, which is really a

deed of exchange, was executed between Mr. G. D. Bevan, his heirs, executors, administrators and assigns described as the first party and the Secretary of State for India in Council described as the second party. This is Ex. 7 and its conditions are important. In the first part of the document, the consideration given by the Secretary of State to Mr. Bevan is recited in these terms: First, we have a mention of the sum of Rs. 15,000, second, we have a mention of the transfer of the property on which the theatre and the restaurant stand along with the theatre and restaurant standing thereon, thirdly, we find a mention of the grant of a right of way over that piece of land marked green on the map B thereto attached and an undertaking on the part of the Secretary of State to provide and maintain a stone flooring upon the same, and lastly we find a mention of the Secretary of State further allowing Mr. Bevan to erect a portico according to a plan to be approved by the Lucknow Improvement Trust upon that portion of land coloured dark red on the map B, and to allow the said first party to place on the said portico when erected a sign board, electric or otherwise, such signboard to be approved of by the Lucknow Improvement Trust.

The document goes on to state that in consideration of the payment of a sum of Rs. 15,000 paid before the execution of these presents, the receipts whereof the first party hereby acknowledges, and the transfer of the land, theatre and restaurant and the grant of right of way and the covenants by the second party hereinafter contained the said first party, Mr. Bevan hereby grants and transfers the property mentioned earlier to the Secretary of State. The second part of this document sets out in detail the transfers, grants and covenants made by the Chairman of the Lucknow Improvement Trust on behalf of the Secretary of State and the wording of the document in regard to the three items, namely (1) transfer of the theatre and land, (2) grant of right of way over the passage and (3) the grant of covenant relating to the portico is in our opinion highly significant, if only for the marked difference in the wording indicating the distinct natures of the different rights granted. In regard to the land and the theatre it is stated that

> the said second party (Secretary of State) hereby grants and transfers to the said first party . . . all that property . . . . together with the theatre and restaurant, etc. etc.

In regard to the right of way over the passage it is said that

> the said second party doth hereby covenant that the said first party would have full and free right and liberty of ingress, egress and regress passage and way . . . . . over and upon the land coloured green upon the map marked B hereto attached and that the said second party will make, provide and maintain a stone flooring formed on that piece or parcel of land delineated and coloured green on the map marked B hereto attached.

It is common ground between the parties that this was a grant of an easement accompanied by an undertaking to maintain a stone flooring over the ground covered by the passage over which the easement of right of way was being granted. As regards the portico it is said that

> the said second party doth hereby grant leave and license to the said first party to erect a portico upon that piece or parcel of land coloured dark red on the map marked B hereto attached provided that the said first party (Mr. Bevan) shall erect the said portico according to the plan and design approved of by the Lucknow Improvement Trust, and further that the said first party may place a signboard electric or otherwise upon the said portico when erected provided that such signboard is erected according to a design approved of by the Lucknow Improvement Trust.

Prior to the execution of this deed of transfer proceedings for the sale of the plots standing between Mr. Bevan's new plot and Hazratganj were going on. Mr. Bevan was consulted by the Lucknow Improvement Trust in regard to the preparation of conditions of auction of the plots in question: *vide* Ex. B.1 dated 8th May 1925 and Mr. Bevan's reply Ex. B.2 dated 11th May 1925, and the copy of the auction conditions for the sale notified to be held on 9th August 1925, Ex. P.W.-1/2. The conditions of the sale incorporated paras. 4 and 5 of Mr. Bevan's agreement of 12th January 1923 and an extract containing the same paragraphs actually formed part of the sale deed executed by the Secretary of State in favour of the purchaser of two of these plots, Mr. S. R. Gandhi, dated 14th November 1927. In addition to this, this sale deed contained a provision that

> the purchaser shall not attach anything to or otherwise use the roof of the portico of the Prince of Wales Theatre which may hereafter be built on the south of the plot hereby transferred adjoining the said passage or interfere with the rights vested in the owner of the said theatre under cls. 4 and 5 of the agreement between the vendor and the owner of the said theatre as set forth in the extracts from the said agreement in Sch. 2 hereto attached.

This document makes it clear that the purchaser of the plots standing between the Prince of Wales Theatre and Mr. Bevan's land on the north and Hazratganj road on the south had notice of the conditions of the agreement between the Secretary of State and Mr. Bevan. It is also indisputable that he also had notice of the conditions of the sale deed which had been executed as far back as 15th January 1926 if only by virtue of the fact that that was a registered deed. The purchaser Mr. Gandhi took no further action to make use of the plot which he had purchased. On 6th January 1933 by a sale deed Ex. 10 he transferred the property purchased by him to the present defendant 3 Minoo Shapoorji Todywala and Mr. Todywala proceeded in the course of the year 1933 to take steps for the construction of a rival cinema theatre now known as the Plaza Talkies on the plots purchased by him standing between Hazratganj and the Prince of Wales Theatre. Papers on the record, for example, Ex. A-1, show that Mr. Todywala applied to the Lucknow Improvement Trust for permission to build on 21st February 1933 and the plans originally tendered by him were sanctioned by a resolution of 3rd May 1933 copy of which was sent to the applicant on 10th May. An examination of these plans, particularly Ex. C-1/2, shows that Mr. Todywala asked for and was given permission to put four pillars outside the area actually purchased by him and over the footpath in such a way that on the first flooring he obtained and extended area measuring 15 feet from north to south and 72 feet 8 inches from east to west or rather parallel to the Hazratganj road. Exs. C-1/3, C-1/8 and C-1/9 further show that in the light of the provisions preventing him from making any use of the portico which was to be constructed by Mr. Bevan to the south of Mr. Todywala's building Mr. Todywala had provided only a narrow balcony about 4 feet 6 inches wide by 24 feet or 25 feet long in extension of this first storey flooring. The very fact that no portico or porch was provided in these plans and the nature of the plans clearly indicate that Mr. Todywala was fully cognizant of the position in regard to the portico and the rights, whatever those rights were, of Mr. Bevan in that connexion. Subsequently on 28th June 1933 Mr. Todywala's engineers submitted to the Improvement Trust revised plans with the blue prints in duplicate described as being of the front elevation modified together with the scheme for arcade (covered way) for nazul plots 1, 2, 3, 4 and 5. In the letter which is addressed to Mr. Botting as Executive Officer of the Lucknow Improvement Trust, it is stated that these blue prints, etc. are submitted "as promised by our Russi B. K. Bana personally to you when he was in Lucknow a few days ago." It is further said that Mr. Botting had been so kind as to recommend this modified elevation with the above mentioned scheme to the chairman and he (the chairman) had been very much pleased to accept it. The only modification which had been made, it was said, was that the openings of the arcade had been made 12 feet wide instead of 11 feet wide. The amended plans bear the date of sanction, 4th July, and sanction was conveyed by Ex. A-3 dated 8th July 1933. It is clear that work in connexion with the construction of the portico, which is found provided for in the revised plan, Ex. A-5, could not have begun before the middle of July 1933 and the evidence is that work on the portico actually began in September 1933. This evidence we accept as correct.

It is said in the plaint, and again we accept this as correct, that Mr. Bevan had gone to England in 1928 and did not return until September 1933. It was originally said in the plaint that he returned in March 1933 but this was subsequently amended, and there is really no evidence that he was in India prior to the end of August. It is said in para. 9 of the plaint that the portico was already nearly completed when Mr. Bevan arrived on the scene, while in para. 10 it is said that Mr. Bevan made repeated verbal protests to the Lucknow Improvement Trust, defendant 2, against the permission given by them to defendant 3, but no attention was paid to his protests. The fact of protests being made to the Secretary of State and the Improvement Trust is admitted by both, but defendant 3 in para. 26 says:

> That Mr. Bevan never protested to him against the erection of the said portico. On the other hand by his various acts and omissions he led defendant 3 to believe that he had no objection to the erection of the said portico by defendant 3 in any manner.

We take it to be not improbable that Mr. Bevan did not in fact protest to defendant 3 who was a licensee or lessee of Mr. Bevan's own licensor or lessor. His procedure in making protests to defendants

1 and 2 was apparently correct. We shall consider this point further in connexion with the plea of acquiescence raised by defendant 3. It is at any rate clear that from the end of 1933 onwards a dispute between plaintiff 1 and the defendant continued until on 5th May 1935, plaintiff 1 gave notice to defendants 1 and 2 of his intention to file a suit. Exs. C-7, C-2 and C-3 are letters dated 21st September 1934, 25th October 1934 and 31st October 1934 which indicate that negotiations for an amicable settlement were proceeding in 1934. After the issue of notice, the plaintiff on 10th August 1935 instituted the present suit. On 7th December 1935, by Ex. 6 Mr. Bevan transferred the whole of his rights in the property purchased by him to the appellants, plaintiffs 2 and 3. The deed of sale was executed on behalf of Mr. Bevan by his attorney from which we may infer that Mr. Bevan himself had by this time left the country. The sale deed effects a complete transfer of all Mr. Bevan's rights in this property to plaintiffs 2 and 3 and there is in para. 11 a further covenant between Mr. Bevan and his vendees with reference to the conduct and prosecution of the suit which was at the time pending. Mr. Bevan undertaking not to compromise the suit without the consent of his vendees and to use his utmost efforts to win the suit so as to secure and provide the portico for his vendees. Mr. Bevan was however not in any manner whether by way of damages or otherwise to be liable to his vendees, and he and the vendees between them agreed to abide by the result of the said suit.

This brings us to the plaintiff's claim as set out in his plaint. The earlier paragraphs relate to the history of the property with which we have dealt above. In paras. 11, 12 and 13 the plaintiff Mr. Bevan indicates what his objections are to the portico as constructed by defendant 3, namely that the pillars on which the roof rests are so large as to obstruct the view into the passage leading to his own theatre, and that had he himself built the portico, he would have built it differently. It is said that if Mr. Bevan had built the portico, he would have placed on the parapet of the portico advertisements of his productions, and he claims that as by the present portico the view of his advertisements standing at the door of his theatre, 120 feet or more away from the outside of the portico, has been narrowed, he has an equitable right to the use of the entire portico both as to its columns and its entire parapet for the purpose of his advertisements solely. These paragraphs seem to be aiming at a basis of compromise with defendant 3. In the event of failure to compromise, the plaintiff Mr. Bevan claimed to have his rights to possession of the ground covered by the present portico decreed to him and that defendant 3 be ordered to remove his portico without any delay and to pay damages for each day it continues to obstruct plaintiff 1 from constructing another portico in its place. In the end the plaintiffs prayed for a decree: (1) for the removal of the present portico and for possession of the ground now covered by the present portico, and the declaration of their rights to the use of a new portico as set out in the covenants contained in the deed of 15th January 1926, (2) does not arise as it was subject to the compromise being accepted, (3) for damages against defendant 3 for contravening their rights (these damages were valued at Rs. 10,000/- in para. 16 of the plaint) and against defendant 1 for breach of the covenant set out in paras. 7 and 18. These damages were valued at Rs. 1000 in the same para. 16 of the plaint. (4) For the stone flooring of the roadway of the arcade as against defendants 1 and 2. This was valued at Rs. 350 in para. 16, but is no longer a matter in dispute as notice had not been given of this claim to defendants 1 and 2 and the said stone flooring has since been constructed. It is further to be noted that no evidence whatsoever has been put upon the record to establish the amount of damages actually sustained by the plaintiffs and therefore this part of the suit must necessarily have failed. The suit therefore as it finally lay before the Court at the stage of argument was really a suit only against the three defendants for removal of the portico, for possession of the ground covered by the present portico, and for declaration of the rights of the plaintiffs to the use of a new portico. The same criticizm as has just been made in regard to the claim for damages against defendant 3 also applies to the claim in para. 3 for damage against defendant 3 for contravening the plaintiffs' right and against defendant 1 for breach of the covenant to allow the petitioner to erect a portico and to allow him to place on the said portico when erected a signboard electric or otherwise and for wrongful giving of permission to defendant 3 to build the present portico on the ground in question.

The defence put forward to Mr. Bevan's suit by the Secretary of State, defendant 1, and the Lucknow Improvement Trust, defendant 2, appears to us to be most unsatisfactory. Defendant 3 justifiably took shelter behind defendants 1 and 2, more particularly the latter. He further pleaded estoppel of the plaintiff by acquiescence. In para. 27 of the written statement he admitted limited rights of the plaintiff in connexion with the portico, but contended that he had never refused to allow the plaintiff to fix his signboard according to his rights. The defendants 1 and 2 on the other hand put in almost identical replies, as might be expected in view of the fact that defendant 2 is admittedly the agent of defendant 1. They disputed the claim with reference to the stone flooring on the ground that it was not mentioned in the notice served on the Secretary of State under S. 80, Civil P. C. and on the Trust under S. 97, U. P. Town Improvement Act. They both alleged that the responsibility for building the portico and defeating the rights of the plaintiff lay solely on defendant 3, and that there was no cause of action against either of them. They denied that any permission had been given to defendant 3 to erect a portico, and contended that what had happened was that defendant 3's building plan had been approved under S. 49, U. P. Town Improvement Act, read with S. 180, U. P. Municipalities Act, because the Lucknow Improvement Trust had no objection to the design of the building etc. They contended that no right to build a portico had ever been conferred on defendant 3 by defendants 1 and 2, that is by defendant 2 as the agent of defendant 1. What this defence amounts to is this. The Trust puts forward the plea that it combines the capacity of owner and manager of Government properties in its charge including the particular plot mentioned in Mr. Bevan's sale deed as the plot on which leave and license is given to construct a portico with the capacity of a Chairman of the Improvement Trust and executive authority of a similar nature to a municipality.

The Improvement Trust like a municipality has certain rules in regard to the erection of buildings with which persons wishing to build on an area within the jurisdiction of the Improvement Trust must comply. Such a person has to apply to the trust for sanction of his plan before he begins the work of construction and it is said that the Trust gave permission to Mr. Todywala merely in the capacity of a building committee charged with the duty of seeing that the rules relating to building plans, etc. are complied with. If this is the view which the Improvement Trusts and Municipalities have of their duties in connexion with the sanctioning of applications for permission to construct buildings accompanied by plans, it is easy to understand how encroachments on public property are of daily occurrence in every big town in these provinces. We are not prepared to accept the view that the Lucknow Improvement Trust is entitled to act upon the principle, "Let not thy right hand know what thy left hand doeth," and the plea that in a case in which it has allowed a person to build on land, with reference to which it has itself executed a covenant, it granted the sanction to the applicant purely on the ground that there was no breach of the building rules apparent on the face of the plans submitted to it. We might further note in this connexion that in the light of the fact that the plans were originally sanctioned on 3rd May 1933 read with the statements in the letter Ex. C-5, we are inclined to accept as substantially true the statement contained in paras. 24 and 25 of Mr. Todywala's written statement wherein it was said

> that the Lucknow Improvement Trust represented to the answering defendant that if he would build a portico in place of the projecting balcony at his own costs, he could have the entire use of the same for himself except that the proprietor of the Prince of Wales Theatre would be allowed to put up a signboard for his theatre, and that acting on this representation, he submitted a revised plan of the portico in place of the balcony according to a design approved by the Lucknow Improvement Trust and the said Lucknow Improvement Trust permitted him to erect the portico according to the said plan, and he thereupon erected it at considerable expense with the consent of the Public Works Department, on whose land the said portico was to be built.

Mr. Todywala gave evidence to this effect, and so far as the facts stated by him go, he was not cross-examined nor was any attempt made to produce evidence to show that his account of what took place was incorrect. (After mentioning the issues framed in the suit their Lordships proceeded.) Coming to the findings of the learned Civil Judge, we regret that we are unable to congratulate him on his judgment in the case. His judgment in this not entirely easy case runs to five printed pages in the paper-book and his findings on some of the issues indicate that he did not really consider them at all

carefully. On Issue 1 he has found that the subject-matter of the suit, that is the right to build the portico, could be legally transferred but the right to sue for damages could not be so transferred. We are of opinion that though doubtless it is a fact that a right to sue for damages is a mere right to sue and not an actionable claim, and therefore in the ordinary way it is not transferable, the bar of S. 6, T. P. Act, is not applicable in the present case inasmuch as the plaintiff, Mr. Bevan, transferred to plaintiffs 2 and 3, the present appellants, the whole of his rights in the property acquired by him from the Secretary of State. The document Ex. 7 by which Mr. Bevan acquired that property gives to Mr. Bevan's assigns precisely the same rights that Mr. Bevan himself had, and we are of opinion therefore that plaintiffs 2 and 3 were clearly entitled to maintain the present suit for damages. As regards Issue 2, it has been held that plaintiff 1 was entitled to continue the suit in view of the provisions of the sale deed as between him and his vendees in regard to prosecution of the suit. The question might have been more important at a later stage had the suit been successful when the question of costs arose. It has not been raised in argument before us.

On Issue 3 the learned Civil Judge held that plaintiff 1 was certainly given a right to build a portico under both the documents. On Issue 4 he has discussed the question whether the conditions mentioned in the two deeds of 1923 and 1926 were binding on the defendants and has held that what was granted to Mr. Bevan was nothing else than a license; that this license was revocable and subsisted only to this extent, that the plaintiff was entitled to put up a signboard. He held that that right was not denied to the plaintiff, and therefore in the event he held that the conditions mentioned in these deeds were not binding on the defendants. He summarily dismissed Issue 5 by holding that the only right of the plaintiffs in respect of the portico is the right to fix a signboard, the design of which must be approved by the Improvement Trust. On the questions set out in Issues 7 and 8 he held that no finding was necessary in view of his finding on Issue 4, and on Issue 9 he held that the plaintiffs were estopped by the acquiescence of Mr. Bevan. Finally on Issue 10, he held that the plaintiffs were not entitled to demolition of the portico in any case, and he dismissed the suit in almost all respects granting to the plaintiffs a declaration only that they have a right to fix a signboard, electric or otherwise, on the portico built by defendant 3.

It may be noted that during the hearing of the case plaintiff 1, Mr. Bevan, died in England on 2nd May 1935. This fact was of course not known to the other parties and evidence which had begun on 28th April was recorded on 5th May and 6th May and judgment pronounced on 18th May in ignorance of Mr. Bevan's death. The point has therefore been raised in this appeal as to whether in view of the death of Mr. Bevan the suit has abated as a whole or not. In point of fact none of the parties concerned is at all anxious that it should be held by this Court that the suit did abate and the decree was a nullity. It is urged on behalf of the plaintiffs-appellants that if Mr. Bevan was a necessary party, then the decree must be a nullity, but that if in fact the whole of his rights could be and were transferred to plaintiffs 2 and 3, he was not after that date a necessary party to the suit and his death at any stage would not render the decree of the Court a nullity. We are of opinion that whatever rights Mr. Bevan possessed by virtue of his deed of exchange of 15th January 1926 could be and were transferred by him to plaintiffs 2 and 3. So far as the defendants were concerned plaintiff 1, Mr. Bevan, no longer had any rights of any kind. He remained on the record of the suit only to satisfy his co-plaintiffs, the present appellants. The Court would have been entitled to strike off his name. The co-plaintiffs were not very anxious that this should be done because it might raise a question as to their right to continue the suit, they not being the persons who had served notices on the Secretary of State and the Chairman of the Lucknow Improvement Trust. The trial Court did in fact frame an Issue 13, on this point but never decided it, presumably because the parties did not ask for any decision on the point, and we are satisfied that as long as Mr. Bevan was a plaintiff along with plaintiffs 2 and 3 the suit could not fail by reason of want of notice. We are further of opinion that the suit could not in any case after it had been once instituted fail on the ground of want of notice by the continuing plaintiffs. If this suggestion were to be carried to its logical conclusion, it would mean that in any case in which the necessary preliminary to a suit is a notice of this kind, the suit could not even be continued by the heirs of the original plaintiff in case

the original plaintiff dies, a proposition which is obviously absurd. In these circumstances we are of opinion that Mr. Bevan was not subsequent to his sale deed in favour of the present appellants a necessary party to the suit, and the decree which was passed does not become a nullity by reason of the fact that the plaintiff Mr. Bevan had died during the pendency of the suit.

On the merits of this appeal we have listened to a very lengthy argument on both sides. The dispute necessarily centres round the nature of the rights conveyed by the Secretary of State to Mr. Bevan, his heirs, assigns etc. in the land of the portico. On behalf of the plaintiffs-appellants it is contended that the covenants contained in the agreement and the deed of exchange did not amount to the grant of a mere license but amounted to something more. Learned counsel has urged first that it was an interest running with the land available against the world and he has based this contention on some remarks in a case of the Judicial Commissioner's Court reported in 27 O C 64.[1] In this case the learned Judicial Commissioner Mr. Wazir Hasan, remarked in regard to a similar document which was contended to be nothing but a grant of a license:

> I am of opinion that the true construction of that document is that it was a contract for consideration between the Secretary of State on the one hand and defendant 2 on the other. The object of the agreement was to grant land to defendant 2 for the purpose of erecting a ghat on the banks of the river Sarju in the town of Ajodhia. The money necessary for the masonry construction was to come out of the funds belonging to defendant 2 and the Secretary of State was to obtain the benefit of all profits that may accrue therefrom. The document distinctly says that defendant 2 shall have a proprietary right in the structure and it further says that defendant 2 shall have no right in the soil. If therefore defendant 2 did under this agreement acquire a right to build a pucca structure on the land of the Secretary of State for India that was a right which must be held to run with the land.

On this ground it was apparently held that the contention that the document was a mere license and could consequently be revoked and was in fact revoked by the subsequent execution of a lease was unsound. This case apparently stands by itself. There is no sign that it has ever been followed in any subsequent case, and we are not inclined to base our decision on it. To some extent it is inconsistent with decisions of the same learned Judge in which it was held that the license given to a tenant to construct a house in an abadi land is a mere license and only becomes irrevocable in the circumstances mentioned in S. 60 (b), Easements Act. The second main line of argument put forward is that what is given to Mr. Bevan is something more than a mere license being in fact an interest in land. It is contended relying on a number of rulings that what is to be seen is not the mere words in which the transaction is clothed but what is the real substance of the transaction, and it is said that what was granted was a right to build a portico on Government land, 120 feet or more away from the land actually transferred to Mr. Bevan, and that what was created was a permanent interest of a restricted character in this land as an accessory to the building itself or as part of the mode of enjoyment of that building. Learned counsel says that the portico was to be an integral part of the theatre itself. Reliance has been placed in this connexion on four cases which we may deal with shortly. In A I R 1933 All 735,[2] it was held that a document describing the parties thereto as licensor and licensee was a lease within the definition of that term under Sec. 2, sub-sec. 16, Cl. (b), Stamp Act. We agree with learned counsel for the respondents that in view of the fact that the definition of "lease" in the Stamp Act is wider than that in the Transfer of Property Act, this case has no application in the present case. In A I R 1933 All 911[3] a Bench of the Allahabad High Court held that

> the effect of a deed which gives the holder an exclusive right of occupation of a shop, although subject to certain reservations and to a restriction of the purpose for which it may be used, amounts in law to a demise of the shop itself and not merely a license. The main test in such cases is that of exclusive possession.

We do not think this case is in any way helpful to the decision of the present case. It would be difficult to hold that the grant of permission to the plaintiff Mr. Bevan to construct a portico standing over a certain plot of land in the present case gave him an exclusive right of occupation of that land. He was entitled to construct a portico and put his signboard on it, but so far

1. Ragho Pershad v. Secretary of State, (1923) 10 A I R Oudh 114=74 I C 369=27 O C 64.

2. In re Burma Shell Oil Storage and Distributing Co. Ltd. of India, (1933) 20 A I R All 735 = 145 I C 674=55 All 874 = 1933 A L J 749 (F B).

3. Behari Lal v. Chhote, (1933) 20 A I R All 911 =149 I C 486.

as the wording of Ex. 7 goes the Secretary of State could have claimed the right to make some other use of the land under the portico, to allow hawkers to sell fruits for example. Reliance has also been placed on 57 Cal 655,[4] a case in connexion with the lease of the land of a hat or market in which it was said that

> the true test in cases of this kind is to find out whether the landlord has granted sufficient control over the land of the hat so as to make the instrument (kabuliyat) a demise and not a mere license.

The same criticizm is applicable to this case as to the last and it is further noticeable that this particular case rested on a special definition of land and the Court held that the so called license fee was really a rent which had been called license fee and in fact that what was really a lease had been called a license to avoid the payment of tax. We are quite clear on a consideration of the plaintiff's documents that there was no intention on the part of the Secretary of State to transfer the land on which the portico was to stand to the plaintiff. The grant made to him was a grant of a license to construct a portico and a right to keep on the portico construction by himself (or if the license should be withdrawn by some one else) a signboard, subject to that signboard being approved by the Improvement Trust. We are of opinion that the right which was granted to Mr. Bevan in connexion with the construction of the portico is one which fell clearly within the provisions of Sec. 52, Easements Act. On the other hand the right to keep a signboard would appear to fall within the provisions of S. 4 and therefore to be an easement. Under S. 4 an easement is defined as :

> A right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and to continue to do something . . . . in or upon or in respect of certain other land not his own.

And among the rights which have been held to be rights of easement is a right "to have a facia, or notice board of sign fastened to another's house," *vide* Katiar on the Law of Easements and Licenses in British India (Edn. 2), p. 490. That right has therefore rightly been conceded by the parties and embodied in the decree of the lower Court. As regards the construction of the portico learned counsel for the appellants has conceded that if his first two contentions fail, then the grant made to Mr. Bevan can be nothing more than a license, but he contends that if it was a license it was irrevocable in view of the terms of S. 60 (a), Easements Act, which provides that

> a license may be revoked by the grantor, unless it is coupled with a transfer of property and such transfer is in force.

A question has been raised whether the underlying meaning of this provision is that a license may be revoked unless it is coupled with a transfer of the same property and such transfer is in force, or whether the condition merely is that it is coupled with a transfer of any property, and in the same connexion it must be borne in mind that the Section relates to licenses and not to easements. A study of the cases quoted in Katiar's book and those which have been quoted to us in argument indicates that the license and the transfer of property must necessarily have reference to the same property and be coupled together, both properties being the properties of the grantor. Mr. Katiar at p. 356 of his book says :

> A mere license is revocable, but that which is called a license is often something more than a license. It often comprises or is connected with a grant, and thus the party who has given it, cannot in general revoke it so as to defeat his grant to which it was incident.

And in fact that appears to be the acid test in cases falling under S. 60 (a). In the present case the withdrawal of the license to construct a porch could not be construed as in any way calculated to defeat the transfer of property made by the licensor. Learned counsel for the appellants referred us to a number of cases but based his argument in the main on A I R 1927 Bom 240.[5] It is true that the reasoning in that case favours his argument but it is clear that the decision genuinely does rest on the provisions of S. 60 (a) because it was a case of a license to one of two brothers to go into a partitioned house of his brother in order to take water from a well. The license could not be revoked without defeating the grant of water from the well. In another case quoted by learned counsel (A I R 1915 All 382[6]) there was a license to go upon certain land coupled with a grant relating to cut wood upon that land. If the license were withdrawn, the grant would be defeated. These cases are all ultimately

4. Secretary of State v. Bhupalchandra Ray, (1930) 17 A I R Cal 739 = 129 I C 177 = 57 Cal 655.

5. Janardan Mahadeo v. Ramchandra Mahadeo, (1927) 14 A I R Bom 240 = 101 I C 393=29 Bom L R 312.

6. Pratap Singh v. Dhum Singh, (1915) 2 A I R All 382 = 30 I C 581 = 13 A L J 886.

based on the English case in (1845) 13 M & W 838.[7] In our opinion the license granted to Mr. Bevan in the present case was not irrevocable by reason of the application of S. 60 (a), Easements Act.

Another argument was put forward that this license was part and parcel of the transfer to Mr. Bevan of the theatre and its revocation constitutes a breach of contract. That may be so, but the only effect would be that the plaintiff might be entitled to damages for breach of contract, if in fact, he was able to prove that any damages were sustained by him. Another argument put forward as a last resort in the reply was an attempt to rely on the provisions of the Crown Grants Act. In our opinion, these provisions have no bearing on the case whatever. The effect of its provisions appears to be that the conditions of a grant by the Crown must be given effect to even if they are contrary to the provisions of some other laws, but where the conditions laid down in the grant are ordinary legal conditions they are to be interpreted and applied in accordance with the ordinary provisions of law.

In the light of all these considerations and the very clear and definite wording of the deed of exchange we are clearly of opinion that the covenant entered into by the Secretary of State with Mr. Bevan in regard to the construction of the portico was nothing more than a license to build, that that license was not irrevocable and it was in fact, pace the statements of the Secretary of State for India in Council and the Chairman of the Improvement Trust in their written statements revoked by the grant of a fresh license to Mr. Todywala in 1933. Defendants 1 and 2 cannot, we think be heard to say that they did not grant a license in 1933 to Mr. Todywala to construct a portico on their land. In these circumstances we are clearly of opinion that the plaintiffs have no cause of action against defendant 3. In this connexion we might refer to S. 64, Easements Act which provides that

> where a license has been granted for a consideration, and the licensee, without any fault of his own, is evicted by the grantor before he has fully enjoyed, under the license, the right for which he contracted, he is entitled to recover compensation from the grantor.

It is pointed out in Mr. Katiar's law on Easements and Licenses (Edn. 2) at p. 377 that

> the Section applies only to cases of eviction by the grantor and does not include cases in which eviction is caused by a third person. In the latter cases if the license is revocable, the licensee must obtain the permission of the licensor and sue in the name of the licensor, but if it is irrevocable he can sue in his own name. In such cases his remedy is by injunction as well as in damages. In the case of a revocable license if the licensor does not permit the licensee to sue the third person in his name, his refusal to permit, it is submitted, may be taken as sufficient proof of the fact that the eviction was on his behalf and the licensee may then sue him as well as the third person for compensation under this Section.

The question would however remain whether, as in a case like the present one, if the licensor has revoked a license and installed a fresh licensee, the original licensee has any cause of action against any one except his licensor who has evicted him, and we are of opinion that he would not have any cause of action whether for damages, for breach of contract or for compensation under the provisions of S. 64. Turning to the cases of defendants 1 and 2, we have to consider the effect of the above findings. It is obvious that if the license granted by the Secretary of State was revocable, then there can be no claim for injunction or demolition. The plaintiffs might be entitled to damages for breach of contract or to compensation under S. 64. The plaintiffs have not proved that they have sustained any damages provided only that their right to put up a signboard as provided in their title deed is assured. Moreover, it is clear that the plaintiffs including the late Mr. Bevan have really not suffered any damages at all. On the contrary, Mr. Bevan was in the past saved from the expenditure of money on constructing a portico and the present plaintiffs are equally saved from that expenditure in future. The points which have been sought to be made in the plaint about the shutting off of the view of the plaintiffs' theatre seems to us to have little or no value. The theatre is situated at the end of a passage 40 yards long and could not possibly be made properly visible to persons passing along the road and in fact no attempt, so far as we know, has ever been made to make it so visible by any special lighting displayed at the entrance to the theatre. In our opinion therefore, on the merits the learned Civil Judge rightly dismissed the plaintiffs' claim for removal of the present portico, possession of the ground and declaration of the alleged rights of the plaintiffs to the use of a new portico, ex hypothesi to be constructed by themselves. He also rightly dismiss-

7. Wood v Leadbitter, (1845) 13 M & W 838 = 14 L J Ex 161 = 9 Jur 187.

ed the claim of the plaintiffs for damages against defendant 3 for contravening their rights. We think that defendant 3 was in the circumstances of the present case entitled to shelter himself completely behind the permission granted to him by the Lucknow Improvement Trust, in view of the circumstances in which the fresh plans were prepared and the fresh sanction accorded to him. Lastly in the light of these findings the Secretary of State, defendant 1, could not be held liable to pay any damages, even if damages had been proved, for his alleged failure to carry out the covenants contained in the said deed and the alleged wrongful act of defendant 2 in granting permission to defendant 3 to construct the present portico.

One other point of some importance has been argued on behalf of the appellants on which it is necessary to give a decision although in view of the above findings it cannot affect the ultimate decision of this appeal. The learned Civil Judge held on Issue 9 that the plaintiffs were estopped by virtue of acquiescence of plaintiff 1 in the year 1927. In this connexion it was argued first by the learned Civil Judge that Mr. Bevan had over a period of seven years failed to act upon the license granted to him by the deed of exchange in 1926. It was further said that Mr. Bevan saw the building of the portico without any objection or protest, and that there was overwhelming evidence to this effect. It was alleged that the plaintiff's own change of pleadings proved that he had made no protest. In point of fact defendants 1 and 2 admitted that there was protest on behalf of the plaintiff, Mr. Bevan. The change of pleadings proves nothing whatever bearing in mind the fact that Mr. Bevan was admittedly in India from before the beginning of September 1933 whereas the construction of the portico could not have begun before about that date, and so far as evidence goes, is proved to have begun in September 1933. The plaintiff, Mr. Bevan, presumably did, as the witnesses say, see some part of the constructions being made, but it served no purpose for him to protest to the building contractors and he by admission did what it was his duty to do, that is to say, he protested to his own licensors.

We have been referred to several cases on the subject of estoppel by acquiescence, for example, 7 O W N 271,[8] 11 O W N 379,[9] 1937 O W N 252[10] and 1937 O W N 330.[11] In the first of these cases it was held that

> in order that acquiescence may be a bar to the exercise of a man's legal right the acquiescence must amount to fraud, elements or requisites necessary to constitute fraud being : first the plaintiff must have made a mistake as to his legal rights; secondly the plaintiff must have expended some money and must have done some act on the faith of his mistaken belief; thirdly the defendant the possessor of the legal right must know the existence of his own right which is inconsistent with the right claimed by the plaintiff; fourthly the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right.

In the present case these five principles are not really very easy to apply. We find it difficult to say that there is any element of fraud in the conduct of Mr. Bevan. Taking the conditions stated, the first condition is that Mr. Todywala must have made a mistake as to his legal rights. As we see the case now, we are of opinion that he did not make any mistake as to his legal rights, and we do not think that at the time in 1933 when he was in the position of having just obtained a license from the Lucknow Improvement Trust which he might reasonably suppose to override and revoke the license granted to Mr. Bevan, it could be said that he had made a mistake as to his legal right. As to the second point that Mr. Todywala did expend money on the faith of his belief, mistaken or otherwise, so strong was his mistaken belief that he constructed the porch, interlocked, as one might say, with the first floor of the main building. Thirdly, the possessor of the legal right must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. On that point there is of course no room for doubt. Fourthly the possessor of the legal right, Mr. Bevan, must know of the plaintiff's mistaken belief of his right. If he does not, there is nothing which calls upon him to assert his own right. Mr. Bevan, as soon as

8. Kanhaiya Lal v. Hamid Ali, (1930) 17 A I R Oudh 235=122 I C 774=7 O W N 271.

9. Mahmudul Haq Khan v. Waquful Aulad, (1934) 21 A I R Oudh 178 = 148 I C 186 = 9 Luck 538=11 O W N 379.

10. Zakia Begum v. Lucknow Improvement Trust, (1937) 24 A I R Oudh 263 = 167 I C 414 = 1937 O W N 252=13 Luck 192.

11. Dan Bahadur Singh v. Talewand Singh, (1937) 24 A I R Oudh 226 = 167 I C 870 = 1937 O W N 330.

he protested to the Improvement Trust, must have been told that Mr. Todywala had been granted a building permit, and there is nothing to show whether or not at that time the Improvement Trust took up the position that the grant of permit was nothing more than an ordinary departmental proceeding. As regards the last point of "encouragement" it seems to us clear that when Mr. Bevan admittedly protested to the Improvement Trust, it cannot be said that he encouraged Mr. Todywala in his expenditure of money on the construction of the portico, and we are of opinion that the learned Civil Judge has not considered this question as thoroughly as he should have and that his finding cannot be maintained. We are satisfied that Mr. Bevan was certainly not estopped by the principle of acquiescence.

One other point remains. It has been declared that the plaintiffs have a right to fix a signboard, electric or otherwise, on the portico built by defendant 3. The plaintiffs are entitled to some further protection against possible obstruction on the part of any of the defendants, particularly dilatory action on the part of the Improvement Trust. We accordingly add to the decree of the lower Court a further provision that if and when the plaintiffs shall submit to the Lucknow Improvement Trust a design for their signboard, the plaintiffs shall, in case the Lucknow Improvement Trust does not within one month of receipt of the said design either approve or reject it and inform the plaintiffs accordingly, be entitled to erect the said signboard without further delay.

Taking the case therefore as a whole we dismiss this appeal subject to this modification: that a rider as mentioned above be added to the decree of the lower Court. As regards the costs, bearing in mind the whole of the circumstances we think that the parties should bear their own costs of this appeal. As regards the costs of the lower Court, we think that defendant 3 was entitled to his costs as ordered in the lower Court's judgment, but in the light of the defence taken up by defendants 1 and 2, in which we find a definite element of impropriety and unfairness both to the plaintiffs and to defendant 3, we think that they are not entitled to any order for costs against the plaintiffs.

S.G./R.K. *Appeal dismissed.*

A. I. R. 1939 Oudh 207

HAMILTON J.

Sunder Singh and others — Appellants.

v.

Emperor.

Criminal Appeal No. 45 of 1939, Decided on 20th May 1939, against order of Sess. Judge, Barabanki, D/- 19th January 1939.

(a) Penal Code (1860), S. 325—Several persons beating another — Several blows inflicted out of which some proving fatal—Lines on which to proceed in deciding case stated—If neither knowledge nor common intention of causing death are proved and person who inflicted fatal blow is not known, all persons are guilty under Section 325.

When a number of assailants inflict lathi blows on one person some of which blows are fatal and some of which are not, the first thing to be ascertained is whether the person who dealt the fatal blow, be he identified or not, had such intention as constituted his action "culpable homicide" or "murder" or had only such knowledge as constituted his offence "culpable homicide" or "murder". If the Court finds that the person who gave the fatal blow had such intention, the next step is to see whether that intention was shared by the co-assailants or not. Where neither intention nor knowledge is established nor is it known who inflicted the fatal blow, then all the assailants are guilty of an offence under Sec. 325 : *A I R 1939 Oudh 49 and 17 Lah 536, Expl.; A I R 1934 Oudh 499, Ref.* [P 208 C 2 ; P 209 C 1, 2]

(b) Penal Code (1860), S. 34—Knowledge.

Section 34 is restricted to common intention and does not embrace any knowledge. [P 209 C 1]

(c) Penal Code (1860), Secs. 299 and 300 — Mere beating person after he has fallen down is not enough to prove intention to cause death unless other factors are also considered.

To beat a person after he has fallen down does not necessarily prove the intention of causing his death. Certain factors will have to be considered such as for instance the number of blows, the nature of those blows and the parts of the body on which those blows have been inflicted. [P 209 C 1]

R. F. Bahadurji — *for Appellants.*
Asst. Govt. Advocate — *for the Crown.*

Judgment. — This is an appeal by four persons Sunder Singh, Ratipal Singh, Razzaq Bakhsh Singh and Laley Singh. The prosecution case is that they pursued Chandrika and Lachhmi Prasad on the roof of the former and beat them with the result that Chandrika received five injuries including two contused wounds on the head and he died from fractures of the right parietal and temporal bones. The defence case, on the other hand, is that the beating took place on the wall of the house next to that of Chandrika Prasad Singh, that is to say, Chandrika Prasad Singh was the assailant and the appellants acted in

self-defence. In support of this story witnesses were produced who claimed that they had seen and heard the occurrence from under a certain tree. The learned Sessions Judge went to the locality and found that from that tree one could neither hear nor see what took place on this roof next door to that of Chandrika Prasad Singh. The evidence of these defence witnesses is therefore false. Further the Sub-Inspector went on to the two roofs and found that there was blood on the roof of Chandrika Prasad Singh and not on the adjoining roof which makes it quite clear that it was not Chandrika Prasad Singh who went on to the adjoining roof to beat anyone, but the appellants went on the roof of Chandrika Prasad Singh and beat him. They had no right to do so for they went purely in order to beat Chandrika Prasad Singh and therefore they were not acting in self-defence. The learned Judge has referred to a decision of this Court reported in 1939 O W N 7[1] and to a decision reported in 17 Lah 536.[2] The learned Judge says that his impression was that when several persons attacked a man with lathis and knocked him down and after he fell down on the ground they belaboured him with lathis and he died, they were guilty of murder as held in 11 O W N 1309[3] and it made no difference if it could not be ascertained which assailant struck the fatal blow as held in the case reported in 17 Lah 536.[2] He then stated that in the case reported in 1939 O W N 7,[1] four assailants lay in ambush for one person and when he passed they sprang up from their hiding and attacked him with lathis giving two lathi blows on the head, one of which fractured his skull, and when he fell down they gave him 12 blows and the man died, but nevertheless they were found guilty under S. 325, Penal Code, only, and they were awarded five years' rigorous imprisonment. On this ground the learned Judge held that in the present case the accused were guilty under S. 325, Penal Code.

The learned Judge appears to have misunderstood the decision reported in 1939 O W N 7.[1] It was found there that death had been caused by a single blow with a lathi and the other injuries found on the body of the deceased did not indicate a determination to beat the deceased to death such as is indicated in many cases. Consequently, it was not possible to hold that death was caused by doing an act with the intention of causing death or with the intention of causing such bodily injury as was likely to cause death, but it might be held that death was caused by the doing of an act with the knowledge that by such act the person who did it was likely to cause death. This decision in no way alters the law as understood in this Province. When a number of assailants inflict lathi blows on one person some of which blows are fatal and some of which are not, the first thing to do is to see whether the assailant who has inflicted the fatal blow is guilty of murder or not. Under Sec. 299, Penal Code, a person commits an offence of culpable homicide by doing an act : (1) with the intention of causing death, or (2) with the intention of causing such bodily injury as is likely to cause death, or (3) with neither intention, but with the knowledge that he is likely by such act to cause death. The offence of culpable homicide becomes murder under S. 300, I. P. C., if the act by which death is caused is done, (1) with the intention of causing death, or (2) with the intention of causing such bodily injury as the offender knows to be likely to cause death, or (3) with the intention of causing bodily injury and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or (4) if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid. Under Sec. 34 I. P. C., when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

A common intention is an intention shared by the person who has caused death and by the other assailants who did not themselves cause death. If the act which caused death is neither murder nor culpable homicide because the person who dealt that blow did not have such intention as is specified under Ss. 299 or 300, I. P. C., but only the knowledge which is specified in either of these two sections, there is no

1. Zahid Khan v. Emperor, (1939) 26 A I R Oudh 49=179 I C 338=40 Cr L J 187=1939 O W N 7.
2. Chanan v. Emperor, (1935) 17 Lah 536 = 166 I C 1005=38 P L R 909=38 Cr L J 342.
3. Raj Bahadur v. Emperor, (1934) 21 A I R Oudh 499=1934 Cr C 1379=152 I C 103=35 Cr L J 1496=11 O W N 1309.

intention which can be shared by all the assailants who did not strike the fatal blow and, therefore, S. 34 cannot apply. The knowledge referred to in Ss. 299 and 300 is personal knowledge of the person who struck the blow and it is difficult to see how it can be shared by his co-assailants, but in any case, S. 34 is restricted to common intention and does not embrace any knowledge. It is true, in 1939 O W N 7,[1] the assailants lay in ambush for the person who was killed, but one can lie in ambush merely to cause grievous or even simple hurt as well as to kill a person. To beat a person after he has fallen down does not necessarily prove the intention of causing his death. Certain factors will have to be considered such as for instance the number of blows, the nature of those blows and the parts of the body on which those blows have been inflicted. In that case taking all the facts into consideration together, the Bench of this Court held that it could not be said that the actual striker of the fatal blow had the intention which constituted murder but had only the knowledge which constituted murder or culpable homicide. Therefore, as the particular assailant who caused the fatal blow was not identified no one could be convicted either of murder or of culpable homicide. In the Lahore case, on the other hand, it was found that on the facts of that case several persons joined together to murder another and did murder him under such circumstances that there would be no doubt that the intention was to murder, therefore, each ought to receive the sentence of death and from the point of view of sentence it did not make the slightest difference that it had not been ascertained which of the accused actually struck the fatal blow. This therefore, was a very different case from 1939 O W N 7,[1] for it was here found that there was a common intention of murder and in the Oudh case it was found that there was no common intention of murder because it was not proved that even the person who dealt the fatal blow had the common intention to murder.

The legal position has in no way been altered by this recent Oudh case. On the facts of the case which a Court is trying it must come to the conclusion whether the person who dealt the fatal blow, be he identified or not, had such intention as constituted his action "culpable homicide" or "murder" or had only such knowledge as constituted his offence "culpable homicide" or "murder." If the Court finds that the person who gave the fatal blow had such intention, the next step is to see whether that intention was shared by the co-assailants or not. To give a very simple instance: if a number of persons had agreed to give a light beating to a certain person and one of the assailants in spite of that agreement deliberately killed the person attacked, his co-assailants would not be guilty of culpable homicide or murder because the intention of the person who inflicted the blow was not shared by the co-assailants; in fact it was contrary to the agreement reached. The law will apply to all cases when there are a number of assailants and all the blows are not fatal, but it is highly unlikely that the facts will be exactly the same in any two cases and it is for the Court to consider all the facts in the case and to come to a decision whether there was intent on the part of the person who dealt the fatal blow which made the offence culpable homicide or murder and whether that intent, if there was any, was common to all the assailants or not. The learned Judges who decided the case reported in 1939 O W N 7[1] stated that death had been caused by a single blow and the other injuries found on the body of the deceased did not indicate a determination to beat the deceased to death such as is indicated in many cases. As regards the law therefore there was nothing novel in the view taken by the learned Judges who decided the case and as regards the facts the decision was based on the facts of the particular case which they themselves have stated to be different from those of many other cases. In the present case it is impossible for me to say from the judgment of the learned Sessions Judge whether there was common intention to cause the death of Chandrika Prasad Singh or whether the person who inflicted the fatal blow committed murder because of his intention or of his knowledge. As it is not known who inflicted the fatal blow and it is not shown that there was a common intent, it is impossible for me to hold that the convictions under S. 325 are incorrect. No question therefore of issuing notice for enhancement arises. As regards the facts, undoubtedly there was at least a common intent of causing grievous hurt and the convictions under S. 325 were justified and the sentences of five years' rigorous imprisonment are not excessive. The appeal is therefore dismissed.

N.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Oudh 210

HAMILTON J.

Ram Din and another — Plaintiffs — Appellants.

v.

Thakur Balbhaddar Singh and another — Defendants — Respondents.

Second Appeals Nos. 467 and 468 of 1936, Decided on 20th February 1939, against order of Civil Judge, Partabgarh, D/- 10th October 1936.

(a) Agra Tenancy Act (3 of 1926), S. 197—Groves in Aichaka village are not transferable.

In the village of Aichaka grove-holders are not allowed to transfer their groves. [P 210 C 1]

(b) Wazib-ul-arz— Evidentiary value of — Custom—Wajib-ul-arz dated 1862 providing that groves were not transferable—No transfer taking place for 70 years—Two recent transfers held attempt to end existing custom that groves are not transferable and not the proof of non-existence of the custom.

Wazib-ul-arz which was said to have been dictated by the talukdar provided that grove-holders were not entitled to transfer their groves, and for about 70 years after the preparation of the wajib-ul-arz there were no transfers except two or three which took place recently:

Held that the recent transfers appeared to be an attempt to make an end of the existing custom rather than prove that the custom that groves were non-transferable never existed; and that the fact that the tenants did not sign the wajib-ul-arz which contained the entry relating to the custom was wholly immaterial: *Case law discussed.* [P 211 C 2; P 212 C 1, 2]

(c) Civil P. C. (1908), S. 100—Second Appeal—Question of law—Judge drawing wrong conclusions which in law could not be drawn —Second appeal lies.

In second appeal what has to be seen is not merely whether the decision arrived at by a Court is one of fact but whether in arriving at that decision the Court has committed an error in law or not; hence where the Judge draws wrong conclusions with regard to the existence of custom which in law could not be drawn, his decision is wrong in law, and second appeal lies against the same: *A I R 1917 P C 33, Rel. on.* [P 213 C 1]

H. Husain and H. H. Zaidi — *for Appellants.*

Radha Krishna and S. N. Srivastava —*for Respondents.*

Judgment.—These are appeals by plaintiffs against an appellate decision of the Civil Judge of Partabgarh. The plaintiffs' case is that in the village of Aichaka grove-holders were not allowed to transfer their groves, but the respondents had done this and possession, should, therefore, be given to the plaintiffs. The learned Civil Judge held that the wajib-ul-arz was dictated by the taluqdar himself and it did not record any well-established custom. He referred to 10 O W N 493[1] as regards this part of his argument and he then pointed out that there were a number of sale deeds as well as a decision of a Court where it was held that the alleged custom was not proved. It was held in 102 I C 626[2] that the general law in Oudh is that the interest of a grove-holder is transferable and there is no general custom to the contrary as distinguished from a village custom proved by the wajib-ul-arz or otherwise. This was repeated in 11 O W N 1365[3] and in both those cases the wajib-ul-arz contained no village custom but a custom which applied only to certain specific groves which did not include the groves which formed the subject-matter of those suits. 10 O W N 493[1] referred to the custom of exclusion of widows in the wajib-ul-arz and it was pointed out that the entry in the wajib-ul-arz was quite inconsistent with the entries in two exhibits and that there was no reliable evidence to prove any instance in which the custom pleaded was recognized. The part of this decision quoted by the learned Civil Judge runs as follows:

There is no class of evidence which is more likely to vary in value according to circumstances than that of the wajib-ul-arz where from internal evidence it seems probable that the entries recorded connote the views of individuals as to the practice that they would wish to see prevailing rather than the ascertained fact of a well-established custom; it is proper to attach weight to the fact that no evidence at all was forthcoming of any instance in which the alleged custom had been observed.

This part of the decision in 10 O W N 493[1] was itself a quotation from 32 All 363,[4] a decision of their Lordships of the Privy Council in a case where family custom was pleaded as superseding the Mitakshara law: it had nothing to do with groves. The learned Civil Judge has referred to 7 O W N 333,[5] a decision of a single Judge of this Court, as regards the evidentiary value of an entry in a wajib-ul-arz recording a custom restraining a tenant cultivator from selling or removing manure and rubbish. The learned Judge there re-

1. Jagdamba Bux Singh v. Badri Pratab Singh, (1933) 20 A I R Oudh 322=145 I C 352=8 Luck 586=10 O W N 493.
2. Ali Mohammad Khan v. Madari Shah (1927) 14 A I R Oudh 297=102 I C 626.
3. Bindeshuri Devi v. Sardar Khan, (1935) 22 A I R Oudh 208=153 I C 818=11 O W N 1365.
4. Anant Singh v. Durga Singh, (1910) 32 All 363=6 I C 787=30 I A 191=7 A L J 704 (PC).
5. Krishna Kumar v. Manzoor Ali, (1930) 17 A I R Oudh 330=123 I C 51=7 O W N 333.

ferred to 5 O W N 252,[6] a decision of a Bench of this Court, as to the evidentiary value of a wajib-ul-arz where it was stated that it was the duty of certain tenants to give the services of a pair of bullocks for two days in the year and a bundle of fodder and one of bhusha yearly. It was stated that when, as was the case there, it was distinctly to the interest of the zamindars to record the existence of cultivators' liabilities and where the cultivators had no opportunity of stating their experience the value of such an entry was necessarily not so great as in a case where the zamindars were recording the existence of customs from which they themselves may suffer. The liabilities of the tenants according to the wajib-ul-arz were I think, somewhat unusual, while the custom preventing transfer of groves is to be found recorded in a very large number of wajib-ul-arz in Oudh. That principle was followed in 7 O W N 333[5] as regards the limitation of rights of tenants as regards manure and rubbish ; and the same learned Judge of this Court in 1935 O W N 928[7] referred to his earlier decision. This was a case in which it was alleged that there was a custom making houses of residents in a bazar non-transferable. The wajib-ul-arz was silent about the right to transfer houses or the absence of such a right, so the question of the evidentiary value of the contents of the wajib-ul-arz did not really arise.

On the other hand, there are two decisions (7 O W N 503[8] and 7 O W N 967[9]) which, in the opinion of the learned Civil Judge, have no application to the facts of the present case. 7 O W N 503[8] was a Bench case where it was held that where a wajib-ul-arz of a particular village records a custom to the effect that the tenants of the village resident therein cannot remove manure therefrom, the custom is not so unreasonable as cannot be enforced in law. The Bench added that it appeared to them that the plaintiff's case did not rest on the existence of custom alone but could also be supported on the broad ground that tenants who acquired agricultural holdings in the zamindar's village and who also acquired lands on which they built their houses for residence must be deemed to have acquired those rights with all the incidents appertaining to such rights and one of the incidents was their disability to remove the manure from one village to another. In this view of the case, it was wholly immaterial whehter they signed the wajib-ul-arz in which the entry relating to the custom was made or not. It should be noticed that though earlier decisions were not referred to specifically in this decision, those earlier decisions appear to have been quoted because there evidently had been an argument to the effect that the wajib-ul-arz had not been signed by the tenants. 7 O W N 967[9] is a case where the wajib-ul-arz of a particular village conferred no right on the grove-holder to plant new trees without permission of the owner of the soil. It would appear that no evidence other than the wajib-ul-arz was produced by the plaintiff. The Courts below had refused to give effect to the terms of the wajib-ul-arz on the ground that there was no evidence that those terms were agreed to by the grove holders of the village or that they were since acted upon, and the Bench held that neither of those two grounds were valid in law. The effect of the entry in the wajib-ul-arz was to fix the terms entered therein as incident of the tenure of a grove-holder in the village and as such it applied to all grove-holders who accepted or maintained such tenures in the soil belonging to the owner of the village. It was further held that the argument that the condition in the wajib-ul-arz was not shown to have been acted upon was vague. The real question was whether it had been departed from with the consent or acquiescence of the landlord. There was no evidence of such consent or acquiescence, but that view of the case in the opinion of the learned Judges did not affect the merits of the plaintiff's claim for he might choose to object in one instance and may elect not to in another. Reference was made to 7 O W N 503[8] as being the correct view in cases of this nature.

The learned Civil Judge was of opinion that these two rulings had no application to the facts of the present case because the question whether a wajib-ul-arz which recorded a custom prejudicial to the interest of the persons who were no parties to it could carry the same weight as other wajib-ul-arz

6. Narpat v. Mohammad Rafi, (1928) 15 A I R Oudh 265=112 I C 10=3 Luck 478=5 O W N 252.
7. Shyama Kumar Singh v. Sat Narain, (1935) 22 A I R Oudh 459 =157 I C 654=1935 O W N 928=11 Luck 397.
8. Parmeshur Din v. Bishambhar Singh, (1930) 17 A I R Oudh 361=126 I C 703= 7 O W N 503.
9. Krishna Pal Singh v. Chhabraja, (1931) 18 A I R Oudh 11=132 I C 239=7 O W N 967.

was not considered. It is true that prior cases were not specifically referred to, but as I have shown in quoting from these judgments the point of tenants' signing or not signing the wajib-ul-arz was considered. This last case was a case about a grove though the custom was not the same, and I find it impossible to agree with the learned Civil Judge that these two cases have not at least as much application to the facts of the present case as the other he has quoted. These two cases are the latest Bench cases and they should therefore be followed in preference to earlier Bench cases or to cases decided by a single Judge of this Court.

The next point is the instance referred to by the learned Civil Judge as disproving the correctness of the contents of the wajib-ul-arz. The wajib-ul-arz applied to the whole of taluqa Tarwal in which this village is situated which taluqa is the property of the Raja of Partabgarh who is a big land holder. Presumably therefore, the taluqa is a large one but no evidence has been pointed out to me to show how many villages were in this taluqa which is a very material point when the number of instances of transfer is concerned. The relevant portions of the wajib-ul-arz are that the groves granted by the taluqdar conferred on the grantee the right to take fruit so long as the grantee or his heir lives in the village. Mahwa and Kathal fruits are divided equally between the talukdar and the grove-holder. A tree fallen owing to wind or old age goes to the talukdar but with his permission can be used by a riaya. In groves in the possession of tenants they have the right to cut wood for house repairs or for house building so long as they live in the village but they are not allowed to transfer the groves and shifting from one village in the taluka to another does not maintain any right in the grove in the original village and it goes to the talukdar. Without the permission of the talukdar new trees cannot be planted. This last condition is exactly the same condition as was the subject in 7 O W N 967.[9]

A talukdar dictating a wajib-ul-arz about his taluka may be correctly stating that a certain custom extends over the whole taluka or it may exist in no part of the taluka or it may exist in some part of the taluka but not in other parts, and it is not therefore sufficient to consider merely the occurrence, instances of transfers especially, when it is not known of how many villages the taluka consists. In this particular village there are only three instances of transfers, Exs. A-4 and A-5, the first dated 1st December 1933, and the second dated 15th December 1933. The transferors were of the same caste and sub-caste being Chhattari Raikwars and for all we know they may have been close relations. This wajib-ul-arz was drawn up in about 1862 so that for 70 years there had been no transfers and these two recent transfers would rather appear to be an attempt to make an end of an existing custom rather than prove that the custom never existed. There had been another transfer which gave rise to a suit by the Court of Wards as representing the Partabgarh estate in 1935 which was decided against the Court of Wards as the Courts relied on 7 O W N 333[5] and 1935 O W N 928,[7] those single Judge cases to which I have referred above. In village Dhima there had been about half a dozen transfers the earliest of them being in 1918 and the latest in 1928. If they established that the custom has never existed in Dhima or has been given up, this is no reason for holding that the custom never existed or has been given up in Aichaka.

There are then transfers in three more villages. In village Parasrampur two, dated 19th October 1895 and one dated 11th February 1897, all by Brahman Tewaris: In village Sarai Balu there were two, one dated 22nd September 1898 and the other 26th January 1915, and finally there was one in village Pura Basawan dated 26th April 1926. It will be noticed that the earliest of these transfers is at least fifty years after the wajib-ul-arz was drawn up and if these transfers show anything they show rather that the custom is being disregarded now but there are no instances of transfers very soon after the wajib-ul-arz was prepared which can enable to hold that the entry in the wajib-ul-arz was incorrect. I must again repeat that these transfers including this village and village Dhima where about half the total number of transfers occurred, occurred in five villages and there is nothing to show how many villages there were in this taluka nor how many groves there were in each of these villages so that it is impossible to say that the proportion of these transfers to the number of groves is such that one can hold the contents of the wajib-ul-arz to be incorrect. The learned Civil Judge has not found that there once was a custom which has been given up but that there was no custom at all. In my opinion, his decision is incorrect.

It has been argued that this decision as to the absence of custom is one of fact which cannot be agitated in this second appeal. In 44 I A 147[10] at p. 158, their Lordships of the Privy Council have stated that

> questions of the existence of an ancient custom are generally questions of mixed law and fact; the Judge first finding what were the things actually done in alleged pursuance of custom, and then determining whether these facts so found satisfy the requirements of the law. This latter is a question of law — not fact.

What has to be seen is not merely whether the decision arrived at by a Court is one of fact but whether in arriving at that decision the Court has committed an error in law or not: for instance, if the decision of a Court that certain custom existed was based on the acceptance of evidence which was inadmissible, there can be no doubt that that decision could be questioned in second appeal. On the other hand, if the decision was based because the Judge believed the statements of three witnesses for one side and disbelieved the evidence of three witnesses on the other, his decision could not be questioned in second appeal. In the present case he has really failed to apply the decisions of this Court reported in 7 O W N 503[8] and 7 O W N 967,[9] and has drawn conclusions from the instances of transfers which in my opinion in law could not be drawn. I therefore find that in the present case a second appeal lay and I have found that his decision was wrong in law. I therefore allow these appeals Nos. 467 and 468 of 1936 with costs throughout.

S.G./R.K. *Appeals allowed.*

10. Palaniappa Chetty v. Devasikamony Pandara Sannadhi, (1917) 4 A I R P C 33=39 I C 722 =44 I A 147=40 Mad 709 (P C).

A. I. R. 1939 Oudh 213

THOMAS C. J. AND ZIAUL HASAN J.

Mohammad Zia Ullah Khan — Appellant.

v.

Rafiq Mohammad Khan and others — Respondents.

First Appeals Nos. 63 and 83 of 1936, Decided on 11th May 1939, against order of Civil Judge, Kheri, D/- 30th May 1936.

(a) Expert evidence — Value of — Handwriting experts produced by both parties — Each supporting case of party calling him—Value of their evidence.

When handwriting experts have been produced by both the parties their evidence is of little help if each of them supports the case of the party who has called him and each gives technical reasons in support of his opinion. [P 219 C 1]

(b) Mahomedan Law—Will— Taluqdari property cannot be taken into consideration in determining share of assets of testator.

As the Oudh Estates Act has laid down specific rules for devolution of taluqdari property and has in this respect displaced the Muhammadan law, such property cannot be taken into consideration in determining a share of the assets of a Muhammadan testator. [P 221 C 1]

(c) Succession Act (1925), Ss. 72 and 71 — Case of unprivileged will is governed by S. 71 and not by S. 72.

Where a will is not a privileged will, S. 72 cannot apply to it. The case of that will is governed by S. 71. [P 221 C 1, 2]

(d) Will—Attestation—Evidence of attesting witnesses doubtful — Court may consider circumstances of case and may disregard testimony of attesting witnesses — Presumption of due execution and attestation will be made in case of will which on face of it is duly executed.

When the evidence of the attesting witnesses is vague, doubtful or even conflicting upon some material point, the Court may take into consideration the circumstances of the case and judge from them collectively whether the requirements of the statute were complied with; in other words, the Court may, on consideration of the other evidence or of the whole circumstances of the case, come to the conclusion that their recollection is at fault, that their evidence is of a suspicious character or that they are wilfully misleading the Court, and accordingly disregard their testimony and pronounce in favour of the will. Every presumption will be made in favour of due execution and attestation in the case of a will, regular on the face of it and apparently on the face of it duly executed : *A I R 1916 Cal 374, Rel. on.* [P 222 C 1]

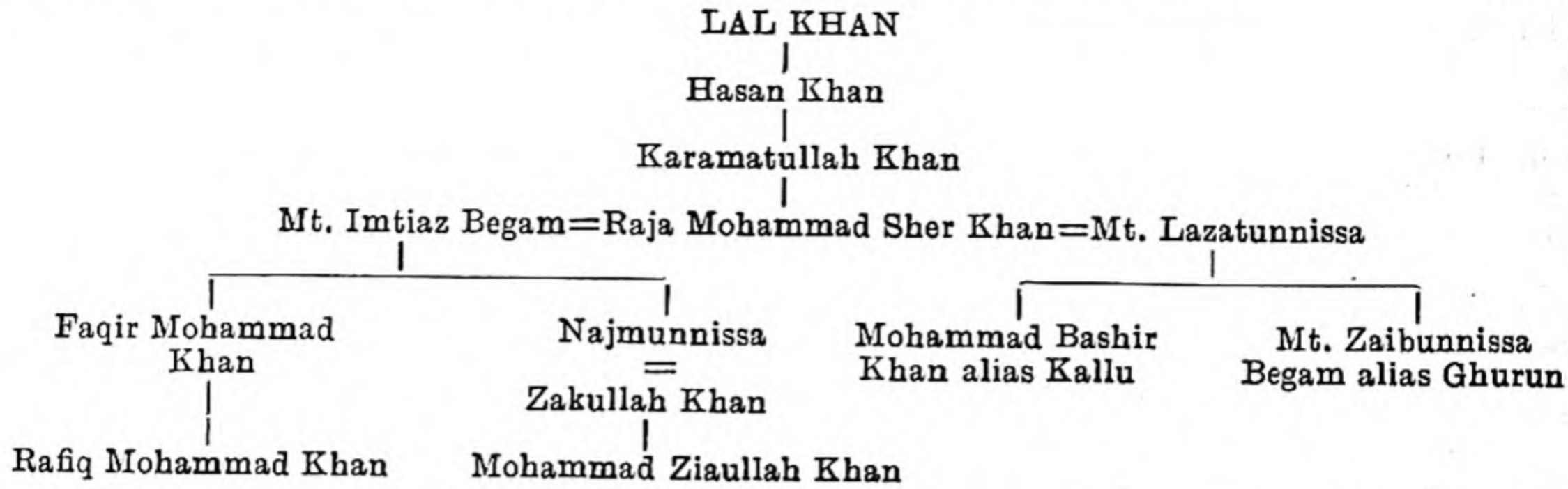
(e) Attestation — No presumption of due attestation can be made from registration endorsement.

No presumption of due attestation of document can be made from the endorsement made on the document by the Sub-Registrar to the effect that the executant acknowledged before him that he had executed the document : *A I R 1939 P C 117, Rel. on.* [P 222 C 2]

Ghulam Hasan, Ahtishan Ali and I. M. Husain—*for Appellant.*

Niamat Ullah, and M. Wasim, M. H. Qidwai and K. M. Shameem — *for Respondents 1 and 2, respectively.*

Judgment. — These appeals arise out of two suits filed in the Court of the Civil Judge of Kheri, one (that is, No. 15 of 1935) by Rafiq Mohammad Khan, respondent in both the appeals, and the other (that is, No. 30 of 1935) by Rafiq Mohammad Khan's father Faqir Mohammad Khan, appellant in Appeal No. 83. The dispute in both these suits relates to the property left by the late taluqdar of Raipur, Mohammad Sher Khan, who died on 15th June 1934 and whose relationship with the parties will appear from the following pedigree:



It will be seen that while Faqir Mohammad Khan, plaintiff appellant in Appeal No. 83, is son of the late taluqdar Rafiq Mohammad Khan, plaintiff-respondent in Appeal No. 63, is his grandson and Ziaullah Khan, appellant in the same appeal and respondent in Appeal No. 83, is his daughter's son. This litigation is due to Mohammad Sher Khan's habit of executing wills and revoking them in quick succession. It is admitted or proved that he executed the following wills. (1) A will in favour of his son Faqir Mohammad Khan executed on 1st September 1901. This will is not on the record but its execution by Mohammad Sher Khan is not disputed. (2) A will in favour of his son Mohammad Shabbir Khan executed on 14th July 1913. This will is also not on the record. (3) A will in favour of Ziaullah Khan (Ex. A-113) executed on 7th December 1920. (4) A will again executed in favour of Ziaullah Khan on 13th November 1924 (Ex. A-1) revoking all the previous wills. (5) A will in favour of Rafiq Mohammad Khan and Ziaullah Khan both, executed on 17th October 1929 (Ex. 1 of Suit No. 15 of 1935).

Besides the above, Faqir Mohammad Khan relies on another will dated 6th July 1930 (Ex. 30). On the death of Sher Mohammad Khan his estate was claimed in the mutation Court by the parties to the present appeals. Ziaullah Khan relied on the wills of 7th December 1920 and 13th November 1924, while Rafiq Mohammad Khan claimed a ten annas share on the strength of the will dated 17th October 1929. Faqir Mohammad Khan claimed the entire estate as the eldest son of the late taluqdar. He did not claim on the basis of the will of 6th July 1930, as according to him he was then ignorant of the existence of that will. The will is said to have been discovered on 16th May 1935, in circumstances that will be mentioned later on. The mutation Court by its order dated 21st November 1934 (Ex. A-80) held the will of 13th November 1924 in favour of Ziaullah Khan to be valid and hence rejecting the claims of Faqir Mohammad Khan and Rafiq Mohammad Khan ordered mutation in favour of Ziaullah Khan. Thereupon Suit No. 15 of 1935 was filed by Rafiq Mohammad Khan under the will of 17th October 1929, for a ten annas share in the property left by Mohammad Sher Khan as the will, Ex. 1 gave a ten annas share of the taluqdar's entire property to him and the remaining six annas to Ziaullah Khan. The suit was originally brought against Ziaullah Khan alone but Faqir Mohammad Khan was subsequently made a defendant to the suit on the application of Ziaullah Khan.

Faqir Mohammad Khan brought Suit No. 30 of 1935 on 25th May 1935, on the strength of the alleged will, Ex. 30 of 6th July 1930, and claimed the entire estate. He mentioned the property left by the late taluqdar in seven lists, that is, lists A to G. List A relates to the taluqdari property, list B to non-taluqdari immovable property, list C to "goods of the house situated at Lakhimpur," list D to cash and gold mohurs and ornaments, list E to utensils of silver, list F to cattle, carts, etc., and list G to miscellaneous articles. As mutation in respect of immovable property had been made in favour of Ziaullah Khan, he claimed possession of the properties mentioned in lists A and B. With regard to properties of lists C to G he only wanted a declaration of his ownership as with the exception of list C property which he said was given in the possession of Ziaullah Khan's father, the other properties were in the possession of the Tahsildar of Mohamdi under orders of the District Judge. To this suit, besides Ziaullah Khan, Rafiq Mohammad Khan was also made a party as he claimed a ten annas share on the basis of the will of 17th October 1929. The chief contest in both the suits was that of Ziaullah Khan who denied the

wills of 17th October 1929 and 6th July 1930 and claimed the entire estate on the wills of 7th December 1920 and 13th November 1924. He alleged that Mohammad Sher Khan was very displeased with both his sons, Faqir Mohammad Khan and Mohammad Shabbir Khan whom he disinherited by deeds dated 11th February 1914 (Ex. A.111) and 9th May 1919 (Ex. A.112) respectively, that Mohammad Sher Khan had turned out both his sons and adopted him (contesting defendant) as his son, that the taluqdar was greatly attached to him and eventually made him the sole legatee of his entire property. With regard to the will of 17th October 1929, he did not admit that it was executed by Mohammad Sher Khan and further contended that even if it was executed by the late taluqdar it must have been brought about by the undue influence of Rafiq Mohammad Khan and his father and is therefore illegal and void. His further plea was that the will set up by Rafiq Mohammad Khan "not having come into force under the Taluqdari Act" is legally unenforceable. He also pleaded that the wills in his favour were not in any case cancelled by the will of 17th October 1929.

As regards the will of 6th July 1930, set up by Faqir Mohammad Khan, Ziaullah Khan's contention is that it is a forged document and has been prepared in collusion with his enemies. He also alleged that the family of Mohammad Sher Khan is governed by Hindu law and custom and that for this reason also Faqir Mohammad Khan has no right in the taluqdari or non-taluqdari left by him. Further pleadings of the parties will appear from the following issues which were framed in both the suits:

1. Is the will dated 6th July 1930 genuine and valid and was it duly executed and attested ?

2. Was Raja Mohammad Sher Khan of sound disposing mind at the time when he executed the above will ?

3. Did Mohammad Sher Khan duly execute the wills dated 13th November 1924 and 7th December 1920 in favour of Ziaullah Khan defendant 1 ?

3a. Were they executed by reason of fraud, undue influence, coercion, importunity and misrepresentation of Zakaullah Khan, father of defendant 1 ?

4a. Did Mohammad Sher Khan duly execute the will dated 17th October 1929 and is it valid and genuine? (b) If so was it revoked subsequently by Mohammad Sher Khan as alleged in the pleadings ? (c) Does the aforesaid document dated 17th October 1929, revoke the previous wills dated 13th November 1924 and 7th December 1920 in favour of Ziaullah Khan ?

5. Is the plaintiff the sole heir of Raja Mohammad Sher Khan under the Mahomedan law as modified by custom of single heir succession to all the properties entered in lists B to G of the plaint ?

6. Was Mohammad Sher Khan competent to make a will of the non-taluqdari property moveable and immovable in favour of any of the defendants and if so to what extent ?

6a. Was Mohammad Sher Khan governed by Hindu law as alleged ?

7. Is the suit bad for non-joinder of parties ?

8. Have the non-taluqdari properties merged into the taluqdari property ?

9. What is the character of the properties mentioned in lists B to G ?

10. Is defendant 1 entitled to special costs under Section 35-A ?

11. To what relief, if any, is the plaintiff entitled ?

12. Does the will of 6th July 1930 revoke the previous will ?

13. Is the plaintiff bound to pay the court-fees separately on the Raipur house ?

On issue 1 the learned Civil Judge held that though the late Raja had been reconciled to his son Faqir Mohammad Khan about the year 1929, yet the execution of the will by him has not been proved. On issue 2 it was held that at the time when the will of 6th July 1930 is said to have been executed by Mohammad Sher Khan, the latter possessed a sound disposing mind. On issue 3 he held that the due execution by Mohammad Sher Khan of the will of 13th November 1924 has been proved but that the will of 7th December 1920 has not been proved. On issue 3 (a) his finding was that the will of 13th November 1924, was not executed by reason of any fraud, undue influence, coercion or misrepresentation by Zakaullah Khan, father of Ziaullah Khan. On issue 4 it was held that the will of 17th October 1929 was genuine and valid, that it was not revoked subsequently by the testator and that it being the last will of the Raja naturally revokes the previous wills of 1920 and 1924. Issue 5 was decided in favour of Faqir Mohammad Khan.

On issue 6 the learned Civil Judge held that Mohammad Sher Khan was competent to make a will of the non-taluqdari property to the extent of one-third. On issue 6 (a) it was held that Mohammad Sher Khan was not governed by Hindu law as alleged by Ziaullah Khan. Issue 7 was decided in the negative. The plea on which issue 8 was based was withdrawn by the counsel for the defendants and so no finding was given on it. On issue 9 it was held that the property mentioned in lists B to G of Faqir Mohammad Khan's plaint and incorporated in the decree was non-taluqdari property. On issue 10 Ziaullah Khan was held not entitled to special costs

under S. 35-A, Civil P. C. Issue 12 was decided in the negative and against Faqir Mohammad Khan. Issue 13 was decided in the negative and in favour of Faqir Mohammad Khan.

Lastly, on issue 11, it was held that Rafiq Mohammad Khan was entitled to a ten annas share in the taluqdari property under the will of 17th October 1929, that Faqir Mohammad Khan is not entitled to any share in the taluqdari property but was entitled to a two-thirds share in the property mentioned in lists B to G. Accordingly, Faqir Mohammad Khan's suit was decreed in respect of a two-thirds share in the properties of lists B to G of his plaint. The rest of his claim was dismissed. The suit of Rafiq Mohammad Khan was decreed to the extent of a ten annas share in respect of the taluqdari property detailed in list A and to the extent of five twenty-fourths in respect of the properties detailed in lists B to G. The rest of his claim was dismissed. Appeal No. 63 of 1936 has been filed by Ziaullah Khan against the decree passed in Rafiq Mohammad Khan's suit No. 15 of 1935 and appeal No. 83 of 1936 has been filed by Faqir Mohammad Khan against the part dismissal of his suit No. 30 of 1935.

We first take up the appeal of Faqir Mohammad Khan, No. 83 of 1936, in which the most important question is whether or not the will, Ex. 30, of 6th July 1930, was executed by Mohammad Sher Khan. Ziaullah Khan, defendant-respondent's case is not only that the will, Ex. 30 is not genuine but also that Faqir Mohammad Khan had so displeased his father that it was not likely that Mohammad Sher Khan should execute a will of his entire property in his favour. There is no doubt whatever, and there is overwhelming evidence to prove the fact, that Faqir Mohammad Khan had somehow or other, presumably by his conduct, rendered himself thoroughly hateful to his father. We have referred to the will of 1901 executed by Mohammad Sher Khan in favour of Faqir Mohammad Khan but in 1914 he executed an aqnama (Ex. A-111), disinheriting Faqir Mohammad Khan, in which he said :

> Whereas my son Faqir Mohammad Khan turned disobedient to me and crosses my will in spite of the fact that I have discharged all my paternal duties towards him in every way enjoined under the Shariat and orders of God and the Prophet ; firstly, I brought him up, secondly I got him educated; thirdly I married him in the best possible way. These were my duties towards my son and I provided him and his wife with all comforts and luxuries. Now at the instigation of his wife and other persons, he neglected to serve and obey me, and he caused all sorts of troubles to me owing to which I am very much displeased with him so he was very much admonished and advised on my behalf, but he did not mend his ways, nor has he any filial love left in him, nor have I got any hopes (of betterment) in him; rather it is said that he will continue to cause various sorts of troubles to me till the end of my borrowed life . . . . Accordingly under these circumstances I disown the abovementioned son from my sonship owing to his disobedience and neglect of services to the parents and also I do hereby agree and reduce to writing that he shall have no concern and interest in my moveable and immovable property, nor will there be any claim of any kind entertainable in the future.

In 1920 Mohammad Sher Khan executed a will (Ex. A-113) in favour of Ziaullah Khan in which referring to Faqir Mohammad Khan he said :

> I have already disinherited my son Faqir Mohammad Khan on 11th February 1914 and this will of mine is in conformity with the said aqnama. He has no right in the moveable and immovable properties and the taluqa nor shall he have any in future, neither he is nor shall he be entitled to inherit anything from me, and my heir and successor Mohammad Ziaullah Khan shall not grant any kind of guzara or concession to Faqir Mohammad Khan, nor shall the said Faqir Mohammad Khan be entitled to receive any.

In the will (Ex. A-1) executed by Mohammad Sher Khan in favour of Ziaullah Khan on 13th November 1924 he said :

> I, the executant, had executed a will on 5th December 1901 in favour of Faqir Mohammad Khan which I revoked on account of the fact that he is unworthy, possesses bad manners and loose character and is disobedient, as well as on account of the fact that the abovementioned person attempted several times to take my life but by the grace of God I narrowly escaped . . . . .

After this he executed the will of 17th October 1929 (Ex. 1 of suit No. 15) by which also Faqir Mohammad Khan was totally excluded and Rafiq Mohammad Khan and Ziaullah Khan were given ten annas and six annas shares respectively. Then we have the drafts of wills Exs. A-148 and A-87 in both of which occurs the following passage :

> Rafiq Mohammad Khan also like his father Faqir Mohammad Khan has proved to be quite unfit and disobedient. Both the father and the son, viz. Rafiq Mohammad Khan and Faqir Mohammad Khan, have proved to be so unfit and disobedient that I pray God that he should not give such children even to an enemy.

Both these drafts are in the handwriting of Zamin Husain Khan (D-1, W-7) who was mukhtar of Raja Mohammad Sher Khan for about nine years up to 1933 and he swears that he wrote them out at the instance of the Raja. The drafts bear no dates but from the fact that both of them

refer to the deed of gift (Ex. A.90) that Mohammad Sher Khan executed in favour of his wife, Mt. Munna Jan in respect of village Biluchpura on 27th March 1933, it is manifest that these drafts were made after that date. It was indeed admitted on behalf of Faqir Mohammad Khan that the relations between him and his father were highly strained for some time, but it was alleged that Mohammad Sher Khan was completely reconciled to his son Faqir Mohammad Khan about the year 1929. The learned Judge of the Court below accepted the plaintiff-appellant's contention and held that the will in question (Ex. 30) was a natural will owing to the reconciliation that he thought took place between the father and the son about 1929. He however held that the genuineness of the will had not been satisfactorily established. We are in perfect agreement with the latter finding but doubt very much the correctness of the former. (After examining certain documents their Lordships concluded.) We are therefore unable to uphold the finding of the learned Civil Judge that a complete reconciliation took place between Mohammad Sher Khan and the appellant and that therefore the will in question can be deemed to be a natural will.

We now come to the other finding of the learned Judge, namely that the genuineness of the will in question has not been proved. We have already said that we are in full agreement with this finding. The circumstances in which the will, Ex. 30 saw the light of day are rather interesting. We have already noted that Mohammad Sher Khan died on 15th June 1934. It appears that as there was a likelihood of a breach of the peace after his death the authorities began to take steps to prevent it while he was still living. It was on 14th June 1934 that the Sub-Divisional Officer of Mohamdi directed the Tahsildar by a written order (Ex. A.44) to go to Raipur to study the situation and make a report. The matter being brought to the notice of the Deputy Commissioner of Kheri the same day he ordered the Sub-Divisional Officer himself to go to Raipur (Ex. A.46). Accordingly, the Sub-Divisional Magistrate went to Raipur on the 15th June, and bound over the two claimants to Mohammad Sher Khan's property under Sec. 107, Criminal P. C. He also put all the moveable property of the taluqdar including cash under lock and seal. A sapurdnama (Ex. A.56) was executed by Faqir Mohammad Khan and it shows that one room and one Kothri in the zenana quarter and seven bakharis in the men's quarter were stored with property and locked and sealed. Exs. A.58 to A.61 are the lists of the various articles that were thus put in the rooms and locked.

We have already referred to the fact that mutation in respect of immovable properties was ordered by the Revenue Court to be made in favour of Ziaullah Khan. Ziaullah Khan made an application to the Revenue Court for possession of the moveables also (Ex. A.65). This application was granted in spite of Faqir Mohammad Khan's objections. Thereupon, on 24th November 1924, Faqir Mohammad Khan made an application to the District Judge, purporting to do so under S. 192, Succession Act, alleging that the Revenue Court had no jurisdiction to order delivery of moveables to Ziaullah Khan and praying that Ziaullah Khan be ordered not to take delivery of the moveables until disposal of his application by the District Judge. It was also prayed that an officer of the Court be deputed to make an inventory of the property and lock and seal it again. The learned District Judge directed that the Tahsildar of Mohamdi should make an inventory of the property and in pursuance of this order the list, Ex. A.95 was prepared by the Tahsildar on 15th January 1935, in the presence of Faqir Mohammad Khan and Zakaullah Khan. The kothri of the zenana house was also opened but again locked and sealed after the list of the contents being made. About four months later, Faqir Mohammad Khan put in an application before the District Judge praying that he might be allowed to inspect all the documents in the house at Raipur as he wanted to make an application under the new Debts Acts and it was necessary for him to know which of the properties was taluqdari property and which was non-taluqdari. On this application the learned Judge passed an order permitting Faqir Mohammad Khan to inspect the documents in the presence of the Tahsildar or some other responsible officer deputed by the Tahsildar. On 14th May 1935, the Tahsildar wrote a letter to Zakaullah Khan informing him of the District Judge's order and asking him to be present at the time of inspection by Faqir Mohammad Khan on 16th May 1935. This notice could not be served on Zakaullah Khan as he was said to have gone to Shahjehanpur. The Tahsil-

dar went to the late Raja's house at Raipur on 16th May 1935 and allowed Faqir Mohammad Khan to inspect the documents in his own presence and in that of Ali Shakir, supervisor qanungo, gola of Mr. Ishaq Husain, who was acting as counsel for Faqir Mohammad Khan, and of one Ahmad Husain. It was in the course of this inspection that the will in question was recovered along with certain other documents (Exs. 31 to 45) from an open box which was inside the kothri of the zenana house.

The defendants-respondents' case is that the will in question was surreptitiously put in the open box by Faqir Mohammad Khan either between 15th January and 16th May 1935, or in collusion with the Tahsildar on the latter date. It was said that Faqir Mohammad Khan, who admitted before the learned District Judge that he opened the lock of the room containing the cash and other valuables in order to save them from Zakaullah, was quite equal to opening the lock of the kothri particularly when the seal put on the lock of the kothri was only an ordinary seal containing one or two letters. It was further said that the application purporting to be under Sec. 192, Succession Act, could not lie as nobody had taken possession of any property or was threatening to take forcible possession of any property, and that in any case the application was only a subterfuge to give colour to the recovery of a forged document. In support of this allegation, it was pointed out that no application under the Debts Acts was ever presented by Faqir Mohammad Khan. Further, it was contended that Faqir Mohammad Khan as the eldest son of Mohammad Sher Khan could not have been ignorant of the different items of taluqdari and non-taluqdari property and in support of this contention it is pointed out that the list of properties filed by Faqir Mohammad along with his suit is identical with that filed by his son Rafiq Mohammad Khan with his plaint which has already been filed in Court when Faqir Mohammad Khan made the application to the District Judge on 13th May 1935. It was also urged that the order for inspection was obtained ex parte in the absence of Zakaullah Khan and that care was taken that inspection should be made behind the back of Zakaullah. On behalf of the plaintiff-appellant it was said that Ahmad Husain, who was one of the persons present at the time of the inspection, was zilledar of Zakaullah Khan. On behalf of the defendant-respondent, on the other hand, it is said that Ahmad Husain had no connexion with Zakaullah but was a creature of the Tahsildar by whom he was appointed zilledar of the late Raja's property when it was made qurq tahsil for default in payment of land revenue. In view of the strong reasons to be stated shortly which lead us to doubt the genuineness of the will in question, we do not consider it necessary to express any opinion on the contentions made on behalf of the defendants-respondents beyond saying that we agree with the learned Judge of the Court below that the circumstances in which the will was recovered are undoubtedly suspicious.

We now take up the question of the genuineness or otherwise of the will, Ex. 30. To begin with, it is very doubtful that Faqir Mohammad Khan had returned to Raipur when the will is said to have been executed in his favour. Faqir Mohammad Khan in his plaint (para. 7) stated that his father called him back to Raipur about eight years before his death, that is to say about 1926. His son Rafiq Mohammad Khan however in the replication filed to the written statement of Ziaullah Khan, defendant, stated in para. 17 that the late taluqdar called back Faqir Mohammad Khan and himself (Rafiq Mohammad Khan) five years before his death. Puttu Lal, the first witness produced by Faqir Mohammad Khan went a step further and stated that Faqir Mohammad Khan had been living with the Raja for nine or ten years before his death. The evidence of Mehdi Husain D-2, W-2, who was the late Raja's ahlmad from 1928 to 1932, on the other hand, stated that Faqir Mohammad Khan came to Raipur with his family only a short time before the witness left Raipur in 1932. Similarly, Irshadullah Khan, D-1, W-8, who is the late Raja's nephew (son of the Raja's wife's brother) and who pays a land revenue of Rs. 1000 states that Faqir Mohammad Khan came back to Raipur with his family only fifteen or twenty days before the death of Mohammad Sher Khan. We have no good reason to disbelieve the statements of Mehdi Husain and Irshadullah Khan particularly when the evidence on the point relied on on behalf of the plaintiff-appellant is discrepant.

Secondly it is difficult to understand how it was that the will in question was not discovered on 15th January 1935, when the Tahsildar drew up a list of the

clothes contained in the box in which the will was subsequently discovered. The list of the contents of this box is in great detail and it is very unlikely that if the will and the other documents were in that box on 15th January 1935 they should not have been discovered on that date when the clothes contained in the box were taken out one by one.

Thirdly, the recovery of the will from the kothri of the zenana house and Faqir Mohammad Khan's desire to inspect the contents of that kothri are in themselves suspicious, considering the fact that when the rooms were originally locked and sealed, papers were kept in the other room.

Fourthly, the signatures of the Raja on the will in question are not in the usual form in which he appears to have had the habit of signing all formal documents. From the documents on the record, it appears that he used to add the words "Taluqdar, Raipur" to his signature but on the will in question these words do not appear anywhere with his signatures. No doubt, as contended on behalf of the plaintiff appellant, the words "Taluqdar Raipur" could also be forged; but it is a matter of common experience that a forgerer tries to reduce his work to the minimum. Handwriting experts have been produced by both the parties but unfortunately their evidence is of little help as each of them supports the case of the party who has called him and each gives technical reasons in support of his opinion.

Fifthly, no draft of the will in question is forthcoming though Faqir Mohammad Khan in para. 7 of his plaint stated that this will was executed by Mohammad Sher Khan after obtaining legal advice. If this had really been so, it is but natural that the draft of the will prepared by the Raja's legal adviser should have been found in the Raja's papers.

Sixthly, the evidence of the two witnesses Puttu Lal, P. W. 1, and Mohammad Umar, P. W. 4, produced as attesting witnesses of the will, is not at all convincing and reliable. Puttu Lal was in the service of the late Raja and admitted that after the Raja's death he was in Faqir Mohammad Khan's service for some time. At first he stated that he served Faqir Mohammad Khan as zilladar for four or five months only after the Raja's death, but when he was confronted with the copy of a statement of his made in the Revenue Court on 13th May 1935, he had to admit that his statement as to the period during which he was in Faqir Mohammad Khan's service was not true and that as a matter of fact he was in Faqir Mohammad Khan's service up to June 1935. It is thus clear that Puttu Lal, who is also the scribe of the will, is not a very truthful or independent witness. Mohammad Umar poses as a friend of the Raja who attended all functions at the Raja's house but Puttu Lal states that Mohammed Umar was neither a relation nor a servant of the Raja and is not prepared to say that he was his friend. The witness himself admits that no other will was executed by the Raja in his presence nor did the Raja ever talk to him about his affairs. Further, what makes the evidence of these two witnesses wholly unreliable is the fact that both of them state that they never mentioned the execution of the will in question by the late Raja to Faqir Mohammad Khan in whose absence the will is said to have been executed and who professes to have been totally in the dark as to its existence before 16th May 1935, when it was recovered from the kothri of the zenana house. The witnesses' explanations that they did not mention the will to Faqir Mohammad Khan because the late Raja had enjoined them not to mention it to anybody, that from the fact that the will was not discovered soon after the death of the Raja, they concluded that it had been destroyed by the Raja or that they thought that if they disclosed the will they would be accused of causing discord in the family are obviously too absurd on the face of them to be accepted.

Seventhly, the fact that Exs. 44 and 45 were found along with the will in question renders the will very suspicious as these are documents which in our opinion could not have been got prepared by the Raja. Ex. 44 is a draft for cancellation of the deed of adoption of Ziaullah executed by the Raja on 22nd July 1924, and for revocation of the will of December 1920, made in favour of Ziaullah Khan. Ex. 45 purports to be a draft by which the deed of disinheritance of Faqir Mohammad Khan dated 11th February 1914 was intended to be revoked. Both these drafts are in the handwriting of Samiullah, a pleader, and as Ex. 44 refers to the deed of adoption of 22nd July 1924, but not to the will (Ex. A-1) of 13th November 1924, it can reasonably be presumed that these drafts were prepared between 22nd July and 13th November 1924, but at that period of time

Faqir Mohammad Khan was admittedly in the bad books of the Raja so that it is impossible to believe that at that time the Raja wanted either to cancel the deed of adoption and the will executed in favour of Ziaullah Khan or to revoke the deed of disinheritance executed by him with regard to Faqir Mohammad Khan. Further, Samiullah is a legal practitioner who was appearing in cases against Mohammad Sher Khan from 1920 right up to 1929 (as is proved by Exs. A.29 to A.43) and it is most unlikely that he should have been employed by the Raja in making drafts of documents for him. That the date of the will of December 1920 is given in Ex. 44 wrongly as 15th December instead of 7th December and that Ex. 44 is the only document in which the Raja purports to say that he was under the influence of his son-in-law Zakaullah Khan are also facts which lead us to a conclusion against the genuineness of Exs. 44 and 45.

Eighthly, the Raja appears to have been in the habit of making alterations from time to time not only in the drafts of wills got prepared by him but even in registered wills after registration. We find such alterations not only in Exs. A.86, A.87 and B.3 but also in the registered wills of 13th November 1924 (Ex. A.1) and 17th October 1929 (Ex. 1 of Suit No. 15). No alterations whatever appear in Ex. 30, the will in question, though by the drafts Exs. B.3, A.87 and A.148 he was again intending to disinherit Faqir Mohammad Khan.

Ninthly, the fact that in the drafts of wills just mentioned no reference whatever is made to the will in question though other wills have been specifically mentioned is also a point which goes strongly against the genuineness of the will.

Tenthly, it is very curious that the will in question is drawn up on two stamped papers of the value of Rs. 5 each, which, according to the endorsements made by the stamp vendor, were purchased by Mohammad Sher Khan for the purpose of executing a will. None of the other wills executed by Mohammad Sher Khan is on a stamped paper and no reason could be assigned on behalf of the plaintiff-appellant why the Raja who knew perfectly well that a will on an unstamped paper was quite legal and valid purchased the stamps for execution of this will. Further, if the Raja had really purchased these stamps in November 1928 as shown by the stamp vendor's endorsements, he would undoubtedly have used these stamps when he executed the will of 17th October 1929. It may be mentioned that according to the rules that were in force before February 1936, stamp vendors were not required to take the signatures or thumb impressions of those who purchased stamps from them, so that anybody could purchase a stamp on behalf and in the name of anybody else, and we should not be surprised if these two stamps were purchased by Faqir Mohammad Khan or somebody else at his instance in the name of the Raja, though the stamp vendor Bhagwati Prasad, P. W. 5, says that these stamps were purchased from him by the Raja himself — a statement which it is not easy to believe.

Eleventhly, all the wills executed by Mohammad Sher Khan were got registered by him but no good reason could be given for the will in question not being registered. The allegation that he wanted to keep the will a secret from Zakaullah does not at all appeal to us as we have already discredited the story of Mohammad Sher Khan being afraid of Zakaullah Khan and as Zakaullah, for aught that we know, made no fuss whatever when the will of 13th November 1924, in favour of his son was superseded by that of 17th October 1929. Even supposing that Mohammad Sher Khan desired that the will in question should not be known to Zakaullah or anybody else, that purpose could easily have been achieved by the will being deposited in a sealed cover in the office of the District Registrar.

Twelfthly, Faqir Mohammad Khan has not had the courage to come into the witness-box to swear to the genuineness of the will in question and to state the circumstances which led to its being executed by the late Raja. The fact that Zakaullah did not also choose to examine himself as a witness for the defendant is no reply to the objection raised on behalf of the defendant-respondent. The will in question was being propounded by Faqir Mohammad Khan and it lay on him to satisfy the Court of its genuineness.

Lastly, as the will was not produced in the mutation Court the plaintiff-appellant had perforce to say that he was not aware of its existence and that it was executed by his father without his knowledge, but this is an allegation which cannot be believed and for which no reason whatever could be given on his behalf. Indeed, in view of the fact that Mohammad Sher Khan had executed various documents in which he

complained of Faqir Mohammad Khan's conduct it was all the more natural for him to inform Faqir Mohammad Khan of his intending to execute or at least of having executed a will in his favour. For all the above reasons, we are of opinion that the will Ex. 30 cannot be held to be genuine and we confirm the lower Court's finding on this point.

The next argument addressed to us on behalf of the plaintiff-appellant was with regard to the extent of the share of non-talukdari property decreed in favour of Ziaullah Khan. It was argued that according to the Mahomedan law, a bequest in favour of a stranger was valid to the extent of one-third of the entire assets and that as the six-annas share of the talukdari property devised in favour of Ziaullah Khan was much more than one-third of the entire assets of the late Raja, Ziaullah Khan should get no share in the non-talukdari property. We however agree with the learned Judge of the Court below that as the Oudh Estates Act has laid down specific rules for devolution of talukdari property and has in this respect displaced the Mahomedan law such property cannot be taken into consideration in determining a share of the assets of a Mahomedan testator. We decide this point also against the plaintiff-appellant.

The next argument advanced on behalf of the plaintiff-appellant was that whether the will of 17th October 1929 be held to be validly executed and attested, as is the case for Rafiq Mohammad Khan and as held by the Court below, or whether it be held not to be duly attested as contended by the plaintiff-appellant, Faqir Mohammad Khan is entitled to the property of his father. It is argued that if the will of 1929 be held to be invalid for want of due attestation, the plaintiff-appellant comes in as legal heir of the Raja, the will being in any case sufficient to revoke the will of 1924. If, on the other hand, the will be held to be valid, it must be taken to have been cancelled by the Raja by making alterations in it.

Reliance is placed on Ss. 70 and 72, Succession Act, which have by S. 19, Oudh Estates Act, been made applicable to wills of talukdars. S. 70, Succession Act, deals with the revocation of unprivileged wills and codicils and S. 72 prescribes the manner in which a privileged will or codicil can be revoked. As the will of 1929 executed by Mohammad Sher Khan was not a privileged will, S. 72, Succession Act, cannot apply to it. The case of that will in our opinion is governed by S. 71 which lays down that no obliteration, interlineation or other alteration made in any unprivileged will after the execution thereof shall have any effect, except so far as the words or meaning of the will have been thereby rendered illegible or undiscernible, unless such alteration has been executed in like manner as hereinbefore is required for the execution of the will. As the alterations in the will of 1929 have not been made in the manner required by this Section the will cannot be said to have been affected by them. The proviso to the Section is not applicable as the alterations are not signed and attested. The learned counsel also relies on the case in 4 I A 228[1] in which their Lordships of the Privy Council considered a verbal authority given by a Hindu testator to a third party to destroy his will sufficient in law to constitute a revocation; but this case was decided by their Lordships on English law and as pointed out in 11 O C 102[2] neither S. 19, Oudh Estates Act, nor S. 57 (equivalent to present S. 70) Succession Act, was mentioned. We therefore decide this point also against the plaintiff-appellant. The result is that Faqir Mohammad Khan's Appeal No. 83 of 1936 fails and is hereby dismissed with costs.

We now take up Ziaullah Khan's Appeal No. 63 of 1936. The only point that arises in this appeal is whether or not the will of 17th October 1929 can be said to have been attested according to law. The will purports to have been attested by two witnesses, Mehdi Husain and Ramzan Khan. Both of them were produced by Rafiq Mohammad Khan; plaintiff Ramzan Khan is also the scribe of the will. Both these witnesses stated that neither the Raja signed the will in their presence nor did they sign it in the presence of the Raja. Ramzan Khan says that after he had scribed the will according to a draft given him by the Raja, a servant of the latter took it away from him and that he signed it at the place where he wrote it out. Mehdi Husain also stated that he signed the will at his house and that neither the Raja nor Ramzan Khan signed it in his presence. Another witness Mohammad Khan was examined by Faqir Mohammad Khan, defendant 2.

1. Maharajah Pertab Narain Singh v. Maharanee Subhao Kooer, (1877-78) 3 Cal 626=4 I A 228 =1 C L R 113 (P C).

2. Lachhman Singh v. Umrao Singh, (1908) 11 O C 102.

He stated that he was present in the registration office on 17th October 1929 as Tale Yar Khan had executed a sale deed in his favour and it was registered on the same day. He further stated that he saw the will in question being signed by the Raja and the attesting witnesses in each other's presence in the registration office. The learned Judge of the Court below relying partly on the evidence of this witness and partly on the circumstances of the case held that the will of 1929 was attested according to law. It is this finding that Ziaullah Khan, defendant-appellant, challenges before us and it is contended that Mohammad Khan's evidence should not be believed. We have been taken through his evidence and have not been very favourably impressed by it. We are of opinion however that the attesting witnesses are not speaking the truth when they deny that they and the Raja signed the will in each other's presence. In 20 C W N 192[3] their Lordships of the Judicial Committee said :

> The principle is well settled that when the evidence of the attesting witnesses is vague, doubtful or even conflicting upon some material point, the Court may take into consideration the circumstances of the case and judge from them collectively whether the requirements of the statute were complied with, in other words, the Court may, on consideration of the other evidence or of the whole circumstances of the case, come to the conclusion that their recollection is at fault, that their evidence is of a suspicious character or that they are wilfully misleading the Court, and accordingly disregard their testimony and pronounce in favour of the will ;

and further :

> Every presumption will be made in favour of due execution and attestation in the case of a will, regular on the face of it and apparently on the face of it duly executed.

In the present case the execution of the will by Mohammad Sher Khan is not seriously disputed and the will appears on the face of it to be duly executed and registered. We also note that Mohammad Sher Khan executed various other wills before executing the will of 1929. In the will of 13th November 1924 (Ex. A-1), he took the precaution of getting the attesting witnesses to make endorsement to the effect that he signed the will in their presence and they signed it in his. There can further be no doubt that he was executing the will willingly and of his own accord. In all these circumstances it is but reasonable to presume that he got the will attested according to law though the attesting witnesses now deny the fact untruthfully.

The learned counsel for the plaintiff-respondent further relied on the endorsement made on the will by the Sub-Registrar to the effect that Raja Mohammad Sher Khan acknowledged before him that he had executed the will. It was argued that by acknowledging execution of the document, the Raja acknowledged execution according to law and that under S. 60 (2), Registration Act, this endorsement is evidence that the fact mentioned in it occurred as mentioned therein. In view however of the recent pronouncement of their Lordships of the Privy Council in A I R 1939 P C 117[4] no presumption of due attestation can be made from the registration endorsement. Nevertheless, we entirely agree with the learned Judge of the Court below that the circumstances of the case fully justify a finding that the will of 17th October 1929 was validly executed and attested. The result is that we find no force in Ziaullah Khan's Appeal No. 63 of 1936 also and dismiss it with costs. The decrees of the Court below are affirmed in both the cases.

D.S./R.K. *Appeals dismissed.*

3. Brahmadar Tewari v. Chandan Bibi, (1916) 3 A I R Cal 374=34 I C 686=20 C W N 192.

4. Surendra Bahadur Singh v. Thakur Behari Singh, (1939) 26 A I R P C 117=181 I C 216 =I L R (1939) Kar 222.

A. I. R. 1939 Oudh 222

ZIAUL HASAN J.

Shiv Narain and another — Accused.

v.

Emperor.

Criminal Ref. No. 8 of 1939, Decided on 4th April 1939, reference made by Sess. Judge, Sitapur, D/- 16th February 1939.

Penal Code (1860), S. 380 — Punishment of whipping can be awarded in lieu of and not in addition to imprisonment.

In a case of theft under S. 380, Penal Code, a sentence of whipping can be passed in lieu of but not in addition to the sentence of imprisonment prescribed by the Code. [P 223 C 1]

H. K. Ghose, Asist. Govt. Advocate — *for the Crown.*

Order. — This is a reference by the learned Sessions Judge of Sitapur recommending that the sentence of whipping imposed on Sheo Narain and Lalji in addition to one year's rigorous imprisonment for an offence under S. 380 be set aside. It appears that originally three persons namely Sheo Narain, Lalji and Saifu were convicted by a Magistrate of the First Class under S. 380 I. P. C., and sentenced to one year's rigo-

rous imprisonment and ten stripes each. All of them appealed against their conviction but the learned Additional Sessions Judge who heard the appeal upheld their conviction. Saifu filed an application in revision in this Court and he was acquitted. This reference is with regard to the other two whose appeal has been dismissed.

The view of the learned Judge is that in a case of theft under S. 380, I. P. C., a sentence of whipping can be passed in lieu of but not in addition to the sentence of imprisonment prescribed by the Penal Code. The learned Assistant Government Advocate disputes the correctness of this view but I am of opinion that the learned Judge is right in the view he has taken. S. 2, Whipping Act of 1909, only lays down as a general proposition that offenders are also liable to the punishment of whipping in addition to the punishments described in S. 53, I. P. C., which do not include whipping; but a comparison of Ss. 3 and 4 of the Act leaves no room for doubt that in regard to the offences mentioned in S. 3 the intention of the Legislature was that whipping should be inflicted, if at all, in lieu of any punishment to which the offender may be liable under the Indian Penal Code and it is only in cases of offences under Secs. 375, 377, 390 and 391, I. P. C., and of abetment of or attempt at an offence under S. 375 that a person can be punished with whipping in addition to any punishment that can be awarded under the Indian Penal Code. Theft under S. 380, I. P. C., is included in the offences mentioned in S. 3. Therefore an offender under S. 380, I. P. C., can be sentenced to whipping but only in lieu of the punishment of imprisonment or fine to which he is liable under the Code. I therefore accept the reference and set aside the sentence of whipping passed on Sheo Narain and Lalji. Let the record be returned.

S.G./R.K. *Reference accepted.*

A. I. R. 1939 Oudh 223

ZIAUL HASAN AND YORKE JJ.

B. Sarsuit Prasad — Appellant.

v.

Lala Baijnath Singh — Respondent.

First Appeal No. 19 of 1937, Decided on 21st March 1939, against order of Special Judge, First Grade, Partabgarh, D/- 13th October 1936.

Usurious Loans Act (1918), S. 3 (2) (b) (as amended by U. P. Act 23 of 1934)—Powers of Court to reduce rate of interest.

Under the U. P. Usurious Loans Act the Court has discretion with due regard to all the circumstances to relieve the debtor against a portion of the stipulated rate of interest when it ranges between Rs. 9 to 24 per cent. per annum by holding it excessive without having to consider whether or not the transaction is substantially unfair.

[P 223 C 2; P 224 C 1]

Radha Krishna and C. P. Lal — *for Appellant.*

Kashi Prasad Srivastava, Tribhawan Nath and L. S. Misra — *for Respondent.*

Judgment.—This appeal arises out of a claim put forward in proceedings under the United Provinces Encumbered Estates Act. The respondent, Lala Baij Nath Singh and some trustees appointed by him for the management of his estate applied under S. 4, Encumbered Estates Act, and included the present appellant among the creditors of the respondent. The appellant filed a written statement claiming Rs. 10,980 as the amount due to him from the respondent on a promissory note executed by the respondent in his favour for Rs. 6000 on 15th September 1933. The debt carried interest at 2 per cent. per mensem. The applicants however contended that the rate of interest was excessive and prayed for being relieved from a portion of it. The learned Civil Judge acting under the Usurious Loans Act reduced interest from 24 per cent. to 12 per cent. per annum. The creditor brings this appeal and contends that the learned Judge was wrong in holding the stipulated rate of interest to be excessive.

We have heard the learned counsel for the parties and though we do not agree with the learned Judge's finding or rather opinion, that the interest stipulated for rendered the transaction substantially unfair, the expression of this opinion being not only uncalled for, as no such plea was taken by the respondent, but also unnecessary as under the United Provinces Usurious Loans Act, the Court below could relieve the debtor against a portion of the stipulated rate of interest without having to consider whether or not the transaction was substantially unfair, we are of opinion that no good case has been made out for interference with the discretion exercised by the Court below.

The learned counsel for the appellant has relied on some cases in which even compound interest at 24 per cent. per annum was allowed even on secured debts; but we are to be guided by the law as it stands in these provinces at present. The United

Provinces Act 23 of 1934 has fixed limits within which a Court has discretion to hold whether a certain rate of interest is excessive or not. Prov. 3 added by the local Act to S. 3 (2) (b), Usurious Loans Act of 1918, provides that in the case of unsecured debts, the Court shall deem the interest excessive if the rate exceeds 24 per cent. per annum, and prov. 5 lays down that if the rate does not exceed 9 per cent. per annum the Court shall not deem it to be excessive. If therefore the stipulated rate ranges between 9 per cent. and 24 per cent. the Court has discretion, of course with due regard to all the circumstances, to hold that it is excessive. In the present case, we find that the respondent is possessed of property which pays a land revenue of Rs. 32,000. It must therefore be taken to be worth about Rupees 6,00,000. The debts standing against the respondent amount to only Rs. 1,60,000 approximately. The list of debts on the record shows that most of the debts were advanced to the respondent on interest at 12 per cent. per annum simple though there are some which carried interest even at a lesser rate. In these circumstances we do not think the learned Judge of the Court below was wrong in holding that the interest in the present case was excessive. We have come to this opinion on the law as it stands at present in spite of the fact that we do not think that there was anything improper in the appellant stipulating for interest at 24 per cent. per annum. The appeal is therefore dismissed, but in view of the special circumstances of the case we order each party to bear his own costs of this Court.

S.G./R.K. *Appeal dismissed.*

A. I. R. 1939 Oudh 224

ZIAUL HASAN C. J. AND BENNET J.

Bhaiya Hari Saran Das — Appellant.

v.

Har Kishen Das — Opposite Party.

Privy Council Appeal No. 11 of 1938, Decided on 25th July 1939, for leave to appeal to His Majesty in Council.

(a) Civil P. C. (1908), S. 109 (a) — Appeal does not lie from order under O. 41, R. 23 reversing decree dismissing suit on preliminary point and remanding suit for trial.

An order of an Appellate Court is not a final order within the meaning of S. 109 (a) unless it finally disposes of the rights of the parties in relation to the whole suit and consequently an appeal does not lie from an order under O. 41, R. 23 reversing a decree which dismisses a suit upon a preliminary point and remanding the suit for trial: *A I R 1933 P C 58, Foll.* [P 224 C 2]

(b) Civil P. C. (1908), S. 109 (c) — Question depending upon interpretation to be put on previous judgment of High Court said to be bar in res judicata is not question affecting large body of public—Appeal under S. 109 (c) does not lie.

A case should be certified to be a fit one for appeal to His Majesty in Council under cl. (c) of S. 109 only when it is of considerable importance and the principle when finally decided by their Lordships of the Privy Council would be of benefit not only to the people who were directly involved in the litigation but to the public at large. The question depending on the interpretation to be put on the previous judgment of High Court which is said to be a bar in res judicata is not a question of law affecting a large body of the public and hence appeal does not lie under Sec. 109 (c): *Case law referred.* [P 225 C 1]

M. Wasim and B. P. Misra — *for Appellant.*

Ganga Dayal, Karta Krishna and Rameshwar Dayal Khare — *for Respondent.*

Order.—This is an application for leave to appeal to His Majesty in Council against an order of remand passed by a Bench of this Court, of which one of us was a member, in a suit brought by the opposite party, Mahant Har Kishen Das against the applicant, Bhaiya Hari Saran Das. The suit was tried by a learned Judge of this Court sitting singly on the Original Side and was dismissed on the ground that it was barred on account of a previous judgment of this Court. The plaintiff preferred an appeal and the Bench which heard the appeal came to the conclusion that the suit was not barred by res judicata and remanded it under O. 41, R. 23, Civil P. C., for trial on the merits. It is against this order that the present application has been brought. We have heard the learned counsel for parties at length and are of opinion that the leave applied for cannot and should not be allowed. Their Lordships of the Privy Council have laid down very definitely in 60 I A 76[1] that an order of an Appellate Court is not a final order within the meaning of S. 109 (a), Civil P. C., unless it finally disposes of the rights of the parties in relation to the whole suit and that consequently an appeal does not lie from an order under O. 41, R. 23 reversing a decree which dismisses a suit upon a preliminary point and remanding the suit for trial. Their Lordships at p. 81 of the report say:

The finality must be a finality in relation to the suit. If after the order the suit is still a live suit in which the rights of the parties have still to be

1. Abdul Rahman v. D. K. Cassim & Sons, (1933) 20 A I R P C 58 = 142 I C 328=60 I A 76= 11 Rang 58 (P C).

determined, no appeal lies against it under Section 109 (a) of the Code.

It was urged that even if the order of the Bench be not considered to be a final order, leave might be granted under cl. (c) of S. 109 of the Code, that is to say, it might be certified that the case is a fit one for appeal to His Majesty in Council. On this point also we do not agree with the learned counsel for the applicant. There is a consensus of opinion in the various High Courts in India that a case should be certified to be a fit one for appeal to His Majesty in Council under cl. (c) of S. 109 only when it is of considerable importance and the principle when finally decided by their Lordships of the Privy Council would be of benefit not only to the people who were directly involved in the litigation but to the public at large: *vide* 50 All 640,[2] 44 Mad 293,[3] 18 Cal 23,[4] 50 All 208,[5] 23 All 227,[6] 54 All 459,[7] 6 Rang 43[8] and A I R 1931 Mad 642.[9] The question involved in the present case is not even a substantial question of law but a matter depending on the interpretation to be put on the previous judgment of this Court which is said to be a bar in res judicata. It is not a question of law affecting a large body of the public.

Further, it is conceded on behalf of the applicant that the decision of the learned Single Judge of this Court did not dispose of the entire case and that even if the former judgment of this Court be held to be a bar in res judicata some of the issues will still remain to be decided between the parties. This being so, it is a further reason why the plaintiff-opposite party should be saved from the harassment of having to defend an appeal unnecessarily before their Lordships of the Privy Council. We therefore dismiss this application with costs.

D.S./R.K. *Application dismissed.*

2. Ruchcha Saithwar v. Hansrani, (1928) 15 AIR All 220=108 IC 238=50 All 640=26 ALJ 336.
3. Radhakrishna Ayyar v. Swaminatha Ayyar, (1921) 8 AIR P C 25=60 I C 85=48 I A 31=44 Mad 293 (P C).
4. Durga Chowdhrani v. Jewahir Singh, (1891) 18 Cal 23=17 I A 122=5 Sar 560 (P C).
5. Mathura Kurmi v. Jagdeo Singh, (1928) 15 AIR All 61=107 I C 33=50 All 208=25 A L J 970.
6. Banarsi Prasad v. Kashi Krishna Narain, (1901) 23 All 227=28 I A 11=7 Sar 825 (P C).
7. Sheopujan Upadhiya v. Bhagwat Prasad Singh, (1933) 20 AIR All 4=143 I C 312=54 All 459.
8. Maung Ba Than v. District Council of Pegu, (1928) 15 A I R Rang 187 = 109 I C 697 = 6 Rang 43.
9. Ramanathan Chettiar v. Audinatha Ayyangar, (1931) 18 A I R Mad 642=132 I C 290.

A. I. R. 1939 Oudh 225

ZIAUL HASAN AND YORKE JJ.

Mohammad Yusuf — Applicant.

v.

Imtiyaz Ahmad Khan—Complainant— Opposite Party.

Criminal Misc. Appln. No. 70 of 1938, Decided on 12th April 1939.

Contempt of Court—In criminal case against complainant accused as witness making defamatory statements — Complainant filing complaint for defamation after examination of all prosecution witnesses — Accused starting contempt of Court proceedings against complainant —Real question is the intention of the complainant—If it is in good faith to protect his good name there is not even a technical offence of contempt of Court against complainant who is not bound to wait till termination of case against him.

In a proceeding under Ss. 420 and 406, I. P. C., against the complainant, the accused as a witness made statements irrelevant to the matter in issue and defamatory to the complainant who during the pendency of those proceedings and after all the prosecution witnesses had been examined and cross-examined before charge, filed a complaint under S. 500, I. P. C., while proceedings for contempt of Court were started against complainant:

Held that the complainant was not bound to remain silent under defamatory charges until the termination of the case against him, but was entitled to make a complaint of an offence under S. 500 if one appeared to have been committed; and that the filing of the same was in good faith, protection of his good name being complainant's intention which was the real question in the matter and that there was not even a technical offence of contempt of Court: *A I R 1935 All 117, Disting.* [P 226 C 2; P 227 C 1]

R. F. Bahadurji and S. C. Das — *for Applicant.*

G. G. Chatterji — *for Opposite Party.*

Order. — The facts of this case have already been set out in full in our order of reference to a Full Bench dated 5th September 1938.* It has now been held by the Full Bench that this Court has jurisdiction in respect of contempt of Courts subordinate to it, and we have therefore now to consider in the light of the facts set out in the first three pages of our order of 5th September 1938, and the arguments put before us whether the action of Imtiaz Ahmad Khan in filing a complaint against Noor Mohammad, a witness in the case proceeding against Imtiaz Ahmad Khan under Ss. 420 and 406, I. P. C., amounts to a contempt of Court or not; and if so, how the offence of contempt of Court committed thereby shall be dealt with. One or two further points have been put before us

* *Reported in* (1939) 26 A I R Oudh 131 (F B).

in regard to the statements made by Noor Mohammad in evidence on 16th August 1937. It is contended that these statements could not properly be the subject of a complaint under Sec. 500, I. P. C., because the witness would have been entitled to protection under the provisions of Sec. 132, Evidence Act. S. 132 provides that

> a witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose such witness to a penalty or forfeiture of any kind :
>
> Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

Reliance on this Section proceeds on the assumption that the statements made by Noor Mohammad were made in answer to a question put by counsel. We find it difficult to believe that a question could have been put by counsel with the object of eliciting that Haji Saheb was afraid of Imtiaz Ahmad Khan when what counsel had to establish was that the Haji Saheb had either been deceived by Imtiaz Ahmad Khan into giving Rs. 6000, or on the other hand had deposited Rs. 6000 with him. No one would be easily deceived by a man of whom he was afraid and in whom he would necessarily have no trust, nor would a man ordinarily make over money to a person of whom he was afraid. The inference is that although this does not appear from the record, these statements mentioned on the third page of our order of reference were voluntary statements and not statements made in answer to questions. Even if they were statements made in answer to questions, we should doubt whether they would have been protected because the answers would suggest that the questions however put could not have been relevant to the matter in issue, namely the question whether or not an offence under S. 420 or S. 406 had been committed by Imtiaz Ahmad Khan. That however is not a matter really for decision at this stage but will be a matter for the consideration of the Court which tries the case under S. 500, I. P. C. Assuming, as we think we should for the purpose of this application, that the statements are not necessarily protected, we have to consider whether Imtiaz Ahmad Khan was bound to sit down silently under defamatory charges of this kind, and not entitled to make some sort of an effort to defend himself. We are unable to hold that he was bound to remain silent and that he was disentitled from making a complaint of an offence, if an offence appeared to him to have been committed.

The real question is as to the intention in filing a complaint. Was it intended to muzzle prosecution witnesses or was it intended to protect Imtiaz Ahmad Khan's own good name? Had Imtiaz Ahmad Khan rushed into Court that very same day or the next day with a complaint against Noor Mohammad before the examination and first cross-examination of the other witnesses had taken place, it might perhaps have been said with reason that he was attempting to intimidate witnesses, but this is not what he did do. The whole of the witnesses were examined and cross-examined prior to the charge and it was not until the six months later that Imtiaz Ahmad Khan filed his complaint, for, as it is said, the reasons which have been mentioned in our order of reference. In our opinion therefore the filing of a complaint by Imtiaz Ahmad Khan was a "bona fide" act intended for the protection of his own good name and not an act aimed at putting pressure to bear on witnesses. The suggestion that it could have the effect of leading witnesses in their second cross-examination to make some admissions favourable to Imtiaz Ahmad Khan seems to us to be very far-fetched. The witnesses had made statements calculated to incriminate him and they could not go back on those statements without exposing themselves to a risk of prosecution for perjury.

It is argued that Imtiaz Ahmad Khan should have waited until the case under Ss. 420 and 406 had terminated. In the first place we do not think that he was bound to do so, and in the second place that case has been kept dragging on already from 1936 to 1939, and the implication of the argument is that Imtiaz Ahmad Khan is to put up with defamatory statements being made without protest until such time as those proceedings terminate which might not be for several years to come. It is the existence of uncontradicted defamatory statements which damages a man's reputation beyond repair, and we are not prepared to hold that the circumstances being as they were, Imtiaz Ahmad Khan was precluded from taking action.

There is another point which has been made in favour of Imtiaz Ahmad Khan. The complaint, which he made under Sec. 500, Penal Code, was made to the same Magistrate who was trying the case under Ss. 420 and 406. It is clear that that Magistrate did not feel that the making of this complaint was in any way calculated to prejudice the trial of the case under S. 420 or S. 406. If he had done so, he would presumably have dismissed the complaint under Sec. 203, Criminal P. C. Learned counsel for the applicant has been unable to quote to us any case on all fours with the present case. Some reference has been made to the case in 57 All 573,[1] but that case stood on a different footing. A notice was served on behalf of the plaintiff by his advocate on the defendant threatening the defendant that unless he withdrew a certain plea put forward in the written statement in a civil suit and paid a certain sum as damages, he would be criminally prosecuted for defamation of the plaintiff's deceased father. It was held that the notice was undoubtedly intended to put extraneous pressure on the defendant in order to compel him under threat of drastic action being taken against him, to withdraw the plea which had been taken by him specifically in the written statement and that this amounted to a direct interference with the administration of justice in preventing or attempting to prevent the defendant from pressing the plea which might prove to be a very substantial and legitimate defence; and in that way an indirect attempt was made to exclude that plea from the consideration of the Court. There is little if anything in common between the action of the plaintiff in that case and the action of Imtiaz Ahmad Khan in the present case.

Taking into consideration all the facts put before us we are of opinion that there has not been in this case even a technical offence of contempt of Court committed by Imtiaz Ahmad Khan. On the other hand, we are also of opinion that it is undesirable that the hearing of the case of defamation should be taken up until such time as the case against Imtiaz Ahmad Khan has been disposed of. We accordingly dismiss the present application but direct the Court in which the complaint filed by Imtiaz Ahmad Khan against Noor Mohammad is pending to take no further proceedings in that case unless and until the case under Ss. 420 and 406 is finally disposed of by the Magistrate concerned.

S.G./R.K. *Application dismissed.*

1. Rajender Singh v. Uma Prasad, (1935) 22 A I R All 117=159 I C 193=57 All 573=1935 A L J 29.

A. I. R. 1939 Oudh 227

HAMILTON AND RADHA KRISHNA JJ.

Kazim Husain — Appellant.

v.

Mt. Mubarak Jahan Begam — Respondent.

Miscellaneous Appeal No. 51 of 1937, Decided on 4th August 1939, against order of Special Judge, First Grade, Hardoi, D/- 22nd May 1937.

U. P. Encumbered Estates Act (25 of 1934), Ss. 8, 9, 10 and 13—Omission of existing debt from written statement of debtor under S. 8 not explained satisfactorily — Presumption is that such omission is deliberate with intention to reap advantage of S. 13—Creditor is entitled to benefit of S. 18, Limitation Act.

Section 18, Limitation Act, is applicable to proceedings under the Encumbered Estates Act. Wherever a debt is proved to exist and the omission of it by the debtor from the written statement of the debtor under S. 8, Encumbered Estates Act, is not explained satisfactorily, it would be a legitimate and fair presumption to draw that such omission was deliberate with an intention to reap the full advantage afforded by S. 13 of that Act coming into play and the creditor is entitled to the benefit of S. 18, Limitation Act. [P 228 C 1, 2; P 229 C 1]

H. Husain, Naziruddin and H. H. Zaidi — *for Appellant.*

G. Hasan and I. Husain — *for Respondent.*

Judgment.— This is an appeal under Sec. 45, U. P. Encumbered Estates Act, against the order dated 22nd May 1937, passed by the learned Special Judge, First Grade, of Hardoi, accepting the claim of the respondent as a creditor of the appellant under S. 10 of the Act. On 10th September 1935, the appellant Khwaja Saiyid Kazim Husain applied under S. 4, Encumbered Estates Act. The appellant did not mention any dower debt due to the respondent. The application was in due course transmitted to the Special Judge and the appellant submitted his written statement under S. 8 on 9th December 1935. In this written statement also the dower debt due to the respondent was not mentioned with the result that when a notice under S. 9 was published in the Gazette calling upon persons having claims in respect of their debts to file written statements of their claims, no notice as required by cl. (2) of that Section was sent to the respondent. The period of three months specified in the

notice under S. 9 (1) for filing claims by creditors expired on 22nd May 1936, and the further period of two months mentioned in cl. (3) of S. 9, during which the Special Judge could entertain the claim on being satisfied that there was sufficient reason for not presenting the claim within the original period of three months also expired on 22nd July 1936. The respondent, Mt. Mubarak Jehan Begam, on 17th November 1936, put in her claim as required by S. 10 accompanied by an application praying for extension of time for admission of her claim on the ground that she was kept from the knowledge of the encumbered estates proceedings and her right to apply under S. 10 by means of fraud committed by the appellant. A more complete statement of fraud alleged by the respondent was given later in her application dated 9th December 1936.

It may be mentioned at this stage that on 26th August 1936, the respondent had applied in the Court of the Civil Judge of Shahjahanpur for leave to sue the appellant as a pauper for the enforcement of her dower debt. During the pendency of this application on 7th November 1936, the appellant appeared before the Civil Judge and represented that in view of Sec. 7, Encumbered Estates Act, no proceedings in respect of any debts could be instituted whereupon the same day the proceedings in that Court instituted by the respondent were stayed, and this date (7th November 1936) was alleged by the respondent as the date on which she came to know of the encumbered estates proceedings for the first time. After several adjournments the learned Special Judge by his order dated 22nd May 1937, held that the omission by the appellant to mention the name of the respondent as a creditor was wilful with the intention to deprive the lady of putting forward her claim, and admitted the claim. In the memorandum of appeal before this Court two points were taken, (1) that S. 18, Limitation Act, was not applicable to the proceedings under the Encumbered Estates Act, and (2) that there were no facts either alleged or proved which could bring the respondent's case under S. 18, Limitation Act. The learned counsel for the appellant did not press the first point, and we think rightly, because in view of S. 29 (2), Limitation Act, there can be no doubt that S. 18 will be applicable to proceedings under the Encumbered Estates Act.

On the second point the question is whether the conduct of the appellant in omitting to mention the name of the respondent as one of the creditors was fraudulent or not, i. e. whether the omission was deliberate with the intention of concealing the proceedings under the Encumbered Estates Act and her right to apply from the knowledge of the respondent. In the present case it is not denied that a very large amount was fixed as dower for the respondent—the exact amount is immaterial for the purpose of this case—and unless this debt was paid off or relinquished it was a subsisting debt. No evidence was adduced on behalf of the appellant to show that the respondent's claim was not a subsisting claim. The case was pending in the Court below for a long time and there were numerous adjournments. No attempt was made on behalf of the appellant to put in an objection or to summon any evidence. It was only at the time of the arguments that the case of oral relinquishment of it in the year 1933 was put through the counsel, which was characterized by the Court as a flimsy one. No determination as to the subsistence or otherwise of this dower debt is involved in the present proceedings but we are of opinion that we can take notice of the nature of the explanation offered and the circumstances in which it has been offered for the purpose of determining whether or not the omission of the respondent's name was fraudulent.

On the other hand, there is no evidence that the respondent had knowledge or could have known of the proceedings in Hardoi. It is admitted that she had been living permanently at Shahjahanpur owing to differences with her husband since long before the institution of these proceedings. If she had known of these proceedings then there is no reason why she would not have filed her claim before the Special Judge instead of proceeding in the regular Court at Shahjahanpur by an application for leave to sue as a pauper. On the facts as gathered from the present record we have to infer that the dower debt due to the respondent must have been within the knowledge of the appellant. The provisions of Sec. 13, Encumbered Estates Act, are very drastic and offer great temptation to a dishonest debtor to escape the payment of his just debts by the simple device of omitting to mention them in his application under S. 4 and his written statement under S. 8, U. P. Encumbered Estates Act. The advantage resulting to the debtor by not filing a claim

by the creditor within the time prescribed by S. 9 is very great and we think that wherever a debt is proved to exist and the omission of it from the written statement of the debtor is not explained satisfactorily, it would be a legitimate and fair presumption to draw that such omission was deliberate with an intention to reap the full advantage afforded by S. 13 coming into play. On a consideration of all the circumstances of the case we find no reason to differ from the finding arrived at by the learned Special Judge and dismiss the appeal with costs.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Oudh 229

HAMILTON AND BENNET JJ.

Sardar Ali Raza Khan — Plaintiff — Applicant.

v.

Sardar Newazish Ali Khan — Defendant — Opposite Party.

Civil Misc. Appln. No. 828 of 1938, filed in F. A. No. 39 of 1938, Decided on 14th July 1939.

Civil P. C. (1908), O. 40, R. 1 — Suit by *A* against *B* in respect of certain property — *A*'s share declared to be 2/15th and that of *B* 1/3rd —Appeal by *A* — Application for appointment of receiver on ground of waste during pendency of appeal—Receiver held could not be appointed.

In a suit by *A* against *B* in respect of certain property it was declared that *A* had right to a 2/15th share in the property and *B* was entitled to 1/3rd share. An application for appointment of receiver was made but was rejected. *A* appealed against this decision and made an application for the appointment of a receiver during the pendency of the appeal on the ground that *B* had been committing waste :

Held that receiver could not be appointed as there would be plenty of property left with *B* from which *A* could obtain compensation for any loss due to acts of waste committed as regards his 2/15th share. Moreover, it was unlikely that *B* would injure the value of the property in which he held 1/3rd share to wrong *A* who was only entitled to 2/15ths: *A I R 1939 Oudh 94, Ref.* [P 230 C 1]

M. Wasim and M. H. Qidwai — *for Applicant.*

Niamatullah and Mohammad Husain Usmani — *for Opposite Party.*

Order. — This is an application for the appointment of a receiver or in the alternative for an order for security for mesne profits and an order to the defendant not to sell or cut any more jungle or trees or grant or create any further subordinate rights in any of the property in suit. The application is by Sardar Ali Raza Khan Qizilbash who was plaintiff in the suit, which was decided by a learned Judge of this Court in the exercise of the original jurisdiction. The defendant was Sardar Newazish Ali Khan. The plaintiff dissatisfied with the decision of the learned Single Judge of this Court has filed an appeal and the original defendant has therefore become a respondent. The suit, in so far as we are at present concerned, referred to property in Oudh which may be referred to as the "Oudh Estate" and to property in the Punjab which may be referred to as the "Rakh Juliana Estate," and the value of these properties as given to us is 18 lakhs for the Oudh Estate and three lakhs for the Rakh Juliana Estate. The plaintiff claimed both estates in their entirety and therefore among his reliefs he asked for a decree for possession of the property. The learned Judge of this Court found that the plaintiff had no right at all to the Oudh Estate, but as regards the Rakh Juliana Estate the defendant had a right to one-third and the plaintiff and his four brothers had equal rights to the remaining two-thirds so that the right of the plaintiff was 2/15ths, but no possession was given because the plaintiff claimed exclusive possession to the whole and therefore the learned Judge remarked that the plaintiff would have to apply for partition in order to get his 2/15th share.

This application is based on the allegation that the defendant has committed acts of waste including the following : (a) sale of large and valuable jungle in the Oudh Estate ; (b) sale of timber trees and fruit bearing trees in both the Oudh and Rakh Juliana Estates ; (c) the grant of leases unfavourable to the estate and the creation of other subordinate rights in favour of his own creatures and his wife ; and (d) the investment of all income derived from the estate in favour of his wife so as to put it beyond the reach of the applicant should the appeal succeed.

The application must be considered in two aspects : according to the rights of the applicant as found by the Single Judge of this Court and the rights claimed by the applicant which he thinks will be recognized by the Appellate Court after the decision of the appeal. The applicant alleges that he has good hopes of succeeding in the appeal and if he succeeds he will be found entitled to both the Oudh and the Rakh Juliana estates and he will be given a decree for possession of both the estates. We propose to consider the two aspects of the case separately.

If his appeal fails he has established title to 2/15ths of the Rakh Juliana estate, that is to a part of the estate worth Rs. 40,000. The defendant, on the other hand, will have established his title to one-third of this estate, therefore to property of the value of one lakh and to the whole of the Oudh estate of which the value is 18 lakhs. The acts of waste committed in the Rakh Juliana estate are only, as alleged in the application, the sale of timber trees and fruit-bearing trees and the investment of the income of that estate in the name of the wife of the defendant-respondent. There will be plenty of property left with the defendant-respondent from which the appellant can obtain compensation for any loss due to acts of waste committed as regards his 2/15th share. We may further say here that these allegations as to acts of waste are not proved, and naturally it appears to us exceedingly unlikely that the defendant-respondent should injure the value of the Rakh Juliana estate where he holds one-third to wrong the applicant who is only entitled to 2/15ths. In this aspect of the case we see no reason to grant the prayer for the appointment of a receiver.

Taking the other aspect, we are asked to presume that the applicant is likely to succeed in appeal. In 1939 O W N 59[1] an application for the appointment of a receiver was made to a Bench of this Court during the pendency of an appeal against the decision of a Single Judge of this Court in the exercise of original jurisdiction. It was there held that when there has been a decision on the merits deciding the rights of the parties in the respective properties concerned, the property cannot be said to be any longer "*in medio*," and a receivership which has come to an end by the decision of the case cannot be continued until the final decision of the appeal. In the present case the property as to which this application is made has been throughout in the possession of the defendant-respondent, and though an application for the appointment of a receiver was made in the original suit, it was rejected so that this is not a case of continuing a receivership because one was in existence during the trial of the original suit, but prayer is made for the appointment of a receiver, though a similar application had been made in the original Court and had been rejected, and though there has been a finding of a competent Court against the applicant, except as regards a 2/15th share in the Rakh Juliana property which property is only worth 1/6th of the Oudh estate. Unless the decision of the Single Judge of this Court is entirely upset, there will certainly be sufficient property in the hands of the defendant-respondent to satisfy any legal claim of the appellant-applicant and we see no reason to presume that such will be the result of the appeal.

We may again repeat that the allegations of waste are vague and that it is difficult to believe that as the defendant-respondent has been successful in the original Court there is any likelihood of his being under such apprehension of the result of the appeal that he has proceeded already to seriously damage the estate or that he will in future seriously damage the estate. We see no reason therefore to grant the application for the appointment of a receiver which would have the result of depriving the defendant of possession who had possession up to the decision of the suit by the lower Court and who has continued to hold possession since, after a recognition of his title by a Judge of this Court which cannot be said to have weakened his position except as regards the Rakh Juliana estate which is of far lesser value than the Oudh estate.

As regards the other prayer of the applicant should his prayer for the appointment of a receiver not be granted, the learned counsel for the applicant has not been able to show under what provisions of the Code of Civil Procedure we could grant this prayer and he has to rely on the inherent powers of the Court. Presuming even that our inherent powers allowed us to grant this prayer (and we do not say that we have these powers) we would see no reason to exercise them because of the reasons we have given in rejecting the prayer for the appointment of a receiver. We therefore dismiss this application with costs.

D.S./R.K. *Application dismissed.*

1. Bisheshar Singh v. Jadhunath Singh. (1939) 26 AIR Oudh 94=179 IC 245=1939 O W N 59.

A. I. R. 1939 Oudh 230

ZIAUL HASAN AND HAMILTON JJ.

Ram Ratan Lal —
Plaintiff — Appellant.

v.

Mt. Akhtari Begum and another —
Defendants — Respondents.

Second Appeal No. 245 of 1936, Decided on 27th March 1939, against decree of Dist. Judge, Hardoi, D/- 21st April 1936.

(a) Second Appeal — Question of fact.

The question whether or not a certain transferee is a bona fide transferee for consideration is a question of fact : *25 Bom 202 and A I R 1926 Lah 25, Rel. on.* [P 231 C 2]

(b) Transfer of Property Act (1882), S. 53—Scope — Transfer with intention of defeating anticipated suit or execution is not voidable even if its object is to prefer one creditor to another—Husband executing sale deed of properties in favour of wife for dowry debt actually due — No suit by creditor of husband then instituted nor any benefit reserved by husband in properties sold — Wife held transferee in good faith for consideration—Fact that wife could not obtain decree for full amount of dower held did not affect sale.

Section 53 contemplates a transfer which removes the whole or part of the debtor's property from the creditors as a body to the benefit of debtor : *A I R 1930 Oudh 93; A I R 1938 Oudh 44 and A I R 1915 P C 115, Rel. on.* [P 231 C 2]

Therefore, a transfer of property even if it is made with the intention of defeating an anticipated suit or execution is not voidable under S. 53 merely because its effect or object was to prefer one creditor to another. [P 231 C 2]

Where therefore a person effected a sale deed of certain properties in favour of his wife in consideration of her dower of Rs. 25,000 which was actually due on that date, and none of the creditors of the husband had at that time filed suit against the husband for their debts nor was there any suggestion that the husband had retained any benefit in the properties after the sale :

Held that the wife was a transferee in good faith and for consideration. The fact that wife could not have obtained a decree for dower for more than Rs. 4000 or Rs. 5000 under Oudh Laws Act did not affect the validity of sale : *A I R 1938 Oudh 44, Rel. on.* [P 232 C 1]

H. Husain and H. H. Zaidi — *for Appellant.*

M. Wasim, K. M. Shameen and Ali Hasan —*for Respondent 1.*

Judgment.—This second appeal against a decree of the learned District Judge of Hardoi arises out of a suit brought by the plaintiff-appellant for a declaration that the sale deed of 4th April 1932, executed by defendant-respondent 2 in favour of defendant-respondent 1 is void under S. 53, T. P. Act, as having been made with intent to defeat or delay the creditors of respondent 2. Respondent 1 is the wife of respondent 2 and was married to him about the year 1924. Both the Courts below have found that at the time of the execution of the deed of sale in question a sum of Rs. 25,000 was due to her from respondent 2 as her dower debt. The sale was made in lieu of a portion of the dower debt, namely Rs. 8500. Both the lower Courts have also found that respondent 1 was a transferee in good faith and for consideration and have therefore dismissed the suit. The plaintiff brings this appeal and his learned counsel has relied on certain circumstances as showing that the transfer in question was made with intent to defeat or delay the creditors. He has pointed out that respondent 2 was prosecuted for dacoity in 1931 but was acquitted, that in January 1932 he executed a will bequeathing all his property to his brother, that the property which according to the findings of the Courts below is worth about Rs. 15,000 to Rs. 20,000 was undervalued in the sale deed, and that in April 1932 the sale deed in question was executed in supersession of the will. It was also urged that though the dower debt was Rs. 25,000 yet if respondent 1 had brought a suit for recovery of it the husband would not have been liable under the Oudh Laws Act to more than Rs. 4000 or Rs. 5000.

We have given full consideration to the points urged on behalf of the appellant but are unable to hold that the sale deed in question is voidable under S. 53, T. P. Act. In the first place the question whether or not a certain transferee is a bona fide transferee for consideration is a question of fact as held in 25 Bom 202[1] and 89 I C 953.[2] In the second place even if the question be gone into by this Court we do not think there is any ground for holding that respondent 1 was not a bona fide transferee for consideration. It is now well-established that a tranfer of property even if it is made with the intention of defeating an anticipated suit or execution is not voidable under S. 53, T. P. Act, merely because its effect or object was to prefer one creditor to another and it has been held by their Lordships of the Judicial Committee that S. 53 contemplates a transfer which removes the whole or part of the debtor's property from the creditors as a body to the benefit of the debtor : *vide* 7 O W N 123,[3] 1937 O W N 1176[4] and 43 I A 104.[5] In the present case the plaintiff-appellant had not even brought his suit against res-

1. Bhagwant Appaji v. Kedari Kashinath, (1901) 25 Bom 202=2 Bom L R 986.
2. Daulat Ram v. Ghulam Fatima, (1926) 13 A I R Lah 25=89 I C 953.
3. Badri Singh v. Hazari Singh, (1930) 17 A I R Oudh 93=125 IC 163=5 Luck 625=7 OWN 123.
4. Bansidhar v. Nawab Jahan Begam, (1938) 25 A I R Oudh 44=171 I C 887=13 Luck 655=1937 O W N 1176.
5. Musahar Sahu v. Hakim Lal, (1915) 2 A I R P C 115=32 I C 343 = 43 I A 104 = 43 Cal 521 (P C).

pondent 2 on the promissory notes in his favour when the sale deed in question was executed and there is no suggestion whatever, much less proof, that respondent 2 retains any benefit after the sale in question. In view of all these circumstances and of the fact that on the findings of the Court below the dower debt of Rs. 25,000 was actually due to defendant 1 on the date of the sale deed, it is impossible to hold that she was not a bona fide transferee for consideration. As to the contention that if respondent 1 had brought a suit for recovery of her dower she could not have obtained a decree for more than Rs. 4000 or Rs. 5000 we may point out that this circumstance does not at all affect the nature of the sale made in her favour. A similar plea was taken in 1937 O W N 1176[4] referred to above and the learned Judges who decided the case remarked :

> But this does not by any means imply that the position of the wife is not that of a creditor. The fact that in a particular case the amount of the debt payable by the debtor has to be ascertained by the Court cannot take the case out of the category of a debt or the person from whom the debt is payable out of the category of a debtor.

We are of opinion that the appeal has no force and it is dismissed with costs.

N.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Oudh 232

ZIAUL HASAN C. J.

Ram Lakhan — Appellant.

v.

Suraj Prasad and others—Respondents.

Second Appeal No. 97 of 1936, Decided on 17th July 1939, against order of Civil Judge, Gonda, D/- 23rd December 1935.

Hindu Law — Joint family property — Agricultural holding acquired by member of joint family may become joint family property if it was so treated by members.

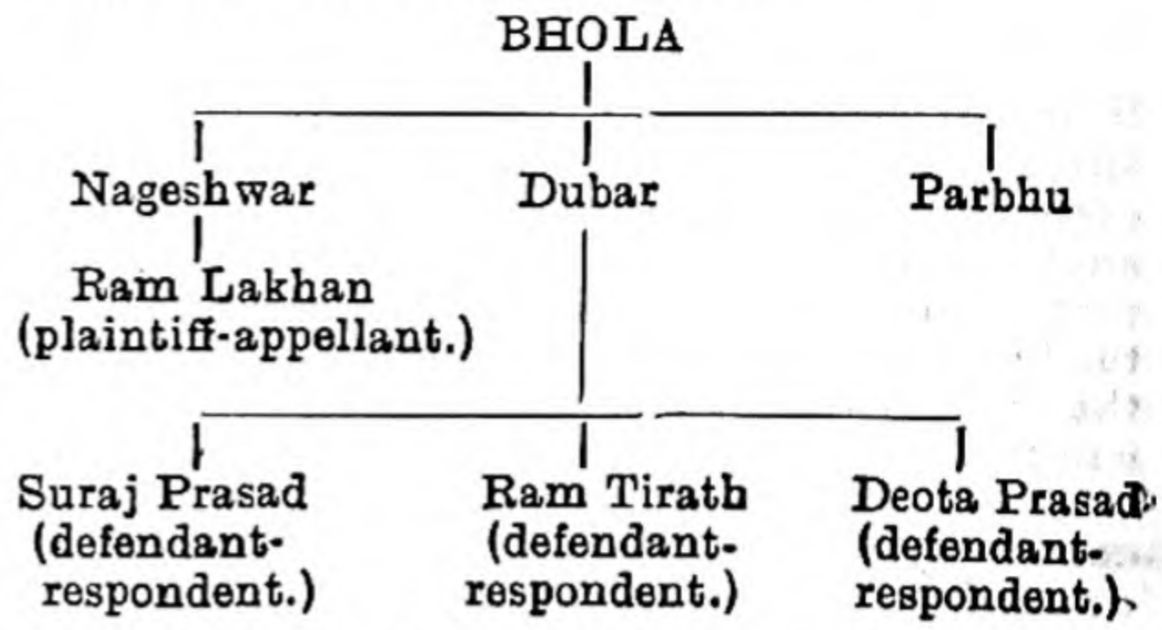
While it cannot be said that in every case an agricultural holding acquired by a member of a joint Hindu family becomes joint family property, it is equally wrong to say that in no case can a holding acquired by a member of a joint family be joint family property. The question depends on the circumstances of each individual case. Though there may be no evidence to show that the holding was acquired with the help of the ancestral or joint family property the holding may be joint family property if there is evidence that the holding was treated by members of the family as joint family property : *A I R 1930 All 822, Rel. on.*

[P 233 C 1, 2]

M. Wasim and Ali Husain — *for Appellant.*

S. N. Roy — *for Respondents.*

Judgment.—This is a plaintiff's second appeal against a decree of the learned Civil Judge of Gonda confirming a decree of the Munsif of that place. The relationship existing between the parties will appear from the following pedigree.



It will be seen that the plaintiff-appellant and the defendants-respondents are cousins. The suit was for recovery of possession of an agricultural holding, 11.6 acres in area, situated in the village of Bishunpur. The plaintiff's case was that he was the sole tenant of the land on behalf of the Mehnawn estate but that the defendants had four years previous to the suit taken possession of it by force. He also claimed Rs. 200 as damages. The defence was that the parties are members of a joint Hindu family, that the plaintiff's father Nageshwar was the manager of the family, that the holding in dispute belonged to the joint family but that when in 1921 the parties separated in mess, a hundred bighas of land were taken by the plaintiff in his cultivation and the land in dispute was taken by the defendants in their cultivation and this arrangement had been in force for more than 12 years. Some legal pleas were also taken but they have not survived.

The learned Munsif disbelieved the plaintiff's case that the holding in suit was acquired solely by the plaintiff's father Nageshwar and he also disbelieved the defendants' story that by a mutual arrangement arrived at in 1921, the land in dispute was given exclusively in the possession of the defendants. Holding that the land in dispute was joint family property he decreed the plaintiff's suit for joint possession only. No damages were awarded to the plaintiff and the parties were ordered to bear their own costs. The plaintiff appealed against this decree but the learned Civil Judge dismissed the appeal and upheld the decree of the trial Court. The admitted facts of the case are that the patta in respect of the holding in suit stood in the name of Nageshwar alone. It was given to him in 1905. About the year 1322-F Nageshwar got the holding recorded in the name

of his son Ram Lakhan the present plaintiff-appellant. Nageshwar died in 1925 and the defendants' father Dubar died in 1928. The plaintiff went on pilgrimage and remained absent from the village for about five years upto April 1930. The defendants or Dubar never paid rent of the land in dispute upto 1331.F. In 1331, 1335 and 1339.F the defendants paid half of the rent and in 1332, 1333, 1336, 1337, 1340, 1341 and 1342 they paid the whole of the rent. The plaintiff paid half of the rent in 1331 and 1335.F and the whole of it in 1334 and 1338.F.

The finding of the lower Court that the family was joint when Nageshwar obtained the patta in respect of the land in suit is not challenged on behalf of the appellant. It is contended however that there can be no presumption that a joint family is possessed of joint family property and that unless it is proved by the defendants that there was a nucleus in the joint family, the holding in dispute cannot be deemed to be joint family property. The general proposition of law stated by the learned counsel is undoubtedly correct but in the present case it has been found as a fact by the Courts below that the holding belonged to the joint family. This finding is borne out by payments of rent of the holding by the defendants in some years, a fact for which no explanation could be offered by the plaintiff. It was argued that the payment of rent by the defendants was subsequent to 1921 when according to the defendants' case there was a separation in the family. The defendants never set up the case that the family was divided in 1921 but only stated that the two branches separated in mess only. On the other hand in para. 7 of their written statement they clearly stated that the parties are still members of a joint Hindu family. The finding of the Courts below also is that the family is joint.

It was further argued that there was no evidence to show that before 1921 the holding was treated by the parties as joint family property or was thrown into the hotch-pot. The payment of rent by the defendants is however an indication of the holding being treated as joint family property and the fact that this payment was made subsequent to the year 1921 is immaterial seeing that no division of the family has as yet taken place. Finally, it was argued that an agricultural holding cannot be joint family property and that the Oudh Rent Act does not contemplate an agricultural holding to be subject to the rules of Hindu law. It seems to me that while it cannot be said that in every case an agricultural holding acquired by a member of a joint Hindu family becomes joint family property, it is equally wrong to say that in no case can a holding acquired by a member of a joint family be joint family property. The question depends on the circumstances of each individual case. The case in 52 All 961,[1] on the second paragraph of the headnote of which the learned counsel for the appellant relies, itself shows that there is nothing to absolutely prevent an agricultural holding from being joint family property and though there may be no evidence in the present case to show that the holding in question was acquired with the help of the ancestral or joint family property, there is evidence that the holding was treated by members of the family as joint family property. I am of opinion that the Courts below were right in giving the plaintiff-appellant a decree for joint possession. The appeal is therefore dismissed with costs.

D.S./R.K. *Appeal dismissed.*

1. Acharji Ahir v. Harai Ahir, (1930) 17 AIR All 822=128 IC 239=52 All 961=1930 ALJ 974.

A. I. R. 1939 Oudh 233

RADHA KRISHNA AND HAMILTON JJ.

Abdul Hafiz — Plaintiff — Appellant.

v.

Manohar Lal and others, Defendants and others, Plaintiffs — Respondents.

Second Appeal No. 391 of 1936, Decided on 26th July 1939, against decree of Civil Judge, Fyzabad, D/- 6th August 1936.

(a) Pre-emption — Suit by plaintiff for pre-emption on ground that he is recorded in khewat as cosharer in mohal or village—Bare denial by defendant that plaintiff was entered as cosharer—It is not plaintiff's duty to bring evidence beyond contents of khewat.

If a plaintiff sues for pre-emption on the ground that he is recorded in the khewat as a cosharer in the mohal or in the village and there is a bare denial or non-admission by the defendant that the plaintiff was entered as a cosharer in the particular village, it is not his duty to bring evidence beyond the contents of the khewat, generation after generation, until one reaches the first settlement to show title. An entry in the khewat is prima facie evidence that there is an existing title: *A I R 1925 P C 132 and 18 I C 386, Expl.* [P 235 C 1, 2]

(b) Pre-emption—Sale whether of doubtful rights depends on facts of each case—Sale held not of doubtful rights.

When considering the question whether there is a sale of a doubtful right no definite rule can be laid down for determining in what cases such a

right must be held to be doubtful. The mere circumstance that a person is out of possession is not enough to make a right doubtful : *A I R 1929 Oudh 22 and A I R 1922 Oudh 156, Rel. on.* [P 237 C 1]

One *A* took possession of the property of the deceased claiming that he was an adopted son. *B* denied the claim of *A* and alleged that he was entitled as residuary to all the estate of the deceased. To finance the necessary litigation he with his son *M*, who really had no title, executed a sale deed in favour of *N* and this sale deed sold half the estate of the deceased to *N*. B and his son *M* as vendors together with their vendee *N* sued *A* and there was a compromise by which the vendors and the vendee got 7/12ths of the property and *A* got 5/12ths. A suit for pre-emption was brought by a third person in respect of the sale :

Held that the fact that *B* contented himself with 7/12ths of the whole was no reason for presuming that his title was doubtful. Hence the title was not doubtful to the extent necessary to justify a rejection of pre-emptor's claim for pre-emption. [P 237 C 1, 2]

(c) Pre-emption—Suit for pre-emption fails if pre-emptor cannot pre-empt all that was sold—This objection can be raised for first time in second appeal.

A suit for pre-emption fails if the pre-emptor cannot pre-empt all that was sold under the sale deed, as the law does not allow him to pre-empt a part only : *A I R 1934 P C 153, Rel. on.* [P 237 C 2]

This objection can be raised for the first time in second appeal : *(1892) A C 473 and A I R 1932 P C 118, Rel. on ; A I R 1931 All 35 (F B), Not foll.* [P 237 C 2]

(d) Oudh Laws Act (18 of 1876), S. 7—Past mesne profits are not pre-emptible.

Past mesne profits do not come within S. 7 and are not pre-emptible under the Oudh Laws Act. [P 238 C 1]

H. Husain and H. H. Zaidi — *for Appellant.*

Ram Prasad Varma — *for Respondent 1.*

S. N. Srivastava — *for Respondent 6.*

Mohammad Ali *in person.*

Judgment.—This is an appeal by one Abdul Hafiz whose original suit, No. 113 of 1935, was dismissed and whose appeal No. 17 of 1936 in the Court of the Civil Judge of Fyzabad was also dismissed. Abdul Hafiz's suit was for pre-emption of property which purported to have been sold on 5th May 1934, by Rahat Ali and his son Mohammad Ali to Manohar Lal, the main contesting respondent, though Mohammad Ali has also contested this appeal. Zafaruddin and Mt. Kaniz Fatima, the latter being the mother of Rahmat Ali, were the children of Fakhruddin, great-grandson of Wali Mohammad. Rahat Ali was a great-great-grandson of Wali Mohammad in another branch, Zafaruddin and Rahat Ali being descended through males from the common ancestor, Wali Mohammad. On 10th January 1930 Zafaruddin died issueless and Rahmat Ali took possession of his property claiming that he was an adopted son. Rahat Ali denied the claim of Rahmat Ali and alleged that he was entitled as residuary to all the estate of Zafaruddin. To finance the necessary litigation he with his son Mohammad Ali who really had no title, executed on 5th May 1934 a sale deed in favour of Manohar Lal and it is clear that this sale deed sold half the estate of Zafaruddin to Manohar Lal. Rahat Ali and his son Mohammad Ali as vendors, together with their vendee Manohar Lal, sued Rahmat Ali and there was a compromise on which was based the decree Ex. A-12 dated 15th March 1935, by which those plaintiffs, that is to say the vendors and the vendee, got 7/12ths of the property and Rahmat Ali got 5/12ths. Apart from the landed property this decree dealt also with two houses and mesne profits. On 8th May 1935 Abdul Hafiz filed this suit for pre-emption based on the sale deed of 5th May 1934. He alleged that he was a cosharer of superior proprietary rights in Mohal Ramzan Ali in the village where the land of Zafaruddin was situated.

The Courts below dismissed the suit on the ground that the plaintiff had not proved that he was a cosharer in that mohal and also on the ground that the deed in suit did not give rise to a right of pre-emption because the title of the vendors was clearly doubtful. We have already stated that the plaintiff based his right to pre-empt on the fact that he was a cosharer in a different mohal of the village where the property in suit was situated. Mohammad Ali in answer to para. 1 stated that it was denied and Manohar Lal, the purchaser, stated that it was denied subject to additional pleas, but no additional pleas deal with this matter. The only issue which can be held to deal with this allegation is issue 1 which runs as follows :

Which of the plaintiffs or defendants 4 to 6 have got preferential right, if any, to pre-empt the property in suit ?

The decision went against the plaintiff on this issue because although he was recorded as a cosharer, the Court held that the entry in the khewat does not establish title and there was no other evidence. In our opinion, considering para. 1 of the plaint and the contents of the written statements in reply to this paragraph, we think that the defendants never at the time of the written statements meant to assert that although

the plaintiff's name was entered in the khewat in reality he had no title. The lower Appellate Court has depended, especially for its decision, on 18 I C 386,[1] a decision of the Additional Judicial Commissioner of Oudh. The names of the plaintiffs in that case were recorded in the village papers as being in possession of their share in the village but it was held : (1) that the burden of proving that the plaintiffs were cosharers lay on them ; (2) that the mere fact that their names were entered in the revenue papers was not sufficient to constitute them cosharers within the meaning of that expression as used in the Oudh Laws Act, mere mutation of names in the absence of proprietary title being no proof of ownership.

The learned Judge has also referred to A I R 1925 P C 132[2] where it was stated that the fact of a person's name being entered in the Collector's book as an occupant of land does not necessarily of itself establish that person's title. We are aware that the khewat is not a book where titles are registered, for possession has to be prominently considered. As regards 18 I C 386,[1] it is clear that there was a contention there that the plaintiffs had not proved that they succeeded to the property left by one Mt. Sukh Dei merely because they had got their names entered in the khewat. It was distinctly pleaded that they were not cosharers and it appears to us that the meaning of "distinctly pleaded" was that there had been a distinct assertion that they were not the heirs of Mt. Sukh Dei. That decision must not be taken to mean that if a plaintiff sues for pre-emption on the ground that he is a cosharer in such a mohal or in such a village and there is a bare denial or non-admission by the defendant it is his duty to bring evidence beyond the contents of the khewat, generation after generation, until one reaches some document showing transfer or until one reaches the first settlement to show title. In our opinion, the denial contained in the written statements was meant to be nothing more than a denial that the plaintiff was entered as a cosharer in this particular village. If it was intended to be a denial of the possession of any proprietary title by the plaintiff, there should have been a specific denial such as is contemplated by O. 8, Rr. 4 and 5. The ground on which issue 1 was decided shows the unfortunate results of vague pleadings and vague issues which can be turned to include a multitude of defences where the plaintiff is given no opportunity of knowing what is admitted by the defendant and what is left for him to prove.

It has repeatedly been held that an entry in the khewat is prima facie evidence that there is an existing title. In this case however we go further than that and say that we can only read the pleadings to which we have referred, (and further the oral pleadings of defendants' counsel of 16th October 1935, that the plaintiff was not a cosharer in mohal Zafaruddin) as an objection that the plaintiff was not a recorded cosharer. As regards this oral pleading we may further note that it was never the case of the plaintiff that he was a cosharer in mohal Zafaruddin where the property in suit is, and this oral pleading was unnecessary in view of the ground on which the plaintiff based his claim for pre-emption. In our opinion the plaintiff has met the objections made by the defendant in their written statements and the suit should not have been dismissed on this ground. Passing now to the second ground on which the suit was dismissed, we have again to say that there was vagueness both in the written statement and in the issues and it appears to us as if the defendants somewhat changed their position. The only issue that deals with this point is No. 6—"does the deed in suit give rise to a right of pre-emption?" Obviously, a number of defences might be raised as coming within this issue. The objection of defendant Mohammad Ali is embodied in para. 11 of his written statement

> keeping in view the facts mentioned above, the deed, the basis of the suit, is not a deed of such nature as to give rise to a suit of pre-emption.

When we seek to finding out exactly what were the facts mentioned above, they are the real agreement between the parties was that whatever property which formed the estate of Zafaruddin was to be secured in the suit brought against Rahmat Ali would be divided in halves of which one would go to Manohar Lal, the vendee, and the other half would go to Rahat Ali, the vendor *(sic.)*. The written statement of Manohar Lal is to the effect that the deed which is the basis of the suit was executed in lieu of Rs. 2500 for transfer of an "actionable claim." As explanation why this deed is to be regarded as only a transfer of an

1. Ram Partap v. Brij Prasad, (1913) 18 I C 386.
2. Mt. Bhagwani Kunwar v. Mohan Singh, (1925) 12 A I R P C 132=88 I C 385 (P C).

"actionable claim," we have only the statement that Rahat Ali was not in possession of the property left by Zafaruddin and was not in a financial position to bring a suit so that he had to get hold of Manohar Lal in the suit. The objection of Mohammad Ali was therefore really that this deed was superseded by an agreement that only what would be decreed in the suit against Rahmat Ali would be divided in equal shares and not the property left by Zafaruddin. We deduce from this that the defendants meant that there could be no pre-emption because there was no sale of property *in praesenti* but the sale of a share in a law suit, and there is an implied reference to 21 Cal 496[3] where the words are used in a judgment of their Lordships of the Privy Council. It does not in itself suggest that there was doubt in the title of Rahat Ali, but only that possession could not be secured without litigation. We would here note that the learned counsel for Mohammad Ali tells us that he insisted on this part of his case that Manohar Lal was only entitled to half of the property which he and his vendors would get, namely one-half of 7/12ths as granted by a decree on a compromise in the suit they brought against Rahmat Ali. We find no reference to this in the judgment of the Courts below and there is no issue which covers this point. There should have been an issue with a decision on it, or if the issue was left undecided, with a mention of this fact, because we do not now know whether this point, though raised in the pleading, was dropped at once or whether it was in fact urged by counsel for this appellant but was not taken into consideration by the Courts below. The written statement of Manohar Lal does not make clear why the deed should be regarded as a transfer of an "actionable claim," but it seems to us to have the same meaning as the one it bears in the statement of Mohammad Ali.

The trial Court referred to 21 Cal 496,[3] 9 O C 86,[4] 20 O C 249[5] and 25 O C 258[6] and found that the vendors were out of possession, and at the most they had a claim to recover that property from third parties in possession on an alleged good title, and the title of the vendors was clearly doubtful and the sale under the circumstances was clearly a sale of a law suit and as such gave rise to no right of pre-emption. The rulings quoted are not all really on the same point. In 21 Cal 496[3] the facts were that a lady Shaluka Bibi claimed certain property as inheritance and dower and not having enough money to pay the costs of litigation and personal expenses she sold a share of whatever she might obtain if the suit was successful to her brothers who agreed to pay all costs of the litigation and her personal expenses. The approximate value of the property and dower to the extent of a moiety share sold was considered to be Rs. 10,000. Their Lordships of the Privy Council found that the plaintiff was not entitled to pre-empt because he denied the title of the vendor and further because the consideration was the providing the money necessary for carrying on the suit, the amount of which could not be estimated. If the defendants succeeded and the suit was dismissed there would have been no property to be sold. In truth the transaction was a sale of a share in a law suit. To rely on this decision the learned Judge would have had to consider whether the consideration in this case was similar to that one and whether the property sold was to be whatever the present respondents would get and not a definite share of the property left by Zafaruddin, but the learned Judge has not done this. It was not contended in the written statements that the consideration for the sale deed was uncertain and therefore the would-be pre-emptor could not pay the real consideration and therefore he was not entitled to pre-empt. On the pleadings what had to be decided was whether there was a sale of property *in praesenti* for a certain sum of money, or whether there was sale of an unknown part of the property of Zafaruddin which would only become certain when the suit against Rahmat Ali was decided for an uncertain amount of money which was not the amount actually stated in the sale deed but something else which depended on what the vendor might have to pay in the prosecution of the suit. The second point does not appear to us to have been pressed and the first point is settled by the sale deed if that alone has to be considered, for the sale deed makes perfectly clear that half the property of Zafaruddin was sold. Doubt was raised as to this by Moham-

3. Abdul Wahid Khan v. Shaluka Bibi, (1894) 21 Cal 496=21 I A 26 (P C).
4. Mirza Mohammad Abbas Ali Khan Bahadur v. A. Quieros, (1906) 9 O C 86.
5. Raj Bahadur v. Jagrup Pande, (1917) 4 A I R Oudh 59=42 I C 37=20 O C 249.
6. Babu Lal v. Ali Ahmad Khan, (1922) 9 A I R Oudh 223=69 I C 110=25 O C 258.

mad Ali and he said that the agreement was really different, and whether counsel urged this or not it was certainly not decided by the Courts below. It appears to us therefore very doubtful whether the second point on which the lower Appellate Court has decided the suit really arises from what was stated in the written statements but we will consider it from this point of view too.

It has been held in 5 O W N 920[7] that when considering the question of whether there is a sale of a doubtful right no definite rule can be laid down for determining in what cases such a right must be held to be doubtful. The mere circumstance that a person is out of possession is not enough to make a right doubtful. In 8 O L J 403[8] this had also been said and the result of the litigation which afterwards took place was relied upon showing that the vendor had good title to the property. In the present case, Rahat Ali did get 7/12ths by means of a compromise and the fact that he sued for the whole property is no proof that he had no title to the remaining 5/12ths. People who have good title not infrequently prefer to compromise because the expenses of further litigation may make it expedient for them to accept less than all what they are entitled to. In this case the pedigree put forward by Rahat Ali contained a pedigree now given by the appellant and on this pedigree Rahat Ali was entitled to the property of Zafaruddin and it was the claim of Rahmat Ali that he was entitled to the property of Zafaruddin that was a weak one. The learned Judge has held that the title was doubtful firstly on the fact that Mohammad Ali, one of the vendors, had no title but only his father had. His father was vendor with him and the fact that the son had no right in the property cannot in any way make the title of the father doubtful. The other reason for finding the title doubtful was that Zafaruddin had stated in a mortgage deed that Rahmat Ali, his sister's son, was his heir. Of course, he was not his heir under Mahomedan law, and a wrong statement of the law by Zafaruddin could not in any way make the title of Rahat Ali doubtful. We have already shown why the fact that Rahat Ali contented himself with 7/12ths of the whole is no reason for presuming that his title was doubtful. We do not find therefore that the title was doubtful to the extent that is necessary to justify a rejection of the plaintiff's claim for pre-emption.

The learned counsel for the respondents has referred us to various cases referring to suits decided on this point, but we have not found that in any of them the facts were so similar to those in the present case as to enable us to disregard what we have already quoted that every case of the kind must be judged on its own facts. Had these been the only two points to be considered in this appeal, we would have allowed it, but there is one point which is fatal to the appellant and it is that every thing sold by this sale deed cannot be pre-empted, and in view of 11 O W N 843[9] the appeal must fail. This objection raised by the learned counsel for the respondents has undoubtedly been first taken in this Court, that is, at a very late stage in the litigation. The learned counsel relying on 53 All 65[10] has argued that it is too late for us to consider this point. Undoubtedly it was there held that a point not taken in the Court below will not be permitted to be raised, except possibly when the point is, (1) involving jurisdiction, (2) involving the principle of res judicata, (3) prevent future litigation, (4) or where the plaint discloses no cause of action or the written statement no ground of defence. There has however been a later decision of their Lordships of the Privy Council reported in AIR 1932 P C 118.[11] The point of law raised there was that a certain document had not been registered and was thereby invalid and inoperative. This point had not been raised in the lower Courts, but their Lordships allowed it to be raised and referred to (1892) A C 473,[12] where Lord Watson in delivering the judgment of their Lordships stated that

> when a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts, either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea.

7. Jiyaoo Singh v. Jageshar Singh, (1929) 16 A I R Oudh 22=114 I C 755=4 Luck 185=5 O W N 920.
8. Gajadhar Prasad v. Manrakhan, (1922) 9 A I R Oudh 156=66 I C 684=8 O L J 403.
9. Birendra Bikram Singh v. Brij Mohan Pande, (1934) 21 A I R P C 153=151 I C 74=61 I A 235=11 O W N 843=9 Luck 407 (P C).
10. Ram Kinkar Rai v. Tufani Ahir, (1931) 18 A I R All 35=133 I C 428=53 All 65=1930 A L J 1601 (F B).
11. M. E. Moola Sons Ltd., v. Perin R. Burjorjee, (1932) 19 A I R P C 118=136 I C 737=59 I A 161=10 Rang 242 (P C).
12. Connecticut Fire Insurance Co. v. Kavanagh, (1892) A C 473=61 L J P C 50=67 L T 508 =57 J P 21.

We think that in view of this decision we cannot but allow the plea to be raised. In this sale deed a share in land was sold, a share in houses was sold and a share in mesne profits for the current and for past years. Undoubtedly the land comes within S. 7, Oudh Laws Act, and we think the houses too, but we are unable to hold that past mesne profits also come in. Under S. 7, the right of pre-emption shall be presumed to extend to the village site, to the houses built upon it, to all lands and shares of lands within the village boundary, and to all transferable rights affecting such lands. Mesne profits are obviously neither land nor shares of lands nor houses and they can only therefore be subject to pre-emption if they are transferable rights affecting such lands. We find it difficult to say what meaning should be attached to the word "affecting," but it certainly cannot be wider than the words "arising from." These transferable rights under S. 7 would then be rights derived from the ownership of land and enjoyed by the owner of the land. Presuming that mesne profits may be treated as profits, under S. 55, T. P. Act, it is laid down that the seller of immovable property is entitled to the rents and profits of the property till the ownership thereof passed to the buyer. Profits would, we think, be transferable rights arising from the land and would therefore be pre-emptible under S. 7, Oudh Laws Act. If such rights arising from land are transferable rights affecting such land they would however only pass to the buyer from the date of the sale, and rights prior to the date of the sale would belong to the then owner of the property qua owner and not to the vendee for at that time he was not owner of the land. In other words, had this sale not mentioned past mesne profits the vendee could not have claimed them as having passed to him because he had bought the land as to which these rights had arisen, and to transfer these rights it was necessary specifically to mention them in the sale deed. Such past mesne profits are not pre-emptible under the Oudh Laws Act and the appellant therefore finds himself in the position that he cannot pre-empt all that was sold under the sale deed and the law does not allow him to pre-empt a part only. Consequently, on this ground his appeal must fail.

We accordingly dismiss the appeal. As regards costs the parties shall bear their own costs because the appellant would have succeeded had not this plea been raised in this Court.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Oudh 238

HAMILTON AND RADHA KRISHNA JJ.

Dr. Nabi Mohammad Khan —
Plaintiff — Applicant.

v.

Mohd. Ahsan and others —
Defendants — Opposite Party.

Civil Revn. Appln. No. 14 of 1938, Decided on 2nd August 1939, from order of Civil Judge, Hardoi, D/- 23rd August 1937.

(a) Civil P. C. (1908), S. 115—Order during pendency of suit setting aside award under para. 15 of Sch. 2 — Revision does not lie.

An application for revision under Sec. 115 does not lie against an order passed in a pending suit setting aside the award under para. 15 of Sch. 2 of the Code and superseding the arbitration as it is not a case decided within the meaning of S. 115, but an interlocutory order which is part of the suit itself: *A I R 1929 Oudh 493, Foll.; Case law referred.* [P 238 C 2; P 239 C 2]

(b) Civil P. C. (1908), S. 115—Word "case" — Scope.

The word "case" is of a larger amplitude than the word "suit" and would include proceedings under the Guardians and Wards Act, Provincial Insolvency Act, Religious Endowments Act and Succession Act, etc. [P 239 C 1]

Akhlaque Husain and Abrar Husain — *for Applicant.*

Hakimuddin — *for Opposite Party.*

Order.—This is an application for revision under S. 115, Civil P. C., directed against the order dated 23rd August 1937 passed by the learned Civil Judge of Hardoi in a pending suit setting aside the award under para. 15 of Sch. 2 of Civil P. C., and superseding the arbitration. A preliminary objection has been taken by the learned counsel for the defendants-opposite party that no revision lies as no "case" has been decided within the meaning of S. 115, Civil P. C. In support of his objection he has relied on a Bench decision of this Court, 6 O W N 813=A I R 1929 Oudh 493[1] and several decisions of other High Courts. The learned counsel for the applicant contends that the reference to arbitration in a pending suit is a case by itself ending with the supersession of it by the Court below. Having heard both sides at lengh we have come to the conclusion that the proceedings for arbitration in the course of a pending suit are of an interlocutory character and

1. Ganga Prasad v. Ram Narain, (1929) 16 AIR Oudh 493=123 IC 224=5 Luck 397=6 OWN 813.

part of the suit itself. The word "case" it must be admitted is of a larger amplitude than the word "suit" and would include proceedings under the Guardians and Wards Act, Provincial Insolvency Act, Religious Endowments Act and the Succession Act, etc. The question however remains whether the proceedings in the course of the trial of a pending suit and orders passed thereon can be regarded as a "case" within the meaning of S. 115, Civil P. C. It follows from the language of S. 115 that there must be a separate record of a case decided by a Subordinate Court which could be called for by the High Court for the purpose of passing such order as it thinks fit. The record of the proceedings for arbitration is in fact part of the record of the suit itself because it cannot be said that they are in any sense separate and distinct from the record of the suit itself. The late Srivastava J. (later Chief Judge), in his judgment in the Full Bench case, reported in 1935 O W N 1158[2] expressed his opinion on this question in the following words :

> The words used in S. 115, Civil P. C., do not contemplate the invoking of the revisional jurisdiction of the High Court in the case of interlocutory orders passed during the trial of a pending suit. In other words in the case of a suit it is the suit itself and not any branch of it which can be regarded as a "case" within the meaning of S. 115. On the correct legal interpretation of the terms of S. 115 all interlocutory orders passed during the trial of a pending suit must be excluded from the application of the Section.

If we may respectfully say so we are in complete agreement with his view. Reference may be made to S. 104 (1), Civil P. C., which allows an appeal from certain orders arising out of arbitration proceedings. Sub-cl. (a) of this Section provides for an appeal from an order superseding an arbitration where the award has not been completed within the period allowed by the Court. This refers to an order of supersession passed under para. 8 of Sch. 2. It is noticeable that while the Legislature has provided for an appeal from an order of supersession passed under para. 8 no provision has been made for an appeal from an order of supersession made after setting aside the award under para. 15 of Sch. 2. This shows that the omission to make a provision for an appeal by the Legislature is deliberate and to allow a revision would be against the spirit of the law.

The point which we have been called upon to decide has already been decided by a Bench decision of this Court in A I R 1929 Oudh 493[1] and we do not know of any later decision in which a different view may have been taken. In the Allahabad High Court however there was some difference of opinion on the point but the matter has now been set at rest by the Full Bench decision in 1938 ALJ 813.[3] The Bombay High Court has consistently taken the view that such an order is an interlocutory order and not subject to the revision under S. 115, Civil P. C. : *vide* 26 Bom 551,[4] 47 Bom 721[5] and A I R 1932 Bom 232.[6] We may also refer to 14 Lah 715[7] and A I R 1936 Lah 538,[8] the two most recent decisions of the Lahore High Court, in which the same view as taken by this Court has been taken. We may further observe that the powers of this Court under S. 115, Civil P. C., are discretionary and in view of the fact that the order of the Court below can be challenged in appeal from the decree of the Court below which passed that order in the suit, it would lead to unnecessary prolongation of the proceedings of the suit in the trial Court if a revision is entertained and we would avoid it. The preliminary objection taken by the learned counsel for the opposite party prevails and the application is dismissed with costs.

D.S./R.K. *Application dismissed.*

2. Paras Nath v. Ran Bahadur, (1936) 23 A I R Oudh 22=158 I C 949=11 Luck 529 = 1935 O W N 1158 (F B).

3. Govind Das v. Indravati, (1938) 25 A I R All 557 = 177 I C 981 = I L R (1938) All 805= 1938 A L J 813 (F B).

4. Damodar v. Raghunath, (1902) 26 Bom 551= 4 Bom L R 267.

5. Chimanbhai v. Keshavlal, (1923) 10 AIR Bom 402=73 I C 464=47 Bom 721=25 Bom L R 443.

6. Nasarwanji Hormusji v. Jameshedji Navroji, (1932) 19 A I R Bom 232=138 I C 215 = 34 Bom L R 376.

7. Ram Sarup v. Mohan Lal, (1933) 20 AIR Lah 692=143 I C 309=14 Lah 715=34 PLR 651.

8. Firm Gulab Singh-Johri Mal v. Messrs. Darmpal Dalip Singh, (1936) 23 A I R Lah 538= 160 I C 1052=38 P L R 121.

A. I. R. 1939 Oudh 239

HAMILTON AND RADHA KRISHNA JJ.

Thakur Mohd. Umar — Defendant — Appellant.

v.

Mt. Nasira and others — Plaintiffs — Respondents.

Civil Reference No. 4 of 1938, Decided on 4th August 1939, made by Commissioner, Fyzabad.

Oudh Rent Act (22 of 1886), Ss. 119 and 108 — Suit asking for two reliefs, one under S. 108 (7) and other under S. 108 (9)—Appeal lies to Commissioner.

Where a suit has asked for two reliefs, one under S. 108, cl. (7) and the other under S. 108, cl. 9 (b), the suit is not in toto one under S. 108 (9). Hence it is not for the Civil Court to hear the appeal and the Commissioner is entitled to hear it.

[P 240 C 2]

Ramesh Narain Sinha—*for Appellant.*

H. N. Das — *for Respondents.*

Judgment. — This is a reference under Sec. 124-A, Oudh Rent Act, made by the learned Commissioner of the Fyzabad Division enquiring whether he was empowered to hear an appeal. The original suit asked for two reliefs, one for delivery of a patta under S. 108, cl. 7 and the other for compensation on account of withholding a receipt for payment of rent under Sec. 108, cl. 9 (b). The suit was wholly triable by an Assistant Collector. Had the suit been merely for a relief under S. 108 (7), appeal would have been to the Commissioner, while, had the relief claimed been only that under Sec. 108 (9) (b), appeal would have been to the Court of the District Judge. The learned Commissioner thinks that the appeal should be decided by the District Judge on the analogy of an original suit partly cognizable by a Civil Court and partly by a Revenue Court in which circumstances the Civil Court tries the whole suit. The reference came before a learned Single Judge of this Court who considered the point of sufficient importance to require a decision by a Bench.

When an original suit is partly cognizable by a Revenue Court and partly by a Civil Court, there is good reason why the Civil Court must try it. Under part of Sec. 108 only certain suits can be heard by Revenue Courts to the exclusion of Civil Courts. Civil Courts therefore are precluded from trying those particular suits only and Civil Courts have the residuary power to try suits which do not come under that part of Sec. 108. A suit which as regards one relief comes under that part of S. 108 but as regards another relief does not, cannot be said to come within the ambit of that part of S. 108, for it does not do so in toto but only in part, and therefore a Civil Court can try it. In the case of appeals however we have to consider Ss. 116 and 119. Sec. 116 lays down that appeals from Revenue Courts go to higher Revenue Courts except in certain cases which are provided for under S. 119. S. 119 applies to appeals from original suits under certain parts of S. 108 including cl. (9). If therefore an appeal is from a suit where the only relief claimed is under Sec. 108 (9), appeal will lie to the District Judge or to the Chief Court as the case may be. If however a suit partly comes under Sec. 108 (9) and partly comes under some Section e. g., S. 108 (7) where an appeal lies to a Revenue Court, it cannot be said that the suit comes under Sec. 119 because it does not do so in toto but only in part. To put it otherwise, we might say that in view of S. 108 the Civil Court is the Court that can try all suits save those specifically excepted while as regards appeals from decisions of Revenue Courts the general rule is under Sec. 116 that the Revenue Courts shall hear the appeal and Sec. 119 is the exception that certain appeals should be heard by Revenue Courts. S. 119 being the exception must be strictly construed and therefore when only part of the appeal would come under S. 119 it cannot be said that Sec. 119 will apply. The analogy of an original suit will really lead to the opposite result from that given by the learned Commissioner. In the present case, there is a further reason for holding that the Commissioner is competent to hear the appeal. The learned counsel both before the Single Judge of this Court and before us has made it quite clear that he does not wish to appeal against that part of the suit which came under S. 108 (9) so his appeal refers only to the decision under Sec. 108 (7) and the appeal would undoubtedly have gone to the Commissioner had the suit claimed this relief only.

What we have to consider is whether the Civil Court can try this appeal, and if it cannot, it is immaterial whether the Revenue Court can hear this appeal because the appeal is only about a relief under Sec. 108 (7) or whether it could hear the appeal if it was also against a decision on the claim under Sec. 108 (9). We are of opinion that as this suit was not in toto one under S. 108 (9), it is not for the Civil Court to hear the appeal and the Commissioner is entitled to hear it. We therefore return the reference stating that the learned Commissioner has power to hear the appeal.

D.S./R.K. *Reference answered.*

A. I. R. 1939 Oudh 241

HAMILTON AND BENNET JJ.

Hinga Lal and others — Appellants.

v.

Raja Syed Ahmad Ali Khan — Respondent.

Appeal No. 9 of 1936, Decided on 1st August 1939, against order of Ziaul Hasan J., D/- 27th October 1936.

Appeal — Abatement—Plots jointly assessed to land revenue purchased by *A* and *B*—Suit by them jointly to recover amount of revenue paid by them—Joint decree in their favour—During appeal by defendant *B* dying but his representatives not brought on record—Appeal held abated in toto.

Certain specified plots which had been jointly assessed to land revenue were purchased by *A* and *B*. They as one entity jointly brought a suit for recovery of amount of revenue paid by them on the ground that they had paid the whole revenue and were entitled to recover the whole revenue from the person liable to pay it. A joint decree was passed in favour of *A* and *B*. In an appeal brought by the defendant, *B* died and his representatives were not brought on the record :

Held that *A* and *B* were each liable to pay the whole revenue to the Government and from the mere fact that they sued jointly for the recovery of the amount it could not be presumed that each must have paid half the amount. The appeal therefore abated in toto and not only as regards the share of *B*. [P 242 C 2, P 243 C 1]

S. N. Srivastava and Ganesh Prasad — *for Appellants.*

H. Husain — *for Respondent.*

Judgment. — This is an appeal under S. 12 (2), Oudh Courts Act, against a decision of a Single Judge of this Court in a second appeal. One Mt. Phulbasa owned a one anna share in mohal Gangh Din, village Jehangirpur. On 31st May 1907 she sold that share with the exception of certain specified plots to Ram Charan and Gangole, but this share was pre-empted by the predecessor-in-interest of Raja Syed Ahmed Ali Khan, defendant in the suit that has given rise to the appeal and respondent in this appeal before us. These plots which had been exempted were sold on 8th February 1919 to Ram Charan and Gangole. Ram Charan and Gangole brought this suit jointly alleging that they had paid Rs. 55 land revenue on these plots sold to them in 1919 and that they were entitled to recover that sum from the defendant because of an agreement contained in the sale deed of 1907 that the purchaser was liable to pay the revenue on the exempted plots. The decision in first appeal was in favour of the plaintiffs, Ram Charan and Gangole and a second appeal was brought against that decision. Gangole had died and the present appellants were substituted. Ram Charan died while the second appeal was pending but no application for substitution was made. When the second appeal came up the respondents, that is to say the appellants before us, urged that the whole appeal had abated owing to the failure to substitute the representatives-in-interest of Ram Charan, and they further urged that on the merits the decision of the first Appellate Court should be upheld. The learned Single Judge of this Court held that the appeal abated only against the representatives of Ram Charan and on the merits found in favour of the appellant before him.

The position therefore is that in the first Appellate Court there was a decision that the revenue of the exempted fields was to be paid by the original defendant Raja Syed Ahmad Ali Khan and a joint decree was given to Ram Charan and to the present appellants Hinga Lal, Nanhay Lal and Mahabir Prasad, sons of the deceased Gangole, for the revenue which that Court had found was to be paid by Raja Syed Ahmad Ali Khan. That being a joint decree any of those plaintiffs could execute the whole decree. The result of the decision of the learned Single Judge of this Court was that the decree of the lower Appellate Court was set aside and the suit was dismissed to the extent of Gangole plaintiff's half share. There was a decision that there was no agreement in that sale deed of 1907 that the purchaser i. e. the predecessor-in-interest of Raja Syed Ahmad Ali Khan, should pay the revenue on the exempted plots which were afterwards sold to Ram Charan and Gangole. The learned Single Judge of this Court based his decision on the fact that the decree of the lower Appellate Court was a joint decree, but in the absence of anything to the contrary it must, on the principle of S. 45, T. P. Act, be presumed that each of the two plaintiffs was entitled to one-half of the amount decreed. S. 45, T. P. Act, lays down that when immovable property is transferred for consideration to two or more persons and consideration is paid the purchasers, in the absence of evidence as to the interests in the fund to which they were respectively entitled or as to the shares which they respectively advanced, shall be presumed to be equally interested in the property.

On this principle Ram Charan was entitled to one-half and Gangole to the other

half of the fields exempted from the sale deed of 1907. This, in our opinion, does not take us much further, for the question still remains in what proportion, if at all, are they entitled to recover from Raja Syed Ahmad Ali Khan. These exempted fields were jointly assessed to revenue with the result that Ram Charan and Gangole were each liable to pay the whole revenue to the Government. Conversely, Ram Charan and Gangole were each entitled to pay the whole revenue to Government to prevent the Government having recourse to the various processes for the recovery of revenue which are specified in S. 146, Land Revenue Act. The right of either Ram Charan or Gangole against the defendant was in reality to recover from him that revenue which he had paid. In our opinion had Ram Charan alone paid the whole revenue he would have been entitled to sue the defendant without Gangole being a plaintiff and if Gangole had paid the whole revenue he would have been entitled to sue the defendant without Ram Charan being a plaintiff. Each of them was entitled to recover what he had paid as revenue and not half the revenue because he had a half-share. Had he not paid half the revenue but a lesser sum he would have been entitled to recover from the defendant only that much and not half the revenue. There should therefore, we think, have been separate decrees in favour of Gangole and of Ram Charan in accordance with what revenue had been paid by each. What however happened was that Ram Charan and Gangole sued jointly on the ground that they had paid the whole revenue and were entitled to recover the whole revenue from the defendant so that they represented themselves as one entity that had paid the whole revenue and were accepted as such by the defendant.

The learned counsel for the respondent has admitted that to support the decision of the learned Single Judge of this Court he must depend on the following presumptions. That Ram Charan and Gangole are purchasers in equal shares, that the liability to revenue between themselves is half and half, that as they sued jointly each must have paid something and as their shares were half and half they must be presumed each to have paid half the revenue. We agree that it can be presumed that they have equal shares in the property they bought and consequently as between themselves each is liable to half the revenue, but as we have pointed out that each was liable to pay the whole revenue to Government. We are unable to assume that because they sued together both of them paid something for they may have thought it necessary that both should be plaintiffs even if one had paid the whole amount, and we think that there is no presumption that each must have paid half the revenue. Suits by a lambardar or by a cosharer against another cosharer for arrears of revenue are of almost everyday occurrence because of that joint and several liability for revenue which frequently makes it necessary for one cosharer to pay the whole revenue lest coercive process be taken against him. As we are unable to make all the presumptions which the learned counsel for the respondent here admits are necessary to defeat this appeal, we must allow this appeal.

The learned counsel for the appellants has brought to our notice the following decisions as supporting his submission that the appeal abates in toto: A I R 1927 Pat 329,[1] A I R 1924 All 95,[2] A I R 1927 All 331,[3] A I R 1927 All 776,[4] A I R 1926 Cal 893,[5] A I R 1933 Lah 356,[6] 11 O W N 1487,[7] 1935 O W N 297[8] and 1935 O W N 401.[9] The learned counsel for the respondent, on the other hand, has called our attention to 51 All 267,[10] 48 All 81,[11] 48 All 251,[12] 50 All 559,[13]

1. Jhakhri Gope v. Phagu Mahto, (1927) 14 A I R Pat 329=103 I C 75=8 P L T 708.
2. Gajraj Tewari v. Bhagirathi Pande, (1924) 11 A I R All 95=74 I C 14.
3. Sheo Chand v. Sita Ram, (1927) 14 A I R All 331=100 I C 482.
4. Sita Ram v. Roshan Lal, (1927) 14 A I R All 776=100 I C 563.
5. Midnapore Zamindary Co. Ltd., v. Amulya Nath Roy Chowdhury, (1926) 13 A I R Cal 893=95 I C 649=53 Cal 752=43 C L J 401.
6. Chuni Lal Tulshiram v. Amin Chand, (1933) 20 A I R Lah 356=142 I C 649=14 Lah 543 =34 P L R 11.
7. Fazal Mohammad Khan v. Ali Mohammad Khan, (1935) 22 A I R Oudh 36=153 I C 54= 10 Luck 387=11 O W N 1487.
8. Ram Jas Tewari v. Ram Lal Tewari, (1936) 23 A I R Oudh 209=165 I C 45=1935 O W N 297.
9. Mohammad Faruq v. Azizul Hasan, (1935) 22 A I R Oudh 329=154 I C 897=1935 O W N 401=11 Luck 5.
10. Mahomed Wajid Ali Khan v. Puran Singh, (1929) 16 A I R P C 58=114 I C 601=56 I A 80=51 All 267 (PC).
11. Darshan Das v. Bikramajit Rai, (1926) 13 A I R All 128=89 I C 953=48 All 81=23 A L J 938.
12. Narain Das v. Sheo Din, (1926) 13 A I R All 234=91 I C 859=48 All 251=24 A L J 300.
13. Faqira v. Hardewa, (1928) 15 A I R All 172= 114 I C 177=50 All 559=26 A L J 217 (FB).

49 Bom 118,[14] 58 Cal 1341,[15] 10 Lah 7,[16] 18 Lah 746,[17] A I R 1933 Pat 646,[18] A I R 1925 Nag 299,[19] and 1938 O W N 40.[20] We do not discuss these cases because our decision is based on the fact that if the appeal did not abate in toto it was not as to the half share of Gangole that it did not abate but only as to whatever Gangole paid and as no presumption can be made about this it must be held to have abated in toto.

We would further point out that the position at the time this appeal was filed involves consequences which make the position anything but clear. As the heirs of Ram Charan were not substituted there is a decision in favour of Ram Charan and therefore of his successors-in-interest that the whole revenue of the exempted fields can be recovered from Raja Syed Ahmad Ali Khan and that decision is final between Ram Charan and the Raja. On the other hand, there is a decision in favour of the Raja against the successors-in-interest of Gangole that the Raja is not liable for any of the revenue payable on these exempted plots. It would thus appear that if Ram Charan's successors-in-interest paid the whole revenue of the exempted plots they could recover it from the Raja while if the successors-in-interest of Gangole paid the whole revenue of the exempted plots they could not recover any part of it from the Raja. This is creating an anomalous position. We think it is impossible in this suit to separate the successors of Ram Charan and the successors of Gangole, but even if it were possible, the Raja could succeed against the heirs of Gangole only to the extent of the payment made by them and not to the extent of their half share, and as the amount paid by them is unknown and cannot be presumed the second appeal abated in toto. We accordingly allow the appeal with costs throughout.

D.S./R.K. *Appeal allowed.*

14. Shankerbhai Manorbhai v. Motilal Ramdas, (1925) 12 A I R Bom 122=85 I C 197=49 Bom 118=26 Bom L R 1217.
15. Krishnabandhu Pal v. Brajendrakumar Shah, (1932) 19 A I R Cal 184=58 Cal 1341.
16. Sant Singh v. Gulab Singh, (1928) 15 A I R Lah 572=114 I C 417=10 Lah 7=30 P L R 453 (FB).
17. Hayat v. Mutali, (1938) 25 A I R Lah 35=175 I C 819=ILR (1937) 18 Lah 746=40 PLR 273.
18. Harihar Singh v. Brijnandan Sahay, (1933) 20 A I R Pat 646=147 I C 784.
19. Narayan v. Dhudabai, (1925) 12 A I R Nag 299 =92 I C 663=21 N L R 38.
20. Ram Chandra v. Makhdoom Singh, (1938) 25 A I R Oudh 62=172 I C 655=1938 O W N 40.

A. I. R. 1939 Oudh 243

RADHA KRISHNA J.

Sripal Singh and others — Plaintiffs — Appellants.

v.

Mata Badal and others — Defendants — Respondents.

Second Appeal No. 427 of 1936, Decided on 14th August 1939, against order of Civil Judge, Sultanpur, D/- 17th September 1936.

Cosharers — One cosharer in exclusive possession of plot of land without let or hindrance by other cosharers can transfer it to third person — Transferee is entitled to continue in possession subject to suit for partition by other cosharers.

A cosharer, who has been in exclusive possession of a certain plot of land without let or hindrance by other cosharers, can transfer the plot to a third person subject to the right of other cosharers to obtain a partition of the village. The transferee is entitled to continue in such possession so long as such possession does not interfere with the use by other cosharers of what was in their possession, and the cosharer not in actual possession has no right to eject the transferee in possession. His remedy is to obtain a partition. He is always entitled to claim partition of the village and to contend that the transfer executed by only some out of a large number of cosharers have no effect upon his proprietary rights in the village or his right to claim partition : *A I R 1927 Oudh 467 and A I R 1921 Oudh 106, Rel. on; A I R 1937 Oudh 503, Expl. and commented upon.*

[P 244 C 1, 2]

Haider Husain and H. H. Zaidi — *for Appellants.*

Suraj Narain — *for Respondents.*

Judgment. — This appeal relates to plot No. 2807 situated in village Katawan. The original plaintiffs, Baldeo Singh and Ambika Prasad, filed a suit for possession of the said plot alleging that they and defendants 2 to 80 were the joint cosharers of it. Defendants 1 to 3 contested the suit on the allegation that the plot in dispute was in the exclusive enjoyment of defendants 2 and 3 who had given two leases in respect of it, one dated 11th October 1932, and the other dated 15th November 1932, in favour of defendant 1 who had taken possession of it and dug a very costly well and constructed a kachcha building on it.

The two Courts below came to the conclusion that the plot in dispute had always remained in the possession of defendants 2 and 3's family for many years and they were entitled to execute a lease in respect of it in favour of defendant 1 and the lease was effective till the partition of joint lands. The Courts below have further held that they allowed defendant 1 to build a costly

well without any hindrance and were estopped from challenging this right. During the pendency of the second appeal both the plaintiffs died and the present appellants have been substituted in their place. The main question for decision is whether the possession of defendant 1 over the plot in dispute can be maintained in view of the finding that it had been in the possession of the family of defendants 2 and 3 exclusively for many years. In the alternative, the plaintiffs claim a decree for joint possession. It must be noted at the very outset that in the Court of trial the pleader for defendants 1 to 3 made the position of his clients quite clear by making the following statement :

The village katawan belongs to the plaintiffs and defendants 2 to 88 and others jointly. The village katawan is not partitioned. The land in Suit No. 2807 (2520 old) with an area of 1 bigha 19 biswas (pacca) appertains to khata khewat No. 60/1. Plaintiffs and defendants 2 to 88 are cosharers in khata khewat No. 60/1. The land in suit has always been in exclusive possession of defendant 2, his brother, Sitla Bakhsh and their father, Kaika Singh, son of Ausan Singh, as their grove land. I admit the execution of the perpetual leases as alleged in the plaint. I also admit the construction of a well and house as alleged in the plaint. The land is still covered by defendant 2's grove. Defendant 3 is only a cosharer in khata khewat No. 60/1 to which the land in suit appertains.

The question, therefore, is whether a cosharer, who has been in exclusive possession of a certain plot of land without let or hindrance by other cosharers, can transfer the plot to a third person subject to the right of other cosharers to obtain a partition of the village. The law on the point in Oudh seems to me to be well settled. In 21 O C 214[1] Lindsay, J. C. (later Lindsay, J.) held that the general rule regarding the enjoyment of joint property by the cosharers is that one cosharer has no right to appropriate specific portions of such property to the exclusion of his cosharers except by means of a lawful partition. This rule, however, is subject to the qualification that where one cosharer has been for a long time in peaceful possession of a portion of the joint property without hindrance or opposition by his co-owners the latter are not entitled to eject him except by means of a partition. This view was followed in 24 O C 227.[2]

In this Court a Bench consisting of Sir Louis Stuart Kt., C. J. and the late Raza, J. took the same view in 4 O W N 871.[3] In this case the plot in dispute was owned by two cosharers. One of them who had been in exclusive possession of it for many years mortgaged it with possession to a third person. Thereupon the other cosharer ejected the mortgagee from possession without process of the law. On a suit for possession brought by the mortgagee his suit was decreed. On the basis of the rule laid down in 21 O C 214[1] it was remarked in this case that a cosharer who had been in exclusive possession of a certain plot of joint land or his transferee was entitled to continue in such possession so long as such possession did not interfere with the use by other cosharers of what was in their possession and the cosharer not in actual possession had no right to eject the mortgagee in possession. His remedy was to obtain a partition.

A later decision of a Single Judge of this Court reported in 1937 O W N 1036[4] was relied upon by the learned counsel for the appellants. In this case in 1899 a perfect partition of a mahal called Baqia Rahimunnissa was formed. The plaintiff was not a cosharer in that mahal after that partition but some time in 1910 some of the cosharers of the mahal Baqia Rahimunnissa effected an exchange of plot No. 140 with the plaintiff to regularize the plaintiff's possession over that plot which seems to have existed from before. This case was clearly not a case where the cosharers who were parties to the exchange had been in exclusive possession of it, and so the exchange carried out by them behind the back of other cosharers could not be binding upon cosharers not parties to the exchange. On the facts therefore the identical question involved in the present appeal did not arise in that case. The learned Judge however seems to have approved of the view that a cosharer in an undivided mahal cannot alienate any defined portion of such mahal even though he might have been in exclusive possession of the same by an agreement amongst the various cosharers. For the purposes of that case it was not necessary for the learned Judge to lay down the view stated above. I respectfully dissent from the view taken by

1. Ram Piyare Lal v. Nageshwar, (1918) 5 A I R Oudh 288 = 48 I C 91 = 21 O C 214.
2. Ram Bahadur Singh v. Narsingh Partap Bahadur Singh, (1921) 8 A I R Oudh 106=63 I C 433 = 24 O C 227.
3. Jalaluddin Khan v. Rampal, (1927) 14 A I R Oudh 467 = 105 I C 359 = 2 Luck 740 = 4 O W N 871.
4. Wajid Ali v. Mohammad Naziruddin Husain, (1937) 24 A I R Oudh 503=171 I C 89=1937 O W N 1036.

the learned Judge and follow the view taken by this Court in 4 O W N 871.[3] In view of my decision on the first point it is not necessary to discuss the question of estoppel. Defendants 1 to 3 admitted the title of the plaintiffs as cosharers in the plot in dispute. The plea of estoppel, it is admitted, has not the effect of destroying the proprietary rights of the plaintiffs who as cosharers are always entitled to claim partition of the village and to contend that leases having been executed by only two out of a large number of cosharers have no effect upon their proprietary rights in the village or their right to claim partition.

Lastly, the learned counsel for the plaintiffs-appellants claimed that a decree for joint possession be passed in their favour. I am of opinion that in view of the admission by defendants 1 to 3 of the plaintiffs' title and my own decision on the point it is not necessary for me to pass such a decree. The plaintiffs' title as cosharers has never been questioned. The decree passed by the Court below is maintained and the appeal fails and is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

*** A. I. R. 1939 Oudh 245**

ZIAUL HASAN C. J. AND BENNET J.

Nazir Hasan Khan — Appellant.

v.

Ganga Din — Respondent.

Misc. Appeal No. 75 of 1937, Decided on 7th August 1939, against order of Special Judge, first grade, Bara Banki, D/- 31st August 1937.

(a) U. P. Encumbered Estates Act (25 of 1934), S. 9 (3) — Amendment of written statement cannot be allowed under O. 6, Rule 17, Civil P. C., if under garb of amendment creditor is putting new claims which he is precluded from doing under S. 9 (3).

Order 6, R. 17, Civil P. C., would not enable a party to alter the nature of his suit by the substitution or the addition of a claim founded on a different cause of action. Amendment cannot be allowed if it will take away a valid defence under the law of limitation. Hence if under the garb of amendment the creditor is putting new claims which he is precluded from doing under S. 9 (3), U. P. Encumbered Estates Act, the amendment cannot be granted: *AIR 1925 Bom 248*; *AIR 1926 Mad 827*; *A I R 1914 All 80 and A I R 1922 P C 249, Rel. on.* [P 246 C 2; P 247 C 1, 2]

(b) Limitation Act (1908), S. 5 — Mistaken advice of counsel is not sufficient to extend time under S. 5 unless it is in good faith.

The mistaken advice of counsel is not sufficient to justify extension of time under S. 5, unless the advice was given in good faith, that is, with due care and attention. [P 247 C 1]

B. K. Dhaon — *for Appellant.*

M. Ayub and M. L. Tilehri — *for Respondent.*

Judgment. — This is an appeal under S. 45, Encumbered Estates Act, against the order dated 31st August 1937 passed by the Special Judge, first grade, Bara Banki, on an application for amendment of a written statement filed under S. 10 of that Act. This application was made by Ganga Din, the respondent in this appeal. The applicant under S. 4 in the case was the appellant Nazir Hasan Khan. It appears that another application under the Encumbered Estates Act had been made by one Krishna Bihari alias Manna Babu, and that the respondent Ganga Din had filed a written statement in that case also, which was before a Special Judge of the second grade. His written statement in this latter case was filed on 27th March 1936, while in the case of Nazir Hasan Khan it was filed on 23rd April 1936. In both cases he made claims against the applicants on the basis of certain mortgages. In the case of Nazir Hasan Khan, Ganga Din referred in his written statement to a number of mortgages, but made claims in respect of some of them only. In the case of Krishna Bihari, Ganga Din made claims in respect of seven mortgage deeds.

Ganga Din's claim in Krishna Bihari's application was decided by compromise in respect of three out of the seven mortgage deeds. In respect of the remaining four his claim was dismissed on 1st March 1907. On 5th August 1937 Ganga Din made an application before the Special Judge of the first grade, who was dealing with Nazir Hasan Khan's application, asking that his written statement in that case might be amended by the addition thereto of claims based on the four mortgage deeds in respect of which his claims had been rejected by the Special Judge of the second grade. Nazir Hasan Khan objected to the amendment prayed, but Ganga Din's application was allowed by the Special Judge of the first grade on 31st August 1937, in the order against which the present appeal has been preferred. Neither the record of the proceedings before the Special Judge of the second grade nor any copy of the judgment of that Special Judge in which he rejected Ganga Din's claims in respect of the four mortgage deeds referred to, has been placed before us. It would appear from the order of the Special Judge of the first grade appealed against that the compromise by

which the claim on the other three mortgage deeds was settled did not cover in any way the four deeds now under consideration. The record of the Special Judge, second grade, was before the Special Judge, first grade, and in his order he has observed as follows :

It does not clearly appear as to how the claim for these four deeds was left out in that Court (the meaning of this apparently being that the reasons for rejecting the claim on these deeds are not clearly given). They are no doubt mentioned in the original written statement filed in the Court of the Special Judge, second grade, but subsequently it appears that no claim with reference to them was pressed. I come to this conclusion by reading the order of the Special Judge, second grade, dated 1st March 1937, in which he decrees claim No. 53/2 relating to three mortgage deeds other than those which are in dispute here. As regards these four deeds the learned Special Judge remarks in his judgment that the applicant of that case, namely Krishna Bihari, was not liable to pay the debts due under these four deeds.

As regards the merits of the application made by Ganga Din for amendment of his written statement in the Court of the Special Judge, first grade, the Special Judge remarked as follows :

The difficulty is about the application of O. 6, R. 17, Civil P. C., and S. 9 (3), Encumbered Estates Act, and Ss. 5 and 14, Limitation Act. The provisions of S. 9 (3), Encumbered Estates Act, are mandatory, but I think that they do not preclude the applicability of the Civil Procedure Code or the Limitation Act. I quite feel that under the garb of this amendment the creditor is putting new claims which he is precluded from doing under S. 9 (3), Encumbered Estates Act, but having regard to the broad principles of equity and the exceptional circumstances of this case and to the fact that litigation about these deeds was going on in the lower Court, I allow the application for amendment subject to the payment of Rs. 25 as costs to the other side.

It is not, in our opinion, necessary to consider at length why Krishna Bihari was at first thought to be liable on these mortgages. It is sufficient to say that, according to the application for amendment made by Ganga Din on 5th August 1937, Krishna Bihari had purchased a portion of the mortgaged property in execution of a decree against Nazir Hasain Khan.

Section 9, Encumbered Estates Act, provides that claims shall be presented within three months from the date of the publication of the notice referred to in this Section, and that the Special Judge may receive the written statement if presented within a further period of two months on his being satisfied by the claimant that he had sufficient cause for not presenting it within the period of three months. Since notice was published in Nazir Hasan Khan's case under Sec. 9 on 8th February 1936, it is clear that the additional claims made by Ganga Din on 5th August 1937 were made long after the period of limitation had expired. It has, however, been contended on his behalf that he was entitled to amend his original written statement which had been made within time on 23rd April 1936, having regard to the provisions of O. 6, R. 17, Civil P. C. This Rule empowers a Court at any stage of the proceedings to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. It has however been held by all or nearly all High Courts that this Rule would not enable a party to alter the nature of his suit by the substitution or the addition of a claim founded on a different cause of action. We have been referred on this point to a large number of rulings, but we will mention only a few of them. In A I R 1925 Bom 248[1] the Bombay High Court held that a plaintiff cannot by amendment be allowed to substitute one plaint for another. In A I R 1926 Mad 827[2] the Madras High Court observed that

it is a cardinal maxim of the law of amendment not only that you should not amend so as to change the cause of action but you should not amend in such a way as will take away a valid defence under the law of limitation.

In 36 All 370[3] the Allahabad High Court held that a Court had no power to allow amendment of the plaint by introducing a new cause of action after the period of limitation in respect of such cause of action had expired. Finally in A I R 1922 P C 249[4] their Lordships of the Privy Council observed :

All rules of Court are nothing but provisions intended to secure the proper administration of justice and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but none the less no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit.

Learned counsel for the respondent has argued that actually there was no change

1. Kokamal Madhoram v. Gulabsingh Gurudatsingh, (1925) 12 AIR Bom 248=87 I C 481=27 Bom L R 277.
2. Lakshmanacharyulu v. Venkataramanuja Charyulu, (1926) 13 A I R Mad 827=96 I C 700=51 M L J 414.
3. Balkaran Upadhya v. Gaya Din Kalwar, (1914) 1 A I R All 80=24 I C 255=36 All 370=12 A L J 635.
4. Ma Shwe Mya v. Maung Mo Hnaung, (1922) 9 A I R P C 249=63 I C 914=48 Cal 832=4 U B R 30=48 I A 214 (P C).

in the nature of the suit. The mortgage deeds had been referred to in the respondent's original written statement. It is admitted, however, that no claim was made on them and it is also admitted that the omission to make any claim on them was due to the fact that a claim was being made on them before the Special Judge of the second grade. There can be no doubt whatever therefore that there was a material change in the claim made in the written statement, since further substantial amounts were claimed on the basis of no less than four additional mortgage deeds. The respondent cannot therefore rely on O. 6, R. 17 to bring his additional claim within time.

Reference was made by the Special Judge, first grade, in his order to Ss. 5 and 14, Limitation Act. S. 14 has not been referred to by counsel, and we have no doubt that it cannot apply since the person against whom the claims were made was different in each case. As regards S. 5 the respondent would lay the blame on his counsel for advising him wrongly, but it has been held in various cases that the mistaken advice of counsel is not sufficient to justify extension of time under S. 5, unless the advice was given in good faith, that is with due care and attention. We have been referred on this point to the case in A I R 1938 Lah 81.[5] It has not been contended that the respondent or his counsel was justified in believing that he was entitled to sue on these deeds against Krishna Bihari, and it would seem from what the lower Court observed in its order that it was realized during the proceedings in that Court that the claim in respect of these deeds could not be pressed.

Even if it were held that the respondent had some justification for making the claim on Krishna Bihari's application, it can hardly be doubted that he and his counsel were negligent in not preferring it in the Court of the Special Judge, first grade, earlier. Actually they allowed a period of more than five months to elapse after the claim had been rejected by the Special Judge, second grade, and the only explanation which has been offered for this delay is that they were considering whether an appeal should be preferred against the order of the Special Judge, second grade. In view of the observations of the lower Court with regard to the proceedings in the Court of the Special Judge, second grade, we are doubtful whether this explanation is true, and in any case we do not consider that it would justify such a long delay.

The lower Court admitted that the respondent was putting in new claims which he was precluded from doing under S. 9, Encumbered Estates Act, and we do not consider in the circumstances that the reasons given for allowing the amendment are sufficient. We accordingly allow this appeal, set aside the order passed by the Special Judge of the first grade and disallow the application made by the respondent for the amendment of his written statement. The appellant will recover his costs in this appeal from the respondent. The appellant applied to this Court twice for an order of stay of proceedings in the Court of the Special Judge, first grade, but this application was not allowed, it being considered that he would not be prejudiced if those proceedings were allowed to continue. The effect of the order now passed on this appeal will be that the decree awarded by the Special Judge against the appellant will be modified in so far as it is based on the deeds with which this judgment is concerned, the amount being reduced accordingly together with the costs allowed.

D.S./R.K. *Decree modified.*

5. Amrit Lal v. Phool Chand, (1938) 25 A I R Lah 81=178 I C 510=I L R (1938) Lah 379 =40 P L R 986.

A. I. R. 1939 Oudh 247

HAMILTON AND RADHA KRISHNA JJ.

Tek Chand — Plaintiff — Appellant.

v.

Becha and others — Defendants— Respondents.

Second Appeal No. 288 of 1936, Decided on 3rd August 1939, against order of First Sub-Judge, Kheri, D/- 20th May 1936.

(a) Oudh Rent Act (22 of 1886), S. 48 — Sister is collateral.

A sister and a brother do not descend one from the other and therefore they must be held to be collaterals although the term is generally applied to a more distant relationship: *17 R D 1013, Expl.* [P 248 C 2]

(b) Oudh Rent Act (22 of 1886), S. 48 — Cultivation done by husband on behalf of wife —This does not make wife sharer in cultivation.

Cultivation in the sense in which it is used in S. 48 refers to a physical act or, in other words, the sharing must be a real and a personal one. Where the husband of a collateral has taken part in the physical cultivation of the land on behalf of his wife, this cannot in law make his wife a sharer in the cultivation. [P 248 C 2; P 249 C 1]

Ram Prasad Varma — *for Appellant.*

Judgment. — This is a second appeal by the plaintiff in a suit brought by Tek

Chand against four persons, Bansi, Becha, Chhutkau and Jagannath of whom the first is dead leaving thus only three respondents, but we will keep the same numbers as were given to them in the Courts below. The plaintiff had obtained a tenancy lease of the land in suit from the Oel estate that was the superior proprietor. The date of this lease was August 1934 and it is said to have followed on the death of Parbhu which occurred in May 1934, who had been tenant of the estate in this land. The plaintiff alleged that the respondents had dispossessed him of the land in suit having no rights to it and accordingly he brought this suit to recover possession and for damages. The defendants alleged that Parbhu had left a sister Mt. Phula who is the wife of defendant 4, Jagannath, and defendants 1 to 3 were in possession as collaterals of the deceased Parbhu while respondent 4 was in possession on behalf of his wife Mt. Phula who was heir of her brother Parbhu. The defence alleged that respondents 1 to 3 had shared with Parbhu in the cultivation of the land in suit together with Mt. Phula, sister of the deceased and Lalji, her son, and all the defendants were legal heirs and were joint cultivators of the deceased during his lifetime and after his death they continued in possession.

The Courts below held that Mt. Phula, as sister of the deceased tenant, Parbhu, was an heir and not a collateral and therefore the Oel estate could not give a valid lease to the present plaintiff. They have not found that Mt. Phula herself joined in the cultivation, but the lower Appellate Court has made remarks which are somewhat vague on the subject. The learned Civil Judge states that the husband of Mt. Phula, i. e. Jagannath, respondent 4, might be in possession on her behalf and his possession was practically possession of Mt. Phula. We will take the judgment of the learned Civil Judge to include two findings, firstly that Mt. Phula is an heir and not a collateral and secondly that if it was nevertheless necessary for her in order to succeed Parbhu to share in the cultivation, she must be held in law to have done so through her husband, respondent 4.

In holding that the sister is not a collateral but an heir the Courts below have relied on a decision of a single Member of the Board of Revenue reported in 17 R D 1013,[1] where it was held that under the Hindu law of Inheritance (Amending Act) of 1929, a sister comes in as an heir after the father's father and the respondent Mt. Maharaji was the nearest living relation of the last male tenant Rameshwar, and a sister, in the opinion of the learned Member of the Board, was not a collateral but an heir just as a brother is an heir under the Oudh Rent Act. The learned member of the Board of Revenue while referring to the brother was apparently referring to S. 24, Agra Tenancy Act, where a brother is No. 5 in the order of succession, the nearest collateral male relative in the male line of descent being No. 7. In the Oudh Rent Act a brother is not mentioned as an heir; in fact he is not mentioned at all. On the other hand, under S. 24, Agra Tenancy Act, the word "heir" does not occur at all. Under Section 48 (1), Oudh Rent Act, it is laid down that when a statutory tenant dies, his heir shall be entitled to retain occupation of the holding while in cl. (2) it is laid down that a collateral relative who did not, at the date of the death of the deceased, share in the cultivation of the holding shall not be deemed to be an heir of the deceased within the meaning of this Section. An heir under this Section is an heir under the personal law of the deceased and cl. (2) by its wording implies that a collateral relative can be an heir, but for the purposes of this Section shall not be deemed to be an heir, that is to say, he shall not be entitled to retain occupation of the holding. The word "collateral" in Wharton's Law Lexicon is held to mean "indirect, sideways, that which hangs by the side," and

> collateral consanguinity or kindred, which descend from the same stock or ancestor as the lineal relation, but do not descend one from the other, as the issue of two sons.

It cannot be said that a sister and a brother descend one from the other and, in our opinion therefore they must be held to be collaterals although the term is generally applied to a more distant relationship. We are therefore unable to agree with the decision of the learned Member of the Board of Revenue that a sister is not a collateral. As she is only a collateral heir we now have to decide whether in the words of S. 48, Mt. Phula shared in the cultivation of the holding.

We think that cultivation in the sense in which it is used in this Section refers to a physical act or, in other words, to quote 1 U D B R 138,[2] "the sharing must be a real

1. Ram Saroop Singh v. Maharaji, (1933) 17 R D 1013.

2. Harbans v. K. Bishambhar Singh, 1 U D B R 138.

and a personal one." It has not been alleged that Mt. Phula herself did anything in connexion with this holding but only that her husband did so on her behalf. We think that it is relevant to note that at the time that the Rent Act first came into force a sister under the Hindu law was not an heir and collateral heirs were only males who could take a personal part in the actual work of cultivation. If the representation of Mt. Phula by her husband made her a sharer in the cultivation, it seems to us that it would be open to any collateral to say that he shared in cultivation because somebody else was doing so on his behalf. If this was so, it would, in our opinion, in practice do away with the restrictions imposed by S. 48 (2). We are of opinion that the fact that the husband of Mt. Phula took any part in the physical cultivation of this land cannot in law make his wife a sharer in the cultivation. Mt. Phula therefore could not take the benefits granted to a collateral heir under S. 48, Oudh Rent Act, and the present defendants consequently were trespassers. We therefore allow the appeal and set aside the decisions of the lower Courts and decree the suit with costs in all Courts.

D.S./R.K. *Appeal allowed.*

A. I. R. 1939 Oudh 249

ZIAUL HASAN C. J. AND BENNET J.

Kundan Lal — Plaintiff — Appellant.

v.

Secretary of State and another — Defendants — Respondents.

First Appeal No. 48 of 1936, Decided on 7th August 1939, against decree of Civil Judge, Lucknow, D/- 6th April 1936.

Contract Act (1872), Ss. 2 and 7 (1)—Advertisement by railway company in newspaper inviting tenders for certain contract — Firm making proposal to railway company to give them contract on terms mentioned in draft agreement—Railway company accepting it conditionally — Counter proposals made by it not accepted by firm—Advertisement in newspaper held did not constitute proposal and there was no complete contract.

A railway company by an advertisement published in a newspaper invited tenders for undertaking the contract of the cash and payment work of the railway. A firm made a proposal to the railway that they should give the firm the contract of the cash and payment department on terms mentioned in the draft agreement received by the firm from the railway. The railway accepted the proposal only subject to certain conditions to be fulfilled by the firm. The counter-proposals made by the railway company were not accepted by the firm:

Held that the notice published by the railway in the newspaper did not constitute a proposal within the meaning of S. 2, because the notice was not addressed to any particular person, nor did it express willingness to do or to abstain from doing anything with a view to obtaining anybody's assent thereto. [P 252 C 2]

Held further that there was nothing in law to prevent the railway from qualifying their acceptance with certain conditions. The acceptance being not unconditional and the counter-proposals made by the railway not having been accepted by the firm, there was no complete contract between the parties. [P 253 C 1, 2]

M. Wasim and P. L. Varma — *for Appellant.*

H. S. Gupta and R. K. Bose — *for Respondents.*

Judgment. — This is a plaintiff's appeal against the judgment and decree of the learned Civil Judge of Lucknow, dismissing his suit for damages against the Secretary of State for India in Council. By an advertisement published in the "Statesman" of 7th April 1929, the Agent, East Indian Railway, invited tenders up to noon on 31st May 1929, for undertaking the contract of the cash and payment work of the East Indian Railway with effect from 1st September 1929.

The plaintiff-appellant and Madho Prasad Khanna, respondent 2, entered into a partnership under the style of Madho Prasad Kundan Lal for the purpose of obtaining the contract from the railway. They obtained the printed form, on which the tender was to be offered, from the railway on making the necessary payment and this form was accompanied by a printed draft of an agreement which the contractor whose tender was accepted was to execute. The sum of Rs. 500 was also deposited by them as earnest money as required by the advertisement. On 28th May 1929, the firm sent in the tender offering to carry out the contract for a monthly remuneration calculated at the rate of Re. 1-15-6 per mile of the route mileage of the railway opened for traffic. The plaintiff's case is that the tender was accepted by the Agent, East Indian Railway, by his telegram dated 27th March 1930, but that subsequently he tried to impose upon the firm terms different from and more onerous than those contained in the draft agreement supplied with the tender form. The plaintiff objected to the new conditions sought to be imposed but the objections were overruled and the firm was informed that the conditions contained in the draft agreement sent after the acceptance of the tender were absolutely neces-

sary. The plaintiff further stated that he made the tender and spent a considerable amount of money on the faith of the terms of the tender and draft agreement originally supplied and that had he been intimated earlier of the intention of the railway to have an agreement on terms and conditions so different as were subsequently insisted upon, he would never have offered the tender or expended large sums of money to acquire the contract. As according to the plaintiff, defendant 1, namely the Secretary of State for India in Council, tried to avoid and cancel the contract and did ultimately refuse to perform his part of the contract, he was liable for damages incurred by the plaintiff as set out in the schedule attached to the plaint. He assessed the damages as follows:

	Rs.	a.	p.
1. Pay of staff	1132	4	3
2. Miscellaneous expenses such as printing, advertisement, travelling expenses, etc.... ...	4361	10	9
3. Interest paid to the employees on the security money deposited by them	716	1	0
4. Legal adviser's charges ...	1536	0	0
5. Interest on Rs. 2 lakhs ready in hand from 1st April 1930 to 16th January 1930, *(sic)* ...	14,254	0	0
6. Loss of business and trouble, etc.	8000	0	0
Total Rs. ...	30,000	0	0

The plaintiff however claimed Rs. 15,000 only. Madho Prasad Khanna who had not joined the suit was made a pro forma defendant. The suit was contested by the Secretary of State for India in Council mainly on the ground that no contract was entered into between him and the plaintiff or the firm of Madho Prasad Kundan Lal. On the pleas raised by defendant 1 the learned trial Court framed the following issues:

1. Did the telegram of 27th March 1930 complete the contract between the parties? 2. If not, did the letter of 29th March 1930 complete the same because as alleged by the plaintiff the execution of a written agreement was a mere matter of form? 3. Was there, as alleged, a completed agreement between the parties to form out to the plaintiff the cash and pay work on the East Indian Railway line? 4. Was defendant 1 justified or not in adding new conditions to those sent to the plaintiff along with the form of tender? 5. Which of the parties was responsible for non-execution of the deed of agreement? 6. Did defendant 1 misrepresent to the plaintiff that the latter would get the theka as alleged? 7. Did the plaintiff incur losses and expenditure detailed in the plaint? 8. Is defendant 1 liable to compensate the plaintiff for the same? 9. Is the suit beyond the territorial jurisdiction of this Court? 10. To what relief is the plaintiff entitled? 11. Can defendant 1 be made liable on the ground of misrepresentation, if any, made by the State's servants?

Issues 1, 2 and 3 were decided in the negative and issue 4 in the affirmative. As to issue 5 the learned Judge remarked that as the negotiations never ripened into a binding contract that issue did not arise. Issue 6 was also decided in the negative. On issue 7 it was held that the plaintiff would have been entitled to a sum of Rs. 11,295-15-3 if the first three issues had been decided in his favour. Issue 8 was also decided in the negative. The question of jurisdiction had been decided in favour of the plaintiff before the trial of the suit actually commenced. On issue 10 it was held that the plaintiff was not entitled to any relief and about issue 11 it was said that it did not arise owing to the finding on issue 6. The suit of the plaintiff was accordingly dismissed with costs to defendant 1.

The main question for decision before us is whether there was a complete contract between the plaintiff and respondent 1 and whether there was any breach of the contract on the part of the latter. For a decision on this point it is necessary to consider the history of the negotiations that were carried on between the parties. We have already said that it was by an advertisement inserted in the "Statesman" of 7th April 1929, that tenders were called for by the Agent, East Indian Railway. Para. 7 of this advertisement runs as follows:

Tenders must be submitted on a form, which with a draft of the contract to be executed by the successful tenderer, may be obtained from the undersigned on payment to the Treasurer of the East Indian Railway, of a fee of Rs. 15 which will not be refunded. The tender form will be issued on production of a receipt from the Treasurer. Tenderers outside Calcutta may obtain tender form by remitting Rs. 15 per money-order direct to the undersigned.

Accordingly on 9th April 1929 the firm of Madho Prasad Kundan Lal sent a sum of Rs. 15 by money-order to the Agent, East Indian Railway, and asked for a tender form by their letter, Ex. A-1. The Secretary to the Agent despatched the tender form together with a form of agreement (Ex. 22) to the firm on 17th April 1929: *vide* Ex. 5. On 2nd May 1929 the firm despatched a sum of Rs. 500 in Government currency notes under registered and insured cover to the Chief Accounts Officer of the railway (Ex. 6) and on 28th May they despatched the tender form (Ex. A-46) duly filled up. It appears that the firm received no communication from

the railway for several months and a telegram (Ex. 45) was sent by the plaintiff-appellant probably in the beginning of December 1929 to the Chief Accounts Officer asking for information about their tender. To this a reply was sent by telegram (Ex. 9) by the Chief Accounts Officer on 4th December saying that no information was available. Madho Prasad Khanna appears to have then communicated with the Raliway Board and on 16th December a telegram (Ex. 10) was sent to him by the Board saying that the matter was still under consideration. On 18th March 1930, Madho Prasad again wired to the Agent, East Indian Railway (Ex. A-3), asking for the decision about the tender. To this a reply by wire (Ex. A-4) was sent by the Agent on 20th March saying that the Railway Board's decision was awaited. On the same date a letter (Ex. A-5) was addressed by the Assistant Director of Finance, Railway Board to the Agent, East Indian Railway. This letter has an important bearing on the case. It says that the Financial Commissioner, Railways, considers that the lowest tender by Messrs. Madho Prasad Kundan Lal should be accepted provided they agree to furnish cash security of Rs. 2,00,000 or Government securities of the market value of Rs. 2,00,000 with a margin to cover depreciation in such market value and to execute an agreement in the form that would be drafted and would include a bond for Rs. 4,00,000 and "all clauses that are considered necessary for the efficient performance of the work." It further said that the draft agreement was under preparation and would be sent to the addressee in due course. On 26th March 1930 Madho Prasad sent a reply prepaid telegram (Ex. A-6) to the Agent of the Railway to the effect "Kindly wire Railway Board's decision if received," and on the next day a telegram (Ex. 12) containing the single word 'Accepted' was sent by the Agent to Madho Prasad. This telegram was followed by a letter (Ex. A-10) dated 29th March 1930, the material portion of which is as follows :

Dear Sirs,

With reference to the tender submitted by you in the matter of the cash contract for this railway, I am requested by the Agent to advise you that the Railway Board has accepted the same subject to the following conditions :

1. That you furnish cash security of rupees two lakhs or Government securities of the market value of rupees two lakhs with a margin to cover depreciation in such market value.

2. That you execute an agreement in a form which will be sent to you later, which will include a bond for rupees four lakhs and all clauses that are considered to be necessary for the efficient performance of the work.

3. The agreement will require to be executed by the several partners trading in the name of Messrs. Madho Prasad Kundan Lal jointly and severally, in their individual capacity, unless your above firm is a registered one, of which proof will be required.

This letter also asked for the names of the individuals who would execute the agreement, their residences and also a list of immovable properties which were going to be hypothecated to the Government of India. This letter, which was addressed to the firm of Madho Prasad Kundan Lal, Jopling Road, Lucknow, appears to have been sent to the Dead Letter Office and from there to the sender and on 8th April 1930 it was sent again by the Agent along with his letter, Ex. A-13, but this time it was addressed to Madho Prasad Khanna personally. On 13th April Madho Prasad acknowledged receipt of this letter on behalf of the firm by his letter, Ex. A-14. On 27th April 1930 Madho Prasad and the present appellant executed a deed of partnership (Ex. 32) for the purpose of carrying on the contract for which they had applied to the railway. On 28th April both the partners of the firm sent a letter (Ex. A-16) to the Agent in which they said :

With reference to your letter No. A-E 1455, dated 29th March 1930, received on the 11th instant communicating your desire to advise us the acceptance of our tender by the Railway Board on the conditions stated therein for which kindly accept our many thanks . . . .

2. We note the requirements for the execution of the agreement which we will execute on receipt of the form from you . . . .

On 8th May 1930, letter Ex. A-18 was despatched by the Agent to the firm asking for full details of the property which the firm proposed to hypothecate to the Government of India and further said :

The date on which the Agent will require you to take up the duties of cash contractor will be fixed on a satisfactory completion of the conditions attached to the offer made to you by the Agent in regard to the securities to be deposited or assigned and no definite date can be given unless and until these matters have been properly dealt with.

To this a reply (Ex. A-19) was sent signed by both the partners on 12th May 1930, in which they said :

However if you consider that a further security of Rs. 2,00,000 of immovable property is necessary in consideration of the Railway Board's desire, we have no objection to comply with your wishes and here in detail further properties to be hypothecated to the Government of India making a total of Rs. 6,00,000 . . . .

On 18th June 1930, the Agent by his letter, Ex. A.20 asked the firm to send title deeds of the properties which they proposed to hypothecate and on 21st June 1930 the firm sent the title deeds through a messenger along with their letter, Ex.A-21 to the Chief Accounts Officer of the railway. After this some correspondence followed between the firm and the railway in connexion with the title deeds and eventually, on 27th September 1930, the Chief Accounts Officer sent to the firm along with letter Ex. A.23 two copies of the agreement and indenture that the firm were required to execute "before you can be allowed to enter on your duties" and asked on what date the members of the firm would be in Calcutta for executing the said documents. On 7th October 1930, Kundan Lal wrote to the Chief Accounts Officer (Ex. A-24) saying that the draft agreement

is not the same which was originally supplied but was more onerous to the contractors and imposes fresh liability and involves more expenditure and greater risks.

It was requested that another draft might be prepared in accordance with the draft which was originally supplied with the tender form. The Chief Accounts Officer by his letter (Ex. A-25) dated 14th October 1930, asked for details of the objections that the firm had to the draft agreement sent to them. Thereupon, on 31st October 1930, the plaintiff sent details of the objections (Ex. A-26) to the Chief Accounts Officer and on 7th November he returned the draft agreement with his letter Ex. A.27 after making some alterations in the draft. In reply to this the Agent sent a long letter (Ex. A-28 dated 20/22nd December 1930) considering in detail all the objections raised by the firm to the draft agreement and making some alterations in the draft to meet the wishes of the firm. Along with this letter was sent another draft (Ex. A-49) as amended by Messrs. Morgan & Co. On 9th January 1931, the plaintiff-appellant sent another letter to the Agent (Ex. A-32) replying to the contents of the Agent's letter (Ex. A-28) and making some more suggestions about the draft agreement. On 16th January 1931, the Agent wrote to the firm (Ex. A.34) asking to be informed by the 22nd January if the firm were agreeable to execute the revised draft agreement and mortgage deed that were sent to them with the letter dated 20/22nd December 1930. To this the plaintiff-appellant who now subscribed himself "Managing Proprietor of the firm Madho Prasad Kundan Lal" replied by his letter, Ex. A-35, dated 19th January 1931, the last paragragh of which runs as follows:

I feel much disconcerted and painful and losing a lot but considering the danger my property will be in, I find it difficult to work in partnership under the new draft agreement offered to be executed.

Finally, on 26th February 1931, the Agent, East Indian Railway, addressed the following letter (Ex. A-40) to the firm.

Dear Sirs,

Cash Contract.

With reference to the letter dated, Lucknow, 19th January 1931, from Mr. Kundan Lal, and letters dated, Calcutta 22nd January 1931, and 26th January 1931, from Mr. M. P. Khanna I am directed to state that the Agent notes your decision not to execute the agreement that has been drafted in accordance with the conditions mentioned in this office letter No. AE1455 dated 29th March 1930. In the circumstances, I am to communicate that the negotiations with you for the performance of the work of the cash and pay department of this railway are to be considered as at an end.

The Chief Accounts Officer has been requested to refund to you the earnest money of Rupees 500 deposited with the tender on your returning to him the receipt for the deposit.

After this Madho Prasad tried to secure the contract for himself along with another partner (Ex. A-42) but his offer was rejected by the Agent (Ex. A-43). The above is a brief history of the negotiations that were carried on between the parties and it is in the light of the above facts that we must decide whether or not any contract was completed between the plaintiff or the firm on the one hand and the Secretary of State for India in Council on the other. "Contract" is defined by S. 2 (h), Contract Act, as an agreement enforceable by law. Under cl. (e) of the Section every promise and every set of promises forming the consideration for each other, is an agreement. Under cl. (b), when a person to whom a proposal is made signifies his assent thereto, the proposal is said to be accepted and the proposal when accepted becomes a promise. Cl. (a) defines proposal as follows:

When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.

In view of this definition it cannot be said for a moment that the notice published by the raliway in the "Statesman" of 7th April 1929 constituted a proposal within the meaning of S. 2, Contract Act, because the notice was not addressed to any particular person, nor did it express willingness to do or to abstain from doing anything with a view to obtaining anybody's assent thereto. It was in fact conceded on behalf

of the appellant that the aforesaid advertisement was not a proposal. On the other hand the contention was that the proposal in the present case emanated from the plaintiff and that it was accepted by the railway. In the Court below, it seems to have been contended that the railway accepted the plaintiff's proposal by their telegram Ex. 12 of 27th March 1930, as well as by the letter (Ex. A-10), dated 29th March 1930. In the course of arguments before us however the learned counsel for the appellant did not rely upon the telegram, and we think very properly, as according to the rules of business every telegram has to be confirmed by a letter and as a telegram cannot be expected to be more than a mere outline of a communication. The learned counsel however strenuously argued that while accepting the plaintiff's proposal by their letter, Ex. A-10, the railway were not legally justified in supplementing the acceptance with any terms other than those contained in the draft of the agreement sent along with the tender form. We do not see our way to accept this argument. When it is conceded that the advertisement which appeared in the "Statesman" was not a proposal and when it is further conceded that the so-called acceptance of the plaintiff's proposal was for the first time embodied in the letter, Ex. A-10, we fail to see what there was in law to prevent the railway from qualifying their acceptance with certain conditions. Indeed in view of S. 7 (1), Contract Act, which lays down that in order to convert a proposal into a contract the acceptance must be absolute and unqualified, the so-called acceptance contained in the letter, Ex. A-10, was no acceptance at all. On the plaintiff's own argument the situation was this. The plaintiff's firm made a proposal to the railway that they should give the firm a contract of the cash and payment department on terms mentioned in the draft agreement received by them from the railway. The railway did not see their way to accept the proposal absolutely but considered it necessary in their own interest to require certain other conditions to be fulfilled by the plaintiff's firm. What was there in law against it, or what rights did the plaintiff's firm acquire merely by making a proposal? The plaintiff's proposal would have ripened into a contract if the railway had accepted it unconditionally or if the counter-proposals made by the railway had been accepted by the plaintiff's firm. Neither of these two eventualities happened. Therefore there was no complete contract between the parties.

We may also note that on receipt of the Agent's letter, Ex. A-10, dated 29th March 1930, the firm, so far from raising any objection to the conditions mentioned in the letter, by their letter, Ex. A-16, of 28th April 1930, thanked the Agent for acceptance of their tender and said:

> We note the requirements for the execution of the agreement which we will execute on receipt of the form from you.

This gives the lie to the plaintiff's allegation that he considered the terms contained in the draft agreement sent along with the tender form to be the only terms which he would have to comply with in order to secure the contract. The learned counsel for the appellant and the learned Government Advocate on behalf of the Secretary of State for India, respondent, have referred to various rulings but we do not consider it necessary to discuss them as the principles of law laid down in them on the interpretation of the provisions relating to contracts contained in the Contract Act are not disputed by either party and as the sole question for decision in the present appeal is the question of fact whether or not the plaintiff's proposal matured into a contract. In view of the facts mentioned above, it cannot be held for a moment that the proposal matured into a contract.

The learned Government Advocate also relied on S. 30, Government of India Act of 1919 and argued that as no assurance was executed in the present case by a person authorized by the Governor-General in Council, the contract, if any, cannot be enforced against the Secretary of State for India. It is in our opinion unnecessary to consider the validity or otherwise of this argument as we have held that there was in fact no contract between the plaintiff and the Secretary of State for India. The learned Government Advocate also objected to the amount held by the learned Judge of the Court below as that to which the plaintiff would have been entitled if the main question in the case had been decided in his favour. We think there is force in the argument that as nothing was claimed by the plaintiff in his plaint on account of the depreciation in the value of the securities purchased by him for the purposes of the contemplated contract with the railway, the Court below was not justified in holding that the plaintiff was entitled to

Rs. 6686-10-0 on that account. The question of the amount that the plaintiff should get does not however arise as the plaintiff's claim must fail on our finding that there was no contract between him and respondent 1. The result is that we agree with the learned Judge of the Court below on his findings on issues 1 to 3 and dismiss this appeal with costs.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Oudh 254

ZIAUL HASAN C. J. AND BENNET J.

Bhagwati and others — Accused Appellants

v.

Emperor.

Criminal Appeal No. 161 of 1939, Decided on 24th July 1939, against Addl. Sess. Judge, Bahraich, D/- 11th May 1939.

Penal Code (1860), Ss. 302, 325 and 34 — Several accused attacking deceased with lathis and beating him—Death caused by two serious injuries on vital part while other bodily injuries simple — Which of accused struck fatal blows not known — They are guilty of offence under S. 325 read with S. 34 and not under S. 302.

Several accused attacked the deceased with lathis and beat him, as a result of which he fell down and died. The accused did not strike him after he fell down. The death was caused by two serious injuries on vital part while other bodily injuries were simple. It was not known which of the accused struck the fatal blows :

Held that the common intention of the accused was merely to give the deceased a sound beating rather than to kill him. In these circumstances it could not be said that the accused knew that death was likely to be committed in the prosecution of their common object. Hence the accused were guilty under S. 325 read with S. 34 and not under S. 302: *A I R 1939 Oudh 49, Expl. and Rel. on ; A I R 1930 Bom 483; 35 All 560 and A I R 1935 Oudh 110, Disting.* [P 256 C 2; P 257 C 1, 2]

R. F. Bahadurji and P. N. Bhatt — *for Appellants.*

Govt. Advocate — *for the Crown.*

Judgment. — The appellants Bhagwati, Bachchu, Sheoraj and Saktu have been convicted by the learned Additional Sessions Judge of Bahraich under S. 302 read with Sec. 149, I. P. C., and sentenced to death. The case has been referred for confirmation of the sentence. The appellants have also been convicted under S.147, I.P.C., and sentenced to two years rigorous imprisonment. The appellants are all comparatively young men. Bhagwati and Bachchu are brothers. Bhagwati and Bachchu are the nephews of Sheoraj. All the appellants live in the same village of Rampur. The prosecution story is a simple one and for the most part it has not been disputed by the learned counsel for the defence. The appellant Sheoraj is married to a young girl, named Mt. Pala, who is the daughter of a man named Lachhman. It is in respect of Lachhman's death that the appellants have been convicted. The evidence of Mt. Pala shows that on account of some petty matter she was beaten by her husband, Sheoraj, and his nephew Bhagwati, as a result of which she went to her parents' house, and told the whole story to them. Two days later Bhagwati came to the village and inquiry was made from him by Lachhman's brother, Ram Nath, as to the incident deposed to by Mt. Pala. Bhagwati denied having struck the girl, but Ram Nath and Lachhman did not believe this denial, and they gave him a beating. This portion of the girl's story is corroborated by Ram Nath. Both these witnesses say that Bhagwati uttered a threat as he went away to the effect that he would "show his manliness" two days later.

According to the evidence of several prosecution witnesses Lachhman was working in his field with his wife, Mt. Naina, two days later, that is on 28th November 1938. Their son, Bhulai, a boy of 14 years, was also with them. A large number of persons, including the four appellants, are said to have come armed with lathis and to have surrounded Lachhman. He was however actually struck only by the four appellants. After he had been beaten the appellants turned their attention to Mt. Naina and she also received some injuries. It appears that Lachhman was dead when he was picked up. The occurrence is said to have taken place about noon and it was reported at a police station four miles away at 6 P. M. the same evening. Apart from the four appellants certain other persons namely Dasrath, Bhajan and Bharosey were mentioned in the first information report as responsible for the attack upon Lachhman, but the report does not clearly show that they were present. The evidence that was produced in the case does not implicate Dasrath; it implicates Bhajan and Bharosey as persons who were present and instigated the four appellants to strike the deceased. The case was brought against the four appellants, Bhajan, Bharosey, and a seventh man, named Hubdar, who was not named in the report. The Additional Sessions Judge did not consider that it had been proved that Dashrath, Bhajan and Bharosey had taken part in any way in the assault on Lachhman. He observed :

Their presence on the spot is not even clearly shown. The words now attributed to them do not find place in the first information report. I think it is an afterthought that these two persons are impleaded and I am not prepared to believe the evidence about their participation in the crime. They are alleged to have taken no part in beating Lachhman and if they were present they were only spectators. There is no evidence to show that they formed part of the unlawful assembly. I very much doubt their presence even on the spot and no offence is brought home against them.

With regard to Hubdar he added :

As regards Hubdar, I find that there is no mention of his name in the first information report. Nor do I find that he is named by P. Ws. 1, 2, 3 and 6 who say that he (presumably Ram Nath, P. W. 6) has named all the persons in the first information report who were present at the time of occurrence. It is only in identification proceedings that Hubdar appears.

But while holding that only the four appellants were directly responsible for Lachhman's death the additional Sessions Judge accepted the prosecution case that there were also a large number of other persons who were members of the unlawful assembly alleged. The principal witnesses in the case all say that about 18 or 19 persons, including the appellants, came to the place armed with lathis. The Additional Sessions Judge accepted this and further observed that they all began to beat Lachhman. Since only 12 injuries were found on Lachhman, it is quite clear that they could not all have taken part in beating him. Moreover it is not suggested by the witnesses that any one but the four appellants took part in the beating. It is also significant, we think, that not a single witness can give the names of any of these 18 or 19 persons apart from the four appellants, and Bhajan and Bharosey. We feel considerable doubt therefore whether the Additional Sessions Judge was justified in holding that there was an unlawful assembly of five or more persons, and on this view the conviction under S. 147 as well as the conviction under Sec. 302 read with S. 149, I. P. C., cannot stand.

The medical evidence shows that there were 12 injuries on Lachhman's body. These consisted of two serious wounds on the head: eight contusions, mostly on the upper part of the body, an abrasion on the right forearm, and an abrasion on the left ear. Of the two injuries on the head one was a contused wound $4'' \times \frac{1}{2}''$ scalp deep on the right side of the head, two and a half inches above the right ear; the other was a contusion $3'' \times 2''$ on the right temple. The Civil Surgeon of Bahraich, who performed the post mortem examination, noted that there was ecchymosis on the right side of the tissue of the scalp, and a fissured fracture three inches long involving the outer part of the right parietal and the right temporal bones, this being situated below injury No. 2. The membranes of the brain were congested and death was due to compression of the brain, resulting from haemorrhage. All other organs were normal. It would appear from this that the ecchymosis on the right side of the tissue of the scalp was due to the wound on the right side of the head above the right ear, and the fissured fracture to the contusion on the right temple beneath which it was found. The medical evidence does not clearly show which of these two injuries was responsible for the haemorrhage which resulted in death, and possibly this could not be ascertained. It may be that there was haemorrhage from both injuries.

It has been contended on behalf of the appellants that these injuries on the head may have been caused by a single blow. There was no inquiry from the medical witness on this point, and we are inclined to doubt whether this is likely. We think it more probable that two blows were inflicted. At the same time it is of course possible that both these blows were struck by the same person. Since it has not been argued on behalf of the appellants that they were not responsible for Lachhman's death and since it has only been contended that the offence falls not under S. 302 but under S. 325, Penal Code, it is only necessary for us to examine the reasons which induced the Additional Sessions Judge to find the appellants guilty under the former Section. The Additional Sessions Judge has referred first of all to certain cases in support of his view that each of the appellants must be found guilty of murder. We do not think that these cases are really applicable. The Additional Sessions Judge has referred to the case in A I R 1930 Bom 483[1] as showing that a person who voluntarily inflicts injuries such as to endanger life must always, except in the most exceptional and extraordinary circumstances, be taken to know that he is likely to cause death of the person on whom he inflicts injuries. The Additional Sessions Judge has then stated as a fact that all the four appellants gave lathi blows on Lachhman's head and that they must have known that their act was

1. Mana Gendal v. Emperor, (1930) 17 A I R Bom 483=1930 Cr C 1019=129 I C 351=32 Cr L J 289=32 Bom L R 1143.

so imminently dangerous that it must in all probability cause death. But since there were only two injuries on the head at the most, it is quite impossible that all four appellants could have struck Lachhman on the head. At the most, two of them could have done so, and as we have mentioned it is a possibility that only one of them did so.

In another case cited, 11 A L J 926,[2] the Allahabad High Court no doubt laid down that where five men armed with lathis assaulted an unarmed person and beat him in such a way that he died, they are guilty of culpable homicide amounting to murder, that the intention of causing death can be inferred from reasonable and probable result of the act or conduct of the accused, and that in case death is caused, even though there is no desire on the part of the accused to kill the deceased, they must be taken to have had knowledge that their act must in all probability cause death or such bodily injury as is likely to cause death. In this case five men assaulted two other men so severely with lathis that they died. One of the deceased had his breast-bone fractured and injury was also caused to the pericardium. The other deceased had his skull fractured and also his breast-bone. The evidence showed that both men were knocked down and beaten as they were lying on the ground with such violence that they died on the spot. We think that an assault of this kind can be distinguished from that under consideration. In the present case it is not proved that Lachhman was beaten after he had fallen down. It is true that the evidence of one witness does suggest this, but the evidence of another suggests that as soon as Lachhman fell down the appellants turned on Mt. Naina. And while the bodily injuries in 11 A L J 926[2] were so severe as to be the cause of immediate death in the case of one deceased it has been shown in the present case that while the injuries inflicted on the body were numerous, they were not of a very serious nature. It is not shown that any fracture was caused except that on the head, nor has it been shown that there was any internal injury.

In another case referred to by the lower Court, namely 11 O W N 1543,[3] it was held by this Court that where several persons armed with lethal weapons, such as lathis and kantas, assault a single person and strike him several times on a vital part of his body, not only the person who actually inflicted the fatal blow, but all are guilty of causing his death, inasmuch as the death was caused in the prosecution of the common object, and the rioters, even before they moved to action, knew that death was likely to be committed in the prosecution of their common object. We think that this case also can without difficulty be distinguished from that under consideration. In 11 O W N 1543[3] some of the rioters were armed with "kantas" which may be considered to be a weapon of a more lethal nature than a "lathi." In 11 O W N 1543[3] the deceased was struck several times on a vital part of his body, while in the present case the deceased Lachhman was struck only twice on a vital part. Moreover in the present case the fact that ten other injuries were inflicted by the appellants on non-vital parts of the body, all these injuries being apparently simple in nature, indicates an intention merely to give the man a severe beating rather than an intention to kill him. We do not think in the circumstances that it can be said that the appellants knew that death was likely to be committed in the prosecution of their common object. The appellants were connected with the deceased and it is not likely in our opinion, that they ever contemplated a fatal sequel to their attack upon him.

The Additional Sessions Judge referred to a recent ruling of this Court, 1939 O W N 7,[4] but distinguished it from the case under consideration. He observed that the ruling in 1939 O W N 7[4] shows that where several persons attacked another and his death is caused by a single blow with a lathi, but the other injuries found on his body do not indicate a determination to beat him to death, it is not possible to hold that death was caused by doing an act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death, but it may be held that death was caused by the doing of an act with the knowledge that by such act the person who did it was likely to cause death, the case falling within the knowledge clause of S. 299, Penal Code, and that in such a case, if it is not known which of

2. Hanuman v. Emperor, (1913) 35 All 560 = 21 I C 1005=11 A L J 926.
3. Chait Singh v. Emperor, (1935) 22 A I R Oudh 110=1935 Cr C 200=153 I C 81 = 36 Cr L J 249=11 O W N 1543.
4. Zahid Khan v. Emperor, (1939) 26 A I R Oudh 49=179 I C 338 = 40 Cr L J 187 = 14 Luck 378=1939 O W N 7.

the persons concerned actually struck the fatal blow, it is not possible by the application of Sec. 34 to convict any of the persons taking part of an offence under the second part of Sec. 304, Penal Code. The Additional Sessions Judge distinguished the case cited from that under consideration in this way. He observed:

> This ruling does not fully apply to the facts of the case before me. Here it is not shown that death was due to a single blow and then the evidence shows that all the four persons gave lathi blows and there is no doubt about the giving of the fatal blow.

The only difference between the two cases that we have been able to discover is that in 1939 O W N 7[4] death was caused by a single blow, whereas in the present case it was probably due to two blows. It is not possible to say by which of the appellants the fatal blow or blows were struck, and we think therefore that the case in 1939 O W N 7[4] is more applicable than the other cases referred to by the Court below. In 1939 O W N 7[4] the accused were not charged with rioting as they were in the present case. It has been contended by the counsel for the Crown that there might be a conviction under S. 302 read with S. 149, I. P. C., in circumstances similar to those under consideration, though in the same circumstances there could not be a conviction under S. 302 read with Sec. 34, the reason being that it is immaterial for the purpose of a conviction under S. 149 that there should be a common intention to commit the actual offence with which the accused are charged, while for the purpose of S. 34 it is necessary to find that they had a common intention to commit that offence. For the purpose of S. 149, it is sufficient to find that the act committed was committed in furtherance of the common object.

Since however for the reasons which we have given we are not prepared to uphold the conviction of the appellants under Sec. 147, or under S. 302 read with S. 149, it is unnecessary for us to consider this aspect of the matter. As it has been established to our satisfaction that more than four persons took part in the affair, the appellants can only be convicted with the assistance of Sec. 34, I. P. C. It has been contended by the defence counsel and it is conceded by the counsel for the Crown that the common intention of the appellants was merely to give the deceased a sound beating and on that view it must be held that the offence committed by them falls under S. 325 read with S. 34, I. P. C.

We accordingly allow this appeal to the extent of setting aside the convictions of the appellants under S. 147 and the sentences of two years' rigorous imprisonment passed under this Section and of substituting for the conviction under S. 302 read with S. 149 a conviction under S. 325 read with S. 34, Penal Code, and a sentence under the latter Sections of seven years' rigorous imprisonment on each of the appellants for the sentence of death imposed by the lower Court under S. 302 read with S. 149.

D.S./R.K. *Appeal partly allowed.*

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* A. I. R. 1939 Oudh 257

ZIAUL HASAN AND RADHA KRISHNA JJ.

Raja Sri Amar Krishna Narain Singh — *Plaintiff* — Appellant.

v.

Sheikh Nazir Hasan and others — *Defendants* — Respondents.

First Appeal No. 47 of 1936, Decided on 14th August 1939, against decree of Civil Judge, Bara Banki, D/- 6th February 1936.

(a) Legal Practitioner — Powers of counsel appearing in case stated—Counsel has implied authority to admit or deny document.

A counsel appearing in a case from the very nature of his duties and for the purpose of a proper conduct of the case must be deemed to have an implied authority to admit or deny document, to press or withdraw an issue in the case, to examine a witness or call no witnesses and do such other acts which are required for the proper management and conduct of the trial: *A I R 1935 P C 119, Rel. on.* [P 262 C 1]

(b) Oudh Rent Act (22 of 1886), S. 3 (8) — "Under-proprietor" covers perpetual lessee holding heritable and transferable rights.

The definition of the word "under-proprietor" as given in Oudh Rent Act covers the perpetual lessee holding land with heritable and transferable rights. [P 263 C 1]

(c) Lease — In absence of specific law on question of lease Court can refer to provisions of Transfer of Property Act.

In the absence of any specific law on the question of lease the Court would be justified in referring to the provisions of the Transfer of Property Act. [P 263 C 2]

(d) Lease—Construction—Attendant circumstances can be referred to.

In order to give a correct meaning to the words used in a lease for the purpose of defining the rights of lessee it would be necessary to refer to certain attendant circumstances. [P 263 C 2]

(e) Deed—Construction—Principle.

It is always dangerous to interpret a document with reference to the interpretation placed upon another document made in different circumstances. [P 264 C 2; P 265 C 1]

(f) Lease—Construction — Lease executed by one claimant in favour of another claimant in settlement of dispute relating to proprietary title and in consideration of latter withdrawing his claim Lease perpetual and for ever—Lease held transferred heritable and transferable interest in favour of lessee.

The words "perpetual" and "for ever" are words of flexible amplitude and if the circumstance under which the instrument is made and the subsequent conduct of parties show an intention with clearness and certainty that a heritable and transferable grant was made, then it is open to the Court to give that meaning to these words.

[P 265 C 1]

A lease was executed by one claimant in favour of another claimant in settlement of dispute relating to proprietary title and in consideration of latter withdrawing his claim. The lease was perpetual and for ever:

Held that the lease transferred heritable and transferable interest to the lessee: *Case law discussed.* [P 266 C 2]

(g) Transfer of Property Act (1882), Section 111 (f) — Implied surrender when takes place stated.

An implied surrender takes place either by the creation of new relationship between the lessor and the lessee, such as the acceptance of a new lease which must operate as an implied surrender of the old one, or in other ways based upon the consent of the parties, or by the relinquishment of possession by the lessee and taking over possession by the lessor which would lead to the inference of an implied surrender of the lease. [P 267 C 1]

*** (h) Transfer of Property Act (1882), Sec. 111 (g) (2) — Lessee setting up higher rights under lease than admitted by landlord—This is not disclaimer of landlord's title and does not fall under S. 111 (g).**

If a lessee has never denied his liability to pay the rent fixed but has asserted a higher status as lessee than was admitted by the landlord, such an assertion does not amount to the denial of the title of the landlord or claiming the title for himself and does not fall within the language of S. 111 (g) (2): *Case law referred.* [P 267 C 2; P 268 C1]

(i) Transfer of Property Act (1882), Secs. 111 (g) and 112 — Forfeiture is waived by acceptance of rent which became due since forfeiture even if acceptance is under protest.

If there is any forfeiture under the principle of Section 111 (g) (2), it is waived by the acceptance of rent by the landlord which became due since the forfeiture even if the acceptance of rent is under protest: *9 Cal 843 and A I R 1923 Cal 663, Rel. on.* [P 268 C 1, 2]

(j) Landlord and Tenant Simple assertion of proprietary right in judicial proceeding connected with land in dispute cannot by lapse of six or twelve years convert tenancy title into that of under-proprietor.

The simple assertion of a proprietary right in a judicial proceeding connected with the land in dispute which ex hypothesi was unfounded at the date when it was made cannot by the mere lapse of six or twelve years convert what was an occupancy or tenant title into that of an under-proprietor: *A I R 1923 P C 118, Rel. on.* [P 268C 2; P 269 C 1]

P. L. Banerji, H. Husain, Durga Dayal and H. H. Zaidi — *for Appellant.*

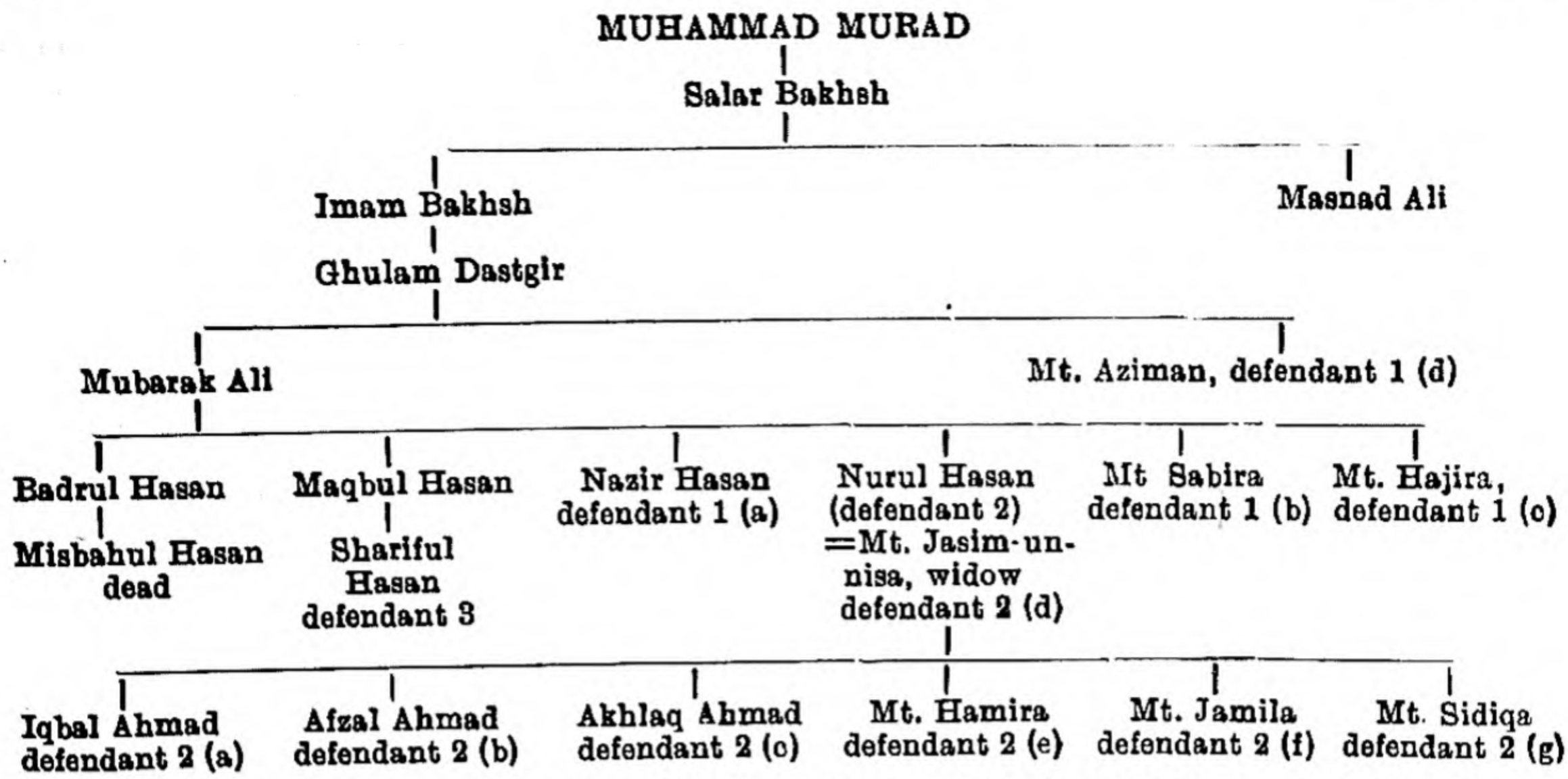
M. Wasim, Nawab Ali and Ali Hasan — *for Respondents.*

Judgment. — This is a plaintiff's appeal arising out of a suit for possession. The property in suit consists of a village called Chak Rahramau, which forms part of taluq Ramnagar Dhameri in the district of Bara Banki, of which the plaintiff-appellant is the present holder. The suit as originally filed was against three defendants, i. e., Mubarak Ali, Nurul Hasan and Shariful Hasan. During the pendency of the suit Mubarak Ali and Nurul Hasan, defendants 1 and 2, died and defendants 1 (a) to 1 (d) and defendants 2 (a) to 2 (g) were brought on the record as their legal representatives respectively. A pedigree of the family of the defendants may be given here for a proper appreciation of the facts necessary for the decision of this case.

(See pedigree on next page.)

This pedigree may be taken as admitted between the parties inasmuch as the portion from Ghulam Dastgir downwards was admitted on behalf of the plaintiff in oral pleadings and no part of it has been questioned before us in appeal.

In 1858, Raja Sarabjit Singh the predecessor-in-title of the plaintiff and the original taluqdar of the taluqa Ramnagar Dhameri, and Ghulam Dastgir were both rival claimants for the settlement of the village in dispute at the time of the second summary settlement. On 4th December 18 8, the Raja is said to have written a letter to Ghulam Dastgir (Ex. A.6) referring to the cordial relations that had subsisted between them and also to the fact that other persons were likely to put forward claims to the Chak and promising to give him a lease of the entire Chak for ever in case Ghulam Dastgir made efforts so as to bring about the settlement of the chak with the Raja. Ghulam Dastgir on 23rd December 1858, filed an application, which is included in the summary settlement file of the village, claiming settlement of the chak in his favour on the basis of his ancestral rights After statements had been made by one Jawahir Karinda on behalf of the Raja and by Ghulam Dastgir, to which reference will be made later on, the application of Ghulam Dastgir was consigned to records, and settlement of the village was made with the Raja, who executed a qabuliat and an agreement in respect of it in favour of the Government on the same



date: *vide* Exs. A-117 and A-118. The defendants' case is that soon after the Raja in fulfilment of his promise made earlier executed a perpetual lease in favour of Ghulam Dastgir on 11th March 1859 conferring upon him heritable and transferable rights in the village. The plaintiff's case, on the other hand, as disclosed in the oral pleadings, is that the village was granted by the Raja orally to Ghulam Dastgir as an ordinary thekadar on payment of an annual rent but he was unable to give its date.

Ghulam Dastgir died in 1875 and was succeeded by his son Mubarak Ali. The Raja's estate came under the superintendence of the Court of Wards in 1888 and soon after a dispute arose between Mubarak Ali and the Court of Wards in respect of the village in suit. The Deputy Commissioner took possession of the Chak, excepting the *sir* plots, by force and served a notice upon him for his ejectment from the *sir* plots. Mubarak Ali filed a suit under S. 9, Specific Relief Act, for possession of the village, excepting the *sir* plots, and obtained a decree on 31st January 1890, and successfully contested the notice of ejectment issued by the Court of Wards with the result that he was restored to the possession of the entire Chak Rahramau. The Court of Wards then on 8th August 1893, instituted a suit for possession of the village against Mubarak Ali in the Court of the Subordinate Judge of Bara Banki. The trial Court held that the plaintiff had treated the defendant as a tenant and was not entitled to a decree for possession but it decreed the suit declaring that the defendant had no right to hold the Chak Rahramau after his father's death. In appeal the late Court of the Judicial Commissioner of Oudh allowed the appeal and dismissed the suit in its entirety. This judgment of the Judicial Commissioner's Court is Ex. A-25 and will have to be referred to again later. During the pendency of the above-mentioned suit the Court of Wards sued Mubarak Ali for arrears of rent also.

On 1st January 1923, Mubarak Ali made an oral gift of the Chak in dispute in favour of Nurul Hasan, the predecessor-in-interest of respondents 2 (a) to 2 (g) and Shariful Hasan, defendant 3, and it was followed by the delivery of possession in favour of the donees. The village in question was entered in the name of Mubarak Ali as a pukhtadar and so,on mutation being allowed,the donees were also entered as pukhtadars of the village. In the year following, Mubarak Ali filed a suit for a declaration that the gift by him in favour of Nurul Hasan and Shariful Hasan was fictitious. Nural Hasan and Shariful Hasan confessed judgment and a decree as prayed by Mubarak Ali was passed in the suit. During the pendency of this suit the donees had applied in the Revenue Court for correction of papers on the ground that they sh uld be entered as underproprietors and not as pukhtadars. This application was opposed on behalf of the talukdar and the proceedings ultimately terminated by the order of the Board of Revenue dated 11th November 1925 which held that the transfer by Mubarak Ali in favour of Nurul Hasan and Shariful Hasan was invalid in law and directed the name of Mubarak Ali to be entered as holding under a heritable but non-transferable lease: *vide* Ex. A-79. On appeal by the talukdar from this order of the Board of

Revenue their Lordships of the Privy Council held that he had no right to appeal to His Majesty in Council and dismissed the appeal: *vide* Ex. 10.

The plaintiff filed the present suit against Mubarak Ali, Nurul Hasan and Shariful Hasan as stated above for possession of village Chak Rahramau, and in the alternative prayed for a declaratory decree against the defendants to the effect that defendant 1 had no transferable rights in the village. The suit was contested by defendants 2 and 3 of whom defendant 2 is represented now by defendants 2 (a) to 2 (g) as stated above. The learned Civil Judge of Bara Banki framed necessary issues and dismissed the suit. The main findings arrived at by him may be mentioned here:

(1) That the defendants' claim that they are under-proprietors was not made out but it was proved that their predecessor-in-interest, Ghulam Dastgir held the village with heritable and transferable rights under the patta dated 11th March 1859. (2) That Sheikh Mubarak Ali made an oral gift of the village in favour of Nurul Hasan and Shariful Hasan on 1st January 1923 and put the donees in possession of it. (3) That this gift did not result in an abandonment of Mubarak Ali's interest in the village and the plaintiff did not acquire a right of re-entry. (4) That the plaintiff was estopped by the judgment of the Judicial Commissioner's Court dated 18th August 1898, between the parties from contesting the following points by virtue of S. 11, Civil P. C.:

(a) That Raja Sarabjit Singh granted Chak Rahramau to Ghulam Dastgir by a patta dated 11th March 1859.

(b) That the original of the aforesaid patta was lost and the secondary evidence thereof tendered in that case was admissible and duly proved.

(c) That the patta conferred heritable rights in Chak Rahramau on Ghulam Dastgir.

(5) That the suit of the plaintiff for the relief for possession was within time but the relief for a declaration was barred by time. It may be mentioned here that the finding No. (2) by the learned Civil Judge was not questioned before us by the learned counsel appearing on behalf of the respondents.

The points argued by the learned counsel for the appellant before us are: I. That the judgment of the Judicial Commissioner's Court dated 18th August 1898 referred to above did not operate as res judicata in respect of the points mentioned by the learned Civil Judge in his finding No. 4 noted above. II. That the lease set up by the respondents dated 11th March 1859 is not genuine and they are not entitled to adduce secondary evidence thereof. III. That the said lease, if proved, enured for the lifetime of Ghulam Dastgir and no more and did not confer upon him either heritable or transferable rights. IV. That even if the rights under the lease were heritable an absolute transfer by the gift by Mubarak Ali in favour of Nurul Hasan and Shariful Hasan resulted in an abandonment of his interest in the village and the plaintiff became entitled to re-entry and take possession of it. V. That none of the reliefs claimed was barred by time.

We now proceed to consider each of the points mentioned above in the order in which they are noted:

I. Res Judicata. — As stated above in the narration of facts the Deputy Commissioner of Bara Banki as manager of the Court of Wards in charge of the Ramnagar estate brought a suit on 8th August 1893, against Mubarak Ali for possession of Chak Rahramau on the allegation that his father Ghulam Dastgir was a mere thekadar and on his death Mubarak Ali acquired no rights in the village. Mubarak Ali in defence relied upon the written lease dated 11th March 1859, which he alleged was granted to his father Ghulam Dastgir by Raja Sarabjit Singh, the then talukdar. The defendant further averred that the original patta had been lost and relied upon a copy thereof. On the basis of this patta Mubarak Ali claimed that permanent and heritable rights were conferred upon Ghulam Dastgir. The issues that arose between the parties were whether the defendant had made out a case for the reception of secondary evidence of the patta, whether the lease relied upon by the defendant was proved and whether it conferred a heritable estate upon the lessee. These issues were directly and substantially in issue in the former suit which was between the parties under whom the present parties claim. They were litigating under the same title and the former Court was quite competent to try the present suit. The issues in question were finally decided between the parties. There can therefore be no doubt that S. 11 is fully applicable and it is not open to the plaintiff to raise the same points in the present suit, but an escape from the application of the rule of res judicata is

sought on the ground that in view of certain admissions made by Mr. Cockerell, the learned counsel for the Court of Wards in appeal, the decree of the late Court of the Judicial Commissioner of Oudh must be treated to be a consent decree and before such a decree can be given effect to, it must be established that the consent to that decree had been given by a person having authority to give that consent. Reliance in support of this contention was placed on two decisions of their Lordships of the Privy Council in 23 I A 75[1] and 24 I A 107.[2]

In our opinion this contention has no force for two reasons. In the first place, the decree of the Judicial Commissioner's Court cannot be characterized as a decree on the consent or admission of claim and secondly the action of Mr. Cockerell in admitting certain documents in appeal before the Judicial Commissioner's Court was an action within his authority as a counsel for his client in the case. From a perusal of Ex. A-25, the judgment of the Judicial Commissioner's Court, it would appear that Mr. Cockerell admitted Exs. B-7, B-10, B-18, B-19, B-20, B-22 and B-25 of that case. Out of these documents the learned Judicial Commissioners relied upon Exs. B-7, B-10 and B-25; the other documents were not referred to at all in the judgment. Exs. B-7, B-10 and B-25 of that case are the same as Exs. A-6, A-11 and A-16 respectively of this case. These are the letters of the Raja dated 4th December 1858, 1st March 1859 and 10th January 1865, respectively. Their genuineness was very probable in view of the admitted fact that Ghulam Dastgir had been in possession of the village since long before 1858 and his claim to the sub-settlement had been withdrawn on the assurance on behalf of the Raja that if he withdrew his claim he would be granted a perpetual lease of the village at a proper jama and "shall uphold the same from generation to generation" (*vide* the statement of the karinda, Ex. A-8). Mr. Cockerell did not admit the copy of the lease dated 11th March 1859, relied upon on behalf of the defendants. The question of the genuineness of the lease was strenuously argued by him in the light of all the facts and full reliance was placed on all the circumstances and evidence negativing its existence. The admission of the three documents mentioned above was not an admission of the claim of the defendant in that case and would not convert the decree passed on contest into a decree of consent. It passes our comprehension how a judgment such as passed by the Judicial Commissioners can be called a judgment on consent.

23 I A 75[1] was a case in which one Thakur Parshad as an agent of the Court of Wards had made a verbal admission of the claim of the opposite side and got the decree for sub-settlement passed in favour of the opposite party in the Settlement Court. The talukdar on attaining majority filed a suit to recover possession of the property in respect of which the decree for sub-settlement had been passed by the Settlement Court and the defendant relied upon the decree. Their Lordships of the Judicial Committee held that it was for the defendant to prove that Thakur Parshad on whose admission the settlement decree had been passed had authority to admit the claim and that the Court of Wards had authorized him to make the admission.

In 24 I A 107[2] the previous settlement decree had been obtained on the admission of one Salig Ram on behalf of the Court of Wards. This Salig Ram happened to be the brother of Ram Ghulam, the claimant. Their Lordships of the Privy Council were of opinion that having regard to the facts disclosed by the proof the settlement decree was not binding upon the minor represented by the Court of Wards. Salig Ram who appeared before the Settlement Court to represent the Court of Wards and to protect the interests of the minor taluqdar was on account of his relationship with the claimant an interested party and the authority to admit the claim obtained from the Deputy Commissioner by Salig Ram was not a good authority as it had been obtained without disclosing his relationship to the applicants or his personal interest in the success of the case. None of these cases is applicable to the facts of the present case. There is no evidence that Mr. Cockerell, who appeared as a counsel for the Court of Wards before the Judicial Commissioner's Court, had been expressly asked not to admit the documents denied before the trial Court. For aught we know he may have obtained instructions from the Court of Wards to admit the documents which he did. From our experience we believe that a counsel of Mr. Cockerell's position must

1. Muhammad Mumtaz Ali Khan v. Sheorattangir, (1896) 23 Cal 934 = 23 I A 75 = 7 Sar 41 (P C).
2. Ram Autar v. Muhammad Mumtaz Ali Khan, (1897) 24 Cal 853 = 24 I A 107 = 7 Sar 148 (P C).

have consulted his client beforehand. Further, we are of opinion that a counsel appearing in a case from the very nature of his duties and for the purpose of a proper conduct of the case must be deemed to have implied authority to admit or deny a document, to press or withdraw an issue in the case, to examine a witness or call no witnesses and do such other acts which are required for the proper management and conduct of the trial. We are of opinion that the Court of Wards was bound by the admission of the genuineness of the documents in question by Mr. Cockerell. It would be enough for us on this point to cite a ruling of their Lordships of the Privy Council reported in 62 I A 196.[3]

We are therefore of opinion that the plaintiff is bound by the findings in the former suit to the effect that Raja Sarabjit Singh granted Chak Rahramau to Ghulam Dastgir by patta dated 11th March 1859, that the original patta was lost and the secondary evidence thereof was admissible and duly proved and that the patta conferred heritable rights in the Chak on Ghulam Dastgir.

II. Genuineness of the Patta. — After our finding on the question of res judicata in fact it is not necessary for us to decide point No. 2 on merits, but as our attention has been drawn to the evidence on the record bearing on the point we shall refer to it briefly and give our decision. Ex. A-6 is a letter dated 4th December 1858, written by Raja Sarabjit Singh to Ghulam Dastgir. This document is proved by Exs. A-29, A-31 and A-30. These are the copies of proceedings containing the statements of Lal Bahadur and Ibad Ali made in the previous suit. By this letter the Raja promised to give the lease of the entire Chak and the *sir* lands and to uphold his rights in future as usual provided that Ghulam Dastgir helped him in getting a settlement of the village in his favour. Ex. A-7 is the copy of Ghulam Dastgir's application for sub-settlement. On 31st December 1858, Jawahir Karinda on behalf of the Raja stated before the Settlement Court that an agreement had been arrived at between the parties that Ghulam Dastgir would withdraw his claim and in lieu thereof the Raja would grant him a perpetual lease of the village at a proper jama and shall uphold the same from generation to generation. This statement was verified by Ghulam Dastgir, who withdrew his claim: *vide* Exs. A-8 and A-9. On 1st March 1859, the Raja acknowledged the services of Ghulam Dastgir and invited him to his place for the purpose of executing the lease in his favour. Ex. A-15 is the copy of the lease itself granted on 11th March 1859, i. e. ten days after the letter Ex. A-11. The execution of the lease is further supported by another letter (Ex. A-16) written by the Raja to Ghulam Dastgir on 10th January 1865, wherein a distinct reference has been made to a written lease. This letter was also proved by Lal Bahadur and Abid Ali in the former suit: *vide* Exs. A-29 to A-31. On behalf of the plaintiff it was stated that the village was granted to Ghulam Dastgir by an oral lease but of this there is no evidence on the record.

As against all this evidence reliance was placed on certain reports of the Sarbarakar of the Court of Wards and the letters of the Raja denying the execution of the lease as well as certain wasilbaqis: *vide* Exs. 11 to 21 and 35. All these documents were produced in the first suit and were considered by the learned Judicial Commissioners. The letters of the Raja are of a period subsequent to his estate being taken under the superintendence of the Court of Wards. We are not prepared to put any faith in these documents in the face of more direct and contemporaneous evidence produced on behalf of the defendants and hold that a written lease was in fact granted by Raja Sarabjit Singh to Ghulam Dastgir on 11th March 1859.

Now as to the loss of the document, the story of the defendants, as disclosed by Mubarak Ali in the previous suit, was that after the institution of the suit in 1893 it was handed over to Munshi Qurban Ahmad Vakil, who gave it to Azizuddin, agent of Mubarak Ali, with instruction to take it to the office of the Sub-Registrar and to search for documents bearing the signatures of the Raja resembling the one on the lease. Azizuddin accordingly went to the registration office, searched the registers and then left with the original patta as he thought in his pocket. He soon discovered that the patta was not there in his pocket and returned to the registration office for a search. A report of the loss was made at the police station. Azizuddin was examined in the former suit and his statement was believed by the learned Judicial Com-

3. Sheonandan Prasad Singh v. Abdul Fateh Mohammad, (1935) 22 AIR P C 119=156 I C 694=62 I A 196=14 Pat 545 (P C).

missioners, and we have no reason to take a different view. The copy of the lease produced in this case (Ex. A-15) is the same which was produced in the former suit On the statement of Azizuddin, it was held that Ex. A-15 was a true copy of the original patta granted by Raja Sarabjit Singh. The learned Civil Judge, who tried the present case, came to the conclusion that the loss of the original patta had been proved and that Ex. A-15 was a true copy of it, and the same view had been taken in the former suit by the Judicial Commissioners. On a consideration of all the evidence in the case we have no reason to differ in the finding of the learned trial Judge.

III. The Interpretation of the lease.— The main controversy in the case between the parties has ranged round the question whether transferable rights in land were granted by the lease dated 11th March 1859 or not. Before we discuss this point on the merits, it may be observed that we have not been able to follow the distinction made by the learned Civil Judge between an under-proprietor and a lessee holding land with heritable and transferable rights. The learned Civil Judge has found that the defendants have failed to prove that they hold under-proprietary rights but has held them to be holding under a perpetual lease with transferable rights. The word "under-proprietor" is defined in the Oudh Rent Act as a person possessing a heritable and transferable right of property in land for which he is liable or but for a contract or decree would be liable to pay rent. This definition covers the perpetual lessee holding land with heritable and transferable rights. It may be that the word "under-proprietor" is a general term and is applicable to all persons holding land on payment of rent with heritable and transferable rights, howsoever those rights may have been acquired. The under-proprietary right may be created in many ways, for instance, under the Oudh Sub-settlement Act by a declaration under S. 107-H, Oudh Rent Act in a suit for assessment of rent or by the sale of an under-proprietary interest by the proprietor having carved it out of his proprietary rights in land. A landlord may as well create an under-proprietor by executing a perpetual lease. The finding of the Court below that the defendants held under a perpetual lease conferring upon the lessee heritable and transferable rights is inconsistent with his other finding that the defendants are not under-proprietors. It may be that the Court below was considering a claim to under-proprietary rights outside the lease dated 11th March 1859, but we may observe that no such case was either put forward in the pleadings or argued before us (*vide* paras. 19 and 20 of the written statement). The right of transfer in para. 20 was claimed in respect of the rights of a lessee under the provisions of the Transfer of Property Act whatever those rights may be. The rights owned and possessed by Ghulam Dastgir, the original lessee, prior to his claim for sub-settlement were referred to in arguments as evidence of surrounding circumstances in respect of the interpretation of the lease.

Coming to the merits of the question, we may observe that it was admitted before us that the provisions of the Transfer of Property Act (IV of 1882) would apply to the lease, although it was executed long before the Act came into force, firstly because the law was the same before the passing of that Act as after it, and secondly because in the absence of any specific law on the point the Court would be justified in referring to the provisions of the Transfer of Property Act as embodying the rules of equity, justice and good conscience which would be applicable. In order to give a correct meaning to the words used in the lease for the purpose of defining the rights of the lessee it would be necessary to refer to certain attendant circumstances. Exs. A-2, A-4 and A-34 would show that one Khadim Ali was the owner of the entire or major part of village Chak Rahramau and had mortgaged certain lands and shares of that village to Imam Bakhsh, the father of Ghulam Dastgir. Ex. A-5 is a parwana of the year 1845 in the name of Masnad Ali, the uncle of Ghulam Dastgir, from the Chakledar entrusting Chak Rahramau to him and enjoining upon him to pay revenue in the treasury in instalment after instalment. Ex. A-30 is the copy of the statement of Abid Hasan examined in the previous litigation between the parties. He stated that Masnad Ali and Imam Bakhsh possessed the Chak which ultimately came into the possession of Ghulam Dastgir. It has already been stated that Raja Sarabjit Singh and Ghulam Dastgir were rival claimants to sub-settlement at the time of the second summary settlement. No sanad in respect of the village in dispute had been granted to the Raja till then, and the dispute was with regard to proprietary rights

in the village. On 4th December 1858, the Raja sent his karinda Jawahir with a letter (Ex. A-6) to Ghulam Dastgir, in which he sought his help in securing the settlement of the village in his favour and promised that

all the plots of *sir* land bearing old rental with other proprietary rights which are in your possession from old time shall be upheld also in future as usual.

This letter embodies an admission on the part of the Raja that Ghulam Dastgir held proprietary rights in the village. On 23rd December 1858, Ghulam Dastgir filed a claim for sub-settlement in his favour. It does not appear whether he ignored the request of the Raja for the time being or he did so in order to put off the other claimants from whom the Raja feared some opposition. At any rate, it is clear that on 31st December 1858, Ghulam Dastgir and Jawahir, the person mentioned in the letter Ex. A-6, appeared before the Settlement Court. Jawahir made the following statement:

My client, Raja Sarabjit Singh, has made the plaintiff to agree to the fact that the plaintiff should withdraw his claim and in lieu thereof the defendant shall grant a perpetual lease of the village to the plaintiff at a proper jama and shall uphold the same from generation to generation. This statement of mine may be got verified from the plaintiff and settlement of this village be made with Raja Sarabjit Singh.

Thereupon Ghulam Dastgir made the following statement and withdrew his claim:

The statement of the karinda of Raja Sarabjit Singh in respect of my willingness is correct and in accordance with that I, the deponent, at this time withdraw from my claim about this village; its settlement be made with Raja Sarabjit Singh.

The application of Ghulam Dastgir was ordered to be dismissed: *vide* Ex. A-14. The Raja thus bound himself to grant a perpetual lease of the village to Ghulam Dastgir with rights lasting from generation to generation and wrote a letter of thanks to him (Ex. A-11) on 25th Rajab 1275 Hijri, which would be equivalent to 1st March 1859, in which he emphasized that he would not go against his writing (reference is to his letter Ex. A-6) and invited him to take the lease. Ten days later the lease (the copy of which is Ex. A-15) was executed. The translation of this lease may be reproduced here:

Signature of Raja Sarabjit Singh in Hindi.

Perpetual lease in favour of Sheikh Ghulam Dastgir, zamindar of village Rahramau from the beginning of 1266 Fasli.

Let it be known to you that the perpetual lease of entire land, cultivated and uncultivated of village Chak Rahramau, belonging to me, comprised in the Ramnagar estate, has been granted to you for ever at the Jama of Rs. 2550, half of which amounts to Rs. 1275, in lieu of your loyalty and abstaining from putting forward a claim. You should after letting out the land, comprised in the said chak, to your entire satisfaction continue to pay the dues assessed by me and should remain in occupation of the said village. No interference whatever shall ever be made contrary to this writing on my behalf and on behalf of my representatives. All the malikana rights due from ryots and *sir* land, etc. which you enjoyed and are in possession from old time shall as usual be upheld and maintained in your favour. Excepting the proposed jama of the theka, mentioned above, nothing more shall be taken ever on my behalf. You should remain satisfied in every way and always try for my welfare.

Dated 5th Shaban 1275 Hijri.

Signature of Bhikhari Lal,
Patwari, in Hindi.

It is contended by the learned counsel for the plaintiff-appellant that the only dispositive words in this lease although described as a perpetual lease, are "has been granted to you for ever," and these words are satisfied by the grant being for the life of Ghulam Dastgir. Reliance was placed on two decisions of their Lordships of the Judicial Committee in 28 I A 1[4] and 28 I A 65.[5] We do not think that these cases are applicable inasmuch as the deeds in these cases were executed under very different circumstances. In the first case the deed was made by a talukdar in favour of a junior member of the joint family as a maintenance grant which connotes prima facie an intention that it should be for life. In the other case the word "hamesha" was used in an award by which a certain allowance per mensem was fixed for the brother of the defendant in that case. Their Lordships in interpreting the words "hamesha" occurring in the award observed that they were not inconsistent with limiting the interest given but the circumstances under which the instrument was made or the subsequent conduct of the parties may show the intention with sufficient certainty to enable the Courts to presume that the grant was perpetual. Their Lordships did not see in the circumstances under which the award was made anything which would enable them to pronounce that the allowance was payable after the death of the grantee.

It is always dangerous to interpret a document with reference to the interpretation placed upon another document made

4. Rameshar Bakhsh Singh v. Arjun Singh, (1901) 23 All 194=28 I A 1=7 Sar 804 (P C).
5. Azizunnissa v. Tassadduk Husain Khan, (1901) 23 All 324=28 I A 65 (P C).

in different circumstances. In the present case we know that Ghulam Dastgir withdrew his claim in consideration of an agreement made on behalf of the Raja that his previous malikana rights would be respected and that he shall grant a perpetual lease of the village and shall uphold it from generation to generation. The lease therefore was executed in fulfilment of the agreement mentioned above and we are of opinion that the words "perpetual lease granted for ever" stand for the words "perpetual lease enjoyable from generation to generation in proprietary rights" (that is, under-proprietary rights). The words "perpetual" and "for ever" are words of flexible amplitude and if the circumstance under which the instrument is made and the subsequent conduct of parties show an intention with clearness and certainty that a heritable and transferable grant was made, then it is open to the Court to give that meaning to these words.

Two letters were written by Raja Sarabjit Singh to Ghulam Dastgir (Exs. A-16 and A-17) on 10th January 1865, and 31st July 1874 respectively. In the first of these letters the Raja referred to the statement made by his karinda before the Settlement Court and to the written lease which he had executed. By the second letter, he agreed to give Rs. 206 annually to the daughter-in-law of Ghulam Dastgir on the occasion of salam karai, i. e., the first occasion on which a bride comes to the family of her husband and pays respects to elders. This sum of Rs. 206 was to be credited towards the rent from generation to generation. How could this deduction be made from generation to generation unless the lease itself was from generation to generation?

The lease has already been held in the previous litigation by the late Judicial Commissioner's Court to confer heritable rights upon the lessee: *vide* Ex. A-25. We have already held that this finding cannot be questioned by the plaintiff. The words "generation to generation," which as we have stated above should be read in the lease for the words "for ever" have acquired a technical meaning in India. There is nothing in the lease which may show that the interest conveyed was sought to be limited in its scope. The lease was executed in settlement of a dispute relating to proprietary title, which is a very strong circumstance in favour of holding that the transferor intended to transfer all his interest in the property, i. e., a heritable and transferable estate. We rely for this view upon a decision of their Lordships of the Privy Council in 14 I A 7.[6] The principle of S. 8, T. P. Act also favours this interpretation. In this Court in a previous case, 4 O W N 15[7] the same rule of interpretation was applied. Their Lordships at p. 25 observed as follows:

> Ordinarily a transfer of land without restrictions carries with it every incident of ownership and passes to the transferee all interests which the transferor is then able to pass in the property and in the legal incidents thereof. Therefore where a grant is proved to be for "generation after generation" it must be construed, in the absence of anything to the contrary, to be a grant of an absolute estate.

The learned counsel for the appellant has argued that the principle of interpretation applied in the above-mentioned case is much too wide and is not supported by other decisions of the late Judicial Commissioner's Court or of this Court. Reference has been made to the following decisions: 6 O C 94,[8] 12 O C 267[9] and 1935 O W N 638.[10] In our opinion all these cases are distinguishable. In 6 O C 94[8] the under-proprietary rights claimed were negatived and a perpetual hereditary farming lease of the village was decreed. It was held that in the circumstances of that particular case a decree which was passed with the consent of the talukdar who had resisted the claim to the under-proprietary rights did not convey transferable rights. In 12 O C 267[9] the facts are practically identical with the facts in 6 O C 94.[8] In 1935 O W N 638[10] the lease acknowledged the existing occupancy rights for life which had been decreed previously and made those rights available from generation to generation on payment of an annual rent, which was described in the lease as malikana. The Hon'ble Judges who decided the case held that in the particular circumstances of that case much stronger language was needed to show that in place of the original occupancy right which was acknowledged an under-proprietary right had been conferred for future. The learned Judges did not take exception

6. Thakur Harihar Baksh v. Thakur Uman Parshad, (1887) 14 Cal 296=14 I A 7=4 Sar 766 (P C).
7. Sheo Bahadur Singh v. Bishunath Saran Singh, (1927) 14 A I R Oudh 74=99 I C 876=2 Luck 4=4 O W N 15.
8. Nand Ram v. Amanat Fatima Begam, (1903) 6 O C 94.
9. Muhammad Abdul Karim Khan v. Niwaz Singh, (1909) 12 O C 267=3 I C 868.
10. Hira Lal v. Gajraj Kuer, (1935) 22 A I R Oudh 423=155 I C 909=1935 O W N 638=11 Luck 203.

to the rule of interpretation adopted in 4 O W N 15 [7] but held that in the case before them there were indications that the estate was not meant to be transferable. The learned counsel for the appellant strongly relied upon the admission of Ghulam Dastgir contained in Ex. 31 in the year 1866 as well as the report of the Naib Sadar Munsarim (Ex 32) in the same case in which the above statement was made. A perusal of these two documents does not show to what proceeding they relate and how that proceeding terminated. All that we can gather from the heading is that there was some sort of enquiry in respect of the land held on concession in village Chak Rahramau. Rup Narain, the agent of the Raja, stated that the Raja had granted 182 bighas odd land to Ghulam Dastgir and

that this village has not been granted by virtue of any right nor is it his *sir*. It is only kashtkari tenure and the chak is held by Ghulam Dastgir by way of Theka Mustajari.

This statement of Rup Narain was accepted as correct by Ghulam Dastgir and the report (Ex. 32) of the Naib Sadar Munsarim is based upon those two statements. We attach no value to the statements of Rup Narain and Ghulam Dastgir recorded in Ex. 31 in the face of the letters of the Raja (Ex. A.16 dated 10th January 1865, and Ex. A.17 dated 31st July 1874) written later than this statement in Ex. 31. The learned counsel for the appellant has further referred us to the statement of the Raja dated 29th October 1888, (Ex. 35), which contains a complete denial by the Raja of the lease granted by him on 11th March 1859. This statement of the Raja cannot be believed. In fact, in the previous litigation before the learned Judicial Commissioners in appeal it was clearly held that the denial by the Raja of any matter was worth nothing and the learned counsel who appeared for him in that Court asked the learned Judicial Commissioners to disregard the Raja's evidence entirely and admitted that the greater part of it was false.

It has further been strenuously contended before us that there were several litigations between the parties between the death of Ghulam Dastgir and the institution of the present suit and in none of these the defendants laid any claim to hold transferable rights in the land covered by the lease and all that they did was merely to claim heritable rights. The litigations that took place between the parties are : the suit under Sec. 9, Specific Relief Act, by Sheikh Mubarak Ali against the Deputy Commissioner of Bara Banki, (*vide* Ex. A-113), the suit for possession brought by the Deputy Commissioner in charge of the Court of Wards, Ramnagar estate, against Sheikh Mubarak Ali (Ex. A.21) ending in the judgment of the late Judicial Commissioner's Court in appeal (Ex. A.25), the suit to contest the notice of ejectment between Sheikh Mubarak Ali and the Deputy Commissioner in charge of the Court of Wards, Ramnagar estate, (Ex. A.121 and Ex. 2, the order of the Board of Revenue), and the correction of papers case ending in the order of the Board of Revenue (Ex. A.79). It is urged that in none of these cases the defendants put forward a case that they were full under-proprietors of the land in dispute and this was a very strong circumstance against them. We are of opinion however that it was not absolutely necessary for the defendants or their predecessors to put forward their full claim in any of these cases. All that was necessary for them to do was to allege such rights in themselves as were enough to save them from ejectment and to ensure their possession of the land. On a consideration of all the attendant circumstances, the language of the lease in dispute and the conduct of the parties subsequent to the time when the lease was granted, we have come to the conclusion that by the lease a heritable and transferable interest in land was granted to Ghulam Dastgir which for the purpose of this case amounts to under-proprietary rights.

IV. Abandonment.—The decision of this point has to be given on the assumption that Ghulam Dastgir had no transferable rights under the deed and that it conveyed a heritable interest to him and no more. The plaintiff's case on this point is contained in para. 4 of the plaint, read with para. 3. His case is that by the act of making an absolute gift on 1st January 1923, of the property in suit by Mubarak Ali an abandonment of his interest occurred in the eye of the law and the plaintiff became entitled to re-enter into possession. The plaint is in the Urdu language but para. 4 mentions the word "abandonment" in English, which was used therein as a technical term. To this the defendants' reply was that even though no transferable estate was granted by the lease, yet the lessee's rights, whatever they may be, were heritable and transferable (*vide* para. 20 of

the written statement) meaning thereby that the mere act of transfer did not involve loss of the lessee's rights to the lessee. The learned counsel for the plaintiff before the trial Court stated in his arguments that if it were necessary to find a legal expression to indicate the fact detailed in paras. 3 and 4 of the plaint in the language of the Transfer of Property Act, he would put it under "implied surrender" as used in S. 111 (f) of that Act.

This plea was negatived by the Court of trial and abandonment, as meaning "implied surrender," has not been persisted in arguments before this Court for the obvious reason that an implied surrender takes place either by the creation of new relationship between the lessor and the lessee, such as the acceptance of a new lease which must operate as an implied surrender of the old one, or in other ways based upon the consent of the parties, or by the relinquishment of possession by the lessee and taking over possession by the lessor which would lead to the inference of an implied surrender of the lease. In the present case, soon after the gift Mubarak Ali made attempts, with the help and collusion of the donees, to recover back possession of the gifted property on the ground that the gift was fictitious and succeeded in it, and ultimately, we find the Board of Revenue maintained his name in the revenue papers as it originally stood. There was at no time a relinquishment of possession in favour of the plaintiff. In this Court reliance has been placed in support of the case of an abandonment upon S. 111 (g), i. e., termination of the lease by forfeiture in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself.

It has been argued that the act of making an absolute gift by Mubarak Ali in 1923 and setting up a higher right than actually owned by the lessee, such as claiming under-proprietary rights in the Rent Courts in the correction of papers case, amounted to a disclaimer of the rights of the lessor and fulfilled the requirement of the provisions of S. 111 (g) (2), and reliance for this contention was placed upon the following cases : 8 Bom 228,[11] 24 Bom 426[12] and 24 Cal 440.[13]

A very spirited protest has been put forward on behalf of the respondents that this is a totally new case and should not be allowed to be set up in appeal. It has been urged that the respondents have had no opportunity of putting forward their case and their evidence in reply to this new case. There is considerable force in this contention and we are not prepared to allow the plaintiff-appellant to change his case to the extent to which he proposes to do. The learned counsel for the respondents has however replied to this new case on whatever evidence that there is on record, and we shall give our decision in brief on this point.

We are of opinion that if a lessee sets up higher rights under the lease than what the lessor accepts were granted to him, there is no disclaimer of the title of the landlord, for instance setting up permanent rights of tenancy is not the denial of the proprietary rights of the lessor. A perusal of the pleadings of the defendants in the correction of papers case would show that they were all the time claiming under the lease. They never denied their liability to pay the rent fixed. All that they did was to assert a higher status as lessees than was admitted by the plaintiff, and in our opinion, such an assertion does not amount to the denial of the title of the landlord or claiming the title for themselves and does not fall within the language of S. 111 (g) (2). The decision in 8 Bom 228[11] was not followed in a later case by the same High Court: *vide* 15 Bom 407[14] at p. 413.

In 24 Bom 426,[12] a tenant under a plea of ownership had succeeded in obtaining a possessory order in a suit before a mamlatdar. It was held that the defendants had distinctly repudiated the landlord's title in the possessory suit and were not entitled to a notice to quit. The case in 24 Cal 440,[13] was in respect of the recovery of certain premises in Calcutta in possession of the defendant. In a suit for arrears of rent in the Small Cause Court the defendant had denied a tenancy under the plaintiff and had claimed occupation as owner of the land and this denial was held to entail forfeiture. None of these cases is applicable to the facts of the present case. In 13 Cal 248[15] it was held that although the defendant in a previous suit for rent had repudiated the particular holding which the

11. Baba v. Vishvanath Joshi, (1884) 8 Bom 228.
12. Mahipat Rane v. Lakshman, (1900) 24 Bom 426=2 Bom L R 228.
13. Kally Dass Ahiri v. Monmohini Dassee, (1897) 24 Cal 440=1 C W N 321.
14. Vithu v. Dhondi, (1891) 15 Bom 407.
15. Kali Krishna Tagore v. Golam Ally, (1886) 13 Cal 248.

plaintiff attributed to him, he did not question the plaintiff's right to receive rent and therefore did not in any sense repudiate the landlord's title. In 41 Mad 629[16] Seshagiri Ayyar J. at p. 632 observed as follows :

In ordinary parlance the expression 'renounce' would connote that some act is done to the knowledge of the landlord which was calculated to convey to him the impression that the tenant repudiated his title.

Napier J. also took the same view and observed as follows (p. 636) :

It seems to me that both the words 'repudiation' and 'renunciation' require something a great deal stronger than a mere assertion not communicated to the landlord. It is impossible to lay down a hard and fast rule; but to my mind a very good test to apply would be, whether the assertion would operate as a starting point for adverse possession against the landlord (*vide* (1777) 2 Cowp. 622[17] where Lord Mansfield applies this test) and viewed in this light, the assertion will not come within its mischief.

In 46 I A 109[18] Lord Phillimore at p. 118 observed as follows :

The qualification that the denial must be in clear unmistakable terms has not infrequently been applied by the Courts in India, which have held that where a tenant admits that he does hold as a tenant of the person who claims to be his landlord, but disputes the terms of the tenancy, and sets up terms more favourable to himself, he does not, though he fails in establishing a more favourable tenancy, so far deny the landlord's title as to work a forfeiture.

In our opinion the law as laid down by their Lordships of the Judicial Committee is conclusive and we hold that in the circumstances of the present case the assertion of the defendants that they were holding under the lease conferring upon the lessee not only heritable but transferable rights as well, does not amount to a disclaimer of the title of the plaintiff.

We are further of opinion that if there was any forfeiture under the principle of S. 111 (g) (2), T. P. Act, it was waived by the acceptance of rent by the plaintiff which became due since the forfeiture. Exs. A-56 to A-75 are the treasury receipts in favour of Mubarak Ali showing that he used to deposit the rent due from him in the treasury of the Tahsildar, and Exs. 28, 41, 42, 43 and 29 show that the amount of rent deposited by Mubarak Ali used to be withdrawn on behalf of the plaintiff's predecessor, Raja Harnam Singh, under protest. The recital in Ex. 28 is that the amount was payable to the estate which it was desired to receive under protest. The same was the language more or less of the other applications. Acceptance of rent, even under protest, amounts to an acceptance under S. 112 sufficient to operate as a waiver, as held in 9 Cal 843[19] at p. 846 and A I R 1923 Cal 663.[20] On the case that forfeiture had taken place the lessor had no right to take the money at all unless he took it as rent. If he took it as rent the legal consequences of such act must follow, however much he may repudiate it : (1858) 6 H L C 672.[21] This point must therefore be decided against the plaintiff-appellant.

V. Limitation. — The relief for possession has been held by the Court below to be within time. It has been held that the declaratory relief is barred by time. The relief for a declaration is really ancillary to the relief for possession. For a mere relief for a declaration it is admitted that the Article applicable would be Art. 120 of Sch. 3, Limitation Act, but we do not agree with the learned Judge of the trial Court that the cause of action for that relief arose when the plaintiff for the first time learnt of the gift by Mubarak Ali. Soon after the gift Mubarak Ali made attempts to recover possession from the donees on the ground that the deed was fictitious. Further, although the contesting defendants in the correction of papers case set up that they were under-proprietors, yet the Revenue Court did not act up to their assertion and removed their names from the khewat and entered the name of Mubarak Ali as thekadar : *vide* the final order of the Board of Revenue in the correction of khewat case, Ex. A-79. We do not think that under the circumstances it was necessary for, or incumbent upon, the plaintiff landlord to sue for a declaration that the defendants had no transferable rights. In 26 O C 231[22] their Lordships of the Judicial Committee at p. 237 observed as follows :

The Board are unable to hold that the simple assertion of a proprietary right in a judicial proceeding connected with the land in dispute which ex hypothesi was unfounded at the date when it

16. Komalukutti v. Muhamed, (1919) 6 AIR Mad 1106=45 I C 743=41 Mad 629=34 MLJ 170.
17. Deo v. Williams, (1777) 2 Cowp 622.
18. Maharaja of Jeypore v. Rukmani Pattamadevi, (1919) 6 A I R P C 1=50 I C 631=46 I A 109 =42 Mad 589 (P C).
19. Kali Krishna Tagore v. Fazel Ali Chowdhry, (1883) 9 Cal 843=12 C L R 592.
20. B. N. Ry. Co. Ltd. v. Firm Bal Mukunda Biseswar Lall, (1923) 10 A I R Cal 663=80 I C 200.
21. Croft v. Lumley, (1858) 6 H L C 672=27 L J Q B 321=4 Jur (NS) 903=108 R R 252.
22. Mohammed Mumtaz Ali Khan v. Mohan Singh, (1923) 10 A I R P C 118=74 I C 476= 45 All 419=50 I A 202=26 O C 231 (P C).

was made, can, by the mere lapse of six or twelve years, convert what was an occupancy or tenant title into that of an under-proprietor.

Further on they observed as follows :

They are unable to affirm as a general proposition of law that a person who is, in fact, in possession of land under a tenancy or occupancy title can, by a mere assertion in a judicial proceeding and the lapse of six or twelve years without that assertion having been successfully challenged, obtain a title as an under-proprietor to the lands. Such a judgment might have very far-reaching results and would almost certainly lead to a flood of litigation.

In the present case the entry in the papers has always continued as in the past and the attempt of the respondents to have an under-proprietary khewat has failed. We are of opinion that the claim for a declaration was not barred by time. On our findings on points Nos. 3 and 4 the plaintiff's suit fails and must be dismissed. We therefore uphold the decree passed by the Court below and dismiss the appeal with costs.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Oudh 269

ZIAUL HASAN AND HAMILTON JJ.

Raja Pashpat Pratap Singh — *Plaintiff* — Appellant.

v.

B. Udai Bhan Pratap Singh — *Defendant* — Respondent.

First Appeal No. 17 of 1936, Decided on 31st August 1939, against order of the 2nd Addl. Sub-Judge, Fyzabad, D/- 31st October 1935.

(a) Alluvion and Diluvion — Custom of dhardhura explained—Custom of dhardhura obtains between villages of Dewaraganj and Naipura.

The custom of dhardhura means that the main stream of the river would always remain the boundary between the two villages in question irrespective of the fact that the change in the course of the river is gradual or sudden. In other words, land thrown out by a change in the course of the river would by custom appertain to the village in proximity with which it comes out of the river. The custom of dhardhura obtains between the villages of Dewaraganj and Naipura. [P 270 C 1; P 271 C 2]

(b) Res judicata—Consent decree may operate as res judicata in subsequent suit.

A consent decree is binding upon the parties and would operate as res judicata in a subsequent suit unless there are some special reasons for holding that the compromise and decree were void. Hence where in a previous suit custom was pleaded by plaintiff and denied by defendant but the issue on the custom was compromised, a decree based on the compromise is bar in res judicata in subsequent suit : *Case law discussed.* [P 272 C 1]

(c) Bengal Alluvion and Diluvion Regulation (11 of 1825), Ss. 2, 3 and 4—Custom referred to in S. 2 existing—Ss. 3 and 4 do not operate.

Where the custom referred to in S. 2 exists, Ss. 3 and 4 of the Bengal Alluvion and Diluvion Regulation are not called into play. [P 273 C 1]

(d) Registration Act (1908), S. 17 (2) (vi) as amended in 1929—Words added to para. (vi) of S. 17 (2) by amendment of 1929 cannot have retrospective effect.

The words "except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding" occurring in para. (vi) which were added to the said paragraph by an amendment made in 1929 cannot have retrospective effect. Before the said amendment every decree or order of a Court was exempt from the operation of S. 17 of the Act so that even if the decree affected property worth more than Rs. 100 it was not required to be registered. [P 273 C 2]

Dr. Qutab Uddin Ahmad—*for Appellant.*

Niamat Ullah and Bhagwati Nath — *for Respondent.*

Judgment. — This is a plaintiff's appeal against a decree of the learned Second Additional Civil Judge of Fyzabad dated 31st October 1935, by which he dismissed the plaintiff-appellant's suit for possession of 1367 bighas, 12 biswas of land and Rupees 2500 damages. The river Gogra, also called Sarju, flows west to east between the districts of Basti and Fyzabad and while the plaintiff-appellant's village Dewaraganj Barar lies to the north of the river, the defendant's village Naipura lies to the south. The plaintiff claimed the land in suit on the allegations that it formed part of his village Dewaraganj Barar and lay to the north of the river Gogra but that in 1334 F the river changed its course suddenly as a result of which the land in suit fell to the south of the river and was at the quinquennial settlement of the defendant's village in 1334 F, treated as part of the defendant's village and designated as manjha Naipura. The plaintiff's case was that there was no custom of dhardhura between the villages of Dewaraganj Barar and Naipura and that even if it be assumed, which is not a fact, that the disputed land accreted to Naipura gradually, still the plaintiff was the owner of it by reason of the fact that it emerged at its old place and still formed a portion of the plaintiff's village. He also relied on S. 4, cl. 2 of Bengal Regulation 11 of 1825 and averred that he was legally entitled to possession of the land by law also. The damages were claimed in respect of jhau and kusehri plants that grew on the land in suit and were said to have been wrongfully disposed of by the defendant.

The suit was contested by the defendant mainly on the ground that the custom of

dhardhura exists between the parties' villages. The defendant did not admit that there was a sudden change in the course of the river in 1334 F and pleaded that he had been in possession of the land for more than twelve years and that the suit was barred by res judicata and estoppel. On the pleas raised by the defendant fifteen issues were framed by the learned trial Judge. In the present appeal we are however concerned with the following issues :

1. Whether the lands in suit appertained to the plaintiff's village as surveyed in 1860 as alleged? If so to what effect?

6. Whether there is a custom of dhardhura as specifically alleged in oral pleadings? If so whether it bars the plaintiff's claim?

7. Whether Ex. A-4 bars the plaintiffs's claim
(a) by way of res judicata,
(b) as an agreement, or
(c) by way of estoppel as alleged?

8. Whether Ex. A-2 as an agreement was
(a) without consideration,
(b) confined to the parties to the agreement or
(c) illegal being in contravention of Ss. 3 and 4, Bengal Regulations as alleged.

11. Whether the decree Ex. A-4 was passed in terms of the compromise Ex. A-2? If so, whether
(a) it went beyond the scope of the suit,
(b) is unenforceable against the plaintiff,
(c) is inadmissible in evidence, or
(d) is beyond the jurisdiction of this Court as alleged.

We take up the sixth issue first. It was agreed that the custom of dhardhura meant that the main stream of the river would always remain the boundary between the two villages in question irrespective of the fact that the change in the course of the river is gradual or sudden. In other words, land thrown out by a change in the course of the river would by custom appertain to the village in proximity with which it comes out of the river. We find that the question of the custom of dhardhura between the districts of Basti and Fyzabad came up for consideration before the settlement officer in 1866. In that year, Malik Hidayat Husain, taluqdar and proprietor of Mauza Asupur in the Fyzabad district, brought a suit against the Raja of Bansi in respect of some alluvial land which went over to the Basti side by a change in the course of the Gogra. Inquiries as to the existence of the custom of dhardhura were set on foot by the settlement officer and on 26th February 1866 the Sadar qanungo submitted a report (Ex. A 6) mentioning the names of six zamindars whose statements he had taken and stating that the custom of dhardhura existed between the two districts and recounting several instances in which the custom had been enforced. On the next day, that is, 27th February 1866. he submitted another report (Ex. A-7) after making inquiries from some tenants the gist of whose statements he submitted in his report as follows:

The exact number of years is not known but about 16 years ago the course of the river was towards north and Manjha had emerged out towards south and at that time we were in possession and occupation of the said Manjha. Now the course of the river has. for about the aforesaid years been towards the south near the village and Manjha has emerged out towards the north and since that time the said Manjha has been in possession and occupation of the inhabitants of Babwapur (sic) pargana Soli, district Basti and we are not in possession. The custom of dhardhura has been prevalent from times old, i. e., has ever been prevalent This Manjha is two kasis in length from the eastern boundary of Bantpur to Chandipur.

On 9th April 1866, the settlement officer delivered judgment in Malik Hidayat Husain's case in which he summed up his findings as follows:

I will now briefly sum up the result of the enquiry as contained in the joint memo of 20th January last in these proceedings. The Shastras of the Hindus. the treaty of 14th January 1812 made by the British and Oudh Governments the decisions of the Agra Saddar and the enquiries now prosecuted in seven districts through which the river Gogra passes for a distance of more than 200 miles. all go to prove (1) that custom is the rule to follow in cases such as this and (2) that I may say, the, invariable custom is that the main stream is the boundary

On these findings the suit of Hidayat Husain for possession of the alluvial land as belonging to his village was decreed (Ex. A.8). The defendant to the suit, who was the predecessor in-interest of the present plaintiff, filed an appeal against the decree of the settlement officer, before the Commissioner of Fyzabad and the learned Commissioner by his judgment dated 25th July 1866 (Ex. A.9) dismissed the appeal and confirmed the decree of the settlement officer. The learned Commissioner said:

Under these circumstances the first thing for the settlement Court to do was to ascertain whether there was any clear and definite usage of shukast paivast immemorially established for determining the rights of the proprietors of two or more contiguous estates divided by a river. The settlement Court did ascertain the existence of such clear and definite usage which governed his decision.

It appears that after the decision in Malik Hidayat Husain's suit, agreements were taken from zamindars whose villages lay on either side of the river Gogra as to the observance of the custom in future. Exs. A-17, A-18 and A-19 are instances of such agreements executed in September 1866. It appears that the present defendant tried to obtain a copy of a similar agreement executed by the then zamindar of

Naipura but his application was disallowed as the agreement was "quite torn" and "not fit to be copied" (*vide* Ex. A.72). There are however on record lists of the villages (Exs. A.13, A.14 and A.16) the owners of which executed agreements to observe the custom of dhardhura in future and the name of the plaintiff's village Dewaraganj Barar is mentioned at No. 8 in list A.14. The next document relied on by the defendant-respondent is the wajib-ul-arz of the plaintiff's villages Dewaraganj Barar (Ex. A.23). Para. 3 of this wajib-ul-arz runs as follows :

Custom governing dhardhura (the stream constituting the boundary lines.)	On the boundary of the village, opposite to Fyzabad district the river Gogra lies and the stream constitutes the boundary line.

It was argued by the learned counsel for the appellant that the custom of dhardhura is not specifically mentioned in this wajib-ul-arz but our reading of para. 3 is that it recites that the main stream of the river Gogra will always constitute the boundary between the villages lying on the two banks; in other words, that the custom of dhardhura prevails between the two districts. We now come to a suit filed by the predecessor-in-interest of the plaintiff-appellant himself, in the Court of the subordinate Judge of Gorakhpur, in 1900 in respect of some alluvial land, against the predecessor-in-interest of the present defendant (*vide* Ex. A.1). In this suit, the plaintiff's predecessor himself claimed the land on the custom of dhardhura. Para. 3 of the plaint runs as follows:

That the custom of dhardhura has from times old been observed in respect of parties villages as well as in respect of other villages situate along the borders of the river Gogra which has ever been accepted by the ancestors of the parties and the said custom has always been entered in the Government "papers".

The defendant to the suit no doubt denied the custom but the parties at last came to terms and filed a compromise (Ex. A.2) in the following terms :

It has been mutually settled and determined for ever amongst the parties that the custom of dhardhura shall as usual continue to apply in respect of the village Dewaraganj Barar of the plaintiff and village Naipura of the defendant and the land to the north of the river Gogra in the Basti district would continue to belong to the plaintiff and the land to the south of the said river in district Fyzabad would belong to the defendant. and to this custom there would in future be no excuse or objection whatever and there would be no objection, dispute or argument on behalf of any of the parties to the land emerged out suddenly or emerged out gradually in front, and none of the parties shall be in a position to challenge or dispute this in any way whatever in case the river branches out into two streams; on the other hand, the main deep stream out of the two channels of the river Gogra, separating district Basti from district Fyzabad shall be taken to be the boundary line of the villages of the parties, viz. the villages of Dewaraganj Barar and village Naipura, mentioned above, and contrary to this no objection on behalf of either of the parties shall be maintainable by any of the departments.

On this compromise a decree (Ex. A.4) followed which incorporated the terms of the compromise. We shall deal with the decree and compromise in connexion with issues 7, 8 and 11. Further, we have on record a judgment of the Subordinate Judge of Fyzabad dated 15th November 1926 (Ex. A.20) in a suit between other parties, zamindars of villages on either side of the Gogra, in which also the custom of dhardhura was the basis of the suit and issue 1 in the case was specifically framed on the question of the existence of the custom. The learned Judge held as follows :

The deep stream rule is therefore established as against the absentees particularly in view of its judicial recognition in the Maharaja of Ajodhiya's suit against the Raunahi zamindars (Exs. 46 and 47). And this rule applies whether the manjha is capable of identification with the old land or not and whether it has appeared by a sudden change in the course of the river or by a slow accretion. And this custom is an ancient one (Ex. 47). This disposes of issue 1 and the first part of issue 4 in plaintiff's favour.

The case was taken up in appeal to the District Judge of Fyzabad and the learned Judge dismissed the appeal by his judgment dated 27th July 1927 (Ex. A.21). Besides the documentary evidence referred to above, we have also the sworn testimony of six witnesses, D. Ws. 1 to 6, five of whom are zamindars and one is an agriculturist and all of whom swear that the custom of dhardhura prevails between the parties' villages. As against this the plaintiff-appellant could not produce a single witness to say that the custom of dhardhura does not exist as between Dewaraganj Barar and Naipura. Nor is there any evidence to show that the Zamindar of Dewaraganj Barar was ever in possession of land lying to the south of the main stream or that the Zamindar of Naipura was ever in possession of land to north of the main stream. In view of the evidence referred to above we have no hesitation in upholding the finding of the learned trial Judge that the custom of dhardhura obtains between the villages of Dewaraganj and Naipura.

The learned counsel for the plaintiff-appellant relies on Ex. 14, a judgment of the Subordinate Judge of Fyzabad in suits

brought by the present appellant against some zamindars and in which it was held that the defendants had failed to prove the existence of the custom of dhardhura and also on 8 O W N 866[1] by which this judgment was upheld in appeal by this Court; but some of the evidence which is now before us was not before the Bench which decided that case. We are in perfect agreement with the general proposition of law laid down in that case but we consider that in the present case there is abundant evidence in proof of the existence of the custom. We therefore decide this point against the appellant.

We now take up issue 7, namely whether Ex. A.4, the decree in the suit of 1900 bars the present suit. It was argued that as the suit of 1900 between the predecessors-in-interest of the parties was decided on a compromise, the decree in that suit does not operate as res judicata in the present suit. We are not prepared to accept the proposition that a consent decree can never operate as res judicata in a subsequent suit. On the other hand, we find that in 4 Luck 181[2] it was held by this Court that a consent decree is binding upon the parties and would operate as res judicata in a subsequent suit unless there are some special reasons for holding that the compromise and decree were void. In 26 I A 101[3] in which in a suit for lands by inheritance the defence was that a consent decree passed previously was a bar, their Lordships at p. 106 said:

> The razinama, in so far as it was submitted to and was acted upon judicially by the learned Judge was in itself a step of judicial procedure not requiring registration; and any order pronounced in terms of it constituted res judicata, binding upon both the parties to this appeal who gave their consent to it.

We are therefore of opinion that the decree Ex. A.4, though it was passed on a compromise, is a bar in res judicata in the present suit by reason of the fact that the custom of dhardhura was pleaded by the plaintiff and denied by the defendant so that an issue on the custom did arise in the case which was subsequently compromised by the parties. The learned counsel for the appellant has relied on the cases in A I R 1930 Lah 487,[4] 36 Bom 53,[5] A I R 1929 Mad 694,[6] 11 I C 834[7] and 17 I C 434,[8] but none of these cases helps him in our opinion. In the first case it was no doubt held that S. 11, Civil P. C. does not apply in terms to consent decrees but it was also held that a consent decree has to all intents and purposes the same effect as res judicata as it raises an estoppel as much as a decree passed in invitum. In the Bombay case a particular consent decree was held not to bar a subsequent suit on several grounds, namely that there was no issue raised and no adjudication on the issue whether the village was impartible, secondly that parties could not make an estate impartible which is partible and that this is opposed to public policy and thirdly, because the compromise involved the interests of a minor and no sanction was granted by the Court to the guardian of the minor to enter into the compromise. In the Madras case in A I R 1929 Mad 694,[6] it was held that judgment given by consent when there are no pleadings in action does not operate as res judicata. At page 696 it is said:

> From the extract of the judgment in O. S. No. 122/18 given above, it is clear that though the defendants appeared in person they filed no written statement; they simply confessed judgment and a decree was passed against them for the balance of the amount remaining unpaid.

Then again:

> If so the question now raised not having been put in issue in the prior suit how can a decision in that suit operate as res judicata in the subsequent suit?

In the case under consideration as we have pointed out above the issue as to the existence of the custom was clearly raised by the pleadings of parties. In the Madras case in 11 I C 834[7] also the issue, the decision of which was sought to operate as res judicata, was not raised in the previous suit. The last case of Madras, namely 17 I C 434,[8] does not also go beyond holding that S. 13 of the (old) Civil P. C., does not apply in terms to a consent decree. We therefore decide this point also against the appellant and hold that the decree Ex. A.4 bars the present suit by way of res judicata.

Issue 8 involves three questions. First,

1. Sheo Ram v. Pashupat Pratab Singh, (1931) 18 A I R Oudh 369=136 I C 213=8 O W N 866=7 Luck 179.
2. Durga Prasad v. Narain, (1929) 16 A I R Oudh 63=115 I C 294=4 Luck 181=5 O W N 1081.
3. Pranal Annee v. Lakshmi Annee, (1899) 22 Mad 508=26 I A 101=7 Sar 516 (P C).
4. Mt. Said Khanam v. Said Muhammad, (1930) 17 A I R Lah 487=126 I C 570.
5. Pirojshah Bhikaji v. Manibhai, (1912) 36 Bom 53=12 I C 543=3 Bom L R 963.
6. Govinda Krishna v. Venkata Subiah, (1929) 16 A I R Mad 694=117 I C 295.
7. Venkata Satyanarayana v. Gangamma, (1911) 11 I C 834.
8. Gopalasami v. Govindasami, (1912) 17 I C 434.

whether the compromise Ex. A-2 was an agreement without consideration. We are of opinion that it clearly was not. The defendant to the suit gave up his claim to the land in suit in consideration of the plaintiff to the suit agreeing to abide by the custom of dhardhura in future. The second question is whether the compromise was personally between the parties thereto and cannot be enforced against their representatives-in-interest. We see no reason to hold so. The learned counsel for the appellant relies on the case in I A Sup Vol 34[9] but the facts of that case were totally different from those of the case before us. In that case an ikrarnama was sought to be enforced against a person who was neither himself a party to the ikrarnama nor a representative of any party thereto. In the present case both the parties are representatives-in-interest of those who entered into the compromise (Ex. A-2). The third question is whether the compromise was illegal as being in contravention of Ss. 3 and 4, Bengal Regulation 11 of 1825. We are in agreement with the finding of the learned Judge of the Court below that it would have been illegal if it had not been found that the custom of dhardhura exists as contemplated by S. 2 of the said Regulation. As we have held that the custom referred to in S. 2 exists, Ss. 3 and 4 of the Regulation are not called into play. Issue 8 is also decided against the appellant.

As to issue 11. The first point involved in it is whether the decree Ex. A-4 went beyond the scope of the suit. It was argued that it went beyond the scope of the suit in so far that it declared the existence of the custom of dhardhura. We are unable to accept this argument. Para. 11 of the plaint, Ex. A-1, of the suit of 1900 shows that a declaration as to the existence of the custom of dhardhura was in fact included in the relief claimed so that if the parties made a declaration as to the existence of the custom in the compromise and the decree gave effect to that compromise, it cannot be said that the decree went beyond the scope of the suit. The next point is whether the decree is unenforceable against the plaintiff; but no question of the decree Ex. A-4 being enforced against the plaintiff arises in the present suit. The third point raised in regard to Ex. A-4 was that it was inadmissible in evidence as it dealt with property worth more than Rs. 100 and ought to have been registered. We see no force in this argument also. Reliance is placed on the words :

> Except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding,

occurring in para. (vi) of Sec. 17, sub-s. 2, Registration Act, but these words were added to the said paragraph by an amendment made in 1929 and cannot have retrospective effect so as to apply to the decree in question. Before the said amendment, every decree or order of a Court was exempt from the operation of S. 17 of the Act so that even if the decree in question affects property worth more than Rs. 100 it was not required to be registered. The last point in relation to issue 11, namely whether Ex. A-4 was beyond the jurisdiction of the Court, was not pressed before us.

The only other issue on which the finding of the Court below was challenged in the grounds of appeal is issue 1 which was to the effect whether the land in suit appertained to the plaintiff's village as surveyed in 1860 as alleged. The learned Judge of the trial Court held that the plaintiff had failed to prove that the land in suit appertained to his village in 1860 but we are of opinion that it is not necessary to decide this question. It is not seriously disputed that the land lying to the north of the river Gogra before it changed its course in 1334 F appertained to the plaintiff's village. The suit of the plaintiff however fails on issues 6, 7 and 8 and for this reason also it is not necessary to go into the question. The appeal therefore fails and is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Oudh 273

ZIAUL HASAN C. J. AND RADHA KRISHNA J.

Brij Mohan Singh — Appellant.

v.

Rameshar Singh and others — Respondents.

Execution of Decree Appeal No. 24 of 1936, Decided on 11th August 1939, against the order of Civil Judge, Sultanpur, D/- 17th February 1936.

(a) Civil P. C. (1908), S. 144—Scope.

Section 144 contemplates a case in which the decree or order of a trial Court has been put in

9. Baboo Bissessurnath v. Maharajah Mohessur Bux Singh Bahadur, (1872) I A Sup Vol 34= 18 W R 160=11 Beng L R 265=3 Sar 147= 2 Suther 650 (P C).

execution and the decree or order has afterwards been varied or reversed in appeal. The restitution sought under S. 144 must be in respect of a decree which has been varied or reversed: *20 I C 203, Rel. on.* [P 274 C 2]

(b) Civil P. C. (1908), Ss. 144 and 151 — Restitution application and order thereon not strictly coming under S. 144 but under S. 151 —No appeal lies from such order.

The right of appeal is a creature of the statute and unless there are express provisions of law relating to maintainability of an appeal it cannot be said that because an appeal is allowed by statute in certain cases it must be allowed by way of analogy in other similar cases. An order under S. 151 is not appealable and where not only was the application for restitution made by the judgment-debtors under that Section but it was treated as such by the Munsif who dealt with it, no appeal lies against the order of the Munsif made on such application as that order does not strictly come under S. 144, and has been passed under S. 151: *A I R 1927 Cal 285 and A I R 1931 Cal 779, Dissent.; A I R 1936 Mad 636 and A I R 1934 Lah 1023, Disting.* [P 275 C 1]

Bhagwati Nath Srivastava — *for Appellant.*

G. Hasan — *for Respondent 1.*

Judgment. — This is a second appeal against an appellate order of the learned Civil Judge of Sultanpur dismissing the appellant-judgment-debtor's appeal against an order of the learned Munsif on the ground that no appeal lies in the case. The facts are that in 1927 a simple money decree was obtained by Mahabir Singh (father of respondent 2) against Jageshar Singh (father of the present appellant) and Mahabali Singh, respondent 3 and Tawakkal Singh, respondent 4, for a sum of Rs. 273-12-0. In execution of his decree, Mahabir Singh put certain properties of the judgment-debtors to sale and in 1928 the property was purchased in auction sale by Rameshar Singh, respondent 1, for a sum of Rs. 2950. On 17th April 1929 Rameshar Singh obtained formal possession of the property purchased by him through the Court. It is not disputed that as a matter of fact he was in actual possession of the property from before on foot of certain mortgages held by him. Out of the sale consideration the decretal amount was paid to Mahabir Singh, Rs. 661-4-0 were set-off against decrees held by Rameshar Singh and the balance of Rs. 2015 was ordered to be paid over to the judgment-debtors. Subsequently on 2nd May 1930 the sale of the property was set aside by the Commissioner. Thereupon on 11th July 1930 Rameshar Singh, the auction-purchaser, filed a regular suit for a declaration that the Commissioner's order setting aside the sale was void. This suit was decreed by the learned Munsif who tried it but eventually it was dismissed by this Court in 1932. After that, on 13th September 1934, the judgment-debtors applied to the Munsif for restoration of possession of the property to them. This application purported to be under S. 151, Civil P. C., and was treated as such by the learned Munsif. He allowed the application on condition that the judgment-debtors applicants pay back the sum of Rs. 2015 withdrawn by them to the auction-purchaser. It was against the condition attached to the order that the judgment-debtors appealed to the Civil Judge. He was of opinion however that as the order was passed under S. 151, Civil P. C., it was not appealable and dismissed the appeal. One of the judgment-debtors now comes to this Court in second appeal.

A preliminary objection has been taken by the learned counsel for Rameshar Singh, auction-purchaser, who contends that no appeal lies in the present case. As the objection itself raises the question whether or not the order of dismissal of the appeal passed by the learned Civil Judge was correct we have heard the learned counsel for parties on the merits. The learned counsel for the appellant contends that the order of the learned Munsif against which his client appealed to the District Judge was in reality an order under S. 144, Civil P. C., and as such there was no bar to an appeal being brought against it. We cannot however accept this contention. S. 144 contemplates a case in which the decree, or it may be, the order, of a trial Court has been put in execution and the decree or order has afterwards been varied or reversed in appeal. In the present case the decree, on the reversal of which the learned counsel for the appellant relies, was no doubt passed by the learned Munsif but it was not in execution of that decree that the sale purchased by respondent 1 had taken place. Therefore no restitution was due to the judgment-debtors on the reversal of that decree by this Court. The sale had been held and the auction-purchaser put into possession of the property in pursuance of quite a different decree which, for aught we know, was not varied or reversed in appeal. It is clear that the restitution sought under S. 144 must be in respect of the decree which has been reversed or varied. This view is supported by 20 I C

203.[1] In fact, it seems very doubtful if the learned Munsif had jurisdiction to pass an order of restitution in the present case. However this is not a ground taken by either party before us. We are therefore clear that S. 144, Civil P. C., has no application to the case. The learned counsel for the appellant has relied on the following cases: 31 C W N 290,[2] 35 C W N 105,[3] A I R 1936 Mad 636[4] and A I R 1934 Lah 1023.[5] The last two cases are not much in point. In the two Calcutta cases no doubt it was held that when an order which does not strictly come under S. 144 has been passed under Section 151 it is appealable. With due respect we are unable to follow the decision in these two cases. The right of appeal is a creature of the statute and unless there are express provisions of law relating to the maintainability of an appeal it would not in our opinion be correct to say that because an appeal is allowed by statute in certain cases it must be allowed by way of analogy in other similar cases. It is not disputed that an order under S. 151 is not appealable and we have already noted that not only was the application for restitution made by the judgment-debtors under that Section but that it was treated as such by the learned Munsif who dealt with it. We think therefore that the learned Judge was perfectly right in holding that no appeal lay to him against the order of the Munsif. This appeal is therefore dismissed with costs.

N.K./R.K. *Appeal dismissed.*

1. Sham Parshad v. Ram Chand, (1913) 20 I C 203=273 P L R 1913.
2. Gnanada Sundari Mojumdar v. Chandra Kumar De, (1927) 14 A I R Cal 285=100 I C 735=31 C W N 290.
3. Sasikanta Acharjee v. Jalil Baksh Munshi, (1931) 18 A I R Cal 779=134 I C 1185=35 C W N 105=53 C L J 49.
4. Ramireddi v. Satyam, (1936) 23 A I R Mad 636=167 I C 356.
5. Mam Chand v. Ali Mohammed, (1934) 21 A I R Lah 1023=155 I C 500=36 P L R 119.

A. I. R. 1939 Oudh 275

RADHA KRISHNA J.

Radhey Lal and others — Defendants — Appellants.

v.

Mahraj Kunj Behari Lal — Plaintiff — Respondent.

Second Appeal No. 305 of 1936, Decided on 15th September 1939, against order of the Addl. Sub-Judge, Sitapur, D/- 21st May 1936.

Cosharers—One cosharer erecting building on land in his exclusive possession as his sahan darwaza—Other cosharers can object to such construction even in absence of proof of direct injury to them.

One of several joint owners cannot erect a building on joint land without the consent of other cosharers. Whether he can erect a building on land which he has been using as sahan darwaza is a question which also must be decided on the same principles. The right of a cosharer to continue in exclusive possession of those portions of joint land of which he was allowed to acquire exclusive possession arises on the assumption that it was consented to by his other cosharers. Such a consent in case of plots in exclusive possession of one cosharer in a village must be confined to the nature of exclusive possession already enjoyed. If the nature of the exclusive possession which has been submitted to or consented to by other cosharers is changed then the other cosharers have a right to object to the change. The construction of a building on a sahan darwaza is to change the method of exclusive possession already enjoyed by one cosharer, and the other cosharers will be well within their right to object to the construction of the building even in the absence of proof of direct injury to them: *A I R 1927 All 709, Rel. on; A I R 1937 Oudh 449, Expl.* [P 276 C 2]

H. H. Zaidi — *for Appellants.*

K. P. Misra — *for Respondent.*

Judgment. — This is the defendants' second appeal arising out of a suit brought by the plaintiff against them for a permanent injunction restraining them from building any constructions on plot No. 39 in the abadi of village Umrapur, pargana Pirnagar, District Sitapur. A further relief for demolition of certain walls which had been newly constructed was added in the plaint by amendment. It is admitted that the plaintiff and defendants 1 and 2 are cosharers in the abadi land which is undivided, and it is further admitted that defendants 4 to 6 are occupying houses Nos. 18, 19 and 20, which are situated just to the west of plot No. 39 on behalf of defendants 1 and 2. It may further be pointed out that the house of the plaintiff is situated to the east of the houses of defendants 4 to 6 and in between the house of the plaintiff and those of the defendants stands the abadi plot No. 39, which is the subject-matter of dispute in the present case. The trial Court came to the finding that plot No. 39 was used by the defendants as their sahan darwaza for sitting purposes and for tying their cattle. It further found that there was a public rasta on this plot running from north to south and that the rain water from north had its natural flow over plot No. 39 towards the south. It came to the conclusion that the

plot was not in the exclusive possession of the defendants as alleged by them.

The judgment of the trial Court shows that in its opinion the plea that plot No. 39 was in use by the defendants as their sahan darwaza and the plea that plot No. 39 was in their exclusive possession did not present any distinction for the purpose of the decision of this case. The learned Munsif further held that the narrow strip of land out of plot No. 39, as it would be left after the completion of the proposed construction by the defendants, would not be sufficient either for rasta or for the entire rain water to run out and that it would endanger the kachcha house of the plaintiff. In the result, the trial Court decreed the suit and ordered removal of the walls complained of. The lower Appellate Court upheld the decree passed by the trial Court. As regards the exclusive possession set up by the defendants it held it proved that defendants 4 to 6 tied their cattle on this plot and kept straws thereon and took this evidence to establish that plot No. 39 was in the use of the defendants as their sahan darwaza. It may however be noted that neither of the Courts below demarcated on the spot as to how much of plot No. 39 was the exclusive sahan darwaza of the defendants and what part of it was used as public rasta. I have gone through the entire evidence on the record and find that plot No. 39 being vacant land is used for rasta as well as towards the west of it the defendants tie their cattle and have their cattle troughs fixed and use it more or less as one would use a sahan darwaza. The lower Appellate Court was of opinion that the constructions would inconvenience the plaintiff and were likely to cause damage to the kachcha house towards the east, and dismissed the appeal.

In second appeal before this Court, the learned counsel for the appellants has argued that on the finding that the plot in dispute was in the use of defendants 4 to 6 as their sahan darwaza on behalf of defendants 1 and 2 cosharers they were entitled to erect constructions on it as of right, and the cases which were applicable to the sahan darwaza of mere riyayas were not applicable to the sahan darwaza in the occupation of a cosharer in the village. He has further argued that the evidence on record did not establish any injury or likelihood of any injury to the plaintiff in the enjoyment of his kachcha house towards the east.

I am unable to agree with any of the contentions raised by the learned counsel for the appellants. It is well settled law that one of several joint owners cannot erect a building on joint land without the consent of other cosharers. Whether he can erect a building on land which he has been using as sahan darwaza is a question which also, in my opinion, must be decided on the same principles. The right of a co-sharer to continue in exclusive possession of those portions of joint land of which he was allowed to acquire exclusive possession arises on the assumption that it was consented to by his other cosharers. Such a consent, in my opinion, in case of plots in exclusive possession of one cosharer in a village must be confined to the nature of exclusive possession already enjoyed. If the nature of the exclusive possession which has been submitted to or consented to by other cosharers, is changed then the other cosharers have a right to object to the change. In my opinion, the construction of a building on a sahan darwaza is to change the method of exclusive possession already enjoyed by one cosharer, and the other cosharers will be well within their right to object to the construction of the building even in the absence of proof of direct injury to them. Even assuming that the plot in suit was in the exclusive possession of the appellants as their sahan darwaza, I am of opinion that they have no right to erect a building on any part thereof. I am supported in the view that I have taken above by a decision of Ashworth J. in A I R 1927 All 709.[1]

The learned counsel for the appellants has drawn my attention to a decision of this Court reported in 1937 O W N 764[2] in which it was held that a tenant is entitled to construct a kachcha chabutra as a convenient sitting place on a portion of his sahan darwaza. This case does not lay down any rule of law contrary to the one I have stated above. In fact, a kachcha chabutra for sitting purposes is not inconsistent with the nature of use of the land as sahan darwaza. Further, both the Courts below have in this case come to a concurrent finding of fact that the constructions

1. Sheo Harakh v. Jai Gobind, (1927) 14 A I R All 709=104 I C 414.
2. Chandi Prasad v. Shyam Behari, (1937) 24 A I R Oudh 449=170 I C 518=1937 O W N 764=13 Luck 442.

in question will inconvenience the plaintiff and are likely to cause damage to his kachcha house. The second point raised by the learned counsel for the appellants also has no force. The finding is a finding of fact and there is a good deal of evidence on record in support of that finding. The result is that I maintain the decree passed by the Courts below and dismiss the appeal with costs.

D.S./R.K. *Appeal dismissed.*

*** A. I. R. 1939 Oudh 277**

RADHA KRISHNA J.

Nawab Syed Kazim Husain — Judgment-debtor — Applicant.

v.

Seth Pearey Lal — Decree-holder — Opposite Party.

Misc. Appln. No. 255 of 1939, Decided on 1st September 1939.

*** Civil P. C. (1908), O. 22, Rr. 1 to 11 and S. 115—There is no rule of limitation governing application for substitution of parties in revision application.**

The provisions of O. 22, Rr. 1 to 11 are applicable only to suits and appeals. There is no provision of law laying down procedure for substitution in place of a deceased party in a revision application and the reason is obvious. The remedy provided by S. 115 is absolutely discretionary with the High Court. Hence the law does not prescribe any rule of limitation for impleading a representative of the deceased party in a revision application: *80 I C 456, Rel. on.* [P 277 C 2; P 278 C 1]

Ram Bharose Lal and Murli Manohar— *for Applicant.*

Ghulam Hasan — *for Respondent.*

Order.—This is an application purporting to be under S. 151, Civil P. C., by the applicant-judgment-debtor praying that the name of Mt. Mangla Devi, the widow of the deceased decree-holder, Seth Pearey Lal, be substituted in place of her deceased husband. The facts leading to this application are that the applicant-judgment-debtor applied for reduction of interest in the Court of the Munsif of Kheri under S. 30, U. P. Agriculturists' Relief Act, in respect of a decree in favour of Seth Pearey Lal against the applicant. This application was rejected as not maintainable by the learned Munsif on 14th December 1936, whereupon the present applicant applied in revision to this Court against that order. This application for revision was admitted on 30th April 1937, by a Bench of this Court. Seth Pearey Lal, the decree-holder, died on 23rd August 1938, before the revision application could be heard. On 22nd November 1938, the applicant applied that the names of three minor sons of the deceased, who according to him were his heirs and legal representatives, be brought on record in place of the deceased. On 3rd April 1939 this prayer was rejected on the ground that in view of the Hindu Women's Rights to Property Act of 1937 it is not the minor sons of Pearey Lal but the widow who was the legal representative of the deceased. It may be noted here that in a connected appeal between the parties on a similar objection of the opposite party on 23rd December 1938, this Court had ordered that the legal representative of the deceased was Mt. Mangla Devi, the widow. On the next day of the dismissal of the application for substitution the present application was filed and is opposed. The contention of the learned counsel appearing for Mt. Mangla Devi is that the application is beyond time and that the revision application has abated and further there is no ground for setting aside the abatement which has already taken place.

The learned counsel for the applicant has alleged that the fact that Mangla Devi, and not the sons of the deceased, was the legal representative of the deceased was not within the knowledge of the applicant or his mukhtar and that he acquired this knowledge only on 3rd April 1939, that is the day on which his previous application was rejected. It is prayed that this ground is sufficient for setting aside the order of abatement and for an order of substitution as now prayed. As noted above, it is very probable that the fact of the existence of Mt. Mangla Devi and her being the legal representative of the deceased must have come to the knowledge of the applicant on 23rd December 1938, or soon after that. I disbelieve paras. 3, 6 and 7 of the application and I do not think that there is sufficient cause for setting aside the abatement if abatement has taken place in law. The second contention of the learned counsel for the applicant is that the law does not prescribe any rule of limitation for impleading a representative of the deceased party in a revision application. His contention has in my opinion great force. A perusal of the provisions of O. 22, Rr. 1 to 11, will show that the provisions of this order are applicable only to suits and appeals. By R. 12 it is definitely laid down that nothing in Rr. 3, 4 and 8 shall apply to proceedings in execution of a decree or order. There is no pro-

vision of law laying down procedure for substitution in place of a deceased party in a revision application and the reason is obvious. The remedy provided by Sec. 115, Civil P. C., is absolutely discretionary with the High Court. This Section empowers the High Court to call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies, and if certain conditions are fulfilled then the High Court is entitled to pass such orders as it thinks fit. This Section does not lay down the procedure by which the High Court is to be moved to call for the record of any case. There is no specific provision for an applicant to move the High Court to take action under S. 115, Civil P. C. The applications that are made are just a method of bringing the matter to the notice of the High Court and no more. When an application has been admitted, the effect of the admission is that the High Court has decided to call for the record of the case and in my opinion when that stage is reached it is the duty of the High Court to examine the record and pass such orders as it thinks fit, and in order to be able to do this more effectively it is necessary that the record be examined in the presence of the parties. If a party to the case had died in the meantime it is only just and proper that his legal representatives be brought before the Court, and such an order to bring such legal representative on the record of a revision application can be passed under S. 151, Civil P. C. I am definitely of opinion that as I have said above the provisions of O. 22, Civil P. C., do not apply to revision applications and if I am correct in my conclusion then it follows that there is no rule of limitation governing an application for substitution of parties in a revision application. My attention has been drawn by the learned counsel for the applicant to 80 I C 456[1] which supports my view. In this case the learned Judicial Commissioners of Sind observed as follows:

In the case of an appeal the matter is one between parties and it is obviously for the parties to see that necessary materials for the Court to decide are before the Court. In the case of a revision application the matter is different. An order in revision is made by the Court, of its own motion, to redress grievances which come to its notice. The order in revision is of its very nature an essential act of the Court. No doubt the Courts do not pass orders which would prejudice any party to the proceedings without hearing them and therefore it will be necessary to issue notices to all the parties, and this seems rather a reason why the Court, if it discovered that certain of the parties were dead and not properly represented, should see that they were properly represented. It seems to us therefore that the whole theory of abatement is inapplicable to revision applications.

1. Baksho v. Piaro, (1924) 80 I C 456.

My attention was drawn to Article 177, Limitation Act, but that Article has no application on the view that I have expressed above. Assuming that the present application is subject to the law of limitation, then in my opinion the residuary Article of Limitation, i. e. Art. 181, would apply to the case, but in view of the facts in the present case it is not necessary to express any definite opinion on this point. I therefore hold that O. 22, Civil P. C., is not applicable to an application for substitution of the name of a legal representative in place of a deceased party in a revision application. I order acting under S. 151, Civil P. C., that the name of Mt. Mangla Devi be substituted in place of the deceased Seth Pearey Lal, opposite party, as prayed. The applicant will get costs of this application from Mt. Mangla Devi.

D.S./R.K. *Order accordingly.*

A. I. R. 1939 Oudh 278

HAMILTON AND RADHA KRISHNA JJ.

Jageshar Prasad and others — *Defendants* — Applicants.

v.

Lal Narsingh Pratap Bahadur Singh — *Plaintiff* — Opposite Party.

Civil Revn. Appln. No. 134 of 1939, Decided on 4th September 1939, from order of Dist. Judge, Rae Bareli, D/- 21st September 1937.

(a) Oudh Rent Act (22 of 1886), S. 119-B— Appeal against appellate decision of District Judge if lies to High Court would be under S. 119-B and not under O. 43, R. 1, Civil P. C.

An appeal against an appellate decision of the District Judge under the Oudh Rent Act if there could be an appeal to High Court would be under Sec. 119-B, Oudh Rent Act, and not under O. 43, R. 1, Civil P. C. [P 279 C 1]

(b) Oudh Rent Act (22 of 1886), Ss. 32-B (1) and 108 (2)— Suit under Sec. 32-B (1) may be joined with suit under S. 108 (2)— Suits when so joined, whole appeal lies to Appellate Revenue Court and not to District Judge.

A suit for determination of rent under S. 32-B, sub-s. (1) may be joined with a suit for arrears of rent under cl. (2) of S. 108. An appeal from an order of an Assistant Collector of the First Class in a suit under S. 108, cl. (2) lies to the District Judge but an appeal in a suit for determination of rent under S. 32-B (1) would not lie to the District

Judge. But the whole appeal would lie to an Appellate Revenue Court and not to the District Judge, if the two suits become one : *A I R 1939 Oudh 239, Applied; AIR 1925 Oudh 499, Not followed ; AIR 1929 Oudh 481 and AIR 1929 Oudh 79, Disting.* [P 279 C 1]

D. K. Seth — *for Applicants.*

M. Wasim — *for Opposite Party.*

Order. — This appeal has been filed by defendants as an appeal under O. 43, R. 1, Civil P. C. It is however an appeal against an appellate decision of the District Judge of Rae Bareli under the Oudh Rent Act and therefore if an appeal lay to this Court it would be under S. 119-B, Oudh Rent Act, and not under O. 43, R. 1, Civil P. C. The decision of the District Judge is however not a decree passed under the Oudh Rent Act for, it is an order of remand to the lower Court and we have therefore been asked to treat this appeal as a revision.

The plaintiff sued for determination of rent under Sec. 32.B (1) and for arrears of rent under cl. 2 of Sec. 108. Accordingly, S. 32.B (3) applies, namely that a suit for determination of rent under S. 32.B sub-s. 1 may be joined with a suit for arrears of rent under cl. (2) of Sec. 108. An appeal from an order of an Assistant Collector of the First Class in a suit under S. 108, cl. (2) lies to the District Judge but an appeal in a suit for determination of rent under Section 32.B (1) would not lie to the District Judge. In view therefore of 1939 O A 603[1] the whole appeal would lie to an appellate Revenue Court and not to the District Judge, if the two suits become one, while if they are still separate appeal would only lie to him as to arrears after determination. Our attention has been drawn to three cases, 2 O W N 499,[2] 4 Luck 517[3] and 5 O W N 1126.[4] Of these the first is a case directly in point which was decided by a single Judge of this Court. Reference was there made to appeals against decisions under Sec. 127, Oudh Rent Act, and it was stated that when a plaintiff claimed a relief as to arrears of rent he usually went in appeal to the Court of the District Judge and then in second appeal to this Court. The learned single Judge held that on a proper interpretation of sub-cl. (3) of S. 32-B it appeared to him clear that the principal suit was the suit for arrears of rent and therefore appeal would lie to the District Judge. We find ourselves unable to follow that decision because the Oudh Rent Act has no provision about distinguishing between what is principal and what is ancillary for the purposes of deciding the forum of appeal. As has been stated in 1939 O A 603[1] all appeals against decisions of an Assistant Collector go to a superior Revenue Court under Sec. 116 unless S. 119 applies and as that is the Section which creates exceptions to the general provision it must be strictly construed. As regards 4 Luck 517[3] and 5 O W N 1126,[4] we think that a distinction can be drawn. Under S. 32.B (3) two suits may be joined together but they are two suits. On the other hand, under Sec. 127, Oudh Rent Act, there is one suit and it is for rent although the rent which the trespasser is liable to pay is at such rate as the Court may determine to be fair and equitable: there is no suit for the determination of rent as there is in the case of a tenant. It is also true that under S. 127 ejectment can also be decreed, but the decree if passed is merely on an application of the plaintiff. We consider that in a case like the present one where the point of determination of rent was involved 1939 O A 603[1] must be applied and we must therefore find that an appeal did not lie to the District Judge and as he had no jurisdiction to pass the order which he did pass we can in revision set aside that order.

We therefore set aside that order and order the appeal presented to the District Judge to be returned for presentation in the proper Court. We grant the defendants-applicants their costs.

D.S./R.K. *Order set aside.*

1. Thakur Mohammad Umar v. Mt. Nasira, (1939) 26 A I R Oudh 239=183 I C 463=1939 O W N 749=1939 O A 603.
2. Kalka v. Ram Suchit, (1925) 12 A I R Oudh 499=89 I C 511=2 O W N 499.
3. Sarfaraz Singh v. Deputy Commissioner, Gonda, (1929) 16 A I R Oudh 481 = 117 I C 475=4 Luck 517=7 O W N 191.
4. Ram Bahadur Singh v. Dharam Raj Singh, (1929) 16 A I R Oudh 79 = 114 I C 761 = 5 O W N 1126.

A. I. R. 1939 Oudh 279

ZIAUL HASAN AND BENNET JJ.

Haji Ewaz Mohammad and another — *Plaintiffs* — Appellants.

v.

Nageshwari Prasad and another — *Defendants* — Respondents.

Second Appeal No. 258 of 1936, Decided on 28th September 1939, against order of Dist. Judge, Fyzabad, D/- 14th July 1936.

Landlord and Tenant — Under-proprietor is absolute owner of trees in grove and cannot be restricted in his use of those trees.

An under-proprietor has a heritable and transferable interest in the land and is to all intents and purposes proprietor of the land with the only restriction that he is liable to pay rent to the superior proprietor. The trees of the grove are undoubtedly the property of the under-proprietor and he should not be enjoined not to deal with the trees which are his property in any manner he likes: *A I R 1929 Oudh 524, Rel. on.*

[P 281 C 1]

Mohammad Wasim and Faiyaz Ali — *for Appellants.*

S. N. Srivastava, Niamatullah and Mohammad Ayub — *for Respondents.*

Judgment. — These appeals against decrees of the District Judge of Fyzabad, in cross-appeals in the same suit have been brought by the plaintiffs to the suit. The dispute in the case relates to a grove of fruit trees having an area of 3 bighas odd and situated in village Rauza Bijli, parganah Tanda of the Fyzabad District. Nageshari Prasad, respondent 1, is the under-proprietor of the grove, having succeeded his father Kamta Prasad, who obtained a decree of under-proprietary rights from the Revenue Court and finally in appeal from the Court of the Judicial Commissioner of Oudh on 18th April 1889. The plaintiffs claimed to be the superior proprietors of the grove and though this claim was disputed by both the respondents, it has been found by both the Courts below that they are the superior proprietors of the grove and this finding is not now challenged before us. As in the course of proceedings for correction of the khewat respondent 2 was represented by respondent 1 to be the superior proprietor of the land and as those proceedings terminated in the Revenue Courts in favour of respondent 2, the plaintiffs impleaded him also in their suit. Their allegation was that according to the decree of the Judicial Commissioner, referred to above, they were entitled to get one-fourth of the price of the fruit of the grove in suit from the under-proprietor and in their suit they prayed for the following reliefs:

(a) A decree for declaration of right be passed in favour of the plaintiffs against the defendants specifying that only the plaintiffs and not defendant 3 are entitled to recover from defendants 1 and 2 as superior proprietors the one-fourth share in the fruits and wood of the orchard in suit or any other produce or crop of the orchard in suit as detailed at the foot of this plaint or the one-fourth share of those annual profits or produce which may be obtained from the use of the land of the orchard in suit in any other way.

(b) If the Court thinks it fit that a decree for possession is necessary, then, in accordance with the prayer in the aforesaid relief (a) a decree for possession of the superior proprietary rights in the land of the orchard in suit as detailed at the foot of the plaint be granted to the plaintiffs against the defendants.

(c) In the case of a decree respecting the aforesaid relief (b) Rs. 300 or more, the mesne profits, i. e. the value of fruits of the trees and other produce and profit of the superior proprietary right in the land of the orchard in suit for three years prior to the filing of this suit, which may be found due after inquiry, be recovered from defendant 3 for the plaintiffs on payment of the deficit of the court-fee, if any, and proper orders be passed respecting the recovery of the mesne profits during the pendency of this suit.

(d) A decree for the perpetual injunction be passed in favour of the plaintiffs against the defendants specifying that the defendants should not cut down any tree in the orchard in suit, neither cause damage to any tree, nor erect any building which they intend to construct as mentioned in the map prepared by the Commissioner and filed on 5th February 1935, nor fix any machinery on the said plots of land or any other portion of the orchard in suit, nor erect any other structure in any portion of the orchard in suit, also they should not use the land of the orchard in suit in any other way detrimental to the rights of the plaintiffs.

The learned trial Court decreed the plaintiffs' suit in the following terms:

The plaintiffs' claim for proprietary possession with respect to the grove in suit is hereby decreed with Rs. 15 against defendants 1 and 3 (respondents 1 and 2). Defendant 1 is enjoined not to cut or injure in any manner the trees shown by the commissioner as existing on the land in suit. The plaintiffs shall get their proportionate costs of the suit from defendants 1 and 3 who shall bear their own costs. The claim for plaintiffs' declaration of title fails and is hereby dismissed with no order as to costs.

Against this decree both the parties appealed to the District Judge. The learned Judge dismissed the appeal of the plaintiffs but allowed respondent 1's appeal in part and dismissed the plaintiffs' suit so far as it related to any injunction against defendant (respondent) 1. Against this decree, as said above, the plaintiffs bring these appeals and respondent 1 has filed cross-objections. We have heard the learned counsel for the parties at length and are of opinion that the appeal must be allowed in part. As will be seen from relief (a) claimed by the plaintiffs and reproduced above, the plaintiffs claimed a declaration not only of their proprietary rights in the grove but also a declaration to the effect that they were entitled

as superior proprietors to the one-fourth share in the fruits and wood of the orchard in suit or any other produce or crop of the orchard in suit as detailed at the foot of this plaint or the one-fourth share of those annual profits or produce which

may be obtained from the use of the land of the orchard in suit in any other way.

We do not think that the decree of the Judicial Commissioner entitled the plaintiffs to any portion of the wood of the trees or to a share in profits which may be obtained from any use of the land of the grove; but they are undoubtedly entitled to one-fourth of the produce of the trees standing in the grove. There was to our minds no reason why a declaration to this effect should not have been made in their favour. As regards the injunctions sought in cl. (d) of the reliefs claimed, the learned counsel for the appellants does not press for an injunction restraining the under-proprietor from erecting any building or fixing any machinery on the land or to put the land to any use other than of an orchard, but he strongly protests against the learned District Judge's order setting aside the injunction granted by the trial Court by which the under-proprietor was restrained from cutting down or causing any damage to any tree in the orchard. We do not however agree with his point of view in this matter. An under-proprietor has a heritable and transferable interest in the land and is to all intents and purposes proprietor of the land with the only restriction that he is liable to pay rent to the superior proprietor. In 6 O W N 921[1] it was held that the superior proprietor has no right of re-entry on the under-proprietary tenure and he is not entitled to a decree in ejectment even if the actual possession is with trespassers without any title and that the under-proprietary tenure carries with it both transferability and heritability the two essential elements of ownership and the ownership thus vests in the original under-proprietor and not in the superior proprietor whose only right is to receive rent and no more. This being so, the trees of the grove are undoubtedly the property of the under-proprietor and there seems to be no reason why he should be enjoined not to deal with the trees which are his property in any manner he likes. It is true that the decree of the Judicial Commissioner entitles the superior proprietor to one-fourth of the produce of the fruit trees growing on the land but if the trees cease to exist the superior proprietors can seek any remedy that may be available to them at the time. In fact as pointed out by the learned counsel for the respondents they ought to have in their own interest got rent fixed on the land in question at the settlements that followed the decree of the Judicial Commissioner. Anyhow this is the lookout of the plaintiffs themselves and what we have to see in the present case is whether the plaintiffs were entitled to get an injunction against the under-proprietor in regard to the trees of the grove. As we have said the under-proprietor is the absolute owner of the trees and he cannot be restricted in his use of those trees. Nor does the decree of the Judicial Commissioner contemplate that the under-proprietor should always maintain the land as a grove.

We therefore decree these appeals in part and modify the decree of the lower Appellate Court by giving the plaintiffs a declaration of their proprietary right to the grove in suit and to the effect that as superior proprietors they are entitled to get a one-fourth share in the produce of the trees growing in the grove. The rest of the appeals is dismissed. The learned counsel for the respondents does not press the cross-objections. They are also dismissed. We order each party to bear his own costs in this Court. This judgment will govern both the appeals.

D.S./R.K. *Decree modified.*

1. Mohammad Khan v. Abdul Rahman Khan, (1929) 16 A I R Oudh 524=125 I C 388 = 6 O W N 921.

A. I. R. 1939 Oudh 281

RADHA KRISHNA J.

Ainul Haq Khan—Judgment-debtor — Appellant.

v.

Mt. Nawaban—Decree-holder — Respondent.

Exn. of Decree Appeal No. 23 of 1937, Decided on 14th August 1939, against order of Civil Judge, Gonda, D/- 7th January 1937.

(a) Limitation Act (1908), Art. 182 (7) — Decree for maintenance directing payment at certain date—Application to enforce payment —Time runs from date of default of any of the instalments.

The words 'such date' in the last column of Art. 182 (7) refer to the date on which a default was made in the payment of any of the instalments. [P 282 C 2]

Where a decree for maintenance directs payment at a certain date an application to enforce such payment would fall under cl. (7) of Art. 182 and time would run from the date of default of any of the instalments : *A I R 1927 P C 146, Rel. on.* [P 282 C 2]

(b) Deed — Construction — Precedents can hardly be useful.

On the question of interpretation of a document precedents can hardly be useful; each document has to be construed on its own language and in interpreting a decree it would not be right to be influenced by decisions in which other decrees were interpreted in other cases. [P 283 C 1]

(c) Decree—Yearly maintenance decree made payable at end of certain month each year — In case of default decree providing recovery of amount from person or other property of judgment-debtor—Decree held capable of execution.

In every decree for payment of money, a condition that the money can be realized by execution is implicit. [P 284 C 1]

A yearly maintenance decree was made payable at the end of August of each year, and the right to claim this maintenance was to be given from certain date. It was further provided that in case of non-payment by that date the decree-holder was entitled to realize the amount due out of certain share of property as well as the person or other property of the judgment-debtors :

Held that that part of the decree which provided that the decree-holder in case of default would be entitled to recover the amount of maintenance due from the person and other property of the judgment-debtors was capable of execution : *22 Cal 903; A I R 1915 All 61; 15 O C 99 and A I R 1927 Oudh 457, Expl.* [P 284 C 1]

Mohammad Ayub — *for Appellant.*

Zahur Ahmad — *for Respondent.*

Judgment.—On the death of one Karim Dad Khan, the respondent in this case, who is his daughter, filed a suit for possession of her share in her father's property against Mt. Waziran, the widow of Karim Dad Khan, his two sons and two other daughters. The appellant is one of the sons of Karim Dad Khan and was defendant 2 in the suit. On 21st August 1922 a compromise was arrived at between the respondent on the one hand and Mt. Waziran and the appellant on the other. Other defendants were discharged. A decree on the basis of this compromise was passed. The compromise is in vernacular and the relevant portion of it may be translated as follows :

That the plaintiff is entitled to get Rs. 60 only per annum as maintenance for her life from defendants 1 and 2 (i. e. Mt. Waziran and the present appellant). Defendants 1 and 2 shall pay this amount of maintenance to the plaintiff month by month from 1st September 1922, till her lifetime and the amount of maintenance aforesaid shall be a charge on the two annas share of village Manjhwa Kurthuwa, mahal Karim Dad Khan, which will remain in possession of defendant 1. In case defendants 1 and 2 fail to pay this maintenance of Rs. 60 till the end of August every year, then the plaintiff shall be entitled to realize it from the two annas share of mahal Karimdad Khan mentioned above as well as from their person and other moveable and immovable properties. The suit of the plaintiff for possession be dismissed. The plaintiff shall have no right left in the estate of Karim Dad Khan and the defendant shall be liable to pay the court-fee of the suit, and the remaining costs shall be on parties. The other defendants be discharged.

On 27th July 1936 the plaintiff decree-holder applied for execution of the above decree for the recovery of arrears of maintenance from 1st September 1933 up to the end of August 1935, against the appellant by attachment and sale of his moveable properties. The appellant objected to the execution on several grounds, the chief of which were that the decree was merely a declaratory decree and was not capable of execution and that the application for execution was barred by time. The objection of the appellant was dismissed and execution was allowed to proceed by the first Court and the order of the first Court has been upheld by the learned Civil Judge of Gonda in appeal and this is a second execution appeal against that order. The appellant contends that the application for execution is barred by time and that the decree is of a declaratory nature and not capable of execution and the respondent disputes both these contentions of the appellant.

On the first point I am clearly of opinion that the Article applicable to the facts of the present case is Art. 182, cl. (7), Limitation Act, which runs as follows :

Description of application.	Period of limitation.	Time from which period begins to run.
182. For the execution of a decree or order of any Civil Court not provided for by Article 183 or by Section 48 of the Code of Civil Procedure, 1908.	Three years; or where a certified copy of the decree or order has been registered, six years.	7. (where the application is to enforce any payment which the decree or order directs to be made at a certain date) such date.

The words "such date" in the last column refer to the date on which a default was made in the payment of any of the instalments which in the present case would mean 31st August of each year. On the occasion of each default the decree-holder would be entitled to enforce his claim. The decree directs payment at a certain date and an application being enforced such a payment would fall under cl. (7). The point under discussion is in my opinion fully covered by a decision of their Lordships of the Judicial Committee reported in

5 Rang 422.[1] I therefore hold that the present application for execution was well within time inasmuch as it was for recovery of arrears falling due on 31st August 1934 and 31st August 1935.

On the second point the contention on behalf of the appellant is that the decree in question only declared the rights and liabilities of the parties to the decree as they were to come into existence in future and the decree did not lay down what would happen in case the defendants failed to perform their part of the compromise. The argument in substance is that the decree does not lay down in express words that the respondent shall be entitled to realize the maintenance due by execution and the decree should be construed as merely declaring the rights of the parties in future which can be enforced only in a separate suit. The learned counsel for the appellant in support of his contention places reliance upon 22 Cal 903,[2] 26 I C 597,[3] 15 O C 99[4] and 4 O W N 882.[5]

My opinion is that the decree in the present case is not a mere declaratory decree and is capable of its execution. The question in dispute has to be solved on a proper interpretation of the decree itself. On the question of interpretation of a document precedents can hardly be useful, each document has to be construed on its own language and in interpreting the present decree it would not be right to be influenced by decisions in which other decrees were interpreted in other cases. In 22 Cal 903[2] reliance was placed upon another decision reported earlier in 22 Cal 859[6] in which the learned Judges at p. 864 observed that as the decree stood the plaintiff could realize the instalments by execution by sale and attachment of any property of the defendant but if he wished to sell and attach the properties charged he must bring a suit. In the present case the decree-holder is not enforcing the decree by the sale of two-annas share in mahal Karim Dad Khan, but by enforcing her right to realize the money from the judgment-debtor personally. This part of decree was clearly held to be executable in the case mentioned above. The same view was taken in 1 O L J 403,[7] which dealt with a decree similar to the present one. The case in 26 I C 597[3] was the case of a Revenue Court decree passed on an award. The award provided that if the maintenance due was not paid then the payment could be enforced by taking proceedings in a competent Court. The learned Judges of the Allahabad High Court held that the distinction between enforcement of payment by execution and enforcement of payment by taking proceedings in a competent Court was well understood by the arbitrator, and the particular provision in the award indicated that the payment had to be enforced by a regular suit in a Civil Court. 15 O C 99[4] dealt with a case of a settlement decree by which Rs. 25 per mensem was decreed as nankar. The decree was as follows:

> Ordered that the claim of the plaintiff for the receipt of Rs. 240 per annum against the defendant be decreed. Order communicated to the parties. A note should accordingly be made in the papers. The plaintiff will recover Rs. 240 per annum in execution of the decree.

On a proper construction of the decree it was held that the operative part of the decree ended with the words "be decreed" and the rest was in the nature of directions to the office. The decree fixed no date for payment of the nankar and was in its character a declaratory decree and its character could not be altered by the mere addition of an unauthorized direction that the nankar will be realized on the execution side. In 4 O W N 882[5] a decree had been passed in a suit for redemption declaring the right to redeem and the right to recover possession after payment of certain amount as principal and interest. It further declared the manner of devolution of that right on the death of the mortgagor in favour of one of the defendants or such person or persons who may be found entitled to it. No date was fixed for payment of the mortgage money. It was held that the decree was in the circumstances of that case in its nature declaratory of the plaintiff's right to redeem, leaving it open to him to claim actual possession whenever he found it convenient to do so by a separate suit. In the present case the yearly

1. Maung Sin v. Ma Tok, (1927) 14 A I R P C 146=101 I C 736=54 I A 272 = 5 Rang 422 (P C).
2. Matangini Dassee v. Chooneymoney Dassee, (1895) 22 Cal 903.
3. Anupa Kuer v. Achchaihar Singh, (1915) 2 A I R All 61=26 I C 597 = 37 All 97 = 13 A L J 38.
4. Kashi Ram v. Sahib-un-nisa, (1912) 15 O C 99 =15 I C 389.
5. Suraj Bakhsh v. Ganga Bakhsh, (1927) 14 AIR Oudh 457=105 I C 93=4 O W N 882.
6. Aubhoyessury Dabee v. Gouri Sunkur Panday, (1895) 22 Cal 859.
7. Muneshar Bakhsh Singh v. Mt. Phul Kuar, (1914) 1 A I R Oudh 268 = 25 I C 684 = 1 O L J 403.

maintenance decree was made payable at the end of August of each year, and the right to claim this maintenance was to be given from 1st September 1922. It was further provided that in case of non-payment by the end of August the plaintiff was entitled to realize the amount due out of the two-annas share of mahal Karim Dad Khan as well as the person or other property of the defendants. There is no doubt in my mind that the decree, at any rate, so far as it entitles the decree-holder to realize her maintenance out of the person and other property of the defendants, is clearly capable of enforcement by execution. In my opinion in every decree for payment of money a condition that the money can be realized by execution is implicit. This is borne out by O. 21, R. 30, Civil P. C., which runs as follows and the form of a simple money decree (Form No. 2 of Appendix D):

Every decree for the payment of money, including a decree for the payment of money as the alternative to some other relief, may be executed by the detention in the civil prison of the judgment-debtor, or by the attachment and sale of his property, or by both.

I therefore hold that that part of the decree which provides that the decree-holder in case of default would be entitled to recover the amount of maintenance due from the person and other property of the judgment-debtor is capable of execution and the present application for execution is maintainable. The order passed by the Courts below is maintained and the appeal is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Oudh 284

BENNET J.

Shahzada Daljit Singh — Applicant.

v.

Mian Tej Singh — Opposite Party.

Criminal Revn. No. 52 of 1939, Decided on 18th August 1939, from order of Addl. Sess. Judge, Bahraich, D/- 29th May 1939.

Criminal P. C. (1898), Ss. 145 and 561-A—Magistrate has jurisdiction to cancel preliminary order issued under S. 145 (1) — But he cannot order delivery of attached property in favour of either party—Proper order for High Court in such case is to continue attachment until determination of question of title.

Where a Magistrate has issued a preliminary order under S. 145 (1) holding that a dispute likely to cause breach of peace exists he has jurisdiction to cancel that order if circumstances justify doing so. : *30 Cal 112, Rel. on.* [P 285 C 2]

But after proceedings under S. 145 have been dropped he has no jurisdiction to order delivery of the attached property to either party. The proper order for High Court in such a case is to continue attachment until the determination of the question of title, since release from attachment may result in a conflict between the parties. : *A I R 1925 Nag 297; A I R 1915 Mad 588 and A I R 1921 Cal 522, Rel. on.* [P 286 C 2]

Dr. J. N. Misra — *for Applicant.*

S. Kalbe Abbas and H. G. Walford — *for Opposite Party.*

Order. — This is an application in revision against the order of the Additional Sessions Judge, Bahraich, dated 29th May 1939, upholding the order of the District Magistrate, Bahraich, dated the 31st March 1939, in proceedings under S. 145, Criminal P. C. These proceedings were initiated by the applicant Shahzada Daljit Singh, a minor, under the guardianship of his mother, Rani Rajendra Pal Kauar Sahiba, on 22nd December 1938. In this application it was stated that in the previous September the applicant's mother had brought into her possession four villages which had been granted by way of jagir to Shahzada Jagjaut Singh and Shahzada Fateh Singh. The grantees had only a life interest in the villages, and on their death they reverted to the applicant as proprietor of the Pipri estate. The opposite party Miyan Tej Singh had however obtained a deed of gift in respect of these villages from Shahzada Jagjaut Singh and Shahzada Fateh Singh, and was claiming the property in virtue thereof, though whatever rights he may have had under the gift deed ceased on the death of the donors. The applicant claimed that the villages had come into his possession peacefully and that the tenants had been willingly paying their rents to him.

Reference was also made in this application to the fact that in one of the four villages referred to there was a temple dedicated to Mahadeoji in which the offerings and tah-bazari dues on mela occasions were realized on behalf of the applicant. The opposite party Miyan Tej Singh disputed his right to do so, and on 20th November 1938 the police had attached the offerings and dues. Consequently the applicant prayed that proceedings might be taken under S. 145 in respect of the four villages as well as in respect of the temple offerings and mela dues, and the applicant's possession be upheld. A police inquiry was ordered on this application, and the Sub-Inspector

of Police who made the inquiry reported on 16th January 1939. The general conclusion at which the Sub-Inspector arrived was that there was no apprehension of a breach of the peace from the side of Miyan Tej Singh such as would justify proceedings against him under S. 145. It was also stated in the report that Miyan Tej Singh had produced documentary evidence in support of his possession which was corroborated by the patwaris. There was no evidence of any quarrel between Miyan Tej Singh and the Rani Sahiba.

The Deputy Superintendent of Police submitted the papers to the Superintendent of Police and expressed the opinion that there would be trouble between the parties until one party was declared to be in possession and the other directed to establish his rights in the Civil Court. The Superintendent of Police concurred and recommended action accordingly to the District Magistrate. The District Magistrate, who was then Mr. Badri Prasad, noted on 6th February 1939, that he was satisfied on this report and notes that a dispute existed between the parties which was likely to cause a breach of the peace, and he therefore required the parties to attend in person or by pleader on a certain date before a certain Magistrate and file written statements. Subsequently, an application was made by Miyan Tej Singh asking for reconsideration of the order. The application was made before Mr. Badri Prasad, but he was shortly afterwards succeeded by Mr. Stubbs. Mr. Stubbs reconsidered the matter and passed the order which is primarily the subject of the present application. He heard counsel for the parties and expressed the opinion in his order of 31st March 1939, that the report and other papers on the record merely established the existence of a dispute and did not establish the need for action under Sec. 145. He accordingly cancelled the notice issued to the parties. He also ordered that the property which had been attached should be released in favour of Miyan Tej Singh and he warned the Rani of Pipri and her servants and adherents not to attempt to interfere illegally with his possession. If they did so, action would be taken against them under Sec. 107, Criminal P. C. Presumably the order for release from attachment of the property referred to the offerings and dues which had previously been attached by the police as well as to the immovable property which was the principal subject of the application of 22nd December. An application in revision against the District Magistrate's order was preferred in the Sessions Court and disposed of by the Additional Sessions Judge in the order of 29th May against which this present application in revision has been filed. The Additional Sessions Judge saw no reason to interfere with the District Magistrate's order.

Two questions arise from the District Magistrate's order, the first being whether he had power under sub-s. (5) to cancel the preliminary order issued under sub-s. (1) of Sec. 145, and the second whether he had power to order delivery of the property to Miyan Tej Singh. On the first point there are numerous authorities to the effect that the matter is entirely within the Magistrate's discretion, save where the order is passed without any material to justify it. It cannot be said in this case that there was no basis for the Magistrate's order, for the report of the Sub-Inspector who made inquiry on the original application was that proceedings under Sec. 145 were not necessary. His superior officers and Mr. Badri Prasad, who was then the District Magistrate, thought that they were necessary, but on application being made for reconsideration by Miyan Tej Singh, Mr. Stubbs came to a different conclusion. In 30 Cal 112[1] it was held that the Magistrate has jurisdiction to cancel the original order where the circumstances justify this. It is more difficult to defend the order of the District Magistrate for delivery of the property to Miyan Tej Singh. I take the following passage based on various rulings from p. 701 of Chitaley's Commentary on the Code of Criminal Procedure :

> On the making of an order dropping the proceedings, the Magistrate is "functus officio" and has no "jurisdiction" thereafter to pass any order relating to the claims of the parties or to the disposal of the property or the crops thereon and the parties should be left to settle their rights in a competent Court or in any manner they choose. Any attachment effected in the course of the proceedings automatically ceases, and the position of the parties is precisely the same as if no proceedings had been instituted at all under this Section. Where the profits, rents or realizations from the attached property are in court deposit, the proper course to adopt, on the cancellation of the preliminary order, would be to keep the amount in court deposit, until the party entitled to it has established his rights in a proper proceeding; the Magistrate has no power to pass an order under Section 517.

It has been argued in support of the

1. Manindra Chandra v. Barada Kanta, (1903) 30 Cal 112=6 C W N 417.

Magistrate's order releasing the property in favour of Miyan Tej Singh that the circumstances and the evidence on the record are such as to warrant it, but, however strong the case of one party may appear to be, a Magistrate is not justified in coming to any conclusion in regard to the rights of the parties when a dispute admittedly exists, as that would be in effect deciding the question at issue between them. So far as the question of possession is concerned that can only be decided under S. 145 after taking all such evidence as the parties may adduce: while the question of title can be decided only by a Civil Court. This part of the Magistrate's order cannot therefore be upheld.

The question remains what is the proper order to pass in the circumstances of the case with respect to the property. Two courses are possible. One is to order release of the property from attachment without directing delivery to either party and the other is to order that the attachment shall continue until the question of title has been decided by the Civil Courts. It may be mentioned here that an order was passed by this Court when the application in revision was filed that the attachment should continue in force pending orders on the application, unless possession had already been handed over. It was stated by the applicant's counsel during the hearing of the application that possession had not been handed over, and therefore the ad interim order for the attachment to remain in force still holds good.

It was frankly admitted by counsel for the parties that if the property is released from attachment and no order is passed for its delivery to either party, a breach of the peace would certainly ensue. Consequently, there can be no doubt that whatever justification there may have been for the view taken by the District Magistrate that there was originally no apprehension of a breach of the peace, it could not be considered now in view of the subsequent developments that there would still be no apprehension of a breach of the peace on such release of the property from attachment. The District Magistrate would then have to take action either under S. 107 or under S. 145, and he would probably have to pass orders for the attachment of the property again. Learned counsel for the applicant has suggested that in these circumstances the proper order for this Court to pass would be that the property should remain under attachment pending decision of the question of title. In support of such an order he has referred me to the ruling in A I R 1925 Nag 297.[2] In this case it was held that where a Magistrate attaches property which is the subject of dispute under S. 145 and subsequently comes to the conclusion that there is no danger of a breach of the peace and on that ground files the proceedings he has no jurisdiction to direct that the attached property should be delivered to one of the parties. The proper order is to direct that the property should remain in his custody and management pending decision of a Civil Court on the question of title.

The same view has been taken by other High Courts. In 27 I C 152[3] the Madras High Court held in similar circumstances that the Magistrate had no jurisdiction to direct that the attached properties should be delivered to one of the parties and that he should keep them or their sale-proceeds, if perishable, in deposit until one of the parties establishes its right in a Civil Court. In 48 Cal 522[4] the Calcutta High Court held that it had inherent power to give directions as to disposal of property attached and dealt with by a Magistrate in the course of proceedings instituted without jurisdiction under Sec. 145 of the Code. Statutory effect has since been given to this decision by the enactment of S. 561-A of the Code whereby nothing therein shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under the Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. It seems clear therefore that this Court has power to pass an order that the attachment shall continue, and in the circumstances of the case this appears to be the more appropriate order to pass, since release from attachment might result in a conflict between the parties or their servants before action to prevent it could be taken by the authorities.

While therefore upholding the order of the District Magistrate cancelling the preliminary order under sub-s. (1) of S. 145, I set aside his order directing delivery of the property to Miyan Tej Singh and

2. Dashrath v. Tarachand, (1925) 12 A I R Nag 297=89 I C 514=26 Cr L J 1378=21 N L R 191.
3. Chenga Reddi v. Ramasamy Gounden, (1915) 2 A I R Mad 588=27 I C 152=16 Cr L J 104.
4. Pigot v. Ali Mahammad, (1921) 8 AIR Cal 30 =60 I C 325=22 Cr L J 219=48 Cal 522=32 C L J 270 (S B).

direct that the property including both the immovable property and the temple offerings and tah-bazari dues, shall remain under attachment until the question of title has been determined by the Civil Courts.

D.S./R.K. *Order accordingly.*

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ZIAUL HASAN AND BENNET JJ.

Thakur Lal Ram Partap Singh — *Plaintiff* — Appellant.

v.

Ganga Prasad and another — *Defendants* — Respondents.

Second Appeal No. 333 of 1936, Decided on 2nd October 1939, against decree of Dist. Judge, Gonda, D/- 21st July 1936.

Usurious Loans Act (1918), S. 3—Suit can be brought on series of transactions.

The Usurious Loans Act permits a suit to be brought on a series of transactions. [P 288 C 1]

M. Wasim and Ali Hasan — *for Appellant.*

S. N. Srivastava—*for Respondent 1.*

Judgment.—This second appeal against a decree of the learned District Judge of Gonda arises out of a suit brought by the plaintiff-appellant under S. 33, Agriculturists' Relief Act. It appears that the plaintiff-appellant executed three mortgage deeds in favour of the respondents between 1918 and 1920. The first deed, which is Ex. 1, on the record, was executed on 1st July 1918 for a sum of Rs. 20,000 and provided for interest at Re 1-8-0 per cent, per mensem compoundable half-yearly. The mortgage consideration consisted of the following items:

Rs.	12,546—8—0	paid in cash.
"	8500—0—0	due to the mortgagee on bahi khata account.
"	175—0—0	due on account of interest.
"	8499—4—0	on account of price of cloth.
"	100—0—0	interest on price of cloth.
"	150—0—0	paid in cash.
"	29—4—0	paid in cash.
Total	Rs. 20,000	

The second mortgage deed, Ex. 2, was executed on 19th March 1920, for Rupees 28,000. Interest was stipulated at 12 per cent. per annum compoundable yearly. Out of the consideration a sum of about Rupees 25,000 was set off against the amount due on the first mortgage and the rest was received in cash. The third deed, Ex. 3, was executed three months later on 17th June 1920. It was a mortgage for Rupees 30,852 and carried interest at 7½ per cent. per annum compoundable yearly. This deed paid off the earlier deed, Ex. 2, and the rest of the consideration was obtained in cash. The only question that arises in this appeal is whether or not the plaintiff-appellant is entitled to have the transactions of 1st July 1918 and 19th March 1920, reopened under the provisions of the Usurious Loans Act. Both the Courts below have held that these transactions cannot be reopened. The trial Court reduced the contractual rate of interest under the provisions of Sec. 30, Agriculturists' Relief Act, and held that a sum of Rs. 8419-11-0 was still due by the plaintiff to the defendants-mortgagees. S. 3, Usurious Loans Act, as amended by the Local Act 22 of 1934 provides that if

> in any suit to which the Act applies, the Court has reason to believe (a) that the interest is excessive or (b) that the transaction was as between the parties thereto substantially unfair, the Court shall . . . . . reopen the transaction, take an account between the parties and relieve the debtor of all liability in respect of any excessive interest . . . . and set aside either wholly or in part any . . . . . agreement made in respect of any loan.

The question therefore is what is "the transaction" in the present case. The learned counsel for the respondent says that the transaction in suit in the present case is only the last mortgage of 17th June 1920, and as the stipulated rate of interest, 7½ per cent. per annum compoundable yearly, is not excessive and as the transaction was not substantially unfair, the two earlier transactions cannot be reopened. We are of opinion however that the transaction in suit in the present case covers all the three mortgages mentioned above. Beyond the fact that the mortgage deed of 17th June 1920 was mentioned in the plaint first of all, there is no indication that the plaintiff wanted an account to be taken under S. 33, Agriculturists' Relief Act, in respect of that transaction only. On the other hand para. 1 (a) of the plaint mentions the earlier transactions also in the following terms:

> That the mortgage deed mentioned in para. 1 was executed in lieu of mortgage deed dated 1st July 1918 and 19th March 1920, which carried interest at the rate of Re. 1-8-0 per cent. per mensem compoundable with six-monthly and yearly rests and the property was mortgaged which is hard and unlawful according to S. 3, Usurious Loans Act; hence the plaintiff is entitled to a rendering of accounts and a deduction in the interest in the consideration money of the deed mentioned in para. 1 regarding those deeds.

Further the relief claimed by the plaintiff clearly shows that he wanted accounts to be taken of all the three transactions.

Sub-para. (a) of the reliefs claimed is as follows :

That after accounting according to the Agriculturists Relief Act regarding the reduction of interest the amount due from the plaintiff to the defendants be mentioned and declared that accounts be made in respect of the deeds mentioned in paras. (1) and (1a), that after making an account of interest according to the Agriculturists' Relief Act and Usurious Loans Act and after making deductions of the sums paid by the plaintiff the amount due from the plaintiff be notified that if any surplus amount be found due to the plaintiff then it be got returned to him by the defendants.

That the Usurious Loans Act permits a suit to be brought on a series of transactions is shown by the Explanation to proviso (i) to S. 3 (1) of the Act. It runs as follows:

In the case of a suit brought on a series of transactions, the expression 'the transaction' means for the purposes of proviso (i) the first of such transactions.

We have therefore no doubt that this was a suit brought on a series of transactions and that as such we have to see whether interest was excessive or the transaction was substantially unfair between the parties. Under the provisos to sub-s. (2) of S. 3 of the Act on a loan secured by a first mortgage interest must be deemed to be excessive if the rate exceeds 12 per cent. per annum but it is not to be deemed excessive if it does not exceed 7 per cent. per annum. By this standard, interest on the mortgage of 1st July 1918 was undoubtedly excessive and that on the mortgage of 19th March, 1920, may possibly be excessive by being in excess of 7 per cent. per annum compoundable half-yearly. Then again it is alleged by the plaintiff and not denied by the defendants that the plaintiff has made payments amounting to Rs. 47,458-14-2 to the defendants out of which Rs. 24,147 was paid on account of principal and Rs. 23,311-14-2 as interest. In view of the above we are of opinion that the trial Court should have re-opened all the three transactions and given relief to the plaintiff under the Agriculturists' Relief Act and the Usurious Loans Act. The appeal is therefore decreed with costs and the suit remanded to the trial Court for retrial by reopening all the three transactions.

D.S./R.K. *Suit remanded.*

END

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1939

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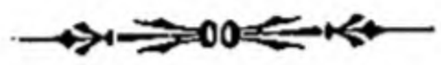

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ALMOND J. C.

Ghulam Ali Amir Khan — Plaintiff — Appellant.

v.

Amir Khan and others — Defendants — Respondents.

Civil Appeal No. 42/10 of 1938, Decided on 24th October 1938, from order of Addl. Dist. Judge, Peshawar, D/- 17th March 1938.

Res Judicata—Co-defendants—Decision when operates as res judicata between co-defendants stated.

For a decision to operate as res judicata between co-defendants, there must be a conflict of interest between the defendants; it must be necessary to decide this conflict in order to give the plaintiff the relief he claims and the question between the defendants must have been finally decided. Where all these ingredients are present the finding operates as res judicata between co-defendants even if in the former suit the plaintiff's case was dismissed in toto : *A I R 1931 P C 114 and A I R 1932 P C 161, Foll.; A I R 1932 Mad 207, Ref.* [P 2 C 2]

A. Said Ali Shah — *for Appellant.*

K. B. Saaduddin — *for Respondents 4 and 5.*

Respondent 1 in person.

Judgment. — Ghulam Ali sued Amir Khan, Faqir Khan and Rafiq, three brothers, and Abdul Rahman and Abdul Manan also brothers for possession of 11 kls. 17 mls. of land and two houses situated in village Pakha Ghulam. A reference to the pedigree-table given in the judgment of the Appellate Court will simplify the explanation of the case. Ghulam Ali alleged that the property belonged to Feroze, that on his death it had been occupied by Mt. Begum Jan, his widow, under a life interest and that on her death 2½ years before the suit he succeeded as the reversioner of Feroz. He referred to previous litigation ending in a judgment of this Court dated 25th May 1936 in Revision No. 128 of 1936,[1] in which a suit brought by Amir Khan, Faqir Khan and Rafiq against him, Abdul Rahman and Abdul Manan for a declaration of their rights in the landed property now in suit had been dismissed and he prayed for possession of the suit property. The first three defendants admitted the plaintiff's suit except as regards one of the houses which they averred had never been the property of Feroz. Defendants 4 and 5 contested the suit on the ground that by a certain arrangement made in 1886 after the death of Feroz between his relatives Mt. Begum Jan had become the full owner of the land in suit. They prayed for the dismissal of the whole suit but made no specific reference to the house property. The learned trial Judge framed the following issues :

1. Is the question relating to the title of the property in dispute barred being res judicata.

2. In case Issue 1 is not proved, was then the property in dispute owned by Mt. Begum Ji and in that case defendants 4 and 5 owned any title to it.

2 (a). In case Issue 2 is not proved, was house No. 2 owned and possessed by defendants 1 and 2 (apparently a mistake for defendants 1 to 3).

3. To what relief is the plaintiff entitled ?

He found on Issue 1 that the matters in dispute were governed by the principle of res judicata. On Issue 2 he did not give any decision on the facts but merely reiterated that the question was governed by the principle of res judicata. On Issue 2 (a)

1. Amir Khan v. Ghulam Ali, *Reported in* (1936) 23 A I R Pesh 163=164 I C 750.

he found that defendants 1 to 3 had proved that the house which they claim did not belong to Feroz and he therefore granted the plaintiff a decree for the land in suit and for one of the houses and dismissed the suit as regards the second house. Against that finding defendants 4 and 5, Abdul Rahman and Abdul Manan, appealed to the Court of the District Judge. It may be noted that the appeal was stamped on the value of the land only and there is no specific mention of the houses in the grounds of appeal although it is stated in ground of Appeal No. 2 that the finding of the lower Court in respect of Issues 1 and 2 is incorrect. It must therefore be taken that the appeal was as regards the land only. The learned Additional Judge reversed the finding of the trial Judge regarding the operation of res judicata and remanded the whole case for redecision under Sec. 151, Civil P. C., in view of his findings. Against that order the plaintiff has applied for revision in this Court and two points have been argued by his learned counsel. The first is that the decision of the Appellate Court on the question of res judicata is incorrect and that even if it is correct, it did not give the learned Judge the right to remand the whole case when there was no appeal as regards the decision on the two houses. On the latter of these two questions, it is clear that the case should not have been remanded on any point on which the appellants had not appealed, but in my opinion apart from this question the decision of the Appellate Court is wrong on the question of res judicata.

The learned Appellate Judge in the course of his judgment referred to three decisions of their Lordships of the Privy Council reported in A I R 1931 P C 114,[2] A I R 1932 P C 161[3] and A I R 1935 P C 129.* The last named case has been wrongly cited and as neither party has referred to it in the course of their arguments, I am unable to say to what case the learned Appellate Judge was actually referring. He remarked however that in these rulings the point at issue was between the plaintiff and the defendants and that in the present case the parties were co-defendants in the former suit. This is not a correct statement of fact as regards the two former cases at any rate. In both those cases the question was whether the principle of res judicata operated between co-defendants, and in both the cases the following principles were laid down for deciding this point :

(1) There must be a conflict of interest between the defendants concerned. (2) It must be necessary to decide this conflict in order to give the plaintiff the relief he claims and (3) the question between the defendants must have been finally decided.

It appears to me that all these ingredients are present in the case now for decision. It was in dispute between the two sets of defendants in the previous case as to whether Mt. Begum Jan acquired full ownership rights in the property in dispute in 1886. It was necessary in order to decide whether the plaintiffs in that case were entitled to succeed or not to decide this point, and the point was finally decided in this Court. Learned counsel who has appeared on behalf of the contesting respondents has argued that in the former suit as the plaintiffs' case was dismissed in toto, Abdul Rahman and Abdul Manan had no right of appeal and for this reason the finding could not operate against them. That however is not one of the conditions which have been laid down by their Lordships of the Privy Council for decision of the question, and of the rulings to which learned counsel has referred me there is only one in which such a principle was laid down. That is reported in 55 Mad 483.[4] It makes no reference to the Privy Council rulings and was probably dated before the judgments of their Lordships of the Privy Council had been published. I am of opinion that the questions now arising between the plaintiff and the contesting defendants in this case are governed by the decisions made in the previous case and that the plaintiff was entitled to succeed to the extent to which his suit was decreed by the trial Court.

I therefore accept this appeal and setting aside the order of the Appellate Court restore the decree of the trial Court. As regards costs I observe that the contesting

2. Munni Bibi v. Tirloki Nath, (1931) 18 A I R P C 114 = 132 I C 598=53 All 103 = 58 I A 158 (P C.)

3. Mg. Sein Done v. Ma Pan Nyun, (1932) 19 A I R P C 161=137 I C 328=10 Rang 322 = 59 I A 247 (P C).

* Probably the Appellate Judge had referred to A I R 1935 P C 139 which is a case of res judicata among co-defendants as the preceding two cases—*[Ed.]*

4. Kumarappa Chetti v. Muthuvijaya Raghunatha, (1932) 19 A I R Mad 207=137 I C 616 =55 Mad 483=62 M L J 141.

defendants 4 and 5 only disputed the rights of the plaintiff to the land which is about half the value of the total property in suit. I therefore direct that the plaintiff shall recover half his costs in all the Courts from respondents 4 and 5. No order was made by the trial Court as regards the costs of the first three defendants. Only one of them has appeared before me and he has not been represented by counsel. They should bear their own costs in this Court.

D.S./R.K. *Appeal accepted.*

A. I. R. 1939 Peshawar 3

ALMOND J. C.

Mahbub Shah — Defendant — Petitioner.

v.

Daud and others — Respondents.

Civil Revn. No. 175 of 1938, Decided on 8th November 1938, from order of Addl. Judge, Peshawar, D/- 28th April 1938.

Pre-emption — Purchaser of property transferring it by exchange before pre-emption suit to another person having equal right to pre-empt—Pre-emptors' suit cannot succeed.

Where the purchaser of property transfers it before the institution of a suit for pre-emption to another person having an equal or superior right to the pre-emptor in recognition of that person's right to pre-empt, then the pre-emptor cannot succeed. [P 3 C 2]

The basis of this principle is that a person with a right to enforce pre-emption can do so out of Court and thereby defeat a plaintiff also possessing a right of pre-emption who has to come into Court to enforce his right. There is no difference in principle as to whether such right is enforced out of Court by means of a sale or by means of an exchange. [P 3 C 2]

L. Krishan Chand—*for Appellant.*

Abdul Latif—*for Respondent (Daud).*

Mohsin, respondent, in person.

Order.—By two unregistered sale deeds dated 1929 and 1932 respectively Mahomed Inam and Nur Khan sold the land in suit to Mohsin for an ostensible price of Rs. 198. A mutation regarding this sale was entered in the revenue papers on 25th July 1934 and was attested on 29th August 1934. By another mutation entered and attested on the same day Mohsin transferred the suit land to Mahbub Shah by exchange for some other land. Daud Khan brought a suit for pre-emption against both the vendees and both the vendors. The suit was first of all dismissed on the ground of being time-barred. That decision was reversed on appeal and the suit of the plaintiff on being remanded was again dismissed by the trial Court on the ground that the rights of the plaintiff had been defeated by the exchange effected between Mohsin and Mahbub Shah. It is not disputed that Daud Khan has a superior right of pre-emption to Mohsin and only an equal right with Mahbub Shah.

On appeal to the District Judge, the learned Additional Judge reversed the finding of the trial Court and held that the exchange effected between Mohsin and Mahbub Shah cannot affect the plaintiff's rights. He therefore decreed the plaintiff's suit on payment of Rs. 100. Against that decree Mahbub Shah has applied for revision and two points have been raised by his learned counsel, viz : (1) the question of limitation, and (2) the question of the effect of the exchange between Mohsin and Mahbub Shah on the rights of the plaintiff.

The application can be disposed of on the second of these questions. It may be stated that there is no direct authority on the point now in issue. There is an abundance of authority that where the purchaser of property transfers it before the institution of a suit for pre-emption to another person having an equal or superior right to the pre-emptor in recognition of that person's right to pre-empt, then the pre-emptor cannot succeed. It is however contended that there is a difference between a sale and an exchange. The basis on which the above principle has been laid down is that a person with a right to enforce pre-emption can do so out of Court and thereby defeat a plaintiff also possessing a right of pre-emption who has to come into Court to enforce his right.

I am unable to see any difference in principle as to whether such right is enforced out of Court by means of a sale or by means of an exchange, and the question for consideration in this case is whether the exchange effected between Mohsin and Mahbub Shah was effected with a view to enforcing the right of Mahbub Shah to pre-empt the disputed property. It appears to me that all the circumstances of the case indicate that this was so. The land in suit is situated in village Bakhshali. The vendors were residents of village Shahbaz Garaha. Mohsin, the first vendee, was a resident of Bakhshali but owned no land there. The second vendee, Mahbub Shah, as well as the pre-emptor, are also residents of Bakhshali and own land there. The original

transaction between the vendors and Mohsin took place in 1929 and 1932, but no attempt was made to give effect to the transaction in the revenue papers until 1934 when on one and the same day not only the original sale but also the exchange transaction were entered in the revenue papers and they were also attested on the same day. It seems to me in these circumstances that Mohsin was afraid of getting the transaction entered in the revenue papers lest he should be ousted by a possible pre-emptor and that when he saw that this was likely, he allowed Mahbub Shah to enforce his right to pre-emption.

For these reasons, I am of opinion that the decision of the first Court was correct. I therefore accept the petition and setting aside the order of the Appellate Court restore that of the trial Court dismissing the plaintiff's suit. The defendants will have their costs throughout.

D.S./R.K. *Petition accepted.*

A. I. R. 1939 Peshawar 4

ALMOND J. C. AND MIR AHMAD J.

Fakir Jumma Khan
Accused — Appellant.

v.

Emperor.

Criminal Appeal No. 366 of 1938, Decided on 9th November 1938, from order of Sess. Judge, Peshawar, D/- 13th October 1938.

Evidence Act (1872), S. 157—In murder case, brothers of deceased giving evidence that deceased was murdered by their cousin *F*—On behalf of prosecution two other independent witnesses who were in neighbourhood at time of crime deposing that they went to spot as soon as crime was committed and were told by brothers of deceased that *F* had murdered him — Statements of independent witnesses held admissible under S. 157.

In a litigation between a nephew *F* and his uncle in respect of certain land the nephew got a decree but as his uncle would not give him possession in spite of the decree the nephew had to resort to Criminal Court without success. One day while the sons of the uncle *G* and *A* accompanied by *M* were bringing sheaves of wheat from the disputed field, *G* was shot dead and *F* was alleged to be the murderer. On behalf of the prosecution *A* and *M* gave the story as set out above. On behalf of the prosecution there were two other independent witnesses who were in the neighbourhood of the place at the time of the crime. They said that they heard two shots, went to the scene of murder, found deceased lying dead and were told by *A* and *M* that *F* had murdered him :

Held that the statements of the two independent witnesses were admissible under S. 157 to corroborate *A* and *M* in that they charged *F* at once. [P 5 C 2]

Held further that there was sufficient motive for the accused to kill the deceased. [P 5 C 2]

Saaduddin Khan — *for Appellant.*

Sher Ali Khan, Public Prosecutor — *for the Crown.*

Mir Ahmad J.—Fakir is a nephew of Faizullah, being the son of his brother Jumma Khan. (He has been wrongly shown to be the son of Mohd. Khan in some places.) They live at Khushmuqam, which is situated at 7 miles from the Pabbi Police Station in the Peshawar District. There is a plot of land which Fakir claimed as his property but Faizullah would not admit his right to it. They had litigation. Fakir came out successful. Faizullah would not give its possession to Fakir in spite of a decree and Fakir had to resort to Criminal Courts without success.

At about digar time on 5th May 1938 Ghulam Habib and Abdul Wahid, sons of Faizullah, accompanied by Manai, went to the disputed field to bring sheaves of wheat home. The cart on which they were bringing them was overturned halfway between the field and the garden of Hastam. They had to give up the idea of taking it further. They therefore unyoked the bullocks and started with them for their house. On the way Ghulam Habib entered the garden of Hastam in order to ease himself. He had not gone far when he was fired at. He dropped down dead. Faizullah, the father of Ghulam Habib, appeared at the Police Station at 11 o'clock in the night and charged Fakir, his nephew, with the murder. Consequently, Fakir was placed for his trial under S. 302, I. P. C., before the Sessions Judge, Peshawar. The prosecution produced the following evidence :

(a) *Doctor.* The deceased had received pellet wounds in the area of the sternum and also on the back of the right hand. The right lung and the heart were injured, causing death.

(b) *Faizullah.* He gave the information with regard to the quarrel over the land. He alleged that he was in possession of it even then. He was near the place of occurrence when he heard shots. He went to the spot and was told that Fakir had murdered his son. He proved the F. I. R. which he had made to the police. It is significant that in this report Umar Khan was mentioned as having seen Fakir running away after committing the crime.

(c) *Patwari.* The disputed land had Khasra No. 473. It measured 7 kanals. Fakir and Faizullah had shares in it besides others. Faizullah was in possession of more than his share.

(d) *Abdul Wahid and Manai.* They gave the story set out above. Manai admitted that Hamesh Gul was his brother and he was married to the daughter of a nephew of Faizullah. He also did not deny that Fakir had brought a criminal case against him, the deceased and Abdul Wahid jointly.

(e) *Umar Khan.* He was in the vicinity at the time of occurrence. He heard a shot and then saw Fakir going armed with a single barrelled gun. They met each other but he did not try to arrest him because he was unarmed.

(f) *Shah Mohammad and Amirzada.* They were also in the neighbourhood. They heard two shots and cries from the garden. They went to the scene of murder. They found the deceased lying dead and were told by Abdul Wahid and Manai that Fakir had murdered him.

(g) *Ghulam Khan, A. S. I.* Khush Muqam village is 6-7 miles from Pabbi by the direct road and 4 miles by a short route. He reached the spot at 1-30 A. M. The garden in which the murder took place is not dense and a man can be seen moving about.

The accused denied the charge. He said that Faizullah, his uncle, was inimical towards him and wanted to get him hanged so that he should obtain his property. He did not produce any defence. Three of the assessors found the accused innocent and the fourth declared him to be guilty. The learned Sessions Judge observed that the statements of Umar Khan, Amirzada and Shah Mohammad, who were independent witnesses, afforded corroboration of the testimony of Abdul Wahid and Manai. He therefore convicted Fakir under S. 302, I. P. C., and sentenced him to death. The convict has presented an appeal to this Court and the sentence of death is also before us for confirmation. We have carefully considered the evidence of Umar Khan. We have come to the conclusion that there is nothing to shake his veracity. He saw the accused going away from the spot with a single barrelled shotgun in his possession after the deceased was shot. Again, Amirzada and Shah Mohammad are disinterested witnesses. They say that they arrived at the spot immediately after the shots were heard by them, and Abdul Wahid and Manai charged Fakir with the crime. The criticizm of the evidence of these witnesses by the learned counsel for the appellant is to the following effect: The field of Umar Khan being far away he had no business to reach there and therefore he was a hired witness. The statements of Amirzada and Shah Mohammad were not relevant because they proved what was said by Abdul Wahid and Manai to them and those statements could not be taken to be a part of res gestæ under S. 6, Evidence Act. The objections preferred by the learned counsel do not appeal to us. Umar Khan says that he had bought clover which was close to the scene of occurrence. He has not been contradicted on this point and his presence in the neighbourhood is therefore established. The statements of Amirzada and Shah Mohammad are admissible under Sec. 157, Evidence Act. They have been used by the prosecution to corroborate Abdul Wahid and Manai in that they charged Fakir at once. There is every reason to believe that they have told the truth and their evidence is therefore of great value.

The learned counsel urged that there was not sufficient motive for the accused to kill the deceased. We think that it is otherwise. The party of the complainant were bringing sheaves from the very field which the accused had won and the possession of which Faizullah would not give over to him. He would be naturally incensed at their taking his wheat stalks and we think that it was due to this immediate cause that the accused took such a rash step. The counsel also urged that there was a great delay in making the report to the police. We do not think that there has been any undue delay. Faizullah had to take the body of his son to the village and then start for the Thana. He must have started at 8 P. M., for the offence took place at about 7-15 P. M. The Sub-Inspector says that the short route is not even and he would naturally take the direct road. Being an old man he would not take less than 2½ hours to reach the Police Station. The report made at 11 P. M. has therefore not been made after any appreciable delay. The statements of the three independent witnesses, when taken together with the evidence of Abdul Wahid and Manai, conclusively establish the guilt of the accused.

We are therefore satisfied that Fakir has murdered Ghulam Habib. The conviction is consequently maintained. The murder was brutal and premeditated. The death penalty is therefore well merited. The appeal is dismissed and the sentence of death is confirmed.

D.S./R.K. *Death sentence confirmed.*

*** A. I. R 1939 Peshawar 6**

ALMOND J. C. AND MIR AHMAD J.

In re Sant Singh Sardar Rattan Singh, Printer, Editor & Publisher of "Sarhadi Sikh Samachar" Peshawar — Petitioner.

Misc. Case No. 50 of 1938, Decided on 17th December 1938.

*** (a) Press (Emergency Powers) Act (1931), S. 23—Limitation—Application under S. 23 is civil miscellaneous application—Period of two months expiring when High Court closed for civil work — Application presented on day when Court opens is in time.**

Applications under S. 23 being in the nature of of civil proceedings are treated as civil miscellaneous applications. Therefore when the period of two months for applying under S. 23 to set aside an order made under Sec. 7 expires on a day when the High Court is closed so far as civil work is concerned, such application if made on the day when the High Court re-opens will be deemed to have been presented in time. [P 7 C 1, 2]

*** (b) Press (Emergency Powers) Act (1931), S. 4 (1), Cls. (d) and (h)—Article published in newspaper—Writer pointing out that people of certain community were constantly kidnapped by outlaws residing in tribal territories and requesting Government to take drastic action to stop kidnapping and raids—Article held did not fall either under Cl. (d) or Cl. (h) of S. 4 (1).**

Where in an article published in a newspaper, the writer pointed out that people of a community were being tortured, harassed and constantly kidnapped into tribal territories by outlaws who absconded into such territories and further suggested that if a man committed cruelty he should be bombed without warning so that it may serve as a deterrent to cruel persons and he concluded the article by requesting the Government that the area where the outlaws took shelter should be razed to the ground by bombing :

Held that the article did not fall under S. 4 (1), Cl. (d) or Cl. (h) as it was only an honest criticism offered with a view to persuade Government to take drastic action to stop kidnapping and raids and it could not be said that the writer in doing so had any malice or was trying to bring the Government in disrepute. [P 7 C 2 ; P 8 C 1]

L. Charanjit Lal — *for Petitioner.*

S. Raja Singh, Advocate-General — *for the Local Government.*

Mir Ahmad J. — Under S. 7 (3) Press (Emergency Powers) Act (23 of 1931) the Provincial Government has the power to call upon the publisher of any newspaper to deposit with the Magistrate within whose jurisdiction the newspaper is published security not less than Rs. 500 and not more than Rs. 3000 if the newspaper has published any words which fall within the ambit of S. 4 of the same Act as amended by S. 16, Criminal Law Amendment Act (23 of 1932). Under these powers the Provincial Government of the N. W. F. P. has on 27th July 1938 issued a notice to the publisher of "Sarhadi Sikh Samachar" calling upon him to deposit the security of Rs. 500 before 10th August 1938. The reason given in the notice was that in the issue of the paper dated 29th June 1938 there were words which fall within the purview of S. 4 (1) (d) and (h). For facility of reference the sub-clauses are reproduced as follows :

(d) to bring into harted or contempt His Majesty or the Government established by law in British India or the administration of justice in British India or any class or section of His Majesty's subjects in British India, or to excite disaffection towards His Majesty or the said Government ; (h) to promote feelings of enmity or hatred between different classes of His Majesty's subjects.

We may note that the following Explanations also occur in this sub-section.

Explanation 2.—Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means without exciting or attempting to excite hatred, contempt or disaffection shall not be deemed to be of the nature described in Cl. (d) of this sub-section.

Explanation 3.—Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, shall not be deemed to be of the nature described in Cl. (d) of this sub-section.

Explanation 4.—Words pointing out, without malicious intention and with an honest view to their removal, matters which are producing or have a tendency to produce feelings of enmity or harted between different classes of His Majesty's subjects shall not be deemed to be words of the nature described in Cl. (h) of this sub-section.

Under S. 23, Press (Emergency Powers) Act, the publisher of a newspaper who has been ordered to deposit security under Section 7 (3) of the Act has a right within two months from the date of such order to apply to the High Court for the local area in which such order was made to set aside such order and the High Court shall decide if the newspaper . . . . in respect of which the order was made did or did not contain any words . . . . of the nature described in S. 4, sub-s. (1).

The publisher of 'Sarhadi Sikh Samachar' has therefore presented an application to this Court with the request that the order

of 27th July 1938 should be set aside. This application was instituted on 4th October 1938. A notice was issued to the Advocate-General and to the Chief Secretary of the Government of this Province by this Court. The Advocate-General has entered appearance on behalf of the Provincial Government and has raised the objection that the petition is time-barred. It was urged that it was necessary that the application should have been presented within two months from the date of the order (that is to say by 27th September 1938). The objection was met by the reply that this Court was closed for all civil work during the month of September and that the petition was therefore filed on the first day on which it opened after the September vacations viz. on 4th October 1938. The proceedings under S. 23 of the Act 23 of 1931 are obviously in the nature of civil proceedings, for High Court has been defined in S. 2, sub-cl. 3 as the highest Civil Court of appeal for any local area except in the case of the Province of Coorg where it means the High Court of Judicature at Madras.

In S. 27 of the Act the High Court is required to frame rules to regulate the procedure for entertaining applications under S. 23 and it has been laid down that

until such rules are framed the practice of such Court in proceedings other than suits and appeals shall apply, so far as may be practicable, to such applications.

This in other words means that they shall be treated as miscellaneous civil applications. Now this Court was closed during the month of September so far as civil work was concerned and the application even if brought to the Court could not have been accepted during that month. S. 4, Limitation Act, lays down that if the period of limitation expires on a day when the Court is closed, the suit, appeal or application may be presented on the day on which the Court opens. S. 29 of the same Act makes this S. 4 applicable to proceedings under special and local laws. S. 10, General Clauses Act (all India) or of the N. W. F. P. General Clauses Act, 1932, also runs thus:

Where, by any Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceedings shall be considered as done or taken in due time, if it is done or taken on the next day afterwards on which the Court or office is open. Provided that nothing in this Section shall apply to any act or proceeding to which the Limitation Act, 1908, applies.

The Court being closed on 27th September 1938 the application could, under S. 4, Limitation Act, be presented on the first day on which this Court opened, i. e. the 4th October 1938. Consequently we hold that the application was presented within time. Turning to the merits of the case we reproduce in extenso the article which has been declared to have contravened the provisions of Sec. 4 (1) (d) and (h). The following is the text of that article:

BOMBING ON THE FRONTIER

Questions are often asked in the Parliament that bombing on the Frontier is against civilisation. The real difficulty lies in the fact that the members who ask these questions have no knowledge of Indian affairs and are little acquainted with the mentality of the Pathans, residing in the Tribal Territory. The regrettable thing is that on the one hand these members sympathize with China and Abyssinia and on the other hand criticise the policy of the Government of India. Japan and Italy are condemned for their cruelty in bombing the people of China and Abyssinia. Does not the same state of affairs exist on the Frontier? The poor and helpless Hindus and Sikhs are being constantly kindnapped into the Tribal Territory by these cruel Pathans and even orphan children and women are not spared. They are tortured and then let off on payment of Rs. 2000 or Rs. 3000 as ransom. The Muslim population on the Frontier is 92 p.c. and the Hindus and Sikhs number about 8 p.c. But so far as kidnapping and looting is concerned our share is even more than 92 p.c. A few years ago Miss Ellis was kidnapped. Forces were immediately sent and series of questions were asked in the Parliament. The Government of India was requested to take drastic measures. If this principle could be applied in the case of Miss Ellis, why not in the case of the four Hindu girls of Umar Tittar Khel? Is it because they are Hindus?

In my opinion even the policy of giving 24 hours warning is wrong. If a man commits an act of cruelty he must suffer for it. Bombing should be done without any warning so that it may serve as a deterrent to cruel persons. Religious fanatics frequently murder Hindus and Sikhs and abscond into the Tribal Territory. With folded hands I pray to Hon'ble Dr. Khan Sahib that the area where the outlaws take shelter, should be razed to the ground by bombing. If this is done I can say with certainty that all the outlaws will be sent back to the British territory within 24 hours and in future no one will dare to abscond and murders will almost come to an end.

We have carefully considered the criticism and we do not see anything in it which might be taken to bring into hatred or contempt His Majesty or the Government established by law in British India or to excite feelings or hatred between two classes of His Majesty's subjects. In our opinion it is an honest criticism offered with a view to persuade the Government to take some drastic action in Waziristan in order to stop kidnapping and raids. It

cannot be said for a moment that in doing so the author of the article had any malice or was trying to bring the Government into disrepute. We therefore accept the petition and set aside the order of the Provincial Government.

N.S./R.K. *Petition accepted.*

*** A. I. R. 1939 Peshawar 8**

MIR AHMAD J.

Kaka Ram Tej Bhan Sekari — Plaintiff — Petitioner.

v.

Khattar Electrical Engineering & General Supply Co., Ltd., Dera Ismail Khan — Defendant — Respondent.

Civil Revn. Nos. 241 and 242 of 1938, Decided on 13th January 1939, against judgment and decree of Judge, Small Cause Court, Dera Ismail Khan, D/- 30th April 1938.

(a) Electricity Act (1910), S. 21 (2) — Rule made by Khattar Electric Engineering and General Supply Co. providing that every consumer shall pay minimum charge of Rs. 25 per annum is ultra vires.

The rule made by the Khattar Electric Engineering and General Supply Co. Ltd. Dera Ismail Khan, providing that every consumer shall pay a minimum charge of Rs. 25 per annum, had not been made with the approval of the Government. The fact that in 1936 the company had addressed a letter to the Chief Engineer on the subject and had received the reply that in the case of each consumer the recovery of the minimum charge was lawful from the date of the contract entered into by that consumer with the company is no approval of the rule and therefore the rule is ultra vires. [P 9 C 1]

*** (b) Contract Act (1872), Ss. 21 and 72 — Payment of bill by consumer to Electricity Supply Co. under mistake that it had made rules after complying with all legal preliminaries—This is not mistake as to law and S. 21 does not apply — Payment made under protest after warning that supply would be disconnected — This is coercion and consumer would be entitled to refund under Sec. 72.**

Where a consumer of electricity pays the bill to the electricity supply company under mistake that the company had made rules after all necessary legal preliminaries had been gone through, this is not a mistake as to any law in force in British India. This is a mistake of fact and is covered by S. 72. Besides this, if the payment is made under protest after being warned that supply would be disconnected if the payment is not made, this is sufficient to constitute coercion in the general sense of the word and the consumer would be entitled to refund under Sec. 72. [P 9 C 1]

Ganesha Khan — *for Petitioner.*

L. Manohar Lal — *for Respondent.*

Order. — An interesting question arises in these two connected revisions presented to this Court by Rup Chand and Kaka Ram under S. 25, Small Cause Courts Act. Rup Chand had to pay Rs. 33-6-0 and Kaka Ram Rs. 19-6-0 to the Khattar Electric Engineering and General Supply Co., Ltd., Dera Ismail Khan, in the following circumstances : The company had made a rule that every consumer shall pay a minimum charge of Rs. 25 per annum. In fact this rule was one of those which were printed on the back of the application form which every consumer had to sign and present to the company before obtaining a connexion. The company insisted on the payment being made and debited every consumer with the difference between the minimum charge and the price of the energy consumed during the years 1934 and 1935. The two amounts referred to above represent this balance. I may point out that it is admitted before me by the counsel for the respondent that the money was paid by Rup Chand and Kaka Ram to the Electrical Inspector under protest and the latter paid it to the company. Rup Chand sued the company for refund of Rs. 40 claiming Rs. 6-10-0 as interest. Kaka Ram sued for Rs. 19-6-0 paid by him. They both alleged that these items had been unlawfully recovered from them by the company. The Small Cause Court Judge, D. I. Khan, dismissed the suits on the ground that the payments were voluntarily made and that consequently the appellants could not ask for refund under Sec. 72, Contract Act.

On hearing the counsel, I have come to the conclusion that the rule asking for a minimum charge of Rs. 25 a year is ultra vires. There is no mention in the license of a power to recover this amount. Under para. 8 of the license which is published in the N. W. F. P. Government Gazette dated 31st March 1922, p. 354, and according to Sec. 21, sub-s. 2, Electricity Act, no rules can be enforced by the company unless or until they had previously been approved by the Government. It is admitted before me that the rule asking for a minimum charge had not been made with the approval of the Government. In 1936 the company had addressed a letter to the Chief Engineer on the subject and had received the reply that in the case of each consumer the recovery of the minimum charge was lawful from the date of the contract entered into by that consumer with the company. In law this is no

approval of the rule. I hold therefore that the rule was ultra vires. The counsel for the respondent has however taken up the position that the payment was voluntarily made under a mistake of law and that therefore the petitioners could not ask for a refund. He relied on Sec. 21 and Sec. 72, Contract Act, for this proposition. Sec. 21 runs thus :

A contract is not voidable because it was caused by a mistake as to any law in force in British India, but a mistake as to a law not in force in British India has the same effect as a mistake of fact.

Section 72 is as under :

A person to whom money has been paid or anything delivered by mistake or under coercion, must repay or return it.

I have no doubt that S. 21 has no application to this case. According to that Section a refund cannot be allowed if the contract has been made under "a mistake as to any law in force in British India." The petitioners gave the money to the company under the mistake that the company had made rules after all necessary legal preliminaries had been gone through and this is certainly not a mistake as to any law in force in British India. In my opinion this is a mistake of fact and is covered by Sec. 72, Contract Act. Again I am of opinion that the money was paid by the petitioners under coercion. It is not denied by the counsel for respondent that the petitioners paid the money to the Electrical Inspector under protest after they had been warned that they would be disconnected if they did not make the payments. This, to my mind, is sufficient to constitute "coercion" in the general sense of the word which it is now well settled is the sense in which the word should be construed. For these reasons I disagree with the learned trial Judge and hold that S. 72, Contract Act, applied to these cases. I accept the petitions and set aside the decrees of the lower Court. I do not think Rup Chand is entitled to interest. He should therefore get a decree for Rs. 33-6-0 and Kaka Ram for Rs. 19-6-0. They shall have their costs in both Courts.

D.S./R.K. *Petitions accepted.*

A. I. R. 1939 Peshawar 9

MIR AHMAD J.

Firm Bundhel Khand Cycle & Motor Agency and others — Petitioners.

v.

Peoples Bank of Northern India Ltd. and another — Respondents.

Civil Revn. No. 299 of 1938, Decided on 21st February 1939, from order of Addl. Judge, Peshawar, D/- 7th June 1938.

(a) Civil P. C. (1908), O. 21, Rr. 66 and 90, O. 30, R. 3 — Judgment-debtors sued not as partners but as individuals — Failure to serve notice under O. 21, Rule 66 on any of them amounts to material irregularity under O. 21, Rule 90.

Where several judgment-debtors are sued not as partners in the name of their firm but as individuals and the decree directs all of them to pay the decretal amount, notices in execution under O. 21, R. 66 must be served on all judgment-debtors. Failure to serve such notice on any of them amounts to an obvious breach of O. 21, R. 66 which cannot be cured under O. 30, R. 3 and which therefore amounts to a material irregularity within the meaning of O. 21, R. 90. [P 11 C 2]

(b) Civil P. C. (1908), O. 21, Rr. 66 (3) and 90—Failure to present application under O. 21, R. 66 (3) is material irregularity contemplated by O. 21, R. 90.

Order 21, R. 66 (3) makes it mandatory that an application by the decree-holder under Rule 66 should be given, as it gives advantage to the Court of enabling the execution Judge to obtain all necessary information required for drawing up a proclamation of sale. Therefore failure of the decree-holder to present an application under O. 21, R. 66 (3) is a material irregularity contemplated by O. 21, R. 90. [P 11 C 2 ; P 12 C 1]

(c) Civil P. C. (1908), O. 21, R. 66 (2), Proviso (N. W. F. P.) and R. 90—Decree-holder and judgment-debtor giving separate estimate of value of property — Failure to give both estimates in proclamation is material irregularity under O. 21, R. 90.

Proviso to O. 21, R. 66 (2) does not condone the failure of the execution Judge to mention the correct estimate of the value of property proposed to be auctioned. When the decree-holder and judgment-debtor give their respective estimates of the value at two different figures, failure to give both the estimates in the proclamation is serious omission likely to influence the minds of those who propose to buy the property and therefore amounts to material irregularity referred in O. 21, R. 90. [P 12 C 1]

(d) Civil P. C. (1908), O. 21, Rr. 54 and 90 — Failure to affix copy of proclamation at court house is material irregularity.

Failure to affix a copy of the sale proclamation at the court house of the execution Judge amounts to irregularity of a material character as described in O. 21, R. 90. [P 12 C 1]

(e) Revision — Execution sale — Court committing mistakes which result in substantial injury — Irregularities resulting in miscarriage of justice — High Court can interfere in revision.

Where in execution proceedings for the sale of property there has been misunderstanding as regards the legal position and the Courts commit serious mistakes in ignoring many important factors in connexion with the property put up for sale, and are largely carried away by the fact that there is no substantial injury but where the various material irregularities in fact cause substantial injuries, the irregularities must be deemed to have resulted in miscarriage of justice and High Court can in such case interfere by way of revision.

[P 13 C 2]

L. Charanjit Lal — *for Petitioners (Judgment-debtors).*

L. Mehr Chand Mahajan, Pir Bakhsh and Qazi Abdul Wahab — *for Respondent (Auction-purchaser).*

S. Saran Singh — *for Respondent (Decree-holder).*

Order.—The Peoples Bank of Northern India obtained an ex parte decree against the firm Bundhel Khand Motor and Cycle Agency Nowshera, Johari Lal, Brij Lal minor through Jaggan Nath and Sri Krishan. The decree was passed by a Court at Lahore and the decretal amount was a little more than Rs. 4000. The Bank applied for execution and obtained a transfer to Peshawar. The Senior Sub-Judge, Peshawar, who dealt with the application, attached property of the judgment-debtors situated in Nowshera and ordered its sale. At the sale only three bidders offered to buy. The property was knocked down to K. B. Mian Feroz Shah for Rs. 12,000. The judgment-debtors preferred objections. They were rejected by the Senior Sub-Judge. An appeal to the District Court also failed. The judgment-debtors have come up on revision to this Court. The principal objections put forward by the judgment-debtors in the lower Appellate Court and the findings given thereon by the learned Additional Judge were as follows :

Objection No 1. — Brij Lal minor was represented in the suit by one Jaggan Nath, a clerk of the Court of the Sub-Judge at Lahore, because Johari Lal would not agree to represent him. During the execution proceedings the Court issued notices under O. 21, R. 66, Civil P. C., to Brij Lal minor through Jaggan Nath, to Sri Krishan and to Johari Lal and the reports on the notices were that Jaggan Nath was in prison, that Sri Krishan refused service and that Johari Lal had been served. The examination of the process-server showed that the report with respect to the guardian of the minor was based on a mistake and that Jaggan Nath was working in the Court of the Sub-Judge at Lahore and was not in jail. The process-server explained that the agent of the decree-holder told him that Jaggan Nath was in jail. The process-server added that he knew that one Dasrat Lal, a relation of Brij Lal, was in prison and that the representative of the decree-holder told him that Jaggan Nath was another name of Dasrat Lal. It was urged by counsel that owing to this mistake the minor remained unrepresented and his interests were not protected. He concluded that all the proceedings were ultra vires. The learned Additional Judge disposed of this argument by depending upon O. 30, R. 3, Civil P. C. He held that as two of the adult partners were served the third minor partner need not have been served.

Objection No. 2. — The execution Judge had not entered in the proclamation of sale the correct value of the property. The learned Additional Judge disposed of this argument by referring to the amendment added to O. 21, R. 66, Civil P. C., in the N. W. F. Province which lays down that the Court need not give its own estimate of the value of the property but that the proclamation should include the estimate if any given by either or both of the parties.

Objection No. 3. — The auction did not take place long enough to attract bidders. Attention was invited to the fact that the bailiff had not noted in the report the hour at which the auction began and that at which it was closed. The bailiff deposed in evidence that he opened the auction at 10 A. M. and closed it at 2-30 P. M. The learned Additional Judge believed the bailiff and refused to believe that the sale was a hurried affair. It was also urged in the lower Appellate Court that the irregularities in publishing and conducting the sale had caused substantial injury because the property had fetched a price much lower than the market value. The learned Additional Judge did not agree on this point also because he believed the statement of Mr. F. H. Khan who said that the building was worth Rs. 12,300.

The learned counsel who appeared before me on behalf of the judgment-debtors repeated the arguments which were taken at the Bar in the District Court. He added (1) that the judgment-creditor had not presented an application under O. 21, R. 66 (3), Civil P. C., (2) that a copy of the proclamation of sale was not affixed to the Court house as required by O. 21, R. 54 (2) read with O. 21, R. 67 (1), Civil P. C., and

(3) that substituted service should have been ordered in the case of Sri Krishan under O. 48, R. 2, Civil P. C., read with O. 5, R. 20, Civil P. C. I may note that these points were taken in the grounds of appeal but had not been noticed by the learned Additional Judge in his judgment. As regards the auction itself learned counsel pointed out that the other two bidders, Makhdum Shah and Mohammad Amin, were interested in the auction-purchaser; the former being a nephew of Muzaffar Shah, the father-in-law of K. B. Mian Feroz Shah and the latter having been an arbitrator in a case between K. B. Mian Feroz Shah and Mohammad Yusaf in which he gave a decree to K. B. Mian Feroz Shah. Counsel referred to the statement of Makhdum Shah that he never paid any income-tax since 1931 and that he arrived at 11 A. M. and the bids were called from 11 A. M. to 3 P. M. Counsel similarly invited a reference to the statement of Mohammad Amin that he paid no income-tax for the last four years and that he went to the place of auction at 11 A. M. Counsel then turned to the statement of the bailiff to the effect that he started the auction at 10 A. M. Counsel pointed out that it was impossible that the sale should have gone on from 10 A. M. to 11 A. M. without two out of the three bidders. Counsel inferred that the sale did not in fact take place, that the auction-purchaser was the only bidder and that his two partisans were named in the list of bids to make a show that there was a so-called competition. Counsel sought to further strengthen his position in this respect by depending on the following two facts: (a) that the receipt for Rs. 3000 (one-fourth of the sale price produced on the spot by the auction-purchaser) was dated 12th May 1934 which was a Saturday, and (b) that the Imperial Bank of India was closed on Saturday at 12 noon. He asserted that the auction must have finished before 12 o'clock in the day for otherwise the money could not reach the bank when it was open.

The learned counsel for the respondent took up a preliminary objection that there was no ground for revision. He brought to my notice the Proviso added to O. 21, R. 90, Civil P. C., in the N. W. F. Province, which lays down that objections which could be raised before the sale and were not raised should not be made grounds for setting aside the sale. He argued that it was too late now to raise objections other than those relating to the auction itself. With respect to the point that Brij Lal was not served under O. 21, R. 66, Civil P. C., counsel did not take up the position which had been adopted by the learned Additional Judge, that is to say that O. 30, R. 3, Civil P. C., cured the defect. He admitted it to be a material irregularity but fell back on the defence that the objection was belated and that there was no substantial injury. He had the same answer to the criticizm that substituted service was not ordered in the case of Sri Krishan. In connexion with the question of substantial injury he stressed the point that the experts had found the property worth the amount for which it had been knocked down and argued that the defects pointed out were of no value because the Proviso to O. 21, R. 90, Civil P. C., required that the defects should cause substantial injury in order to justify the setting aside of a sale. I will now proceed to give my own findings on the points raised.

I am perfectly satisfied that Brij Lal minor was not served. I do not agree with the learned Additional Judge that O. 30, R. 3, Civil P. C., cured the defect. The three judgment-debtors were not sued "as partners in the name of their firm" as required by the Rule. The attested copy of the decree which is on the file shows that it was ordered that the defendants (in the plural) shall pay the decretal amount to the plaintiff. Again notices were issued to the judgment-debtors and once the Court had ordered that they should all be served there is nothing in the Rule to show that on the failure of the process serving agency to serve any one of them the Court need not have taken further steps to serve him. Counsel for the respondent was therefore correct in not depending on O. 30, R. 3, Civil P. C. Now O. 21, R. 66, Civil P. C., is clear that the sale proclamation "should be drawn up after notice to the decree-holder and the judgment-debtor." The failure to serve the minor judgment-debtor is consequently an obvious breach of this provision and to say the least, it is a material irregularity within the meaning of O. 21, R. 90, Civil P. C. Next, it was admitted that the decree-holder did not present an application under O. 21, R. 66(3), Civil P. C., giving the information required by O. 21, R. 66 (2), Civil P. C. R. 3 makes it mandatory that such application should be given and it gives an advantage to the Court, for it enables the execution Judge to

obtain all the necessary information required for drawing up the proclamation of sale. I hold that it is a material irregularity contemplated by O 21, R. 90, Civil P. C. The natural result of the failure to get the proper application under O. 21, R. 66 (3), Civil P. C., is that the Court could not get information with regard to the correct value of the property and therefore did not incorporate it in the proclamation of sale. The decree-holder had in the plan attached by him to his application for execution mentioned the price of the property as Rs. 4000. The judgment-debtor Johari Lal had been describing it as worth Rs. 50,000 or so in his petitions. The Court stated in the proclamation of sale that it was worth Rs. 4000. Now the Proviso added to O. 21, R. 66 (2) in the N. W. F. Province, runs thus :

> Provided that it shall not be necessary for the Court itself to give its own estimate of the value of the property but the proclamation shall include the estimate, if any, given by either or both of the parties.

In my opinion the Additional Judge was wrong in thinking that this amendment condoned the failure of the execution Judge to mention the correct estimate of the value of the property proposed to be auctioned. Rather, it made the position worse. According to this amendment the Judge should have given both the estimates (Rs. 4000 and Rs. 50,000 in the proclamation). This is a serious omission and may have influenced the minds of those who proposed to buy the property, for some of them may not have considered it worthwhile to go and bid for property worth Rs. 4000. In fact the superstructure alone of the property was later found by the engineers to be worth not less than Rs. 12,000. I consider this mistake also to be a material irregularity referred to in O. 21, R. 90, Civil P. C. I also agree with the learned counsel for the petitioners that the failure to affix the proclamation of sale at the court-house in Peshawar amounts to an irregularity of a material character as described in O. 21, R. 90, Civil P. C. The report of the bailiff on the proclamation is to the effect that the proclamation was put up outside the tahsil at Nowshera and was also advertised by beat of drum in Nowshera. O. 21, R. 54, Civil P. C., makes it compulsory that a copy of the order should be affixed "upon a conspicuous part of the court-house." The court-house was at Peshawar (the Court of the Senior Sub-Judge, Peshawar). The town of Peshawar is inhabited by many rich persons and there was every possibility of some moneyed men being attracted by the notice if it had been affixed outside the court-house at Peshawar. Nowshera is comparatively a smaller place and the people living in it are also comparatively poor. Now with regard to all these objections it was said that the Proviso added in this province to O. 21, R. 90, Civil P. C., barred the judgment-debtors from raising them. The Proviso runs thus :

> Provided further that no such sale be set aside on any ground which the applicant could have put forward before the sale was conducted.

As regards one objection the counsel for the petitioners seems to have a good answer to this contention. He pointed out that the report that the proclamation was only put up outside the Tahsil at Nowshera was on the back of the proclamation, that the Bailiff who made the report kept the proclamation with him till the auction was completed and then sent it to the Court, that it was impossible for the judgment-debtors to have known of this defect till the auction report was received in Court, and that they could not have therefore raised the objection before the sale took place. I agree with the learned counsel that in these circumstances this was a point which could not have been raised before the sale. But I have held that the minor was not served. It follows that he did not know of the proceedings going on in the Court and could not have consequently objected to the defects in those proceedings before the sale. I therefore hold on this general ground that the Proviso to O. 21, R. 90, Civil P. C., in force in the N. W. F. Province does not take away the value of any of the objections raised by the counsel for the petitioners.

Lastly, I will deal with the question whether the auction took place between the hours given by the bailiff in his statement. The bailiff has not mentioned the hours in his report. He says in his evidence that he started at 10 A. M. and closed at 2.30 P. M. The two bidders allege that they went to the auction at 11 A. M. The bids were as under :

Government	Rs. 10,000.
Mufti Mohammad Amin	Rs. 10,500.
Sayed Makhdum Shah	Rs. 11,000.
K. B. Mian Feroz Shah	Rs. 11,200.
Sayed Makhdum Shah	Rs. 11,500.
Mufti Mohammad Amin	Rs. 11,700.
K. B. Mian Feroz Shah	Rs. 12,000.

The two bidders had something to do with the auction-purchaser. It is curious that although all the witnesses produced by the auction-purchaser regarding the auction said that a large number of people assembled at the place no fourth bidder could be found for the property. I do not attach much significance to the argument that the money was deposited in the Imperial Bank on a Saturday and must have therefore been so deposited before 12 noon. Although the Bank generally closes at noon on Saturdays there is no evidence on the record to prove that the Imperial Bank of Nowshera did close at 12 o'clock on that particular Saturday. The other reasons given above however have raised a doubt in my mind as to the straightforwardness of this affair of sale. The result is that I find that there were several material irregularities in publishing and conducting the sale. I have next to see whether any substantial injury has been caused as required by the Proviso to O. 21, R. 90, Civil P. C., so that they should be good grounds for setting aside the sale. On carefully going through the judgments of the two Courts below I find that there has been a misunderstanding in the matter of assessing the value of the property. The superstructure has undoubtedly been found by Mr. F. H. Khan, an engineer, to be worth about Rs. 12,000. But it was entirely overlooked by the two Courts below that Mr. F. H. Khan had only assessed the value of the brick and mortar. The brick and mortar were not the only things to consider. There is a lease on the file which shows that about 1916-17 the Government had granted the lease of this land to the judgment-debtors for 99 years with a possibility of a renewal for further 99 years. The learned lower Appellate Judge has already pointed out that the building is situated on the Grand Trunk Road. It seems to be in a populated part of the town for there is evidence that it consists of shops. The Courts below have failed therefore to appreciate that the value of the lease rights and the situation value of the property had also to be taken into account and it means a good deal when the property is used for commercial purposes. In my opinion there was a possibility of the property fetching a much higher price if it had been properly advertised and the auction conducted long enough to give time to the bidders to offer their bids. Moreover, I am sure that if the minor had been properly represented steps would have been taken by the guardian to get the property advertised and sold with due care, and the property might have brought in more money. I am fortified in this opinion by the fact that Sher Bahadur Khan Vakil who was a receiver in the case and who was the witness of the auction-purchaser has given the approximate rental of the property as Rs. 280-6-9 a month. Certainly this amount could not be the economic return on Rs. 12,000 or thereabout and the value of the property must be much higher. Again, Jawala Singh, a witness for the judgment-debtor who owns property worth about 3-4 lacs, in Nowshera and pays Rs. 2000 a year as income-tax and house-tax, has stated that he purchased property in Nowshera Cantonment for Rs. 92,010 and was getting Rs. 398 a month as rent for it. This is another indication that the property in dispute has been undervalued to a large extent. I hold therefore that there was a substantial injury owing to the material irregularities committed by the execution Judge.

I will now turn to the question of revision. I have shown above that there has been a misunderstanding as regards the legal position. Moreover the Courts have committed a serious mistake in ignoring the most important factor that there were lease rights and situation value to be taken into consideration when estimating the price of the property. They were largely carried away by the fact that there was no substantial injury and that the law was in the way of the objections raised. To my mind the result would have been different if they had correctly construed the law and had realized the position with regard to the assessment of value. They have also entirely ignored the importance of the statements of Sher Bahadur Vakil and S. Jawala Singh in connexion with the appraisement of price. The cumulative effect of these omissions is that the Courts have committed a material irregularity which has resulted in miscarriage of justice and I hold that a case has been made out for interference on revision. As a result I accept the petition, reverse the orders of the two Courts below and set aside the sale. The case will now go back to the execution Judge who should take steps according to law. The respondent auction-purchaser shall pay the costs of the petitioners. Pleader's fee Rs. 100.

N.S./R.K. *Petition accepted.*

A. I. R. 1939 Peshawar 14

ALMOND J. C. AND MIR AHMAD J.

Nathu Ram Girdhari Ram and others — Petitioners.

v.

Uttam Chand Nanak Chand — — Respondent.

Civil Revn. Nos. 14, 68 and 214 of 1938, Decided on 13th February 1939, from order of Senior Sub-Judge, Peshawar, D/- 18th October 1937.

(a) Provincial Small Cause Courts Act (1887), Art. 8—Shop is house within Art. 8.

A shop is a house within the meaning of Art. 8. Hence a suit for rent of a shop is triable as a small cause : *Case law followed.* [P 15 C 2]

(b) Provincial Small Cause Courts Act (1887), S. 27 — Small cause tried by Judge exercising Small Cause Court's powers on regular side — Appeal does not lie.

Where a small cause has been tried by a Judge, who exercises Small Cause Court's powers, on the regular side, no appeal lies against his decision : *40 Cal 537 ; 25 Bom 417 and A I R 1937 Mad 227, Rel. on.* [P 15 C 2]

(c) Provincial Small Cause Courts Act (1887), Sec. 23 — Suit for rent based on rent deed — Plaintiff's title denied but execution of lease deed not denied—Sec. 23 does not apply.

Where in a suit for rent based on a rent deed, the defendant denies the title of the plaintiff but does not deny the execution of the rent deed, Sec. 23 does not apply, as tenant cannot deny the title of his landlord. [P 16 C 1]

L. Charanjit Lal — *for Petitioners.*

S. Raja Singh — *for Respondent.*

Respondent Gobind Ram in person.

Almond J. C.—This judgment will cover Revision Applications Nos. 14, 68 and 214 of 1938. They have been referred to a Bench as a question arose as to whether rent of a shop is a small cause within the meaning of Art. 8, Provincial Small Cause Courts Act. The first of the suits deals with the recovery of a sum of Rs. 459-4-9. It was brought by Uttam Chand against Nathu Ram, Ram Parshad, Dhanni Ram and Gobind Ram for recovery of rent and house-tax of one-fourth share of four houses and a shop situated in Nowshera Saddar bazaar on the basis of a rent deed executed in favour of the plaintiff by the antecedents in interest of the defendants. It was tried as a regular suit and was decreed ex parte on 28th February 1936. An application for setting aside the ex parte decree was made and this was rejected on 26th May 1937 on the ground that the judgment-debtors had not deposited the decretal amount. It is to be noted in connexion therewith that the judgment-debtors filed a bond on 25th May 1937 binding themselves to appear at the hearings of the case until it was disposed of. An appeal against that order was filed in the Court of the Senior Sub-Judge who held that although the case had been tried as a regular suit, it was in fact a small cause and therefore no appeal lay. The learned Senior Sub-Judge cited as his authorities 40 Cal 537,[1] 25 Bom 417[2] and 39 All 101.[3] Application No. 14 is against that order of the Senior Sub-Judge. It is contended in the grounds of revision that the order of the Senior Sub-Judge is incorrect, that an appeal did lie to him and that in any case in the interests of justice the ex parte decree should be set aside.

The second and third cases were brought by Uttam Chand against Nathu Ram, Gopi Chand, Ram Parshad and Govind Ram for recovery of rent of three-fourths of the same property at the rate of Rs. 300 p. m. on the basis of a rent deed executed in favour of the plaintiff as a mortgagee of the three-fourth share. The two suits relate to rent for two different years. The first of them was tried as a regular suit and was decreed on 31st August 1937. An appeal was filed in the Court of the Senior Sub-Judge. On 18th December 1937 after the appeal in the Rs. 459 suit had been dismissed, counsel for the appellant applied to withdraw the appeal to present it in this Court. The Senior Sub-Judge ordered that the appeal should be returned to the appellant on condition of his paying Rs. 10 costs to the respondent. On 20th December it was noted that no one was present, that the costs had not been paid and therefore the appeal was dismissed with costs. We are told by learned counsel for the petitioners before us that the costs had actully been paid but they were not present when the appeal was called. Application No. 68 is against the order of the Senior Sub-Judge in this case. The other suit for Rs. 300 was decided as a small cause and the application for revision has been submitted directly to this Court.

The principal question for decision in these suits is whether a suit for rent of a shop is a small cause or not. The question has arisen on more than one occasion in

1. Indra Chandra Mukherjee v. Srish Chandra Banerjee, (1913) 40 Cal 537=21 I C 120.
2. Shankarbhai v. Somabhai, (1901) 25 Bom 417 =3 Bom L R 129.
3. Abdul Majid v. Vedyadhar Saran Das, (1917) 4 A I R All 159=37 I C 92=39 All 101 = 14 A L J 984.

this Court before single Judges and with the exception of one case it has invariably been held that a suit for rent of a shop which can be used as a dwelling house is a suit for house rent. The one exception is a case (Civil Revision No. 147 of 1932) in which a Judge of this Court refused to entertain an application for revision on the ground that an appeal lay. The application was dismissed at a preliminary hearing in a very short order and the petitioner was not represented by counsel. In other cases which have come before this Court, it has always been held that a shop is included in the term "house." We are referred to Civil Revision No. 446 of 1928, a case reported in A I R 1935 Pesh 192,[4] in which it was held that a garage was a house and another case reported in A I R 1936 Pesh 55.[5] In the latter case all the authorities were reviewed and it was noted that in all cases a shop which could be occupied as a residence was held to be a house within the meaning of Art. 8, Provincial Small Cause Courts Act. Reference was also made to A I R 1933 All 918,[6] in which it was held that a khatti for storing grain was not a house.

Learned counsel for the petitioners in arguing this part of the case has relied principally on what he contends to be unsound reasoning in 98 I C 848[7] which was referred to in 1936 Pesh 55.[5] The learned Judge who decided 98 I C 848[7] based it largely on the analogy of the use of the word "house" in the Court-fees Act. Learned counsel for the respondent, on the other hand, contends that the word "house" in Art. 8 includes every sort of building, and there is some support for his contention in the definitions which are given of "house" and "shop" in the Shorter Oxford Dictionary. Amongst other definitions of "house" appears the following: "a building for the keeping of cattle, birds, plants, goods, etc." Under the definition of "house" as a verb appears "to keep or store in a house or building," "shop" is defined as "a house or building where goods are made or prepared for sale and sold." We do not propose to make any pronouncement as to whether this extended definition suggested by learned counsel for respondent is correct for it is not necessary for the purposes of these cases. It is sufficient to state that with the one exception of Civil Revision No. 147 of 1932 all authorities are consistent that a shop is a house within the meaning of Art. 8. We follow these decisions and hold that the three suits from which these applications arise were triable as small causes.

The next point for decision is whether the first two suits having been decided as regular suits, an appeal could lie against them. Learned counsel for the petitioners in connexion with this part of the case has only been able to say that of the three cases on which the learned Senior Sub-Judge relied in deciding the Rs. 459 appeal, one, namely 40 Cal 537[1] is based on a second, namely 25 Bom 417[2] which latter judgment is a short judgment. It is however obvious that all these three High Courts, namely Calcutta, Bombay and Allahabad, are agreed that where a small cause has been tried by a Judge, who exercises Small Cause Court's powers, on the regular side, no appeal lies against his decision. Learned counsel for plaintiff-respondent has cited a case, namely A I R 1937 Mad 227[8] which also endorses this view. We therefore hold that no appeal lay.

The next contention made by learned counsel is that the suit for Rs. 459 was a suit for mesne profits and therefore was excluded from trial by a Small Cause Court under Art. 31. He points out that although the plaint bases the suit on a registered lease deed, that deed was executed by the antecedents in interest of his clients who could therefore not be considered as tenants of the plaintiff. That however was a question which could have been contested at the hearing of the suit, had the defendants contested it. The suit as framed was a suit for rent based on a lease deed. The nature of a suit is decided by the allegations in the plaint and we are of opinion that the suit as framed was of the nature of a small cause. It is further contended by learned counsel as regards the first of the Rs. 300 suits that although the suit was based on a rent deed, the defence clearly denied the title of the plaintiff and therefore the procedure prescribed under S. 23, Provincial Small Cause Courts Act, should

4. Parkash Mehra & Co. v. Sant Ram, (1935) 22 A I R Pesh 192=160 I C 175.
5. Kesho Ram v. Municipal Committee, Abbotabad, (1936) 23 A I R Pesh 55=161 I C 207.
6. Kamla Prasad v. Ram Prasad, (1933) 20 A I R All 918 = 146 I C 594 = 56 All 261 = 1934 A L J 73.
7. Ahmadi Begum v. Girraj Kishore, (1927) 14 A I R All 194=98 I C 848 = 49 All 134 = 25 A L J 131.
8. Gopala Krishna Nayakar v. Madhava Nayaki Ammal, (1937) 24 A I R Mad 227 = 168 I C 691=(1937) 1 M L J 14.

have been followed. We do not see any force in this contention. The execution of the lease deed was not denied and a tenant cannot deny the title of his landlord.

Lastly, it is contended that the defendants should have been given an extension of time in the Rs. 459 suit for depositing the decretal amount or for furnishing security. That was a matter which was in the discretion of the Court, if in fact any such discretion does exist, and we are not prepared to interfere in the discretion of the learned trial Judge. Especially we are unwilling to take this course when it is clear from the bond which was filed on 25th May 1937 that the defendants were aware that some such security or deposit was necessary. We can find no reason for interfering in any of these cases and dismiss all three applications with costs.

D.S./R.K. *Applications dismissed.*

*** A. I. R. 1939 Peshawar 16**

MIR AHMAD J.

Gul Mohammad and others — Petitioners.

v.

Habibullah Karim Ullah—Respondent.

Criminal Revn. No. 341 of 1938, Decided on 24th February 1939, against order of Addl. Sess. Judge, Peshawar, D/- 22nd November 1938.

(a) Criminal P. C. (1898), S. 436—Further inquiry can be ordered only if Magistrate's judgment is perverse.

A further inquiry can be ordered only on the ground that the judgment of the trial Magistrate was perverse and foolish : *A I R 1934 Pesh 52 and A I R 1928 Pat 12, Rel. on.* [P 16 C 2]

*** (b) Criminal P. C. (1898), Ss. 202 and 436—Magistrate when proceeding under Sec. 202 is not barred from cross-examining witnesses—Intensive cross-examination by Magistrate of witnesses to get at truth is no ground for directing further inquiry.**

The hands of the inquiry Magistrate are not tied in the matter of questioning the witnesses when they are produced under S. 202. It would be dangerous to lay down hard and fast rules as to how far the Magistrate should go in trying to elicit the truth from the witnesses when he is conducting an enquiry behind the back of the accused. It is commendable on the part of the Magistrate to show keenness in finding out the truth or falsity of the case before he gives the accused person the trouble of appearing before him in response to a criminal charge. Hence the anxiety of the trial Magistrate to get at the truth and his intensive cross-examination of the witnesses for that purpose are no grounds in law for directing a further inquiry. [P 17 C 1]

Khowaja Mohammad — *for Petitioners.*

Lala Nanak Chand and Kazi Abdul Wahab — *for complainants (Mt. Wafa Jan and Habibullah).*

Order. — Habibullah reported to the Police that his wife Mt. Wafa Jan was forcibly taken away by several persons. The police did not challan the case. Consequently Habibullah brought a complaint under Ss. 342, 366, 452 and 494, I. P. C., against the seven petitioners before me and Mt. Wafa Jan. Later Mt. Wafa Jan instituted a complaint under Ss. 342 and 366, I. P. C., against the same seven petitioners. These two complaints were enquired into by the Magistrate under S. 202, Criminal P. C. The Magistrate carefully cross-examined every witness. He was not satisfied that the case was true. He therefore dismissed the complaints under S. 203, Criminal P. C., writing a detailed judgment in which he showed the discrepancies between the statements of the witnesses and the reasons why he considered them to be unreliable.

The complainants Mt. Wafa Jan and Habibullah preferred revision petitions to the Court of the Sessions Judge. The learned Additional Sessions Judge accepted the petitions and directed a further inquiry. The ground for doing so was given by the Judge to be that the Magistrate had gone out of his way to thoroughly cross-examine the witnesses. He observed that the procedure adopted was not justified by law and impliedly suggested that this procedure indicated mala fides on the part of the Magistrate. The accused have come up on revision to this Court in both cases. Counsel for the petitioners urged that a further inquiry could be ordered only on the ground that the judgment of the trial Magistrate was perverse and foolish. He quoted A I R 1934 Pesh 52[1] and 28 Cr L J 857[2] in support of this proposition. He pointed out that the Additional Sessions Judge had not given any such finding and that the reasons given by him for directing a further inquiry were not sufficient in law. The counsel for the respondents could not satisfactorily meet this objection.

As I was inclined to agree with the counsel for the petitioners the counsel for the respondents requested me to give him

1. Zarin v. Emperor, (1934) 21 A I R Pesh 52= 1934 Cr C 884=151 I C 143=35 Cr L J 1282.
2. Radha Prasad v. Emperor, (1928) 15 A I R Pat 12=104 I C 633=28 Cr L J 857.

an opportunity to show that the judgment of the trial Magistrate was perverse and foolish on the merits. I gave an adjournment for the purpose and have heard the parties today on the facts also. Two points arise for consideration so far as the judgment of the Additional Sessions Judge is concerned, firstly whether the Magistrate acted mala fide, and secondly whether the Magistrate even if he was acting bona fide was barred from cross-examining the witnesses at length when proceeding under S. 202, Criminal P. C.

The first point need not detain me long. There is nothing on the record to point to the Magistrate's partiality in the matter. In fact counsel for respondents has not questioned the honesty of the Magistrate at all. In the circumstances I hold that there is no cause for suspecting the conduct of the trial Magistrate in the matter and that the fact that he carefully scrutinized the evidence does not by itself justify any suspicion in that direction. The second question is also not difficult to answer. Counsel for respondents has not been able to show me any law by which the hands of the inquiry Magistrate are tied in the matter of questioning the witnesses when they are produced under S. 202, Criminal P. C. It would be dangerous to lay down hard and fast rules as to how far the Magistrate should go in trying to elicit the truth from the witnesses when he is conducting an enquiry behind the back of the accused. I would give him a free hand and wish to lay down that it is commendable on the part of the Magistrate to show keenness in finding out the truth or falsity of the case before he gives the accused person the trouble of appearing before him in response to a criminal charge. I hold therefore that the anxiety of the trial Magistrate to get at the truth and his intensive cross-examination of the witnesses for that purpose are no grounds in law for directing a further inquiry.

As to merits I find no perversity in the judgment of the trial Magistrate. He had drawn inferences from the evidence which could reasonably be drawn from it. His appraisement of the evidence does not therefore amount to perversity or foolishness. I consequently accept the petition, set aside the order of the Additional Sessions Judge directing a further inquiry and restore the order of the original Magistrate.

D.S./R.K. *Petition accepted.*

A. I. R. 1939 Peshawar 17

ALMOND J. C. AND MIR AHMAD J.

Karim Shah and others — Appellants.

v.

Emperor.

Criminal Appeal No. 463 of 1938, Decided on 9th March 1939 from Judgment of Magistrate, First Class, D/- 12th December 1938.

Criminal P. C. (1898), S. 393 — Cumulative sentence of imprisonment for more than five years cannot be maintained when accused is sentenced to whipping.

The cumulative sentence of imprisonment of more than five years cannot be maintained in the case of a person who has been ordered to undergo punishment of whipping and vice versa : *1 Mad 56 and A I R 1930 Rang 138, Rel. on.*

[P 20 C 1]

Saadudin Khan — *for Appellants.*

S. B. Sardar Raja Singh, Advocate-General — *for the Crown.*

Mir Ahmad J.— Karim Shah, Rahmat Shah and Muzaffar Shah are brothers. Abdul Sattar is the brother-in-law of Karim Shah. Nasrullah, Sadullah and Made are brothers and the wives of Nasrullah and Sadullah are daughters of Sorab Shah, a cousin of Karim Shah. They were all placed before the A. D. M. Charsadda for trial in connexion with the abduction of Mt. Mah Jabina which took place on 14th August 1938 at village Turangzai (Peshawar District). The facts brought out by the prosecution were as follows:

Mt. Mah Jabina was in her house. The other occupants of the house were Mt. Hussan Jamala, the mother of Mt. Mah Jabina, and Sadullah, the brother of Mt. Mah Jabina. At evening time, Mt. Mah Jabina was making balls of dough and her mother was preparing oven for cooking them. Sadullah was on the roof of the kotha offering his prayers and his village defence rifle was lying on a charpoy nearby. Karim Shah, Rahmat Shah, Muzaffar Shah and Nasrullah entered the house. Karim Shah went upstairs. The other members of the party went towards Mt. Mah Jabina. She rushed into a kotha but before she could chain the door the accused opened it and caught hold of her. Karim Shah had in the meantime taken possession of Sadullah's defence rifle. He called Rahmat Shah upstairs. Karim Shah gave his own rifle to Rahmat Shah and fired a shot at Sadullah

with the latter's rifle. He however missed him. Then both Karim Shah and Rahmat Shah belaboured Sadullah and went downstairs. There they joined the others who were taking away Mt. Mah Jabina by force. The party went out of the village. Rahmat Shah returned to the village with the rifle of Sadullah which he gave to Tamash. Some villagers turned out in pursuit but Karim Shah fired 3 or 4 shots at them. The girl was then taken to village Sarki Mulayan to the house of the accused Abdul Sattar. Abdul Sattar advised the abducting party to take the girl to a sugarcane field. It was done and he supplied them with a mattress and a pitcher. He continued serving them with meals there. Sadullah and Made, accused, came to the field next morning and gave information to the abductors of the movements of the persons who were out to trace the girl. The girl was taken to another field during the following night and while Muzaffar Shah and Nasrullah kept guard at some distance Karim Shah committed rape on her. On the morning of the third day the police and villagers surrounded the field. Muzaffar Shah and Nasrullah managed to slip away. Karim Shah led Mt. Mah Jabina at the point of his gun to a field where sugarcane was thick. There he placed his rifle on the ground for a while. Mt. Mah Jabina took advantage of this moment to rush out of the field and to go over to the police. Karim Shah was eventually rounded up and arrested. His gun and bandoliers were found inside the field. The mattress and the pitcher were also taken into possession by the police. During the investigation, Tamash produced Sadullah's defence rifle to the investigating officer.

The story set out above was given by Mt. Mah Jabina at the trial. The witnesses of the abduction were Sadullah, the brother of the girl, Mt. Hussan Jamala, the mother of the girl, Mt. Begum Jana, a neighbour, who is a cousin of Mt. Hussan Jamala, Khowaja Mohammad, Hijab, Khaista Gul, Fateh Mohammad, Sultan, Sher Mohammad and Abdul Manan. Sarwar Khan, S. I., gave evidence with regard to the coming out of the girl from the field, the arrest of Karim Shah and the discovery of the gun and the bandoliers inside the field which were identified by Mt. Mah Jabina to belong to Karim Shah. The lady doctor had examined the girl. She stated that the girl was 18/19 years old and that sexual intercourse had been committed with her within two or three days because her hymen had been ruptured inside that period. Dr. Bishamber Nath described the wounds on Sadullah, complainant and Karim Shah, accused. They were as follows:

Sadullah :— (1) Two abrasions on the right forearm.
(2) A contusion mark on the left temporal region.
(3) An abrasion on the palm of the left thumb.

Karim Shah:—(1) An abrasion on the right side of the chest.
(2) A contusion on the left scapular region.
(3) Two abrasions on the right forearm.
(4) Three abrasions on the left forearm, near the wrist.
(5) An abrasion on the inner side of the right thigh.
(6) An abrasion on the right cheek.

Tamash deposed that a gun was given to him by Rahmat Shah, accused, who said that it should be handed over to Sadullah, complainant. The witness handed over the rifle to the mother of Abdul Manan and later took it back from her and gave it to the police. Karim Shah, accused, pleaded that the girl was betrothed to him and had eloped with him of her own free will. The others denied the charges. Abdul Wahid and Said Ahmad appeared to prove the alibi of Abdul Sattar. It may be noted that Said Ahmad had said that Abdul Sattar had reached his village Tor Dher on 14th August, that they came to Charsadda on the 15th at 10 A. M., and that they stayed for the day there. The Sub-Inspector of Police, however, found him in his village at 2.30 P. M., on the 15th when he searched his house and obtained his signature on the search memo. Umar Gul and Zamir Gul brothers, were produced by the defence to prove the alibi of Nasrullah and Muzaffar Shah. Umar Gul admitted that the accused Nasrullah and Muzaffar Shah were his cousins while the other witness denied this fact. Ghulam Mohammad tried to show that Rahmat Shah was in his field at the time of occurrence and Fazlo deposed that he saw a woman willingly going with Karim Shah but he could not identify her.

The Magistrate convicted and sentenced the accused as follows:

Karim Shah:—U/S. 366, I. P. C. (abduction) — Seven years' R. I. including two months' solitary confinement.
U/S. 376, I. P. C. (rape)—Four years' R. I. and 15 stripes.
These sentences to run consecutively.
U/S. 452, I. P. C. (criminal house-trespass)—Two years' R. I.
U/S. 506, I. P. C. (2 counts) criminal intimidation by firing shots on the roof of Sadullah's house and also in the fields outside the village to scare the rescue party—Two years' R. I. on each count.
U/S. 19 of the Arms Act (being in possession of an unlicensed rifle)—One year's R. I.
These sentences to run concurrently.
As a sum total he was ordered to undergo 13 years' R. I. including two months' S. C. and to receive 15 stripes.

Rahmat Shah, Muzaffar Shah, Nasrullah. } U/S. 366, I. P. C., five years' R. I.
U/S. 452, I. P. C., two years' R. I.
The sentences to run concurrently.

Abdul Sattar. U/S. 212, I. P. C., two years' R. I.

Sadullah, and Made. } U/S. 212, I. P. C. one year's R. I.

The convicts have presented a joint appeal to this Court. The learned counsel urged that Mt. Mah Jabina went with Karim Shah of her own accord, that she however made her paramour stage an abduction so that her people may not suspect that she was a consenting party in the matter, that Sadullah was therefore beaten and the woman taken away, and that the act of Karim Shah was in the circumstances not so heinous as was considered to be by the Magistrate. As regards Muzaffar Shah, Rahmat Shah and Nasrullah he argued that they had taken no part in the abduction because it was not necessary to take so many persons to carry a girl who wanted to go herself. He asked us to disbelieve Mt. Mah Jabina when she says that Abdul Sattar provided them food and other requirements, and that Made and Sadullah brought information to her abductors about the movements of the rescue party. He pointed out that all the other witnesses had something to do with Sadullah either in the form of relationship or otherwise and that they had lent themselves in order to make out a case against the accused persons of whom Karim Shah had fallen foul of Sadullah by eloping with his sister. In short, counsel asked for reduction of the sentence of Karim Shah and for the acquittal of the other accused.

We have no reason to reject the statement of Mt. Mah Jabina. The facts that Sadullah has wounds on his person, that Karim Shah had to keep Mt. Mah Jabina in a sugarcane field and that she managed to rush out of the field directly she noticed that a cordon was put around it strongly corroborate the story which the girl has given and go against the theory that she had willingly gone with Karim Shah. Again, the connexion of the other witnesses with Sadullah is very slight. Mt. Begum Jan is only a cousin of the mother of Sadullah. Khowaja Mohd., Hijab and Abdul Manan are related to both sides. Khaista Gul sits in the hujra of Hijab. Fateh Mohd. is the son of Khowaja Mohd., witness. Sultan was sent up under S. 110, Criminal P. C., and Khowaja Mohd. stood surety for him. Sher Mohd. is a tenant and a friend of Sultan. Tamash sleeps in Sadullah's hujra and works for him but his step-father is the uncle of Karim Shah, accused. We have consequently no cause for rejecting their testimony also. We believe therefore that the woman was abducted from her house by Karim Shah, Rahmat Shah, Muzaffar Shah and Nasrullah. We also accept the statement of Mt. Mah Jabina that Abdul Sattar provided food etc., to the party in the sugarcane field, and that Made and Sadullah, accused, kept the party informed as to what was going on in the outside world in order to assist them to avoid apprehension (an offence contemplated by S. 212 read with S. 216-B, I. P. C.). Lastly the medical evidence clearly shows that Mt. Mah Jabina was raped and supports her statement to that effect. This part of the case has also been thus established against Karim Shah. It has already been shown that the defence evidence has no value whatsoever and the learned Magistrate was right in rejecting it. We consequently maintain the convictions of all the accused. The sentences awarded to Karim Shah require consideration. S. 393, Cr. P. C., runs thus:

> No sentence of whipping shall be executed by instalments: and none of the following persons shall be punishable with whipping, namely (a) females; (b) males sentenced to death or to transportation or to penal servitude, or to imprisonment for more than five years; (c) males whom the Court considers to be more than 45 years of age.

It is clear from the Section itself that whipping cannot be given where a person has been sentenced to imprisonment for more than five years whether for the offence for which whipping has been given or for any other. But if there is any doubt in the matter there are authorities in support of this interpretation of the statute. They are 1 Mad 56[1] and A I R 1930 Rang 138.[2] The cumulative sentence of imprisonment of more than five years cannot therefore be maintained in the case of Karim Shah if the order of whipping is to remain and vice versa. We think that the sentence of 13 years' rigorous imprisonment is very long. We therefore accept the appeal of Karim Shah to this extent that we reduce the punishment under S. 366, I. P. C., to five years' rigorous imprisonment including two months' solitary confinement and we order that all the sentences awarded to him under the other Sections shall run concurrently with this sentence. In all he shall undergo five years' rigorous imprisonment including two months' solitary confinement. We also maintain the order of the Magistrate that he should receive 15 stripes in addition as a part of his sentence under Section 376, I. P. C. The sentences awarded to the other accused appellants are all appropriate. They are upheld and their appeals are dismissed.

N.S./R.K. *Order accordingly.*

1. High Court Proceedings, 19th April 1876, (1876) 1 Mad 56=2 Weir 448.
2. Nga Nyi Gyi v. Emperor, (1930) 17 A I R Rang 138=1930 Cr C 305=120 I C 697 = 31 Cr L J 176=7 Rang 769.

A. I. R. 1939 Peshawar 20

MIR AHMAD J.

Ashraf Israrudin — Petitioner

v.

Emperor.

Criminal Revn. Nos. 55 and 56 of 1939, Decided on 31st March 1939, against order of Addl. Sess. Judge, Peshawar, D/- 6th February 1939.

Penal Code (1860), Sec. 334 — Crying of counter-slogans does not normally amount to grave and sudden provocation though it is likely to cause provocation.

The crying of a counter-slogan in praise of the leader of one's own party and not in dispraise of the leader of the other party is likely to cause provocation to its members but it does not normally amount to grave and sudden provocation.

[P 22 C 1]

Mian Ziauddin — *for Petitioner.*
Abdul Latif Khan — *for the Crown.*

Order.—At 10 A. M. on 10th July 1938 a procession of the Muslim League was passing through the Tangi bazar. The members of the procession were crying their usual slogans. It appears that counter-slogans were shouted by some Red-shirts who were standing in the bazar and this led to trouble between the Muslim Leaguers and the Red-shirts. As a consequence Ghulam Sarwar and Qalandar Red-shirts were wounded. Mir Mohammad, a neutral shopkeeper, was accidentally injured and Afridai, one of the Muslim Leaguers, also got slight wounds. Afridai, Fakir, Ashraf, Sardar and Ghulam Mohammad were challaned by the police for causing hurt to Ghulam Sarwar and Qalandar. (After summarizing the evidence in the case his Lordship proceeded.) The learned trial Magistrate convicted Afridai and Fakir under S. 324, I. P. C., for causing a burn to Ghulam Sarwar. He also convicted Ashraf under S. 324, I. P. C., for stabbing Qalandar. He observed :

It is true that there is party feeling and that the complainants and the prosecution witnesses are Red-shirts and the accused members of the Muslim League. Although the complainants deny that they caused any provocation, I think that the allegation by the defence witnesses that they shouted counter-slogans is eminently probable. It is alleged that when the procession shouted "Mohammad Ali zinda bad" that the accused (six complainants) shouted "Mohammad Ali murda bad." Allowing for the feelings on both sides, such provocation would be quite sufficient to cause the more hot-headed members of the procession to assault the interrupters.

The trial Magistrate sentenced all the three accused to one year's R. I. each. When giving the sentence he remarked :

In regard to the sentence to be inflicted on the one hand there is the consideration that these acts were done on sudden provocation. There is on the other hand the point that it is very dangerous to treat lightly such incidents occurring in the course of political processions.

The convicts appealed to the Sessions Court and the Additional Sessions Judge dismissed the appeal. It was argued before the Additional Sessions Judge that provocation had been offered to the members of the procession. The learned Judge did not agree with this point of view. His discussion of this point may be usefully reproduced as follows :

The learned counsel for the appellants made much of the fact that persons in the bazar had raised shouts counter to the shouts raised by the processionists. (The learned Magistrate himself found that these shouts 'provoked' the three appellants to assault Ghulam Sarwar and Sardar in the way they did.) He even attributed it to sudden provocation. It was no doubt the motive. It does not seem to me that if it can be called provocation,

and it led to the assault that it is an extenuating circumstance. Clearly the shouts of the bystanders which annoyed the appellants were raised in answer to shouts they themselves had been making and which they knew were also likely to annoy the bystanders as much as the bystanders' reply was annoying to themselves.

Fakir and Afridai have presented one application for revision against these orders and Ashraf has instituted another. This judgment will cover both cases. In my opinion, the two Courts below have gone wrong in holding that it was established that Ghulam Sarwar was deliberately thrown into the oil pan by the convicts Afridai and Fakir. The circumstantial evidence clearly indicates to the contrary. The bazar is only three paces wide. A procession of the Muslim League was going in the middle in single file. There were bystanders. Half the procession had gone when something happened which caused a fight between the processionists and the bystanders. One of the shopkeepers had an oil pan for cooking food in which there was hot oil. The struggle must have caused a good deal of pushing about. It may be that some of the strugglers slipped over the skin of melons which were admittely lying about. All these circumstances make it absolutely possible that Ghulam Sarwar, one of the persons who were struggling, may have fallen on the ground and his hand may have accidentally gone into the pan. This is the defence which was taken by the accused and in support of which defence evidence was led. I may note that Jaggat Ram, the defence witness, was mentioned by Ghulam Sarwar in the F. I. R. as one of the persons who were present at the time of the occurrence. He supports this defence and his evidence is therefore entitled to weight.

Now let us examine the story for the prosecution. According to the prosecution witnesses three persons lifted Ghulam Sarwar bodily and threw him into the pan head downwards. Is it conceivable that Ghulam Sarwar would only get a burn on the hand if three strong adults were to throw him right into the oil particularly when the whole distance between his shop and the oil pan is on his own showing not more than 5 paces? His head and face would have been burnt and most probably he would have been dead if this had been done. It is significant in this connexion that Sardar was spoken of as one of those who had thrown Ghulam Sarwar into the pan. Sardar has been discharged and it can be safely presumed that he was charged falsely. Ghulam Mohd. was similarly held to be innocent. There are moreover discrepancies in the statements of the P. Ws. which also indicate that they have been drawing on their imagination. For example they do not agree as to whether Ghulam Sarwar was thrown first or Qalandar stabbed first. It is not improbable therefore that Ghulam Sarwar having fallen by accident and burnt his outstretched hand considered it as God-sent and availed of this opportunity to avenge himself upon the members of the Muslim League procession. It should be remembered that according to Taqrirullah, P. W. Ghulam Sarwar and others were crying the counter-slogans. Ghulam Sarwar was therefore an enthusiastic member of the opposite faction. For the reasons given above I give the benefit of doubt to Fakir and Afridai and accepting their petition for revision set aside their convictions and sentences and direct that they should be released at once. I have no difficulty in the case of Ashraf. Qalandar, the man who charges him with stabbing, comes from a different village called Mirza Dher. He did not know him and in the F. I. R. he gave his description only, the chief point of identification being that he was one-eyed: he is one-eyed. Moreover, Qalandar picked him up in an identification parade which was held by the Sub-Inspector in the hospital. It was a broad daylight affair and Qalandar would certainly know who stabbed him. It is therefore established that Ashraf caused the wounds on Qalandar.

It was argued on behalf of Ashraf that the Muslim League processionists were given grave and sudden provocation and it was urged that the proper Section to apply in his case was S. 334, I. P. C. My attention was invited to the fact that the trial Magistrate did admit that provocation was offered. The learned counsel for the Crown however pointed out that the learned Additional Sessions Judge was of opinion that provocation was mutual. If I were to believe the statement of Said Ahmad, witness for defence, that "Mohd. Ali murda bad" was shouted by the bystanders in reply to the cry of the procession "Mohd. Ali zinda bad," then there was certainly grave and sudden provocation. But I am not prepared to believe the statement of Said Ahmad because Jaggat Ram, the other D. W., has not said anything about it. There remains the admission of Taqrirullah, P. W., that

"Fakhri Afghan zinda bad" was said in reply to "Mohd. Ali zinda bad." I agree with the counsel for the Crown that the crying of such counter slogan, that is to say in praise of the leader of one's own party and not in dispraise of the leader of the other party, should not normally amount to grave and sudden provocation. I may remark here that for the same reason I do not agree with the learned Additional Sessions Judge that crying of slogans by the processionists gave provocation to the bystanders. I would however make the observation that although ordinarily permissible, the crying of such a counter-slogan also at a time when the opposite party is going drawn up in a procession and in reply to the slogans cried by that party is likely to cause provocation to its members though not grave and sudden.

In fact the counter-slogan when shouted in these circumstances cannot be said to have been used in token of the admiration of the leader of the party crying it but as challenge to the opposite faction, and from this point of view it is bound to give offence. It is beyond my province to discuss the other aspects of this matter but I cannot help thinking that it is desirable otherwise also to abstain from making such challenges if healthy rivalry in political life is sought to be promoted in the country. I hold therefore that Ashraf was given some provocation but it was not grave and sudden. His conviction under S. 324, I. P. C., is consequently maintained. As regards sentence I think he has already been leniently treated and I do not propose to order any reduction on the ground of provocation. His petition is dismissed.

S.G./R.K. *Order accordingly.*

A. I. R. 1939 Peshawar 22

MIR AHMAD J.

S. Attar Singh S. Sujan Singh — Appellant.

v.

Secretary of State and another — Respondents.

Civil Appeal No. 52/16 of 1939, Decided on 9th May 1939, from order of Addl. Judge, Peshawar Division, D/- 15th February 1939.

(a) Cantonments (House Accommodation) Act (6 of 1923), S. 7—Reasonable rent—Criterion.

The best criterion for arriving at a reasonable figure of rent of a house is to find out the rent of bungalows in the locality. [P 22 C 2; P 23 C 1]

(b) Cantonments (House Accommodation) Act (6 of 1923)—Amendment suggested.

There should be some provision in the Act that where a house has been taken over and the question of rent is contested by the landlord the amount fixed by the officer commanding should be paid to the landlord without prejudice to his right to fight in Court the question of the enhancement of the rate of rent. [P 23 C 2]

Sardar Ajit Singh — *for Appellant.*

A. M. Qureshi — *for Respondents.*

Judgment. — Bungalow No. 31 belongs to Attar Singh and is situated in Kohat Cantonment. It has been acquired on lease by the officer commanding Kohat Military Station under the House Accommodation Act for five years. The officer commanding fixed the rent at Rs. 65 a month and also ordered repairs of the value of Rs. 1399 to be made. The repairs seem to have been carried out. The owner was however not satisfied with the amount of rent fixed. He therefore asked for a reference to Court. The matter was consequently referred to the District Court, Peshawar. Owing to arrears of work in that Court the case could not be taken for about three years, for the notice of appropriation was given on 7th August 1936, the house was appropriated on 15th August 1936 and the reference was decided by the Additional Judge on 15th February 1939. The Additional Judge maintained the figure offered by the officer commanding. The owner has come up on appeal to this Court. The owner has himself gone into the witness-box and sworn that this bungalow used to fetch Rs. 95 a month before appropriation. I find from the evidence of Captain Blunt that Bungalow No. 30 is situated opposite to bungalow No. 31 and that both are similar in accommodation. Again it is clear from the statement of Mr. Smith, Assistant Garrison Engineer, that the rent of bungalow No. 30 is Rs. 120 a month. This witness has also deposed that bungalow No. 31 consists of a kacha building with a pakka facing. This witness had been in Kohat for about 18 months. He has said that bungalow No. 31 has always been occupied during that time by a senior Captain and that at the time of his giving evidence it was occupied by a Major. In the opinion of this witness bungalow No. 31 is slightly inferior to bungalow No. 30. He alleged that bungalow No. 30 was on a monthly tenancy with the Government.

The House Accommodation Act lays down that the Court shall fix a reasonable rent

of the house appropriated by the officer commanding. I think the best criterion for arriving at a reasonable figure is to find out the rent of bungalows in the locality. I have shown above that bungalow No. 30 which is opposite to bungalow No. 31 is similar in accommodation and that a rent of Rs. 120 a month is being paid for it by the Government on the monthly basis. I admit that in the case of acquisition under the House Accommodation Act the Government has to repair the house and there is no fear of the house remaining vacant. But then there is the consideration that the house is being appropriated against the will of the landlord. Moreover, there is a great difference between Rs. 65 a month and Rs. 120 a month and I think that even if all these matters were allowed for, the rent should be higher than that offered by the officer commanding. For the reasons given above, I am of opinion that Rs. 65 a month is very low and the circumstances relating to bungalow No. 30 make me sure that the owner has told the truth when he has stated on solemn affirmation that he was getting Rs. 95 a month for the bungalow before it was appropriated. I therefore accept the appeal and raise the rent to Rs. 95 a month from the date of appropriation. The landlord shall get his costs in this Court as well as in the District Court. Pleader's fee Rs. 30.

I may refer to another point which arose during the proceedings of the appeal. The owner made an application to me that since the date of appropriation the house was in the possession of the officer commanding and that he was not getting any rent from that officer. He asked me to order that subject to protest the rent be paid to him at the rate fixed by the officer commanding. After hearing counsel for the officer commanding, I came to the conclusion that there was some legal difficulty in my way in dealing with the matter. It was doubtful whether I could order the payment of the arrears of rent at the rate fixed by the officer commanding although it is obvious that it should have been paid to the landlord for all the landlord is fighting for is that he should get more rent. As the appeal could be disposed of in a short time I refused to proceed with the application. But I must point out that there is a lacuna in the House Accommodation Act which it would be fair on the part of the Government to fill up. The only points on which the landlord can get a reference to the Court are the fixation of the rent and the amount of repairs to be made by him. Consequently there should be some provision in the Act that where a house has been taken over and the question of rent is contested by the landlord the amount fixed by the officer commanding should be paid to the landlord without prejudice to his right to fight in Court the question of the enhancement of the rate of rent.

N.S./R.K. *Appeal accepted.*

A. I. R. 1939 Peshawar 23

ALMOND J. C. AND MIR AHMAD J.

Mian Gul Mahmud Shah — Appellant.

v.

Emperor.

Criminal Appeal No. 141 of 1939, Decided on 9th May 1939, from order of Addl. Sess. Judge, Peshawar, D/- 12th April 1939.

Criminal P. C. (1898), S. 309 — Accused convicted under Ss. 302, 304 and 324, Penal Code — Judge's refusal to prescribe punishment under Ss. 304 and 324 is illegal.

Under S. 309, Criminal P. C., the Judge is bound to pass a sentence on each of the charges of which the accused is found by him to be guilty. Hence where he has convicted accused under Secs. 302, 304 (1) and 324, Penal Code, his refusal to prescribe the punishments under Ss. 304 Part (1) and 324, I. P. C., is illegal : *22 Cal 805, Rel. on.*

[P 24 C 1]

Mian Samiuddin — *for Appellant.*

Sardar Raja Singh, Advocate-General — *for the Crown.*

Mir Ahmad J.—Umar Shah belongs to village Bakar Shah Koruna which is situated at two miles from Takhtbai Police Station in the Mardan District. He made a report at 10-5 P. M. on 3rd November 1926 at the station house. The following is the gist of the information given by him : The reporter was asleep in his house when at about 9.30 P. M. he heard an uproar in his hujra. The house of the reporter is adjacent to the hujra. The reporter called out to Sheraf Gul his tenant and asked him as to the cause of the trouble. Sharaf Gul told him that Mian Gul and Mir Hassan Shah had stabbed Nurainuddin, Umar Din and Bacha and had run away. The reporter rushed to the hujra and found all the three wounded persons there. On his inquiry they told him that they were wounded by Mian Gul while they were held by Mir Hassan Shah. The reporter came to know that the cause of the quarrel was that Mir

Hassan Shah and Nurainuddin were teasing a boy called Karim. Nurainuddin and Umar Din succumbed to their wounds. The police challaned the two brothers Mir Hassan Shah and Mian Gul who were committed to the Court of Session and tried there under S. 302/34, I. P. C. (two counts) for the murders of Nurainuddin and Umar Din, and under Sec. 307/34, I. P. C., for the attempted murder of Bacha. The evidence led at the trial may be summarized as follows. (His Lordship then referred to the evidence and proceeded.) The accused denied the charge and attributed it to enmity. Mir Hassan Shah said that he had gone to his village in T. T. two years before the occurrence. The accused did not produce any defence. The assessors were of opinion that Mian Gul had caused the injuries on the wounded persons and that Mir Hassan Shah had no weapon with him.

The learned trial Judge acquitted Mir Hassan Shah and convicted Mian Gul. He observed that Mian Gul stabbed Nurainuddin in order to rescue his brother Mir Hassan Shah. He gave him therefore the benefit of Excep. 2 to S. 300, I. P. C. with respect to the murder of Nurainuddin and convicted him under S. 304, Part (1), I.P.C., for that offence. He was of the view that the act of the accused in killing Umar Din was murder and that he was not helped by any Exception to S. 300, I. P. C., with regard to that offence. He therefore convicted him under S. 302, I. P. C., for killing Umar Din. As regards the wounding of Bacha he convicted him under S. 324, I. P. C. The Judge sentenced the accused to death under S. 302, I. P. C. As regards the other convictions he remarked "It is unnecessary to pass any separate sentence under the other heads under which he has been convicted." We may note here that under S. 309, Criminal P. C., the Judge is bound to pass a sentence on each of the charges of which the accused was found by him to be guilty and his refusal to prescribe the punishments under Ss. 304, Part (1) and 324, I. P. C., was therefore illegal. We are fortified in this view by a ruling of the Calcutta High Court reported in 22 Cal 805[1] at p. 809. Mian Gul has come up on appeal to this Court and the sentence of death is also before us for confirmation. His learned counsel pointed out that the night was dark and suggested that some unknown person stabbed the deceased and that they implicated the two brothers Mir Hassan Shah and Mian Gul by conjecture. He also laid great stress on the point that the two deceased persons were not consistent as regards their assailants and that the witnesses were also not unanimous on this point. He urged that in the circumstances it was not definitely proved that Mian Gul was the person who caused the death of Umar Din. We do not find any force in the argument that the assailants were not identified. If this were correct, we should have expected that all the witnesses and the wounded persons would concentrate on Mir Hassan Shah who had started the mischief by molesting Karim, and Mir Hassan Shah should have been named in the beginning as the assailant of Umar Din. We however find from the cross-examination of the witnesses that it was Mian Gul who was charged with the offences in the beginning. It was afterwards that attempt was made by them to implicate Mir Hassan Shah also along with Mian Gul.

It is true that the evidence is not consistent. But we have no reason to reject the testimony of Umar Shah. Umar Shah went to the wounded persons at the earliest opportunity and there was no time for the relations of the victims to coach them. What they said to Umar Shah was therefore the truth and we are prepared to accept it as such. Moreover, Umar Shah went straight to the police station and told the police what the victims told him. He had also no time to make additions and alterations. Again we have the fact that the accused absconded after the offence. This conduct of the accused corroborates the charge laid at his door and shows that the deceased persons have rightly implicated him. For the reasons given above we maintain the conviction of Mian Gul under S. 302, I. P. C. The sentence of death is well deserved because Mian Gul had no right to come in with his knife when there was only an ordinary altercation going on between Nurainuddin and Mir Hassan Shah. We dismiss the appeal and confirm the sentence of death.

D.S./R.K. *Appeal dismissed.*

1. Diwan Singh v. Queen-Empress, (1895) 22 Cal 805.

A. I. R. 1939 Peshawar 25

ALMOND J. C. AND MIR AHMAD J.

Wali Shah and others

v.

Hasham Khan and others.

Civil Revn. No. 191-A of 1938, Decided on 8th May 1939.

Scheduled Districts Act (14 of 1874), S. 8 — "Other territory"—Meaning of.

The words "other territory" do not apply to territories outside British India. [P 26 C 1]

Almond J. C. — Certain land owners in Thal, a village in the Kohat District, sued the residents of the village Bilandkhel situated in the Kurram Agency in a representative capacity for a declaration that they were the owners of something over two thousand kanals of land situated in an area known as "Spin Thal" and for an injunction to restrain the defendants from interfering with the exercise of their rights. While the case was pending in the Court of the Senior Sub-Judge, Kohat, the Deputy Commissioner of that district, on the instructions of the Local Government, drew the attention of the Court to the fact that this land was situated beyond the limits of British India and therefore the Senior Sub-Judge had no jurisdiction to try the suit. Upon receipt of this letter the Senior Sub-Judge framed the following issue : "Whether this Court has jurisdiction to entertain the suit." He came to the conclusion that he had not such jurisdiction. He remarked that the land in dispute had formerly been in the Kurram Agency which was part of British India, and that in the year 1927 it had been annexed to the Kohat District by an order of the Local Government the validity of which he doubted. He considered further that the Civil Procedure Code had not been extended to this particular piece of land because it had not formed part of the Kohat District when the Civil Procedure Code was applied in that district. He therefore directed that the plaint be returned for presentation in the proper Court. An appeal was preferred to the District Judge who came to the opposite conclusion. He agreed with the finding of the trial Court that the land had been annexed to the Kohat District in the year 1927 but held that the Judge had been appointed to administer civil justice within the limits of that district under the N. W. F. P. Courts Regulation and that his jurisdiction extended to the whole of the district as it existed at the time of his appointment. He therefore remanded the case with a direction that it should be tried by the Senior Sub-Judge. The Agent to the Governor-General then moved this Court to exercise its powers under Sec. 34 of the N. W. F. P. Courts Regulation on the ground that the disputed land was situated in tribal territory and therefore not within the jurisdiction of the Senior Sub-Judge, Kohat.

The plaintiffs appeared through counsel in this Court. The Advocate-General was allowed to represent the point of view of the Agent to the Governor-General. Attempts were made to serve the respondents both through the Deputy Commissioner of Kohat who refused to serve them on the ground that they lived in tribal territory and also through the Political Agent, Kurram Agency, who refused to serve them on the ground that notices could not be served in tribal territory. A notice was however served upon the counsel who represented the defendants in the trial Court, but he did not attend. There has therefore been formal service of the defendants and as any decision which we give in this case cannot adversely affect their rights, they have been proceeded against ex parte. Learned counsel for the plaintiffs has simplified the points for decision in this case by admitting that the remark of the learned trial Judge that the Kurram Agency forms part of British India is incorrect. There can be no doubt that the Kurram Agency does not and has never formed part of British India. Such jurisdiction as is exercised in the Kurram Valley is exercised in view of Foreign Department Notification No. 1691-F, dated 23rd June 1902 and was made in exercise of powers conferred by Ss. 4 and 5 of the Foreign Jurisdiction and Extradition Act (21 of 1897). Those Sections definitely refer to the exercise of powers and jurisdiction in places beyond the limits of British India. Learned counsel however contends that this piece of land was validly included within British India under Sec. 8, Scheduled Districts Act (14 of 1874), by an order of the Chief Commissioner of the N. W. F. Province contained in letter No. 904-R. A., dated 15th July 1937 from the Revenue Secretary to the Chief Commissioner to the Political Agent which is reproduced as follows :

Subject : Reduction of land revenue amounting to Rupees 515 from the Rent Roll of the Kurram Agency for the Agricultural year 1926-27 and for future years.

Memo.

Reference your Memo. No. 349, dated 18th June 1927.

The sanction of the Chief Commissioner is hereby conveyed to the reduction of a sum of Rs. 515 (Khalsa) from the Rent Roll of the Kurram Agency for 1926-27 as well as for future years owing to the transfer of the Thal lands from the Kurram Agency to the Kohat District.

This was the only letter contained in the correspondence leading to the order which the Deputy Commissioner would produce before the Court. He claimed privilege for other correspondence leading up to the letter. We are of opinion that learned counsel's arguments regarding the application of S. 8, Scheduled Districts Act, is fundamentally wrong. The Section reads as follows :

Whenever any question arises as to the line of boundary between any of the scheduled districts and other territory, such officer as the Local Government, or (where the districts and the other territory are not subject to the same Local Government) as the Governor-General in Council from time to time appoints, may consider and determine such line of boundary; and the order thereon by such officer, if confirmed by the Government which appointed him, shall be conclusive in all Courts of Justice.

In the first place it is to be noted that the Kohat District was a scheduled district within the meaning of that Act until the Act was repealed by the Government of India (Adaptation of Indian Laws) Order, 1937 made by His Majesty in Council under the provisions of Government of India Act, 1935. Learned counsel contends that "other territory" referred to in Sec. 8, Scheduled Districts Act, includes territory which was outside British India, but that cannot be so for the Preamble to the Act as well as S. 1 of the Act show specifically that the Act applied to British India alone. The words "other territory" could therefore not apply to territories outside British India. Furthermore, there is no suggestion in the letter of the Revenue Secretary referred to above that this action was taken under Sec. 8, Scheduled Districts Act, and the plain meaning of the letter in our opinion is that in future the land revenue assessed on this land instead of being paid into the treasury in the Kurram Agency will be paid into the treasury in the Kohat District owing to the transfer of the Thal lands from the Kurram Agency to the Kohat District. Neither party has been able to show us any authority under which territory situated outside British India can be included in British India by any authority in India, and prima facie such action could not be taken except under a parliamentary statute. We are therefore of opinion that the land now in dispute is not situated within the Kohat District and that the Courts in Kohat have no jurisdiction to entertain the suit. We therefore acting under Sec. 34 of the N. W. F. P. Courts Regulation set aside the order of the District Judge and restore that of the trial Judge. As the question of jurisdiction was one which was not free from difficulties, we think that both parties should bear their own costs up to this date and direct accordingly.

N.S./R.K. *Order set aside.*

A. I. R. 1939 Peshawar 26

MIR AHMAD J.

Mian Feroz Shah — Petitioner.

v.

Firm Bundhel-Khand Cycle & Motor Agency, Nowshera, Judgment-debtors and others, Decree-holders — Respondents.

Misc. Appln. No. 8 of 1939, Decided on 5th May 1939, for leave to appeal to His Majesty in Council from order of Judicial Commissioner, *Reported in A I R 1939 Pesh 9.*

(a) Civil P. C. (1908), S. 109 (a) — Order passed after calling for record under S. 34, N. W. F. P. Courts Regulation is not appealable under Sec. 109 (a).

Orders passed after calling for the records under S. 34 of the N. W. F. Province Courts Regulation are not passed on appeal. They are passed in exercise of the power of superintendence vested in the Court by this provision of law. Hence the order is not appealable to His Majesty in Council under S. 109 (a), Civil P. C. : *11 I C 65 and 9 I C 183, Disting.* ; *A I R 1936 Pat 465* ; *A I R 1934 All 198 and A I R 1926 All 202, Rel. on.* [P 27 C 2]

(b) Civil P. C. (1908), S. 109 (c)—Execution sale set aside on consideration of facts—Appeal under S. 109 (c) does not lie.

No appeal under S. 109 (c) lies from an order setting aside an execution sale on consideration of facts. [P 27 C 2]

Pir Bakhsh Khan — *for Petitioner.*

L. Charanjit Lal — *for Respondents.*

Order.—The Peoples Bank of Northern India had a decree against the Firm Bundhel-Khand Cycle & Motor Agency. In execution of that decree the Bank brought to sale a property belonging to judgment-debtors. The property was purchased by K. B. Mian Feroz Shah. The judgment-debtors objected to the sale. The objections were overruled in the two Courts below. They came up on revision to this Court. On revision I set aside the orders of the Subordinate Courts and cancelled the sale. K. B. Mian Feroz Shah has presented an application for leave to appeal to His

Majesty in Council. S. 109, Civil P. C., governs such applications. It runs thus :

Subject to such rules as may, from time to time, be made by His Majesty in Council regarding appeals from the Courts of British India, and to the provisions hereinafter contained, an appeal shall lie to His Majesty in Council

(a) from any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction ;

(b) from any decree or final order passed by a High Court in the exercise of original civil jurisdiction ; and

(c) from any decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council.

Learned counsel for the petitioner claims that his application falls under (a). Learned counsel for the judgment-debtors respondents points out that the order from which an appeal is proposed to be made to His Majesty was not passed 'on appeal' but on revision. Counsel for the petitioner replies that an order passed in exercise of revisional jurisdiction is an order 'on appeal'. Counsel for petitioner quoted 11 I C 65,[1] a judgment of the Calcutta High Court and 9 I C 183[2] another judgment of the same High Court. Counsel for the respondent has quoted A I R 1936 Pat 465,[3] A I R 1934 All 198[4] and 48 All 226.[5] The rulings quoted by counsel for the petitioner have no direct bearing on the case before me. They relate to the Original Side of the High Court and are therefore based on different considerations. The authorities referred to by counsel for the judgment-debtors respondents lay down in so many words that an order passed on the revision side is not an order 'on appeal' and therefore not appealable to His Majesty in Council under S. 109 (a), Civil P. C. Petitions for revision are presented to this Court under Sec. 34 of the N. W. F. Province Courts Regulation the relevant portion of which runs thus :

34. (1) The Court of the Judicial Commissioner may call for the records of any case in which no appeal lies to it, and

(a) if the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction with material irregularity, or

(b) if on application made to it the Court of the Judicial Commissioner is of opinion that there is an important question of law or custom involved and that such question requires further consideration,

the Court of the Judicial Commissioner may make such order in the case as it thinks fit . . . . .

It is obvious that it is only in cases in which no appeal lies to the Court of the Judicial Commissioner, that the Judicial Commissioner can be moved to call for the records. It follows that orders passed after calling for the records under this Section are not passed on appeal. They are passed in exercise of the power of superintendence vested in the Court by this provision of law. The wording of S. 34 also does not justify the contention of the petitioner. For the reasons given above I agree with the arguments of learned counsel for the judgment-debtors respondents and hold that the petitioner cannot of right ask for leave to appeal to Privy Council under S. 109 (a), Civil P. C. I have been asked in the alternative to grant a certificate under S. 109 (c), Civil P. C. A sale has been set aside on considerations of facts. I do not see any ground for my acting under Sec. 109 (c), Civil P. C. I dismiss the petition with costs. Pleader's fee Rs. 50.

D.S./R.K. *Petition dismissed.*

1. Harish Chandra v. Nawab Bahadur of Murshidabad, (1911) 11 I C 65=15 C W N 879=13 C L J 688.
2. Secy. of State v. British India Steam Navigation Co., (1911) 9 I C 183=13 C L J 90=15 C W N 848.
3. Krishna Chandra Deb v. Rajendra Narayan Bhanj Deo, (1936) 23 A I R Pat 465=164 I C 287=15 Pat 659=17 P L T 760.
4. Atma Ram v. Beni Parsad, (1934) 21 A I R All 198=147 I C 1067=1934 A L J 1166.
5. Suraj Singh v. Phul Kumari, (1926) 13 A I R All 202=90 I C 904=48 All 226=23 A L J 997.

A. I. R. 1939 Peshawar 27

ALMOND J. C. AND MIR AHMAD J.

Abdul Wahab Khan — Plaintiff — Appellant.

v.

Muqarrab Khan and others — Defendants — Respondents.

Civil Appeal No. 107/29 of 1938, Decided on 20th March 1939, from Judgment and decree of Addl. Judge, Peshawar, D/- 16th July 1938.

Transfer of Property Act (1882), Sec. 54 — Sham transaction — Title does not pass to the vendee and suit for possession is not maintainable.

A sham transaction is not sale : *A I R 1932 Bom 247 ; A I R 1937 Oudh 493 and A I R 1924 Nag 146, Rel. on.* [P 29 C 1]

It is only in cases where transfer is genuine and title passes that the vendee is entitled to possession and the vendor can maintain suit for consideration money if it has not been paid. Where however no consideration passes from the vendee nor is there any intention of passing the rights from the vendor to the vendee and the whole transaction is fictitious, title does not pass to the vendee and a suit by the latter for possession is not maintainable : *A I R 1931 Pat 236, Disting.* [P 28 C 2 ; P 29 C 1]

S. B. Sardar Raja Singh and L. Jaggan Nath — *for Appellant.*

R. S. Mehta Mangal Sain, Kazi Mohd. Shafiq, and Abdul Wahid Khan — *for Respondents 1, 3 to 5, and 17 respectively.*

Mohd. Yusaf, Mohd Sadiq, Mohd. Zaman *Respondents in person.*

Mir Ahmad J. — On 25th May 1921 Abdul Akbar mortgaged 1099 kls. 15 mls. of land to K. B. Muqarrab Khan for Rs. 23,000. On 17th August 1932 K. B. Muqarrab Khan leased this land for five years to one Fazal Haq. Fazal Haq undertook to pay Rs. 300 a year to the lessor. The lessee employed one Fateh, a servant, and he was killed. Ghulam Sarwar, the son of Abdul Akbar, and his two tenants were charged with the murder but acquitted. On 19th August 1933, K. B. Muqarrab Khan sold his mortgagee rights to one Abdul Wahab. It may be noted that during the new settlement the area was found to measure 1060 kls. 3 mls. The consideration was the same which was paid by K. B. Muqarrab Khan to Abdul Akbar, i. e. Rs. 23,000. The payment was alleged to have been made as follows : Rs. 12,000 privately, Rs. 11,000 paid by Mohd. Yakub on 17th August 1933 in the following manner : Rs. 2000 cash, and a pronote for Rs. 9000 executed by Mohd. Yakub in favour of K. B. Muqarrab Khan.

On 12th January 1935, this suit was brought by Abdul Wahab for possession of 326 kls. 14 mls. He alleged that this area was in the unlawful possession of the three sons of Abdul Akbar. He stated that he was in possession of the remaining land. The plaintiff also asked for Rs. 971-1-6 as mesne profits for three harvests viz. from Kharif 1933 to Kharif 1934. K. B. Muqarrab Khan and Abdul Akbar Khan were defendants in the suit along with the three sons of Abdul Akbar. Both of them pleaded that the transfer of mortgagee rights in favour of Abdul Wahab was without consideration. K. B. Muqarrab Khan explained that he could not get the possession of the land from Abdul Akbar, that a fictitious transfer of mortgagee rights was therefore made in favour of Abdul Wahab in order to enable him to make an attempt to take over the property and that it was agreed that if he succeeded he (Abdul Wahab) would be entitled to retain the property as a permanent tenant and would pay half the produce to K. B. Muqarrab Khan. The trial Judge decided only one issue which was as follows :

Is the mortgage deed dated 19th August 1933 on behalf of K. B. Muqarrab Khan in favour of the plaintiff for consideration ?

He held that no money had passed and that the transaction was fictitiously entered into in order to allow Abdul Wahab, a notorious litigant, to have a chance of trying to take possession of the land from Abdul Akbar. He therefore dismissed the suit. The plaintiff appealed to the District Court at Peshawar. The learned Additional Judge concurred in the view expressed by the trial Judge. Abdul Wahab has come up on further appeal to this Court. His learned counsel did not controvert the fact that the concurrent finding of the two Courts below that no consideration passed does stand in his way. He however urged that the finding that no consideration passed does not necessarily vitiate the transfer of the mortgagee rights in favour of Abdul Wahab. He asked that a decree for possession should be granted to him all the same and suggested that the vendor should bring a suit for recovery of the purchase money and if he proves that he has not been paid the price he would get a decree for the same. In the alternative, counsel referred to the written statement of K. B. Muqarrab Khan and stated that according to the allegations of K. B. Muqarrab Khan the mortgagee rights had been transferred to Abdul Wahab for the consideration that if he obtained possession he shall have a lease of it in perpetuity and shall pay half the produce to K. B. Muqarrab Khan. Learned counsel invited our attention to the definition of sale in S. 54, T. P. Act, and to A I R 1931 Patna 236[1] in support of the first proposition. S. 54, T. P. Act, runs thus :

'Sale' is a transfer of ownership in exchange for a price paid or promised or part paid and part promised.

We have carefully considered the two arguments advanced by the learned counsel for the appellant. We think that the question as to whether non-payment of consideration deprives the vendee of the title passed under a registered sale deed does not arise in this case. It is only in cases where the transfer is genuine that it has been held that the title passes and the vendor can maintain a suit for consideration money if that has not been paid. But in the case before us we find that there is a

1. Ramdhari Rai v. Gorakh Rai, (1931) 18 A I R Pat 236=133 I C 34=10 Pat 264=12 P L T 570.

concurrent finding of the two Courts below that the whole transaction was fictitious. In fact the two Courts have given valid grounds for doing so. A large sum of Rs. 12,000 is alleged to have been paid and we have no documentary evidence of the payment. There is no explanation why such a large sum was handed over privately and not before the Sub-Registrar. Then Rs. 2000 are said to have been paid by Mohd. Yakub two days before the registration and there is no receipt for the same. A pronote for Rs. 9000 was written by Mohd. Yakub in favour of K. B. Muqarrab Khan on the same day. Mohd. Yakub admits that he is a business man. In his account books there are entries of 17th August 1933 which show that Rs. 11,000 were deposited by Mohd. Yakub in the firm's chest in one day. The whole of the sum of Rs. 11,000 was then debited to Abdul Wahab. The opening and the closing balances are negligible. Although we find that Rs. 11,000 cash were brought into the books of Mohammad Yakub yet it is alleged that only Rs. 2000 were paid in cash to Abdul Wahab, and Mohd. Yakub executed a pronote for the balance. Where did Mohd. Yakub get this Rs. 11,000 from is also a question which the learned counsel for the appellant could not answer. He said he may have brought Rs. 2000 from his house and the entries regarding Rs. 9000 might be only a book transaction to give support to the execution of the pronote. All these facts lend colour to the allegation of K. B. Muqarrab Khan that it was a sham transaction and there was no intention of passing the mortgagee rights on to Abdul Wahab. A sham transaction is not sale and if any authority be needed for this proposition we would refer to A I R 1932 Bom 247,[2] 171 I C 233[3] and 78 I C 1011.[4] The observations in the first mentioned case are reproduced below:

> There is a distinction between a sale where the consideration is intended to be paid and is not paid, and where the consideration is not intended by both parties to be paid at all. In the former case the title would pass to the purchaser and in the latter case though the vendor has been tricked into going through the form of execution and registration of the document, the sale deed would be void as a colourable transaction.

The headnote of the Oudh case[3] runs as thus:

> In judging whether the registration of a document is valid, it should be seen whether or not it was really intended that property which purports to have been dealt with by the instrument should actually be so dealt with. In other words, whether the instrument actually "relates" to that property within the meaning of S. 28, Registration Act. The criterion by which the question must be decided is whether, upon the facts established by the evidence, the parties intended this plot of land to pass under the deed. The motive may be immaterial if the requirements of the law have been complied with, but of this the intention is critical. Consequently where a portion of the mortgaged property was entered in the mortgage deed merely with the object of getting the deed registered in the office of a certain Sub-Registrar and it was never intended to make that property form part of the security, the registration of the deed is invalid: *Collector of Gorakhpur* v. *Ram Sundar Lal*,[5] *Venkatarama Rao* v. *Sobhanadri Appa Rao*[6] *and Parshotam Das* v. *Yar Ali*[7] relied on.
>
> Section 54, T. P. Act, does not lay down that if the parties to a so-called sale get a sham deed of sale registered without intending that the transaction should take effect even then the ownership of the property will pass from one to the other by registration.

The headnote of the Nagpur case[4] is in the following terms:

> The two essential constituents of a real sale are the transfer of ownership and the payment or promise of payment of price; a transaction from which either of these is absent is not a sale at all.
>
> Therefore a sale deed which recites that the vendee has already spent a thousand rupees on the vendor's litigation and that the vendor has "this day" received another thousand rupees and deposited the money with the vendee for defraying the further costs of the same litigation, and purports to make a transfer of ownership for a price paid and not for a price promised or part-paid and part-promised does not satisfy more than half the definition of a sale and is not a sale at all.

Here we may advert to the argument of the learned counsel which is based on a remark in the judgment of the Appellate Court that K. B. Muqarrab Khan did not prosecute the case and was proceeded ex parte. Counsel contended that the sons of Abdul Akbar being third parties had no locus standi to question the transfer of the mortgagee rights and that consequently the two Courts below had no justification to dismiss the suit at their instance. We have gone through the several orders passed by the original Judge and we find that K. B. Muqarrab Khan and his counsel had been appearing from time to time and following

2. Basalingava Revanshiddappa v. Chinnava, (1932) 19 A I R Bom 247 = 138 I C 534 = 56 Bom 556=34 Bom L R 427.
3. Parsotam Dass v. Ali Haidar, (1937) 24 A I R Oudh 493=171 I C 233=1937 O W N 944= 13 Luck 484.
3. Hemraj v. Trimbak, (1924) 11 A I R Nag 146 =78 I C 1011.
5. (1934) 21 A I R P C 157=150 I C 545=56 All 468=61 I A 286 (P C).
6. (1936) 23 A I R P C 91=161 I C 29=59 Mad 539=63 I A 169 (P C).
7. (1928) 15 A I R Oudh 439 = 112 I C 273 = 4 Luck 13=5 O W N 725.

the defence taken up in the written statement. The learned counsel did not deny that the Courts could take cognizance of the pleas that no price was paid and that the transaction was a sham one if K. B. Muqarrab Khan contested the suit on those grounds. We have found that he did so. We do not therefore see any force in this argument urged on behalf of the appellant. We will now turn to the alternative position taken up by the learned counsel for the appellant. We think that it is too late now for him to adopt this attitude. It was not the case of the plaintiff in either of the two Courts below that his consideration was the creation of a permanent tenancy. Moreover, if K. B. Muqarrab Khan were to be believed the tenancy was to come into existence on the condition that Abdul Wahab succeeded in obtaining the possession of the land. This has not occurred, for according to the Patwari there is nothing in the land records to show that he has taken possession. We rule out this plea of the appellant also. For the reasons given above we do not propose to disturb the concurrent finding of the two Courts below and dismiss the appeal with costs.

N.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Peshawar 30

ALMOND J. C. AND MIR AHMAD J.

Baba Rama Nand — Appellant.

v.

Parkasha Nand Ghanaya Lal — Respondent.

Appeal No. 64/19 of 1938, Decided on 22nd May 1939, from order of Senior Sub-Judge, Peshawar, D/- 4th January 1938.

(a) N. W. F. P. Courts Regulation (1 of 1931), S. 30 — Application to appeal from orders under Succession Act.

Section 30 does not apply to appeals from an order made under the Succession Act : *A I R 1938 Pesh 62 held not good law.* [P 32 C 1]

(b) Punjab Courts Act (6 of 1918)—Notifications under—Notifications Nos. 570 and 571 of 1889—Applicability to North-West Frontier Province.

The Notifications Nos. 570 and 571 of 1889 under the Punjab Courts Act directing that the Divisional Courts should be deemed to be the District Court for the purposes of the Succession Act are inconsistent with the N. W. F. P. Courts Regulation which abolished Divisional Courts. Hence those Notifications ceased to have any effect when the N. W. F. P. Courts Regulation was passed. [P 32 C 1, 2]

(c) Succession Act (1925), S. 338, Proviso—Construction — Where there is no notification by local Government, Proviso does not apply.

It is a principle of construction of statutes that a Proviso merely detracts from the Section to which it applies. Where therefore there has been no notification by the local Government, Proviso to sub-sec. (2) of S. 388 does not apply. [P 32 C 2]

(d) N. W. F. P. Court Regulation (1 of 1931), S. 23 (3)—Senior Sub-Judge taking cognizance of proceedings under Succession Act, acts as District Judge—Hence appeal from his order lies to this Court.

Section 23 (3) when properly interpreted means that a senior Sub-Judge who takes cognizance of proceedings under Succession Act is exercising functions of a District Judge. Therefore the appeal from his order lies to this Court under S. 384, Succession Act. [P 33 C 1]

(e) Succession certificate — Necessity of — Person asking for succession certificate possessing will in his favour by person whose property he seeks to realize, is entitled to certificate.

No decree can be passed in a case in which a succession certificate is required until a succession certificate has been produced, and it is the duty of the Courts to see which party is prima facie entitled to a certificate. There may be cases in which a Court has discretion to refuse a certificate altogether, for instance in a case where no party proves any prima facie claim to the property in dispute. But where the person asking a succession certificate is in possession of a will in his favour executed by the person whose property he is seeking to realize this is a sufficient ground to grant him a certificate. [P 33 C 1]

Raja Singh and L. Charanjit Lal — *for Appellant.*

Pandit Mool Chand and Nishtar — *for Respondent.*

Almond J. C.—This judgment will cover Civil Appeal No. 64/19 of 1938, Baba Ramanand v. Parkasha Nand, and Civil Revision No. 166 of 1938, Mt. Moti Bai v. Ram Chand and others. They deal with applications for succession certificates under the Indian Succession Act of 1925. In the appeal Baba Rama Nand applied to the Senior Subordinate Judge, Peshawar, for a succession certificate in regard to the property left by Baba Jugta Nand on the basis of a will executed in his favour in 1924. The application was rejected on the ground that complicated questions of law were involved and the parties should settle their dispute by regular suit. An appeal was preferred to the District Judge who returned it for presentation in this Court presumably on the basis of a judgment of the single Judge of this Court published in 1938 Pesh L J 70.[1] In the revision case Mt. Moti Bai applied to the Senior Subordinate Judge, Bannu, for a certificate on the ground that she was the daughter of one Mt. Gulab Devi and as such entitled to succeed to her

1. Durgadevi v. Rup Chand Duni Chand, (1938) 25 A I R Pesh 62=177 I C 705 = 1938 Pesh L J 70.

property. The defendants in that case were the reversioners of Mt. Gulab Devi's husband. Two of them had prior to this applied for a succession certificate which had also been refused. The Senior Subordinate Judge dismissed this application also on the ground that difficult questions of law were involved and his finding was maintained on appeal to the District Judge. Learned counsel who has represented the petitioner in the revision case urges that if it is held that an appeal lies to this Court, his application for revision should be treated as an appeal from the order of the Senior Subordinate Judge.

The principal question for decision in these cases is whether the appeal lay to the District Judge or to this Court, and the history of the legislation on the point is as follows: Part 10 of the Succession Act of 1925 is a re-enactment with slight modifications of the Succession Certificate Act 7 of 1889. Under S. 26 of the old Act, the Local Government was empowered by notification in the official gazette to invest any Court inferior in grade to a District Court with the functions of a District Court under the Act, and it further provided that an appeal from such inferior Court should lie to the District Court and not to the High Court. At the time this act was in force, the North-West Frontier Province was a part of the Punjab and was subject to the Punjab Courts Act, 18 of 1884. Under that Act amongst other Courts established in the province were Courts of Divisional Judges, Courts of District Judges and Courts of Subordinate Judges. By S. 23 of that Act the Court of the District Judge was deemed to be the District Court or principal Civil Court of original jurisdiction in the district, but the Local Government had power to direct that the Divisional Court should for certain purposes be deemed to be the District Court or principal Civil Court of original jurisdiction. Under notification No. 570 dated 4th May 1889 the Punjab Government directed that Courts of Divisional Judges in the Punjab should be deemed to be District Courts for the purposes of the Succession Certificate Act, 1889, and by notification No. 571 of the same date all District Judges and Subordinate Judges of the First and Second Class in the Punjab were invested with the powers of a District Court under S. 26, Succession Certificate Act. The original notifications are not available in this Court but they are referred to in a judgment of the Punjab Chief Court reported in 124 P R 1890,[2] and it is not disputed by parties before us that these notifications were actually issued. When the N. W. F. Province was separated from the Punjab in 1901 the law in force at the time of separation was continued under S. 3, Government of India Act 1854, in so far as it was not altered or repealed by law or regulation made by the Governor-General-in-Council, and under Sec. 7 of the Law and Justice Regulation 7 of 1901, notifications made under the Acts which remained in force continued to have validity with such modifications as might be necessary or proper to adopt them to the matters before the Courts. The notifications of 1889 therefore remained in force in this province until, at any rate, 1925 when the Succession Act of that year was passed. In the meantime other changes had occurred in the Punjab. By the Punjab Courts Act of 1914, Divisional Courts in the Punjab were abolished and it appears to have been the view of the Punjab Government that on the passing of that Act the notifications of 1889 ceased to have effect, for, on 15th July 1914, another notification No. 781 was made under S. 26, Succession Certificate Act of 1889 investing all Subordinate Judges of the First and Second Class in the Punjab with the functions of a District Court under the Act.

In 1918 when the Punjab Chief Court was converted into a High Court another Punjab Courts Act, 6 of 1918, was passed, and the High Court was empowered to authorize by general or special order any Subordinate Judge to take cognizance of proceedings of certain classes which included proceedings under the Succession Act, 1865, and the Probate and Administration Act of 1881 which could not be disposed of by district delegates. Thereafter the Succession Act was passed which conferred jurisdiction in cases coming under the Act on District Judges with powers to the Local Government under S. 388 of the Act to invest Courts inferior in grade to the District Judge with powers to exercise the functions of a District Judge under Part 10 of the Act. Thereafter in 1931 the N. W. F. P. Courts Regulation (1 of 1931) was enacted and under Sec. 23 of the Regulation the Judicial Commissioner was authorized by general or special order to confer on any Subordinate Judge the power to take cognizance of any proceedings under any part of

2. Tikaya Mal v. Launga Malik, (1890) 124 P R 1890.

the Succession Act, 1925, if the proceedings could not be disposed of by a district delegate. All Senior Subordinate Judges were so authorized by this Department's Notification No. 436-J of 1st April 1931. Sub-s. (3) of S. 23 reads as follows :

Proceedings taken cognizance of, by or transferred to a Subordinate Judge under this Section shall be disposed of by him subject to the rules applicable to like proceedings in the Court of the District Judge.

In the same regulation provision with regard to the forum of appeal in appeals from decrees was made under S. 30, but that Section obviously does not apply to appeals from an order made under the Succession Act. (The dictum to the contrary in 1938 Pesh L J 70[1] is clearly not good law.) It is admitted that no notification has been made by the Local Government or the Provincial Government in this province under S. 388, Succession Act. It has been contended before us that the notifications of 1889 continue in force in this province up to the present day by virtue of Sec. 7 of the Law and Justice Regulation and that the Courts Regulation of 1931 merely changes the nomenclature of the Courts. We do not think that S. 7 has any application, for it only deals with the constructions of notifications made under enactments passed before the commencement of the said regulation and the question before us deals with the effect of enactments subsequent to regulation. Under S. 24, General Clauses Act, it is provided that where an Act of the Governor-General in Council or Regulation is after the commencement of the Act repealed or re-enacted with or without modifications, then unless it is otherwise expressly provided, any order, scheme, rule, form or bye-law issued under the repealed Act or regulation shall, so far as it is not inconsistent with the provisions re-enacted, continue in force and be deemed to have been in force under the provisions so re-enacted until and unless it is superseded by an order, scheme, rule, form or by-law issued under the provisions so re-enacted. It appears to us that the notification of 1889 under the Punjab Courts Act, directing that the Divisional Courts should be deemed to be the District Court for the purposes of the Succession Act is inconsistent with the N. W. F. P. Courts Regulation which abolished Divisional Courts. We are fortified in this view by the fact that in 1914 when the same alterations in designations of Courts were made in the Punjab, it was considered necessary to renew the powers conferred by the notifications of 1889 by the issue of a new notification in that year. We therefore hold that the notifications of 1889 ceased to have effect from 1931 at the latest and possibly from 1925 when the new Succession Act comes into force. We are therefore left with the proposition as to what is the forum of appeal under the Succession Act of 1925 in the N. W. F. Province in these circumstances. Learned counsel for the petitioner in Mt. Moti Bai's case has contended that although there has been no notification by the Local Government under S. 388, Succession Act of 1925, still the Proviso to sub-s. (2) of that Section must be considered to be in force. The first two sub-sections of that Section read as follows :

(1) The Local Government may by notification in the local official gazette invest any Court inferior in grade to a District Judge with power to exercise the functions of a District Judge under this Part.

(2) Any inferior Court so invested shall, within the limits of its jurisdiction, have a concurrent jurisdiction with the District Judge in the exercise of all powers conferred by this Part upon the District Judge, and the provisions of this Part relating to the District Judge shall apply to such an inferior Court as if it were a District Judge.

Provided that an appeal from any such order of an inferior Court as is mentioned in sub-s. (1) of S. 384 shall lie to the District Judge and not to the High Court, and that the District Judge may, if he thinks fit, by his order on the appeal make any such declaration and direction as that sub-section authorizes the High Court to make by its order on an appeal from an order of a District Judge.

Sub-s. 1 of S. 384 reads as follows :

Subject to the other provisions of this Part, an appeal shall lie to the High Court from an order of a District Judge granting, refusing or revoking a certificate under this Part, and the High Court may, if it thinks fit, by its order on the appeal declare the person to whom the certificate should be granted and direct the District Judge on application being made therefor, to grant it accordingly, in supersession of the certificate, if any, already granted.

We cannot agree with learned counsel that the Proviso to sub-s. (2) of Sec. 388 can apply where there has been no notification by the Local Government, for it is a principle of construction of statutes that a Proviso merely detracts from the Section to which it applies and as no Court has been invested with powers by the Local Government, the Proviso must be disregarded. We have therefore to fall back on the provisions of S. 384. In this connexion it has been argued that no appeal lies to the High Court from an order of the Senior Sub-Judge made under the Succession Act because a Senior Sub-Judge acting under

S. 23 of the N. W. F. P. Courts Regulation is not a District Judge. We have been referred to the difference in wording between S. 30 of the N. W. F. P. Courts Regulation in which the following words appear: "Such other Subordinate Judge shall be deemed to be the Court of a District Judge for the purposes of all appeals so preferred" and the less specific provisions of sub-s. (3) of S. 23 of the same Regulation reproduced above. We must, however, interpret the latter sub-section as meaning that the Senior Sub-Judge who takes cognizance of proceedings under the Succession Act is exercising functions of a District Judge, and that therefore the appeal from his order lies to this Court under S. 384, Succession Act. We therefore hold that the appeal of Ramanand lies to this Court, and in the case of the revision application of Mt. Moti Bai we treat it as an appeal from the order of the Senior Subordinate Judge, for the petitioner has obviously been misled by the practice which has been universal in this province as to the forum of appeal in such cases. We grant the petitioner the necessary extension of time to bring the appeal within limitation.

On the merits we do not think that either of the orders can be sustained. No decree can be passed in a case in which a succession certificate is required until a succession certificate has been produced, and it is the duty of the Court to see which party is prima facie entitled to a certificate. There may be cases in which a Court has a discretion to refuse a certificate altogether, for instance, in a case where no party proves any prima facie claim to the property in dispute. But in the cases before us Ramanand, the appellant, is in possession of a will in his favour executed by the person whose property he is seeking to realize. We think that this is a sufficient ground on which to grant a certificate to him. Similarly, in the case of Mt. Moti Bai she was, in the previous proceedings in which the reversioners petitioned for a certificate, admitted by all persons in the case to be the daughter of Mt. Gulab Devi. That position is now being challenged. There are prima facie grounds for believing that she is the daughter of Mt. Gulab Devi and her counsel relied on a judgment of this Court reported in A I R 1936 Pesh 26[3] in which it was held that Hindus of Bannu City were bound by Hindu law and not by custom. We therefore accept the appeal and the revision application and direct that in both cases the certificates prayed for shall be granted subject to the grantee furnishing to the Senior Subordinate Judge concerned such security as may be deemed by him to be sufficient under S. 375 of the Act. As there was no authoritative pronouncement of law on the point raised before us, we direct that the parties should in both cases pay their own costs in all Courts.

N.S./R.K. *Certificates granted.*

3. Mukund Lal v. Sant Ram, (1936) 23 A I R Pesh 26=160 I C 672.

A. I. R. 1939 Peshawar 33

SOOFI J.

Seva Singh Rattan Singh—Petitioner

v.

Emperor.

Criminal Side Case No. 150 of 1939, Decided on 16th June 1939, from order of Addl. Sess. Judge, Peshawar at Abbottabad, D/- 22nd April 1939.

Penal Code (1860), S. 304-A — Small boy striking against back wheel of lorry — Boy caught in hind wheel and crushed — Lorry stopped within short distance—Driver held not guilty of rash or negligent act.

While a driver was driving his lorry a boy aged 6 struck against the back wheel of the lorry, was caught in it and was dragged along. The driver was able to stop the lorry within a distance of 21 feet. The boy was found crushed and died on the spot:

Held that it was not the case of the lorry striking against the boy, but was the case of the boy striking against the lorry. The driver was therefore not guilty of rash or negligent act. [P 34 C 1]

S. Saran Singh — *for Petitioner.*

Sardar Raja Singh — *for the Crown.*

Order. — Sewa Singh, petitioner, is a lorry driver. He was convicted by Haji Mohd. Ashraf Khan, Magistrate, First Class, Mansehra, on a charge under Sec. 304-A, I. P. C., and sentenced to two years' imprisonment. On appeal the conviction was upheld by the Additional Sessions Judge, Peshawar, but the sentence was reduced to one of one year's R. I. The case against the petitioner was that on 14th December 1938 at peshin time he was coming from Kashmir, driving his lorry loaded with fruit, and when he came near the village Uttar Seesa he saw a calf crossing the road. Just after that, a boy aged 6 was caught in the hind left wheel of the lorry and was dragged along. Hidayatullah, P. W., who was near the roadside shouted. The lorry was stopped within a distance of 21 feet. The boy aged 6 who had been caught in the wheel of the lorry was crushed and died on the spot.

It has been argued on behalf of the petitioner that no rash or negligent act has been proved against him. Had the boy been overrun by the lorry, that might have been different, but in this case it is the boy who struck against the back wheel. The driver (the petitioner) had been driving the lorry, and he was able to pull up the lorry within a distance of 21 feet. The learned Advocate-General concedes that no rash or negligent act could be ascribed to the petitioner. He admits that it was not the case of the lorry striking against the boy, but was the case of the boy striking against the lorry. I agree that no rash or negligent act had been established. I accept the revision petition and acquit the petitioner.

D.S./R.K. *Revision accepted.*

*** A. I. R. 1939 Peshawar 34**

ALMOND J. C. AND SOOFI J.

Lala Moti Ram Khatri — Plaintiff — Appellant.

v.

Basheshar Nath Khatri and others — Defendants — Respondents.

Appeal No. 75/20 of 1938, Decided on 26th June 1939, from judgment and decree of Senior Sub-Judge, Peshawar, D/-30-3-1938.

(a) Mortgage — Mortgagee can relinquish security and sue on personal covenant.

As a general principle the mortgagee can relinquish the security, and can sue on the personal covenant to pay : *24 All 456 ; A I R 1925 Mad 1083 and A I R 1925 Mad 1101, Rel. on.* [P 35 C 2]

(b) Mortgage — Decree though not in proper form decree-holder can proceed against mortgaged property.

Although the decree is not made out in the proper form in accordance with the provisions of O. 34, Civil P. C., the decree-holder is entitled to realize his decree from the mortgaged property : *26 Cal 166, Rel. on.* [P 37 C 1]

(c) Transfer of Property Act (1882), S. 92 — S. 92 applies to N. W. F. Province.

Section 92 contains a principle of equity, and hence is applicable to N. W. F. Province, though the Act itself is not applicable. [P 37 C 1]

*** (d) Mortgage— Sale by prior mortgagee in execution of his decree without impleading puisne mortgagee — Subsequent suit by puisne mortgagee for sale—Auction-purchaser in execution of prior mortgage decree can claim payment of amount due under it.**

Where a prior mortgagee brings the property to sale in execution of a decree on his mortgage without impleading the puisne mortgagee to the suit, the rights of the puisne mortgagee are not affected by the sale. But if the puisne mortgagee brings a suit on his mortgage the auction-purchaser in the execution of the prior mortgage decree can use the prior mortgage rights as a shield and can claim payment of the amount due under the prior mortgage decree, where the puisne mortgagee seeks a decree for sale in his favour: *A I R 1922 P C 11 ; A I R 1928 Rang 189 ; A I R 1922 Bom 334 ; A I R 1934 Pat 70 and A I R 1938 Cal 524, Rel. on.* [P 37 C 2]

Hukam Chand and L. Lal Chand —*for Appellant.*

L. Charanjit Lal and L. Ladha Ram — *for Respondent 2 (Defendant).*

Soofi J. — Moti Ram, plaintiff, sued Basheshar Nath defendant-respondent 1 for the recovery of Rs. 6000, on the basis of a mortgage deed dated 22nd August 1929. The prayer was for the sale of the mortgaged property (½ share of a six storeyed house situated in Mohallah Lahorian). The further prayer was for proceeding against the person and the other property of Basheshar Nath, defendant-respondent, under the provisions of O. 34, Civil P.C. Two other persons were impleaded as defendants namely Jaggan Nath, defendant-respondent 2, who had purchased the property in suit at a Court sale (vide the sale certificate dated 10th May 1933) and firm Lal Singh Man Singh, defendant-respondent 3, who was a subsequent mortgagee of the same property (vide the mortgage deed dated 9th March 1931) for a sum of Rs. 3000. Basheshar Nath took no interest in the proceedings and has been proceeded against ex parte. Defendant-respondent 3, in the written statement, made a mention of his own separate claim against the property in suit under the mortgage deed dated 9th March 1931, and prayed that he be excused from attendance in respect of this suit.

Defendant-respondent 2 contested the suit. He raised a preliminary objection that the suit as framed cannot lie. On facts, he denied knowledge of the mortgage deed in favour of the plaintiff. He contended that he purchased the property in suit at a Court sale in connexion with the final mortgage decree for a sum of Rs. 8200 in favour of R. B. Chuni Lal against Basheshar Nath. The plaintiff had filed objections under O. 21 Rule 58, Civil P. C., twice in connexion with those proceedings which were dismissed. The plaintiff not having instituted a suit under O. 21, R. 63, Civil P. C., was now barred from proceeding against the property. In the end he pleaded that in case a decree be passed in favour of the plaintiff it should be subject to his charge of Rs. 8200 plus interest at the rate of Re. 1 per cent per month. Sardar Shah Singh, Senior Sub-Judge, Peshawar, framed the following issues :

(1) Whether the suit lies in the present form ?
(2) Whether the suit is barred under O. 21, R. 63?

(3) Is the plaintiff entitled to a decree for sale and for what amount? (4) If so, is defendant 2 entitled to a prior charge and for what amount? (5) To what relief is the plaintiff entitled and against whom?

The learned Senior Sub-Judge decided the first two issues against the plaintiff and dismissed the plaintiff's suit. The appeal against the judgment of the Senior Sub-Judge was accepted on 28th June 1937 by a Bench of this Court[1]; the decision on the first two issues was reversed and the case was remanded under O. 41, R. 23, Civil P. C., for decision on the remaining points. The plaintiff proved his mortgage deed dated 22nd August 1929, by producing the attesting witness Acharaj Ram, P. W. 1, the scribe Faqir Chand, P. W. 3, and the son of the plaintiff Jaggan Nath, P. W. 2, in whose presence the mortgage deed was executed and the payment of the consideration effected. Jaggan Nath, P. W. 2, further proved the accounts of the plaintiff in respect of the mortgage in suit. The contesting defendant produced R. B. Chuni Lal as D. W. He stated that the property in suit was mortgaged to him for a sum of Rs. 5000 by a registered mortgage deed dated 6th November 1924. He added that the deed had been signed by Basheshar Nath in his presence and that it was registered in his presence. He further stated that he instituted a suit on the basis of the mortgage deed, and that it was decided in his favour on 30th October 1930. He admitted having realized his full decretal amount. It may be noted that there is not a word about the passing of the consideration for the mortgage deed dated 6th November 1924, though the fact is hardly material now, for the matter stands adjudicated and fully settled. Some evidence was led by the plaintiff in rebuttal. He sought to establish that Basheshar Nath has been dealing with the property in dispute as his own notwithstanding the Court sale in favour of Jaggan Nath, defendant-respondent 2. He has been from time to time residing in it. He has been letting out portions of it and one Lakhmi Chand has been realizing rents from the tenants on behalf of Basheshar Nath.

The learned Senior Sub-Judge (K. S. Mufti Mohammad Yakub Khan this time) held that the plaintiff was entitled to a decree with costs on the basis of his mortgage with interest at the rate of 6 per cent. per annum subject to a prior charge of Rs. 8200, plus stamp duty of the sale certificate, of Jaggan Nath, defendant-respondent 2. The reason for putting the prior charge was that Jaggan Nath was a stranger and was a bona fide purchaser for value and in accordance with the rule in A I R 1937 Pesh 5[2] was entitled to be recompensed.

The plaintiff has come up on appeal. His prayer in appeal is that the clause regarding the prior charge of Rs. 8327.8.0 of Jaggan Nath over the property in suit be deleted. Jaggan Nath, defendant-respondent 2, has filed cross-objections and prays for an additional charge of Rs. 221.4.0 and for his costs in the lower Court.

The learned counsel for the appellant has argued that defendant-respondent 2 is an auction-purchaser of the property, and as such cannot acquire better title than the mortgagor himself. The proceeding in which the Court sale was made was on attachment in the decree of R. B. Chuni Lal. The learned counsel contends that R. B. Chuni Lal did not specifically ask for a mortgage decree, nor did he obtain a decree in accordance with the provisions of O. 34, Civil P. C. R. B. Chuni Lal did not behave as if he was the holder of the mortgage decree. As soon as the decree was passed he applied for attachment. The sale, though effected a considerable time afterwards, was in consequence of that very attachment. The learned counsel contends that there is nothing in law to prevent the mortgagee from relinquishing his right to the mortgage, and to sue the mortgagor on the personal covenant to pay. In support of this proposition he has referred us to 24 All 456,[3] A I R 1925 Mad 1083[4] and A I R 1925 Mad 1101[5] at p. 1102. So far as the general principle is concerned, we are in agreement that the mortgagee can relinquish the security, and can sue on the personal covenant to pay. In 24 All 456[3] the mortgagee sued on the basis of the simple mortgage, and prayed that a mortgage decree be passed in his favour, or some other relief may be granted, to which he may be eligible. But later on, he made an application in which he specifically relinquished the security of the property and prayed for a simple money decree, based upon the per-

1. Moti Ram Nihal Chand v. Basheshar Nath, *Reported in* (1937) 24 A I R Pesh 97=171 I C 810.

2. Gurdit Singh v. Kalumal, (1937) 24 A I R Pesh 5=167 I C 698.

3. Sukhdev Prasad v. Lachman Singh, (1902) 24 All 456=1902 A W N 114.

4. Candu Kutty v. Narayana Nayar, (1925) 12 A I R Mad 1083=87 I C 557.

5. Ramaswami Naidu v. Subbaraya Thevar, (1925) 12 A I R Mad 1101=88 I C 648=49 M L J 490.

sonal covenant to pay. In A I R 1925 Mad 1083[4] the suit was for recovery of the arrears of rent and for the ejectment of the mortgagor from the house. That was a case of a usufructuary mortgage and it was held that the decree passed was not a preliminary decree, but was executable as it was. In A I R 1925 Mad 1101[5] the dispute was regarding the assignment of a compromise decree. It was held that the creation of a charge by the decree in a money suit did not convert the suit into a mortgage suit. The suit was not based on a mortgage, but was for the specific performance or for damages in respect of which the compromise decree was passed.

It is abundantly clear that the rule in none of the cases cited by the learned counsel is applicable to the facts of the present case. The learned counsel dived through the original file as well as the execution file of R. B. Chuni Lal's suit, and was at pains to glean a point from here and a point from there with a view to build up his case, but it was an unnecessary tax on time. R. B. Chuni Lal's suit was based upon the simple mortgage in his favour executed in the year 1924. The decree was passed on 30th October 1930. As it happened, the decree and the judgment contained no reference to the property. R. B. Chuni Lal applied for the amendment of the judgment and the decree, and prayed that the words "against the mortgaged property" be added. The words were inserted in the judgment itself and an amended decree sheet was made out on 9th December 1930. R. B. Chuni Lal, it may be seen, behaved in quite a different manner, in fact, diagonally opposite, to the manner in which Sukhdeo Prasad acted in his suit: 24 All 456.[3] When R. B. Chuni Lal wanted the property left out by inadvertence to be brought into his decree, Sukhdeo Prasad relinquished his right to the property and by a special application prayed for a simple money decree.

The learned counsel for the appellant has argued that the decree sheet was not prepared in R. B. Chuni Lal's case in accordance with O. 34, Civil P. C., and the attachment of the property was effected on the very day the amended decree was passed. The decree had not been made a preliminary decree, and no time was allowed for the payment of the decretal amount, nor was any mention made in the decree that on the expiry of the time allowed the decree would be made final. We are not convinced with this argument. We grant that the procedure was a bit lax in the Court of the District Judge, who passed the decree. When the application for the amendment of the decree was made by R. B. Chuni Lal, it was up to the District Judge to see whether the decree was in conformity with the judgment. The fact is that the decree as framed was in conformity with the judgment dated 30th October 1930. The District Judge realized that the prayer of the plaintiff that the decree be passed against the property was correct, but he did not know exactly how to do it. The correct procedure for the District Judge was to review his judgment, with a view to make it in conformity with O. 34, Civil P. C., and to pass a preliminary decree based upon it. What the District Judge actually did was to amend his judgment of 30th October 1930 by inserting the words relating to the mortgaged property therein, and then to draw up an amended decree. From the laxity in the procedure, which was, we have reason to believe, based upon ignorance of the correct law, we conclude that what the District Judge wanted to do was to pass a decree for the sale of the mortgaged property. The plaintiff had never relinquished his claim to the mortgaged property. The fact is that the plaintiff wanted to proceed against the property as soon as possible. If the plaintiff wanted to relinquish his claim to the property, there was no reason for him to apply for the amendment of the decree. In accordance with the judgment of 30th October 1930 he could have at once proceeded against the person of the judgment-debtor, or against the property in question or any other property of the judgment-debtor in accordance with the original decree. The fact that he went in for getting the decree amended shows that he primarily wanted to proceed against the mortgaged property. As soon as the decree-sheet was amended, he proceeded against the mortgaged property. Nobody appears to have known that in the case of a decree for the sale of the mortgaged property no attachment was necessary. But anyhow it was an irregularity, just as there had been so many other irregularities in the procedure. We are satisfied that R. B. Chuni Lal's suit was for proceeding against the mortgaged property primarily, and that the amended decree was to the same effect.

In this view we are fortified by the rule in 26 Cal 166,[6] Civil Appeal No. 6/4 of

6. Lal Behary Singh v. Habibur Rahman, (1899) 26 Cal 166=3 C W N 8.

1932[7] of this Court, and Further Civil Appeal No. 166/64 of 1928,[8] decided by this Court on 1st November 1928. It has been clearly ruled in all these cases that although the decree is not made out in the proper form, the decree-holder is entitled to realize his decree from the mortgaged property. The Court sale was effected in favour of defendant-respondent 2 in the execution of the amended decree. This fact would determine the right of the auction-purchaser in respect of the mortgaged property against any subsequent mortgagee.

The learned counsel for the appellant has argued that the lower Court had fixed a charge of Rs. 8200 plus Rs. 127.8.0 on the property in question of defendant-respondent 2. The learned counsel contends that the lower Court while fixing this charge on the property was under the impression that defendant-respondent 2 (the auction-purchaser) was subrogated to the rights of the mortgagee. The doctrine of subrogation is given in S. 92, T. P. Act. The Section contains a principle of equity, and hence is applicable to this Province, though the Act itself is not applicable. The learned counsel contends that the doctrine of subrogation as given in S. 92, T. P. Act, is not applicable to the facts of the present case. We do not feel called upon to discuss this point at any length, because the learned counsel for defendant-respondent 2 concedes that the principles of the Transfer of Property Act apply to this Province and also concedes that the doctrine of subrogation is not applicable to the facts of the present case. The learned counsel for defendant-respondent 2 submits that the principles of S. 101, T. P. Act, are applicable to the facts of the present case. S. 101 of the Act reads as follows:

> Any mortgagee of, or person having a charge upon, immovable property, or any transferee from any such mortgagee or charge-holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be, without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of or person having a subsequent charge upon, the same property; and no such subsequent mortgagee or charge-holder shall be entitled to foreclose or sell such property without redeeming the prior mortgage or charge, or otherwise than subject thereto.

The learned counsel for defendant-respondent 2 submits that the auction-purchaser represents the interests of the mortgagee as well as the mortgagor in the property purchased by him. There is no merger of the interests of the two. So far as the interests of the mortgagor in that property are concerned, the learned counsel concedes that his client cannot legally have any rights to them, but he argues, and we consider with a good deal of force, that the interests of the mortgagee in the property do vest in him as an auction-purchaser. The principle in A I R 1922 P C 11[9] applies to this case. In fact A I R 1922 P C 11[9] is on all fours with the present case. The rule in that case was that where a prior mortgagee brings the property to sale in execution of a decree on his mortgage without impleading the puisne mortgagee, as is the case in the present case, to the suit the rights of the puisne mortgagee are not affected by the sale. But if the puisne mortgagee brings a suit on his mortgage (as is the case here) the auction-purchaser in the execution of the prior mortgage decree can use the prior mortgage rights as a shield and can claim payment of the amount due under the prior mortgage decree, where the puisne mortgagee seeks a decree for sale in his favour (as is the case here).

A similar view was taken in A I R 1928 Rang 189,[10] A I R 1922 Bom 334,[11] A I R 1934 Pat 70[12] and A I R 1938 Cal 524.[13] The position of defendant-respondent 2 in this case, in our judgment, is governed by the rule in A I R 1922 P C 11.[9] Defendant-respondent 2's position would be what the position of R. B. Chuni Lal would have been, had defendant-respondent 2 not purchased the property at the Court sale. We therefore come to the conclusion that essentially the decision arrived at by the lower Court was correct, though we have adopted different reasoning to support it. We dismiss the appeal with costs. Pleader's fee Rs. 150.

The learned counsel for defendant-respondent 2, in this connexion, makes a reference to the cross-objections filed by

7. Haji Abdur Rashid v. Mian Akbar Shah, Civil Appeal No. 6/4 of 1932, decided on 19th February 1932.
8. Bhag Chand v. Malik Ahmad Jan, Further Civil Appeal No. 166/64 of 1928.
9. Mt. Sukhi v. Ghulam Safdar Khan, (1922) 9 A I R P C 11=65 I C 151=48 I A 465=43 All 469 (P C).
10. T. C. Bose v. Obedur Rahman, (1928) 15 A I R Rang 189=111 I C 132=6 Rang 297.
11. Dattatraya Mangeshya v. Venkatesh Basudeo, (1922) 9 A I R Bom 334=69 I C 165=24 Bom L R 741.
12. Ramanandan Prasad Singh v. Ram Das, (1934) 21 A I R Pat 70=155 I C 663.
13. Dhapubai v. Chandra Nath, (1938) 25 A I R Cal 524 = 176 I C 745 = 67 C L J 429 = 42 C W N 721.

his client, in which he prays for his costs in the lower Court and for the inclusion of an additional sum of Rs. 221-4-0 in his charge on the property. The learned counsel for defendant-respondent 2 has made a detailed calculation, which has not been challenged by the learned counsel for the appellant. We have, instead of adopting the calculation in the body of the judgment, chosen to put the calculation on a separate sheet and annex the same to the judgment. According to that calculation, defendant-respondent 2 is entitled to Rs. 9023-8-0 in all. The lower Court has allowed him Rs. 8327-8-0, that being the amount of the purchase money plus the stamp duty on the sale certificate. The cross-objections are in respect of Rs. 278-12-0 costs of the lower Court, plus Rs. 221-4-0 as part of the interest. He waives the rest of the claim.

We are of the opinion that the cross-objections are justifiable. Defendant-respondent 2 had succeeded in establishing his charge on the property and the lower Court had inadvertently not allowed him his costs of the suit. The charge on the property of defendant-respondent 2, as already observed, comes to a much higher figure than the charge allowed by the lower Court. The cross-objections are in respect of a part of the amount found to be in excess. He is entitled to it. We therefore accept the cross-objections with costs and amend the decree of the lower Court so as to make the charge of defendant-respondent 2 on the mortgaged property to be Rupees 8827-8-0 instead of Rs. 8327-8-0.

D.S./R.K. *Order accordingly.*

A. I. R. 1939 Peshawar 38

ALMOND J. C.

Ramditta Mal L. Duni Chand
Petitioner

v.

Emperor.

Misc. Appln. No. 16 of 1939, Decided on 21st July 1939.

(a) Criminal P. C. (1898), S. 539-A — Chief Minister is public servant.

The Chief Minister of a province is covered by the definition of "public servant". [P 39 C 1]

(b) Criminal P. C. (1898), S. 539—'Commissioner'—Meaning explained — Affidavit sworn before Commissioner of Oaths appointed under S. 139, Civil P. C., is not sworn before person authorized to administer.

The words "any Commissioner for taking affidavits in any Court of Record in British India" do not mean any Commissioner for taking affidavit for use in any Court of Record in British India. The Commissioner referred to in S. 539 is a person who is actually sitting in the Court precincts where he is entitled to sit and who has been authorized to administer oaths within the Court precincts. An affidavit cannot be said to have been sworn before a person who is authorized to administer the oath if it is sworn before a Commissioner of Oaths appointed under S. 139, Civil P. C. [P 39 C 2]

(c) Criminal P. C. (1898), S. 526—Affidavit not sworn before High Court—Application for transfer cannot be entertained.

Where an affidavit is filed along with the application for transfer under S. 526 but the affidavit purports to have been sworn before an officer of the District Judge's Court and not before the High Court as required by S. 539 the said affidavit not being sufficient for the purposes of S. 526 (4) the application for transfer cannot be entertained: *A I R 1931 Cal 710, Rel. on.* [P 39 C 2]

(d) Criminal Trial – Practice—Magistrate can accelerate hearing of case.

There is nothing in the Code of Criminal Procedure to prevent a Magistrate from accelerating the hearing of a case. [P 40 C 1]

L. Charanjit Lal — *for Petitioner.*
Sardar Raja Singh, Advocate-General — *for the Crown.*

Order.—This is an application by Ramditta Mal for the transfer of a case pending against him under S. 161, I. P. C., from the Court of the City Magistrate to some other Court. Briefly the facts on which the application is made are: (1) that the Chief Minister of the Province has directed the prosecution and that the Magistrate must necessarily be under his influence; and (2) that the Magistrate himself has been guilty of certain conduct which gives the petitioner a reasonable apprehension that he will not receive a fair trial. As regards the first of these allegations it appears from the evidence which was recorded at a preliminary inquiry that the Chief Minister received information that the petitioner was demanding a bribe from some persons who had official business to transact with him. The Chief Minister therefore caused his personal assistant to mark a five rupee note which was offered by the persons concerned in the case to the petitioner. The Chief Minister then himself proceeded to the office of the petitioner and called there the Assistant Commissioner of Peshawar before whom the note was recovered from the petitioner.

As regards the allegations against the City Magistrate himself my attention has been drawn to the following facts: On 20th May the case had been fixed for hearing on 29th May. On that date, i. e. 20th May which was a Saturday, the Magistrate caused a notice to be served on the petitioner that the case would be taken upon

22nd May, i. e. on Monday. On that day counsel for the petitioner appeared before the City Magistrate and obtained an adjournment on the ground that his client was not prepared for the case. The City Magistrate then fixed the case for 31st May. On 24th May when the petitioner was not present the Magistrate made an order for investigation of the case by the police under S. 155, Criminal P. C. The learned Advocate-General has raised two preliminary points as regards the mode in which the petition has been presented. He contends in the first place that the affidavit which has been presented with the petition is not sworn before a person competent to administer an oath for the purpose of S. 526, Criminal P.C., and he further contends that the affidavit is lacking in particulars prescribed by S. 539-A of the Code with respect to para. 7 of the application. Para. 7 of the application reads as follows :

> That the Honourable the Premier on the face of it has made himself personally interested in the case and the petitioner has learnt that this case is a result of a deeply laid conspiracy to weed out the Hindu employees of Government.

Section 539-A, Criminal P. C., requires that when an application is made to any Court in the course of a proceeding under the Code and allegations are made thereunder respecting any public servant the applicant may give evidence of the facts alleged in the application by affidavit and the Court may order that evidence relating to such facts be so given. Affidavits under this Section are to be confined to, and to state separately, such facts as the deponent is able to prove from his own knowledge and such facts as he has reasonable grounds to believe to be true, and in the latter case the deponent is to state clearly the grounds of such belief.

Learned counsel for the petitioner has contended that S. 539-A has no application to the facts of this case as the Honourable the Chief Minister is not a public servant within the meaning of this Section. The expression "public servant" is defined in S. 21, I. P. C., and under S. 4 (2), Criminal P. C., has the same meaning in that Code. One of the definitions of "public servant" is an officer in the service or pay of Government. It is clear that the Honourable the Chief Minister is covered by the definition of "public servant." It is further clear that the affidavit filed with the petition which is extremely brief in nature gives no ground for the belief expressed in para. 7 of the application. I hold therefore that the affidavit is defective in this respect.

It is in my opinion further sworn before a person who was not authorized to administer the oath in this case. It was sworn before a Commissioner of Oaths appointed under S. 139, Civil P. C. S. 539, Criminal P.C., prescribes the persons before whom an oath may be made for use before a High Court. Learned counsel for the petitioner contends that the commissioner before whom the oath has been taken is covered by the expression in S. 539, Criminal P. C.: "any commissioner for taking affidavits in any Court of Record in British India." He desires to interpret those words as any commissioner for taking affidavits for use in any Court of Record in British India. It is in my view impossible to read into that Section these extra words which learned counsel would put into it. The Commissioner referred to in S. 539, Criminal P. C., appears to me to be a person who is actually sitting in the Court precincts where he is entitled to sit and that he has been authorized to administer oaths within the Court precincts. I am therefore of opinion that the affidavit has not been made before an authorized officer.

The learned Advocate-General has referred me to a case reported in A I R 1931 Cal 710[1] in which it was laid down by a Bench of the Court that where an affidavit is filed along with the application for transfer under S. 526 but the affidavit purports to have been sworn before an officer of the District Judge's Court and not before the High Court as required by S. 539 the said affidavit not being sufficient for the purposes of S. 526 (4) the application for transfer cannot be entertained. No authority to the contrary has been cited by learned counsel for the petitioner. I hold therefore that on technical grounds this application should be dismissed. Apart from technical grounds I am of opinion that no case has been made out on the merits for a transfer. The City Magistrate is in his judicial capacity in no sense subordinate to the Honourable the Chief Minister and there can be no reasonable ground for believing that he would record a conviction in this case merely because he thought it was the desire of the Honourable the Chief Minister that a conviction should be so recorded.

Furthermore as regards the action of

1. Mahim Chandra v. Amjad Ali, (1931) 18 A I R Cal 710 = 1931 Cr C 990 = 134 I C 278 = 33 Cr L J 61.

the Magistrate himself it appears to have been entirely legal throughout. There is nothing in the Code of Criminal Procedure to prevent a Magistrate from accelerating the hearing of a case, as the learned Magistrate did from 29th to 22nd May. After having done this the learned Magistrate at once acceded to counsel's request that it should not be heard on the 22nd when an application was made for the purpose. The order for investigation by the police is a perfectly legal one which can be made under S. 155, Criminal P. C. I am therefore of opinion that on the merits the petitioner has made out no case for transfer. I accordingly dismiss this application. The learned Advocate-General has asked for compensation. I do not think that it can be said that the application was frivolous or vexatious.

D.S./R.K. *Application dismissed.*

A. I. R. 1939 Peshawar 40

ALMOND J. C.

Dil Jan — Petitioner.

v.

Municipal Committee, Peshawar.

Criminal Ref. No. 166 of 1939, Decided on 19th May 1939, reported by Addl. Sess. Judge, Peshawar, D/- 11th May 1939.

(a) Punjab Municipal Act (3 of 1911), S. 81 (as amended in 1933)—Interpretation—Rent if not recoverable under the Act cannot be recovered by procedure prescribed by S. 81.

On a plain interpretation of S. 81 it is clear that any rent which is recoverable under Sec. 81 of the Act must be one which is claimable by the committee under the Act. If the rent claimed is not recoverable under the Municipal Act but under a contract apart from the Act, the same cannot be recovered by the procedure prescribed under S. 81: *A I R 1938 Lah 29, Foll.* [P 40 C 2]

(b) Interpretation of Statutes — Objects and reasons.

It is a fundamental principle of the interpretation of statutes that if they are capable of an interpretation as they stand, the objects and reasons for which they were passed must not be considered. [P 40 C 2]

Sh. Ghulam Naqshband—*for Petitioner.*

M. Nur Elahi — *for the Municipal Committee.*

Order.—An application was made before a Magistrate under S. 81, Municipal Act, by the Municipal Committee, Peshawar, for recovery of the rent of a shop which had been leased by the committee to Diljan under a lease deed. The Additional Sessions Judge reported the case under Sec. 438, Cr. P. C., with a recommendation that the parties be directed to seek their remedy in a Civil Court. The learned Additional Sessions Judge relied on a ruling of the Lahore High Court reported in A I R 1938 Lah 29.[1] Prior to 1933, S. 81 of the Act commenced as follows :

> Any arrears of any tax, water rate or fee or any other money claimable by a committee under this Act may be recovered . . . .

By Punjab Act 3 of 1933 the word "rent" was substituted for the word "or" where it first occurred and the same amendment has been made applicable to this Province by Punjab Municipal (N. W. F. P. Amendment) Act of 1938 under Notification of the Legislative Department No. 676 L. D. dated 8th April 1938. The interpretation of the amended Section came up before a Divisional Bench of the Lahore High Court in the case relied upon by the learned Additional Sessions Judge and it was there held that as it had not been shown whether the rent was recoverable by the committee under the Municipal Act, the procedure under Sec. 81 could not be adopted. It is a fundamental principle of the interpretation of statutes that if they are capable of an interpretation as they stand, the objects and reasons for which they were passed must not be considered, and on a plain interpretation of this Section it is clear to my mind that any rent which is recoverable under S. 81 of the Act must be one which is claimable by the committee under the Act. If these words were not to be read with the word "rent," then the Section would read : "Any rent may be recovered on application to a Magistrate," which in my opinion cannot have been contemplated. Learned counsel for the Municipal Committee has suggested that the rent in this case is claimable by the committee under the Act because under S. 47 of the Act all contracts by the Municipal Committee are required to be entered into according to certain forms. That Section is silent, however, as to how the rent is to be recovered. For these reasons I am in agreement with the view expressed in A I R 1938 Lah 29[1] and hold that the rent claimed in this case is not recoverable under the Municipal Act but under a contract apart from the Act and therefore cannot be recovered by the procedure prescribed unde S. 81. I accordingly accept the recommendation of the Additional Sessions Judge and direct the Municipal Committee to seek its remedy in a Civil Court.

N.S./R.K. *Recommendation accepted.*

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1. Guruditta Mal v. Emperor, (1938) 25 A I R Lah 29=173 I C 211=39 Cr L J 286.

A. I. R. 1939 Peshawar 41

ALMOND J. C. AND SOOFI J.

Haji Khan Gul Khan —
Decree-holder—Appellant.
v.
Chothu Ram and another —
Judgment-debtors — Respondents.

Appeal No. 69/18 of 1938, Decided on 12th June 1939, from judgment of Senior Sub-Judge, Dera Ismail Khan, D/- 3rd June 1938.

(a) Evidence Act (1872), S. 92, Proviso (1)—Mistakes should be genuine and accidental.

The mistakes contemplated by proviso (1) to S. 92 are genuine and accidental mistakes, just as the misdescription of the property : *A I R 1916 Mad 795; A I R 1921 Cal 730 and A I R 1939 Bom 151, Ref.* [P 43 C 2]

(b) Evidence Act (1872), S. 92, Proviso (6)—Terms of written contract clear—Necessity of deducing real terms from conduct of parties does not arise.

Where the terms of written contract are perfectly clear the necessity of deducing the real terms from the conduct of the parties and the reconstituting of the contract in accordance therewith does not arise: *A I R 1924 P C 162 and A I R 1932 All 600, Disting.* [P 43 C 2]

(c) Mortgage—Simple—Unconditional covenant to repay — No delivery of possession—Foreclosure proceedings not contemplated—Time allowed for payment of debt—Mortgage is simple—Personal liability of mortgagor exists unless there is specific contract to contrary.

Where there is an unconditional covenant to repay the loan and there is no delivery of possession, nor is the possession to be delivered under any contingency and foreclosure proceedings are neither contemplated nor actually resorted to and time is allowed for the payment of the debt secured under the deed, the mortgage is simple mortgage and mortgagor is personally liable unless there is specific contract to the contrary: *29 Mad 491; A I R 1934 Pat 433, Rel. on; 10 Cal 740 (PC); 16 Cal 540; 13 Mad 192; 27 Mad 86; 12 O C 275; 8 I C 302 and A I R 1939 All 260, Expl. and Disting.* [P 43 C 2; P 44 C 1, 2]

Saadudin Khan—*for Appellant.*

Raja Singh—*for Respondents.*

Soofi J. — Haji Khan Gul, appellant, is one of the mortgagees under the mortgage deed Ex. P. 1 dated 3rd June 1933, the other co-mortgagees being his three brothers Haji Sahib Jan, Musa Jan and Nazar Shah. Ex. P. 1 is a registered document executed by Chothu Ram and Bodhraj, the respondents, in favour of the appellant and his three brothers. A decree under S. 8 of the F. C. R. was obtained by the present appellant on the basis of Ex. P. 1 from the Court of the Deputy Commissioner, D. I. Khan on 22nd April 1936. This decree was set aside by the Commissioner under the F. C. R. on 28th July 1936. Haji Khan Gul then instituted a suit in the Court of the Senior Sub-Judge, D. I. Khan on 30th March 1937, on the basis of Ex. P. 1. A preliminary decree was passed under O. 34, R. 4, Civil P. C. on 18th May 1937. The decretal amount was Rs. 14,100 and there was a provision for future interest on the principal sum at the rate of 6 per cent. per annum. It was directed that in case the decretal amount is not paid by 18th of November 1937, the mortgaged property would be sold.

The decree was not satisfied by 18th November 1937, hence the decree-holder applied for the making out of a final decree. The decree was made final on 7th January 1938. It was directed that the house which was shown as security for the debt in Ex. P. 1 be sold. On 10th January 1938, an application for the execution of the decree was put in. The house was sold in the execution of the decree and its sale was confirmed on 22nd March 1938. The decree-holder himself was the auction purchaser and he filed a receipt for a sum of Rs. 2375. The decree-holder then pressed that the execution should proceed against the persons and other property of the judgment-debtors, a prayer for which had already been put in by him in the execution application. To this prayer the judgment-debtors objected on the ground that the mortgage deed, Ex. P. 1 had been incorrectly worded and was not in accordance with the agreement arrived at verbally, and that the mistake had been rectified by the ruqa Ex. P. 2 written by the co-mortgagees Musa Jan and Nazar Shah one day after the registration of the mortgage deed. The lower Court brought out the following points for determination between the parties:

1. Whether Ex. P. 2 is admissible in evidence ? Onus on J. Ds.
2. Whether two brothers of the decree-holder executed Ex. P. 2 ? Onus on J. Ds.
3. Whether the decree-holder was bound by Ex. P. 2 ? Onus on J. Ds.

The learned S. S. J. recorded some evidence on behalf of the parties and came to the conclusion that Ex. P. 2 had been executed by Musa Jan and Nazar Shah, brothers of the decree-holder, that it was admissible in evidence, and that the decree-holder was bound by it. The learned S. S. J. then by his order dated 3rd June 1938 allowed the objections of the judgment-debtors and held that the judgment-debtors' persons and other property were not liable for the decretal amount. It is against this order of the Senior Sub-Judge that this appeal has

been preferred by Haji Khan Gul, decree-holder. Before we proceed to discuss the case as argued before us, it will be desirable to examine the mortgage deed Ex. P. 1 and the ruqa Ex. P. 2 in detail, as it would be necessary to refer to the text at one stage or another in the discussion. Apart from that the two documents bring into relief the relations between the parties. Ex. P. 1 reads as follows:

We, Lala Chotu Ram and Lala Bodh Raj, sons of Lala Jhangi Ram, caste Mehndiratta, residents of Kulachi, now staying at Dera Ismail Khan, do hereby, while in enjoyment of sound senses and intellect and of our own free will and consent, declare as follows:

One residential house consisting of four kothas, one verandah, one kitchen, one bath, one drawing room for men, one deorhi roofed and one unroofed haveli bounded by four walls which has got two entrances on the south side and two on the east side (bounded on the south by the house of Chowdhri Ram Mehndiratta and blind passage, on the north by the house of Beli Ram Gulati, on the east by blind alley and house of L. Daulat Ram Mehndiratta and on the west by public passage) situate at Mohalla Brahimzai, Kulachi, District Dera Ismail Khan owned and possessed by us has now been mortgaged by us to, (1) Haji Sahib Jan Khan, (2) Musa Jan Khan, (3) Khan Gul Khan and (4) Shah Khan, sons of Juma Gul Khan, caste Shah Budin Khel Mahmud Khel, Pathan, residents of Zurmat, Afghanistan, at present staying at Dera Ismail Khan, without possession for Rupees 12,000 current coin, half of which comes to Rupees 6000 on the following conditions: (1) The mortgage is without possession and we executors shall remain in possession of the property mortgaged. (2) The mortgage money shall be paid to the mortgagees without interest on 2nd Bisakh Sambat 1991. (3) If the mortgage money is not paid to the mortgagees on 2nd Bisakh 1991 interest at the rate of 8 annas per cent. per mensem shall be charged on the mortgage money thereafter from the date of default and the mortgage money with interest and without interest shall be payable on demand. The mortgaged property shall be liable for the payment of the mortgage money with interest as well and the mortgagees shall be competent to recover the mortgage money with interest jointly and severally. The payment of the mortgage money with interest shall not be given a set off if not supported by a receipt. (4) The mortgage money has been received thus. A sum of Rupees 14,000 on account of principal and Rs. 722 on account of balance of interest, total Rupees 14,722 was due to the mortgagees from us executants on the basis of a pro-note dated 1st Chet Sambat 1987. A separate promissory note for Rs. 2722, out of the said sum, has been executed in favour of the mortgagees and the balance Rs. 12,000 has been given a set off against the mortgage money of this deed of mortgage. Thus the entire mortgage money has been received and the aforesaid promissory note has been cancelled. We shall have no claim for the non-receipt of the mortgage money nor shall the mortgagees have any more claim of any sort against us, the executants, on the basis of the aforesaid promissory note. Of the mortgagees, Musa Jan Khan and Nazar Shah Khan are now present and they accept all the terms noted above, and having heard the above terms they have placed their signatures in token of acceptance. If their brothers Sahib Jan Khan and Khan Gul Khan raise any objection with regard to this deed of mortgage, the mortgagees now present here, namely Musa Jan Khan and Nazar Shah Khan, shall be responsible therefor. Hence this deed of mortgage of a house without possession has been executed to serve as authority.

P. W. 2 reads as follows:

Greetings. A sum of Rs. 14,000 principal and Rs. 722 on account of balance of interest was due to us from you on a pro-note. We have taken on mortgage from you one house for Rs. 12,000 under deed of mortgage dated 2nd June 1933 and on it only the mortgaged house is liable for the payment of the principal mortgage money and interest. There is no personal liability and no other property is liable. If the said deed of mortgage is interpreted to put any personal liability on you, still you have no personal liability and the personal liability may be considered to have been abandoned because the verbal contract between us was to this effect. The costs of stamp and the expenses of registration were to be borne by us. It has been given a set off in the pro-note for the balance of Rs. 2722. We and you have got no other money dealings between us. Hence these lines have been executed by way of an agreement to serve as authority.

Sd. and thumbmarked:

1. Nazar Shah Khan,
2. Musa Jan Khan.

In appeal it has been argued by the learned counsel for the appellant that the document Ex. P. 1 creates a simple mortgage as defined in S. 58 (b), T. P. Act. By its very nature, the simple mortgage presupposes the personal liability of the mortgagor. The property of the mortgagors other than the property under mortgage is also liable. The learned counsel has further argued that the writing, Ex. P. 2 was executed a day after the registration of Ex. P. 1, and thus it amounted to a subsequent contract, and as such it could not modify the terms of Ex. P. 1 to the detriment of the non-signatories of Ex. P. 2. Under Ex. P. 1, the debt had been secured by the hypothecation of the house at Kulachi. The personal liability of the mortgagors, and the liabilities of the other property, were still there. Musa Jan and Nazar Shah, by the execution of Ex. P. 2 could not bind the appellant and Haji Sahib Jan Khan, the non-signatories of Ex. P. 2. As co-creditors Musa Jan and Nazar Shah had no authority to relinquish a right vested in the absent co-creditors. The learned counsel for the appellant has further argued that if it be held that Ex. P. 2 just reiterates an oral contract that was contemporaneously agreed upon by the parties to Ex. P. 1, then S. 92, Evidence Act, is a bar to its admissibility.

The learned counsel for the judgment-debtor respondents has conceded the position that the document Ex. P. 2 does not create a fresh agreement subsequent to the execution of Ex. P. 1. He submits that the position taken by his clients has been consistent throughout. He contends that Ex. P. 2 just rectified the terms embodied in Ex. P. 1. The terms as embodied in Ex. P. 1 had not been agreed upon by his clients, and had been put in on account of mistake on the part of the scribe. As soon as his clients realized that Ex. P. 1 did not represent their real intention, they hastened to approach Musa Jan Khan and Nazar Shah who had negotiated with them for the liquidation of the debt, and got the writing Ex. P. 2 from them with a view to correct the errors in Ex. P. 1 and to make Ex. P. 1 in consonance with the terms verbally agreed upon. The learned counsel further argues that Ex. P. 2 is admissible in evidence as indicating conduct between the parties. He further submits that the agreement, as actually arrived at between the parties, that is to say the agreement Ex. P. 1, as corrected by the writing Ex. P. 2, was not a simple mortgage, but was an anomalous mortgage and hence there was no implied liability of the mortgagors' persons and their property other than the mortgaged property.

The points for determination, as brought out by the arguments of the learned counsel of the parties, are as follows: (1) Whether the document Ex. P. 2 is admissible in evidence? (2) Whether the contract between the parties contemplates the liability of the persons and the other property of the respondents?

(1) The learned counsel for the respondents lays down two abstract propositions of law. Firstly he submits that by virtue of proviso (1) to Sec. 92, Evidence Act, the mistakes of fact or law in a document can be rectified by adducing evidence as to the contemporaneous oral contract between the parties, and in support of this proposition he has referred us to 31 I C 671,[1] 66 I C 345[2] and A I R 1939 Bom 151.[3] Secondly he has submitted that proviso (6) to S. 92, Evidence Act, contemplates the rectification of a document and the interpretation of its terms by the evidence of the conduct of the parties. He has cited 80 I C 807[4] and A I R 1932 All 600[5] in this connexion.

We have carefully considered the two legal propositions and we have come to the conclusion that they have no application to the facts of the present case. In the present case it is alleged that the parties were agreed as to the terms of the mortgage but the scribe wrongly drafted the mortgage deed. The scribe has not been produced. The document was executed on 2nd June, and was presented for registration on the following day. There was ample time to understand the terms. The mistakes contemplated by proviso (1) to Sec. 92 are genuine and accidental mistakes, just as the misdescription of the property as was the case in all the three rulings cited by the learned counsel for the respondents.

The terms of Ex. P. 1 are perfectly clear so the necessity of deducing the real terms from the conduct of the parties and the reconstituting of the contract (the mortgage deed) in accordance therewith does not arise. Now what is the evidence of conduct. Para. 3 of the written statement of the respondents in the suit (dated 15th April 1937) shows that they had recourse to legal experts after the registration of the document. The statement of Bodh Raj, respondent, as D. W. 1, in these proceedings is also to a similar effect. Musa Jan was approached by the respondents. He told them that he would consult his brothers (para. 3 of the written statement.) If the verbal agreement between the parties was already clear where lay the necessity on the part of Musa Jan to consult his brother, and what was the point in the respondents following Musa Jan from Kulachi to Dera Ismail Khan? We therefore hold that it has not been established that the terms which are the subject matter of Ex. P. 2 had been settled verbally contemporaneously with the execution of Ex. P. 1. We also come to the conclusion that the document Ex. P. 2 is not admissible in evidence either under proviso 1 or proviso 6 to S. 92, Evidence Act.

(2) We agree with the learned counsel for the appellant that Ex. P. 1 comes under the definition of a simple mortgage as given in S. 58 (b), T. P. Act. There was an un-

1. China Mellayya v. K. Veeriah, (1916) 3 A I R Mad 795=31 I C 671.
2. Bepin Krishna Ray v. Jogeshwar Ray, (1921) 8 A I R Cal 730=66 I C 345=26 C W N 36=34 Cr L J 256.
3. Janardan Govind v. Venkatesh Waman, (1939) 26 A I R Bom 151=181 I C 991=ILR (1939) Bom 149=41 Bom L R 191.
4. Venkata Subhadrayamma v. Venkatapati Raju Garu, (1924) 11 AIR P C 162=80 I C 807=52 I A 1=48 Mad 230 (P C).
5. Nand Kishore v. Behari Lal, (1932) 19 A I R All 600=140 I C 470=1932 A L J 329.

conditional covenant to repay the loan in cl. (2) of the deed. According to cl. (1) of Ex. P. 1 there was no delivery of possession, nor was the possession to be delivered under any contingency. Foreclosure proceedings were neither contemplated, nor actually resorted to. Time was allowed for the payment of the debt secured under the deed, and the penalty for the non-payment was the liability for interest. A suit for the sale of the security (the house) was instituted. The leading cases on the point are 29 Mad 491[6] and A I R 1934 Pat 433.[7] It is settled law that a covenant to pay must be implied in every transaction of loan and unless there is some specific condition in the bond absolving the borrower from liability to repay the loan he must be held liable on the implied covenant. In this case the condition absolving the borrower from personal liability to repay the loan was in Ex. P. 2 only, which, as we have held, is not admissible in evidence.

The learned counsel for the respondents has cited 10 Cal 740,[8] 16 Cal 540,[9] 13 Mad 192,[10] 27 Mad 86,[11] 3 I C 871,[12] 8 I C 302[13] and A I R 1939 All 260,[14] in support of the proposition that in respect of a mortgage of the nature we have in this case there is no implied covenant to pay. Let us briefly examine the cases cited by him. 10 Cal 740[8] related to a document executed by a taluqdar, which contained no personal contract to pay out of personal estate, or out of any estate other than the taluq. In 16 Cal 540[9] there was a specific stipulation as to personal liability in the contingency that the property mortgaged be sold for the recovery of the arrears of Government land revenue. The contingency did not arise, hence the personal liability could not be invoked. In 13 Mad 192[10] a certain property already mortgaged to another was hypothecated for securing a loan. The specific mode for the repayment of the loan was by daily appropriation on the part of the creditor of part of the sale money of firewood. It was held that no suit could be brought on the basis of the hypothecation deed in a Small Cause Court. 27 Mad 86[11] related to a case where a hypothecation deed for 17 years in favour of *A* and a lease deed for 28 years in favour of *A's* husband had been executed simultaneously. The loan under the hypothecation deed was to be cleared in 17 years by the realization of the rent from the lessee. It was held that the transferees of *A's* interest in the hypothecation bond could not bring a personal claim against the lessors. 3 I C 871[12] relates to a case of mortgage by way of conditional sale. 8 I C 302[13] related to a case where there was clear provision in the mortgage instrument that the mortgage debt was to be paid in a particular manner, (i. e. by the sale of manganese ores.). (Apart from that the debtor and the creditor in this case were more or less in the position of business partners. The former held mining concessions from Mysore State while the latter supplied the capital. They jointly worked for the development of the manganese ore mining business). A I R 1939 All 260[14] related to a case of mortgage by way of conditional sale.

The learned counsel for the respondents appears to have been labouring under the misapprehension that the mortgage in question was not a simple mortgage, and none of the cases cited by him relates to a simple mortgage. To sum up the discussion we come to the conclusion that the mortgage deed, Ex. P. 1 created a simple mortgage, that clause (2) of the deed implied a covenant to pay, and that the deed stands unqualified and unrectified by the writing, Ex. P. 2. We therefore accept the appeal with costs throughout and pass a decree for the balance under O. 34, R. 6, Civil P. C., in favour of the plaintiff which can be executed against the persons of the respondents judgment-debtors and their other property also.

D.S./R.K. *Appeal accepted.*

6. Abbakke Heggadthi v. Kinhiamma Shetty, (1906) 29 Mad 491.
7. Joy Krishna v. Radha Krishna, (1934) 21 A I R Pat 433=149 I C 1197.
8. Narotam Das v. Sheo Pargash Singh, (1884) 10 Cal 740=11 I A 83 (P C).
9. Bunseedhur v. Sujaat Ali, (1889) 16 Cal 540.
10. Sir rjee v. Tiruvengadum, (1890) 13 Mad 192.
11. Gop l Row v. Narasimha Row, (1904) 27 Mad 86.
12. Kur ishi Begam v. Mumtaz Mirza, (1909) 12 O C 275=3 I C 871.
13. Ang o-Indian Trading Co. v. Brierly, (1910) 8 I C 302.
14. Bisl an Datt Singh v. Mathura Prasad, (1939) 26 A I R All 260=181 I C 902=I L R (1939) All 313=1939 A L J 362.

A. I. R. 1939 Peshawar 44

MIR AHMAD J.

Chaudhri Dhanpat Rai Khem Raj — Petitioner.

v.

Firm Hari Chand Gobind Ram — Respondent.

Civil Revn. No. 345 of 1938, Decided on 17th May 1939.

Civil P. C. (1908), O. 14, R. 1 — It is mandatory that every proposition affirmed by one party and denied by other should be made subject-matter of issue—Omission to do so cannot be condoned even if substantial justice is done.

The word "shall" in cl. (3) and cl. (5) of O. 14, Rule 1 does not leave any discretion to the Court and makes it mandatory that every proposition affirmed by one party and denied by the other, whether of fact or of law, should be made the subject-matter of an issue. Even if substantial justice is done, the failure to frame an issue should not be overlooked, because an act which is obligatory under the statute must be done and the omission to do it cannot be condoned by the fact that substantial justice has been done. [P 45 C 2]

L. Lal Chand Chichra — *for Petitioner.*

L. Jaggan Nath — *for Respondent.*

Order. — The petitioner filed a suit against the respondent in Peshawar. The respondent instituted a cross suit in Abbottabad against the petitioner. The respondent requested the Sub-Judge at Peshawar to stay the suit before him under Sec. 10, Civil P. C., on the ground that the subject-matter in dispute was the same in Peshawar and in Abbottabad Courts. The suit at Peshawar was therefore stayed. The suit filed by the respondent at Abbottabad succeeded and an appeal against that order was also dismissed. The respondent therefore moved the Court at Peshawar to dismiss the suit pending before it. He urged that the matter in issue in the Peshawar Court being also in issue in the Abbottabad Court and having been decided in his favour the suit in the Peshawar Court could not be maintained. The trial Judge acceded to his request without framing any issue.

The petitioner presented an appeal to the Senior Sub-Judge, Peshawar against that order. It was argued that no issue having been framed the order of the trial Court was not valid. The Appellate Judge agreed with the trial Judge on merits and did not consider it necessary to frame an issue. Consequently he dismissed the appeal. The petitioner has come up on revision to this Court. O. 14, R. 1, Civil P. C., runs thus :

(1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds : (a) issues of fact, (b) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

It will be observed that in cl. 3 and cl. 5 the word "shall" is used which to my mind does not leave any discretion to the Court and makes it mandatory that every proposition affirmed by one party and denied by the other, whether of fact or of law, should be made the subject-matter of an issue. Learned counsel for the respondent has argued that substantial justice having been done the failure to frame an issue should be overlooked. I do not agree with him. An act which is obligatory under the statute must be done and the omission to do it cannot be condoned by the fact that substantial justice has been done. I therefore hold that the two Courts below have committed a material irregularity in deciding the case without framing an issue. I accept the petition, set aside the orders of the two Courts below and remand the case to the trial Judge with the direction that he should frame issues and decide the case on merits. The party who eventually succeeds shall get the costs of this Court and also of the lower Appellate Court. Pleader's fee Rupees 10.

D.S./R.K. *Case remanded.*

A. I. R. 1939 Peshawar 45

ALMOND J. C. AND SOOFI J.

Autar Singh S. Acharaj Singh — Petitioner.

v.

Mt. Jogindar Kaur — Respondent.

Civil Revn. No. 1 of 1939, Decided on 11th July 1939, from order of Addl. Dist. Judge, Peshawar, D/- 10th December 1938.

Civil P. C. (1908), S. 53 — Legal representative includes Hindu son becoming owner of his father's property by survivorship — He is legally bound to provide out of estate descending to him maintenance payable by father—Maintenance can be enforced against entire property and not only against one charged with it.

The definition of the term "legal representative" does include a son becoming owner of his father's property by virtue of survivorship, for he does represent in law the estate of the deceased and at any rate it is he who intermeddles with the estate of the deceased. He, as a Hindu son, is legally bound to provide out of the estate, which descends to him, maintenance for those persons, whom the late proprietor was legally or morally bound to

maintain. It cannot be said that the particular property specifically charged for the maintenance can alone be proceeded against. According to Hindu law the property inherited by the heir is liable for the maintenance of the persons entitled to maintenance. If a charge is placed upon a specified property, it is only for the sake of convenience, and it does not amount to surrender of the right given by law on the entire property : *A I R 1925 All 471, Rel. on ; 24 Mad 689, Disting.*

[P 46 C 2; P 47 C 2]

L. Charanjit Lal — *for Petitioner.*

Hukam Chand and P. C. Kapur — *for Respondent.*

Soofi J. — This revision arises out of a dispute over maintenance. Sardar Ram Singh married Mt. Jogindar Kaur, respondent, on 14th September 1929. He died on 3rd January 1930. After his death a dispute arose between his adult son S. Acharaj Singh and Mt. Jogindar Kaur. S. Kirpal Singh, Hony. Sub-Judge, Peshawar settled the dispute by arbitration. He gave his award on 17th January 1930, and it was made the rule of the Court on the following day. According to this award Mt. Jogindar Kaur was entitled to maintenance at the rate of Rs. 130 per mensem in addition to a house rent of Rs. 30 per mensem to which she was eligible till S. Acharaj Singh built a house for her.

On 2nd October 1933, S. Acharaj Singh sued for a declaration that the amount of maintenance be reduced. The Sub-Judge by his decree dated 9th March 1935 reduced it to Rs. 65 per mensem. The Additional Judge on appeal raised the amount to Rs. 100 per mensem. The order of the Additional Judge was confirmed by a Bench of this Court on the revision side by the order dated 6th May 1936. Acharaj Singh died on 25th October 1937. On 6th January 1938 Mt. Jogindar Kaur applied for execution against S. Autar Singh, the minor son of S. Acharaj Singh. S. Autar Singh was represented by his mother Mt. Harnam Kaur. It was contended that Rs. 12,077-4-6 had already been received by Mt. Jogindar Kaur in connexion with her maintenance, and the claim was for a sum of Rs. 1017-10-0. Objections were filed on behalf of S. Autar Singh. The objections brought out three points, which are as follows: (1) That the decrees of the years 1930 and 1936 were of a declaratory nature, and are hence inoperative. (2) That S. Autar Singh has become an owner of the property not as the legal representative of his father, but in his own right, by virtue of survivorship. (3) That the family is under heavy debts and until the debts are paid, the question of maintenance does not arise. The senior Sub-Judge by his order dated 2nd April 1938 disallowed the objections. The Additional Judge by his order dated 10th December 1938 dismissed the appeal against the order of the Senior Sub-Judge.

Now a revision petition has been instituted in this Court on behalf of S. Autar Singh. It has been argued on behalf of S. Autar Singh that he is not the legal representative of his father S. Acharaj Singh, because he does not come under the definition of the term "legal representative" defined in S. 2 (11), Civil P. C., which reads as follows:

> Legal representative means a person, who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.

The learned counsel contends that his client being a Hindu survivor the case is not covered by S. 53, Civil P. C. We do not find any force in this argument. The definition of the term "legal representative", as quoted above, does include the petitioner, for he does represent in law the estate of the deceased and at any rate it is he who intermeddles with the estate of the deceased. S. 53, Civil P. C., reads as follows:

> For the purposes of S. 50 and S. 52 property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be the property of the deceased, which has come to the hands of the son or other descendant as his legal representative.

Section 50, Civil P. C., relates to the execution of a decree passed against the estate of a judgment-debtor, who dies before the decree has been fully satisfied. S. 52, Civil P. C. relates to the passing of and the execution of a decree against the legal representative of a deceased person, where the decree is sought for the payment of money out of the property of the deceased. In both of these Sections the legal representative is saddled with personal liability to the extent of the property of the deceased, which came into his hands, if he fails to give a satisfactory account of that property. Ss. 50 and 52, Civil P. C. have been made applicable by virtue of S. 53, Civil P. C. to a Hindu, who would possibly otherwise escape his liability under those two Sections. By the decree of the years 1930 as modified by the decree of the year 1936 S. Acharaj Singh had undertaken a liability to pay a specified amount to Mt. Jogindar

Kaur as her maintenance every month. The estate of S. Acharaj Singh has descended to his son S. Autar Singh, petitioner. He is bound to satisfy the liabilities of his deceased father by virtue of the provisions of S. 53, Civil P. C. As a Hindu son, S. Autar Singh, under S. 290 of Mulla's Hindu Law has the pious liability to pay off his father's debts, which are not tainted with immorality if he gets into possession of his father's property. Under S. 544 of Mulla's Hindu Law the heir is legally bound to provide out of the estate, which descends to him, maintenance for those persons, whom the late proprietor was legally or morally bound to maintain. He inherits the estate subject to the obligation to provide for such maintenance. In the present case, S. Acharaj Singh was both morally and legally bound to pay maintenance to Mt. Jogindar Kaur. That obligation has descended to his son, who has inherited his property.

The learned counsel for the petitioner has tried to distinguish the authorities cited before the two lower Courts, in support of the decisions arrived at by them, but he has not cited any authority in support of the proposition put forward by him. We find that the rule in A I R 1925 All 471[1] regarding the interpretation of S. 53, Civil P. C. confirms our views, for, it has been held there that a decree-holder, who has a decree against a Hindu father, can proceed in execution after his death against the joint ancestral property in the hands of the son, and can treat the son as the legal representative of the judgment-debtor, provided the property is liable under the Hindu law.

The learned counsel for the petitioner has further argued that in case his client be held liable for the maintenance of Mt. Jogindar Kaur, respondent, the maintenance ought to be enforced against the property on which the charge was placed in respect of it. The learned counsel relies upon 24 Mad 689,[2] where an attachment had been made of the property charged with the maintenance; it was held that as the property had been charged in the decree for maintenance it could be sold in execution of the decree, even though the son had not been made a party to the decree. The learned counsel's argument is that in this case since the charge for the maintenance had been put by the award of the arbitrator on a property known as a serai situated in Pipal Mandi, the execution should be taken against that property only, in view of the ruling cited above. We do not think this argument carries any force. In 24 Mad 689[2] the property on which the charge had been placed had been attached, and the decision in that case was that such property could be sold. In the present case the property, on which the charge had been placed, had not been attached at all. The objection put forward by the petitioner was not in respect of the property, which was being attached, but was in respect of his liability in general. The learned counsel cannot be allowed to take up a position at this stage, which was not taken up by him in the objections. Moreover, the rule in 24 Mad 689[2] cannot be interpreted to mean that the particular property specifically charged for the maintenance can alone be proceeded against. According to Hindu law the property inherited by the heir is liable for the maintenance of the persons entitled to maintenance. If a charge is placed upon a specified property, it is only for the sake of convenience, and it does not amount to surrender of the right given by law on the entire property.

The learned counsel did not press the point regarding the indebtedness of the estate, and quite wisely too, because it had not been established in the lower Court that the estate was so heavily in debt, that it had no assets to provide maintenance for Mt. Jogindar Kaur. Nor did he press the proposition that the decrees being of a declaratory nature are not executable. We therefore come to the conclusion that the decision arrived at by the lower Courts was correct. We dismiss the revision petition with costs. Pleader's fee Rs. 32.

D.S./R.K. *Revision dismissed.*

1. Rudra Partap Singh v. Sharda Mahesh Prasad Singh, (1925) 12 A I R All 471=88 I C 200=23 A L J 467.
2. Minakhshi Achi v. Chinnappa Uddayan, (1901) 24 Mad 689.

*** A. I. R. 1939 Peshawar 47**

MIR AHMAD J. C. AND SOOFI J.

Gul Zaman Mir Zaman
Accused—Appellant

v.

Emperor.

Criminal Case No. 288 of 1939, Decided on 12th September 1939, from order of Addl. Sess. Judge, Peshawar, D/- 3rd July 1939.

*** (a) Penal Code (1860), S. 302—It is wrong to say that accused convicted of murder merely on circumstantial evidence should not be visited with extreme penalty : *76 I C 97, Overruled.***

There can be only two positions : The Judge is either satisfied that the accused is guilty or he is not. If he is satisfied, the accused must get the normal punishment. If he is not, the accused must be acquitted. There is no middle course at all in judging the guilt of the accused. Hence it is wrong to say that an accused convicted of murder merely upon circumstantial evidence should not be visited with extreme penalty : *76 I C 97*, **Overruled.** [P 49 C 2]

(b) Criminal Trial—Sentence—Practice.

As a rule, the High Court is reluctant in interfering in the sentence passed by the trial Court. [P 49 C 2]

S. B. Raja Singh — *for the Crown.*

Mir Ahmad J. C. — Gulzaman was married to Mt. Zewar Nissa for about three years. They lived in village Mangal Doga which is situated within the Phulra State and is under the control of the Mansehra police station (Hazara district). On the morning of 9th January 1939 Faqir Mohammad of the same village was passing by the house of Gulzaman. He smelt the burning of clothes. He looked into the house and saw smoke coming out of it. On further examination he found that Mt. Zewar Nissa was lying near the hearth and her clothes were on fire. He raised a hue and cry and went to the hujra where he found Gulzaman and Aziz Mohammad Khan, the Gurarakhor of the village. Gulzaman had, according to Aziz Mohammad Khan, gone to the hujra to inform him that his mother-in-law was forcibly taking away his wife and to ask for his intervention. Aziz Mohammad Khan had sent a servant to the house and the servant was on the way when Faqir Mohammad raised a hue and cry. Faqir Mohammad informed Gulzaman what he had seen. Aziz Mohammad Khan and the other persons sitting in the hujra therefore hastened towards the house of Gulzaman. Gulzaman was with them and when they had reached midway he cried out that his mother-in-law had killed his wife. In the meantime his mother-in-law, Mt. Jan, came out of her house which was on the way and the whole party entered the house. There they found Mt. Zewar Nissa wounded and her clothes burnt. It appears that the females who had reached earlier had put out the fire.

There was a charge and counter-charge. The mother-in-law charged Gulzaman with the offence of murder and Gulzaman alleged that it was his mother-in-law who had killed his wife. Aziz Mohammad Khan therefore detained both of them and sent information to Kalandar Shah, the officer-in-charge of that Ilaqa under the Khan of Phulra. Kalandar Shah arrived. He found a blood-stained dagger behind a corn-bin in the room of Gulzaman. He also took his clothes into his possession : they were blood-stained. He submitted the information to the Khan of Phulra and the Khan then apprised the officer-in-charge of the Mansehra police station of what had occurred. The police took up the case and sent up Gulzaman. He was committed to the Court of Session and tried there under S. 302, I. P. C. The prosecution story set out above was given by Faqir Mohammad, Aziz Mohammad Khan, Mt. Jan and Kalandar Shah. The following witnesses were also examined at the trial: The doctor, Mt. Karam Jan, Mt. Amir Jan, Ghulam Haidar, and Shah Baz Khan, Sub-Inspector. The doctor described the wounds on the deceased as follows : 1. An incised wound on the right side of the head (parietal region) cutting the scalp and the bone beneath. The wound was $5\frac{1}{2}'' \times \frac{1}{2}'' \times 6\frac{1}{2}''$. 2. An incised wound on the left side of the chest $3'' \times 2'' \times \frac{3}{4}''$. 3. Marks of burn on the inner side of the left thigh, knee and leg. 4. Marks of burn on the inner side of the right thigh. Death was due to the injury to the brain.

Mt. Karam Jan, a girl of 11 years, stated that she was going out to answer the call of nature when she heard a noise in the house of the accused. She looked in and saw the accused dragging Mt. Zewar Nissa and throwing her behind the door. Then the accused left the house and the girl also went away. On her return, she heard Faqir Mohammad crying that Mt. Zewar Nissa was on fire. Mt. Amir Jan was an earlier visitor to the house. Mt. Zewar Nissa was the sister of her husband. She had gone to ask for some soup. The accused and the deceased were quarrelling with each other. She had some soup and returned home. At the trial she said that the accused had a dagger in his hand at the moment but she admitted when confronted with her statement to the police, that she had not said this in her police statement : she had said there that the dagger was lying on the hearth. Ghulam Haidar is the brother of Mt. Zewar Nissa. He alleged that on the day of occurrence the accused had, after his arrest, given out that he suspected a liaison between his wife and one Sikandar, his neighbour. He identified the dagger to be the property of the accused. S. I. Shahbaz Khan sent the dagger and the shirt of the accused to the Chemical Examiner and Imperial Serologist who reported

that they were stained with human blood. The accused denied the charge. He said that he did not own the dagger. He admitted that his shirt was blood-stained but he said that he had touched the body of the deceased when picking up his child and had thus stained his shirt. He did not produce any defence. The three assessors who assisted at the trial returned a verdict of guilty. The learned Additional Sessions Judge convicted the accused under S. 302, I. P. C., and sentenced him to transportation for life. The accused has appealed from jail.

On a careful consideration of the case we see no reason to differ from the conclusion arrived at by the learned Additional Sessions Judge. According to the statement of Mt. Amir Jan, the husband and wife were quarrelling early in the morning. Mt. Karam Jan has proved the fact that the husband was dragging the wife and threw her behind the door. Faqir Mohammad saw the woman on fire and raised a hue and cry. At that moment the accused had carried a false tale to Aziz Mohammad Khan that his mother-in-law was trying to take away his wife from his house. Then the accused feigned that his mother-in-law had killed his wife and made an outcry to that effect when the party was on the way to his house. A blood-stained dagger, which was identified by Ghulam Haidar to be the property of the accused, was found behind a corn-bin in the room of the accused and there was blood on the shirt of the accused. The plea of the accused that the shirt was stained when he was picking up his child is idle because he was arrested on arrival in the house and there is no evidence that he went near the deceased on his return from the hujra. The allegation of Ghulam Haidar that the accused gave out his suspicion with regard to the conduct of the deceased provides the motive. In our opinion, a conclusive case has been made out against the accused for murder. We therefore maintain the conviction under Sec. 302, I. P. C. In giving the lesser sentence the learned Judge has made the following remarks:

> Regarding sentence the act of the accused is a brutal one. There are no mitigating circumstances, there is no provocation and the action of the accused in trying to conceal his act by going to the hujra and making up a false story against his own mother-in-law makes his case still worse. At the same time my attention has been drawn to a ruling, 76 I C 97,[1] a judgment of an eminent Judicial Commissioner of the Province, that in cases of purely circumstantial evidence extreme penalty should not be inflicted. I am therefore constrained to pass the lesser sentence and accordingly holding the accused guilty under S. 302, I. P. C., sentence him to transportation for life.

We have carefully examined the ruling referred to by the learned Additional Sessions Judge. The head-note runs thus:

> The proof must be more cogent in criminal cases than in civil cases, but the ultimate test can only be the personal and mental attitude of the person whose duty it is to consider the evidence before him. Purely circumstantial evidence, however overwhelming and convincing it may be, has the character which must leave some loophole for the contingency, however remote and infinitesimal, of possible error. Although it is wholly illogical in case of a trial for murder to accept facts as proved for the purpose of conviction and to throw any doubt on such proof in considering the question of sentence, yet this is an illogicality which has been fully and consistently recognized by the Courts. An accused convicted of murder merely upon circumstantial evidence should not be visited with a sentence which is irrevocable. The Court is reluctant to launch a person into eternity except in case of exceptional strength.

The learned Judge has not quoted any authority in the text for the view that the illogicality has been recognized by Courts. With due respect to the eminent Judge who delivered that judgment we beg to differ from him in this view of law. It amounts to a compromise with one's conscience. There can be only two positions. The Judge is either satisfied that the accused is guilty or he is not. If he is satisfied, the accused must get the normal punishment. If he is not, the accused must be acquitted. We do not see any middle course at all in judging the guilt of the accused. We therefore overrule the authority referred to and direct that it should not be followed in this respect. We have given our anxious consideration to the question whether we should enhance the sentence. As a rule the High Court is reluctant in interfering in the sentence passed by the trial Court. We do not think that we should depart from this practice in this case. We therefore dismiss the appeal.

D.S./R.K. *Appeal dismissed.*

1. Abdul Wahab v. Emperor, (1923) 76 I C 97 = 25 Cr L J 97.

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NAGPUR.

RANGOON HIGH COURT
1939

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ROBERTS C. J. AND DUNKLEY J.

Sawarmal and others — Appellants.

v.

Kunjilal and another — Respondents.

Letters Patent Appeal No. 3 of 1938, Decided on 22nd July 1938, from decree of Sharpe J. in Second Appeal No. 175 of 1937, D/- 10th January 1938.

(a) Practice — Duty of advocate *(Obiter*, Per *Sharpe J.).*

It is ordinarily the duty of an advocate to be present, or to make suitable arrangements for the conduct of the case, and the Courts are not to be inconvenienced by the postponement of cases until the proper advocate is available. [P 3 C 1]

(b) Appeal—Memorandum improperly presented by one advocate on behalf of another—Judge, even if has accepted document and admitted appeal, can subsequently hold that there was no proper appeal *(*Per *Sharpe J.).*

If a memorandum of appeal had been improperly presented by one advocate for another and the Judge accepted the document and admitted the appeal, he can hold that there was no proper appeal and can dismiss the appeal at a later stage, when his attention is drawn to the true legal position, for he was originally acting ex parte and accepted the document and admitted the appeal per incuriam : *E L R (1936) W N 293, Rel. on.* [P 3 C 2]

*** (c) Civil P. C. (1908), O. 3, R. 4—Pleader can delegate functions of ministerial nature—Ministerial act defined—Plaint or memorandum of appeal drawn up and signed by authorized pleader presented by another pleader delegated to do so—Plaint or appeal must be deemed to have been presented by pleader signing it** *(*Per *Division Bench).*

To act for a client in Court is to take on his behalf in the Court, or in the offices of the Court, the necessary steps that must be taken in the course of the litigation in order that his case may be properly laid before the Court : *19 W R (Cr) 8 and 6 Cal 585, Approved.* [P 5 C 1]

But there is nothing in O. 3, Rule 4, which prohibits a pleader from delegating some of his functions, and the Code plainly contemplates that certain functions of a ministerial nature may be delegated. A ministerial act, in relation to this matter, is an act which does not require the personal skill or attention of the pleader and which can be done without consideration of facts or circumstances. To such acts the maxim *qui facit per alium facit per se* must be held to apply. When a plaint or memorandum of appeal has been drawn up and signed by a pleader duly authorized under O. 3, R. 4, there is nothing contrary to the provisions or the spirit of that Rule in the mechanical act of handing over the papers to the Court, or the officer appointed, being performed by a clerk or another pleader to whom the duty of performing that act has been delegated by the duly authorized pleader. The presentation of the plaint or appeal must be taken to be that of the signatory thereto : *A I R 1926 Rang 215, Disting.; 3 Bur L T 131, Approved; 20 Mad 87 and 22 M L J 284, Rel. on.* [P 5 C 1 ; P 6 C 1]

P. K. Basu — *for Appellants.*

Irvine Jones — *for Respondents.*

Appeal No. 175 of 1937

Sharpe J. — In the month of July 1935 the plaintiff was minded to sue the two defendants for the purpose of obtaining a declaration that a certain registered deed of dissolution of partnership was inoperative and invalid, and to that end he executed a power of attorney on the 18th of that month nominating and appointing Mr. B. M. Sarkar, Advocate, to be his advocate in the suit then contemplated. Mr. Sarkar accepted that power of attorney, and the necessary plaint was filed the following day in the Court of the Subdivisional Judge, Mandalay. It should be noted that the first diary entry is as follows : "1925 July 19. Plaint filed by U Aye Maung for Mr. Sarkar for plaintiff. Check and admit." The plaint so filed was accepted by the Court and notices were issued to the defendants who instructed Mr. Wajid, a Higher

Grade Pleader, to appear on their behalf, and the latter did so. The case was somewhat protracted, and finally on 1st February of the present year the Subdivisional Judge dismissed the suit. The plaintiff desired to appeal, and on 9th March last he executed a fresh power of attorney in favour of Mr. Sarkar for the purposes of the appeal, although, having regard to the terms of O. 3, R. 4 (3), Civil P. C., a fresh power of attorney would appear to have been unnecessary. Mr. Sarkar accepted this second power of attorney and drafted and signed the necessary Memorandum of Appeal. No court-fee stamps appear upon the Memorandum of Appeal which was signed by Mr. Sarkar, but there is prefixed thereto a single sheet of paper bearing court-fee stamps to the requisite amount and bearing also the title of the appeal, and, at the bottom, the signature of a Mr. S. N. Mukerjee (another advocate) followed by the words "for M. B. Sarkar, Advocate, for appellant." The whole document, namely the sheet of paper signed by Mr. Mukerjee and bearing the court-fee stamps and the body of the Memorandum of Appeal signed by Mr. Sarkar, were together presented to the Assistant District Court of Mandalay on 11th March last by a Mr. Ganguly, another advocate of Mandalay. The diary entry is in these words :

> 11-3-37. Memorandum of Appeal presented by Mr. Ganguly for Mr. B. M. Sarkar, for appellant. In time. Court fees correct. Call for lower Court record. For admission on 13-3-37.

And on 13th March 1937, Mr. Sarkar was heard and the appeal was admitted. When the appeal came on for hearing, Mr. Wajid, on behalf of the respondents, took a preliminary objection that the Memorandum of Appeal had not been properly presented and that the appeal could not therefore be entertained. O. 41, Rule 1 (1), Civil P. C., provides that :

> Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf,

whilst O. 3, Rule 4 (1), provides that "no pleader" [and S. 2 (15), Civil P. C., enacted that "pleader" includes an advocate of the High Court],

> shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognized agent or by some other person duly authorized by or under a power of attorney to make such appointment.

Mr. Wajid contended that the presentation of a Memorandum of Appeal was an 'act' within the meaning of O. 3, R. 4 (1); that, as Mr. Ganguly had not been appointed for the purpose by any document in writing, his presentation of the Memorandum of Appeal was no presentation at all; and that the Court was therefore bound to dismiss the appeal. On behalf of the appellant it was urged that Mr. Ganguly was not 'acting' at all, but that Mr. Sarkar 'acted' through Mr. Ganguly, and that in any event it is the common practice for Memorandum of Appeals to be presented by one pleader on behalf of another. The learned Assistant District Judge was of opinion that Mr. Ganguly could not present the Memorandum of Appeal without an authority under O. 3, R. 4 (1), and that there was no proper appeal before the Court. He therefore dismissed the appeal with costs. The appellant has now brought a second appeal to this Court, and, in view of what I have been told is the prevailing practice throughout Burma, I am not surprised to hear that the decision which I am about to give is one of great importance to the members of the Bar.

Mr. Paget, who appeared on behalf of the respondents in this Court, called my attention to the decision of the first Bench in Civil Reference No. 11 of 1926, which is reported in 4 Rang 249[1] under the title of '*In the matter of filing powers by an Advocate or Pleader*', a case which does not appear to have been considered by the lower Appellate Court. 'It is not for me to consider whether that case was rightly decided; it is a decision of a Bench and is therefore binding upon me. In that case the then Chief Justice and Carr J. held that

> an advocate 'acts' when he files a Memorandum of Appeal or cross-objections or any other document in a case [other than a memorandum of appearance under R. 4 (5)] and that in all such cases a power of attorney is necessary.

In view of that decision it is, in my judgment, incumbent upon me to hold in the present case that Mr. Ganguly was not entitled to present the Memorandum of Appeal on behalf of Mr. Sarkar. Mr. Bose, who appeared before me on behalf of the appellant relied upon (1902-03) 2 U B R 1.[2] The following passage appears on p. 3 of the judgment in that case :

1. (1926) 13 A I R Rang 215=98 I C 15=4 Rang 249.
2. In the matter of an application by N. N. Ghosh, (1902-03) 2 U B R 1.

It has thus been authoritatively ruled that there is nothing inconsistent with the provisions of the Civil Procedure Code in permitting one advocate to hold the brief of another. If the practice were prohibited in Upper Burma it would cause infinite inconvenience. The Bar in Upper Burma is limited, and first class advocates are scarcely to be found elsewhere than in Mandalay. They have to accept briefs to appear in distant places, and I have no doubt that they have often to leave at so short a notice as to render it impossible to communicate with their clients, who may be living anywhere in Upper Burma. What is to happen when these clients appear on the days fixed for their cases; are they to be left to fight their own cases without the assistance of an advocate, or are the Courts to be inconvenienced by the postponement of cases until the proper advocate returns ? Or suppose an advocate is engaged in one Court while a case of his is called in another. Is his case to be dismissed or decided ex parte because he is not present himself, as would be the necessary consequence of his absence if he is prohibited from instructing another advocate to act for him or even to move an adjournment for him? Such a condition of affairs would be intolerable and, I venture to say, has never been acted on in any judicial system. It has been ruled by my learned predecessor in (1897-1901) 2 U B R 527[3] that it is not the practice of this Court, and should not be the practice of any subordinate Court, to allow advocates to expect cases to be adjourned as a matter of course merely because they are unable to attend, being engaged elsewhere, and that it is ordinarily the duty of an advocate to be present, or to make suitable arrangements for the conduct of the case. The only manner in which he can usually do so is to transfer his brief to another advocate. Such has been the practice in this Court and in the Courts in Upper Burma since they were first constituted, and I am informed that it has also been the invariable practice in Lower Burma. It has been shown that it is not inconsistent with the Civil Procedure Code, and that as regards the convenience of all concerned—Judges, advocates and litigants—it is a necessary practice.

The passage which I have just read has, in my judgment, no application to the present case. It deals only with the practice of one advocate pleading in Court for another; that is the whole tenor of the passage and it expressly refers to "the days fixed for their cases". But as that case has been cited I do desire, in passing, and nowise in connexion with the present appeal, to remind those practising at the Bar in Burma "that it is ordinarily the duty of an advocate to be present, or to make suitable arrangements for the conduct of the case," and that the Courts are not to be inconvenienced by the postponement of cases until the proper advocate is available. Time and again in this High Court, I am faced with the failure of an advocate to fulfil this important duty of making suitable arrangements for the conduct of a case; I hope that in future advocates will realize the importance of the matter both to the clients from whom they receive their fees and also to the Court, and will no longer be found wanting in this respect.

But to return to the present appeal: the Upper Burma ruling which I have cited is no authority in support of the appellant s case here. Mr. Paget has pointed to the distinction between sub-rr. 1 and 5 of O. 3, R. 4 ; there is missing from the former sub-rule the very valuable Proviso which is to be found in the latter. The Proviso to sub-rule 5 of R. 4 is the present sanction for the practice which is referred to and commended in the Upper Burma ruling from which I have just read an extract. If I were to allow the present appeal, I should, in effect, be inserting into sub-rule 1 of R. 4 a Proviso which is not there. That is not my function. If this decision has brought to light an unintentional omission in the Rule, then there is an authority which can remedy the omission, but I must not usurp the functions of that authority. Mr. Bose also contended that the Assistant District Judge having noted in his diary that the Memorandum of Appeal had been presented by Mr. Ganguly for Mr. B. M. Sarkar, and having then accepted the document, and having subsequently admitted the appeal, could not afterwards hold that there was no proper appeal. Those acts did not in my judgment preclude him from dismissing the appeal at a later stage, when his attention was drawn by Mr. Wajid to the true legal position. He was originally acting ex parte and accepted the document and admitted the appeal per incuriam : *see* E L R (1936) W N 293,[4] where the Court of Appeal (in England) first of all gave an appellant leave to appeal upon his ex parte application, and when the appeal came on for hearing the respondent successfully contended that the Court of Appeal had had no power to give leave to appeal, and the appeal was dismissed. In my judgment Mr. Paget's contention is a sound one and this appeal must be dismissed.

In regard to the matter of costs, both the learned advocates agree that the matter is entirely within my discretion. A point similar to the one taken by Mr. Wajid before the Assistant District Judge could equally well have been taken by him before

3. Maung Lat v. Maung Tok, (1897-1901) 2 U B R 527.

4. Conway v. New Ideal Homesteads Ltd., E L R (1936) W N 293.

the Sub-divisional Judge, for the case *In the matter of filing powers*, etc.[1] supra, does not distinguish between plaints and Memoranda of Appeals, (indeed it expressly puts both upon the same footing), and by O. 4, R. 1 (1), plaints have to be 'presented' in the same manner as Memoranda of Appeals. As I pointed out at the commencement of this judgment, the plaint in the present suit was presented by U Aye Maung on behalf of Mr. Sarkar. Mr. Wajid himself appeared in the Sub-divisional Court and took no objection to what had been done on behalf of Mr. Sarkar, but waited and took the point on appeal when Mr. Sarkar again asked a fellow practitioner to present the necessary document. In all the circumstances of the case I think that justice will be done if each side pays its own costs both here and in the lower Appellate Court.

Letters Patent Appeal

Dunkley J. — This Letters Patent appeal, on a certificate granted by a single Judge of this Court in Second Appeal No. 175 of 1937, raises a point of great importance to the leagl profession of this country. The appellants are the legal representatives of Ram Gopal, deceased, who brought a suit in the Sub-divisional Court of Mandalay against the defendants-respondents. The suit was unsuccessful, and he appealed to the Assistant District Court of Mandalay. For the purpose of this appeal he engaged an advocate named B. M. Sarkar, to whom he granted a power of attorney in the usual form. Mr. Sarkar drew up and signed the Memorandum of Appeal but it was presented on his behalf by another advocate named Mr. Ganguli. When the appeal ultimately came on for hearing, on behalf of the respondents a preliminary objection was taken that the Memorandum of Appeal had not been properly presented and that therefore the appeal could not be entertained. The argument for the respondents was based on the provisions of O. 3, Rule 4, sub-r. (1), Civil P. C., which says :

> No pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognized agent or by some other person duly authorized by or under a power of attorney to make such appointment.

The argument was that the presentation of the appeal amounted to "acting" for the appellant, and that as the presentation was made by Mr. Ganguli, who had not been duly appointed to "act" for the appellant under O. 3, R. 4 (1), the appeal must be dismissed. This argument found favour with the learned Assistant District Judge, and the appeal was therefore dismissed. This decision has been upheld on second appeal, but a certificate has been granted for further appeal to a Bench. The learned Judge who heard the second appeal considered that he was bound by the judgment in 4 Rang 249,[1] and that, as in that case it was held that an advocate "acts" when he files a Memorandum of Appeal and therefore in all such cases a power of attorney is necessary, the appeal was not presented in accordance with law to the Assistant District Court, and hence there was no proper appeal before the Court. The second appeal was therefore dismissed.

As presented by learned counsel for the respondents before us, the point is that the provisions of O. 3, R. 4, contemplate that a pleader either acts or pleads and has no other function, it being said that the origin of the distinction between acting and pleading is the distinction between the functions of a solicitor and a barrister in England. It is then urged that "to plead" means to address the Court as an advocate on behalf of either party, and therefore that all the other functions of a pleader must be included within the verb "to act." This argument may on a very strict view, be correct, but I am unable to accede to the further argument that no delegation of the power to act is permitted under O. 3, R. 4. There is nothing in the terms of the Rule to prohibit such delegation. The judgment in 4 Rang 249[1] is distinguishable from the present case, because in that case the Memorandum of Appeal was not only handed over to the Court by an advocate who had no written authority but was signed by the same advocate ; and for the appellants it is not contended that another pleader may sign a Memorandum of Appeal on behalf of the pleader who has been duly appointed under O. 3, Rule 4. So far as India (and Burma) are concerned, the classic definitions of the expression "to act," as used in forensic parlance, are contained in 19 W R Cr 8[5] and 6 Cal 585.[6] In the earlier case Phear J. said (at p. 9):

> I think that the word 'act' there means the doing of something as the agent of the principal party, which shall be recognized or taken notice of

5. In re, Fuzzle Ali, (1873) 19 W R Cr 8.
6. Kali Kumar Roy v. Nobin Chunder, (1881) 6 Cal 585=7 C L R 562.

by the Court as the act of that principal ; such for instance as filing a document.

In the later case White J. said (at p. 590):

To act for a client in Court is to take on his behalf in the Court, or in the offices of the Court, the necessary steps that must be taken in the course of the litigation in order that his case may be properly laid before the Court.

With the greatest respect, I am prepared to adopt these definitions ; but, in my opinion, there is nothing in O. 3, R. 4, which prohibits a pleader from delegating some of his functions, and the Code plainly contemplates that certain functions of a ministerial nature may be delegated. A ministerial act, in relation to this matter, is an act which does not require the personal skill or attention of the pleader and which can be done without consideration of facts or circumstances. To hold otherwise would result in complete chaos in the administration of justice and would, within a short time, bring about a state of affairs which would render it impossible for the Courts of law to carry on their work. For, the payment of court-fees, translation and copying fees and the like, merely ministerial acts are "acting," just as much as the presentation of a plaint or memorandum of appeal is "acting"; and if the judgments of the Assistant District Court and this Court on second appeal are correct, the result would be that officers of the Courts could receive such payments only from the hands of the parties themselves or their pleaders duly appointed, obviously an impossible state of affairs. It is conceded, and no doubt it is correct, that the drafting of a plaint or Memorandum of Appeal, or acts of the same nature, which can only be done upon consideration of facts and circumstances, must be done by the duly appointed pleader, and therefore such documents must be signed by him, and such acts cannot be done or such documents cannot be signed on his behalf by another pleader. But the same consideration does not apply to acts which are merely mechanical, such as handing over a bundle of paper. To such acts, in my opinion, the maxim *qui facit per alium facit per se* must be held to apply, and the presentation of the plaint or appeal must be taken to be that of the signatory thereto, although the actual handing over may be performed by a servant or agent.

In 3 Bur L T 131[7] Parlett J. said :

Reference is made in the arguments to the practice whereby, owing to the inability which barristers share with other people to be in two places at once, one advocate gets another to represent him when his case is called. In the vast majority of instances when this occurs the business is of a merely formal character, and it is for the advantage and convenience of all concerned, Court, counsel and client, that this should be allowed.

The learned Judge went on to say that an advocate could not without his client's consent, hand over the whole conduct of the case to another advocate. With this view I respectfully concur. That such delegation is permissible is, to my mind, clear on the plain provisions of O. 4, R. 1, which refers to the presentation of plaints, and O. 41, R. 1, which refers to the presentation of appeals. O. 4, R. 1, sub-rule (1), says that every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf. There is nothing in the Rule to show that the presentation must be at a particular place or at a particular time or by a particular person, so long as it is a presentation to the Court or to the officer appointed by the Court. O. 41, R. 1, sub-rule (1) is even more explicit. It says:

Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf.

The Rule lays down that the memorandum must be signed by the appellant or his pleader, but it expressly refrains from stating that it must be presented by the appellant or his pleader. In 34 All 482[8] and 47 Mad 312[9] it has been held that a plaint or Memorandum of Appeal may be presented at any time or at any place. It follows as a necessary inference, from the wording of O. 4, R. 1 and O. 41, R. 1, that it may be presented on behalf of the plaintiff or appellant, or his pleader, by any person to whom this duty has been delegated. In 20 Mad 87[10] a Bench of the Madras High Court held that a presentation of an appeal petition by the clerk of the appellant's pleader is equivalent to a presentation by the pleader himself when the petition is signed by the pleader and he is duly authorized. Although this was a criminal case the same principle is applicable to civil cases. And in 22 M L J

7. Maung Kyaw v. Maung Po Thaing, (1909) 3 Bur L T 131=8 I C 958.

8. Din Ram v. Hari Das, (1912) 34 All 482=14 I C 744=9 A L J 743.

9. Settayya Padayachi v. Soundarathachi, (1924) 11 A I R Mad 448=79 I C 1017=47 Mad 312 46 M L J 78 (F B).

10. Queen-Empress v. Karuppa Udayan, (1897) 20 Mad 87=2 Weir 470.

284,[11] where the question of the delegation by a pleader to his clerks of the duty of paying on behalf of his client the various dues of the Court was fully considered, it was not suggested that such delegation was in itself improper. If these functions may be performed by the clerks of pleaders, it would indeed be strange to hold that they cannot be performed by one pleader on behalf of another.

In my opinion, when a plaint or memorandum of appeal has been drawn up and signed by a pleader duly authorized under O. 3, R. 4, there is nothing contrary to the provisions, or the intention, or the spirit of that Rule in the mechanical act of handing over the papers to the Court, or the officer appointed, being performed by a clerk or another pleader, to whom the duty of performing that act has been delegated by the duly authorized pleader. This appeal must therefore be allowed, and the judgments and decree of the Assistant District Court of Mandalay on first appeal and of this Court on second appeal must be set aside, and the first appeal must be remanded to the Assistant District Court of Mandalay for disposal on the merits. As the first appeal was dismissed on a preliminary point, the appellants are entitled under S. 13, Court-fees Act, to a refund of the court-fees paid on the memoranda of second appeal and of this Letters Patent appeal. The costs of the second appeal, advocate's fee two gold mohurs, and of this Letters Patent appeal, advocate's fee three gold mohurs, will be costs in the first appeal before the Assistant District Court.

Roberts C. J.—I agree and have nothing to add.

D.S./R.K. *Appeal allowed.*

11. Muruga Chetty v. Rajasami, (1912) 22 M L J 284=14 I C 823=(1912) M W N 332.

A. I. R. 1939 Rangoon 6

MACKNEY J.

Maung Nyun and another—Applicants.

v.

Collector of Mandalay — Respondent.

Civil Revn. No. 383 of 1937, Decided on 9th February 1938, against order of Deputy Commissioner, Mandalay, D/-9th June 1937.

*** Land Acquisition Act (1894), S. 49 (1), Proviso 2—Order of Collector refusing to make reference under Sec. 49 is administrative and hence is not subject to revision.**

It is part of Collector's administrative duties to make the references which may be required of him under the Act. Before doing so, it may be that he has to decide certain matters in the same way as a Judge has to decide matters in a suit before him or in an application before him : but this does not make the action of the Collector a judicial act in the sense of the act of a particular Court. Hence where before publication of notification under S. 6 the Collector in the course of enquiring into the objections raised to the proposal to publish such a notification is asked to make a reference to the Court under S. 49 and he refuses to do so the Collector is acting administratively. By his mere refusal to comply with the express provisions of S. 49 he does not constitute himself a Court subordinate to High Court. Hence his order is not subject to revision : *32 Cal 605, Ref. ; 12 C W N 241 ; 16 C W N 327 ; A I R 1917 Pat 176 and A I R 1919 Mad 583, Dissent.* [P 7 C 1 ; P 8 C 1]

K. C. Sanyal — *for Applicants.*

Order.—This application under Sec. 115, Civil P. C., to revise the order of the Collector of Mandalay must be dismissed as this Court in my opinion clearly has no jurisdiction in such a matter. The applicants Maung Nyun and his wife are the owners of a piece of property, part of which it is intended to acquire under the Land Acquisition Act for the purpose of making a road. On the portion of the applicants' land which it is proposed to acquire is a shed. The applicants' claim that the land on which this shed is built forms part of the building or manufactory in which they carry on their business of weaving, and when proceedings were taken under Ss. 4 and 5 (a) of the Act they filed an objection before the Collector asking that the whole property be acquired, and declaring that if the acquisition of the whole property was not acceptable, Sec. 49, Cl. (1), of the Act applied and the provisions of the Act could not be put into force. Other objections were raised, but we are not concerned with them. The Collector dismissed the objections. The applicants had asked that the question whether the land proposed to be acquired did or did not form part of the petitioners' house might be referred for determination to the Court as provided in the Proviso 2 to Section 49 of the Act. This the Collector refused to do. It is argued that the making of this reference is a judicial act and in making it or refusing to make it the Collector is a Court and therefore his order refusing to make the reference is subject to revision by this Court. The argument appears to me to be singularly inconclusive.

It is not clear from the wording of S. 49 of the Act at what stage of the proceedings

the Collector is to make the reference: but there is at any rate nothing in the wording to suggest that an objector cannot require the reference to be made before notification under S. 6 is published. We have it then that no notification as yet had been published under S. 6 and that the Collector of Mandalay in the course of enquiring into the objections raised to the proposal to publish such a notification was asked to make a reference to the Court under S. 49 and he refused to do so. It is obvious that throughout these proceedings the Collector is acting administratively. I am unable to see how by his mere refusal to comply with the express provisions of Sec. 49 he constitutes himself a Court subordinate to this Court. In 32 Cal 605[1] it was pointed out that the proceedings resulting in an award under the Act are administrative and not judicial.

I have been referred to 12 C W N 241[2] in which it was held that the refusal of the Collector who had made an award under S. 11 of the Act to make a reference to the Court under S. 18 of the Act was a judicial act and the Collector in rejecting the application was a Court and his order was subject to revision by the High Court. It was said that the Collector's functions under Part 3 of the Act in which Sec. 18 appears are clearly distinguishable from those under Part 2, (S. 49 appears in Part 8 of the Act which is headed 'Miscellaneous'), and Part 3 of the Act relates to the proceedings in Court. With great respect the argument seems to me to be entirely inconclusive; nor with the greatest respect does it appear to me relevant to point out that to hold otherwise would be to leave the party aggrieved without a remedy. This decision was followed in 16 C W N 327.[3] This was a case in which the Land Acquisition Collector had refused to make a reference under S. 49, Land Acquisition Act. The High Court in revision set aside his proceedings subsequent to the refusal and directed the Collector to proceed according to law. The learned Judges followed the case already cited giving their reasons that

> it would obviously be unjust that the Deputy Collector should refuse to obey the provisions of the Act, and to provide no remedy for the correction of his mistaken action. Where the law gives a right to a party to a certain procedure, it must also be deemed to give a remedy for the rectification of any irregularities committed in that connexion.

With great deference I think this argument is not a pertinent one. It may be noted also that apparently the Collector who was asked to make the reference was the Collector who was making the award and evidently the proceedings had gone far beyond the preliminary stage of the proceedings with which we are now dealing. In 2 Pat L J 204[4] the High Court of Patna held that it had jurisdiction to interfere with an order refusing to refer to the Civil Court a question under the Second Proviso to sub-s. (1) of Sec. 49, Land Acquisition Act. The learned Judges adopted the argument that S. 49 requires the initiation of a judicial proceeding in the Civil Court for the determination of the question and the Statute provides that the first step in that judicial proceeding shall be a reference by the Deputy Collector. Chapman J. says:

> I am of opinion that the first step in a judicial proceeding must be held to be a judicial step and that the act making a reference or refusing to make a reference is an act with which we can interfere on the ground that the Deputy Collector is a Court when he takes such a step or refuses to take it.

And the cases already cited are referred to. The learned Judge does not give any reason for holding that when a person fails to take a judicial step he constitutes himself a Court subordinate to the High Court and for myself I regret I am unable to follow the observation. The last case to which I have been referred is 42 Mad 231.[5] This was a case in which the High Court dealt with an application to revise the order of a Revenue Divisional Officer dismissing an application under S. 18, Land Acquisition Act, for a reference to the Court regarding his award of compensation for certain lands. The cases that I have cited were followed. It was observed that proceedings under Part 3 of the Land Acquisition Act, were undoubtedly judicial in character. The Collector had to determine whether the application satisfied the conditions of the Proviso to S. 18, and in making the reference he had to set out the grounds of his own award and his opinion as to what persons were

1. Ezra v. Secretary of State, (1905) 32 Cal 605=1 C L J 227=9 C W N 454 (P C).
2. Administrator-General of Bengal v. Land Acquisition Collector, (1908) 12 C W N 241.
3. Krishna Das Roy v. Land Acquisition Collector, Pabna, (1912) 16 C W N 327 = 13 I C 470=16 C L J 165.
4. Saraswati Pattack v. Land Acquisition Deputy Collector, Champaran, (1917) 4 A I R Pat 176 =39 I C 650=2 Pat L J 204.
5. Parameswara Aiyar v. Land Acquisition Collector, Palghat, (1919) 6 A I R Mad 583 = 49 I C 659=42 Mad 231=36 M L J 95.

really interested in the land required. The learned Judge, Ayling J., considered that in so doing he was acting as a Court. It may be that he was acting in a manner similar to that in which a Court acts; but surely that does not constitute a Court subordinate to the High Court within the meaning of the Civil Procedure Code. One of the learned Judges who decided this case remarks :

It cannot be denied that the proceedings under Part 3 which result in an award of the Court are judicial proceedings and by virtue of S. 54, the Court is subordinate to the High Court. Ss. 18 and 19 provide for the procedure to be adopted to initiate those proceedings . . . As soon as the application under S. 18 is filed, the matter of the amount of proper compensation assumes a litigious form and becomes a contentious proceeding between the owner and the Collector , ... I consider it to be the first step in the judicial proceedings and to be an integral part of it. It follows therefore that if the Collector decides to reject it or passes any orders regarding it, he does so judicially and not administratively; for, a judicial proceeding once commenced cannot be effected by administrative action.

And the learned Judge concludes :

If therefore the Collector takes upon himself to pass an order which has the effect of rejecting the petitioner's application and of preventing his claim being tried by the Court, I see no difficulty in holding that it should be treated as a judicial order subject to our revisional jurisdiction.

And reference is made to the Collector's position under Part 3 where he seems to act in a judicial capacity as "part of the Court" and receives the objection petition and deals with it. Here again although the Collector may be acting "judicially" I cannot see that that constitutes him a Court or "part of a Court" subordinate to the High Court; nor do I see that the fact that he has to decide whether an application under S. 18 complies with the provisions of S. 18 or not in any way constitutes him a Court. It appears to me that what has to be looked to is not what the Collector does or seems to do, but what he is, and he quite definitely is not a Court within the meaning of the Civil Procedure Code, whatever he does. It appears to me that it is part of his administrative duties to make the references which may be required of him under the Act. Before doing so, it may be that he has to decide certain matters in the same way as a Judge has to decide matters in a suit before him or in an application before him; but this does not make the action of the Collector a judicial act in the sense of the act of a particular Court; it still remains an administrative act. In the written application for revision one of the grounds set out is that the proceedings of the Collector were illegal and without jurisdiction because the acquisition of the land was unnecessary for a public purpose. How this could be made a ground of revision in this Court passes my understanding. Under S. 5 (a) these matters are to be decided by the Government whose decision is final. This application is dismissed. It has been heard ex parte : there will be no order as to costs.

D.S./R.K. *Application dismissed.*

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ROBERTS C. J. AND SPARGO J.

J. E. Solomon — Appellant.

v.

Official Assignee and another — Respondents.

Civil Misc. Appeal No. 2 of 1938, Decided on 3rd June 1938, from order of High Court, in Insolvency Case No. 85 of 1936.

(a) Transfer of Property Act (1882), S. 6—Possibility of 'like nature'—Not only is transfer of expectation of heir or legatee forbidden but any transfer of similar kind of possibility—Possibilities that can be transferred.

Not only is a transfer of the expectations of an heir or legatee forbidden, but through the inclusion of the words "of a like nature" the sub-section prohibits any transfer of a similar kind of possibility. It is not the circumstances in which the chance arises which sanction or forbid its transfer but the inherent qualities of the chance itself. Some possibilities are not chances within the meaning of this sub-section. They do not depend on the good fortune of being entitled at a future date to receive an interest in or a right to property at the present unrestricted disposal of some other person. But where they are so dependent they are forbidden by the sub-section to be transferred.

[P 9 C 2; P 10 C 1]

(b) Transfer of Property — Assignment of future property — Assignor however must have interest to transfer.

There may be, it is true, an assignment of future property which creates an interest in it and gives the assignee a security which he can enforce even after the assignor's insolvency. But it must be future property in which the assignor has an interest to transfer: *A I R 1930 P C 17, Ref.*

[P 10 C 1]

(c) Transfer of Property Act (1882), S. 6—Gratuity — Chance of receiving it — Chance depending upon discretion of employer—Transfer of such gratuity is forbidden—Difference with book debts in business.

Transfer of the chance of receiving a gratuitous payment at the discretion of an employer for services being or about to be rendered consists of a possibility which is a purely fortuitous possibility. Its realization is not to be determined by the effort

or design of the transferor. Such a transfer is as of a like nature to the mere expectation or purely fortuitous possibility of succeeding to the whole or some part of an estate and as such is prohibited : *A I R 1933 Cal 154 ; 13 Cal 262 and 31 Cal 667, Disting. ; A I R 1916 Cal 269 ; A I R 1917 All 115 ; A I R 1925 Mad 885 and A I R 1928 All 721, Ref.* [P 10 C 2]

The hope of a gratuity differs from the hope which a tradesman has of future book-debts because book-debts are a necessary incident of every business which is conducted on a credit basis; without them there would be no such business and a mortgage of such debts operates as an equitable assignment fastening on the property when it comes into existence : *31 Cal 667 ; (1882) 19 Ch D 342 ; (1863) 10 H L C 191 and 13 Cal 262, Ref.* [P 10 C 1, 2]

Horrocks — *for Appellant.*

C. K. Ray — *for Respondent 2.*

Roberts C. J.—This appeal raises an interesting point of law which has been argued with great force and ability on both sides. Mr. J. C. Latimour was the Chief Accountant to the Municipal Corporation of Rangoon, and on 14th May 1935 the Finance Committee of that body passed a recommendation that upon his retirement he should be awarded a gratuity of Rupees 24,000. He was what is known as a "Class A employee" and the rules governing the award of a gratuity to him are to be found in Ch. 14 of Sch. 1 to the City of Rangoon Municipal Act, 1922. The Act contains general rule-making powers and by S. 239 (vi) (1) may provide for

the conditions under which municipal officers or servants or any of them shall on retirement or discharge receive pensions, gratuities or compassionate allowances and under which the widows or other dependent relations of any of the said officers or servants who have died whilst in the service of the Corporation may receive pensions, gratuities, or compassionate allowances

and the amount thereof. R. 3 of Ch. 14 of Sch. 1 says: "the Corporation at its discretion may pay to employees of Class A gratuities on retirement" on certain conditions. And it is clear that the Corporation is not bound to pay a gratuity to any such employee. By R. 4 the amount of gratuity "admissible" is to be calculated in accordance with a fixed rule and must not exceed a certain figure which varies in different cases according to the length of an employee's service and his rate of pay. On 29th May 1935, Mr. Latimour borrowed the sum of Rs. 25,000 from Mrs. A. E. Aaron and purported to assign all his rights in the gratuity in question to her by way of English mortgage subject to a proviso for redemption and re-transfer. This mortgage was subsequently transferred by a deed of 2nd September 1935 to the present appellant. The Corporation sanctioned the recommendation of its Finance Committee on 4th June 1935. Mr. Latimour was adjudged insolvent on 9th April 1936, and the question arose as between the appellant and the Official Assignee whether the former was a secured creditor under the deed of 29th May 1935.

There was also an application by the second respondent, Mrs. Evans, under S. 7, Rangoon Insolvency Act, for a declaration that a sum of Rs. 10,032-11-0 in respect of which she held a decree against the insolvent and which was the subject of a prohibitory order, dated 3rd March 1936, whilst it was in the hands of the Corporation, did not vest in the Official Assignee; this application was dismissed, but Mrs. Evans has been given leave to be joined as a respondent in the present appeal. By S. 6, T. P. Act

property of any kind may be transferred except as otherwise provided by this Act or by any other law for the time being in force.

Section 6 (a) continues :

The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature cannot be transferred.

The question which falls to be considered is whether the transfer in the present case falls within the sub-section and is forbidden by law. Two kinds of chances are named, depending on spes successionis or expectation of succession. If the words "of a like nature" were not included in the Section, and it were enacted that "any other mere possibility cannot be transferred" such a possibility would have to be read as ejusdem generis with the expectation of succession. But the words "of a like nature" have been included, and thus the Act has forbidden not only mere possibilities dependent on the hope of succession to the estate or part of an estate of a deceased person but all possibilities of a like nature. It was urged on behalf of the appellant that if the sub-section ended with the words "any other mere possibility" this would cover every kind of chance, but that the words "of a like nature" are words of limitation and show that the possibility must be one arising from succession in order to fall within the sub-section. I cannot accept that view. It appears to me that not only is a transfer of the expectations of an heir or legatee forbidden, but that through the inclusion of the words "of a like nature" the sub-section prohibits any transfer of a similar kind of

possibility. It is not the circumstances in which the chance arises which sanction or forbid its transfer, but the inherent qualities of the chance itself.

Some possibilities are not chances within the meaning of this sub-section. They do not depend on the good fortune of being entitled at a future date to receive an interest in or a right to property at the present unrestricted disposal of some other person. But, where they are so dependent they appear to me to be forbidden by the sub-section to be transferred. In 8 Rang 8[1] their Lordships of the Privy Council dealt with a case in which a contingent interest was given by way of settlement to certain children and Lord Atkin explained that this was something quite different from a mere possibility of a like nature of an heir-apparent succeeding to the estate or the chance of a relation obtaining a legacy and was thus capable of assignment. But Mr. Latimour never had any contingent interest here. He merely had a hope that the Corporation would accept the recommendation of their Finance Committee, and would in the exercise of their discretion pay him the money on his retirement. Not only was the Corporation in no way bound to do so, but it appears from R. 9, Ch. 14 that if Mr. Latimour had died before retirement his estate would in no event have benefited, but the Corporation might in its discretion have paid "the widow or other dependent relations" without any regard to the claims of his creditors at all; and the amount they might pay, if any, would also be in their discretion. There may be, it is true, an assignment of future property which creates an interest in it and gives the assignee a security which he can enforce even after the assignor's insolvency. But it must be future property in which the assignor has an interest to transfer.

It has been strongly contended that the hope of a gratuity differs in no way from the hope which a tradesman has of future book-debts. But book-debts are a necessary incident of every business which is conducted on a credit basis; without them there would be no such business; though the quantum of book-debts not already incurred must always remain in doubt, yet so long as the business is carried on, book-debts will continue and a mortgage of such debts operates as an equitable assignment fastening on the property when it comes into existence. This is only one instance of the rule laid down in (1882) 19 Ch D 342.[2] *See also* (1863) 10 H L C 191[3] and (1888) 13 A C 523.[4] The doctrine there laid down is fully discussed in 59 Cal 1372.[5] It has been applied to a mortgage of crops to be grown on a certain plot of land (13 Cal 262[6]) and to a mortgage or pledge of indigo cakes to be produced at a future time: 31 Cal 667.[7] All these cases appear very different from a purported transfer of the chance of receiving a gratuitous payment at the discretion of an employer for services being or about to be rendered. The possibility which was sought to be transferred here was a purely fortuitous possibility; its realization was not to be determined by the effort or design of the transferor. And I feel obliged to regard it as of a like nature to the mere expectation or purely fortuitous possibility of succeeding to the whole or some part of an estate.

The learned trial Judge pointed out in his judgment that in several cases cited to him the Courts have impliedly held that the transfers forbidden by Sec. 6 (a), T. P. Act, were not limited to those which directly arose out of the chance of succession. Thus, Coxe J. in 43 Cal 28[8] expressly said that the chance of future worshippers giving offerings to a temple was within the sub-section and could not be transferred. A Bench at Allahabad discussed this decision in 39 All 196[9] and held that the remuneration which Maha Brahmins receive for the services they perform at Hindu festivals did not stand on the same basis, as such offerings were not purely voluntary. There was never any suggestion that the sub-section could not apply because the

1. Ma Yait v. Official Assignee, (1930) 17 A I R P C 17 = 121 I C 225=8 Rang 8=57 I A 10 (P C).
2. Collyer v. Isaacs, (1882) 19 Ch D 342 = 51 L J Ch 14=45 L T 567=30 W R 70.
3. Holroyd v. Marshall, (1863) 10 H L C 191=33 L J Ch 193=9 Jur (NS) 213=7 L T 172 = 11 W R 171.
4. Tailby v. Official Receiver, (1888) 13 A C 523= 58 L J Q B 75=60 L T 162=37 W R 513.
5. H. V. Low & Co. v. Pulinbiharilal Singha, (1933) 20 A I R Cal 154=143 I C 193=59 Cal 1372.
6. Misri Lal v. Mozhar Hossain, (1886) 13 Cal 262.
7. Baldeo Parshad Sahu v. Miller, (1904) 31 Cal 667.
8. Puncha Thakur v. Bindeswari Thakur, (1916) 3 A I R Cal 269=28 I C 675=43 Cal 28=19 C W N 580.
9. Sukh Lal v. Bishambhar, (1917) 4 A I R All 115=37 I C 661=39 All 196=15 A L J 41.

transfer was not one dependent upon an expectation of succession, as has here been contended for the appellant. In 48 M L J 598[10] an agreement for the sale of karnam service inam lands when enfranchised was held to be forbidden by S. 6, T. P. Act, as being dependent on a mere expectation, not, be it observed, an expectation of succession, but one of a like nature to it. In 50 All 394[11] although the Court dissented from the decision in 43 Cal 28[8] it was never suggested that their reason was that S. 6 (a) of the Act only applied to chances arising from spes successionis. On the contrary, in that case it was said (at p. 401) that though the amount was uncertain

the fact that offerings large or small are bound to be made is a certainty and not a mere possibility of the nature referred to in S. 6 (a), T. P. Act.

In the present appeal it must be remembered that no gratuity large or small was bound to be paid to Mr. Latimour and it was entirely within the discretion of the Corporation to decline to make payment of any gratuity whatever. I agree with the observation of the learned trial Judge that it is not in the least material in this case to consider what the probabilities were on 29th May 1935. It is said that there was a moral certainty on that date of Mr. Latimour getting a gratuity of the amount recommended by the Finance Committee; all that means is that his sense of expectation was so lively that he treated something which had not yet been done as if it had been done, and purported to assign that which he did not yet possess, namely an interest in moneys then in the hands of the Corporation. Accordingly this appeal fails and must be dismissed with costs to respondent 2, advocates' fees fifteen gold mohurs for the first and eight gold mohurs for each succeeding day. Respondent 1 was not represented, accordingly no question of an advocate's fee arises in his case.

Spargo J.—The question that arises for decision in this case is whether the property which Mr. Latimour sought to mortgage was a "mere possibility of a like nature" within the meaning of Cl. (a), of S. 6, T. P. Act. It was suggested for the appellant that these words mean a possibility of a like nature to the chances of an heir-apparent succeeding to the estate in the sense that the likeness arises from the possibility also being traced to a question of succession. The learned Insolvency Judge found that the possibility contemplated in the last part of Cl. (a), of S. 6 was any possibility affected by mere chances, and it was suggested for the appellant that none of the authorities relied on by the learned Insolvency Judge supported him in finding such a wide application for the words in S. 6, Cl. (a). 50 All 349[11] at p. 401 was referred to as showing that the words "mere possibility" do not refer to cases where there is doubt as to the amount of the property that would be involved.

It was argued that the words used in Cl. (a) must mean that the other possibilities referred to were like the previous chances mentioned in the clause in that they arose out of succession or a bequest, for, the Legislature has specified in this clause two chances and has then gone on to other possibilities, which must be synonymous with chances. If the words "of a like nature" were left out, the Section would not have to be construed ejusdem generis. "Any other mere possibility" is to be regarded as synonymous with a chance, but when the words "of a like nature" are added it must be a chance, and of a nature similar to the chances previously mentioned in the clause. It was strongly argued that future book-debts were mere possibilities of a like nature in the meaning of the clause as found by the learned Insolvency Judge, for there could be no certainty that there would ever be any future book-debts. The transferor could not force people to come and trade with him and so provide book-debts; and he could destroy the chance that there ever should be a need for book-debts by converting his business immediately after the transfer from a credit business to a ready money business. Another argument advanced for the appellant is that if the learned Insolvency Judge's reading of the clause is correct most of the clause is redundant; all that need have been done was to prohibit the transfer of spes of all kinds and though it might be said that the two particular kinds of spes mentioned in the clause are illustrations one has never seen illustrations incorporated in the wording of the Section before.

For the respondent Mr. Ray said, a statute must be interpreted according to the ordinary rules of grammar; words must be given their ordinary meanings. A statute

10. Auryaprabhakara Rau v. Gummudu Sanyasi, (1925) 12 A I R Mad 885 = 88 I C 557 = 48 M L J 598.

11. Balmukand v. Tula Ram, (1928) 15 A I R All 721=113 I C 242=50 All 394=26 A L J 185.

is only the will of the Legislature. The meaning of the clause must be found from the words used. If the words are clear, the Court is not permitted to be influenced by inquiring what was the state of the law at the time the law was passed or what was in the mind of the Legislature. In the clause the words "of a like nature" widen the meaning of possibility, so what is meant is "any other mere possibility" whose nature is like the nature of the chance of an heir-apparent or relation. I have found great difficulty in construing Cl. (a), of S. 6. This difficulty may be illustrated by the opposite conclusions that were drawn by Mr. Ray and by Mr. Horrocks from the presence in the clause of the words "of a like nature." And it appeared to me that whichever of their two lines of argument you followed you were led into difficulties. But if the words "of a like nature" mean that the possibililty in contemplation is one arising out of a succession or a bequest, I have difficulty in imagining what these possibilities are if they are to be 'other than' the chances already mentioned in the Clause. It might be suggested that one such possibility is the chance of an heir-presumptive succeeding but I do not think that this is the meaning because this chance differs very little from the chance of an heir-apparent.

It is therefore difficult to find a meaning for the words on the supposition that the other possibilities must arise out of successions. And, as the learned Insolvency Judge has pointed out, there have been a number of cases considered by Indian High Courts in which the meaning of Cl. (a) has had to be determined and it has never been held that Cl. (a), of S. 6 referred only to transfers of possibilities arising out of successions. In 50 All 394[11] a right to receive the emoluments attached to a priestly office was sought to be transferred. In that case the case in 43 Cal 28[8] was discussed and the learned Judges remarked:

> The right to receive the offerings (offerings received from pilgrims resorting to a temple) when made is a definite and fixed right and does not depend on any possibility of the nature referred to in S. 6 (a), T. P. Act. The moment the offerings are made the persons clothed with the right are entitled to appropriate the same. In short, the right to receive the offerings is not so uncertain, variable and limited as to pass out of the conception of law.

The test applied here is whether the right is so uncertain, variable and limited as to pass out of the conception of law. In the present case Mr. Latimour's rights were uncertain. It was not known whether he would get any gratuity at all at the time of the transfer. His rights were variable being entirely at the disposal of the Municipal Corporation of Rangoon. In truth they had not yet come into existence at all. I agree with my Lord the Chief Justice that the possibility which was sought to be transferred in this case was a mere possibility of a like nature to the mere expectation of succeeding to the whole or some part of an estate. The appeal therefore fails and is dismissed with costs to respondent 2, advocate's fees 15 gold mohurs for the first and eight gold mohurs for each succeeding day.

B.D./R.K. *Appeal dismissed.*

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* A. I. R. 1939 Rangoon 12

MACKNEY J.

Revd. Brother Patrick — Appellant.

v.

Lyan Hong & Co. — Respondent.

Second Appeal No. 292 of 1937, Decided on 3rd February 1938, against decree of District Court, Insein, in C. A. No. 18 of 1937.

*** Receiver — Contract of lease by receiver — Breach of contract of lease — Suit by lessee for damages —Receiver personally is liable and not owner of estate.**

Receivers appointed by the Court are personally liable for the contracts entered into by them unless the express terms of the contract exclude any personal liability. Hence where a receiver of an estate has granted a lease and upon breach of contract of lease the lessee brings a suit for damages the receiver is liable personally. The lessee has no right of suit against the owner of the estate in respect of the breach of contract of lease. The receiver cannot bind the estate by lease and no relationship of landlord and tenant is created between the lessee and the owner of the estate. It may be that the receiver will be able to establish his right to indemnity against the estate and that through him the lessee will be able to resort to the estate to satisfy his dues, but these are matters which cannot arise for decision in a suit by the lessee for damages for breach of contract: *Case law relied on; 30 Cal 937 (P C), Expl. and Dissent.*

[P 13 C 2; P 16 C 2]

E. C. V. Foucar — *for Appellant.*

Kyaw Din — *for Respondent.*

Judgment.—This appeal arises out of a suit brought by the plaintiffs-respondents Lyan Hong & Co. for the recovery of a sum of money as damages for breach of contract of a lease of a certain rice mill. This rice mill belonged to the estate of one

U Po Kha. In Civil Regular Suit No. 5 of 1935 in the District Court of Insein a decree was passed for the administration of this estate, and one U Zeya was appointed receiver. The decree is dated 23rd May 1936. U Zeya was appointed receiver to wind up the estate and partition it among the parties. He was empowered to sell any part of the moveable property of the deceased if he found it necessary to carry out the objects of the suit. He was also empowered to sell the immovable property with the prior sanction of the Court. In addition to these powers, it was declared that the receiver should have power to rent out any immovable property of the estate for a period not exceeding six months if he found it necessary to do so to carry out the objects of this suit. In conformity with this power, U Zeya leased the mill to the plaintiff company on 16th October 1936 but no document of lease was executed. One Chit Po was the former lessee. U Zeya appears to have turned him out. The plaintiff company went into possession on 17th October 1936. On 12th November 1936 they were ousted by an order of the Headquarters Magistrate at Insain and one Ma Hman, said to be a sub-lessee of Maung Chit Po, was put into possession and remained in possession until 31st March 1937.

On 2nd November 1936 the appellant, the Reverend Brother Patrick, having become the sole owner of the estate, the Court discharged the receiver and directed him to give possession of the property which was in his possession to the Reverend Brother Patrick. On 3rd November the receiver was requested by letter to hand over the mill to the Reverend Brother Patrick. To this letter U Zeya replied on 18th November stating that he had leased the rice mill to Lyan Hong & Co. for six months and that the mill was in their possession. On 23rd November a reply was made on behalf of the Reverend Brother Patrick indicating his surprise at receiving the information contained in the letter of 18th November and pointing out that there seemed to be some trouble at the mill as a result of U Zeya's action as one Ma Hman, as the sub-lessee of Maung Chit Po, claimed to be in possession. The plaintiff company joined U Zeya, the Reverend Brother Patrick and one Maung E as defendants in their claim for damages. We are not now concerned with the case of Maung E. The Sub-divisional Court granted the plaintiff company a decree against all the defendants for Rs. 3240-10-0. All the parties appealed against this decree to the District Court. The learned District Judge dismissed the appeals of the defendants, modified the decree of the Sub-divisional Court by granting a decree for Rs. 4405-4-9 and directed that the decree be against the Reverend Patrick and Maung E in their capacity as representatives of the estates of U Po Kha and against U Zeya in his personal capacity. The Reverend Brother Patrick has appealed against the decree of the District Court in dismissing his appeal.

The point taken is that the receiver U Zeya is personally liable for the contract entered into by him, and the other party cannot sue the estate or the owners of the estate for damages for breach of contract but can have recourse only against the receiver. Consequently no decree should be passed against the Reverend Brother Patrick. The receiver can claim to be indemnified from the estate if it is found that his action in leasing the property was correct. The learned District Judge has considered this point in his judgment and he held on the authority of 30 Cal 937[1] that although the receiver was personally liable, a creditor also could have recourse also against the estate, the principle to be applied being that the estate cannot enjoy the benefit of the receiver's acts without being held responsible for the obligations arising out of them. In 14 Rang 336[2] it was pointed out that :

> As regards the liability of the contracting parties there is normally no difference between a contract to which *A* is a party in his capacity as "a trustee" and one to which *A* is a party in his personal capacity. In either case the opposite contracting party contracts with *A* and with no one else; and in the absence of an express or clearly implied term of the contract itself that the personal liability of the contracting trustee is to be excluded, no limitation upon *A's* personal liability arises by virtue only of his being in fact, and by his being described as a trustee. In either case the trustee is the contracting person . . . . If a creditor obtains a decree against a trustee or an executor with whom he has contracted and such trustee or executor has a right of indemnity against the estate, that right of indemnity becomes one of the assets of the trustee or executor accessible to the creditor, whether by subrogation or otherwise. But the personal liability of the trustee or the executor must first be recognized and only then can any right of indemnity arise upon which the doctrine of subrogation can operate.

1. Mohari Bibi v. Shyama Bibi, (1903) 30 Cal 937=7 C W N 799.
2. Mahanth Singh v. U Aye, (1936) 23 A I R Rang 514=166 I C 247=14 Rang 336.

In this judgment a number of English authorities are cited, but as the learned Judge observes in this matter the law applicable in this country does not differ. I have no doubt that the same principles are to be applied in the case of a contract with a receiver. For this there is ample authority. I would first refer to (1910) 2 Ch 470[3] at page 476 in which reference is made to the case in (1880) 15 Ch D 548[4] at p. 555 which is referred to by Braund J. at page 345 of the Rangoon Reports. In (1880) 15 Ch D 548[4] Jessel M. R. said :

If the right of the creditors is, as is stated by Turner L. J., the right to put themselves so to speak in the place of a trustee who is entitled to an indemnity, of course, if the trustee is not entitled, except on terms to make good a loss to the trust estate the creditors cannot have a better right. Reading "receiver and manager" in lieu of "trustee" the passage is exactly in point.

The claim of the creditors was against the receiver and in this case (a debenture-holder's action) they were allowed to claim against the estate only to the extent of the net amount of the receiver's indemnity, i. e. £500, which was less by £400 than the total liability incurred by the receiver, because the receiver's cash account was deficient by £400 which he was unable to pay. Swinfen Eady J. said :

The right of the trade creditors was to sue Watkins (receiver) to whom they gave credit. He would have had no answer to their claim. But can they through him claim against the estate of which they are not creditors? The answer is that they can only claim through him to the extent of his right of indemnity against the estate . . . . . The trade creditors have no higher right than Watkins against the estate. If Watkins paid them the whole £900, he could only come against the estate for the difference between the £900 and the £400 in his hands, i. e. £500.

In (1912) A C 254[5] it is clearly shown that where the contract is made by the receiver and manager he is personally liable, the receiver and manager looking for indemnity to the assets of the company of which he is receiver and manager. Earl Halsbury observed (at page 261):

Once a receiver and manager is appointed things are changed, and every man of business would know, or ought to know, that the only person with whom he could safely contract would be the manager appointed by the Court.

In 10 Pat 379[6] the decision in (1913) A C 160[7] is quoted in which this case is referred to and it is observed by Lord Haldane L. C. :

It is no doubt true that prima facie any new contracts they (i. e. the receivers and managers) made would ordinarily be made by them personally in reliance on their right of indemnity out of the assets as happened in the recent case before the House of Lords in (1912) A C 254[5] where a new contract made by the receiver was held, as a matter of construction, to have been entered into by him personally.

The Patna High Court applied the principle in the case before it. Again, in 58 Cal 174[8] reference was made to English cases and it was pointed out that

receivers appointed by the Court are not agents to contract, either of the Court appointing them or of anybody else, but they are principals. They are personally liable for contracts entered into by them, unless the express terms of the contract exclude any personal liability.

If it be true that the receiver in the present case is personally liable on the lease contract entered into by the plaintiff company, and if the plaintiff company can only enforce its claim against the estate through the receiver on its being able to establish that the receiver is entitled to indemnity in respect thereof from the estate, then it is obvious that the Reverend Brother Patrick, as the owner of the estate, is not a proper party to this suit.

I have examined the case in 30 Cal 937[1] on which the learned District Judge relies but I am bound to say with the greatest respect that I do not understand the reasoning employed in this judgment. This was a suit for the recovery of a sum of money due to the plaintiff's firm on account of their dealings with the receiver of the estate of one Pokhiram, for the administration of which Shyama Bibi had obtained letters of administration, the receiver being discharged. It was contended that the plaintiff's proper remedy was against the receiver alone, but the learned Judge dismissed this contention saying that the creditor is

3. In re British Power Traction and Lighting Co., Ltd.; Halifax Joint Stock Banking Co., Ltd., v. British Power Traction and Lighting Co., Ltd., (1910) 2 Ch 470=79 L J Ch 666=103 L T 451=54 S J 749.
4. In re Johnson Shearman v. Robinson, (1880) 15 Ch D 548=49 L J Ch 745=43 L T 372=29 W R 168.
5. Moss Steamship Co. Ltd. v. Whinney, (1912) A C 254=81 L J K B 674=105 L T 305=16 Com Cas 247=12 Asp M C 25=55 S J 631=27 T L R 513.
6. Dinshaw v. Amrit Lal & Co., (1931) 18 A I R Pat 298=133 I C 459=10 Pat 379=13 P L T 142.
7. Parsons v. Sovereign Bank of Canada, (1913) A C 160=82 L J P C 60=107 L T 572=29 T L R 38=20 Mans 94=50 Sc L R 635.
8. Ramnarayan Satyapal v. Carey, (1931) 18 A I R Cal 491=134 I C 1266=58 Cal 174.

entitled to proceed against the representative of the estate for recovery of debts incurred by the receiver during the management of the estate by him. The learned Judge thought that the right to maintain such a suit against the representative of the estate was founded on the just and equitable principle that as the acts of a receiver, acting within his authority, were the acts of the Court, the estate could not be permitted to enjoy the benefit of those acts without being held responsible for the obligations arising out of them. The observations of Rigby L. J. in (1895) 1 Q B 276[9] are quoted as justifying this conclusion. No doubt it is true that the receiver is entitled to be indemnified by the estate, but this proposition does not justify the conclusion that the creditor is entitled in a suit to recover his dues to proceed against the representatives of an estate instead of the receiver, or conjointly with the receiver, and with the greatest respect I cannot see that the quotation from the judgment of Rigby L. J. justifies such an inference. The quotation is:

> The Court could never have intended by its action to bring about such a state of things as that a business might be carried on perhaps for years, and then, owing to failure of the assets, all the creditors should go without payment.

In point of fact, this observation has been taken right out of its proper context and, when considered with its context, appears to be a meaning quite opposite to that which the learned Judge who decided 30 Cal 937[1] has put upon it. Rigby L. J. says:

> The intention is that the receiver and manager so appointed should appear to the world as the person carrying on the business in the usual way, making himself personally liable on all contracts, except in cases where there might be a special stipulation to the contrary, and looking for indemnity to the assets or the persons for whose benefit ultimately the business was carried on. It would be impossible for a tradesman in the ordinary course of business to ascertain for whose benefit the business was carried on, or what funds might be available; and I do not think that the Court can be supposed to have intended by their action to place people in such a predicament. I do not say that it would be the duty of a receiver and manager to incur liabilities of an exceptionally heavy nature, but I think he must be understood to take on himself the ordinary liabilities that would fall on a person carrying on such a business as that to which his appointment relates. I do not say that, if the fund to which he was looking for indemnity failed, he might not come to the Court and ask to be relieved from responsibility; but I do not think he can get rid of responsibility on a contract merely by stating in the contract that he is a receiver. As soon as it appears that he has no principal, and is a receiver appointed by the Court, it is implied, I think, when he enters into a contract, that it is a real contract, by which he binds himself personally, and he must look for indemnity from the liability so incurred to the assets .... I think that the notion upon which the Court has always proceeded, in exercising its jurisdiction to appoint a manager of a business, is not that he is to be in the position of an agent, although there is no principal, but that he is to be in a position similar to that of persons who in a fiduciary capacity carry on a business, in the course of which contracts have to be entered into, e. g. executors or trustees, who, by the terms of the instrument appointing them, are directed to carry on a business for the benefit of others. The rule has always been that such persons are prima facie themselves personally liable, and they cannot get rid of liability on the contracts made by them merely by describing themselves in the contract as executors or trustees ....

and then comes the sentence which has been quoted in the Calcutta decision. In the Calcutta case Sale J. avers that

> a right to maintain such a suit, (i. e. by creditors of the receiver against the representative of an estate), is, in my opinion, founded on the just and equitable principle that as the acts of a receiver so long as they fall within his authority are the acts of the Court, the estate cannot be permitted to enjoy the benefits of those acts without being held responsible for the obligations arising out of them.

But, with the greatest respect, I do not think that it is correct to hold, even if the acts of a receiver are in this sense the acts of the Court that the creditors of the receiver, have any direct claim against the estate. The learned District Judge referred to a passage in Kerr's 'The Law and Practice as to Receivers' Edn. 10, page 172, but omitted to specify what was the particular passage on which he relied. On referring to the text book in question, the only passage I can find, which, possibly might have been the one the learned District Judge had in mind, is this:

> The acts of a receiver are for the benefit of all parties according to their titles .... Conversely, if a loss arises from the action of a receiver the estate must bear it as between the parties to the action.

Reference is then made to two cases of which the one which I have before me is (1907) 2 Ch 511.[10] This was a debenture-holder's action, so that presumably the word 'action' where it is used for the second time in the quotation must have referred to such an action. In that particular case the receiver and manager who had been

9. Burt v. Bull, (1895) 1 Q B 276=64 L J Q B 232=14 R 65=2 Manson 94=71 L T 810=43 W R 180.

10. In re London United Breweries Ltd.; Smith v. The Company, (1907) 2 Ch 511=76 L J Ch 612=97 L T 541=14 Manson 250.

appointed became bankrupt. There were assets in the hands of the Court and the Court had to decide how these assets were to be dealt with. The trustee in bankruptcy of the receiver put in a claim as well as the debenture-holders. It seems that the receiver had become entitled to certain payments out of the assets of the company but as he had become bankrupt the Court thought fit to make the payments direct to the creditors who could prove that the debts in which they were interested had been properly incurred by the receiver in the course of his duties, the reason being that 'this is what would happen ultimately.' Neville J. observes :

> It seems to me that in directing an inquiry with a view to payment to the creditors of the receiver, after the discharge of the costs of realization, I shall be putting those creditors in precisely the same position that they would have been in, had the receiver paid them and then come for his indemnity against the estate.

The decision deals with a very special case and does not lay down any principle on which the plaintiff-respondent in this case can rely in impleading the Reverend Brother Patrick, the present owner of the estate. Even there, it is shown that the claim of the creditors is through the receiver. Whilst conceding that the principle of law herein set out is correctly laid down, the learned counsel for the respondent contends that the case of a lease is different from that of a contract, that the receiver by leasing the property binds the estate and that the lease created an interest in the estate. I do not think that this is a sound proposition. It does not appear to me to be correct to say that a receiver can bind the estate by a lease. In (1857) 7 El & Bl 590[11] I find the following observation by Lord Campbell C. J. :

> The counsel for the respondents laid down the proposition that an attornment to a receiver appointed by the Court of Chancery enures to the benefit of the person who shall ultimately be found to have in him the legal estate. The Court of Chancery certainly does not assume to itself any title or power of conveying, directing its decrees only in personam, and requiring the parties in whom the legal or equitable interest may be to convey for the benefit of those found to be beneficially interested. But no authority was adduced to show that an attornment to a receiver appointed by the Court of Chancery hypothetically creates a tenancy under another person.

In that case it may be said that Evans was a tenant who had attorned to the receiver. Ultimately the estate passed to the defendant Mathias. It was observed :

> We must therefore hold that Evans never became tenant to Lewis, (who assigned to Mathias) either by the attornment or by the subsequent payment of rent to the receiver; and that the relation of landlord and tenant, upon which the avowry is framed, was not constituted by the subsequent assignment of the term of Mathias.

It would seem therefore that no relationship of landlord and tenant has been created between the plaintiff company and the Reverend Brother Patrick. In Kerr on Receivers at p. 238 it is observed :

> If a receiver himself grants a lease without sanction, the lease will be binding as between him and the person who takes the lease by estoppel. As between the lessee, however and the owner of the legal estate, the lease has, in the absence of special circumstances, no binding force, even though it may have been made with the sanction of the Judge. The powers of the receiver are limited to receiving proposals and making arrangements as to the leasing of the property over which he has been appointed receiver. He has no power by a lease made in his own name to transfer the legal estate in the property, nor can such a power be given to him by the Judge. Leases should be granted in the name of the estate owner.

In the present case the receiver appointed by the Court can have such powers as can in law be conferred on such receivers. O. 40, R. 1, Civil P. C., sets out the powers which may be conferred upon a receiver : none of them include the power to bind the estate by a lease. I am of opinion therefore that the plaintiff-respondent's proper remedy is against the receiver, U Zeya, and that they have no right of suit against the owner of the estate, the Reverend Brother Patrick, in respect of a breach of contract of the lease. It may be that U Zeya will be able to establish his right to indemnity against the estate and that through him the plaintiff company will be able to resort to the estate to satisfy its dues, but these are matters which cannot arise for decision in such a suit as the present one. This appeal is allowed and the plaintiffs' suit against the appellant, the Reverend Brother Patrick, is dismissed with costs in all Courts.

D.S./R.K. *Appeal allowed.*

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11. George David Evans v. Williams Mathias and John Lewis, (1857) 7 El & Bl 590=26 L J Q B 309=3 Jour (N S) 793=29 L T (O S) 209 =110 R R 742=119 E R 1364.

*** A. I. R. 1939 Rangoon 17**

ROBERTS C. J. AND SPARGO J.

U Tun Kywe and others — Applicants.

v.

The King.

Criminal Revn. No. 181-B of 1938, Decided on 17th May 1938, for quashing proceedings of 3rd Addl. Special Power Magistrate, Yamethin.

*** (a) Criminal P. C. (1898), S. 197—Sanction of Local Government is not necessary for prosecuting Secretary of District Council in Burma.**

Though the Secretary of a District Council in Burma is a public servant, he does not fall within Sec. 197 and the previous sanction of the Local Government is not required before prosecuting him. [P 17 C 2]

*** (b) Criminal P. C. (1898), S. 197—Members of District Council taking bribe before making some appointment at the Council meeting—Sanction is not necessary for prosecuting them.**

No doubt, if a public servant is actually engaged in the discharge of his duties, or is purporting or pretending to be so engaged, and commits an offence, the sanction of the Local Government is clearly required before a Court can take cognizance thereof. It is not enough for a public servant to be in an official position, which he may abuse, in order to bring him under the Section: he must be purporting, or pretending to act in pursuance of his official duties. [P 18 C 1, 2; P 19 C 1]

Where certain members of a District Council took a bribe to influence their decision in the appointment of a particular person as a permanent overseer of the Council:

Held that the offence was not committed while acting or purporting to act in the discharge of their official duty within the meaning of the Section. It was an independent act committed by persons whose position gave them the opportunity to commit it; but, it was in no way bound up with the performance of their duties and as such sanction of the Local Government was not necessary: *Case law referred.* [P 19 C 2]

Dr. Ba Ha — *for Applicants.*

U Thein Maung (Advocate-General) — *for the King.*

Roberts C. J.—In this case one Mohamed Ghazi lodged a complaint, under Sec. 161, I. P. C., in the Court of the District Magistrate, Yamethin, against the five applicants, who are the Chairman, Vice-Chairman, Secretary, and members of the Yamethin District Council. The applicants submitted to the trial Magistrate that, under the provisions of Sec. 197, Criminal P. C., no complaint could be laid except with the previous sanction of the Local Government, as the alleged offence was committed, if at all, by the applicants while acting or purporting to act in the discharge of official duty. The trial Magistrate decided against them, and we are asked to quash the criminal proceedings in revision. The applicants are all public servants. Sec. 74, Burma Rural Self-Government Act, 1921, says:

> Every member, and every officer and servant of a District Council, Circle Board or School Board shall be deemed to be a public servant within the meaning of S. 21, I. P. C.

And we have next to consider whether they are public servants to whom Sec. 197, Criminal P. C., applies, that is to say, whether each of them is "not removable from office save by or with the sanction of a Local Government or some higher authority". Sec. 21, Burma Rural Self Government Act, shows that the dismissal or removal of a Secretary of a District Council from his post shall be subject to confirmation by the Commissioner, and it is therefore rightly conceded that though he is a public servant, he does not fall within Section 197, Criminal P. C., and the previous sanction of the Local Government is not required before prosecuting him.

But it has been shown, and we are obliged to Dr. Ba Han for guiding us accurately through the relevant Sections, that the term of office of members of a District Council shall be determined by the Local Government (Sec. 12): that such a person may be removed if the Local Government considers that his continuance in office is dangerous to the public peace or order (S. 17, sub-s. 3); and that the Local Government may dissolve or supersede a Local Board in the exercise of its functions if it persistently makes default in the performance of his duties, or exceeds or abuses its powers (S. 67). There appears to be no other provision for the removal of a District Councillor as such from his office. Accordingly, the question is whether the applicants (other than applicant 3, whose application must be dismissed and to whom I shall not refer again) were accused of any offence alleged to have been committed by them "while acting or purporting to act in the discharge of their official duty." If so, the sanction of the Local Government was required before a Court would take cognizance of their alleged offences; but if not, no such sanction was required. Complaint was laid under S. 161, I. P. C., the material words of which, for the purposes of this case, are as follows:

Whoever being a public servant accepts for himself or for any other person any gratification whatever other than legal remuneration (1) as a motive for doing any official act, or (2) for showing favour to any person . . . . shall be punished. . . .

And the complaint set out the fact that the applicants were public servants, and that they acted in collusion in obtaining, and did obtain and accept, a bribe of Rs. 500, all being present and acquiescing at the time of its receipt by one of them, in consideration of selecting the complainant, who was the temporary overseer to the said council as the permanent overseer thereof, or in consideration of forbearing to oppose his appointment. It is contended before us (I feel bound to say with more hardihood than I should have believed possible) that in accepting this gratification each member of the council was "purporting to act in the dischage of his official duties" within the meaning of Section 197, Criminal P. C. There appears to have been at one time an argument used in cases under this Section that no public servant could be said to be purporting to act in the discharge of his official duties if in doing so he was committing an offence. Of course, this is not so : 52 Mad 347.[1] If a public servant is actually engaged in the discharge of his duties, or is purporting or pretending to be so engaged, and commits an offence, the sanction of the Local Government is clearly required before a Court can take cognizance thereof.

Reference may be made to the case in 52 Mad 602[2] where a village Magistrate confined a woman in the chavadi or lock-up "for not appearing when the summons was sent to her." He was doing a wrongful act but was clearly doing it whilst purporting to act in the discharge of his official duty. In this case also, the sanction of the Local Government was needed before a Court could take cognizance of the offence. The Bench in that case held that in the earlier case cited, too limited a construction was placed upon Sec. 197, Criminal P. C.; the offence, they said, "need not contain any element necessarily dependent on the offender being a public servant". In 14 Pat 299[3] a Deputy Magistrate went to a village to execute a distress warrant. There he assaulted Ram Singh, who was standing among the spectators behind him at a time when the Magistrate was engaged with the defaulters and pressing them for payment of taxes. It was stated in the judgment (at p. 311) that the alleged offence was so connected with the performance of his official duties that it was impossible to say that it was an independent act in no way connected with the realization of taxes. It was also pointed out that each case must be decided upon its own facts. With regard to the nature of the act, we have been referred to the case in 62 M L J 223[4] at p. 226, where Wallace J. said :

It must, as I have said, be an act which has some connexion, other than accidental or temporary, with what he is doing or purporting to do in the exercise of his official duty, i. e. be the sort of act which he is empowered to do by virtue of his office.

What are the facts here ? Under S. 21, Burma Rural Self Government Act, a District Council may employ such officers and servants as may be necessary for the efficient execution of their respective duties. There was to be a meeting on 16th May 1937, at which a permanent overseer was to be appointed. This meeting was postponed till 25th May so that the money payable as a bribe might be forthcoming. It is alleged that the money was paid on 24th May before the meeting was held. The official duties of the members of the Council were to appoint a permanent overseer at their meeting. They were not purporting to act in discharge of this duty, nor of any other duty, when they accepted (if they did accept) a bribe from the complainant beforehand. In this connexion we have been referred to the case in 8 Luck 156,[5] where the members of a District Board attending a meeting, after presenting a defamatory application, walked out of the room, and it was held that it would be doing violence to the language of S. 197 to say that the act of these members constituted an offence committed while acting or purporting to act in the discharge of their official duty within the meaning of the Section. It is not enough for a public servant to be in an official position, which he may

1. Sivaramakrishna Ayyar v. Seshappa Naidu, (1929) 16 A I R Mad 172=115 I C 248=52 Mad 347=30 Cr L J 396=56 M L J 263.
2. Gangaraju v. K. Venki, (1929) 16 A I R Mad 659=1929 Cr C 140=118 I C 102=30 Cr L J 864=52 Mad 602=57 M L J 31.
3. Ram Singh v. S. A. Rizvi, (1935) 22 A I R Pat 52=1935 Cr C 83=155 I C 126 = 36 Cr L J 650=14 Pat 299=15 P L T 775.
4. In re Ganapathi Goundan, (1932) 19 A I R Mad 214=1932 Cr C 156=138 I C 133 = 33 Cr L J 557=62 M L J 223.
5. Bajrang Bahadur Singh Rai v. Emperor, (1932) 19 A I R Oudh 308=1932 Cr C 848 = 141 I C 819=34 Cr L J 253=8 Luck 156 = 9 O W N 875.

abuse, in order to bring him under the Section : he must be purporting, or pretending, to act in pursuance of his official duties. This point is illustrated by the case in 50 Mad 754.[6] Reference may also be made to 52 Mad 695.[7] Madhavan Nair J. in that case said :

> In this case accused 2 is alleged to have threatened some voters that he would increase their property tax, and others that he would institute prosecutions against them for alleged encroachment if they did not vote for his candidate. He is said also to have wrongfully restrained some people from voting. I am clearly of opinion that no sanction is required before proceeding against a Municipal Chairman with respect to these alleged offences. No doubt, the Chairman of a Municipality is a public servant and not removable except by the Local Government: *see* 1 Weir 243[8] and 4 Rang 128[9] at p. 130. But the acts alleged against him cannot be said to have been committed by him while acting in the discharge of his official duty. It is conceded that the alleged act of wrongful restraint cannot be said to have been committed by the Chairman in his capacity of public servant as such. In my opinion, the allegations made against him under S. 54 (b) also fall within the same description.

And adopting the language of Dunkley J. in 13 Rang 540[10] at p. 550, the applicants were acting in direct opposition to their duty, and their office merely provided them with the opportunity of committing the offence: their actions were not such as to cause another person to think that they were acting in the discharge of their duty. I am certainly unable to hold that the complainant honestly believed that it was part of the duty of a District Councillor to demand and receive a bribe from a candidate for employment under the Council. They knew, and he knew, that they were doing a wrong thing, not in the course of their duties or in the purported pursuance of them at all, but entirely outside them : they were using their position as members of the Council (if the complaint and the evidence in support of it is believed) to obtain an illegal gratification.

The applicants of course, never pretended that it was part of their duty to act thus: if they had so pretended and they conveyed to the mind of the person paying the bribe that he was under a legal obligation to pay it and that they were doing what was right and proper in the discharge of their duties, the situation would doubtless be different. Here the offence was complete when they attempted to obtain the money: their duties had not begun and could not purport to begin till they began to consider in Council whom they should employ. The case for the prosecution is that some time before they purported to act in the discharge of their official duties they used their position as members of the Council as an opportunity to commit this offence. I agree entirely with the tersely expressed but wholly accurate order of the Third Additional Magistrate, Yamethin : it is only out of deference to the arguments advanced by counsel for the applicants that I find it desirable to add any observations to what the learned Magistrate said. In the application for revision, it is urged that the applicants purported to act as public servants in accepting the illegal gratification and this also is true; but they never purported to be performing their duty as such. The cases cited to us were apt illustrations of cases in which a public servant in purporting or pretending to perform his duty has committed an offence: but there was no such purport or pretence here, and to say that a member of a District Council is acting in purported discharge of his duties when he accepts a bribe in order to influence his decision at a meeting of that body is to display the gravest misapprehension of what those duties could possibly be. It is an independent act committed by one whose position gives him the opportunity to commit it; but, it is in no way bound up with the performance of his duties. In my opinion therefore all these applications must accordingly be dismissed.

Spargo J.—I agree that the applicants were not acting in the discharge, or purported discharge, of their duties when they demanded this money, if they did so demand it from the complainant. One of the accused in the case, Tun Kywe, filed an application, and in this application he said that according to the complainant and his evidence as disclosed in the preliminary enquiry, the alleged offence was committed while the accused were acting or purpor-

6. Raja Rao v. Ramaswamy, (1927) 14 A I R Mad 566=102 I C 347 = 28 Cr L J 539 = 50 Mad 754=52 M L J 647.
7. Panakalu v. Subba Rao, (1928) 15 A I R Mad 1158=113 I C 625=30 Cr L J 191 = 52 Mad 695=57 M L J 331.
8. In re Chairman of the Municipal Council, Ellore, (1889) 1 Weir 243.
9. Emperor v. U Maung Gale, (1926) 13 A I R Rang 171 = 97 I C 64 = 27 Cr L J 1088=4 Rang 128.
10. Emperor v. Maung Bo Maung, (1935) 22 A I R Rang 263=1935 Cr C 964=157 I C 1034=36 Cr L J 1272=13 Rang 540 (F B).

ting to act in discharge of their official duty, i. e. voting for the appointment of the complainant. There is evidently some confusion here, because the offence alleged in the complaint was that at the house of Ameer Hussain a number of members of the Council forced the complainant to pay them Rs. 500. Whatever they may have done at the meeting it is clear that that action was not in discharge or purported discharge of their official duties.

K.S./R.K. *Applications dismissed.*

A. I. R. 1939 Rangoon 20

SHARPE J.

R. N. Panday — Applicant.

v.

Mohamed Kassim Khan — Respondent.

Civil Revn. No. 271 of 1937, Decided on 14th January 1938, against order of Small Cause Court, Rangoon, in C. R. Suit No. 2739 of 1937.

Civil P. C. (1908), O. 38, R. 11 and S. 73— Scope — Judgment-debtor's money attached before judgment — After decree, no steps by decree-holder to realize decree — Another decree-holder attaching same amount and after decree, applying for money being brought in Court — First decree-holder not having applied for execution before money paid in Court held not entitled to rateable distribution.

Order 38, R. 11 does not excuse an application for execution in any circumstances whatever; it only says that, upon an application for execution, re-attachment of the property need not be applied for, if the property has already been attached under the order. [P 21 C 1]

A decree-holder who had obtained attachment before judgment of a certain amount of the judgment-debtor lying in the hands of a third person, took no steps after the decree was passed to realize the decree. A subsequent decree-holder who had also attached before judgment the same amount in his suit against the same judgment-debtor, applied, after a decree in his favour was passed, for directing the third party to bring the amount into the Court. The third party in pursuance of the Court's order paid the money into the Court. The first decree-holder applied for rateable distribution of the amount between himself and the subsequent decree-holder :

Held that the first decree-holder was not entitled to rateable distribution as he had not applied for execution of his money decree before the amount was paid into the Court : *12 Bom 400 and 34 Mad 25, Ref.* [P 21 C 1]

M. Ahmed — *for Applicant.*

Order. — On 17th February last the present applicant for revision presented a plaint in the Court of Small Causes of Rangoon against one B. V. Rathnam claiming Rs. 230 said to be due on a promissory note. Later that same day he applied for the issue of a prohibitory order before judgment; the application was granted and on 6th April the attachment before judgment was confirmed. The attachment was one covering the money then lying to Rathnam's credit in the books of the Burma Oil Subsidiary Provident Fund Trust (India) Ltd., to which Company I will hereafter refer as "the Company". On 7th April the present respondent presented a plaint in the same Court against the same Rathnam claiming Rs. 300 said to be due on another promissory note. He, too, applied immediately after presenting his plaint, for a prohibitory order covering the same money held by the Company. This second suit against Rathnam was uncontested and on 4th May the respondent obtained a decree for the amount claimed with costs, the second attachment being confirmed on the same day. The respondent took no further step to realize his decree until the application of 27th July with which I will deal in a moment. The present applicant's suit, unlike the respondent's, was contested by Rathnam, and it was not until 18th May that the decree was passed in favour of the present applicant, who, on 17th June, applied for an order directing the Company to pay into Court the money covered by the prohibitory order of 6th April. Notice was issued to the Company who thereupon paid the money into Court; the amount so paid into Court was Rs. 290-4-0. On 27th July the respondent applied under S. 73, Civil P. C., for a rateable distribution of the Rs. 290-4-0 between himself and the present applicant. The learned Judge of the Small Cause Court held that the respondent need not apply for execution after obtaining his decree, and he directed the money to be rateably distributed between the two decree-holders. It is in respect of that decision that the present application for revision is made.

The point for decision is : Was it necessary for the respondent, in order to obtain a rateable distribution, to apply for execution after obtaining his decree ? If so, was the decision of the lower Court otherwise than "according to law" so as to call for revision under S. 25, Rangoon Small Cause Courts Act ? Mr. Ahmed, for the applicant, contends that the words of S. 73 are clear and that, unless the respondent applied to the Court for the execution of his money

decree before the money was paid into Court, he could not obtain an order for the money to be distributed rateably. Mr. Ahmed relies upon 12 Bom 400[1] and 34 Mad 25.[2] It is unfortunate that there has been no appearance by or on behalf of the respondent, and I have not therefore had the assistance of any contrary argument. I apprehend however that the case for the respondent would have been that, having regard to the terms of O. 38, R. 11, Civil P. C., it was unnecessary for him to apply for execution, as he had already attached the property before judgment. I do not think that that is a sound argument. Order 38, R. 11, does not excuse an application for execution in any circumstances whatever: it only says that, upon an application for execution, re-attachment of the property need not be applied for if the property has already been attached under the order. As a matter of fact, the words of the old S. 490 (under which 12 Bom 400[1] was decided) were "to re-attach property in execution of such decree" where now stand the words "upon an application for the execution of such decree to apply for a re-attachment of the property". The new words "upon an application" make it clear that after decree the decree-holder must apply in the usual way.

34 Mad 25,[2] *supra* was also decided under the old wording, and my attention has not been drawn to any reported decision since the coming into force of the Code of Civil Procedure of 1908. Any ambiguity or doubt which may previously have existed has been removed by the wording of the present R. 11 of O. 38. In my judgment, therefore, it was necessary for the respondent to apply for execution of his money decree before the Company paid the money into Court: he did not do so; and accordingly he was not entitled to an order for a rateable distribution of the money in Court. From that it follows that the decision of the lower Court was not "according to law", but that does not of itself entitle the applicant to revision. The word in S. 25, Rangoon Small Cause Courts Act, 1920, is "may", and not "shall"; this Court has a discretion as to what, if any, order it will pass when satisfied that a decree or order made by the Court of Small Causes is not "according to law". I have considered the matter as carefully as I can, without, as I have already said, the benefit of having any argument addressed to me on behalf of the respondent. On the whole I think that this is a case in which I may properly interfere in revision. This application is granted, and the order of the Court of Small Causes dated 31st August 1937 ordering a rateable distribution of the money in Court must be set aside with costs.

N.S./R.K. *Application granted.*

1. Pollonji Shapurji v. Edward Vaughan Jordan, (1888) 12 Bom 400.
2. Arunachellum Chettiar v. Haji Sheik Meera Rowther, (1911) 34 Mad 25=7 I C 856=1910 M W N 688.

A. I. R. 1939 Rangoon 21

MYA BU OFFG. C. J. AND MACKNEY J.

U Zawtipala — Appellant.

v.

U Thatdama — Respondent.

First Appeals Nos. 14 and 49 of 1938, Decided on 28th July 1938, against decree of Asst. Dist. Court, Bassein, in C. R. S. No. 3 of 1937.

(a) Buddhist Law (Burmese)—Representative suit under O. 1, R. 8, Civil P. C., by Burmese monk who is not presiding monk of the kyaungdaik for recovery of land on the ground that it is aramika sanghika property, on behalf of all sanghas of kyaungdaik, and not on behalf of general body of sanghas is not maintainable.

A suit under O. 1, Rule 8, Civil P. C., by a Burmese monk who is not the presiding monk of the kyaungdaik in which he resides, for the recovery of certain land on the ground that it is aramika sanghika property, on behalf of all the sanghas of the kyaundaik (and not on behalf of the general body of sanghas) is not maintainable, inasmuch as none of the sanghas or monks residing in the kyaungdaik is entitled individually to the control, management or possession of the property in addition to mere use and enjoyment. The property is the property of the sanghas in general and not the property of the sanghas of a particular locality. It is the presiding monk alone who is entitled to management, control and possession. The plaintiff in such a suit is also not entitled to a declaration that the lands in suit constitute aramika sanghika property for the enjoyment and benefit of the sanghas of the kyaungdaik, as that would convert the suit into one of entirely a different character: *A I R 1937 Rang 76, Ref.* [P 23 C 2; P 24 C 1]

(b) Buddhist Law (Burmese) — Poggalika property — Claim for.

No one can claim possession of poggalika property against the poggalika owner himself. [P 23 C 2]

(c) Buddhist Law (Burmese) — Aramika sanghika property — Nature of.

Aramika sanghika property is only one kind of sanghika property. The right of use in such property vests in the monks residing in a particular locality but for the sake of conveniece the power of

control resides in a particular monk such as the presiding monk of that locality. [P 23 C 2]

U Chan Htoon — *for Appellant.*

P. B. Sen — *for Respondent.*

Mya Bu Offg. C. J. — In this case the plaintiff U Thatdama, a Burmese monk residing at Nyaungbintha Kyaungdaik, Bassein, instituted this suit in virtue of O. 1, R. 8, Civil P. C., on behalf of all the sanghas (monks) of the said Kyaungdaik, praying for a decree for possession of certain pieces of paddy land which were at the time and for about four years before this suit under the control and management of the defendant, U Zawtipala, presiding monk of the Mingala Yama Kyaungdaik at Kangyidaung, about two hours' journey from Bassein. Before his death which took place on the 13th lasoke of Thadingyut 1295 B. E., corresponding to 16th October 1933, one U Pandissa was managing and controlling Nyaungbintha Kyaungdaik together with the lands in question either as poggalika property or as presiding monk of the Kyaungdaik. The plaintiff, U Thotdama, had been a resident of the Kyaungdaik but he went to Mandalay in 1925 or 1926. About three months before U Pandissa's death the plaintiff was invited to return from Mandalay and to reside in the Kyaungdaik, and according to the evidence he was appointed by U Pandissa as the *taik-ok* of the Kyaungdaik, but on the very day of U Pandissa's death a telegram was sent to U Zawtipala who came to the monastery that very evening, took charge of the deeds relating to the lands in dispute, made a list of the properties left behind by U Pandissa, and took the leading role in the arrangements for the funeral of U Pandissa. Thereafter he went back to his own kyaungdaik at Kangyidaung. The rent due from the paddy lands in suit for the years 1933-34 was collected by him and in Pyatho 1296 B. E., that is about January 1935, U Zawtipala came and resided in Nyaungbintha Kyaungdaik and also realized the rent of the lands in suit.

It appears that after a short spell of residence U Zawtipala went back to Kangyidaung but came to Nyaungbintha Kuanngdaik to spend the Lent of 1297 B. E. He arrived shortly before the commencement of the Lent, somewhere about the beginning of July 1935. Shortly after the commencement of the Lent, a dispute arose between him and some of the monks residing in the Kyaungdaik which was placed before a meeting of some monks and laymen at which, however, nothing definite was settled. So the matter was submitted to another meeting at which it was decided that the matter in dispute was to be referred to the arbitration of some leading sayadaws (monks). It was actually so referred. The dispute, however, was not finally settled with the result that on 26th January 1937 the plaintiff, U Thatdama, filed this suit.

Roughly speaking, there were about eight monasteries in the Kyaungdaik, the residents of six of which followed the lead of U Thatdama while the residents of the other two adhered to U Zawtipala. The followers of U Thatdama were in the majority so far as the monks residing in Nyaungbintha Kyaungdaik were concerned. The minority upon receipt of notices under O. 1, Rule 8, came in and filed their written statement supporting the claim of U Zawtipala. U Zawtipala claimed that the whole Kyaungdaik was the dwithantika property of U Pandissa and himself and, therefore, on the death of U Pandissa the whole of the kyaundaik devolved on him as the survivor. In the course of the evidence and not quite irrelevant to the issue whether U Thatdama was the presiding monk of the Nyaungbintha Kyaungdaik, U Zawtipala claimed that he was the presiding monk of the Nyaungbintha Kyaungdaik. The learned trial Judge held that one out of the four pieces of land was the poggalika property of U Pandissa while three were sanghika property and that, in respect of the poggalika land, the defendant, U Zawtipala, received it as poggalika property in virtue of his being a dwithantika holder of the land with U Pandissa and of the devolution upon him thereof upon the death of U Pandissa, while the other three pieces of land were aramika sanghika property. The trial Court also found that although the defendant, U Zawtipala, had, after the death of U Pandissa been conducting himself in such a way as to denote recognition on the part of the sanghas resident in Nyaungbintha Kyaungdaik of his possession as a monk entitled to control and management, yet, as he was not a resident of Nyaungbintha Kyaungdaik, he could not be held to be the presiding monk of Nyaungbintha Kyaungdaik. As regards U Thatdama, the learned trial Judge disbelieved the evidence tendered to show that he was

the presiding monk of the Kyaungdaik after the death of U Pandissa.

The most important question of fact in this appeal is whether U Thatdama is the presiding monk of Nyaungbintha Kyaungdaik. Upon this point, the finding of the learned trial Judge upon the evidence of the witnesses before him must be given its due weight. He pointed out that some of the witnesses who are monks gave such an exaggerated account of the matter that they spoke of facts which U Thatdama himself did not allege, and that at no time during the disputes which were placed before the meetings of monks and laymen and, in fact, at no time since the institution of this suit was the right of control and management of U Zawtipala of the lands in dispute questioned. All that gave rise to the disputes was the dissatisfaction at the way in which U Zawtipala administered to their comforts and maintenance out of the income that he had derived from the lands. In these circumstances and in view of the fact that U Zawtipala was for some two or three years exercising some right of control and management of the paddy lands in question and also in the affairs of the Kyaungdaik, the finding that U Thatdama is not the presiding monk of the Kyaungdaik must be upheld. It is inconceivable that U Zawtipala was allowed to take a list of the properties left behind by U Pandissa to take possession of the title deeds of the lands in question, manage them and utilize the rents in the manner he thought fit for nearly three years if, during that time, there was some other monk holding the position of a duly constituted presiding monk of Nyaungbintha Kyaungdaik. The ground upon which the learned trial Judge held that U Zawtipala, in spite of the fact that he did some acts which showed that the residents of Nyaungbintha Kyaungdaik tacitly acknowledged his position as a monk entitled to manage and control the Kyaungdaik, was not the presiding monk of the Nyaungbintha Kyaungdaik must also be affirmed because it is difficult to conceive of a monk resident elsewhere being considered by the residence of the Kyaungdaik to be in a position to administer the affairs of the Kyaungdaik in an efficient manner.

In the circumstances of the case the first question that arises is whether the plaintiff's suit is maintainable, and it resolves itself into whether the plaintiff, who is not the presiding monk of the Kyaungdaik can, in this suit, obtain the relief that he claims; which is for possession of the four pieces of paddy land. If the four pieces of paddy land are the poggalika property of U Zawtipala, as he claims that they are, then the plaintiff's suit must fail. No one can claim possession of poggalika property as against the poggalika owner himself. Be that as it may, in the determination of the question as to the maintainability of the suit we need not and do not desire to enter upon the dispute as to whether all or any of the four pieces of land is poggalika property. In the consideration of the question as to the maintainability of the suit and for the purpose only of considering this question we proceed upon the assumption that all the four pieces of land are aramika sanghika property as claimed by the plaintiff. Aramika sanghika property is only one kind of sanghika property. Sanghika property is property which belongs to the sanghas in general. It may arise on the death of a poggalika owner, as I pointed out in 14 Rang 566[1] at p. 570 or because it was dedicated as sanghika property. According to the opinion that I expressed in that case, property of the kind which is in dispute in the present suit is sanghika property of the kind known as aramika sanghika. The right of use in such property vests in the monks residing in the particular locality but for the sake of convenience the power of control resides in a particular monk such as the presiding monk of that locality.

Nothing has been brought before us to induce me to cast any doubt about the correctness of those propositions. In my opinion the claim of the plaintiff to the possession of lands in dispute upon the footing that they are aramika sanghika property on behalf of all the sanghas of Nyaungbintha Kyaungdaik is misconceived. The plaintiff's claim presupposes that the sanghas or monks residing in Nyaungbintha Kyaungdaik were entitled to control, management or possession in addition to mere use or enjoyment. Individually, none of such monks is entitled to such possession. The property is the property of the sanghas in general; not the property of the sanghas of that locality alone. The presiding monk holds the property, manages and controls the same for the benefit of those resident in the monastery, but in doing so he exer-

1. U Zawtika v. U Kalyana, (1937) 24 A I R Rang 76=168 I C 967=14 Rang 566.

cises the power of the sanghas in general who are the owners of the property. Thus neither the plaintiff nor the sanghas that he represents in this suit is entitled to the possession, control or management of the lands in suit. It is in this sense this suit must be held to be not maintainable. It is the presiding monk who is entitled to the possession, management and control. If the residents of the Kyaungdaik are dissatisfied with the present management and control of the property they must take steps to have a presiding monk appointed who will have the right of possession, management and control. Whether the property is sanghika property or poggalika property is a question which must be decided in a properly framed suit. When the plaintiff has had himself constituted a presiding monk of the Kyaungdaik, he will be entitled to possession, management and control of such of the property in dispute as is aramika sanghika property.

It is important to bear in mind that this suit is not a suit on behalf of the general body of sanghas. In a suit on behalf of the general body of sanghas in respect of sanghika property there would probably be no difficulty whatever in passing a decree in favour of the plaintiff in a properly framed suit, viz. a decree for possession based upon the title of the general body of sanghas but that would be a suit of quite a different character from that before us where the plaintiff purports to sue only on behalf of a limited circle of sanghas, viz. the sanghas of Nyaungbintha Kyaungdaik only. The learned advocate for the plaintiff-respondent asks that if a decree for possession cannot be granted in this case the plaintiff may be granted a decree declaring that the paddy lands in suit constitute aramika sanghika property for the enjoyment and benefit of the sanghas of Nyaungbintha Kyaungdaik. Such a suit would be entirely different in character and we do not think that at this stage the conversion of a suit for possession into one for mere declaration should properly be allowed. For these reasons, we allow this appeal setting aside the decree of the trial Court and direct that the suit be dismissed with no order for costs. The cross appeal by the plaintiff in Civil First Appeal No. 49 of 1938 is dismissed without costs.

Mackney J.—I agree.

R.M./R.K. *Appeal allowed.*

A. I. R. 1939 Rangoon 24

MACKNEY J.

Arjan Singh — Appellant.

v.

Kishen Singh and another — Respondents.

Special Second Appeal No. 206 of 1937, Decided on 18th January 1938, from Judgment of District Court, Kyaukse, in C. A. No. 1 of 1937.

(a) Upper Burma Land and Revenue Regulation (1889), S. 53, Cl. (1) and Sec. 25 (c), (d)—Suit for ejectment of persons occupying state-land without permission of Collector does not lie in Civil Court.

The ejection of persons who have been staying on or occupying state-land without the permission of the Collector, from the same is a matter which a Revenue Officer is empowered by or under Regulation to dispose of and a Civil Court has no jurisdiction in the matter under Sec. 53 (1), and a suit for ejecting such persons by a lessee holding under the Government does not lie in a Civil Court. The case would be different if it is a dispute between two private parties, neither of whom claim a grant or lease from the Government and the suit would lie in a Civil Court : *A I R 1914 L B 194, Ref.* [P 25 C 1, 2]

(b) Upper Burma Land and Revenue Regulation (1889) —Powers conferred by Regulation on officers of state do not devolve on lessee of state-land nor can Civil Court exercise the powers.

The Regulation confers certain powers on the officers of the state and provides that occupiers of state-land may not be ejected from such land save in certain circumstances and by officers so empowered to act in those circumstances. The powers of these officers do not devolve on a lessee of state-land, nor can a Civil Court exercise these powers. [P 25 C 2]

Twa Aung — *for Appellant.*

Judgment. — The plaintiff-appellant Arjan Singh is the holder of a lease of a certain piece of land granted by the Deputy Commissioner of Kyaukse under the rules under the Upper Burma Land and Revenue Regulation of 1889. Arjan Singh sued the defendants-respondents for ejectment from a portion of this piece of land, of which they were in occupation with their house. The Township Court held that it was not open to it to question the validity of the lease and consequently the plaintiff must be regarded as the owner of the land and entitled to a decree. Against this decision, the defendants-respondents appealed to the District Court. The District Court found that the plaintiff fraudulently obtained the lease in collusion with the former occupant of the land and that it would

be grossly unfair to eject the respondent who had been in occupation for a number of years, and whose tenant the plaintiff had at one time been, simply because the plaintiff was clever enough to obtain the lease. As a matter of conscience, the learned District Judge thought that he could not permit such injustice to be done. He accordingly set aside the decree and dismissed the plaintiff's suit. The plaintiff has now appealed to this Court. The land in question is state-land. S. 25 (c) of the Regulation lays down that :

An occupier of state-land may not, except for default in the payment of land revenue due from him to the Government, be ejected from such land without such notice as may be prescribed by rules to be made by the Local Government in this behalf or failing such notice, such compensation as, subject to any such rules, the Collector may, having regard to all the circumstances of the case, deem just.

Clause (d) reads :

A person occupying state-land without the permission of the Collector, or of some other officer authorized by rules to be made by the Local Government in this behalf, or occupying such land with such permission and making default in the payment of the land revenue due from him to the Government in respect thereof, may at any time be ejected from the land by order of the Collector.

Now the facts show that the defendants-respondents had in fact been occupying that portion of the land leased to the plaintiff-appellant which is now in their occupation for about 14 years. The plaintiff obtained his lease only in 1936. It is quite clear that the defendants-respondents are occupying state-land without the permission of the Collector. Consequently, they may at any time be ejected from the land by the order of the Collector.

Section 53, Clause (1), of the Regulation reads thus :

Except as otherwise provided by this regulation a Civil Court shall not have jurisdiction in any matter which the Local Government or a Revenue Officer is empowered by or under this Regulation to dispose of.

Now the matter of the ejectment of the defendants-respondents from state-land, who stayed on or occupied it without the permission of the Collector, is clearly a matter which a Revenue Officer is empowered by or under the Regulation to dispose of, and it would seem therefore that a Civil Court cannot have jurisdiction in the matter. The learned counsel for the appellant argues that the plaintiff-appellant by his lease has obtained all the rights of the State. I do not think that this is a sound contention. The Regulation confers certain powers on the officers of the State and provides that occupiers of state-land may not be ejected from such land save in certain circumstances and by officers so empowered to act in those circumstances. The powers of these officers do not devolve on a lessee of state-land, nor can a Civil Court exercise these powers. I have not been able to find any parallel case in the reported rulings of this Court or the Court of the Judicial Commissioner of Upper Burma. The case would be different if this were a dispute between two private parties, neither of whom claimed under a grant or lease from Government : *see* 8 L B R 71[1] which deals with the application of the Lower Burma Town and Village Lands Act, S. 41 which is rather differently worded from Section 53 of the Regulation and reads :

No Civil Court shall have jurisdiction to determine any matter which, under this Act, is to be determined by the Revenue Officer and any claim to any right over land as against the Government.

It was held that the eviction of a squatter by another squatter, or of a sub-lessee by a lessee (from Government) is not a matter that is to be determined by the revenue authority. Had the defendants-respondents been put into possession by the plaintiff-appellant the case would have been entirely different and a suit would lie in a Civil Court. In my opinion the suit was clearly barred by Sec. 53 (1) of the Upper Burma Land and Revenue Regulation, 1889. This appeal is therefore dismissed. The appeal was heard ex parte. The plaintiff must apply to the Collector of the District for redress.

R.M./R.K. *Appeal dismissed.*

1. Sit Yin v. Ma Shin, (1914) 1 A I R L B 194=29 I C 872=8 L B R 71.

A. I. R. 1939 Rangoon 25

DUNKLEY J.

Maung Nyein — Applicant.

v.

Burma Electric Supply Co. Ltd., Mandalay — Respondent.

Civil Revn. No. 49 of 1938, Decided on 18th March 1938, from order of District Court, Mandalay, in Civil Appeal No. 64 of 1937.

(a) Civil P. C. (1908), O. 44, R. 1 — Procedure on presentation of application for leave to appeal as pauper stated—Application for leave to appeal in forma pauperis admitted — Notice issued to opposite party—It is open to opposite party at final hearing to show that case does not satisfy Proviso to O. 44, R. 1.

The correct procedure on the presentation of an application for leave to appeal as a pauper is, if the Court does not see fit to reject the application on hearing the applicant only, to issue notice (without calling for the record), in Form No. 11 of Appx. G, to the respondent and the Government Pleader, and then to hear all parties in regard to the question raised by the Proviso to R. 1 of O. 44, and come to a decision thereon, and also to decide the question of pauperism if that falls to be decided under R. 2: *A I R 1917 P C 179, Rel. on.* [P 28 C 1, 2]

When an application for leave to appeal in forma pauperis is admitted and the Court orders notices to issue to the opposite party and the Government Pleader, it is open to them at the final hearing of the rule to show that the case does not satisfy the Proviso to Rule 1 of O. 44, and the Court has to consider the question whether the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust : *A I R 1917 P C 179, Appl.; A I R 1931 Pat 183 (F B); A I R 1934 Lah 72 and A I R 1934 All 424, Appr.; A I R 1932 Mad 523, Dissent.* [P 28 C 1]

(b) Civil P. C. (1908), O. 44, R. 1 and S. 149 — Application for leave to appeal in forma pauperis rejected on ground that Proviso to O. 44, R. 1 was not satisfied — Court cannot grant applicant time to pay court-fee.

Where an application for leave to appeal in forma pauperis is rejected on the ground that the Proviso to O. 44, R. 1 was not satisfied, the Court has no power to use its discretion under S. 149 and grant time to the applicant in which to pay the court-fees on his memorandum of appeal : *A I R 1935 Rang 336, Foll.* [P 28 C 2]

K. C. Sanyal — *for Applicant.*

Mootham — *for Respondent.*

Order. — Errors of practice in the District Court of Mandalay have given rise to this application in revision. The applicant, Maung Nyein, was permitted to sue the respondent company in forma pauperis in Civil Regular No. 131 of 1937 of the Subdivisional Court of Mandalay, and his suit was dismissed. He then desired to prefer an appeal in forma pauperis in the District Court of Mandalay against the dismissal of his suit, and for this purpose he personally presented in the District Court a schedule of properties and an affidavit verifying the correctness of the schedule, a copy of the judgment and decree of the Subdivisional Court, and a memorandum of six paragraphs which was not "signed and verified in the manner prescribed for the verification of pleadings." The first five paragraphs of this memorandum referred to his pauperism, and the sixth contained the grounds of appeal. This form of presenting an appeal in forma pauperis is not in accordance with the provisions of O. 44, R. 1, Civil P. C., which requires two separate papers to be presented: first, an application duly signed and verified for permission to appeal as a pauper, and second, a memorandum of appeal (the latter, of course, being accompanied by copies of the judgment and decree appealed from. The application ought to have been rejected on this ground, under the provisions of O. 33, R. 3 (as substituted by the Rule Committee of this Court), the provisions of O. 33 being made applicable to pauper appeals by R. 1 of O. 44 ; or opportunity might have been given to amend it and bring it into proper form. However, the learned District Judge, apparently without referring to the law on the subject of pauper appeals, accepted it, and passed a wholly incorrect order on it. The order was as follows :

12th October 1937.— Memo of pauper appeal filed by appellant in person. Call for record and put up on 3rd November 1937.

What is a "memo of pauper appeal" passes my comprehension. The first step to be taken on the presentation of an application for leave to appeal as a pauper is to see whether the application complies in form with the provisions of O. 44, Rule 1, and O. 33, Rule 2. If it does comply with those provisions, the next step to be taken is not to call for the records, but, as required by the Proviso to Rule 1, O. 44, to peruse the memorandum of appeal and the copies of the judgment and decree appealed from (which papers are filed with the application) and come to a decision whether or not the requirements of the Proviso are satisfied ; and, as Jenkins C. J. in 28 Bom 451[1] at p. 453, and Beasley C. J. in 56 Mad 323[2] at p. 326 have pointed out, the reasons for granting leave to appeal as a pauper, if leave is granted, should be briefly recorded. In the present case, the application, with the records, came before another learned District Judge, who treated the application as if it were an ordinary memorandum of appeal, heard the pleader for the appellant, and then recorded the order: "Admitted. Notice to respondent for 18th November 1937." It is urged that the only construction which can be placed on the word "Admitted," as used in this order, is that it means that leave to appeal as a pauper was granted, and I agree that, if it means anything at all (which I beg leave to doubt), it can have no other meaning.

1. Sakubai v. Ganpat Ramkrishna, (1904) 28 Bom 451=6 Bom L R 442.
2. Narayana Rao v. Veerayya, (1933) 20 A I R Mad 519=144 I C 940=56 Mad 323=64 M L J 433.

Notice in the ordinary form, under R. 14, O. 41 (form No. 6 of Appendix G, Sch. 1 Civil P. C.), was then issued and served on the respondent, and after a slight delay the appeal came on for hearing before a third District Judge. For the respondent company it was argued at the hearing that the Proviso to Rule 1, O. 44 was not satisfied, and on this ground, by his order of 6th December 1937 the learned District Judge rejected the application to appeal as a pauper. It is now contended that the order of the learned Disrict Judge was without jurisdiction, as the question whether or not the Proviso to R. 1, O. 44 was satisfied could not be considered, and the respondent could not be heard on this question after the application had been admitted and notice had been ordered to issue to the respondent.

From the action which was taken, it seems fairly clear that the provisions of O. 44 were not present in the minds of either of the two District Judges who first dealt with this matter, but that consideration hardly affects the present point. On this point the decisions of the Madras High Court are in conflict with those of other High Courts. Of course, the notice issued to the respondent company by the District Court in this case was in the wrong form. It should have been in form No. 11 of Appendix G, Sch. 1 of the Code, and not in form No. 6. In the latest ruling of the Madras High Court on this point, 55 Mad 982,[3] the Bench qualified considerably the decisions in the earlier cases in 49 M L J 353[4] and 53 Mad 245,[5] in which it was held that the respondent on an application for leave to appeal as a pauper had no locus standi to appear and require to be heard; 53 Mad 245[5] was subsequently dissented from in 56 Mad 323.[2] In 55 Mad 982[3] it was held that the respondent may as a matter of indulgence be, but is not entitled as a matter of right to be, heard on the question whether the decree of the lower Court is "contrary to law or to some usage having the force of law or is otherwise erroneous or unjust." It is clear from the judgments in this case that the Court was concerned to support a practice of the Madras High Court which had been followed for 32 years, and the judgments proceeded mainly on the use of the word "perusal" in the Proviso to R. 1, O. 44. If the word "perusal" is to have the very restrictive meaning given to it by the learned Judges in that case, namely that the Court must come to a decision on this point without hearing the respondent, then it must equally mean that the applicant himself cannot be heard: in fact, the result of placing this meaning on the word "perusal" would be that the Judge must receive the application in the secrecy of his Chamber and in secrecy decide the question raised by the Proviso to Rule 1, O. 44, plainly an absurd result. The learned Judges further held that form No. 11 in Appendix G, which is the form prescribed to be issued under O. 44, R. 1 only gives an opportunity to the respondent to show that the applicant is not a pauper. With the greatest respect, this is, to my mind, clearly incorrect. The question of pauperism has usually been decided in the regular suit, and ordinarily the Proviso to R. 2, O. 44 applies. As I have said, the form is issued under Rule 1, and its operative part reads as follows:

> Notice is hereby given to you that if you desire to show cause why the applicant should not be allowed to appeal as a pauper an opportunity will be given to you of doing so.

The plain meaning of these words is that the respondent will be given an opportunity of putting forward any grounds on which he contends that the application to appeal as a pauper ought not to be granted; they are not confined to the question of pauperism only. Ramesam J. in his judgment (at page 986) said that the forms appended to the Code should not be allowed to extend the meaning of the Sections and the Rules in the Code; but the above line of argument does not use the form for the purpose of extending the meaning of R. 1, but uses it merely for assistance in construing the provisions of the Rule. With all due respect, I am obliged to dissent from the decision in 55 Mad 982.[3] It appears to me to be contrary to the principle laid down by their Lordships of the Privy Council in 41 Mad 412.[6] The point raised in that appeal was whether, when an appeal had been admitted after the period of limitation in the absence of the respondent, the question of the sufficiency of the cause shown

3. Somasundaram Chettiar v. Arunachalam Chettiar, (1932) 19 A I R Mad 523=139 I C 652=55 Mad 982=63 M L J 28.
4. Parasuramudu v. Ramanna, (1925) 12 A I R Mad 1178=87 I C 960=49 M L J 353.
5. In re Chennamma, (1931) 18 A I R Mad 198 =122 I C 337=53 Mad 245=58 M L J 195.
6. Krishnasami Panikondar v. Ramasami Chettiar, (1917) 4 A I R P C 179=43 I C 493=41 Mad 412=45 I A 25 (P C).

for the delay in filing the appeal could be raised again by the respondent after his appearance. The headnote of the decision reads as follows :

The admission of an appeal after the period of limitation has expired deprives the respondent of a valuable right by putting in peril the finality of the order in his favour. When an order admitting an appeal has been made in the absence of the respondent, and without notice to him, to preclude him from questioning its propriety would amount to a denial of justice. Such an order, so made, should therefore be treated as open to reconsideration at the instance of the respondent.

This case was cited in 55 Mad 982,[3] but, the learned Judges said that they did not see any analogy between the two proceedings. With the greatest respect, there is, in my opinion, a complete analogy, for the headnote of the Privy Council decision would apply in terms to the present matter if the words "the grant of leave to appeal as a pauper" were substituted for "the admission of an appeal after the period of limitation has expired." This was the ratio decidendi of the decision of a Full Bench of the Patna High Court in 10 Pat 606[7] in which, overruling several previous decisions of the Court to the contrary, the Full Bench held that when an application for leave to appeal in forma pauperis is admitted and the Court orders notices to issue to the opposite party and the Government Pleader, it is open to them at the final hearing of the rule to show that the case does not satisfy the Proviso to R. 1 of O. 44, Civil P. C., and the Court has to consider the question whether the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. The same conclusion has been reached by the Lahore and Allahabad High Courts in 15 Lah 132[8] and 56 All 895.[9] I am in entire agreement with the decisions in these cases.

In my opinion, the correct procedure on the presentation of an application for leave to appeal as a pauper is, if the Court does not see fit to reject the application on hearing the applicant only, to issue notice (without calling for the records), in Form No. 11 of Appendix G, to the respondent and the Government Pleader, and then to hear all parties in regard to the question raised by the Proviso to R. 1 of O. 44 and come to a decision thereon, and also to decide the question of pauperism if that falls to be decided under R. 2. This procedure is in accordance with the practice, recommended for adoption by the Judicial Committee in 41 Mad 412,[6] that all such preliminary questions should be finally determined at the stage of admission of the appeal. I hold that in considering, as he did, the application of the Proviso to R. 1 of O. 44 after the appearance of the respondent the learned District Judge acted legally in the exercise of his jurisdiction. This application in revision therefore fails, and is dismissed with costs, advocate's fee five gold mohurs. I have been asked, if the revision application is unsuccessful, to use the discretion which is said to be vested in me by S. 149, Civil P. C., and grant time to the applicant in which to pay the court-fees on his memorandum of appeal, but the case in 13 Rang 50[10] is authority for holding that I have no power to make any such order.

D.S./R.K. *Application dismissed.*

7. Tilak Mahton v. Akhil Kishore, (1931) 18 A I R Pat 183=132 I C 364=10 Pat 606=12 P L T 156 (F B).
8. Benarsi Das v. Munshi Ram, (1934) 21 A I R Lah 72=152 I C 171=15 Lah 132=36 P L R 447.
9. Secretary of State v. Mt. Sonkali, (1934) 21 A I R All 424=148 I C 624 = 56 All 895 = (1934) A L J 827.
10. Vertannes v. Lawson, (1935) 22 A I R Rang 336=159 I C 468=13 Rang 50.

A. I. R. 1939 Rangoon 28

MYA BU OFFG. C. J. AND MACKNEY J.

A. M. Md. Ebrahim — Appellant.

v.

Ma Ma and another — Respondents.

Special First Appeal No. 59 of 1938, Decided on 4th August 1938, against decree of Small Cause Court, Rangoon, in C. R. No. 545 of 1938.

(a) Mahomedan Law — Divorce — Dower — Divorce by apostasy of wife—If marriage is consummated wife is entitled to whole dower.

Even if a divorce is brought about by the operation of the law on the apostasy of the wife, she is entitled to the whole dower if consummation of the marriage had taken place before such divorce just as much as in a case where the divorce has occurred under a talaknama. [P 29 C 2]

(b) Mahomedan Law — Marriage—Dower—Wife is entitled to recover dower however large.

However large the dower fixed may be, the wife is entitled to recover the whole of it from her husband's estate without reference to his circumstances at the time of marriage or the value of his estate at his death : *2 All 573 (FB), Foll.* [P 30 C 2]

A. H. Paul — *for Appellant.*

M. I. Khan — *for Respondents.*

Mya Bu Offg. C. J.—This is an appeal against a decree for the payment of Rupees 2000 by the appellant to the respondent as the amount of the dower alleged to have been agreed upon by the appellant in favour of the respondent when they were married on 4th April 1930. The parties were Sunni Mahomedans and each of them had been previously married—the appellant twice before—while the respondent was a widow with some children by her previous husband. At their marriage on 4th April 1930, the appellant, in accordance with the usual practice and custom, executed a kabinama, which is Ex. A in the case, agreeing, inter alia, to pay the respondent a dower of 50 ticals of gold. They lived together as man and wife for a few years, after which they separated. While living apart the respondent obtained an order of maintenance under S. 488, Criminal P. C. Subsequently, on 28th May 1936, the appellant effected a divorce by means of a talaknama. In making her claim for the payment of the dower mentioned in the kabinama, the respondent relies on the divorce as a fact which gave rise to her right to the immediate payment of the dower.

The main grounds upon which the appellant resisted the claim in the trial Court are : that the marriage between himself and the respondent had become automatically dissolved by reason of the respondent having apostatized by worshipping spirits, images and Buddhist shrines, that upon the dissolution of marriage by such apostasy, the respondent was not entitled to any dower and that, in any event, the amount mentioned in the kabinama was not the amount agreed upon which was only to give ticals of gold. The learned trial Judge dismissed the defence based upon the alleged apostasy on the ground that the issue as to the dissolution of marriage in consequence of the alleged apostasy was res judicata in view of the decision given in the proceeding under S. 488, Criminal P. C., to the effect that the status of husband and wife still subsisted at the time of the order made under that Section. It is urged on behalf of the appellant that this view of the trial Judge upon the point is erroneous. There is considerable force in this contention of the learned advocate for the appellant but, even assuming that the alleged apostasy had taken place and that such apostasy had brought about a dissolution of marriage between the parties, the respondent is, in our opinion, entitled to a decree for the payment by the appellant of the dower agreed upon at the time of the marriage under the Mahomedan law. In 'A Digest of Mahomedan Law' by Baillie, who is a well-known authority on the subject, the following passage appears at p. 182 :

> Apostasy from Islam by one of a married pair, is a cancellation of their marriage, which takes effect immediately without requiring the decree of a Judge, and without being a repudiation, whether the occurrence is before or after consummation ; yet if the husband be the apostate, the wife is entitled to the whole dower when consummation has taken place, and half when it has not. If the wife be the apostate, she is equally entitled to the whole dower in the former case, but to no part of it in the latter.

The part of this passage applicable to this case, on the assumption that the appellant's allegation as to the apostasy of the respondent is true, is the first part of the last sentence in the passage quoted above, i. e. "if the wife be the apostate, she is equally entitled to the whole dower" when consummation has taken place, the parties having lived together as man and wife for quite a few years before being separated. Sir Dinshah Fardunji Mulla in his "Principles of Mahomedan Law," Edn. 11, also states in S. 243, sub-s. 2, Para. 1 :

> If the marriage was consummated the wife is entitled to immediate payment of the whole of the unpaid dower, both prompt and deferred.

Read with the opening clause of the Section this statement means that the wife is entitled to the immediate payment of the whole of the unpaid dower on the completion of a divorce whatever may be the mode of divorce. These authorities clearly enunciate the rule of Mahomedan law to the effect that even if a divorce is brought about by the operation of the law on the apostasy of the wife, she is entitled to the whole dower if consummation of the marriage had taken place before such divorce just as much as in a case where the divorce has occurred under a talaknama. The law on the subject has however been stated in Sections 196 and 197 of the 'Principles of Mahomedan Law' by Tyabji as follows :

> *196.* Where a marriage is made void by the apostasy of the husband, (1) if it has been consummated the wife is entitled to the whole of her "mahr"; (2) if it has not been consummated, she is entitled to half of the "mahr".
>
> *197.* The wife is entitled to no part of the "mahr" where the marriage becomes void by her apostasy.

As authority for the proposition the learned author quotes Baillie, Part 1, p. 182,

Part 2, pages 29, 15 and 127. Sunni Mahomedan law is to be found in Part 1 of Baillie's Digest. The passage appearing in that Digest, Vol. 1 at page 182 has already been quoted above. In our opinion, with all respect to the learned author, it does not appear to support the proposition that if the marriage has been consummated the wife is not entitled to the mahr where the marriage becoms void by her apostasy. For these reasons we hold that in this case, assuming that the respondent has apostatized as alleged by the appellant, and even if the dissolution of marriage between the appellant and the respondent took place in consequence of such apostasy the marriage having been consummated the respondent did not lose her right to obtain the dower from the appellant.

On the question as to the amount of the dower agreed upon, the learned trial Judge considered the evidence of the parties in detail and has pointed out that the witnesses called by the appellant to speak to the amount alleged to have been mentioned at the time of the marriage were not such as to inspire confidence in their testimony. Their evidence gave the learned trial Judge the impression that they were either not in a position to know what the actual amount mentioned was or that they were not present at the ceremony of marriage. The respondent adduced the evidence of two witnesses whose presence there could not be denied. One was the moulvi who conducted the ceremonies and the other, one of the attesting witnesses. The fact that the witness is a cousin of one of the respondent's parents does not militate against the weight of his evidence but tends to show that he was a person who would ordinarily be expected to be present at and take more than the ordinary interest in the ceremony of marriage of the respondent. We see no sufficient ground for interference with the finding of fact arrived at by the trial Judge upon the evidence as a matter of probability. The learned advocate for the appellant has pointed out that in view of the fact that the appellant was at the time when he entered into marriage with the respondent a penniless man, while the respondent had some property which she had inherited from her deceased husband, it was unlikely that the parties would have fixed such a heavy dower as is mentioned in the kabinama, but it does not seem unusual that the amount fixed was incommensurate with the husband's means. In 2 All 573[1] a Full Bench of the Allahabad High Court ruled inter alia that :

> However large the dower fixed may be, the wife is entitled to recover the whole of it from her husband's estate, without reference to his circumstances at the time of marriage or the value of his estate at his death.

Section 218 of the 'Principles of Mahomedan Law', Edn. 11, by Sir Dinshah Fardunji Mulla, is also to the same effect. In all the circumstances of the case the appeal fails and is dismissed with costs.

Mackney J. — I agree.

N.S./R.K. *Appeal dismissed.*

1. Sugra Bibi v. Masuma Bibi, (1880) 2 All 573 (F B).

A. I. R. 1939 Rangoon 30

ROBERTS C. J. AND DUNKLEY J.

Maung Thaung — Appellant.

v.

Shaik Abdul Gani — Respondent.

First Appeal No. 108 of 1937, Decided on 1st February 1938, from Judgment of High Court in C. R. No. 155 of 1936.

(a) Burma Land and Revenue Act (2 of 1876), S. 44—Owner of property going to another place leaving person as caretaker of property —Owner subsequently dying—Revenue authorities not knowing this, addressing notice under S. 44 to him — Notice handed to caretaker — Caretaker not being agent of dead owner notice held could not be deemed to be served on person liable to pay and sale held nullity.

An owner of property fell ill and went to another place leaving a person as a caretaker of the property with authority to collect rent. The owner subsequently died and the revenue authorities not knowing this, addressed a notice under Sec. 44 to him for municipal and other taxes. When the bailiff went to serve the notice, the owner being dead was not there and hence the notice was handed to the caretaker :

Held that the caretaker was not agent of the owner as the owner was dead. Hence the notice was not validly served on person liable to pay ; so there was no default made by anybody. It followed that the sale of the property was invalid and a nullity: *A I R 1932 Rang 123, Rel. on.* [P 31 C 1]

(b) Burma Land and Revenue Act (2 of 1876), S. 56—Disputes regarding right to occupy land between private individuals — Jurisdiction of Civil Court is not barred.

The prohibition to the jurisdiction of the Civil Courts extends to disputes to which Government is a party and not to disputes regarding the right to occupy land between private individuals: *A I R 1915 L B 75 and A I R 1914 L B 194, Rel. on.* [P 32 C 1]

Hla Tun Pru — *for Appellant.*

Paul — *for Respondent.*

Roberts C. J. — I am of opinion that this appeal must be dismissed. The suit was brought for a declaration with consequential reliefs and the plaintiff claimed that he was the elder brother and heir of one Shaik Elahi Bux, who had a leasehold garden land known as Holding No. 70 in Survey Block No. 53, Cantonment Circle, Rangoon, with two houses and a hut which were built and standing thereon. The deceased owner fell ill in January 1935, and went to Calcutta, leaving Ma Bu Ma as a kind of caretaker with authority to collect the rents on his behalf. Shortly after arriving in Calcutta he died in February 1935, but this fact was not known to the revenue authorities at first and on 6th June, the Revenue Officer of the Corporation issued a notice under Sec. 44, Burma Land and Revenue Act, for Rs. 66-10-0 for municipal and other taxes, and the important thing to observe about the notice is, as the learned trial Judge, Braund J. pointed out, that it was addressed to Elahi Bux. When the bailiff came down to serve the notice, Elahi Bux, of course, was not there, and he handed it to Ma Bu Ma. It has been pointed out to us that in certain circumstances a notice may be addressed to and served upon an owner or an occupier : but this notice was not addressed to Ma Bu Ma and could only have been validly served by handing it to her if she was in fact the agent of Elahi Bux to whom it was addressed. She was not his agent, and could not have been his agent, for he was dead and dead persons cannot have agents : and accordingly, the notice was not validly served upon the person liable to pay. And it is conceded now that the person liable to pay was the plaintiff in the action who in the appeal is respondent 1.

The notice was not validly served upon the person liable to pay ; so there was no default made by anybody and a sale can only take place where a default is made. It follows that the sale was invalid and a nullity, and Maung Thaung, though acting in good faith in bidding at what to all appearances was, at the time, a valid sale, was unhappily under an illusion, and what he has done is not to have purchased the property at all, though he has been put in possession of it and has paid moneys to the revenue authorities as dues on the property. There having been no real sale, and the learned trial Judge having accepted as true the evidence of Shaik Abdul Gani that he was the brother of the deceased, and consequently his heir, we think the learned trial Judge was right in the decision at which he arrived.

But we have been referred by U Hla Tun Pru, who appears for the appellant, to S. 56, Burma Land and Revenue Act (Act 2 of 1876), read with S. 55, Provisos (h) and (i) and it is contended that those Provisos oust the jurisdiction of the Civil Courts in this particular matter. Now, it must be pointed out that the Rangoon Corporation, in having recourse to the procedure indicated by the Act, must fulfil certain preliminary requirements and in 10 Rang 412[1] at p. 433, Page C. J. said as follows :

> Now, under Ss. 44 and 45 of Act 2 of 1876, it is a condition precedent to the right of the appellants to have recourse to the special procedure prescribed in that Act that a sum has fallen due for the terminal tax and a written notice of demand for it has been served on any one of the persons liable for it.

Here we are satisfied that the written notice of demand was not served on any one of the persons liable. Elahi Bux had been liable, but he was dead, and by his death, had ceased to have any agent acting for him in the person of Ma Bu Ma, and the person who became liable for the tax on the death of Elahi Bux is, as the learned Judge has found, the present respondent 1. Now, it is said by U Hla Tun Pru, "we could not find respondent 1," but then, it is said that he was in Rangoon at the time and there is no kind of evidence to show either that he was looked for, or that the procedure which is laid down that a person liable for the tax is looked for and cannot be found was followed. Reference was made to R. 86 of the Rules under the Act (Act 2 of 1876), but it is clear that if that Rule has any application here it could only have application where the notice was published by a copy of it being posted on the ward headman's house. It is clear that that was not done and I am of opinion that the suggestion that Rule 86 has application to the circumstances in this case is without foundation. Accordingly, for the reasons I have stated and the reasons which appear in the learned trial Judge's judgment, into which I need not, I think, go very fully, I am of opinion that this appeal should be dismissed with costs, advocate's fee five gold mohurs.

1. Rangoon Development Trust v. G. S. Behara & Sons, (1932) 19 A I R Rang 123=139 I C 566=10 Rang 412 (F B).

Dunkley J.—I agree. A further ground on which it must be held that R. 86 of the Rules under the Land and Revenue Act has no application is that publication, under the last clause of the Rule, is only permitted when notice of demand cannot be served on either the owner or a person in occupation of the property. In the present case it is quite clear that there were a number of persons in occupation of these buildings, and notice could have been served readily on any one of them. As regards the prohibition contained in Sec. 56 of Act 2 of 1876, it has been laid down in a line of judgments of the Chief Court of Lower Burma and of this Court that the prohibition to the jurisdiction of the Civil Courts extends to disputes to which Government is a party and not to disputes regarding the right to occupy land between private individuals. I need only refer to two of the best known of these cases, namely 8 L B R 227[2] and 8 L B R 71.[3]

D.S./R.K. *Appeal dismissed.*

2. Maung Naw v. Ma Shwe Hmat, (1915) 2 A I R L B 75=30 I C 772=8 L B R 227 (F B).
3. Sit Yin v. Ma Shin, (1914) 1 A I R L B 194=29 I C 872=8 L B R 71.

A. I. R. 1939 Rangoon 32

BAGULEY AND MOSELY JJ.

Ma Twe and others — Appellants.

v.

U Toke — Respondent.

First Appeal No. 155 of 1937, Decided on 23rd February 1938, from order of Dist. Court, Mandalay, in Civil Exn. Case No. 3 of 1934.

Court-fees—Appeal against order under Sec. 144, Civil P. C. must be stamped ad valorem : *Rang S. A. No. 316 of 1935, Overruled.*

The Code of Civil Procedure regards Ss. 47 and 144 as quite distinct. An application under S. 144 is no doubt one which carries out the intention of the Appellate Court's decree, but it does not directly execute that decree. What it does is to undo an execution wrongly granted by the Court below. Appeals filed against order under S. 144 do not come within the exemption given by Financial Department Notification No. 41. Hence the appeal must be stamped ad valorem : *A I R 1930 Rang 241 and A I R 1925 All 137, Approved; A I R 1918 Cal 335, Dissent.; A I R 1933 Rang 180, Expl; Rang S. A. No. 316 of 1935,* **Overruled.**

[P 33 C 1, 2; P 34 C 1]

K. C. Sanyal — *for Appellants.*

A. N. Basu — *for Respondent.*

Baguley J. — This is an appeal against an order passed by the District Judge of Mandalay in Civil Execution No. 3 of 1934. The order was passed on an application filed by the appellants. The prayer of the application is :

> Wherefore pray that order for restitution by delivery of 888 baskets and 6 pyis of paddy or by payment of Rs. 1066 being the equivalent money value thereof to the petitioners may be made;

and the petition itself in para. 13 states :

> That in the circumstances the applicants are under the provisions of S. 144, Civil P. C., entitled to be placed in the position they would have occupied but for the order of this Honourable Court.

The appeal was filed with a two rupee court-fee stamp and a preliminary objection has been raised that the memorandum of appeal must be stamped ad valorem. This would be a rather serious matter because the appeal is valued for jurisdiction at Rs. 12,000. The valuation however is placed at that figure merely because the decree under execution is said to be for Rs. 12,000, although according to the application for execution it was only for Rs. 8950.

The question for consideration now therefore is, can an appeal of this nature be filed on a two rupee court-fee stamp? There is a published ruling of this Court on the point, 8 Rang 271.[1] This was a reference from the Taxing Master to Ormiston J. and he held that an ad valorem court-fee was payable on this appeal. His reasoning was shortly that all appeals have to be stamped ad valorem unless some specific exemption can be found, that Financial Department Notification No. 41, dated 19th September 1921, reduces the fee chargeable on appeals from orders under S. 47, Civil P. C., 1908, if the appeals filed are permissible, that this exemption says nothing about appeals under Sec. 144, Civil P. C., and that therefore, as they are not exempted, they must be stamped ad valorem. There is however a subsequent unpublished ruling of Leach J. in Second Appeal No. 316 of 1935[2] in which he took a contrary view and held that a memorandum of appeal against an order passed under S. 144, Civil P. C., was correctly stamped with a two rupee stamp. He differed from Ormiston J. on this point and held that he was bound by a Bench decision of this Court published in 11 Rang 275.[3] If this case is examined, it will be

1. Maung Hla Maung v. Ma Hnin Dauk, (1930) 17 A I R Rang 241=126 I C 211=8 Rang 271.
2. A. V. P. L. N. Chettyar Firm v. Daw Min Baw, Rang Second Appeal No. 316 of 1935.
3. Muthukaruppan Chettiar v. Annamalai, (1933) 20 A I R Rang 180=149 I C 889=11 Rang 275.

found that the ruling says nothing at all about court-fees. What it does hold is that for purposes of limitation, Art. 182, Limitation Act applies to an application for restitution under Sec. 144. The question of whether the application comes under the exempting provision of Notification No. 41 was not considered. The headnote however says :

> An application for restitution under Section 144, Civil P. C., is an application for execution of a decree.

In the body of the judgment however Brown J. appears to use a somewhat different expression. On p. 283 after quoting the old S. 583 he says: "That Section seems clearly to regard an application for restitution as an application in execution," and he goes on to say that he sees no reason for supposing that in passing the present Code of Civil Procedure the Legislature intended to alter the general principle of law. Further on, on p. 285, he quotes the cases of the Bombay High Court, in which he says that that Court held that proceedings in restitution must be treated as proceedings in execution and on page 286 he goes on saying :

> But the balance of authorities would appear to be in favour of the view that applications by way of restitution are applications in execution of a decree ;

and he winds up on page 287 :

> In my view it must be held that the law on this matter is the same as it was under the Code of 1882 and applications by way of restitution must be treated as applications in execution.

It is for that reason that he held that Art. 182, Limitation Act, applied. Now the Code of Civil Procedure appears to regard Ss. 47 and 144 as quite distinct. In S. 2 (2), Civil P. C. there is a definition of the word "decree," in which it is said :

> It shall be deemed to include the rejection of a plaint and the determination of any question within S. 47 or S. 144.

If every question arising under S. 144 were also included in Sec. 47 the double reference would be redundant. Clearly, it is quite possible that an application for restitution may involve directly an application to execute a decree, for the decree of the Appellate Court may directly reverse the decree appealed against and embody in itself the actual order of restitution. There are, however, other cases in which as in the present case the mere execution of the decree of the Appellate Court will not in itself involve restitution and it is when restitution has to be sought outside the four corners of the decree of the Appellate Court that S. 144 has to be invoked. With respect I am unable to agree with Leach J. when he says that because of what was laid down in 11 Rang 275[3] he was bound to differ from what was laid down by Ormiston J. in 8 Rang 271.[1] In 11 Rang 275,[3] the Judges were not considering the question of whether an appeal under Sec. 144 was or was not exempted from payment of full court-fees. They were only concerned with the question of what Article of the Limitation Act applied and from what starting point limitation ran. In addition to the ruling in 8 Rang 271[1] there is a ruling of the taxing Judge in 47 All 98.[4] In this case the learned Judge came to the same conclusion as was come to by Ormiston J. in the Rangoon case. In the judgment occurs the passage :

> An application under Sec. 144 is no doubt one which carries out the intention of the Appellate Court's decree, but it does not directly execute that decree. What it does is to undo an execution wrongly granted by the Court below.

This passage appears to me, if I may say so, to express the matter in a nutshell. It is not executing the existing decree: it is un-executing a decree which had ceased to exist. There are, I know, other decisions to the contrary. In 21 C W N 544[5] Chatterjea J. held that an appeal from an order under S. 144 was properly stamped with a court-fee of two rupees; but with respect I am unable to follow his ruling. In the judgment there is a passage :

> The Court in making restitution has to execute the decree of reversal (which necessarily carries with it the right to restitution even though the decree may be silent as to such restitution) in order to give effect to the reversal of the decree.

I find myself unable to understand how carrying out an intention about which the decree is silent can be executing the decree. A decree is supposed to bear on its face everything it is necessary for the Court which is executing it to know. If the decree is silent about any matter, an executing Court cannot execute that about which it is silent: so, enforcing the spirit of the decree is not executing it. If such a thing has to be done, it must be under a different Section, namely Sec. 144. A similar point was dealt with by Jwala Prasad J. in

4. Baijnath Das v. Balmakund, (1925) 12 A I R All 137=82 I C 321=47 All 98=22 A L J 881.
5. Madan Mohan Dey v. Nogendra Nath Dey, (1918) 5 A I R Cal 335 = 89 I C 640 = 21 C W N 544.

4 Pat 294.[6] In this case after dealing with the matter at length the learned Judge really concludes by saying : "I, as a taxing Judge, am not prepared to go against the view of my predecessor-in-office." So he merely repeats what his predecessor in 1917 had said. The note of his predecessor is : "I accept the view taken in 21 C W N 544[5]" : so these decisions of the Patna High Court do not help us very greatly. In my opinion the view taken by Ormiston J. in 8 Rang 271[1] and Daniels J. in 47 All 98[4] is correct, and appeals filed under S. 144 do not come within the exemption given by Notification No. 41. It is admitted however that the valuation given for purposes of jurisdiction was merely put in as a matter of routine without any great consideration. Mr. K. C. Sanyal asked to be allowed to file an amended memorandum of appeal in which he will put the value on the appeal which is really the value of the subject-matter in dispute in this appeal, and for this purpose we will allow him time.

Mosely J.—I agree.

D.S./R.K. *Order accordingly.*

6. Sital Prasad Singh v. Jagdeo Singh, (1925) 12 A I R Pat 577 = 92 I C 474 = 4 Pat 294=7 P L T 415.

A. I. R. 1939 Rangoon 34

DUNKLEY AND BRAUND JJ.

M. R. P. M. R. Murugappa Chettyar — Appellant.

v.

K. S. A. K. Chettyar Firm and another — Respondents.

Letters Patent Appeal No. 5 of 1938, Decided on 23rd June 1938, against decree of Mackney J., in Second Appeal No. 275 of 1937, D/- 24th February 1938.

(a) Limitation Act (1908), S. 26 — Easement of way—Person claiming it must have been conscious that he was using passage as easement—Person throughout claiming ownership of soil under passage cannot claim easement of way over it (Per *Mackney J.*)

It is essential that the person claiming easement of way must have been conscious when he was using the passage that he was exercising a right of easement over the land of another. When he has throughout claimed that he was the owner of the land over which the way passed, it cannot be said that he was conscious of using the way in the exercise of his right to do so as an easement and his claim for easement must fail. If the facts proved are so indeterminate as to point equally to ownership or to the exercise of a right to an easement, it cannot be held that an easement has been established because the fact of ownership has not been proved. Further, for the purpose of acquiring a right of way or other easement under Sec. 26 it must at least be shown that the servient owner might be expected to have known of the assertion of the right of way on the part of the dominant owner : *(1914) 3 K B 911 ; A I R 1926 Mad 728 (F B); A I R 1915 P C 131; 16 Bom 592; A I R 1932 Bom 513 and 10 Cal 214, Rel. on ; A I R 1922 Bom 199 ; A I R 1933 Bom 122 and A I R 1922 Bom 79, Expl.* [P 36 C 2; P 37 C 2; P 39 C 1]

(b) Limitation Act (1908), S. 26 — Municipal sweepers in exercise of statutory duty passing over land of a person to sweep latrine standing on another person's site—User by sweeper of such passage cannot entitle owner of latrine to claim easement of way (Per *Dunkley and Braund JJ.*)

When S. 26 talks of the enjoyment of a right by a person what it really means is that there must be an exercise of that right by that person. [P 41 C 2]

Where for a period of over twenty years the sweepers employed by the Municipal Committee have passed in exercise of statutory duty over the sites of a person in order to reach a latrine standing on another person's site, and to remove the nightsoil therefrom the owner of latrine cannot claim a right of way by way of easement in respect of this user by the sweepers of the Municipality, because the activities of the sweepers are directed wholly by the Municipality and over them the owner of the latrine himself has no control. In these circumstances, such user cannot be accounted an enjoyment by the owner of the latrine of the right he claims, as an easement and as of right. Furthermore, as under S. 185, Burma Municipal Act, the sweepers have a right, given by statute, to enter on any other land, for the purpose of conserving latrine, their passage through a person's land has been in exercise of that right. Consequently no question of the acquisition of right of way as an easement arises in such case : *13 Cal 136 (P C), Expl.; A I R 1926 Bom 282, Explained and observations held obiter.* [P 37 C 1; P 40 C 1, 2; P 41 C 1, 2]

Basu — *for Appellant.*

Hay — *for Respondents.*

Second Appeal No. 275 of 1937.

Mackney J.—The facts of this case are fully set out in the judgments of the lower Courts and it will not be necessary to repeat them in full here. The plaintiff-respondent Firm M. R. P. M. R. Murugappa Chettyar are the owners and occupiers of a house site in Kyaikto Town which is at the corner of the Yunzalin Road and the main road, the Yunzalin Road being on the east and the main road on the south of the site. Immediately adjoining the site on the west and extending the whole length of the plaintiffs' site and a little further north is a site belonging to and occupied by the defendants-appellants the K. S. A. K. Chettyar Firm and the C. T. K. N. Kanappa Chettyar Firm. Immediately adjoining the plaintiffs' site on the north and abut-

ting on to the Yunzalin Road on the east and extending to the defendant-appellant's holding on the west already mentioned is another holding belonging to the defendant-appellant. This holding is No. 106. The plaintiffs' holding is No. 105, and the holding of the defendants on the west of the plaintiffs' holding is No. 104. Holding No. 106 has not been continuously occupied and has occasionally been vacant for an appreciable time. Running between the plaintiffs' holding and defendants' holding No. 106 there is a brick drain which takes drainage from the defendants' well in holding No. 104.

It is also used by the plaintiffs to take drainage from their bath-room, their shed and their latrine which are close to it. The plaintiffs have a latrine in the north-west corner of their house-site. Between the back of the latrine and the fence of holding No. 104 there is a space. It would be possible to get into this space from the plaintiffs' house-site; but they have put a corrugated iron walling across it. There is also a space between the two houses of the parties, so that it would be possible to get to the latrine from the main road by passing between the two houses. Similarly by going past the fuel shed on the plaintiffs' side of the fence between holding Nos. 105 and 106 it is possible to get on to the Yunzalin Road. It has been found by the lower Courts that the Municipal sweeper who conserved the plaintiffs' latrine used to obtain access thereto by walking along the drain in the defendants' holding No. 106 from the Yunzalin Road and then turning into the passage between the plaintiffs' latrine and the defendants' fence to holding No. 104. Recently, the defendants blocked the passage by the side of this drain by means of a wall at the Yunzalin Road end, and another wall at the point where a person would turn from the drain southwards to get to the latrine. As the plaintiffs themselves have a corrugated iron wall extending the whole breadth of their house site on the south of the drain it is thus now impossible for the Municipal sweeper to get to the plaintiffs' latrine in this way. The plaintiffs refuse to make any other arrangements and consider themselves aggrieved by the defendants' action. They filed a suit claiming alternatively that they were the owners of the land over which the drain passes and/or, if not, that they had acquired a title to the enjoyment of the passage along this drain to the latrine as an easement.

Both the Courts have found that the plaintiffs-respondents were not the owners of the land through which the drain passes but that they had acquired an easement as claimed. The Township Court granted the plaintiffs an injunction ordering the defendants to remove the obstructions which they had put up to the passage and to pay a compensation of Rs. 15 to the plaintiffs. Against this decree the defendants appealed to the District Court of Thaton. The District Court, Thaton, upheld the decree of the Township Court and dismissed the appeal. The defendants now appeal to this Court. It is said that on the facts held to have been proved the existence of such an easement as is claimed by the plaintiffs has not been established. The law applicable is set out in S. 26, Limitation Act (9 of 1908), the relevant portion of which is as follows:

(1) Where the access and use of light or air to and for any building have been peaceably enjoyed therewith as an easement, and as of right, without interruption, and for twenty years,

and where any way or watercourse, or the use of any water, or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right without interruption, and for twenty years,

the right to such access and use of light or air, way, watercourse, use of water, or other easement shall be absolute and indefeasible.

Each of the said periods of twenty years shall be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

It is the second part of the sub-clause on which the plaintiffs-respondents rely. The defendants-appellants claim that the plaintiffs have not openly enjoyed this right of way as an easement and as of right and that on their own showing they have made use of the way in the belief that they were owners thereof: they cannot claim to have enjoyed the way as an easement. The question arises whether the words "as an easement and as of right without interruption and for twenty years" are to be read with the words "claiming title thereto," or whether those latter three words are to be regarded as an interpolation merely explanatory of the word "person" which they immediately follow, so that the sentence should read: "peaceably and openly enjoyed as an easement and as of right without interruption and for twenty years." It may be remarked at once that the

punctuation is entirely against the latter reading. The natural interpretation of the clause as printed is that the enjoyment must be by a person who has claimed title thereto as an easement and as of right without interruption and for twenty years. If the second interpretation were true, we would have expected the clause to have been worded thus: "peaceably and openly enjoyed as an easement and as of right without interruption and for twenty years by any person claiming title thereto," and it might then be clear that the words "claiming title thereto" referred to the claim which was put forward in the suit which the aforesaid person brought. It appears to me however that the very essence of the definition is that the claim should be made continuously and not put forward at the end of twenty years of enjoyment in a suit to establish the claim.

It will be noticed that the words "by any person claiming title thereto" do not occur in the first sentence of this clause which deals with access or use of light or air, and surely the insertion of these words in the second clause must have a peculiar significance. I do not think that S. 26, Limitation Act, was intended to be a novel departure from the English law. In Halsbury's Laws of England, Edition 2, Vol. 11, para. 505 it is observed :

> Easements, being rights which are superadded to the ordinary common law incidents of the ownership of land, can only be created by grant or statute. . . .
>
> An easement may either rest upon an express grant actually subsisting or upon a presumed grant or upon a grant arising merely by implication. . . .
>
> An easement existing by presumed grant is an easement claimed under the doctrine of prescription, based either upon the doctrine of prescription at common law, or on the doctrine of a lost modern grant, or on the provisions of the Prescription Act, 1832, all of which rest upon the fact of long undisturbed enjoyment of the right constituting the easement.

Again in para. 554 it is observed :

> With regard to all easements except the easement of light, the user contemplated by the statute is user sufficient to indicate, during the whole of the statutory period (and whether acts of user be proved in each year or not), to a reasonable person in possession of the servient tenement the fact that a continuous right to enjoyment is being asserted and ought to be resisted, if such right is not to be recognized, and if resistance to it is intended; and no user can be sufficient which does not raise a reasonable inference of continuous enjoyment.
>
> User which consists of acts attributable to a claim to a title in the soil is not such user as will support a claim to an easement under the Act.

Here reference is made to (1914) 3 K B 911.[1] In this decision Shearman J. distinguished the case before him from (1881) 17 Ch D 535,[2] as well as another case to which he referred. He observed that in those cases :

> The acts upon which the claims were grounded were acts showing a claim of right to a profit in *alieno solo*, although the claim was made under a mistaken belief. Here the acts were acts attributable to a claim to the ownership of the soil itself. I think the words 'claiming right thereto' in S. 1,* Prescription Act, 1832, mean claiming right thereto as a common or profit. . . . Here the enjoyment, such as it was, was attributable to a mistaken claim to right to the soil.

It appears to me that it is essential that the plaintiffs must have been conscious when they were using this passage that they were exercising a right of easement over the land of another. When, as in the present case, the plaintiff has throughout claimed that he was the owner of the land over which this way passed, how can he turn round and say that he was conscious of using the way in the exercise of his right to do so as an easement ? In actual fact the plaintiffs appear to have been conscious of nothing of the kind. The plaintiff firm came into possession of this property some 6 or 7 years ago. It is true that the Courts have found that Municipal sweepers had been using this way for nearly 25 years: but no facts have been disclosed which would show that this happened of deliberate purpose. The sweeper on whose evidence the lower Courts have relied, and who claims to have conserved this latrine during the whole of the period, admits that for a number of years there was no fence between the plaintiffs' compound and the drain. It was obviously merely a matter of his own convenience that he should walk along the drain which led to the latrine instead of meandering through the outhouses in the interior of the plaintiffs' holding. There is no evidence that the plaintiffs or their predecessor-in-title required the

1. Lyell v. Lord Hothfield, (1914) 3 K B 911=84 L J K B 251=30 T L R 630.
2. Earl De La Warr v. Miles, (1881) 17 Ch D 535 =50 L J Ch 754=44 L T 487=29 W R 809.

* Section 1, Prescription Act, 1832 reads as follows :

> Be it enacted, that no claim . . to any right of common or other profit or benefit to be taken and enjoyed from or upon any land . . . shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto, without interruption for the full period of thirty years, be defeated or destroyed by shewing only etc., etc. . . . .

sweeper to go that way. It was simply indicated by the circumstances of the property as an easy way for the sweeper to go. It has not been shown that there was any conscious purpose on the part of the plaintiffs or their predecessor-in-title of causing the sweeper to go over the defendants' land. There was certainly no necessity for the sweeper to go that way. The plaintiffs' predecessor-in-title could easily have arranged for him to go through his own compound.

It is important to notice that there was no necessity for the plaintiffs to force the sweeper to go over the defendants' land. The latrines would be conserved at night time, and it is certainly not at all apparent that there was anything in the circumstances of the case from which it could be presumed that the defendants were aware that the Municipal sweeper went that way to conserve the latrine. They could not be supposed to know the interior arrangements of the plaintiffs' compound and that the plaintiffs had blocked a way here and a way there, so that the sweeper had to go round by the north of the plaintiffs' holding. The learned District Judge has quoted a number of decisions in his judgment. A number of them appear in reports which are not authorized law reports. I must again point out that it is a waste of time for Judges to refer to these reports in their judgments. There is always a good reason why a case which is reported in these unauthorized reports does not appear in the authorized reports. The decision in 38 Mad 1[3] was overruled by the Full Bench decision in 49 Mad 820.[4] In any case the former decision dealt with the interpretation of Sec. 15, Easements Act. S. 15, Easements Act, reads as follows :

Where the access and use of light or air to and for any building has been peaceably enjoyed therewith as an easement without interruption and for twenty years,

and where support from one person's land, or things affixed thereto, has been peaceably received by another person's land subjected to artificial pressure, or by things affixed thereto as an easement, without interruption, and for twenty years,

and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right without interruption, and for twenty years,

the right to such access and use of light or air, support or other easement, shall be absolute.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which the period relates is contested.

It will be noted that the punctuation in the clause relating to right of way or any other easement is different from the punctuation used in S. 26, Limitation Act, and in the earlier Madras case this fact is commented on and it is observed : "Now the punctuation shows that title need not be claimed as an easement". In 49 Mad 820[4] it was observed :

The learned Judges in 38 Mad 1[3] seem to imply that the assertion of ownership during the period of user is not fatal to the success of a claim to an easement. To this proposition we cannot assent. Our opinion is that while the mere putting forward of a wider claim in legal proceedings is not conclusive against a right of easement, yet the question *quo animo egerit*, to what purported character are the acts of user to be ascribed, is one which the Court must answer, and if 38 Mad 1[3] implies the contrary we think it is wrongly decided. We agree with the conclusion of Shearman J. in (1914) 3 K B 911[1] that acts done during the statutory period which are only referable to a purported character of owner cannot validate a subsequent claim to an easement. The question of animus in this case is one of fact . . . .

The defendants-appellants urge that the lower Courts having held that the acts of the plaintiffs were not acts of ownership, it was open to them to find that they must have been acts asserting a right to an easement. I do not agree. It seems to me that on the one hand there is the Court's finding that the acts proved are not acts of ownership, and on the other hand the plaintiffs' claim that they did the acts as owners. The finding negates the claim but not the fact that the claim was made. It certainly does not amount to a finding that the acts proved were acts done in the assertion of the right to an easement. If the facts proved are so indeterminate as to point equally to ownership or to the exercise of a right to an easement, it cannot be held that an easement has been established because the fact of ownership has not been proved. Again I must emphasize the fact that there must be a conscious claim of the right as an easement for the statutory period. In (1915) A C 599[5] at p. 617 it is observed :

It is also further maintained that in any view the use to which the land was put by the respondents and their predecessors-in-title could not be the foundation of any easement, as it was not a right assumed to be taken or asserted over the land

3. Konda Reddi v. Ramasami Reddi, (1916) 3 A I R Mad 718=17 I C 112=38 Mad 1.
4. Subba Rao v. Lakshmana Rao, (1926) 13 A I R Mad 728=96 I C 968=49 Mad 820 (F B).
5. Attorney-General of Southern Nigeria v. John Holt and Co. (Liverpool) Ltd., (1915) 2 A I R P C 131=(1915) A C 599=84 L J P C 98=112 L T 955.

of another; the possession founded upon was possession of the land as owner thereof . . . . It seems to be undoubtedly true that what was done by the respondents was done by them as in their opinion upon their own lands. There was much in the nature of affairs and the legal situation to induce this opinion, and it is not to be wondered at that not only they but all parties on the island, appear to have considered these operations, which were clearly beneficial to the general interest, in no way to be of the nature of wilful appropriation or of trespass, but merely of making good and proper use of their rights as owners of property abutting upon the sea.

There then follow these observations:

An easement however is constituted over a servient tenement in favour of a dominant tenement. In substance the owner of the dominant *tenement throughout* admits that the property is in another, and that the right being built up or asserted is the right over the property of that other. [The underlined (here *italicised*) is mine.]

In 16 Bom 592[6] the interpretation of S. 26, Limitation Act, which I am disposed to follow was accepted. This case was not actually dissented from in 34 Cal 51[7] but it was sought to make a distinction between the two cases because in the former case

it was held that the evidence produced in the first suit to prove user by right of ownership was inconsistent with their present claim to the user as an easement. The decision therefore was on the evidence. The case before me has not reached the stage for the evidence to be considered by the Subordinate Judge. He has dismissed it solely on the ground that the claims in the alternative could not be considered in one suit.

It was held in the Calcutta case that there was no reason in principle why a claim in the alternative to ownership or to use of a right of way as an easement should not be tried. No doubt the plaintiff is at liberty to put forward all alternative claims, but if it is found that whilst failing to establish the fact that he was not an owner of the land in question he has also failed to prove that he exercised a right of way as an easement, obviously he cannot succeed at all. In 56 Bom 427[8] the decided cases on the point are reviewed and it is observed:

It seems therefore to be established law, which has been recognized by the English Courts in a series of cases, by the Privy Council, by the Court in 16 Bom 592,[6] and by the Madras High Court in 49 Mad 820,[4] that a person cannot acquire an easement unless he acts with the knowledge that it is a case of a dominant and a servient tenement and that he is exercising a right over property which does not belong to him, and in the present case, where the defendant has consistently claimed ownership in the land over which the so-called easement is now claimed, he cannot, in the face of these cases, claim to have acquired an easement.

With great respect this point does not seem to have been present in the minds of the learned Judges who decided 46 Bom 200.[9] Actually the case turned on the interpretation of pleadings and the real issue in the case was whether the plaintiffs had enjoyed for a statutory period the right of way over the strip in question. The learned Chief Justice however went on to say:

Whether in previous years they merely exercised rights of way over that strip against the true owner, or did so because they thought it had belonged to their ancestors, it does not seem to me to make very much difference.

This observation appears to me somewhat to beg the question which was: "Has the plaintiff been exercising a right of way or has he been exercising a right of ownership?" If he used the way because he was the owner, then he did not exercise a right of way. I might here interpose the remark that in the present case the plaintiffs claim to have repaired the drains to which reference has been made in the exercise of their right of ownership, and they supported their claim by the production of their accounts. Neither of the lower Courts referred to this piece of evidence. They felt themselves to be concerned merely with the question whether the plaintiff firm was in fact the owner and not with the question whether it had claimed to be owner.

The learned District Judge referred to 35 Bom L R 144.[10] This is an excellant illustration of the observation which I made at the outset in regard to the authorized law reports. In this case the learned Chief Justice merely made an observation, entirely as his own personal opinion, that he did not himself see why, if the owner of a piece of land proved that for twenty years he has in fact exercised a right of passing and repassing over adjoining land *nec vi nec clam nec precario* he should be unable to establish an easement of way over such adjoining land merely because when he exercised that right he believed that he had a right of ownership in the adjoining land, which right he was unable to establish in a Court of law. This, as I have said, is a mere

6. Chunilal Fulchand v. Mangaldas Goverdhandas, (1892) 16 Bom 592.
7. Narendra Nath v. Abhoy Charan, (1907) 34 Cal 51=4 C L J 437=11 C W N 20 (F B).
8. Marghabhai v. Motibhai Mithabhai, (1932) 19 A I R Bom 513=139 I C 571=56 Bom 427=34 Bom L R 1015.
9. Dharamdas Kaushalyadas v. Ranchhodji Dayabhai, (1922) 9 A I R Bom 199=64 I C 517=46 Bom 200=23 Bom L R 1009.
10. Tamanbhat Shankarbhat v. Krishtacharya Tamancharya, (1933) 20 A I R Bom 122=144 I C 998=35 Bom L R 144.

expression of the personal opinion of the learned Chief Justice and he then adds :

For the purposes of this case I will assume as correct the law as found by the Madras High Court: 49 Mad 820.[4]

In what way can it be said that in the present case the plaintiffs exercised this right of way as of right? As I have already remarked there was really nothing to put the defendants on their guard and no overt act certainly on the part of the predecessors-in-title of the plaintiffs of exercising a right of way through the defendants' land. Cases dealing with the right to access of light are obviously on a different footing, and the wording of the first two clauses of Sec. 26, Limitation Act, clearly indicates this. As I have already pointed out in Cl. 1 the words "by any person claiming title thereto" are omitted. In 56 Cal 927[11] it is observed :

It was contended on behalf of the Pal defendants that long user was sufficient for a finding of an enjoyment as of right. This is a proposition of law to which I am unable to accede. Whether an enjoyment is as of right or not is, in my opinion, a pure question of fact, and enjoyment as of right cannot be inferred as a matter of course from a finding of user only.

45 Mad 633[12] was a case under Sec. 15, Easements Act, but it was there held :

The presumption of right from long user is not in this country a presumption *de jures et de jure*. It only starts a party with a presumption in his favour which can be rebutted by proof of facts which are inconsistent with or which militate against the inference which in the absence of evidence by the defendant would entitle plaintiff to a decree.

Such facts are, in my opinion, patent in the present case. I do not wish to be understood to maintain that for the purpose of acquiring a right of way or other easement under S. 26, Limitation Act, it is necessary that the enjoyment of the easement should be known to the servient owner : but it must, in my opinion, at least be shown that the servient owner might be expected to have known of the assertion of the right of way on the part of the dominant owner. 10 Cal 214[13] is not against this view. The learned Judges who decided the case certainly seem to imply that there should be this possibility. They observed :

It is probable that the words "peaceably and openly" which are not in the English Act, have been introduced into the Indian Act for the very purpose of preventing these rights being acquired by stealth or by a constantly contested user, although actual knowledge of the user on the part of the servient owner may not be necessary.

(Here again however the significance of the words "claiming title thereto as an easement etc." does not appear to have been considered.)

In 76 I C 754,[14] an alleged decision of the Bombay High Court to which the learned District Judge refers, although the facts might at first sight appear similar to the present, it is clear that they were not so because it was found that the defendants could not possibly have been unaware of the fact that for more than 20 years the plaintiffs' latrine had been cleaned from their side of the hedge. The latrine was only a few feet away from the defendants' house and was so built that the sweeper could only have access to it from the defendants' compound. In my opinion the plaintiffs failed to establish that they had acquired an easement over the defendants' property. They were not entitled to an injunction against the defendants to permit them to use the passage and they were not entitled to any damages. The appeal is therefore allowed and the plaintiffs' suit is dismissed with costs in all Courts, (advocate's fees in this Court five gold mohurs as the hearing has been somewhat protracted).

Letters Patent Appeal

Dunkley J.—The suit of the plaintiff-appellant was bound to fail on a ground which has not been mentioned by either of the lower Courts or by this Court on second appeal. The parties live in the town of Kyaikto. The plaintiff-appellant occupies a site contiguous to the sites occupied by the defendants-respondents. His case, as it is now presented, is that for a period of over 20 years the sweepers employed by the Municipal Committee of Kyaikto have passed over the sites of the defendants-respondents in order to reach a latrine, used by him and standing on his site, and to remove the night-soil therefrom. The plaintiff-appellant therefore claims a right of way by way of easement in respect of this user by the sweepers of the Municipality. The claim is based on S. 26, Limitation Act. The provisions of this Section have been set out in the judgment of the learned Judge on second appeal, and I do

11. Siti Kanta Pal v. Radha Gobinda Sen, (1929) 16 A I R Cal 542=119 I C 293=56 Cal 927=33 C W N 517.
12. Kunjammal v. Rathinam Pillai, (1922) 9 A I R Mad 5=66 I C 11=45 Mad 633=42 M L J 417.
13. Arzan v. Rakhal Chunder, (1884) 10 Cal 214.
14. Yosef David Varulekar v. Moses Solomon Talkar, (1922) 9 A I R Bom 79=76 I C 754=24 Bom L R 298.

not propose to repeat them. For the present purpose the important words are, "openly enjoyed by any person claiming title thereto as an easement".

There is no suggestion in the evidence that the appellant or his servants or members of his household, or persons visiting his house, ever at any time used this supposed right of way. The only evidence is to the effect that the municipal sweepers have used this method of approach to the appellant's latrine. They did so to suit their own convenience in carrying out their duties, and they did not do so on the authority or at the wish of the appellant. Consequently, it is clear that the appellant who is claiming this right of way, has never enjoyed it. Moreover, it is clear that the municipal sweepers did not use or enjoy the right of passing over the respondents' land as an easement. They passed over the respondents' land in the exercise of a right or duty to remove night-soil, which duty is imposed on the Municipal Committee by the provisions of Section 145, Burma Municipal Act. If an easement could be acquired, it would have to be acquired by the Municipality, and the Municipality is not the owner of a dominant tenement. What is done in the exercise of a statutory right or duty cannot be the subject of an easement.

Furthermore, under Section 185, Burma Municipal Act, the sweepers have a right, given by statute, to enter on the land of the respondents, or on any other land, for the purpose of conserving the appellant's latrine, and their passage through the respondent's land was in exercise of that right. Consequently no question of the acquisition of a right of way as an easement arises in this case. Mr. Basu, for the appellant, has referred to the case in 13 I A 77,[15] but in that case in the first instance the sweepers were hired by the plaintiffs, and during the time that the privy was being conserved by the servants of the plaintiffs an easement was already acquired. Subsequently, the privy was conserved by the municipal authorities under statutory powers, but under the Act, the plaintiffs were bound to give access to their land for the purpose of removing the night-soil, and therefore their Lordships held that the easement already acquired was not lost by reason of a supposed discontinuance of user by the substitution of the sweepers hired by the plaintiffs by municipal scavengers.

Mr. Basu has also referred to the case in 28 Bom L R 601[16] in which it was held that under Easements Act one can acquire an easement of a right of way for the use of the sweeper though such sweeper may be a municipal servant; but in this case the appeal was dismissed on other grounds and therefore the observations of the learned Judges on this point were obiter. Moreover, the question of the statutory rights or duties of the municipality was not considered and we do not know from the judgment what those rights or duties were. In view of the provisions of S. 185, Burma Municipal Act, it is clear that the entry upon the respondents' land was entry in pursuance of a statutory right and therefore could not be in the nature of an easement. This appeal therefore fails and is dismissed with costs, advocate's fee ten gold mohurs.

Braund J. — I agree. These proceedings commenced in the Township Court of Kyaikto. The Township Judge found the facts of the case, which have not since been disturbed and are not in appeal in this Court. He found that there had been a user of the passage in question by certain scavengers employed by the Kyaikto Municipality for a period exceeding 20 years. And, basing himself upon those facts, he granted relief to the plaintiff upon the footing that he had established an easement. The District Judge of Thaton, affirmed the decision of the Township Judge. But, upon appeal to this Court, the learned Judge reversed the decisions both of the Township Judge and of the District Judge, upon the ground that, by reason of the fact that an alternative claim had been made by the plaintiff to ownership of the soil of the ground over which the easement was claimed, it was not open to him under Section 26, now to prove user as of right. And he duly granted a certificate for a further appeal to this Court upon the point of law which he conceived to be involved in that decision.

Upon appeal to us there has arisen, and one cannot help feeling that it is unfortunate that it did not arise at a much earlier stage, a new question. As my learn-

15. Jadu Loll v. Gopal Chandra, (1886) 13 Cal 136 =13 I A 77=4 Sar 713 (P C).

16. Ramchandra Vasudev v. Anant Laxman, (1926) 13 A I R Bom 282=95 I C 170=28 Bom L R 601.

ed brother has pointed out, the right to an easement in this country must be established, if it is to be established at all, in strict accordance with Sec. 26, Limitation Act. That Section says (so far as it is material to read it here) that :

> Any way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right.

It has therefore to be observed that what is necessary is that it should have been enjoyed by a person claiming title thereto, that is to say, to the easement; it should have been enjoyed by him as an easement ; and it should have been enjoyed by him as of right. And it is those facts that he is required to prove by evidence in order to establish his easement. The position therefore with which we are faced is this. The plaintiff succeeded in establishing, not that he himself, or his predecessors-in-title, had actively made use of the passage in question, but that certain scavengers, whose activities were directed wholly by the Municipality and over which the plaintiff himself had no control, had made use of the passage : and the question that arises is this, whether, in those circumstances, such user can be accounted an enjoyment by the plaintiff of the right he claims, as an easement and as of right.

In this connexion it is important to observe that by Sec. 145, Burma Municipal Act of 1898, and its amendments, there is cast upon the Municipalities of Burma, and presumably upon the Municipal Committee of Kyaikto among them, the statutory duty of clearing the refuse from latrines such as the one in this case; and they are fortified for that purpose with a statutory right of entering upon the land of any person for the purpose of removing that refuse. It appears to me, therefore, that what was proved, and the only thing that was proved, in this suit was that for 20 years or more the Municipal Committee of Kyaikto had performed nothing more nor less than their statutory duties, and in doing so they had exercised their statutory rights. That, of course, was a matter over which the plaintiff and the predecessors-in-title of his premises had no control whatsoever. It seems to me, therefore, that it is impossible to say that the owners or occupiers of the plaintiff's premises have at any time exercised any right of way over the defendant's land. Such exercise of any right that there has been by the Municipality under its statutory powers under S. 185, Municipal Act.

It is quite true that Sec. 26 does not use the word "exercise" but uses the word "enjoy". In one sense, of course, as Mr. Basu has pointed out, inasmuch as the removal of the night-soil from the latrine was for the benefit of the plaintiff's premises, he enjoyed it in that sense. But, in my view when S. 26 talks of the enjoyment of a right by a person, what it really means is that there must be an exercise of that right by that person. The owner or occupier of the plaintiff's premises never had any right to say when or how or over what land or by what method the municipal scavengers should carry out their work. For these reasons, I think, as my learned brother thinks, that it is quite impossible to say that there has been any enjoyment by the plaintiffs in this case : and by parity of reasoning it is equally impossible to say that, even if there had been any enjoyment, it could have been an enjoyment as an easement. Even though the enjoyment were by the plaintiffs, it would have been an enjoyment of something that there was a statutory right to do, which of course is a sheer contradiction of the notion of an easement : and again, it would have been impossible to say that it was done as of right. Enjoyment as of right, under Sec. 26, does not mean rightful, but what it means is, in assertion of a right, and, in this case, in assertion of an adverse right, that is to say a right of easement. Quite clearly, the user of the defendants' land for the purpose of the passage of the municipal scavengers was not in assertion of any such right; it was in exercise of a statutory right. In those circumstances, I agree that this appeal must be dismissed.

Note.—I should like to add, but not as part of my judgment, that I have been impressed by the judgment of the Township Judge. I have his judgment before me, and in my view it is a careful and very well reasoned judgment and well composed. Speaking entirely for myself, he should not be discouraged that a superior Court, better equipped than he is, has come to a different conclusion.

Dunkley J. — I should like to associate myself with those final remarks.

D.S./R.K. *Appeal dismissed.*

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MYA BU OFFG. C. J. AND DUNKLEY J.

D. Ramanna Reddy and another — Appellants.

v.

Abdul Rashid — Respondent.

Special First Appeal No. 65 of 1938, Decided on 16th August 1938, against decree of Small Cause Court, Rangoon, in Civil Regular No. 7902 of 1937.

(a) Practice—New plea—Plea of limitation raised only in appeal—Mixed question of law and fact—No facts on record to determine plea —Plea cannot be allowed.

Plea of limitation is not a pure question of law but a mixed question of law and fact. To support that plea facts are always necessary. Where such plea is raised for the first time in Appellate Court and there is no material on record for the Court to come to any finding on that point, the plea cannot be permitted to be raised in appeal : *A I R 1938 Rang 236, Rel. on.* [P 44 C 1]

(b) Appeal — Interest — Question of law — Facts admitted or proved beyond controversy— Plea of interest can be allowed for first time in appeal.

The question whether plaintiff is entitled to claim interest on transactions in the suit is purely a question of law and where facts on record about this question are admitted or proved beyond controversy, the plea of interest can be raised in appeal even for the first time although the defendant may not have specifically denied in his pleadings plaintiff's claim for interest : *A I R 1938 Rang 236, Rel. on ; A I R 1938 P C 67, Ref.* [P 44 C 1]

(c) Limitation Act (1908), Art. 60—Agreement that deposit shall be payable on demand can be implied.

The agreement that the money shall be payable on demand within Art. 60 need not be an express agreement. It can be implied agreement, and often is implied from the circumstances of the deposit : *A I R 1938 Rang 335, Rel. on.* [P 45 C 2]

P. K. Basu — *for Appellants.*

Dr. Rauf and Ahmed — *for Respondent.*

Mya Bu Offg. C. J.—This is an appeal against the decree of the Court of Small Causes, Rangoon, allowing the respondent's claim against the appellants for recovery of an amount made up of sums alleged to have been deposited by the plaintiff with the defendants, together with interest at two per cent per mensem. The plaintiff-respondent is a rice sampler of No. 1, Kanaungtoe Mill of Messrs. Steel Brothers & Co. Ltd., while the appellants are cooly maistries who supply labour to the mill. The plaintiff-respondent and another man called Abdul Rahman used to get quantities of sample rice which they were permitted by the mill manager to sell and appropriate the sale proceeds thereof to their own use. They used to sell such rice to the defendants-appellants, who found it convenient to buy them for supply to coolies working under them. The plaintiff-respondent's case is that he and Abdul Rahman used to deposit their respective shares of the sale proceeds of such rice when it was sold to the defendant-appellants and that the plaintiff-respondent also deposited some small savings of his own. The total amount of the deposits, less repayments, came to Rs. 1076-15-0, and interest on it at two per cent. per mensem was claimed in the plaint on that sum from 22nd May 1936, to 30th September 1937, which was two days before the institution of the suit. The period during which the deposits were made was between January 1933, and January 1935. Further, it is the case for the plaintiff-respondent that an attempt was made towards the end of 1935 to get the amount of the deposit repaid, and as it proved unsuccessful the plaintiff-respondent approached the mill manager, through the godown master, to intervene in the matter and obtain repayment of the amount deposited. The amount was then Rs. 1316-15-0. As no substantial compliance was made with the demands thus made, a panchayet was called, at which the accounts were checked and it was only thereafter, and in pursuance of a promise made at the panchayet by the defendant-appellants, that certain sums were paid, altogether amounting to Rs. 240. The last of such sums was paid on 22nd May 1936. Therefore the period for which interest was claimed in the plaint was from 22nd May 1936 to 30th September 1937.

The part of the written statement which is material to this appeal is the denial by the defendants-appellants of the alleged deposits. It was not pleaded that the interest that was claimed was not due or payable. In the course of his evidence, the plaintiff-respondent unequivocally admitted that there was no arrangement to pay interest and that he did not expect to receive any interest. According to the plaintiff-respondent, the deposits were made for his own convenience and not for any purpose of the defendant-appellants. The trend of the plaintiff-respondent's story is that he and Abdul Rahman wanted to keep their little savings in safe custody and therefore made the deposits of sums

which they had either saved or were coming into their hands. This appeal has been prosecuted mainly upon three grounds the first of which is that the finding of the learned trial Judge that the alleged deposits were made was not supported by evidence; secondly, that the alleged deposits were not in fact deposits at all but were the price of the various quantities of rice which were sold and delivered, as it were, on credit, and that therefore the claim was for recovery of money due for goods sold and delivered and as such the suit was barred by limitation under Art. 52, Limitation Act, and thirdly that in the face of the plaintiff-respondent's own admissions in his evidence as regards interest, the award of interest as claimed in the plaint is not justified.

With reference to the finding of fact that the plaintiff-respondent had made the deposits as alleged, there is ample evidence in support of it. The plaintiff-respondent himself speaks to the making of the deposits and he and two of those who were present at the panchayat speak to the fact that the appellants at the panchayat admitted the respondent's claim and agreed to pay up the amount. The plaintiff-respondent also adduced the evidence of the appellant's clerk, Narayana, who admittedly wrote Ex. A, which is a list setting out sums of money with the respective dates and certain notes appended to them. Narayana also admittedly wrote a similar list for Abdul Rahman, which is Exhibit D; Narayana explains that the items of these lists were written by him as occasion arose at the request of the plaintiff and Abdul Rahman, who jointly sold their rice to the appellants and divided the sale proceeds between them, as notes of the amounts which they had respectively received from those transactions. In addition, the plaintiff-respondent adduced the evidence of the godown master, Mr. Wynn, with reference to his allegation that at his request Mr. Wynn intervened and obtained the admission of the defendants about the end of 1935. Mr. Wynn's statement is of little value as substantive evidence in the case, because he does not remember to whom he spoke in pursuance of the plaintiff-respondent's request and his memory as regards what he did on that occasion has faded through lapse of time so that he was able to say very little out of his own recollection. But he wrote a certain note at the request of the respondent on 27th May 1936, as he was about to go away on leave, which shows that he did take certain steps in connexion with the respondent's demand for repayment of certain moneys from some other person working at the mill and he remembers that this note, which is dated 27th May 1936, was written about six months after he had intervened in the matter. According to the sequence of events given by the plaintiff-respondent, this note was written long after the holding of the panchayet, which itself was subsequent to Mr. Wynn's intervention. This note appears in the note book, Ex. B, on the reverse of the page on which the alleged repayments after the panchayet were entered. The repayments were made between 14th January 1936 and 22nd May 1936, and they are written on the first and the third pages of the book, whereas Mr. Wynn's note, dated 27th May 1936, appears on the reverse of page 1, which is page 2.

Therefore the evidence of the plaintiff-respondent and his two witnesses who were present at the panchayet receives very strong corroboration from the fact that Narayana wrote the entries in Ex. A and Ex. D and that the plaintiff-respondent approached Mr. Wynn to make a demand for the repayment of the amount of his deposit from the defendant-appellants. In spite of the fact that Mr. Wynn does not remember the details as to what he did and to whom he spoke, his testimony affords substantial corroboration of the plaintiff's allegation that he did approach Mr. Wynn with the request that he should make demand from the defendant-appellants. That Mr. Wynn did do something in pursuance of that request and wrote his impression of what happened in his note, Ex. A-1, dated 27th May 1936, is not open to doubt. The very fact that this note appears on the reverse of Ex. B-1 strengthens the view that what Mr. Wynn had done about six months before he wrote this note was in connexion with the matter which is entered in Exhibit B-1. Narayana's explanation of why he wrote the lists in Exs. A and D is rendered improbable by the fact that Ex. A contained amounts—sums amounting to as much as Rs. 1165-13-0 under the heading "collections," which did not appear in Ex. D. If the amounts entered in Exhibits A and D consist only of the amounts divisible between the plaintiff-respondent and Abdul Rahman on their joint sales of

rice, it is strange that these other items do not appear in Abdul Rahman's book while they do in Ex. A. For these reasons, in my opinion, no sufficient ground has been made out for this Court to interfere with the findings of fact arrived at by the trial Court upon the evidence.

With reference to the plea of limitation, it must be pointed out that it was raised only when this appeal was filed. It was not raised at any stage of the proceedings in the trial Court. In 1938 R L R 256[1] it was held that a question of law raised for the first time in a Court of last resort will receive consideration only if it is based on facts either admitted or proved beyond controversy. The plea that is raised in this appeal as regards the limitation is not a pure question of law, but it is a mixed question of fact and law. In order that this plea may be supported, it will have to be found that the sales of rice were sales on credit and were not cash transactions. It is the duty of the defendants to put it forward as a specific plea in their written statement under O. 8, Rule 2, Civil P. C; but they not only omitted to do so, but they did not raise the plea at any stage of the trial in the Court of Small Causes, nor was any attempt made on their behalf to bring forward materials with a view to showing that the transactions of sale and purchase of rice were on credit. In these circumstances, the plea raised only when this appeal reached this Court cannot be permitted.

As regards the question of interest, in view of the fact that, although interest was claimed in the plaint, the plaintiff admitted in the course of his evidence, that interest was not agreed upon, nor had he contemplated receiving any interest, there is no legal basis for the award of interest as claimed. Although the appellants did not specifically deny their liability to pay interest on the deposits, yet it is open to this Court, under the ruling quoted above, to allow this plea that interest should not have been allowed because, not only is it a question of law as to whether the plaintiff-respondent is entitled to receive interest upon the transaction in suit, but it is a question about which there are facts admitted or proved beyond controversy which show that the plaintiff had no legal right to receive interest or any part thereof which he claimed in his plaint. In the absence of either usage or any contract, express or implied, to justify the award of interest, no interest is payable, and the Court is not justified in awarding interest on the amount of the claim except for the period from the institution of the suit to the date of realization of the decretal amount: *see* I L R (1938) 2 Cal 72.[2] Accordingly, in upholding the judgment of the trial Court with reference to the principal sum claimed in the plaint, the award of interest to the plaintiff-respondent will have to be set aside and in its place the plaintiff-respondent will be granted interest on the principal amount of claim, namely Rs. 1076-15-0 from the date of the institution of the suit to the date of the decree of the trial Court at 12 per cent. per annum and on the decretal amount from the date of the decree to the date of the realization of the amount at court rate. The decree of the trial Court will be altered accordingly. Subject to this modification of the decree, the appeal will be dismissed with costs in both Courts. The defendants-appellants will pay the plaintiff-respondent's costs in both Courts.

Dunkley J.—I am of the same opinion, and I propose to state my reasons quite briefly. There is no evidence regarding the items of the deposits, except the evidence of the entries in the book, Ex. A, and it may be said that that book has by no means been proved, in view of the hostile nature of the evidence of the clerk, Narayana. But, in my opinion, the plaintiff-respondent has established his case by proving that the amount of the deposits had been admitted by the defendants-appellants. There is perhaps some doubt as to whether the letter, dated 16th October 1935, Ex. C, was ever delivered to Mr. Wynn; but his evidence does make one fact clear, and that is, that some time about October or November, 1935 the plaintiff-respondent reported to him that the defendants-appellants owed him this debt. The suit was not brought until October 1937. It is necessary to ask oneself why there was this great delay in bringing the suit. The delay has been explained in only one way, and that is by the evidence called by the plaintiff-

1. A. R. M. N. A. Chettyar Firm v. R. M. V. S. Chettyar Firm, (1938) 25 A I R Rang 236=1938 R L R 256.

2. Bengal Nagpur Railway, Ltd. v. Rutanji Ramji, (1938) 25 A I R P C 67=173 I C 15=I L R (1938) 2 Cal 72=32 S L R 374=65 I A 66 (P C).

respondent. In my view, it can be explained in no other way and the explanation is that at some time or other the defendants-appellants had admitted the debt and promised repayment. If the claim had been a false claim, plainly, it would have been sued on soon after the report made by the respondent to Mr. Wynn. The suit was not brought, as I have said, for two years, and the reason must be that, as the respondent alleges, there was a panchayet and at this panchayet the appellants admitted their liability and subsequently, during the early part of 1936, some instalments of the amount due were repaid. It is unfortunate, of course, that the writer of the book, which is alleged to be the record of the repayments, Ex. B, (the writer's name being Maung Ba Zan) was not called as a witness, but it is quite clear that this book was not made up for the purpose of this case. It was in existence before May 1936 when Mr. Wynn wrote his note in it. He himself said in evidence that he saw this book at the time when he wrote his note. Of course, he did, because he has written in it. He has written on the second page and the reason for his writing on the second page was that the entries on the first page were already in existence. So, before the end of May 1936, entries of alleged repayments between January and May 1936, had already been made. In my opinion, these facts establish that the appellants did owe to the respondent the amount of Rs. 1076-15-0, for which this suit was brought.

As regards the question of limitation, I agree with my Lord that this is not a question which can be raised for the first time in this appeal. For the respondent, reference has been made to the provisions of Order 8, R. 2, Civil P. C., and it has been pointed out that, if this question of limitation had been raised in the written statement, obviously the respondent would have been far more carefully examined-in-chief in regard to the circumstances under which he made these deposits with the appellants and the nature of the agreement between him and them. Therefore, it is not a question of limitation which can be decided upon the pleadings or upon facts which are not in controversy. However, in my opinion, the Article of the Limitation Act which does apply to this case is clearly Art. 60, and the suit was within time. The suit was a suit for the recovery of moneys deposited under an agreement that the moneys should be repayable on demand. According to the case of the respondent—and no attempt has been made to rebut his evidence—the respondent sold rice to the appellants and instead of taking the price for each sale from them he left the money with them for safe custody. How would such money become repayable? Obviously on demand being made for repayment. As my brother Mosely and I have pointed out in a recent case, which is just about to be reported, 1938 R L R 468,[3] the agreement that the money shall be payable on demand within Art. 60, Limitation Act, need not be an express agreement. It can be an implied agreement, and often is implied from the circumstances of the deposit. The circumstances of this case show that the respondent intended the appellants to keep this money, and that the appellants took it into their custody with the intention of keeping it, until the respondent demanded repayment.

The question of interest is also another matter which was raised for the first time on this appeal. But, so far as the present case is concerned, it is a question of pure law, namely that there was no evidence whatever to support an agreement for the payment of interest; and, in fact, such evidence as there was, was in the other direction, namely that no interest was expected to be paid. That is the statement of the respondent himself. Paragraph 4 of the plaint, which sets out the only basis of the claim for interest, is quite irrelevant. I however agree with my lord, that we can and ought properly to award interest for the duration of the suit, under the provisions of S. 34, Civil P. C. I agree that the decree of the Small Cause Court should be modified to a decree for the sum of Rs. 1076-15-0, with interest for the duration of the suit at 12 per cent. per annum and further interest on the total amount of the decree at the Court rate until realization. Subject to this modification, I agree that this appeal should be dismissed with costs in favour of the respondent in both Courts.

N.S./R.K. *Decree modified.*

3. Daw Hnit v. Anamalai Chettyar, (1938) 25 A I R Rang 335=1938 R L R 468.

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ROBERTS C. J. AND BRAUND J.

P. Johnston — Appellant.

v.

Official Liquidator, High Court, Rangoon — Respondent.

Civil Misc. Appeal No. 28 of 1938, Decided on 7th June 1938, against order of High Court, in Civil Misc. No. 260 of 1936, D/- 8th March 1938.

(a) Company — Liquidation — Official Liquidator representing company — Position of — He is not bound to call claimants before him and make enquiry.

The Official Liquidator representing a company is in no different position from anyone else against whom a stranger or a third party makes a claim. His only duty is to consider and if he thinks it is an admissible claim to admit, and if he thinks it an inadmissible claim to reject it; and accordingly he is not bound to call on the claimant to appear before him and make enquiry. [P 47 C 1]

(b) Transfer of Property Act (1882), Sec. 55 (4) — Sale — Charge for balance — Difference between covenant to pay immediately and covenant to pay at future time —One gives rise to right under Sec. 55 (4) while other for right to sue for breach of contract — Transferor transferring his property— Transferee agreeing to do certain things — Transferee going in liquidation — Transferee cannot claim charge under S. 55 (4).

There is a world of difference between a covenant to pay the purchase price and a covenant to pay a sum of money in the future; in the one case the consideration consists of money, in the other the consideration consists of the covenant itself: *31 Cal 57 (P C), Rel. on.* [P 48 C 1]

Hence where there was an agreement to transfer certain clay works to another company, the consideration for which was partly in cash, partly in promise to employ the transferor at a certain rate, and partly for the allotment of shares to the transferor and the company went into liquidation before the conditions were carried out, such transferor held could not claim a charge against the assets of the company under Sec. 55. His remedy lay otherwise by action against the company for breach of contracts. [P 48 C 1]

Aiyangar — *for Appellant.*

Surridge — *for Respondent.*

Braund J. — This is an appeal from a judgment of Shaw J., which arises in the matter of the Burma China Clay Works, Ltd. in liquidation. That company was incorporated on 22nd January 1935, and the purpose of its incorporation was to purchase and to carry on a fire-bricks works which had formerly belonged to a gentleman named Mr. Johnston. On 15th January 1935, that is seven days before the incorporation of the company, Mr. Johnston entered into an agreement for the sale of his fire-bricks business. I need only refer briefly to that agreement for the purpose of pointing out what the consideration was. The main consideration consisted of a sum of Rs. 1,17,000 which was to be satisfied by payment of Rupees 12,400 in cash and the allotment of 1051 shares of Rs. 100 each to Mr. Johnston or his nominees. It has to be observed that the whole of that consideration was satisfied.

The agreement then went on to provide that the vendor, Mr. Johnston, was to be employed as the company's manager for a period of three years, and it has to be observed in passing that he was in fact so employed although the company went into liquidation before the period of three years was completed. The company also covenanted to take over and indemnify the vendor against certain liabilities of the old business. And eventually by cl. 6 it was provided in the events which actually happened, that the vendor should become entitled to 624 further fully paid-up shares in the capital of the company upon the expiration of two years from the date of the agreement. There was that intervening period because in the meantime certain other parties, Messrs. Finlay Fleming & Co., Ltd. had a two years' option within which they could take up those shares; but in the events that happened they did not in fact take advantage of that option. The winding up order was actually made on 21st January 1937, that is two years less one day after the date of the incorporation of the company; and the Official Liquidator in due course went into possession.

Those are the circumstances which gave rise to the application made by the letter dated 25th November 1937 addressed to the Official Liquidator by Mr. Johnston. I propose to read that letter. It says:

Sir,

My vendor's lien on the property taken over from me by Burma China Clay Works, Ltd.

As you are aware the Burma China Clay Works, Ltd. failed to pay the balance of the agreed purchase price being 624 shares of Rs. 100 each fully paid and I have, under S. 55, T. P. Act, a charge upon the property in the hands of the buyer for that part of the purchase price remaining unpaid amounting, without interest, to Rs. 62,400. You are also aware that under S. 101 of the same Act 'no subsequent mortgagee is entitled to foreclose or sell without redeeming the prior charge or subject thereto'.

I should be glad therefore if you will officially admit my claim as a secured creditor for Rupees 62,400 plus interest, this claim to rank prior to that of Messrs. Finlay Fleming & Co. Ltd.

I may say that it is not possible for the company to issue the shares as the company has gone into liquidation and such issue would be void under S. 227, Companies Act.

Yours faithfully.

On 8th January 1938 the Official Liquidator replied to that. He said :

I have read the letter. I am of opinion that his claim is not tenable and I am also satisfied that Messrs. Finlay Fleming & Co. only have a mortgage over all the assets of the Burma China Clay Works, Ltd.

Under the above circumstances I reject the claim put in by Mr. P. Johnston.

Some comment has been made by the learned advocate who has appeared for the appellant, to the effect that the Official Liquidator was guilty of some impropriety in not summoning before him the appellant and calling for documents and otherwise making what I might describe as a public judicial enquiry in this case. I desire to make it clear that for my part I do not share that view. The Official Liquidator representing a company is in no different position from anyone else against whom a stranger or a third party makes a claim. His only duty is to consider and if he thinks it is an admissible claim to admit it, and if he thinks it an inadmissible claim to reject it; and accordingly I think that the Official Liquidator in this case acted quite properly and that the appellant has no ground for complaint upon the ground that the Official Liquidator did not call upon him to appear before him.

The appellant then filed a petition before Shaw J. dated 3rd February in which he asked to have the decision of the Official Liquidator reversed and for what he describes as his claim to be recognized. In other words what he is really asking for is a declaration that he is entitled to a charge under Sec. 55, T. P. Act, for this Rs. 62,400. And that is the question which was considered by the learned Judge and which falls to be considered by us on appeal. It is necessary, I think, at that point for me to read S. 55, sub-s. 4, T. P. Act. It reads thus :

The seller is entitled

(a) (We are not concerned with this sub-paragraph.) ;

(b) Where the ownership of the property has passed to the buyer before payment of the whole of the purchase money, to a charge upon the property in the hands of the buyer for the amount of the purchase money or any part thereof remaining unpaid, and for interest on such amount or part.

It is therefore obvious that the first consideration that has to be taken into account is whether or not the ownership in the property over which a charge is claimed has passed to the buyer. Now, in this particular case, all that the company has so far got is possession of the property. There has been no conveyance or transfer of the property to the company, and all that has happened is that with the consent of the vendor the company has gone into possession; and it is conceded, and I may say frankly conceded, by Mr. Aiyangar, who appears for the appellant, that in this case he cannot contend that ownership of the property has passed to the buyer. And that, as it stands, is a fatal obstacle to the application that was made before Shaw J., and must necessarily be a bar to the appeal before us. It is obvious that it is necessary that ownership should pass to the buyer, because if that were not so the vendor would be merely claiming a charge or lien over that which is still his, which is absurd, and therefore that short ground, which, as I have said, rests for its facts upon the admissions of the appellant, must alone necessarily afford a reason why we must dismiss this appeal.

It is however right, in deference to the judgment of the learned Judge in the Court below, that I should say that there were a number of other grounds discussed by him upon which he was right in dismissing the application. The most important of those grounds was possibly this: As I have already said, all that remained of this consideration to be satisfied was that the appellant was, at a distance of two years from the date of the agreement, entitled to claim an allotment of 624 shares, and that was impossible of performance by reason of the liquidation of the company. Now, S. 55 (4) requires that the charge upon the property in the hands of the buyer shall be for the amount of the purchase money or any part thereof remaining unpaid. It is difficult to see how the failure of the company to fulfil a future covenant to allot shares can be described as a failure to pay the purchase money or part of it. What in reality it is, is that it is a breach of a contract pure and simple and nothing more. In the same way, it is said that the other part of the consideration here which has failed consists of the fact that the appellant, instead of being employed for the full term of three years, has only been employed for a term of two years as the manager of the company. That again I think, cannot possibly be des-

cribed as falling under S. 55 (4) of the Act, and as being a failure to pay the purchase money. That again is a pure question of breach of contract.

As the learned Judge has pointed out, it has already been considered and decided by the Judicial Committee of the Privy Council in 31 Cal 57[1] that there is a world of difference between a covenant to pay the purchase price and a covenant to pay a sum of money in the future: in the one case the consideration consists of money; in the other the consideration consists of the covenant itself. And that is so even when it is applied to terms of money. But this is an *a fortiori* case, because here the covenant was a covenant merely to allot shares at a future date and in a contingency. Moreover, it is difficult to see upon what ground the appellant can assess the purchase price in respect of which he claims a lien at the face value of the 624 shares to which he said he was entitled. If indeed, which is contrary to my view, this covenant to allot 624 shares can be assessed in terms of the purchase price at all, it seems to me that it is a complete fallacy to suppose that it must necessarily be the face value of the shares, or indeed a fixed sum of any sort or kind. What in truth and in reality it is, is that the appellant claims what amounts to damages for breach of a pure contract on the part of the company to allot shares in a particular contingency.

I am quite unable to see that that amounts in any sense to a failure to pay the purchase money, or that it falls under S. 55 (a). In deference to the learned Judge therefore although this appeal falls to be decided upon the first point alone, I wish to point out that we do not in any way differ from the decision of the learned Judge on the other points. It remains for me to say this, that although it has been necessary to dismiss this appeal and hence in effect to declare that the appellant has no charge upon the property under Sec. 55 (4), T. P. Act, nevertheless it may well be that in another application in another place he might be able in the liquidation to sustain a claim to prove for any loss he has suffered by reason of a breach of contract. I say nothing as to that, except that all questions of that kind remain open and that all that has been decided as a result of this appeal is that the appellant is not entitled to a vendor's charge on the property in the hands of the liquidator under S. 55 (4), T. P. Act. Accordingly, this appeal must, in my opinion, be dismissed.

Roberts C. J.—I agree. The claim set up and rejected by the Official Liquidator was for a lien and was expressed to be under Sec. 55, T. P. Act, and the appeal before us deals with that claim alone and lies within a narrow compass. The claim was for a charge on 624 shares which the Burma China Clay Works, Limited, had agreed to allot to him in the event of Messrs. Finlay Fleming and Co., Ltd. not exercising an option under the agreement for sale of these clay works to the company which was formed to take over and work them. But S. 55 has no application to the present case. The company which bought the property obtained possession, but there was no transfer executed, and therefore the ownership of the property has not passed. This is rightly conceded by Mr. Aiyangar, who could have taken no other course than that which he took when he saw the difficulty which no lawyer would have been able to surmount.

Moreover, there is nothing here which can be described as 'purchase money' under S. 55. There was an agreement to transfer, the consideration for which was, partly in cash, partly in promise to employ the appellant as manager at a certain rate, and partly for the allotment of shares. There may be an appropriate remedy for any breach of these covenants. We are not dealing with that, and nothing we say must prejudice any claim which might later be raised. But, as stated in 31 Cal 57,[1] there is a distinction between cases in which the consideration is a covenant and those in which it is money itself. The covenant to allot shares is not "purchase money," and no right arises under Sec. 55, T. P. Act. Accordingly, I agree that this appeal must be dismissed. Advocate's fee ten gold mohurs in respect of the Official Liquidator and five gold mohurs in respect of Messrs. Finlay Fleming and Co., Ltd.

B.D./R.K. *Appeal dismissed.*

1. Webb v. Macpherson, (1904) 31 Cal 57=30 I A 238=8 Sar 554=8 C W N 41 (P C).

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MYA BU OFFG. C. J. AND DUNKLEY J.

Bissessar Das and another—Appellants.

v.

Ma Yi and another — Respondents.

First Appeal No. 63 of 1938, Decided on 24th August 1938, against order of Dist. Court, Mandalay, in C. A. No. 11 of 1938.

(a) Gift — Acceptance — Acceptance can be implied — Gift bona fide — Registered deed handed over to donee — Mutation in name of donee—Possession of donee along with donor—These circumstances constitute acceptance.

Acceptance of a gift does not mean express acceptance but it may be implied. The circumstances that the bona fides of the transaction is undisputed ; that after a gift deed was obtained from the Registration Office it was made over to the elder of the two donees who was then a major and who kept it in a box used commonly by the donor as well as the donees ; that the mutation of names was effected in the municipal registers ; that the taxes were assessed in the names of the donees and were collected from them; and that the donees were in constructive possession inasmuch as they as well as the donor lived in the house constitute sufficient data from which acceptance can be inferred : *A I R 1932 All 444, Foll.* [P 49 C 2]

(b) Buddhist Law (Burmese)—Gift—Acceptance is necessary (Per *Dunkley J.*).

It is nowhere stated in the Burmese Buddhist law that a gift need not be accepted : *A I R 1936 Rang 430, Rel. on.* [P 50 C 1]

K. N. Dangali — *for Appellants.*

Chari — *for Respondent 1.*

Mya Bu Offg. C. J. — This is an appeal against an order of remand passed by an Appellate Court. The correctness of the order is assailed on the ground that the gift relied on by plaintiff-defendant 1, Ma Yi, was invalid for want of due acceptance. The gift in question was of a house and site in Mandalay and it was made by Daw Chit, mother of Ma Yi, in favour of Ma Yi and her elder half-brother, Maung Ba Din, by a registered deed in 1927. Maung Ba Din is son of Daw Chit by her first husband, and she married one U Kyaw Win who brought five children of his previous marriage. Ma Yi is the daughter of Daw Chit by U Kyaw Win. At the time of the gift in question Maung Ba Din was major while Ma Yi was a girl of only about 13. The bona fides of the transaction is not impugned, Daw Chit intending to avoid any possibility of complications in future on account of the mixed character of the family gave the house and site to her own issues, Maung Ba Din and Ma Yi. After the deed was received back from the Registration Office it was handed over to Maung Ba Din who kept it in a box the key of which was in the custody of Daw Chit or Maung Ba Din or Ma Yi Mutation of names followed in the municipal registers and the municipal taxes were collected in the names of the two donees. The property was however in the occupation of the donor as well as the donees and also U Kyaw Win. In the year 1931 a mortgage of the property was effected by Daw Chit and Maung Ba Din. The question before us is whether acceptance as required by S. 122, T. P. Act, was effected before the alleged mortgage in order to give validity to the transaction evidenced by the registered deed of gift.

It seems to be a clear principle of law that acceptance does not mean express acceptance but it may be implied. The circumstances that the bona fides of the transaction is undisputed ; that after the deed was obtained from the Registration Office it was made over to the elder of the two donees who was then a major and who kept it in a box used commonly by the donor as well as the donees; that the mutation of names was effected in the municipal registers ; that the taxes were assessed in the names of the donees and were collected from them ; and that the donees were in constructive possession inasmuch as they as well as the donor lived in the house constitute, in our view, sufficient data from which acceptance can be inferred. In 54 All 534,[1] where the facts bear resemblance to those of the present case and where there was a gift of zamindari property by a husband to his wife and the circumstances indicated that the wife had knowledge of the gift, there was mutation in her favour and she had actual or constructive possession through her husband, it was held that those circumstances amounted to proof of acceptance of the gift. In our opinion in the circumstances of the present case the gift must be held to have been accepted by the donees.

The learned Judge of the lower Appellate Court pointed out another ground in support of his order of remand which is to the effect that a gift of immovable property amongst Burman Buddhists before 1st April 1930 is valid without acceptance or delivery of possession provided there is a registered

1. Anandi Devi v. Mohan Lal, (1932) 19 A I R All 444=137 I C 756=54 All 534=1932 A L J 335.

deed of gift duly attested by two witnesses. This ground is based upon the view that under S. 129, as it stood before the amendment by Act 20 of 1929, the requirement as to acceptance for the validity of a gift under S. 122 could not affect any rule of Burmese Buddhist law relating to gifts which did not make acceptance essential to the validity of a gift. The correctness of this proposition is questionable, for, it assumes that the Burmese Buddhist law did not require acceptance as an essential element of a valid gift. To dispose of this appeal however it is sufficient for the purpose of the present case that acceptance as required by S. 122, T. P. Act, has been proved. This appeal fails and it is dismissed with costs, advocate's fee five gold mohurs.

Dunkley J.—I am of the same opinion. The main contention for the appellants in this appeal has been that the proposition of law laid down by the learned District Judge, namely that a gift of immovable property among Burmese Buddhists was valid without acceptance before 1st April 1930 is wrong. With the greatest respect, I think the learned District Judge was incorrect in his view. In the first place he has overlooked the Full Bench decision in 14 Rang 439.[2] Although that case dealt with a rule of Mahomedan law relating to gifts, the same arguments will apply equally to a rule of Burmese Buddhist law. Furthermore, even if it were to be held that the Burmese Buddhist law relating to gifts was the law of the land prior to 1st April 1930, nevertheless, so far as I am aware, it is nowhere stated in the Burmese Buddhist law that a gift need not be accepted. Consequently S. 122, stating that acceptance is necessary, is not contrary to any rule of Burmese Buddhist law. However I agree with my Lord that on the facts and circumstances of this case the appeal is concluded against the appellants by the judgment of a Bench of the Allahabad High Court in 54 All 534.[1]

B.D./R.K. *Appeal dismissed.*

2. Ma Asha v. B. K. Haldar, (1936) 23 A I R Rang 430=164 I C 984 = 14 Rang 439 (F B).

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MYA BU OFFG. C. J. AND MACKNEY J.

A. Samad — Appellant.

v.

Dr. Meah — Respondent.

First Appeal No. 61 of 1938, Decided on 10th August 1938, against decree of Dist. Court, Yamethin at Pyinmana, in C. R. No. 12 of 1937.

Registration Act (1908), S. 77—Substance of order should be looked into—Order stating that document was not registrable for certain reasons—Order amounts to refusal to register.

In interpreting an order of a Registrar one should not merely look to the form but should look to its substance as well: *A I R 1927 Lah 395, Rel. on.* [P 51 C 1]

Where a Registrar in his order stated that no reason had been shown to show why document was not presented within time under S. 23 and that time of eight months also has expired and further stated that the document was not registrable under the Act:

Held that such order amounted to refusal to register : *A I R 1929 Bom 365, Ref. ; A I R 1927 Rang 83, Expl.* [P 51 C 2]

A. A. Darwood — *for Appellant.*

Eunoose — *for Respondent.*

Mya Bu Offg. C. J.—This is an appeal against a decree dismissing a suit under S. 77, Registration Act, on the ground that in the circumstances of the case the suit is not maintainable. The relevant part of S. 77 runs as follows :

> Where the Registrar refuses to order the document to be registered, under S. 72 or S. 76, any person claiming under such document . . . . . may, within thirty days after the making of the order of refusal, institute in the Civil Court, within the local limits of whose original jurisdiction is situate the office in which the document is sought to be registered, a suit for a decree directing the document to be registered in such office if it be duly presented for registration within thirty days after the passing of such decree.

The learned trial Judge came to the conclusion that there had been no refusal by the Registrar to order the document to be registered and that, accordingly, there was no cause of action in this case for a suit of the character mentioned in S. 77. The document in question is a partnership deed dated 7th January 1937 purporting to have been executed by the respondent. It was not presented to the Sub-Registrar within the first four months after its execution.

On 1st September 1937, which was only a few days short of eight months after the date of the execution, the appellant presented an application to the Sub-Registrar

under S. 25 (2) of the Act. The Sub-Registrar had a notice issued and served on the respondent. On the date fixed for the case viz. 6th September 1937, the Sub-Registrar recorded a note to the effect that the respondent had been sitting in his office without saying anything before the case was called, but when the case was called the respondent went away. It appears that from the conduct of the respondent the Sub-Registrar thought that the respondent was going to deny the execution of the document. The note further pointed out that the document was time-barred inasmuch as it had not been presented for registration within the first four months but that the advocate was willing to pay a certain penalty. Having recorded this note the case was submitted to the Registrar for orders inasmuch as the application was one under S. 25 (2) and could be disposed of only by the Registrar under S. 25 (1) which provides:

> If owing to urgent necessity or unavoidable accident, any document executed . . . . is not presented for registration till after the expiration of the time hereinbefore prescribed in that behalf, the Registrar, in cases where the delay in presentation does not exceed four months, may direct that, on payment of a fine not exceeding ten times the amount of the proper registration-fee, such document shall be accepted for registration.

When the matter was placed before the Registrar he passed the following order:

> The document sought to be registered is dated 7th January 1937. It should have been registered within 4 months under S. 23, Registration Act. Neither urgent necessity nor unavoidable accident is shown to bring S. 25 of the Act into operation. That the other party took no notice of requests to appear and register the document does not bring the matter under S. 25. S. 36, eventually used, was always open to appellant to procure the presence of the other party. The time limit of eight months however has expired so that the question of refusal to register on account of denial of execution does not arise. The document is not registrable under the Act. The appeal is summarily dismissed.

The wording of this order indicates some confusion in the mind of the Registrar as to the nature of the proceeding that was laid before him and strictly following its wording, the learned trial Judge came to the conclusion that it did not amount to a refusal to register the document. But the proper way to interpret this order is to look at not merely the form but the substance of it as well, as pointed out in 8 Lah 208,[1] in which a document had been returned with an order to the effect that the officer concerned could neither register, nor refuse to register the document and this was held to be an order refusing to Register the document. In 53 Bom 644[2] the Sub-Registrar, having accepted a penalty, forwarded the deed to the Registrar with a recommendation for excusing the delay in the presentation of the document which was presented for registration after the expiry of the first four months but within eight months of the date of execution. The Registrar declined to excuse the delay whereupon the Sub-Registrar made an endorsement refusing to register the document. Against this refusal an appeal was preferred under S. 72 to the Registrar who dismissed it. It was held that a suit was competent under S. 77, Registration Act, to challenge the order made by the Registrar under S. 25 of the Act. Looking at the substance and the effect of the order passed by the Registrar in this case, it must, in our opinion, be held to be tantamount to an order refusing either to accept the document for registration or to register the document. The judgment of the trial Court displays some misunderstanding of the nature and effect of the decision in 4 Rang 500[3] where it was held that:

> A suit to compel registration of a deed would not lie independently of the Registration Act, S. 77; and that where there was no appeal or application to the Registrar against the Sub-Registrar's refusal to Register the document, a suit in the Civil Courts is not maintainable.

In that case the matter never went before the Registrar in any shape or form. The order of refusal against which the suit was filed was an order made by the Sub-Registrar and there the matter ended before the suit was filed in the Civil Court. The facts of that case are clearly distinguishable from the present one where the matter, having been laid before the Registrar, he passed an order which had the effect of refusing either to accept the document for registration or to register it. The order of the Registrar in substance and in effect is an order which falls under S. 76 (1) (a) of the Act and a suit under S. 77 (1) lies for a decree directing the document to be registered in the manner provided by that Section.

A subsidiary preliminary issue was also decided by the same judgment of the learned

1. Barkha Nath v. Shri Ram, (1927) 14 A I R Lah 395=102 I C 796=8 Lah 208=28 P L R 849.

2. Maneklal Mansukhbai v. Kasturbhai Manibhai, (1929) 16 A I R Bom 365=119 I C 651=53 Bom 644=31 Bom L R 676.

3. Maung San Ya v. Maung San Pe, (1927) 14 A I R Rang 83=99 I C 998=4 Rang 500.

trial Judge. The decision appears to be that in a case properly laid under S. 77 of the Act the Court entertaining the suit has jurisdiction to question the discretion of the Registrar. If the learned Judge means that the question as to whether the Registrar was justified by the circumstances of the case in refusing or declining to excuse the delay in presenting the document for registration is one which the Court entertaining the suit has jurisdiction to decide, we agree with the learned Judge. The order of dismissal of the suit on the ground that it is not maintainable must however be set aside. The appeal is allowed, the decree of the trial Court directing the dismissal of the suit is set aside and the suit is remanded to the trial Court for trial on its merits. The costs of this appeal shall be costs in the cause, advocate's fee five gold mohurs.

B.D./R.K. *Appeal allowed.*

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ROBERTS C. J.

A. P. L. Palaniappa Chettyar — Appellant.

v.

Official Assignee and another — Respondents.

Civil Misc. Appeal No. 5 of 1938, Decided on 31st May 1938, against order of High Court, D/- 15th December 1937.

Presidency Towns Insolvency Act (1909), (Rangoon), S. 99 (2)—Infant partner does not mean partner by contract.

In British India and Burma an infant cannot be a partner at all. Hence in S. 99 (2), Rangoon Insolvency Act, "an infant partner" means an infant who is admitted to the benefit of partnership and not a partner by contract : *(1894) A C 607; (1926) 1 Ch 274 and A I R 1925 P C 18, Expl. ; A I R 1922 P C 237, Foll.* [P 53 C 2]

P. K. Basu — *for Appellant.*

Clark — *for Respondent No. 1.*

Roberts C. J.—In the insolvency of the T. S. N. Firm, which was adjudicated on 10th March 1930, the Official Assignee sought to set aside certain transfers as void by reason of the provisions of S. 55, Rangoon Insolvency Act. His application before Braund J. was successful and this is an appeal against the order of the learned Judge. So far as the appellant is concerned, it is alleged that one T. S. Palaniappa Chettyar executed two deeds of assignment on behalf of the T. S. M. R. K. R. M, Firm of Pyapon, dated respectively 17th and 19th October 1929, purporting to transfer certain mortgage debts to the second respondents : and that subsequently the second respondents assigned and transferred two of the mortgage debts under the first assignment and four of the mortgage debts under the second assignment to the appellants. It is contended by the Official Assignee that all the partners of the T. S. M. R. K. R. M. were partners of the insolvent firm and that its estate became vested in the Official Assignee upon the adjudication of the T. S. N. Firm. As to the second respondents, the Official Assignee says, they are not a bona fide firm at all but came into existence when the insolvents were in low water financially, merely for the purpose of facilitating transfers which were in fraud of creditors, that they had no genuine business and that their proprietor, Chidambaram Chettyar, is a relation of S. R. M. Ramaswamy Chettyar, who is the managing partner of the T. S. N. and T. S. M. R. K. R. M. Firms.

The T. S. N. Firm commenced business on 29th October 1925. Prior to that date there had been a firm known as the T. S. Firm, but some of the original partners died. This T. S. Firm had an offshoot, by reason of the retirement of one of its partners, S. T. Chockalingam Chettyar, otherwise Nagappa, which was called T. S. T. S. Firm. The T. S. Firm carried on business in Pyapon and in Rangoon and its business at Pyapon became known as the T. S. M. R. K. R. M. Firm : the Rangoon business became known as the T. S. N. Firm. The T. S. N. Firm consisted of the following partners : (1) S. R. M. Ramaswamy Chettyar, one of the original members of the T. S. Firm ; (2) Ramaswamy Chettyar and (3) Muthiah Chettyar, adult sons of a deceased brother of S. R. M. Ramaswamy Chettyar; (4) Arunachalam Chettyar, adult grandson of another deceased brother ; (5) T. N. Muthiah Chettyar, adult son of another deceased brother. All these deceased brothers had been members of the T. S. Firm. In addition to these five partners there were four minors who had been admitted to the benefit of partnership whilst under the age of majority. Three of them were the younger brothers of Arunachalam Chettyar, and one was his first cousin, the surviving son of a deceased paternal uncle; this individual is, of course, a grandson, just as Arunachalam Chettyar is,

of one of these deceased brothers of S. R. M. Ramaswamy Chettyar, who was a partner of the T. S. Firm. Every one of the partners of the T. S. N. Firm except (5) T. N. Muthiah Chettyar is also a partner of the T. S. M. R. K. R. M. Firm at Pyapon. Every one of the minors mentioned has also been admitted to the benefit of the T. S. M. R. K. R. M. partnership. The T. S. M. R. K. R. M. Firm possesses no partner who is not a partner of the T. S. N. Firm. There is no minor admitted to the benefit of partnership of the T. S. M. R. K. R. M. Firm who has not also been admitted to the benefit of partnership of the T. S. N. Firm.

The argument addressed to us on behalf of the appellants was that the T. S. N. Firm consisted of adults and minors as partners, and that by the order of adjudication only the adult members of the firm were adjudicated. In support of this proposition, the case in (1894) A C 607[1] was cited to the Court, and it was urged that the Official Assignee could not have recourse to the share of the minors who were partners in the T. S. M. R. K. R. M. Firm to satisfy the liabilities of the adult partners of the T. S. N. Firm, because the minors had not been, and could not be, adjudicated insolvents. This argument, in my opinion, rests upon a misconception for, in English law an infant can be a partner: *see* Lindley on Partnership, Edn. 10, page 91. In (1926) 1 Ch 274[2] the only two partners in a firm were both infants: but, in British India and Burma an infant cannot be a partner at all. This has been pointed out by Sir Lawrence Jenkins, delivering a judgment of the Judicial Committee of the Privy Council in 49 Cal 560[3] at page 570. He said :

> A person under the age of majority cannot become a partner by contract, 30 Cal 539,[4] and so, according to the definition, he cannot be one of that group of persons called a firm. It would seem therefore that the share of which S. 247 (that is of the Contract Act) speaks, is no more than a right to participate in the property of the firm after its obligations have been satisfied.

Some reliance was placed upon the following passage in the judgment of Sir John Edge in another case before the Judicial Committee, 52 I A 22[5] :

> It is quite clear that if this joint family could be treated as a firm carrying on its business in partnership . . . an order adjudging the firm insolvent could not be made under that Act (that is, the Presidency Towns Insolvency Act, 1909) which would affect the interests of a minor who happened to be a partner in the firm.

On an examination of the Act their Lordships were satisfied that it was not the intention of the Act that on the insolvency of a father the joint property of his family should at once vest in the assignee. Partnership cases cited to their Lordships were held not to be directly in point, and the passage relied on dealt merely with the hypothetical effect of treating a joint family as though it were a firm carrying on a partnership business. It does not mean that a minor can be a partner, but that if a joint family could be treated as a partnership, which it cannot, then it would be necessary to treat the minors as though they were partners, which they could never be. Then Sec. 99, Presidency Towns Insolvency Act, was cited. Sub-s. (2) says :

> In the case of a firm in which one partner is an infant, an adjudication order may be made against that firm other than the infant partner.

And Sec. 30, Partnership Act, 1932, was quoted. This lays down in the clearest possible terms :

> A person who is a minor according to the law to which he is subject may not be a partner in a firm.

This latter statute does not apply to the present insolvency, which, as I have stated, dates from March 1930. But in view of Secs. 247 and 248, Contract Act, and the decision in 49 Cal 560,[3] to which I have referred, I feel obliged to hold that in Sec. 99 (2), Rangoon Insolvency Act, "an infant partner" means an infant who is admitted to the benefit of partnership, and not a partner by contract. Accordingly, upon the adjudication of the partners of the T. S. N. Firm, all the partners of the T. S. M. R. K. R. M. Firm became adjudicated and all the property of the latter firm became vested in the Official Assignee. As the learned trial Judge put it :

> Where *A*, *B* and *C* carry on a business under one name and *A* and *B* carry on a business under a separate name there can, I think, be no doubt that the insolvency of *A* and *B* under an adjudication order made against the former firm involves

1. Lovell v. Beauchamp, (1894) A C 607 = 63 L J Q B 802=11 R 60=71 L T 587=43 W R 129.
2. In re A and M, (1926) 1 Ch 274=95 L J Ch 258 =134 L T 539=70 S J 607 = (1926) B & C R 19.
3. Sanyasi Charan Mandal v. Krishnadhan Banerji, (1922) 9 A I R P C 237 = 67 I C 124 =49 Cal 560=49 I A 108 (P C).
4. Moheri Bibee v. Dharmodas Ghose, (1903) 30 Cal 539=30 I A 114 = 8 Sar 374 = 7 C W N 441 (P C).
5. Sat Narain v. Behari Lal, (1925) 12 A I R P C 18=84 I C 883=6 Lah 1=52 I A 22 (P C).

also the insolvency of the two partners in the latter firm, and of course the insolvency of the latter firm itself.

Now, the next question is who effected the transfers. The first was made directly by the T. S. M. R. K. R. M. Firm by its duly constituted agent Palaniappa Chettyar, and no question arises as to that. But the second was made by the T. S. Firm. Accordingly, Mr. Basu for the appellants says that it is not the transferor who has been adjudicated insolvent and S. 55, Presidency Towns Insolvency Act, can have no application. One of the partners of the old T. S. Firm was S. T. Chockalingam Chettyar and he was never adjudicated insolvent. The old T. S. Firm is not dead; a suit was filed against it in Madras in 1933, of which Ex. 5 is the plaint. (After discussing the evidence his Lordship came to the conclusion that the transfers sought to be set aside were made by the insolvents, under other names and by their agent T. S. Palaniappa Chettyar; and that they were also transfers of the property of the insolvents. His Lordship next examined evidence on the question of good faith and valuable consideration and then proceeded further.) Once the position has been reached that in the absence of a satisfactory explanation a prima facie case for annulment of the transfers has been shown, the rest of the matter is relatively easy. The M. R. M. S. Firm produced no books. M. R. M. S. Chidambaram Chettyar was never called as a witness, nor was the appellant. It is true his evidence was taken in the insolvency case under S. 36, Rangoon Insolvency Act, but no explanation whatever was forthcoming as to the bona fides of the transfers before the learned trial Judge. Mr. Basu for the appellant was constrained to admit that if there was a prima facie case for the Official Assignee it had not been answered by the appellant. The learned trial Judge carefully weighed the evidence before him and I am of opinion that he came to a right conclusion and that this appeal should be dismissed with costs: advocate's fee twenty five gold mohurs.

D.S./R.K. *Appeal dismissed.*

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ROBERTS C. J. AND DUNKLEY J.

P. L. K. Palaniappa Chettyar and another — Appellants.

v.

Official Assignee, High Court, Rangoon —Respondent.

Civil Misc. Appeal No. 6 of 1938, Decided on 31st May 1938, against order of Braund J., D/- 4th January 1938.

*** Presidency Towns Insolvency Act (1909), (Rangoon), S. 55—Onus — Fact that transfer is in favour of insolvent's agent does not shift the burden which lies on Official Assignee to prove want of good faith.**

The burden to prove that a transfer is without good faith and valuable consideration is on the Official Assignee. It is not proof of the parties to the transaction but proof of the nature of the transaction itself, and that alone which can discharge the onus cast upon the Official Assignee. A transfer to an agent is not any more prima facie proof of mala fides or want of consideration than transfer to a near relative. Hence the transfer to an insolvent's agent does not shift the burden which lies on the Official Assignee to prove want of good faith and valuable consideration: *A I R 1931 P C 75 and A I R 1930 P C 265, Foll.*

[P 55 C 1, 2]

P. K. Basu — *for Appellants.*

Clark — *for Respondent.*

Roberts C. J. — This is an appeal from an order of Braund J. setting aside, under S. 55, Rangoon Insolvency Act, two transfers of 5th September 1929, by the T. S. M. R. K. R. M. Firm to appellant 1 and, under S. 51 of the same Act, a transfer on 13th March 1930, by the T. S. Firm to the same transferee. It arises out of the insolvency of the T. S. N. Firm, which was adjudicated insolvent on 10th March 1930, and relates to the same firms whose constitution has been discussed in the judgment I have just delivered in Misc. Appeal No. 5 of 1938.[1] It is conceded that appellant 1 and A. P. L. Palaniappa Chettyar are one and the same person. The transfer of 13th March 1930, having been made three days after the T. S. N. Firm was adjudicated and adjudicated to the knowledge of appellant 1, was rightly declared to be void by reason of S. 51, Rangoon Insolvency Act, so far as such transfer affected or related to any interest in the property comprised therein of the T. S. M. R. K. R. M. Firm. It has already been held that the partners of the T. S. M. R. K. R. M. Firm became

1. Palaniappa Chettyar v. Official Assignee, *Reported in* (1939) 26 A I R Rang 52.

insolvent on the adjudication of the T. S. N. Firm, since all the partners of the former firm were also partners of the latter, and the T. S. M. R. K. R. M. possessed no partner who was not also a partner of the insolvent T. S. N. Firm. The questions which arise with regard to the transfers of 5th September 1929, require more lengthy consideration. The learned trial Judge said:

> I think that the onus lay in the first instance upon the Official Assignee. But the moment he established, or it was conceded, that P. L. K. Palaniappa was the agent of the vendors from whom he bought and that the property purchased was part of the subject-matter of the agency, I think that the onus of establishing the bona fides of the transaction passed to him. The Official Assignee has shown the Court that these two particular transfers were upon a purchase by an agent from his principal. The mortgages purchased were part of the property of the firm;

and later he said :

> I think the whole matter in reality turns upon whether I have rightly cast the onus upon the respondents for in no circumstances can this case be free from reasonable doubt.

This view is based upon the argument that leaving insolvency out of account altogether, a principal can demand an account from his agent who is in a fiduciary position with regard to the principal's property, and so therefore can the Official Assignee. But whereas the principal would be bound, say by proof of the existence of a letter signed by him and authorizing the agent to transfer his property, no such admission would bind the Official Assignee. In other words, once it is shown that the insolvent's agent transferred the insolvent's property to himself, it is said that the burden of proof is shifted and that the transfer will be set aside unless it is proved to have been made in good faith and for valuable consideration. Speaking for myself, and with some hesitation, I should require some authority in support of such a proposition before holding that the rule so clearly laid down by their Lordships of the Privy Council in 9 Rang 170[2] is subject to any gloss or exception in case of a transfer by the agent of an insolvent of the insolvent's property to himself. It was contended that to hold otherwise would open the door to fraud, but I cannot regard this as the right way of approaching the matter; if the contention be true, it might be a matter for the Legislature. I do not see why a transfer to an agent is any more prima facie proof of mala fides or want of consideration than transfer to a near relative. The authority which I have cited followed the case in (1931) A C 67,[3] an appeal from Penang, where the Bankruptcy Ordinance then in force was similar in character to the Rangoon Insolvency Act. The case was one of a conveyance by the insolvent to a secondary wife and the trial Judge thought that it was therefore "tainted with fraud intrinsically, and apart from any question of the onus of proof" but their Lordships were of opinion that there was nothing in the admitted facts to shift the onus of proof to the respondent. In my opinion it is not proof of the parties to the transaction but proof of the nature of the transaction itself, and that alone which can discharge the onus cast upon the Official Assignee.

However, in para. 16 of the amended petition the Official Assignee had pleaded that these two transfers were made "in fact after the suspension of payment by the insolvent firm of which fact the T. S. M. R. K. R. M. Firm and the respondent were fully aware." This is denied in the written objection of the respondent, the present appellant 1. At the public examination of the appellant (on p. 23) Mr. Aiyangar put in a certified copy of his evidence in Criminal Trial No. 115 of 1929 because the witness said he did not remember if he stated that the Rangoon firm of T. S. N. suspended payment on 7th August 1929. But he did say so in the criminal proceedings; and this evidence being part of the case for the Official Assignee, proof was given that these two transfers made on 5th September 1929 were made at a time when appellant 1 knew that the T. S. N. Firm had committed an act of insolvency. To my mind this alters the whole character of the transaction. It is impossible for his advocate to contend that though the T. S. N. Firm suspended payment in August appellant 1 only learnt of it later, and after he made the first two transfers which are the subject-matter of this appeal, because in the criminal proceedings referred to he said that he was agent of T. S. M. R. K. R. M., Pyapon, and that his firm was T. S. N. under another name. Moreover, he was agent of the T. S. N. Firm and all the part-

2. Official Receiver v. P. L. K. M. R. M. Chettyar Firm, (1931) 18 A I R P C 75=131 I C 767=9 Rang 170=58 I A 115 (P C).

3. Official Assignee v. Khoo Saw Cheow, (1930) 17 A I R P C 265=128 I C 662 = (1931) A C 67=100 L J P C 45 = (1929-30) B & C R 270 =144 L T 130.

ners but one, of this business were the partners, and the only partners of the T. S. N. Firm. Accordingly, I am of opinion that the Official Assignee did prove facts which in the absence of any satisfactory explanation would show that these transactions were mala fide.

What was the explanation given? It was that the T. S. M. R. K. R. M. Firm had had to borrow Rs. 30,000 from Dawson's Bank. The bank wanted it repaid and accordingly appellant 1 says he borrowed on his own account to relieve his principals. He borrowed Rs. 15,000 from the A. K. A. C. T. A. L. Firm and used it or, at any rate, Rs. 14,000 of it to pay his principal's most pressing creditors, and took the principal's property by way of consideration for the loan. I am not surprised at the learned Judge's comment that in itself this was a strange transaction. Why could not the firm have borrowed on the security of this property? Then it transpired that one of the creditors alleged to have been paid off was the P. L. A. V. N. K. Firm of Bogale of which the appellant was himself a partner, and which was said to be a pressing creditor. In relation to the alleged payment of Rs. 6000 to Dawson's Bank on 6th September, it was shown that the bank actually cashed a cheque for the T. S. M. R. K. R. M. Firm for Rupees 30,000 on 28th August, drawn in cash by P. L. K. Palaniappa Chettyar. He says he sent it to India, but there is no proof of this: why not get the Bank to send it to India? And if it is true, what becomes of the suggestion that either the Bank or other creditors were pressing at about this time, and that it was on this account that appellant 1 undertook some of the liabilities and paid them, in exchange for the two transfers of property which it is sought to set aside? The learned trial Judge reviewed the evidence at his disposal and I am satisfied for the reasons given and after observing his comments on the nature of the evidence before him, that he came to a right conclusion. Accordingly, in my opinion, this appeal should be dismissed with costs; advocate's fee ten gold mohurs.

Dunkley J.—I agree and have nothing to add.

D.S./R.K. *Appeal dismissed.*

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SHARPE J.

Mathura Prasad — Applicant.

v.

R. A. Philips — Respondent.

Civil Revn. No. 377 of 1937, Decided on 21st February 1938.

Civil P. C. (1908), O. 33, R. 2 (1) (Rangoon)—Applicant, for leave to sue as pauper, may before determination of that application apply to pay proper court-fee—By so doing his application for leave to sue as pauper stands rejected—But, he does not abandon his suit—Court may under S. 149 allow him to pay court-fee—Plaint then must be deemed to be stamped on date on which it was filed.

A plaintiff, who has applied for leave to sue as a pauper in accordance with the terms of O. 33, may at any time apply to the Court under Sec. 149 for leave to pay the court-fee payable on the plaint. By making such application his prior application to sue as a pauper must be taken to be abandoned and will accordingly stand rejected. But the plaint is not automatically rejected when the petition to sue as a pauper is rejected. In such cases the position is that there is before the Court a plaint on which proper court-fees have not been paid, but the provisions of S. 149, Civil P. C., are available for the assistance of the plaintiff. The Court must exercise its discretion judicially and must consider all the circumstances of the case, including, of course, the fact that, if the application is granted, the plaintiff may, by presenting and subsequently abandoning a petition for leave to sue as a pauper, have obtained a valuable extension of time, and that the Court, by exercising its discretion in the plaintiff's favour, may in effect be extending the limitation of time imposed by statute. If the Court exercises its discretion in favour of the plaintiff and allows him to pay the requisite court-fee within the time to be fixed by it, then the plaint must be deemed to have been properly stamped on the date on which it was originally filed: *2 All 241; A I R 1929 Pat 637 and A I R 1936 Cal 28, Ref.; A I R 1938 Rang 58 and A I R 1923 Rang 256, Rel. on; A I R 1937 Rang 185, Disting.*

[P 57 C 2; P 58 C 1]

A. N. Basu — *for Applicant.*

G. N. Banerji — *for Respondent.*

Order.—This application for revision raises two short points namely: (1) can an applicant for leave to sue as a pauper subsequently, and prior to the determination of that application, apply to pay the proper court-fees? and (2) if in such a case he is allowed to pay the court-fees, is the date of his application to sue as a pauper or the date upon which he pays the court-fees the guiding date for the purposes of the Limitation Act? It is necessary to bear in mind from the outset that O. 33, Civil P. C., has been entirely superseded so, far as this High Court is concerned, by this High Court's own O. 33, which differs in a

number of material particulars from the corresponding Order to be found in the Code of 1908. In this judgment references to O. 33 are references to O. 33 of this High Court.

The material dates and facts in this case are as follows: On 5th August 1933, the defendant executed a promissory note for Rs. 350 in favour of one Nandakumar Mahajan who on 6th March 1936, endorsed it over to the plaintiff for valuable consideration. On 5th August 1936, the plaintiff presented a plaint in the Court of Small Causes, Rangoon, in which plaint he claimed from the defendant the said principal sum of Rs. 350 together with interest thereon and in accordance with R. 2 (1) of O. 33 he also presented therewith a petition for leave to sue as a pauper. The Court proceeded to the hearing of the petition in accordance with the provisions of R. 4 of O. 33. The petition was down for hearing on 21st August 1936, but for various reasons it was adjourned from time to time, and still no evidence had been taken by the following 21st December, on which date the petition was again in the list for hearing. Upon its being called on that day, the learned pleader appearing for the petitioner intimated that he was proposing to pay the full court-fees on the plaint. He was given time to do so until 15th January 1937 and on that date the full court-fee stamps were affixed to the plaint. The matter was placed before the Chief Judge who directed that regular proceedings should be opened and that the matter should be placed before the Second Judge for further action. The latter subsequently transferred the plaint to the regular file and the suit proceeded in the usual way. Two issues were framed, the second of which raised the question as to limitation. The learned Second Judge found that the original application for leave to sue as a pauper was not made in good faith and that the plaintiff's claim was time-barred, and he dismissed the suit with costs. The plaintiff has now filed this application for revision.

The learned advocate for the applicant cited three cases before me: 2 All 241,[1] 9 Pat 439[2] and 62 Cal 711.[3] Each of those cases fell to be decided under a provision of the law whereby a pauper applicant was not required to present a plaint together with an application to sue as a pauper as is required by our present O. 33, but had only to file a petition to sue as a pauper without a plaint, such petition being required however to contain the particulars required in regard to plaints. It is because of this distinction between our rules and the rules under which the above mentioned cases were decided that it is not possible to apply the reasoning in those judgments to the facts of the present case, but in my judgment the ultimate result of the different wording in our O. 33 is substantially the same as the results arrived at in the three cases which I have just mentioned.

The position under O. 33 of this High Court appears to me to be this: A pauper applicant has, as I have already pointed out, actually to present a plaint. My brother Baguley and I have recently held in 1938 R L R 68,[4] that an application for leave to sue as a pauper is entirely a matter of procedure, and that the plaint is not automatically rejected when the petition to sue as a pauper is rejected. In my judgment, in such cases as the present, the position is that there is before the Court a plaint on which proper court-fees have not been paid, but the provisions of Sec. 149, Civil P. C., are available for the assistance of the plaintiff. That Section gives the Court a discretion to allow the plaintiff to pay the whole or any part of the necessary court-fee and upon such payment the plaint in respect of which such court-fee is payable shall have the same force and effect as if the court-fee had been paid in the first instance. If the Court exercises its discretion in favour of the plaintiff and allows him to pay the requisite court-fee within the time to be fixed by it, then the plaint must be deemed to have been properly stamped on the date on which it was originally filed. By applying, during the pendency of the inquiry into his pauperism, for leave to pay the court-fees ordinarily payable in respect of his plaint, a plaintiff admits that he is no longer desirous of suing as a pauper and must be taken to abandon his petition to be allowed so to sue. But he gives up nothing else; he does not thereby abandon his suit. Therefore a

1. Skinner v. Orde, (1878-80) 2 All 241=6 I A 126=4 Sar 31 (P C).
2. Bank of Bihar Ltd. v. Ramchanderji Maharaj, (1929) 16 A I R Pat 637=118 I C 329=9 Pat 439=11 P L T 55.
3. Jagadishwari Debee v. Tinkari Bibi, (1936) 23 A I R Cal 28=160 I C 586=62 Cal 711.
4. Ahmed Ebrahim Rowther v. Mohamed Meera Sahib, (1938) 25 A I R Rang 58=174 I C 268 =(1938) R L R 68.

plaintiff, who has applied for leave to sue as a pauper in accordance with the terms of Order 33, may at any time apply to the Court under S. 149 for leave to pay the court-fee payable on the plaint. By making such application his prior application to sue as a pauper must be taken to be abandoned and will accordingly stand rejected. It is then incumbent upon the Court to deal with the application under Sec. 149. The Court must exercise its discretion judicially and must consider all the circumstances of the case, including, of course, the fact that, if the application is granted, the plaintiff may, by presenting and subsequently abandoning a petition for leave to sue as a pauper, have obtained a valuable extension of time, and that the Court, by exercising its discretion in the plaintiff's favour, may in effect be extending the limitation of time imposed by statute.

The general principles which I have just enunciated would appear to be entirely in consonance with the decision of Young J. in 1 Rang 196.[5] The recent Bench decision in 1937 R L R 331[6] is distinguishable from the case which I have to decide because (a) it fell to be decided under Order 33 as it stood before it was re-cast by the Rule Committee of this High Court and (b) in that case no application was made under Sec. 149 until after the rejection of the petition to sue as a pauper. I will now apply these principles to the present application for revision. When, on 21st December 1936, the learned advocate for the plaintiff intimated that he was paying the court-fees (the diary entry reads : "Basu is paying court-fee. To pay on 15th January 1937"), he was not entitled, as of right, to pay them. He ought to have been taken as merely applying for leave to do so, and the Court ought to have considered the matter and exercised its discretion judicially, and have either granted or refused that application only after a proper consideration of the whole matter. It does not appear either that the Court treated Mr. Basu's statement as an application under Sec. 149 or that, if it did treat it as such an application, it considered it as it should have done. When the matter subsequently came before the Second Judge in the circumstances which I indicated at an early point in this judgment, he framed an issue as to limitation, and in connexion with that issue recorded certain evidence of the plaintiff and two of his witnesses with a view to ascertaining, as he later expressed it in his judgment, "whether the original application to sue in forma pauperis was fraudulent and mala fide or a bona fide one."

I will deal with the case as if, on 21st December 1936, the plaintiff had asked for leave under S. 149 to pay the court-fees on his plaint. That is the most favourable assumption which I can make in the plaintiff's favour. I am quite satisfied from the evidence to which I have just referred and which I need not here discuss, that that application, if considered at all, must have failed. The dismissal of that application leaves an unstamped plaint without any supporting application to sue as a pauper, because, as I have already held, upon an application for leave to pay court-fees being made, the application for leave to sue as a pauper automatically stands rejected. The net result is an unstamped plaint, which must involve the dismissal of the suit. As in fact the plaintiff's suit has been dismissed, the result arrived at by the Small Cause Court is correct in law, although the means by which that result was achieved were not such as they should have been. But as the actual result is what it should have been, this application for revision is dismissed with costs.

D.S./R.K. *Application dismissed.*

5. Sook Lal v. Dal Chand, (1923) 10 A I R Rang 256=74 I C 835=1 Rang 196.
6. Ma Saw Yin v. S. P. K. A. A. M. Firm, (1937) 24 A I R Rang 185 = 169 I C 890 = (1937) R L R 331.

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MYA BU OFFG. C. J. AND DUNKLEY J.

Eusoof Abdul Razak — Appellant.

v.

Messrs. Royal Stationery House — Respondent.

Civil Misc. Appeal No. 43 of 1938, Decided on 24th August 1938, against order of Dist. Court, Amherst, D/- 21st May 1938.

(a) Provincial Insolvency Act (1920), S. 41— Conditional discharge — No proof to show that insolvent is likely to have future earnings or to acquire property — Condition asking him to deposit such earning or acquisition is not good.

Unless there is evidence to show that since his insolvency the insolvent has, or is likely to have, any income or has acquired or is likely to acquire, any property a conditional discharge asking an

insolvent to deposit all his subsequent earnings or his after-acquired property in Court is not good. [P 59 C 1]

(b) Insolvency—Order of discharge— Direction that insolvent should deposit all his subsequent earnings or property is bad.

An order vesting the whole of a man's earnings subsequent to insolvency and after acquired property in the Court, is an order which ought not to be made because it destroys the very motive which moves a man to attempt to obtain income or to acquire property : it has the effect that he has no incentive either to work or to acquire property : *(1890) 61 L T 648, Rel. on.* [P 59 C 1]

C. K. Ray — *for Appellant.*

Dunkley J. — This is an appeal against an order of the learned District Judge of Amherst under Sec. 41, sub-sec. (1), Cl. (c), Provincial Insolvency Act, the appellant being the insolvent. The order is in the following terms:

He will be granted a discharge subject to the condition that any earnings or income which may hereafter become due to him or any property which may be acquired by him shall vest in the Court until the scheduled creditors receive a total dividend of four annas in the rupee.

This order cannot be supported on two grounds. In the first place, there is no evidence that since his insolvency the insolvent has, or is likely to have, any income, or has acquired, or is likely to acquire, any property, and consequently, this order is never likely to be of any value to the creditors and its only effect will be to cause the insolvent to remain a bankrupt for the rest of his natural life. Secondly, an order of this kind, vesting the whole of a man's earnings subsequent to insolvency and after-acquired property in the Court, is an order which ought not to be made because it destroys the very motive which moves a man to attempt to obtain income or to acquire property: it has the effect that he has no incentive either to work or to acquire property. This has been clearly laid down in (1890) 61 L T 648.[1] For these reasons therefore, the appeal is allowed and the order of the learned District Judge is set aside and instead thereof there will be an order under Sec. 41 (1) (b) of the Act, suspending the discharge of the insolvent until a dividend of not less than four annas in the rupee has been paid to the creditors who have proved their debts.

B.D./R.K. *Appeal allowed.*

1. In re Shackleton : Ex parte Shackleton, (1890) 61 L T 648=38 W R 288=6 Morrell 304.

A. I. R. 1939 Rangoon 59

MYA BU AND SHARPE JJ.

Ma Lon and another — Appellants.

v.

Ma Mya May — Respondent.

Letters Patent Appeal No. 2 of 1937, Decided on 8th April 1938, from decree of High Court in Civil Misc. Appln. No. 11 of 1937, D/- 19th March 1937.

(a) Buddhist Law (Burmese) — Testamentary disposition even in guise of gift is void.

It is not only a death-bed gift which is void under the Burmese Buddhist Law but a gift in the nature of testamentary disposition, or in other words, a testamentary disposition in the guise of a gift is also void as contravening the fundamental principles of the Burmese Buddhist Law which recognizes no form of succession other than intestate succession : *A I R 1932 Rang 104 and A I R 1927 Rang 271, Rel. on.* [P 61 C 2]

(b) Appeal — Right to — Findings of fact against party — Decision however in favour of that party—Such party has no right to appeal.

The mere fact that there are adverse findings of fact or even of law on the other issues in the judgment of the Court gives the party against whom such finding are given no right of appeal whatever, where the ultimate decree is in their favour. [P 62 C 1]

(c) Second Appeal — S. 100, Civil P. C., is enabling Section — S. 101 however restricts power — Respondent in appeal under S. 100 is not barred from challenging finding of facts against him—Purpose of O. 41, R. 22 (1), Civil P. C. explained. *(Per Mya Bu J.)*

Section 100 is an enabling Section. It enables a party aggrieved by a decree passed in appeal by a Court subordinate to the High Court. S. 101 restricts the grounds of such appeal only to the grounds mentioned in S. 100. The restriction is imposed on the party appealing against a decree passed in appeal by a Court subordinate to the High Court. There is thus nothing in the language of these two Sections which gives countenance to the view that a respondent in appeal under S. 100, Civil P. C., is debarred from challenging the correctness of the findings of fact of the first Appellate Court which in spite of such findings, dismissed the appeal. On the other hand under O. 41, R. 22 (1), it is open to a respondent to support the decree under appeal on any of the grounds decided against him in the Court below. O. 42, R. 1 provides that the rules in O. 41 shall apply, so far as may be, to appeals from appellate decrees. If the statement that a Court of second appeal is bound by the findings of fact of the first Appellate Court holds good, both as against an appellant and as against a respondent, it is inconceivable that the Legislature permits a respondent to support the decree of the lower Appellate Court on any of the grounds decided against him in the Court below in a case in which there are both issues of fact as well as issues of law or issues of mixed fact and law. Where a respondent takes any cross-objection to the decree, such cross-objection would be governed by the rules of procedure governing an appeal, because under O. 41, Rule 22 (1), a cross-

objection must be such as the respondent could have taken by way of appeal. It is to be noted that a cross-objection is a cross-objection to the decree, and where the decree is entirely in favour of the respondent, there is nothing to which it is necessary for the respondent to take cross-objection : *A I R 1930 Cal 165 and A I R 1921 Mad 172 (F B), Applied; 17 Cal 291 (P C) ; 18 Cal 23 (P C); 19 Cal 249 (P C); A I R 1918 P C 92 and A I R 1928 Rang 303, Ref.* [P 63 C 2 ; P 64 C 1]

(d) Review—Erroneous view of law—Refusal to consider finding of fact — Review held was allowable.

Where a Judge erroneously came to a conclusion that he was bound by the finding of facts of the lower Court and which was tantamount to a refusal to consider the question of fact :

Held that there was sufficient cause for a review : *A I R 1922 P C 112 ; A I R 1924 Mad 98 ; A I R 1924 Cal 872 and A I R 1927 Rang 20, Rel. on.* [P 64 C 2]

(e) Letters Patent (Rangoon), Cl. 13 — Certificate under, when should be granted.

The practice of Rangoon High Court is to grant such certificates only in cases in which doubtful questions of law or procedure exist which deserve reconsideration, and this practice is sound in principle in view of the fact that questions of fact cannot constitute valid grounds even of a second appeal under the Code. [P 65 C 2]

(f) Appeal — Letters Patent — Court cannot try issue on evidence.

After two Courts have properly considered the evidence and come to a concurrent finding upon an issue of fact, it is not the function of the Court hearing a Letters Patent appeal to try the issue upon the evidence over again. [P 65 C 2]

(g) Appeal—Order granting review—Appeal from — Right limited to provisions of O. 47, R. 7, Civil P. C., only — Review granted on wrong view of R. 1 of O. 47—Appeal not possible on that ground.

An appeal lies from an order admitting an application for review, but it is a limited right of appeal on one or other of the three grounds set out in O. 47, Rule 7 (1) of the Code. O. 43, R. 1 (w) which allows the appeal, must be read with the provisions of O. 47, R. 7 (1). Where a Court bearing in mind the provisions of O. 47, R. 1 grants an application for review, it cannot be said to contravene the provisions of O. 47, R. 4 merely because it may have taken a wrong view as to the meaning of R. 1. An Appellate Court would be acting without jurisdiction if on this ground alone, it sets aside an order of the lower Court granting a review : *A I R 1929 Rang 105, Foll.; A I R 1915 Cal 283, Rel. on ; A I R 1922 P C 112, Expl.* [P 66 C 1]

Paget — *for Appellants.*

F. S. Doctor — *for Respondent.*

Mya Bu J. — This is a Letters Patent appeal brought on a certificate granted under the latter part of Cl. 13 of the Letters Patent of this High Court. An uncommon feature of this appeal is that it is an appeal against the judgment and decree passed on review of a judgment passed in a civil second appeal. The main point for determination in this appeal is whether the law permitted the learned Judge who granted the certificate (Dunkley J.), to review the judgment which he had passed in the second appeal. The argument of the learned advocate for the appellants is directed to show that none of the grounds requisite under O. 47, R. 1, Civil P. C., for the granting of a review existed in this case. Under O. 47, R. 1, an application for a review of judgment is competent only if it is based on any of the following grounds : (1) discovery of new and important matter or evidence which after the exercise of due diligence, was not within his (applicant's) knowledge or could not be produced at the time when the decree was passed or order made; (2) some mistake or error apparent on the face of the record, and (3) any other sufficient reason. On behalf of the respondent it is contended that the review was justified on the third of the grounds enumerated above.

The case originated in a Subdivisional Court where the appellants, Ma Lon and Ma Tin Shwe, instituted the suit under O. 21, R. 63, for a declaration that certain immovable property which had been attached at the instance of the respondent in execution of a money decree obtained against the estate of Daw Pon, deceased, mother of Ma Lon and grandmother of Ma Tin Shwe, was not liable to attachment and sale in execution of that decree. The appellants alleged in the plaint that the property in question had been conveyed to them during the lifetime of Daw Pon by a registered deed of gift. It is common ground that Daw Pon died about six months after the alleged gift. According to the certificate of report of her death she was 89 years of age. The respondent contested the suit denying the execution of the deed of gift by Daw Pon and averring that it was a fictitious transaction made in order to defeat and delay the claims of Daw Pon's creditors and further, that the transaction was tantamount to a testamentary disposition which is invalid as being in contravention of the principles of the Burmese Buddhist law. The pleadings gave rise to five issues that were framed by the Court of first instance, but for our present purposes it is necessary to point out only three, namely :

1. Did the late Daw Pon execute the deed of gift, Ex. A, jointly with Maung Po San and Ma Ngwe Yin ?

2. Was it made by the late Daw Pon to defeat or delay the claims of her creditors ?

3. Whether the gift of the properties by Daw Pon was in the nature of testamentary disposition for reasons given in para. 6 of the written statement ?

Issue 1 is purely one of fact and as such turned upon the evidence adduced at the hearing. Under Issues 2 and 3 the questions that arose were whether, in the circumstances which the Court considered proved in the case, an inference can be properly drawn either with respect to Issue 2, that the transfer was made with intent to defeat or delay the creditors or with reference to Issue 3, it amounted to a disposition of property intended to take effect only after the death of Daw Pon. Although no objection was taken in the written statement to the validity of the alleged deed of gift on the ground of want of due registration and therefore no issue was framed as to whether the deed of gift was void by reason of any legal defect concerning its registration, the parties appear to have been fully conscious of such question being involved in the case, during the progress of its hearing. Upon this point, the respondent's case was that Maung Po San, father of Ma Tin Shwe and son of Daw Pon, who held a general power of attorney from Daw Pon and was also one of the executants of the deed of gift, was not duly authorized to present the deed for registration.

The learned Subdivisional Judge discussed the oral evidence in all its material parts and answered Issue 1 as framed in the negative, and also held, upon his interpretation of the power of attorney of Maung Po San, that he was not duly authorized to present the document for registration on behalf of Daw Pon. The learned Subdivisional Judge also found Issues 2 and 3 adversely to the appellants. Accordingly the suit was dismissed. The appellants appealed to the District Court. The learned District Judge also came to the conclusion that Maung Po San was not duly authorized to present the deed for registration and therefore held that the appeal must fail but continuing he observed :

But on the other grounds I would say briefly that the reasons given by the lower Court for holding that Daw Pon did not herself execute the deed do not commend themselves to me. Both the witnesses to the deed (P. Ws. 3 and 4) say that she did, and the evidence of Po Hmein (D. W. 2), the writer of the deed, who says that she did not, and that she allowed Po San to sign for her, is unworthy of credit. This is by no means the first occasion on which the writer of a deed has come into Court and professed to have been the party to a fraud of a similar nature. Such evidence is always to be looked upon with grave suspicion.

* * * * *

As regards the death-bed gift, a deed made six months before death cannot possibly be so regarded.

* * * * *

Last, there is the question of intent to defeat and delay the creditors. The only creditor was the mortgagee and it is clear that it was not till after Daw Pon's death that there was any failure to pay land revenue and Aung Kin's evidence that he was pressing for a mortgage of the remaining property is unsupported by any other witness.

He speaks to the interest due but fails to mention the amount though however on the issues actually framed, my findings are contrary to those of the lower Court, I am bound to hold as above stated that the deed of gift was not duly registered and therefore fails.

It is clear that the learned District Judge dealt with the facts of the case in the briefest manner and his judgment in that respect is opposed to the well-known principles under which the power of the Appellate Court to disturb the findings of fact arrived at by a trial Court should be exercised.

Upon the question as to the validity of the alleged gift under the Burmese Buddhist Law, although the judgment of the trial Court shows some confusion of thought between a death-bed gift and a gift in the nature of testamentary disposition, there can be no doubt that the learned Subdivisional Judge regarded the gift in question "to be in the nature of testamentary disposition." The judgment of the District Court omitted to deal with that aspect of the question while the law is clear that it is not only a death-bed gift which is void under the Burmese Buddhist law but a gift in the nature of testamentary disposition, or, in other words, a testamentary disposition in the guise of a gift is also void as contravening the fundamental principles of the Burmese Buddhist law which recognizes no form of succession other than intestate succession : *see* 10 Rang 224[1] and 5 Rang 371.[2] Upon the finding that Maung Po San was not authorized to present the deed of gift for registration, the appeal in the District Court failed and was dismissed. So the findings expressed in the judgment of the District Court on the other issues were not necessary for the effective disposal of the appeal. Since the District Court dismissed the appeal the party aggrieved thereby

1. U Tezawunta v. Maung Saw Pe, (1932) 19 A I R Rang 104=139 I C 278=10 Rang 224.
2. Mg. Thu Ka v. U Thunanda, (1927) 14 A I R Rang 271=105 I C 51=5 Rang 371.

were the appellants. In spite of the observations in the judgment, the decree was entirely in the respondent's favour. The appellants were the only party entitled to present an appeal against the decree and an appeal by them would be entertained if it was brought in the manner provided by law, namely S. 100, Civil P. C. The mere fact that there are adverse findings of fact or even of law on the other issues in the judgment of the District Court gave the respondent no right of appeal whatever. The appellants filed their second appeal in this Court. It was heard by my learned brother Dunkley J., who delivered his judgment immediately upon the close of the hearing, the opening words of that judgment are :

> The short point raised in this second appeal is whether a certain registered deed of gift upon which the suit was brought in the Subdivisional Court was properly presented for registration.

On a true translation of the power of attorney on which Maung Po San acted the learned Judge found that the power of attorney itself gave ample authority to Maung Po San to present any document whatever for registration on behalf of Daw Pon and held that the ground upon which the lower Appellate Court had agreed with the Subdivisional Court in dismissing the suit of the appellants was wrong. The learned Judge then went on to observe :

> On the questions of fact the learned District Judge's judgment is extremely brief and he does not appear to have dealt with these questions in detail but he has come to findings on all the questions of fact and in regard to the facts he has differed entirely from the findings of the Subdivisional Court and his judgment sets out that if he had been able to hold that the deed of gift in question had been registered he would have decreed the plaintiffs-appellants' suit. There is no special right of second appeal on the facts and consequently his finding of fact on the first appeal are binding upon me and I therefore have no alternative but to set aside the judgments and decrees of both the lower Courts and to allow this appeal and to decree the suit of the plaintiffs-appellants.

After this judgment the respondent presented an application for a declaration under Cl. 13 of the Letters Patent with a view to the institution of a Letters Patent appeal against that judgment but before the final disposal of that application the respondent filed the application for review which the learned Judge granted by an order dated 16th March 1937. In view of this order the respondent withdrew the application for a certificate under Cl. 13 of the Letters Patent. On the hearing of that application for review the learned advocate for the applicant (the present respondent) submitted that it was unnecessary for the lower Appellate Court to deal with the appeal on the facts because the conclusion which the learned District Judge arrived at on the question as to the due presentation of the document for registration was sufficient to dispose of the appeal against the appellants, and if the second appeal had come to this Court in that state on reversing the decision of the learned District Judge on that point, this Court should have referred the case back to the District Court for hearing on the questions of fact and if after such remand the learned District Judge came to the same findings upon the questions of fact and consequently in view of the findings by this Court upon the question as to the due presentation of the deed for registration allowed the appeal, the applicant (the present respondent) would under the provisions of S. 11, Burma Courts Act, have had a special right of appeal in regard to the facts to this Court. This submission met with the approval of the learned Judge who came to the conclusion that by his decision in the second appeal the respondent had been deprived of the right of appeal which she ought to have had under S. 11, Burma Courts Act, and further agreed that he was wrong in following the findings of fact of the lower Appellate Court and in holding that they were binding upon him. Then observing :

> I should have adopted one or the other of the two courses. I could have treated the findings of fact of the learned District Judge as being unnecessary to the decision of the appeal before him and therefore of no effect and remanded the appeal to the District Court for a fresh judgment upon the facts, or I could have taken advantage of the provisions of S. 103, Civil P. C., and decided these questions of fact myself.

The learned Judge set down the hearing of the appeal on the facts: the result of such hearing was the judgment of 19th March 1937 in which the learned Judge disagreed with the finding of the lower Appellate Court and upheld that of the Court of first instance on the issue as to the execution of the deed of gift by Daw Pon and ordered that his judgment in the second appeal be reversed and instead thereof a decree be passed dismissing the second appeal and dismissing the suit of the appellants with costs throughout.

In assailing the propriety of the order of 16th March 1937 granting the application for review it is contended on behalf of the

appellants that the learned Judge's conclusion that, by his judgment in the civil second appeal he had deprived the respondent of her right of appeal which she ought to have had under S. 11, Burma Courts Act, is erroneous. Inasmuch as this conclusion presupposes the right in the respondent to have the case sent back to the District Court for hearing on the question of fact, while in law the respondent did not possess such a right, it must be conceded that the contention is well founded. But the order granting the application for review was not passed solely on that ground. Although the learned Judge agreed with the argument of the learned advocate for the applicant (the present respondent) he held, quite correctly, that on his answering the question of law in favour of the appellants, there were two courses open to him, namely (1) of treating the findings of fact of the learned District Judge as being unnecessary to the decision of the appeal and of remanding the appeal to the District Court for a fresh judgment upon the facts, or (2) of taking advantage of the provisions of S. 103, Civil P. C., and of deciding this question of fact. What made Dunkley J. fail to adopt either one or the other of these two courses was his notion that the findings of fact of the learned Judge of the lower Appellate Court were binding upon him. In attempting to show that that notion is correct, the learned advocate for the appellants has laid before us the rulings of their Lordships of the Privy Council in 17 Cal 291,[3] 18 Cal 23,[4] 19 Cal 249[5] and 46 Cal 189[6] and a ruling of my learned brother Baguley J. in 6 Rang 586.[7] The effect of these rulings is to make explicit the meaning of S. 100 read with S. 101, Civil P. C., which permits a second appeal to the High Court only on any of the following grounds, namely ; (a) the decision being contrary to law or to some usage having the force of law; (b) the decision having failed to determine some material issue of law or usage having the force of law ; (c) a substantial error or defect in the procedure provided by the Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

They also point out as a necessary corollary to the rules contained in those Sections that the finding of the first Appellate Court upon a question of fact is final. One cannot fail to notice upon a perusal of these cases that this statement is made with reference to the rights of an appellant in a second appeal or, in other words, the rights of the Court in a second appeal to reconsider questions of fact at the instance of the appellant. The statement does not affect the respondent's right of contesting the findings of fact of the first Appellate Court in the course of a second appeal which is prosecuted against him.

Section 100 is an enabling Section. It enables a party aggrieved by a decree passed in appeal by a Court subordinate to the High Court. S. 101 restricts the grounds of such appeal only to the grounds mentioned in S. 100. The restriction is imposed on the party appealing against a decree passed in appeal by a Court subordinate to the High Court. There is thus nothing in the language of these two Sections which gives countenance to the view that a respondent in an appeal under S. 100, Civil P. C., is debarred from challenging the correctness of the findings of fact of the First Appellate Court which, in spite of such findings, dismissed the appeal. On the other hand, under O. 41, R. 22 (1), it is open to a respondent to support the decree under appeal on any of the grounds decided against him in the Court below. O. 42, Rule 1 provides that the rules in O. 41 shall apply, so far as may be, to appeals from appellate decrees. If the statement that a Court of second appeal is bound by the findings of fact of the first Appellate Court holds good, both as against an appellant and as against a respondent, it is inconceivable that the Legislature permits a respondent to support the decree of the lower Appellate Court on any of the grounds decided against him in the Court below in a case in which there are both issues of fact as well as issues of law or issues of mixed fact and law. Where a respondent takes any cross-objection to the decree, such cross-objection would be governed by the rules of procedure governing an appeal, because under O. 41, R. 22 (1), a cross-

3. Pertap Chunder Ghose v. Mohendranath Purkait, (1890) 17 Cal 291 = 16 I A 233 = 5 Sar 444 (P C).
4. Durga Chowdhrani v. Jewahir Singh, (1891) 18 Cal 23=17 I A 122=5 Sar 560 (P C).
5. Ramratan Sukal v. Nandu, (1892) 19 Cal 249 =19 I A 1=6 Sar 119 (P C).
6. Nafar Chandra Pal v. Shukur Sheikh, (1918) 5 A I R P C 92=51 I C 760=46 Cal 189=45 I A 183 (P C).
7. Ma Pyu v. K. C. Mitra, (1928) 15 A I R Rang 303=114 I C 538=6 Rang 586.

objection must be such as the respondent could have taken by way of appeal. It is to be noted that a cross-objection is a cross-objection to the decree, and where the decree is entirely in favour of the respondent, there is nothing to which it is necessary for the respondent to take cross-objection : *see* 57 Cal 289[8] and 44 Mad 605.[9] These cases deal with the respondent's right in a first appeal, but they are useful as showing that, for the sole purpose of supporting and not for the purpose of objecting to a part or parts of the decree, it is unnecessary to file any cross-objection. For these reasons, I am in entire agreement with my learned brother, Dunkley J., that he was wrong in holding in his judgment in second appeal that he was bound by the findings of fact of the Court of first appeal.

Unless and until the appellants could satisfy the High Court (1) that the deed of gift was executed by Daw Pon and (2) that the deed was duly presented for registration, the foundation upon which their suit was based would never be established. Assuming that they succeeded in establishing these points in the second appeal, that would not conclude the whole case in their favour, because the question whether the transaction was in fraud of creditors and the question whether it was a testamentary disposition in the guise of a gift were still at large, and a finding in favour of the respondents on either of these two questions would be sufficient to conclude the case against the appellants. Therefore in the second appeal before Dunkley J. in addition to his finding in favour of the appellants that the deed was duly registered, it was necessary for him to answer the three other issues in the appellants' favour to establish a proper basis on which a decree in their favour could be made. As he was not bound by the findings of the lower Appellate Court on those issues, it was incumbent upon the learned Judge to give his considered decisions on them. Even assuming for the sake of argument that the learned Judge was bound by the findings of the lower Appellate Court on such issues, the lower Appellate Court had given no finding on the question whether the alleged gift was a testamentary disposition in the guise of a gift which, if answered in the respondents' favour would disentitle the appellants to the decree which was passed in their favour in the second appeal. In view of the fact that the learned Judge erroneously held that he was bound by the findings of the lower Appellate Court on such other issues, which is tantamount to a refusal to consider the case upon those issues, and of the further fact that the learned Judge passed a decree which, even if he was bound by the findings of the lower Appellate Court, would have no proper foundation unless the question of the validity of the gift under the principles of the Burmese Buddhist law was decided in favour of the appellants, I am of the opinion that the judgment passed in the second appeal was a fit and proper one for review.

It is contended on behalf of the appellants that the mistake or error, which the learned Judge declared that he had committed, was not an error apparent on the face of the record, nor did it constitute sufficient reason within the meaning of O. 47, R. 1. In support of this contention the decision of their Lordships of the Privy Council in 3 Lah 127[10] has been relied on. In that case their Lordships held that the provisions of O. 47, Rule 1 must be interpreted strictly, that the words "any other sufficient reason" in that Rule meant a reason at least analogous to those specified immediately previously and that it was not a sufficient reason for granting a review that the order sought to be reviewed proceeded upon an incorrect exposition of the law. Since then there have been cases in which opinions as to the effect of this decision were expressed. In 46 Mad 955[11] a Bench of the Madras High Court expressed the opinion that each case must be judged by itself and that where the error of law was such that it was clearly apparent on a perusal of the record there was ground for granting a review. Accordingly, where a Judge dismissed a suit on the ground that, as between the plaintiffs who were the nearest agnates and the defendants who were the sister's sons of the last male owner, the latter were the preferential heirs under the Mitakshara law prevailing in the Madras Presidency, the error was regarded

8. Abinashchandra v. Narahari Mather, (1930) 17 A I R Cal 165=123 I C 444=57 Cal 289=50 C L J 260.
9. Baluswami Aiyar v. Lakshmana Aiyar, (1921) 8 A I R Mad 172=63 I C 374=44 Mad 605=41 M L J 129 (F B).
10. Chajju Ram v. Neki, (1922) 9 A I R P C 112=72 I C 566=3 Lah 127=49 I A 144 (P C).
11. Murari Rao v. Balavanth Dikshit, (1924) 11 A I R Mad 98=76 I C 342=46 Mad 955=45 M L J 309 (P C).

as an error of law apparent on the face of the record and that the Judge was competent to grant a review. A Bench of the Calcutta High Court came to the conclusion that the discretion of the Court in saying what is "sufficient reason" within the meaning of O. 47, R. 1, Civil P. C., is not so rigidly circumscribed that an analogy must be discovered between the two grounds specified, namely the "discovery of a new and . . . important matter or evidence" and "some mistake or error apparent on the face of the record": 39 C L J 247.[12] In 4 Rang 265[13] Brown J. following 46 Mad 955[11] held that, although an error of law was not necessarily a ground for review in the particular case before him, as the appeal had been decided purely on a consideration of S. 5, Limitation Act, on the assumption that the appeal was barred by limitation without considering a most important point relevant to the question whether it was barred, and the facts material for the decision of such point were all on that record, a failure of the Court to consider this point, though not urged and argued on appeal, was analogous to a mistake or error apparent on the face of the record. I concur in the opinions expressed in these cases.

In my opinion, the error which Dunkley J. declared that he had committed is no less an error of law apparent on the face of the record than that which was held to have justified the order granting the review in 46 Mad 955.[11] If, however, the whole substance of the judgment in the second appeal is taken into account, namely the erroneous view that the learned Judge was bound by the findings of fact of the lower Appellate Court, which was tantamount to a refusal to consider the questions of fact, and the passing of the decree in favour of the appellants in the absence of a finding in their favour upon the issue as to the validity of the alleged gift under the Burmese Buddhist law be taken into account the case becomes a much stronger one for review. Whether or not in the course of the hearing of the second appeal the learned advocate for the respondent requested the learned Judge to give him a hearing upon the issues involved in the case other than that relating to the due registration of the deed of gift does not affect the question whether there was an error apparent on the face of the record in the judgment in second appeal or whether there was any other sufficient reason to justify the grant of the application for review. If the law permitted the respondent to contest the findings of fact of the lower Appellate Court at the hearing of the second appeal, even if the advocate for the respondent submitted that he had no right to do so, such submission would not be sufficient to destroy the respondent's legal rights (*see* 26 I A 216[14] at page 221) or to relieve the Court of its duty to give its considered judgment on those issues, and the error committed by the Court would no less be an error.

In the order of Dunkley J. granting a certificate under Clause 13 of the Letters Patent in this appeal there is no indication as to the point or points on which the case was considered to deserve consideration in the Letters Patent Appeal. Therefore, the learned advocate for the appellants asks us to allow him to go into the evidence for the purpose of showing that the findings of facts (i. e. that execution of the deed by Daw Pon was not proved) arrived at by the learned Judge in his judgment on review were erroneous. For the purpose of disposing of this request, but without in any manner suggesting that in an order granting a certificate under Cl. 13 of the Letters Patent the point or points for consideration should always be indicated, I desire to point out that in my experience the practice of this Court is to grant such certificates only in cases in which doubtful questions of law or procedure exist which deserve reconsideration, and this practice is sound in principle in view of the fact that questions of fact cannot constitute valid grounds even of a second appeal under the Code. In the present case, it is manifest that after a thorough reconsideration of the evidence on the record and coming to the same conclusion upon the question of execution of the deed of gift by Daw Pon as the trial Court, Dunkley J. cannot be regarded as having considered that a further consideration of the question of fact turning on the evidence was needed. In my opinion the proper principle to adopt is that, after two Courts have properly considered the

12. Gopika Raman Ray v. Mahar Ali, (1924) 11 A I R Cal 872=81 I C 738=39 C L J 247.

13. J. N. Surty v. T. S. Chettyar Firm, (1927) 14 A I R Rang 20=98 I C 417=4 Rang 265.

14. Beni Pershad Koeri v. Dudh Nath Roy, (1900) 27 Cal 156=26 I C 216=7 Sar 580=4 C W N 274 (P C).

evidence and come to a concurrent finding upon an issue of fact, it is not the function of the Court hearing a Letters Patent appeal to try the issue upon the evidence over again.

The question whether there were valid grounds for the order granting the application for review, which is the only question of law in the case, having been decided in favour of the respondent, this appeal fails. It must also be observed that no appeal lies under the Code from an order rejecting an application for review, nor does an appeal lie from an order granting an application for review, except on the grounds specified in Order 47, Rule 7 (1), and such grounds are: (a) that the application was in contravention of the provisions of R. 2; (b) that the order was in contravention of the provisions of Rule 4, or (c) that the application was after the expiration of the period of limitation prescribed therefor and without sufficient cause.

The objection taken in this appeal to the order granting the application for review may shortly be stated to be that the application does not satisfy the conditions laid down in O. 47, R. 1 inasmuch as there was no mistake or error apparent on the face of the record or any other sufficient reason. The ground of objection in this case does not fit in with any of the grounds enumerated in O. 47, R. 1. The only one of the latter grounds which it is relevant to consider in this case is that set out in Cl. (b). Rule 4 provides:

1. Where it appears to the Court that there is not sufficient ground for a review, it shall reject the application.

2. Where the Court is of opinion that the application for review should be granted, it shall grant the same.

Provided that:

(a) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree or order, a review of which is applied for; and

(b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation.

It is contended, on behalf of the appellants, that the Court entertaining an appeal from an order granting an application for review may properly consider the sufficiency of the ground in support of the application for review under R. 1. This, in my opinion, is an untenable proposition. If this proposition be sound, it will be impossible to conceive of any necessity to enumerate the grounds on which an appeal from an order granting an application for review might be made under R. 7 (1), the general right of appeal from such an order having been already provided for in O. 43, R. 1 (w). There are numerous cases of the Indian High Courts in which it is laid down that Cl. (w) of O. 43, R. 1, is to be read with and subject to R. 7 (1), so that an appeal lies only on the grounds mentioned in that Rule. One of such cases is that of 41 Cal 746,[15] which was an appeal from an order granting an application for review on the grounds that there was no sufficient reason shown for granting an application but it was held that an appeal on the question as to sufficiency of reason in support of the application for review did not lie. I may at once say that I am in full agreement with the decision of Brown J. in 7 Rang 187,[16] the headnote of which runs thus:

An appeal lies from an order admitting an application for review, but, it is a limited right of appeal on one or other of the three grounds set out in O. 47, R. 7 (1) of the Code. Order 43, R. 1 (w) which allows the appeal, must be read with the provisions of O. 47, R. 7 (1). Where a Court bearing in mind the provisions of O. 47, R. 1, grants an application for review, it cannot be said to contravene the provisions of Order 47, R. 4 merely because it may have taken a wrong view as to the meaning of Rule 1. An Appellate Court would be acting without jurisdiction, if on this ground alone, it sets aside an order of the lower Court granting a review.

I do not think that it is necessary to recapitulate here the reasons for the decision which, if I may respectfully say so, appear fully in the judgment of that case. The learned advocate for the appellants relies on 3 Lah 127[10] as an implied authority of the Privy Council for the view that an order granting an application for review may be appealed against on the ground that the application did not satisfy the provisions of O. 47, Rule 1. It must be conceded that in that case their Lordships of the Privy Council laid down the rule that "any other sufficient reason" in Order 47, Rule 1 means a reason sufficient on grounds at least analogous to those specified immediately previously, and their Lordships did not find that there was such reason in support of the application in that case. But, while there is an entire absence of anything

15. Hari Charan Saha v. Baran Khan, (1915) 2 A I R Cal 283=25 I C 903=41 Cal 746 (P C)

16. Lan Tin Ngan v. Ma Mya Kyin, (1929) 16 A I R Rang 105=118 I C 120=7 Rang 187.

suggesting that an order granting an application of review may be assailed on the ground that the application did not disclose grounds which might be held to be sufficient reason for the granting of an application, it is manifest that the order granting the application in that case was made by a Bench quite incompetent to deal with the matter in view of the provisions of O. 45, Rule 5, which appears to me to be the real ground on which the appeal was entertained by the Privy Council. For these reasons, I am of the opinion that the order made by Dunkley J., who after bearing in mind the provisions of O. 47, R. 1, came to the conclusion that there was either an error apparent on the face of the record or some sufficient reason for the granting of the application, is not open to an appeal. For the above reason, the appeal fails, both on the merits regarding the only question of law in the case and also on the ground that the appeal is not permitted by law. The appeal is dismissed with costs. Advocate's fees, 15 gold mohurs.

Sharpe J. — In this Letters Patent Appeal the appellants before us have alleged by their memorandum of appeal that they are aggrieved by two judgments of Dunkley J. dated 16th and 19th March 1937 respectively. The judgment of 16th March was a judgment delivered on an application by the present respondents for review of a judgment which Dunkley J. had previously delivered in a civil second appeal, which judgment was adverse to the present respondents. Order 47 deals with review and Rule 7 (1) of that Order provides certain grounds upon which an order granting an application for review may be objected to. The grounds upon which objection may be taken are strictly limited, and I am unable to see how the present appellants are able to bring themselves within one of the three specified grounds. Therefore, in my judgment, it is not open to the present appellants to object to the order of Dunkley J. of 16th March 1937 granting an application for review.

As I have already indicated, the present appellants are also appealing against the later judgment of Dunkley J. when he disposed of the whole matter on review. It is to be observed at the bottom of page 3 of Dunkley J.'s judgment of 16th March whereby he granted the application for review that there the learned Judge points out that :

Both learned counsel are now agreed that I should hear them upon the facts of the case and write a further judgment in regard to the facts and finally decide this appeal.

This is what Dunkley J. proceeded to do, and in view of the fact that both the learned counsel had agreed to that course I am unable to see how the appellants are now able to say that they are aggrieved by Dunkley J. going into the question of fact as he did. In the result therefore this appeal must be dismissed.

At one time I thought it would be necessary to deliver a lengthy judgment dealing amongst other things with the question as to how far questions of fact may be gone into in second appeal, but, it appears to me that it is unnecessary for me to do so in view of the particular facts and circumstances of the present case. I therefore express no opinion upon that aspect of the case and this judgment of mine must not be taken to be one either agreeing with or dissenting from my learned brother Mya Bu, upon the matters of which he has so exhaustively treated in his judgment. I am merely deciding this appeal on the particular facts of the case. I am not laying down any general rule or principles which can be of assistance in any other case, for, in my view, it is quite unnecessary for me to do so. I agree that the appeal must be dismissed with costs, advocate's fees 15 gold mohurs.

B.D./R.K. *Appeal dismissed.*

A. I. R. 1939 Rangoon 67

MACKNEY J.

Ma E Shi — Applicant.

v.

U San Kai — Respondent.

Criminal Revn. No. 686-B of 1937, Decided on 7th March 1938, from order of Sub-divisional Magistrate (1), Kanbalu, D/- 2nd October 1937.

(a) Criminal P. C. (1898), Ss. 488 and 490 — Order directing father to pay for maintenance of his children — Order ceases to be enforceable in respect of eldest of them who has come of age if he has become able to earn his livelihood — But order remains enforceable in respect of remaining children.

Where an order directing a father to pay for the maintenance of his children is made and subsequently if it is proved that the eldest of them who has come of age has become able to earn his livelihood, the order ceases to be enforceable in respect of him. But, it cannot be said that it ceases to be enforceable in respect of the remaining children. [P 68 C 2 ; P 69 C 1]

(b) Criminal P. C. (1898), S. 490—Costs.

Section 490 does not contain any provision such as that in sub-cl. (7), S. 488, which would enable the Court to grant costs. [P 69 C 1]

K. C. Sanyal — *for Applicant.*

A. N. Basu — *for Respondent.*

Order. — With effect from 6th August 1930, the applicant Ma E Shi obtained an order from the Sub-divisional Magistrate of Kanbalu directing the respondent U San Kai to pay to her for the maintenance of his three children by her the sum of Rs. 15 a month. Ma E Shi in giving evidence in that case on 28th July 1930 stated that her eldest boy was then 11 years of age. In the case out of which the present application arose, Ma E Shi applied to the Court for the enforcement of the maintenance order in respect of the arrears for three months. Her application is dated 16th June 1937. The respondent pleaded but did not prove that he had waived his claim to a certain piece of land which was in Ma E Shi's possession in consideration of being excused further payment under the maintenance order and further that he had actually paid in cash more than the alleged arrears of Rs. 45. In his written statement he set out the payments with the dates thereof. In his evidence he made no attempt whatsoever to prove these accounts. The only statement that we have is the statement of Ko Yin Tin Maung, the eldest son of the parties, who in cross-examination in September 1937 stated that he knew that Rs. 10 had been paid at the house of U Ba Tin and Rs. 25 at the house of Saya Pu. He does not say when these payments were made, in respect of what they were made, or to whom they were made. Nevertheless, the Magistrate took this as proof of the fact that Rs. 35 out of the sum of Rs. 45 due had been paid, and he allowed the applicant an order for Rs. 10 only. In this I think he erred. The respondent had further claimed that the eldest child was now 18 years of age and able to earn his livelihood. Relying on the case in 9 L B R 49[1] he claimed that the composite order of maintenance made in favour of the three children must now be regarded as no longer in force. On the point of the age of the child, no evidence was adduced save that of the Sub-Assistant Surgeon who gave it as his opinion after examining the child that the lad was about 18 years of age. Ma E Shi herself says that Maung Tin Maung the eldest child was 15 years and five months old in December 1937; she was not questioned as to her statement in the original case. It must be admitted that there was not sufficient evidence before the Magistrate to justify his holding that the lad was 18 years of age before 16th June 1937. From that inference the Magistrate drew further the conclusion that the lad was able to maintain himself and he observed that the original maintenance order could therefore no longer be enforced.

The Magistrate's attention is called to the case in 2 Rang 682[2] in which it is held that a father who has sufficient means is bound to maintain his child who is under the age of majority, and in fixing the sum payable no regard should be paid to the fact that the child is able to contribute towards its own support by means of labour or work of any kind. As a matter of fact however, it was entirely unnecessary for the Magistrate to make any observations at all as to the future validity of the maintenance order. It is true that the case cited from the Lower Burma Rulings is authority for the proposition that when a child becomes able to maintain itself, the order for his maintenance becomes not enforceable. In that case it appears that the child was over 19 years of age and was actually in employment and earning sufficient to live on. Reliance was placed on the case in 19 All 50,[3] where it was held that an order for maintenance of a wife could no longer be enforced after the wife had been divorced. The same reasoning as was applied in the case of a wife who had ceased to be a wife also seems to apply to the case of a child who has ceased to be unable to maintain himself. As was pointed out in the Allahabad case the order was an order for the maintenance of a wife, and if the person to be maintained ceased to be a wife, then clearly the order ceased to be valid: so, where the order is for the maintenance of a child unable to maintain itself, it was argued in the Lower Burma case the order ceased to be valid when the child became able to maintain itself. There appears to me to be considerable force in this conten-

1. Thambuswamy Pillay v. Ma Lon, (1917) 4 A I R L B 84=37 I C 311=18 Cr L J 103=9 L B R 49.

2. Baran Shanta v. Ma Chan Tha May, (1925) 12 A I R Rang 197=85 I C 375=26 Cr L J 535=2 Rang 682.

3. Shah Abu Ilyas v. Ulfat Bibi, (1896) 19 All 50=1896 A W N 173.

tion, and had it been proved in the present case that the eldest child was in a position to maintain himself I should have followed it, in considering whether the boy was entitled to any allowance after the date on which he had been held to become of age.

The Magistrate has gone further and expressed his opinion that the order cannot be enforced in respect of the remaining two children. Here again he relied on the Lower Burma case already cited. That however was a case in which a composite order of maintenance of a wife and child had been made, and it was held that as it was not known what proportion of the total amount awarded was to be devoted to the maintenance of the wife it was not possible to enforce the order in respect of the maintenance of the wife. The question does not really arise on the finding that it has not yet been shown that the eldest child is able to earn his livelihood. I am not however prepared to say that the order could not be enforced in respect of the remaining two children when it ceases to be enforceable in respect of the eldest child. It seems to me that such a case would differ from the case which was before the learned Chief Judge of the Chief Court of Lower Burma. In my opinion, the order of the Magistrate was incorrect, and Ma E Shi was entitled to have an order for the full amount of Rs. 45. The order of the Magistrate is set aside and the Magistrate is directed to take steps to realize the sum of Rs. 45 from the respondent, the arrears of maintenance for three months from 8th March 1937. S. 490, Criminal P. C., does not contain any provision such as that in sub-cl. (7), S. 488, which would enable the Court to grant costs. The order of the Magistrate requiring the respondent to pay costs is also set aside.

D.S./R.K. *Order set aside.*

A. I. R. 1939 Rangoon 69

SHAW J.

The King

v.

Maung Saw Han — Respondent.

Criminal Appeal No. 1035 of 1937, Decided on 7th October 1937, from order of Sess. Judge, Myaungmya, D/- 10th June 1937.

(a) Burma Rural Self-Government Act (4 of 1921), S. 77—Clerk of Circle Board renting his house to Circle Board without Commissioner's permission—He commits offence under S. 168, I. P. C., read with Sec. 77, Burma Rural Self-Government Act.

Section 77, Burma Rural Self-Government Act, does not limit contracts intended to be covered by its penal provision only to such contracts as may be related to the matters mentioned in Ss. 48, 50 and 56 of the Act. [P 70 C 1]

Where a clerk of the Circle Board rents his house to the Circle Board for use as its office without the permission in writing of the Commissioner as required by Sec. 77, Burma Rural Self-Government Act, he commits an offence under S. 168, I. P. C., read with Sec. 77, Burma Rural Self-Government Act. as he is interested in the contract made with the Board. [P 70 C 2]

(b) Criminal Trial — Sentence — Factors for decision of.

In a criminal trial a sentence must be passed which is considered proper in all circumstances of the case regardless of the consideration whether it should be an appealable one. [P 70 C 2]

Tun Byu, Govt. Advocate—*for the* Crown.

Chit Tun — *for Respondent.*

Judgment. — This is an appeal by the Crown against the acquittal by the Court of Sessions, Myaungmya, of the respondent who had been tried in the Court of the Special Power Magistrate, Myaungmya, for an offence under S. 168, I. P. C., read with S. 77, Burma Rural Self-Government Act, and convicted and sentenced to imprisonment until the rising of the Court and to pay a fine of Rs. 10, or in default to undergo seven days' simple imprisonment.

The respondent was a clerk employed by the Labutta Circle Board. He owned a house in Labutta which was rented by the Labutta Circle Board from December 1932 to April 1935 at Rs. 30 per mensem up to March 1934 and thereafter at Rs. 20 per mensem. The rent was drawn in the name of Ma E Tin, the wife of the respondent. Previously the Labutta Circle Board had rented the house of U Ah Naing, an uncle of Ma E Tin's. About six months before December 1932, U Ah Naing requested that the rent payable to him should be paid to Ma E Tin. Then in December 1932 U Ah Naing wanted back his house and so the Office of the Circle Board was shifted to the house of the respondent, since when up to April 1935 that house was used as the Office of the Circle Board. The rent was drawn in the name of Ma E Tin, but it was rent payable to the respondent and receivable by him though his wife's name was used. The respondent did not obtain permission from the Commissioner in writing or at all for the letting of his house to the

Circle Board of which he was a servant. It is elementary that there was a contract between the respondent as the owner of the house and the Circle Board for the letting and renting of the house. So, there can be no question that the respondent was interested in the contract of letting even though his wife's name was used instead of his own. In fact it could be argued that his wife's name was made to appear in the business in order to try and hide his own connexion or interest in it. But it may be allowed that as his wife was already drawing rent for U Ah Naing's house when the change of office was made, her name was still used for convenience because, as a Burmese Buddhist, she had an interest in the house of her husband. Even if the actual letting was made by Ma E Tin and so the contract was with her, the respondent had nevertheless an interest in it as he was her husband and the house was in his name.

The learned Sessions Judge has held that the word "contract' in S. 77, Burma Rural Self-Government Act, must be interpreted with particular reference to Ss. 48, 50 and 56 of the Act. I do not agree. In any event, the terms of Sec. 56 (1) of the Act enable the Circle Board to enter into and perform all such agreements and contracts as it may consider necessary for carrying out the purposes of the Act. To have an office to carry out its duties under the Act is surely something for which a Circle Board may legally make provision under that Section. Sec. 77 of the Act does not, in my view, limit contracts intended to be covered by its penal provision only to such contracts as may be related to the matters mentioned in Ss. 48, 50 and 56 of the Act. It is conceivable that a local body may enter into an entirely illegal contract with one of its members, officers, or servants, in which case the permission of the Commissioner could hardly have been obtained. For that reason, it could not be argued that therefore no offence had been committed by that member, officer, or servant, under S. 77 of the Act read with S. 168, I. P. C. But, here it is not argued that the contract of letting and renting was one which the Circle Board was not authorized to enter into and that therefore it was illegal. The learned Sessions Judge himself states that the Circle Board has got to provide itself with a house for the accommodation of its office. If so, surely it is competent to make a contract for the renting of a house to use as its office. It seems that the respondent obtained permission from the Chairman of the Circle Board to occupy a room at the back of the house which must have amounted virtually to his occupying the whole house when the Circle Board was not actually holding its meetings therein. This only shows the danger of such a practice as that which S. 77, Burma Rural Self-Government Act, is meant to discourage.

I set aside the acquittal of the respondent and convict him under S. 168, I. P. C., read with S. 77, Burma Rural Self-Government Act, on the charge framed against him in the Court of the Special Power Magistrate, Myaungmya, in that between December 1932 and April 1935 at Labutta, as an officer or servant, to wit, a clerk of the Labutta Circle Board, he was interested in a contract made with the said Circle Board whereby his house was rented to the said Circle Board for use as its office without the permission in writing of the Commissioner of the Irrawaddy Division, in contravention of S. 77, Burma Rural Self-Government Act. Regarding the sentence, I shall content myself by restoring that which was passed on the respondent by the learned Special Power Magistrate but, in doing so I must draw attention to what I consider reprehensible in passing a sentence so that an appeal may be had. A sentence must be passed which is considered proper in all circumstances of the case, regardless of the consideration whether it should be an appealable one.

S.C./R.K. *Acquittal set aside.*

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MYA BU AND SHARPE JJ.

Singh — Appellant.

v.

Burma Railways — Respondents.

Civil Misc. Appeal No. 36 of 1937, Decided on 7th March 1938, from order of Commissioner, Insein, in Workmen's Compensation Case No. 7 of 1936.

(a) Workmen's Compensation Act (1923) Secs. 23 and 32 — Rules made under Sec. 32, R. 38, Proviso (b)—Commissioner acting under the Act has no jurisdiction to issue commission for examination of witness—Answers given by witness to interrogatories furnished to him are not admissible in evidence.

There is nothing in the body of the Workmen's Compensation Act which empowers or authorizes

the Commissioner to have evidence taken on commission. Sec. 23 invests the Commissioner with powers of Civil Court, under the Civil Procedure Code, only for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and compelling production of documents and material objects. Proviso (b) to Rule 38 of the Rules, made in exercise of the powers conferred by S. 32, cannot be read as authorizing the Commissioner to adopt a rule of procedure entirely outside and unconnected with the scope of the rules of procedure laid down by the Rules. A Commissioner acting under the Act has therefore no jurisdiction or power to issue a commission to examine a witness and issue of such commission is ultra vires of the Commissioner and the answers given by the witness to interrogatories and cross-interrogatories, furnished to him cannot be received as legal evidence, more particularly so, when the answers are not recorded before any Court or any officer examining the witness on commission and are not given on oath : *(1914) 3 K B 989, Rel. on.* [P 72 C 1, 2]

(b) Workmen's Compensation Act (1923), S. 32 — Rules framed under — Rr. 20, 21, 22 and 24—Commissioner cannot dismiss application summarily unless applicant is examined or unless he has been called upon to produce his evidence — Commissioner not availing himself of power given by R. 20 or R. 22 — He must issue notice to opposite party straightway — If opposite party appears and contests claim, Commissioner must reduce result of examination to writing — Omission to do so is substantial error in procedure. (Per *Sharpe J.*)

Rule 21 of the Rules framed under Sec. 32 does not give the Commissioner any power to dismiss the application summarily unless the applicant has been examined nor does Rule 22 give him any power of summary dismissal unless he has called upon the applicant to produce evidence in support of his application. So also, if a Commissioner is not going to avail himself of the power given to him under R. 20 or R. 22, he ought to issue notice to the opposite party straightway and not put the applicant to the necessity of unnecessary attendance before him. If the opposite party appears and contests the claim but does not file a written statement, it is the Commissioner's duty to examine him and to reduce the result of the examination to writing in accordance with the express direction contained in R. 24 (2). Omission to do so is a substantial error in procedure. (Procedural errors committed by the Commissioner pointed out and importance of adherence to Rules emphasized.) [P 73 C 2; P 74 C 1]

Bhattacharyya — *for Appellant.*

Surridge — *for Respondents.*

Mya Bu J.—This is an appeal against an order passed by the Commissioner for Workmen's Compensation, Insein, disallowing the appellant's claim for compensation for an alleged total disablement resulting from an injury received in the course of his employment as a spring-smith in the Loco Workshop of the Burma Railways at Insein on 29th January 1936. Against such an order, an appeal lies to this Court under S. 30 (1) (a) Workmen's Compensation Act, provided a substantial question of law is involved in the appeal. The question of law which has been put forward as a ground of this appeal is that the Commissioner based his finding on inadmissible evidence. The issues of fact between the appellant and the Burma Railways are (1) whether the eyesight of the appellant is permanently lost and if so (2) whether it is the result of the alleged accident. That an accident did occur to the appellant arising out of and in the course of his employment, was not disputed by or on behalf of the respondents whose case is, (*vide* the evidence of Dr. Prasad of the medical department of Burma Railways), to the effect that the accident did not cause direct injury to the eyeball but caused a punctured wound on the left lower eyelid only of the appellant with conjunctivitis of the left eyeball. The Chief Medical Officer, Burma Railways, gave evidence to the effect that he examined the appellant's eye on or about 22nd December 1936—the alleged accident having occurred on 29th January 1936—but found no trace of injury having previously occurred to the eyeball and was unable to detect any deterioration of vision. He however sent the appellant to be further examined by Colonel Cormack who was then Ophthalmic Surgeon at the General Hospital, Rangoon.

The evidence of the Chief Medical Officer was contrary to that of the private Ophthalmic Surgeon whose evidence was adduced by the appellant in support of his case. In that state of the evidence, the Commissioner considered it essential for the proper decision of the case, to have the evidence of Colonel Cormack who at the time was Officiating Inspector-General of Civil Hospitals, with headquarters at Rangoon. The learned Commissioner however came to the conclusion that the personal attendance of Colonel Cormack might be dispensed with and with the consent of both parties, decided to have Colonel Cormack examined on interrogatories and cross-interrogatories. Interrogatories were drawn up and filed before the Commissioner on behalf of the respondents. They were forwarded to Colonel Cormack who answered them as per Ex. 3. On receipt of these answers, the learned advocate for the appellant drew up cross-interrogatories, which were sent to Colonel Cormack who answered them as in Ex. 5. These answers confirmed the opinion expressed by the Chief Medical Officer,

Burma Railways, in his evidence and militated against the weight of the opinion expressed by Dr. V. R. Patel the private Ophthalmic Surgeon, who gave evidence in support of the appellant's allegation as to his vision. The learned Commissioner in his judgment observed :

> It is of course difficult to come to a decision when the doctors do not agree . . . I can see no reason for not accepting the evidence of Dr. Carrier and Colonel Cormack.

These observations show that the learned commissioner was materially influenced by the opinion of Colonel Cormack in arriving at his conclusions upon the issues of fact. It is contended on behalf of the appellants, that the answers given by Colonel Cormack to the interrogatories and cross-interrogatories are not admissible as evidence inasmuch as the Commissioner has no jurisdiction to issue a commission for the examination of witnesses. There is considerable force in this contention, which, in my opinion, must be upheld. There is nothing in the body of the Act which empowers or authorizes the Commissioner to have evidence taken on commission. S. 23 invests the commissioner with powers of the Civil Court, under the Code of Civil Procedure only for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and compelling production of documents and material objects. In Part 5 of the rules, made in exercise of the powers conferred by S. 32 of the Act, there appear rules of procedure to be followed by the commissioners in the disposal of cases under the Act. Rule 38 of these rules enacts :

> Save as otherwise expressly provided in the Act or these rules, the following provisions of Sch. 1, to the Civil P. C. 1908, namely those contained in O. 5, Rr. 9 to 30 ; O. 7, Rr. 9 to 18 ; O. 9; O. 13 ; O. 16 ; O. 17 and O. 23, Rr. 1 and 2 shall apply to proceedings before commissioners, in so far as they may be applicable thereto.

There are two provisos to that rule one of which runs as follows :

> (b) The commissioner may, for sufficient reason, proceed otherwise than in accordance with the said provisions, if he is satisfied that the interests of the parties will not thereby be prejudiced.

Order 26, Civil P. C., which contains rules with reference to commission to examine witnesses is not mentioned in R. 38. This omission, in my opinion, indicates the want of power or jurisdiction in the commissioner to issue commissions to examine witnesses. Therefore the issue of commission for obtaining the evidence of Colonel Cormack was ultra vires of the commissioner, and the answers given by him to the interrogatories and cross-interrogatories cannot be received as legal evidence. I am reinforced in this conclusion by the decision of the Court of Appeal in (1914) 30 T L R 616[1] which deals with the question of jurisdiction of a County Court Judge sitting to hear an application for compensation under the Workmen's Compensation Act, 1906. The circumstances of that case were such as would justify a County Court Judge's order to have the appellant's evidence to be taken on commission or before an examiner if the Judge had jurisdiction to make such an order but it was held that the Judge had no jurisdiction to make such an order. Proviso (b) to R. 38 cannot, in my opinion, be read as authorizing the commissioner to adopt a rule of procedure entirely outside and unconnected with the scope of the rules of procedure laid down by the rules.

There is another ground for holding that the answers given by Col. Cormack to the interrogatories and cross-interrogatories were not legally admissible as evidence. The answers were not recorded before any Court or any officer examining the witness on commission. Interrogatories were forwarded direct to Col. Cormack by means of a letter of request and Col. Cormack also forwarded his answers to the Commissioner in the form of a letter in compliance with the request. The answers were not made on oath. S. 5, Oaths Act, 1873, provides that oaths or affirmations shall be made by all witnesses, that is to say all persons who may lawfully be examined by any Court. This mandate was not observed in this case. The omission to observe this mandate is not sufficient to invalidate the proceedings or render inadmissible any evidence, but in the present case the evidence of Col. Cormack was not only not given on oath but it was not recorded by any person authorized to record the evidence. The answers given by Col. Cormack are not admissible as evidence, and from the judgment of the learned Commissioner it is clear that he treated the so-called evidence of Col. Cormack as the main pivot in the case. For these reasons, the order of the commissioner for Workmen's Compensation, Insein, disallowing the appellant's claim is set aside and the case will be remanded to

1. Taylor v. Cripps, (1914) 3 K B 989=83 L J K B 1538=1914 W C & I Rep 515=111 L T 780==30 T L R 616.

the Commissioner for Workmen's Compensation, Insein, to proceed to record such evidence as the parties may desire to adduce according to law, and upon such evidence together with the evidence which had already been taken before the passing of the order under appeal to dispose of the case according to law. Each party must bear its own costs of this appeal.

Sharpe J.—On 29th January 1936, the appellant, who was then employed by the respondents as a spring-smith in their Locomotive Workshop at Insein, received an injury to his left eye. As a result of that injury, he was away from work for about a month and after resuming work at the end of February he continued in the respondents' employ until 30th September 1936, when he was discharged on the ground, so the respondents then said, of "reduction of staff." The appellant asked the respondents' agent for re-instatement or compensation but the latter regretted that nothing could be done for the appellant who, he now said, was "rightly discharged on the ground of comparative inefficiency." The appellant, I would point out, had been continuously employed by the respondents since January 1926. The appellant placed the matter in the hands of a pleader who wrote to the respondents claiming compensation for his client under the Workmen's Compensation Act (to which I will hereafter refer as "the Act"). It does not appear whether the respondents made any reply to that letter; at any rate, on 10th December 1936, the appellant filed an application for compensation before the Commissioner for Workmen's Compensation, Insein. In that application, which was in proper form according to the Act and the Rules made thereunder, the appellant alleged that the

> result of the injury sustained by (him) arising out of and in course of his employment is a permanent partial disablement of vision of left eye and an almost total disablement of the vision of the right eye.

Part 5 of the Rules made under the Act very carefully lay down the procedure to be adopted by commissioners in the disposal of cases under the Act. By Rule 20 the Commissioner may cause the applicant to be examined, and by Rule 21 he may, after considering the application and the result of any such examination of the applicant, summarily dismiss the application. If he does not so dismiss the application, the Commissioner may, by Rule 22 require the applicant to produce evidence in support of his application before calling upon any other party; and, if the applicant then fails to make out a case for the relief claimed, the Commissioner may dismiss his application. It will be seen that Rr. 20, 21 and 22 contain a number of provisions which are permissive and not obligatory, but R. 21 does not give the commissioner any power to dismiss the application summarily unless the applicant has been examined (because he has first to consider the application and the result of any examination of the applicant under R. 20); nor does R. 22 give him any power of summary dismissal unless he has called upon the applicant to produce evidence in support of his application. So that, though the Commissioner need not either have the applicant examined (under R. 20) or require him to produce evidence (under R. 22), yet he cannot dismiss the application summarily unless he either has the applicant examined or requires him to produce evidence. R. 23 requires the Commissioner to give notice to the opposite party, if the application is not dismissed under R. 21 or R. 22; which also means, of course, that the Commissioner must give such notice to the opposite party if he neither has the applicant examined nor requires him to produce evidence. In the present case although he directed the applicant to appear before him on 5th January 1937 (which the latter did), the Commissioner neither had him examined nor required him to produce evidence, but directed notice to issue to the respondents. Although, there is nothing inherently irregular in this procedure, it does appear that it was unnecessary for the applicant and his pleader to be required to attend before the Commissioner at that stage, unless the applicant was then to be examined or had been required to produce evidence, which this applicant had not. In my opinion, if a Commissioner is not going to avail himself of the power given him under either R. 20 or R. 22, he ought to issue notice to the opposite party straightway and not put the applicant to the necessity of an unnecessary attendance before him.

As I have said, the procedure so adopted by the Commissioner was not inherently irregular but he then proceeded to commit more than one error in procedure which was a serious and substantial error. When a Commissioner has issued notice to the opposite party, the latter may, and if so

required by the Commissioner shall, file a written statement. That is the effect of R. 24 (1). R. 24 (2) provides that if the opposite party contests the claim the Commissioner may, and, if no written statement has been filed, shall examine him upon the claim. In the present case, after the Commissioner had issued notice to the respondents, the latter did not voluntarily file a written statement and the Commissioner did not require them to do so. On 18th January 1937, the case was called, both parties appeared, and the respondents contested the claim. Therefore, under R. 24 (2), it then became and was the Commissioner's duty to examine the respondents (which in this case means their proper representative), and to reduce the result of the examination to writing, in accordance with the express direction contained in R. 24 (2). The Commissioner did not do so; such omission was to my mind a substantial error in procedure the serious result of which will appear in a moment when I refer to the issues which were framed.

Rule 25 (1) requires the Commissioner to frame the issues after considering any written statement and the result of any examination of the parties. Owing to the course which he had adopted in this case, the Commissioner did not have before him the result of any examination of the parties, and as the respondents had not chosen to file any written statement (and they were perfectly entitled not to file one in this case, if they so desired, as the Commissioner had not required them to do so) the Commissioner had not before him those materials which the rules say, and rightly say, are necessary materials upon which to settle the issues. Nevertheless, the Commissioner proceeded to settle the issues without the proper materials, and here again he committed a serious procedural error. His own diary entry of 18th January 1937, viz. "There is some dispute about the eyesight of the applicant," employs extremely loose phraseology, which was however the almost inevitable result of a failure to take the prescribed steps to ascertain what the respondents' case exactly was. Of the two issues specifically framed, the first takes no account of the fact that the applicant was alleging a different disability in regard to each eye. Nor did the Commissioner, in recording the issues, distinguish those which concerned points of fact and those which concerned points of law, as he was required to do by R. 25 (2). I have called attention to these procedural errors because it is of the utmost importance that the rules should be carefully adhered to. It is however unnecessary for me to base my decision upon such irregularities prior to the hearing, because during the hearing itself there was an even more serious error committed by the Commissioner. During the course of the hearing the Commissioner improperly received the "evidence" of Colonal Cormack, if "evidence" is the right word to use when referring to the documents signed by Colonel Cormack which clearly influenced the Commissioner in arriving at the conclusion which he did. My learned brother has so fully and clearly dealt with this further aspect of the case in his judgment that I need say no more than that I entirely agree with all he has said upon the subject. For that reason alone, this case must go back to be dealt with according to law. I agree that the appeal must be allowed, the Commissioner's order set aside, and the case remanded, each party to bear its own costs of this appeal.

R.M./R.K. *Case remanded.*

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FULL BENCH

MYA BU OFFG. C. J., BA U AND DUNKLEY JJ.

Ma Pwa Tin — Applicant.

v.

Yeo Sein Maung — Respondent.

Civil Ref. No. 3 of 1938, Decided on 22nd August 1938; reference made by Mya Bu and Mackney JJ.

Buddhist Law (Chinese)—Widow of intestate Chinese Buddhist deceased in Burma is not entitled to letters of administration to his estate as against son of deceased : *(1938) R L R 249= A I R 1938 Rang 321=177 I C 628, Overruled.*

According to the Chinese Customary law, the widow's sole right in the estate in the presence of children is the right to maintenance and ultimately to funeral expenses. A right to maintenance out of the estate of the deceased is not a right to any share of the estate, it is not even a charge on the estate. She does not therefore fall within the provisions of Sec. 218 (1), Succession Act. Hence the widow of an intestate Chinese Buddhist deceased in Burma, succession to whose estate is governed by the Chinese Customary law, is not entitled to the grant of letters of administration to that estate as against the son of the deceased : *A I R 1923 Rang 180 and A I R 1933 Rang 313, Ref. ; (1938) R L R 249=A I R 1938 Rang 321=177 I C 628,* **Overruled.** [P 75 C 2 ; P 76 C 1, 2]

O. S. Woon — *for Applicant.*

C. C. Khoo — *for Respondent.*

Dunkley J.—The questions which in this reference have been propounded for the decision of the Full Bench are as follows :

(1) Whether the widow of an intestate Chinese Buddhist deceased in Burma, succession to whose estate is governed by the Chinese Customary law, is entitled to the grant of letters of administration to that estate as against the son of the deceased ?

(2) If the answer is in the affirmative, would she be so entitled where she is not the mother of the opposing son.

The learned Judges who made the reference doubted the correctness of the decision of my brother Mosely and myself in (1938) R L R 249[1] in respect of the grant of letters of administration to the estate of a deceased Chinese Buddhist and therefore this decision falls for further consideration by the Full Bench. The headnote in (1938) R L R 249[1] reads as follows :

In case of contested applications for letters of administration to the estate of a deceased Chinaman, when the applicants are a widow and a son, it does not matter whether the deceased was a Buddhist or a non-Buddhist or whether the succession to his estate is governed by Chinese Customary law or the Succession Act, for, in either case, the proper person to obtain letters of administration to his estate is his widow, and other persons having claims to the estate must, if necessary, prosecute those claims in the form of a separate suit against the widow, either for their share or for the administration of the estate by the Court.

This headnote correctly summarizes our decision, which was based upon a statement of the Chinese Customary law made in 1 Rang 161[2] at p. 168, where it was laid down that if there are sons or daughters the widow has only a right to administer the estate and to be maintained out of it and a claim on the estate for provision for her funeral, but the property vests not in her but in the children. This statement of the law was subsequently quoted with approval in 2 Rang 94[3] and 6 Rang 623,[4] and in 8 Rang 172[5] their Lordships of the Privy Council appear to have recognized the right of the widow of a Chinese Buddhist to administer her deceased husband's estate.

1. Shwe Khoon v. Ma Sein Nu, (1938) 25 A I R Rang 321=177 I C 628=(1938) R L R 249.
2. Maung Po Maung v. May Pyit Ya, (1923) 10 A I R Rang 180=74 I C 933=1 Rang 161.
3. Ma Sein v. Ma Pan Nyun, (1924) 11 A I R Rang 219=80 I C 749=2 Rang 94.
4. Chan Pyu v. Saw Sin, (1929) 16 A I R Rang 22=114 I C 513=6 Rang 623.
5. Bon Kwi v. S. K. R. S. K. R. Firm, (1930) 17 A I R P C 26=121 I C 233=8 Rang 172=57 I A 38 (P C).

I have referred to such authorities on Chinese Customary law as are available to us, and I have no doubt that the statement of the widow's rights which was laid down in 1 Rang 161[2] is a correct statement of the Chinese Customary law.

Following this decision, my brother Mosely and I in (1938) R L R 249[1] assumed that, as the widow has under the Chinese Customary law a right to administer her deceased husband's estate, she is entitled to the grant of letters of administration to his estate; but that assumption was not justified. It does not follow that because under the Customary law the widow has a right of administration she therefore has a right to obtain letters of administration under the Succession Act. S. 13 (1), Burma Laws Act, enacts that in any question regarding succession or inheritance the Buddhist law shall be applicable in cases where the parties are Buddhists except in so far as such law has by enactment been altered or abolished; and it is therefore necessary to consider whether this rule of the Chinese Customary law has been "altered" by the provisions of the Succession Act. The relevant provision is S. 218 (1) of that Act, which enacts that if the deceased has died intestate, and was a Buddhist, administration of his estate may be granted to any person who, according to the rules for the distribution of the estate applicable in the case of such deceased would be entitled to the whole or any part of such deceased's estate. Consequently, the widow cannot be entitled to the grant of letters of administration unless, according to the rules of the Chinese Customary law for the distribution of the estate of a deceased person, she is entitled to the whole or any part of her deceased husband's estate. That she is not so entitled is, in my opinion, clear. In 11 Rang 310[6] it was laid down that the estate of a deceased person governed by Chinese Customary law is divided among his sons: daughters only succeed when there are no sons, and the widow succeeds only when there are no children; otherwise the widow has a right to maintenance, and to have her funeral expenses provided. Hence the widow's sole right in the estate is the right to maintenance and ultimately to funeral expenses. A right to maintenance out of the estate of the deceased is not a right to any share of

6. Ma Sein Byu v. Khoo Soon Thye, (1933) 20 A I R Rang 313=148 I C 492=11 Rang 310.

the estate; it is not even a charge on the estate. This is clear from the provisions of S. 39, T. P. Act, which reads as follows:

> Where a third person has a right to receive maintenance or a provision for advancement or marriage from the profits of immovable property, and such property is transferred, the right may be enforced against the transferee, if he has notice thereof or if the transfer is gratuitous; but not against a transferee of consideration and without notice of the right, nor against such property in his hands.

Hence the right to receive maintenance is not a charge on the property. In regard to the right of a Hindu widow to maintenance, it was laid down that this right is not a charge on her deceased husband's estate, as long ago as 1877, by the Bombay High Court in 2 Bom 494,[7] a decision which has since been consistently followed by the High Courts in India. In that case it was decided that according to the Mitakshara, sons must, from the moment of their father's death, be regarded as sole owners of the estate, yet with a liability to provide for the maintenance of their father's widow, and with a competence on the widow's part to have the estate made answerable; the widow has no proprietorship in the estate, but she has an equity to a provision which the Court will enforce to guard her against attempted fraud. In the course of his judgment in that case West J. said (at p. 515):

> The widow's claim being strictly to maintenance and maintenance only, without any defined share in the estate even on partition, and the kind of maintenance even that she can claim being dependent on the perhaps fluctuating circumstances of the joint family, it appears that although she may, at her will, get her claim recognized as chargeable on the estate in the hands of the co-parceners, reduced to certainty, and secured as a specific charge on the estate. . . . yet, if she should refrain from that course in the hope of sharing the improving circumstances of the family or through mere carelessness, she leaves the co-parceners an unlimited estate to deal with at their discretion, and must share their ill as well as their good fortune.

This is a statement of a general principle which applies equally to the right of a Chinese Buddhist widow as to the right of a Hindu widow. The whole of the property vests in the sons of the deceased upon his death, subject to an obligation on their part to maintain their deceased father's widow out of the estate. But this obligation is not in the nature of a charge on the estate, although the widow may by appropriate action before the Courts crystallize it into a charge. Consequently, it cannot be said that the widow of a Chinese Buddhist is a person who is entitled to any part of the deceased's estate, and therefore she does not fall within the provisions of S. 218 (1), Succession Act, and consequently is not entitled to the grant of letters of administration to the deceased's estate. Hence the case in (1938) R L R 249[1] was wrongly decided. The answer to the first question propounded is in the negative, and the second question does not arise. The costs of this reference are assessed at ten gold mohurs to be costs in the appeal in which the reference was made.

Ba U J. — I agree.

Mya Bu J. — I agree in the order proposed by my learned brother Dunkley J. The judgment of the referring Bench of which I was a member is sufficiently indicative of my opinions upon the points involved in the consideration of the questions referred for the decision of the Full Bench. The reasons given in that judgment and fully explained in the judgment of my learned brother confirm the view that the widow of an intestate Chinese Buddhist deceased in Burma, succession to whose estate is governed by the Chinese Customary law, is not entitled to the grant of letters of administration to that estate as against the son of the deceased.

D.S./R.K. *Answered in negative.*

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BRAUND J.

U Thita and another — Plaintiffs.

v.

U Areseinna and others — Defendants.

Civil Regular Suit No. 236 of 1936, Decided on 2nd March 1938.

(a) Buddhist Law (Burmese) — Ecclesiastical law — Poggalika owner of kyaungdike can surrender to original kyaungtagas his power to nominate his successor.

According to the Burmese Buddhist ecclesiastical law which is to be applied by consent of the parties the poggalika owner of kyaungdike is entitled to surrender to the original kyaungtagas the power to nominate his successor as poggalika owner of the kyaungdike. [P 78 C 1]

(b) Transfer of Property Act (1882), S. 5 — There may be 'transfer' by person exercising powers over property of another.

It is within the contemplation of Sec. 5 that there may be a 'transfer' by a person exercising powers over the property of another. Hence it is a case of transfer when the donee of a power of

7. Lakshman Ramchandra Joshi v. Satyabhama Bai, (1877) 2 Bom 494.

appointment, having a power to appoint a beneficial interest in property, exercises that power.

[P 78 C 2]

(c) Buddhist Law (Burmese) — 'Poggalika' ownership of religious property does not amount to full beneficial ownership.

A 'poggalika' owner of religious property stands upon much the same footing as, prior to the Law of Property Act of 1926 and the Settled Land Act of 1926, an English tenant for life of property with a power of appointment over on death stood in relation to settled property, and while there are present some of the incidents of beneficial ownership during his lifetime, they do not amount to full beneficial ownership : *A I R 1918 L B 11 ; A I R 1924 Rang 309 and A I R 1930 Rang 29, Ref.*

[P 79 C 1]

*** (d) Transfer of Property Act (1882), Secs. 122 and 123 — Word 'voluntarily' in Sec. 122 does not mean 'without consideration'—Transmission of kyaungdike effected by nomination or appointment by kyaungtagas, though transfer, does not amount to gift.**

In S. 122 the word 'voluntarily' bears its ordinary popular meaning, denoting the exercise of the unfettered free will and not its technical meaning of 'without consideration': *(1895) 2 Q B 466; (1926) 1 Ch 842 ; (1894) 2 Q B 609 and (1849) 10 Q B 869, Rel. on.* [P 80 C 1]

The transmission of the kyaungdike effected by the 'nomination' or 'appointment' by the kyaungtagas though may be a 'transfer', does not amount to a 'gift'. [P 80 C 2]

(e) Buddhist Law (Burmese) — Ecclesiastical — Religious property becoming Sangika property—Right to appoint presiding monk belongs not to any individual but to Sangha in general.

It is true that the poggalika owner who eventually succeeds becomes ex officio the presiding monk. But what he is appointed to be is poggalika owner and not presiding monk. Moreover, it is accepted as good Burmese Buddhist ecclesiastical law that where religious property has become for whatever reason sanghika property, then the right to appoint the presiding monk belongs not to any individual, but to the Sangha in general.

[P 82 C 1]

Chan Htoon — *for Plaintiffs.*

E Maung — *for Defendants.*

Judgment.— This is a case which raises at the outset an interesting and difficult point. The suit is brought by two pongyis, U Thiha and U Kothala, as plaintiffs for the ejectment of three other pongyis from a kyaungdike called the Athiti Kyaungdike. There are a number of facts which are not, I think, in dispute which can be stated quite briefly. The Athiti Kyaungdike was originally dedicated some 40 years ago by two Burmese gentlemen, Dr. U Nyo and U Ba Nyunt. It was dedicated by them to a rahan named U Paduma as his poggalika property. U Paduma occupied it, as the poggalika owner, for many years until April 1929, when he died. So much is not in dispute. The plaintiffs' story is that shortly prior to his death U Paduma surrendered to the original donors, Dr. U Nyo and U Ba Nyunt, the power to appoint his successor and that in pursuance of that power of appointment, Dr. U Nyo and U Ba Nyunt appointed the two plaintiffs to be the poggalika owners and presiding monks of the Athiti Kyaungdike in succession to U Paduma. To put the rest of the plaintiffs' story shortly, the plaintiffs complain that in October or November 1935, they were virtually ejected from the kyaungdike by the defendants and their followers, or at least intimidated into leaving, and they now claim to be reinstated. That puts the essential parts of the plaintiffs' case in the briefest possible way. The pleadings as they stand raise serious questions of Burmese Buddhist ecclesiastical law in connexion with the right of a poggalika owner to appoint a successor. The course adopted — I venture to think it was a sensible course — was to refer to the thathanabaing such questions of pure Burmese Buddhist ecclesiastical law as emerged from the case, and the parties, very sensibly, upon those issues, agreed to be bound by the edicts of the thathanabaing. The questions referred to the thathanabaing and the answers he has given are set out below. In setting out the answers of the thathanabaing I have set out only what the parties have agreed to be their effect.

Q.— 1. Has the poggalika owner of a kyaungdike any power, according to Burmese Buddhist law, to confer the right to nominate his successor upon the donor of the kyaungdike ?

A.—Yes. He has the right to surrender to the donors the power to appoint his successor as poggalika owner of the kyaungdike.

Q.—2. If so, does the successor so nominated by the donor become the lawful poggalika owner and presiding rahan of the kyaungdike ?

A.—Yes.

Q.—3. Alternatively, does the ownership of the kyaungdike on the death of the original poggalika owner vest in the Sangha at large ?

A.—Yes, if the original poggalika owner has not either himself appointed his successor or conferred the right to appoint a successor on a third party.

Q.—4. If so, does the right to nominate a successor to the original poggalika owner as presiding monk belong to the donor or ought such successor to be elected by the surviving resident rahans of the kyaungdike ?

A.—In view of the answer to (1) above, this does not arise upon this part of this case.

Q.—5. If a successor of the original poggalika owner ought not to be nominated or elected as presiding rahan in any of the above ways, how and by whom ought such successor as presiding rahan to be nominated or elected ?

A. In view of the answers to the previous questions, this does not arise in this case.

It is satisfactory therefore to be in a position to begin the consideration of this case from the agreed starting point that, according to the Burmese Buddhist ecclesiastical law which is to be applied by consent of the parties, U Paduma must be taken to have been entitled to surrender to the original kyaungtagas the power to nominate his successor as poggalika owner of the kyaungdike. That, of course, is the foundation of the plaintiffs' claim. In those circumstances, it appeared to me that three comparatively simple issues arose. They are these :

1. Did U Paduma, before his death, validly confer upon Dr. U Nyo and U Ba Nyunt the right to nominate his successor as the poggalika owner of the Athiti kyaungdike ?

2. If so, did the said Dr. U Nyo and U Ba Nyunt validly exercise the said right to nominate the successor of the said U Paduma as the poggalika owner of the said kyaungdike by appointing the plaintiffs to be the dwithantaka owners of the said kyaungdike ?

3. Is it open to the plaintiffs to prove any such appointment as is mentioned in Issue 2 in view of the prohibitions contained in S. 123, T. P. Act ?

It is obvious that if the third of those issues is to be answered in the negative the case can go no further, because the plaintiffs will be precluded from establishing any title at all to the kyaungdike whether as poggalika owners or as presiding monks and, accordingly, it falls first to consider the third of the three issues which I have settled in this case. And it is that issue which, in view, raises a question which is both important and interesting. The defendants' case, upon this issue, is that, by virtue of S. 123, T. P. Act, the plaintiffs cannot be heard to prove the appointment of the kyaungdike to them. For the defendants say that what is alleged on the face of the pleadings to have happened amounts to a "gift" and S. 123 precludes the proof of any "gift" which has not been effected by a registered instrument. S. 123, T. P. Act, runs thus :

For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

It is clear therefore that, if the transmission of the kyaungdike effected by the "nomination" or "appointment" by the kyaungtagas which is pleaded amounts to a transfer by way of "gift," then it cannot be proved in this suit in the manner in which it is proposed to be proved. And it falls to me to consider whether what has happened amounts to a "gift." That there has been a technical "transfer" I shall for the moment concede, though it has been suggested—and there is a good deal in the suggestion—that this is a case of devolution and not of transfer at all. But I shall concede it, without deciding the point. If, then, it be a "transfer," it is a transfer of a very peculiar character. A "transfer of property" is defined by S. 5, T. P. Act, as being

an act by which a living person conveys property in present or in future, to one or more other living persons. . . .

It is to be particularly noticed that this definition does not require that the "living person" who conveys should necessarily be the same person as he who owns, or owned, the property conveyed. All that is required is that there should be an act of conveyance by some living person. It is therefore to my mind quite clear that it is within the contemplation of S. 5 that there may be a "transfer" by a person exercising powers over the property of another. That is, I think, made still more clear when the definition of "a person competent to transfer," contained in S. 7 of the Act, is taken into account. For, it is there obviously contemplated that a transferor may be a person who is not himself the owner of the property but is merely "authorized to dispose of or transfer property not his own." Instances of that would arise in the case of transfers by agents, guardians, managers of joint Hindu families and so forth. And, in my judgment, it arises equally in a case in which the donee of a power of appointment, having a power to appoint a beneficial interest in property, exercises that power.

I do not want, in this judgment—though I cannot say that I think the Burmese Buddhist law in this respect to be in a very satisfactory condition—to discuss at great length the nature of poggalika ownership. I am not quite satisfied with the position of the law upon this subject as it stands. But it is clear that while a poggalika interest in both religious property (such as a kyaungdike and its site) and in lay property (such as a paddy field) confers upon the poggalika owner certain of the incidents of beneficial ownership such as a right of possession during life, it falls, nevertheless —in the case at any rate, of religious property—far short of full beneficial ownership.

For instance, in the event of a poggalika owner dying without having disposed of the subject-matter of his poggalika ownership in one of the ways in which he is entitled to dispose of it, it passes to the sangha in general. It is not transmissible to his heirs, because a rahan can have no heirs. In the event of a poggalika owner leaving the priesthood, the same effect follows. It is, I think, extremely doubtful if a poggalika owner of a religious property, such as a kyaungdike, can exercise, for his own benefit, such of the ordinary incidents of ownership as the effecting of a lease, mortgage, or sale of the property in question. When I say, "for his own benefit," I mean that I doubt whether he could apply the proceeds beneficially for his own purposes. While it must be conceded that poggalika ownership confers upon the poggalika owner an interest in the property carrying with it a certain degree of beneficial enjoyment during his lifetime, it is equally clear to my mind that it falls short of the interest of a full beneficial owner. I have referred to a number of authorities upon this question. But, I do not want to embark in this judgment upon an exhaustive discussion of them, as I feel it will lead me somewhat away from the main point in this case: *see* May Oung's Leading Cases on Buddhist Law, Second Edn. pp. 194 to 197, 9 L B R 258,[1] 2 Rang 131[2] and 7 Rang 617.[3]

I venture to suggest that a true view of this question may possibly be that a "poggalika" owner of religious property stands upon much the same footing as, prior to the Law of Property Act 1926 and the Settled Land Act of 1926, an English tenant for life of property with a power of appointment over on death stood in relation to settled property and that, while there are present some of the incidents of beneficial ownership during his lifetime, they do not amount to full beneficial ownership. That is in conformity with the view of the law which has been propounded by the thathanabaing and which, for the purposes of this case, I am, by agreement of the parties, bound to accept, namely that it is possible for a poggalika owner, upon his death, to confer upon a third party the power to appoint a successor and that only in default of such appointment is there a remainder to the sangha in general. In my view, in this case, the exercise by the two kyaungtagas of the power conferred upon them—if, in fact, it was so conferred—by U Paduma, falls to be considered upon lines analogous to those of the exercise of an ordinary special power of appointment. As I have pointed out, the act of conveyance must, under Sec. 5, T. P. Act, be the act of a "living" person. In the particular case before me, the act of conveyance was obviously the act of nomination by the two kyaungtagas. It was only upon that "act" that any property passed. The "transfer" cannot have been the act of delegation to them by U Paduma, because upon that no property passed and at the time U Paduma died there had been, of course, no act of conveyance. Accordingly, the only possible act of conveyance to constitute the transfer by a "living" person must be that of the two living donees of the power. To appreciate that, is to my mind of some little importance. It is now possible to consider, somewhat more closely, the question whether what has happened in this case amounts to a "gift" under Sec. 123. In my judgment, it does not. A "gift" is defined by Sec. 122, T. P. Act, in this way:

> "Gift" is the transfer of certain existing moveable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.
>
> Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.
>
> If the donee dies before acceptance, the gift is void.

I have conceded that there is, or may be, here a "transfer" of immovable property by a living person (that is to say, the two kyaungtagas) to the plaintiffs. But the question remains whether the transfer was made "voluntarily and without consideration." Those words require to be very carefully considered. To a lawyer, the word "voluntary" has a peculiar technical meaning. It is applied to such things as "voluntary transfers," "voluntary settlements" and "voluntary dispositions." In those contexts, it has the peculiar and technical meaning of "without consideration." There is no lawyer who sees the words "voluntary settlement" without instinctively taking it to mean "a settlement made without consideration." That however in my view

1. U Zayanta v. U Naga, (1918) 5 A I R L B 11 =45 I C 926=9 L B R 258.
2. U Pandawun v. U Sandima, (1924) 11 A I R Rang 309=83 I C 557=2 Rang 131.
3. U Ahdeiksa v. Ma San Me, (1930) 17 A I R Rang 29=121 I C 787=7 Rang 617.

cannot be the meaning of the word "voluntarily" as used in Sec. 122. The words are, "voluntarily and without consideration" and it is quite clear that in that context "voluntarily" must mean something different from "without consideration," as otherwise it would amount merely to a senseless repetition. I have come to the conclusion that in S. 122, T. P. Act, the word "voluntarily" bears its ordinary popular meaning, denoting the exercise of an unfettered free will and not its technical meaning of 'without consideration."

I have been able to find no Indian authority which touches this point. But I have considerable support by way of analogy from various English authorities which I have been able to discover. In (1895) 2 Q B 466[4] the question of the meaning of the word "voluntarily" arose in connexion with the Customs and Revenue Act of 1881. For reasons no more cogent than those which apply in this case the Court came to the conclusion that the word "voluntarily" was not in that statute used in the sense of "without consideration" but bore its ordinary sense and that sense Lord Russell of Killowen defined as being "freely," "without compulsion," and "not under any obligation." The question was again considered in (1926) 1 Ch 842,[5] where Lord Tomlin observed thus :

> 'Voluntarily' means obviously the doing of something as the result of the free exercise of the will. In (1895) 2 Q B 466,[4] which was a revenue case, Lord Russell, when dealing with the meaning of 'voluntarily' in connexion with a voluntary transfer, said : 'We are however of opinion that in the Section under consideration the word 'voluntarily' is not used in the sense of 'without consideration' but in its ordinary sense of freely, without compulsion and not under any obligation.' So too, I think in this will the phrase is used to refer to an act done as the result of the exercise of the lady's own free will, in circumstances in which there is nothing in the nature of a legal duty or obligation requiring her to take a particular course.

In (1894) 2 Q B 609[6] the meaning of the word "voluntary" came under the consideration of a Court of Appeal consisting of Lord Esher M. R., Kay L. J. and A. L. Smith L. J., in relation to the words "voluntary contributions," and Lord Esher and Kay L. J. there again attributed to the word a meaning implying the exercise of free will : *see too* (1849) 10 Q B 868.[7] I do not mean to imply that these English cases are by any means upon all fours with the present case. They do however assist, first of all, in showing that both in statutes and elsewhere the words "voluntary" and "voluntarily" are susceptible of proper use in their popular sense as distinct from their technical sense and that that popular sense implies that the person whose action is required to be voluntary must be not only free from compulsion and free from any particular obligation or duty but also in possession of the exercise of his free will in the matter.

Applying that to the present case, can it be said that the donee of a mere special power of appointment, in exercising that appointment, does so voluntarily and without consideration ? He certainly does it without consideration. But does he do it voluntarily ? If the power in this case is exercised at all, then it must necessarily be exercised by way of "gift" and in no other way. The power to appoint being a power to appoint by way of gift, then ex hypothesi no choice between a gift and any other mode of disposition is open to the appointer. If he appoints at all, he is under both a duty and an obligation to appoint without consideration and by way of gift. He has no other choice, and, in my judgment, it can no more be said that a man, who is under an obligation to give, makes a gift "voluntarily," than it can be said that a man "voluntarily" walks straight on when he has not the opportunity to turn either to the right or to the left. For those reasons, in my judgment, the appointment, if one was made by the kyaungtagas in favour of the plaintiffs, though it may have been a "transfer," did not amount to a "gift," and accordingly I must proceed to hear this suit upon its facts.

I have already related most of the relevant facts. The two issues which remain before the Court to deal with are, first, the issue whether U Paduma, before his death, validly conferred upon Dr. U Nyo and U Ba Nyunt, the right to nominate his successor as the poggalika owner of the Athiti kyaungdike, and, secondly, whether in fact, if that be so, Dr. U Nyo and U Ba Nyunt did validly appoint the plaintiffs as

4. Attorney-General v. Ellis, (1895) 2 Q B 466=64 L J Q B 813=15 R 584=73 L T 190=44 W R 13=59 J P 774.
5. In re Wilkinson Page v. Public Trustee, (1926) 1 Ch 842=95 L J Ch 528=135 L T 736.
6. Art Union, London v. Overseers of the Savoy, (1894) 2 Q B 609=63 L J Q B 836.
7. Churchwardens of Birmingham v. Shaw, (1849) 10 Q B 868=18 L J M C 89 = 3 New Sess Cas 445=13 Jur 357=74 R R 523.

poggalika owners. As regards the first of those issues, the Court is happily relieved of its tasks, because the parties have, upon the evidence, agreed that it must be accepted that U Paduma did, upon his death-bed, bestow upon Dr. U Nyo and U Ba Nyunt, the original kyaungtagas, the power to appoint his poggalika successor. The only issue therefore that remains is to consider whether in fact, Dr. U Nyo and U Ba Nyunt validly exercised that power in favour of the plaintiffs.

I have heard a good deal of evidence but I do not propose to go through it at great length because it will really be found to turn upon what transpired on 29th July 1931 at the ceremony of dedication which is said to have taken place at which the plaintiffs are alleged to have been installed by Dr. U Nyo and U Ba Nyunt. I may perhaps remind myself that U Paduma had died in April 1929 and that the alleged installation of the plaintiffs as poggalika owners did not take place until July 1931. A period therefore of something over two years elasped. During that time the present plaintiffs were not in regular residence in the kyaungdike and I find as a fact upon the evidence that a rahan named U Pyinnyathami who was an old resident of the kyuhgdike acted as the presiding monk. I think I am right in saying that he died. I mention this only because it has struck me as curious that, if the power conveyed to Dr. U Nyo and U Ba Nyunt by U Paduma on the death-bed was to be exercised, there should have been a delay of over two years in doing so. But as I said, the matter really turns upon what happened on 29th July 1931. There is a great deal of evidence about this, most of which is extremely vague. But if one thing is more certain than another, it is that the two persons who are best qualified to say whether they dedicated the property in pursuance of the power or not and, if they did dedicate it, in what form they dedicated it, are the donees of the power themselves—Dr. U Nyo and U Ba Nyunt. It is fortunate that both these gentlemen are still alive and have been available to give their evidence. If I have to criticize the evidence of either of them upon the ground that it is not consistent with the evidence of the other, I must not be taken as inferring that I doubt for a moment but that each of them did his best to assist the Court according to his recollection. The fact is that they did give conflicting accounts of this dedication. U Ba Nyunt gives this account which I give verbatim. He was asked :

Q. — "Did you tell them that they were to remain in tava kalika form ?"

A.—"Yes."

Q.—"When you spoke of a dedication did you mean that the two plaintiffs were installed in tava kalika form ?"

A.—"Yes."

Q.—"Did you make the plaintiffs dwithantaka owners ?"

A. — "Yes. We made them dwithantaka in tava kalika form, i. e. joint temporary holders."

The evidence of Dr. U Nyo on the other hand is quite different. I shall give the relevant passage from his evidence also verbatim. He was asked :

Q. — "How did you dedicate the kyaung to them ?"

A.—"According to the custom of our father we dedicated the kyaung to them as sanghika."

Q.—"Do you know what poggalika property is?"

A.—"Yes."

Q.—"Did you dedicate it as pogalika property?"

A.—"No. As sanghika."

Q.—"Did you dedicate the kyaungas ?"

A.—"For the general use of the sanghas."

Q.—"Did you dedicate the kyaung to these two pongyis only or to the sangha in general ?"

A.—"To all the sanghas with the two of them as heads."

Q. — "Do you know what dwithanka property is ?"

A.—"No."

Q.—"Do you remember doing the dedication ?"

A.—"Yes."

Q.—"You said something in company with U Ba Nyunt ?"

A.—"Yes."

Q.—"Is there any written record of what you said ?"

A.—"No."

Q.—"Can you remember what you said at the dedication ?"

A.—"Yes. I said that I was going to dedicate this kyaungdike following the custom of our fathers as sanghika."

That, of course, is as explicit as anything can well be and it is quite obvious that Dr. U Nyo is familiar with what sanghika property is. I make a general comment upon the other evidence that it is, to my mind, vague and I must necessarily be guided principally by the evidence of the two men whose act it is that we are considering in this case. Dr. U Nyo and U Ba Nyunt are obviously the two persons best able to tell me what they did. Unfortunately, they are not in agreement upon the

matter and it is, of course, a more than possible explanation that one of them had one thing in his mind and the other had another thing in his mind at the time. Now, the power vested in Dr. U Nyo and U Ba Nyunt was, as I have already said in my judgment, in the nature of a special power of appointment. It is clear from the answers that the Thathanabaing has given that the power which a poggalika owner has is a power either himself to nominate his poggalika successor or to invest someone else with a power to appoint his poggalika successor for him and I desire particularly to point out that what is done by the deceased owner in the first case or is to be done by the donee of the power in the other case, is to appoint another poggalika owner and not merely to appoint a presiding monk. It is true that the poggalika owner who eventually succeeds becomes ex officio the presiding monk. But what he is appointed to be is poggalika owner and not presiding monk. Moreover, it is accepted as good Burmese Buddhist ecclesiastical law and is confirmed by the fourth answer given by the Thathanabaing that where religious property has become for whatever reason sanghika property, then the right to appoint the presiding monk belongs, not to any individual, but to the Sangha in general.

In these circumstances we have to consider what the position is. The power which was vested in Dr. U Nyo and U Ba Nyunt was a special power to make the appointment of a poggalika owner to succeed U Paduma and nothing else. It is elementary that if a power is to be validly exercised both the terms of the power must be strictly complied with and the objects in whose favour it is exercised must be strictly defined. In my judgment, I am unable to find in the accounts which have been given by U Ba Nyunt and Dr. U Nyo a valid exercise of the special and particular power which was vested in them. In the first place, according to their own accounts, they were not even agreed in the matter. If I reject the story of one of them and accept the story of the other, then in neither case would it, I think, be a strict exercise of their power. If I accept U Ba Nyunt's version, then the appointment was not of a poggalika owner but of a tava kalika or temporary incumbent. If I accept the version of Dr. U Nyo, then the appointment was not an appointment of a poggalika owner. The power was a "joint" power and upon no footing was it exercised jointly, for one made one appointment and the other made another. I have come to the conclusion, not without reluctance, that I must hold in this case that the exercise of the power was wholly defective. Mr. Chan Htoon who, if I may say so, has said everything that can be said on behalf of his clients, has argued with force that even if this appointment were to fail as a poggalika appointment it ought to take effect as an appointment of presiding monks. But I cannot accept that because if there be a failure of appointment to poggalika ownership in succession to U Paduma, then the kyaungdike must have become sanghika property and, in that event, as I have already pointed out, the appointment of presiding monks would rest not with the nominees of U Paduma at all but with the Sanghas in general. And that, too, is in accordance with the opinion of the Thathanabaing.

The defendants in this case are in possession of the kyaung and accordingly, the onus lay upon the plaintiffs of establishing in themselves a title sufficient to displace the prima facie right of the defendants by virtue of their possession. I am, for the reasons I have given, unable in this case to find that the plaintiffs have established a title in themselves as poggalika owners or otherwise and accordingly, I am not able to make an order for possession of the kyaungdike in their favour or for ejecting the defendants. The suit therefore must fall to be dismissed. No order for costs is asked for.

D.S./R.K. *Suit dismissed.*

*** A. I. R. 1939 Rangoon 82**

DUNKLEY J.

Ma Hla Yon and another — Appellants.

v.

Maung Tun Yin and another — Respondents.

Second Appeal No. 281 of 1937, Decided on 11th March 1938, from decree of Dist. Court, Hanthawaddy, D/- 13th September 1937.

*** Civil P. C. (1908), O. 21, R. 16, Proviso 2 —Decree for money against two or more judgment-debtors—One of them dying — His legal representative is not judgment-debtor against whom decree for payment of money has been**

passed—If such person is transferee of decree, he can execute it against remaining judgment-debtors.

Where a decree for money has been passed against two or more judgment-debtors and one of them dies, his legal representative does not become a judgment-debtor and certainly not a judgment-debtor against whom a decree for the payment of money has been passed within the meaning of O. 21, Rule 16, Proviso 2. Hence, if the legal representative is interested in the decree as a transferee he is entitled to execute the decree against the rest of the judgment-debtors : *31 Bom 308 and A I R 1932 All 704, Rel. on ; A I R 1926 Mad 1141, Disting.* [P 84 C 1]

Basu and Rajagopaul — *for Appellants.*

E. Hay — *for Respondent No. 1.*

Judgment. — This second appeal arises out of somewhat complicated facts. The A. R. S. A. Chettyar Firm obtained a decree in suit No. 45 of 1933 of the Sub-Divisional Court of Twante, on a promissory note against four persons, Maung Shwe Wa and his wife Ma Hla Yon, and Maung Shwe Yaung and his wife Ma Ywet. All these persons are now dead, except Ma Hla Yon who is appellant 1. Ma Nyi Ma Gyi, appellant 2, is a daughter of Maung Shwe Wa and Ma Hla Yon. Maung Nyo, respondent 2, is a son of Ma Hla Yon. He has taken no active part in the proceedings. Maung Tun Yin, respondent 1, is the husband of Ma Kyin May, who is the adopted daughter of Ma Ywet. The original decree against these four persons was a decree for the payment of money by these four persons jointly and severally. On 5th May 1934, Ma Ywet made a gift of 300 acres of land to her daughter, Ma Kyin May. Subsequently Ma Kyin May and her husband, Maung Tun Yin, mortgaged part of these gifted lands to the A. R. S. A. Firm for a sum of Rs. 1500, and then for this sum, plus a further sum of Rs. 1700, the decree obtained in Suit No. 45 of 1933 was transferred by the A. R. S. A. Firm to Maung Tun Yin alone. Maung Tun Yin was substituted as the decree-holder in place of the A. R. S. A. Firm, under the provisions of O. 21, R. 16, Civil P. C., and proceeded to execute the decree against the two appellants and respondent 2. Objection has been taken by the appellants to this application for execution, and, so far as this second appeal is concerned, reliance is placed solely on Proviso 2 to R. 16, O. 21. This is in the following terms :

Provided also that, where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others.

It is urged on behalf of the appellants that, although the transfer of the decree was taken in the name of Maung Tun Yin only, Ma Kyin May also became interested in this decree by reason of the transfer (her interest in the decree as joint transferee remaining to be ascertained), and, relying on the judgment in 5 All 27,[1] it is urged that to the extent of Ma Kyin May's interest in the decree, it cannot be executed by reason of Proviso 2 to R. 16. It is admitted on behalf of respondent 1 that Ma Kyin May is to a certain extent interested in the decree, although the transfer was taken in the name of her husband alone; but it is contended that Proviso 2 to R. 16 has no application in this case. The argument on behalf of the appellants is that Ma Kyin May is also a judgment-debtor, because she is the daughter and heir of the deceased judgment-debtor, Ma Ywet, and therefore became a judgment-debtor as the legal representative of Ma Ywet. The authority for the proposition that, when a person is the legal representative of a deceased judgment-debtor and at the same time is interested in the decree as decree-holder, that person is unable to execute the decree is 51 M L J 443.[2] But, to my mind, this case can be distinguished because, as it appears from the judgment (at p. 446), it was admitted in argument that the legal representative of a judgment-debtor is in effect the judgment-debtor himself. This admission was, in my opinion, wrongly made, and is contrary to law, so far as Proviso 2 to R. 16 is concerned, because this Proviso is concerned solely with a decree for the payment of money against two or more persons, and there can be no decree for the payment of money against the legal representative of a deceased judgment-debtor.

The liability of such a legal representative is enacted in the provisions of S. 50, Civil P. C., and all that this Section states is that where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased, and, further, such a legal representative is liable only to the extent of the property

1. Banarsi Das v. Maharani Kuar, (1882) 5 All 27=1882 A W N 140.

2. Muhammad Abdul Kadir v. Abdul Kadir, (1926) 13 A I R Mad 1141 = 98 I C 26 = 51 M L J 443.

of the deceased which has come to his hands and has not been duly disposed of. The legal representative therefore does not become a judgment-debtor, and certainly not a judgment-debtor against whom a decree for the payment of money has been passed. This is the view which has been taken by the Bombay High Court in 31 Bom 308[3] and the Allahabad High Court in 54 All 448,[4] with which decisions I respectfully agree. In my opinion, Ma Kyin May is not a person against whom there is a decree for the payment of money within the meaning of Proviso 2 to R. 16, O. 21, Civil P. C., and consequently, I hold that, as the transferees of the decree, Maung Tun Yin and Ma Kyin May are entitled to execute the decree against the appellants. This appeal therefore fails and is dismissed with costs, advocate's fee three gold mohurs.

D.S./R.K. *Appeal dismissed.*

3. Panachand Pomaji v. Sundrabai, (1907) 31 Bom 308 = 9 Bom L R 409.

4. Asia Bibi v. Malik Azir Ahmad, (1932) 19 A I R All 704=137 I C 50=54 All 448=1932 A L J 230.

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* A. I. R. 1939 Rangoon 84

ROBERTS C. J. AND DUNKLEY J.

A. K. A. C. T. A. L. Chettyar — Appellant.

v.

A. K. R. M. M. K. Firm and others — Respondents.

First Appeal No. 92 of 1937, Decided on 9th February 1938, from Judgment of High Court in O. S. C. R. Suit No. 50 of 1937.

(a) Contract Act (1872), Sec. 51 — Promisee agreeing to reduce rate of interest provided promisors pay it regularly and pay principal within certain time — Promisors prevented from performing their part of agreement within time by promisee's persistent refusal to be bound by agreement — Promisors are entitled to reasonable time to perform their part of agreement.

Where by an agreement with the promisors the promisee has agreed to reduce the rate of interest, provided that the promisors pay it regularly once a year and pay the principal within certain time, the promisee cannot be heard to say that the promisors have committed breach of the agreement if by the persistent refusal of the promisee to be bound by the agreement the promisors are prevented from carrying out their part of the agreement within time. Hence the promisors are entitled to reasonable time to perform their part after promisee has performed his part of the agreement. [P 85 C 2]

*** (b) Contract Act (1872), S. 63—Remission or dispensation of whole or part of promise by promisee does not require to be supported by consideration.**

A dispensation or a remission by a promisee of the performance of the whole or any part of the promise made to him does not require to be supported by consideration and there need not be a proposal of the dispensation or remission which is accepted. Hence where a promissory note is executed by some persons, one of them is entitled to take advantage of the remission by the promisee of part performance of the contract contained in the promissory note although he is not a party to the agreement embodying the remission : *A I R 1928 P C 99, Rel. on; A I R 1928 Rang 144, held not good law.* [P 86 C 2]

K. C. Bose — *for Appellant.*

Clark & Chakravarti & K. C. Sanyal — *for Respondents 1 & 2 & 3 respectively.*

Dunkley J.—The suit out of which this appeal arises was brought by the plaintiff-appellant against the defendants-respondents on a mortgage by deposit of title deeds. The suit was filed on 18th February 1937. The plaint set out that the defendants-respondents had borrowed a sum of Rs. 30,000 and executed a promissory note therefor and at the same time, had deposited certain documents of title with the plaintiff-appellant as security on 19th May 1931, and that the rate of interest mentioned in the promissory note was 1½ annas above the Rangoon Chettyars' current rate of interest, per cent. per mensem. Various repayments of principal, which have been made at different times, were set out, and the balance, namely Rs. 20,871-14-0 (Rs. 13,858-10-0 principal and Rs. 7013-4-0 interest), less a payment on account of Rs. 6000 made on 4th January 1937, was claimed, and a preliminary mortgage decree for the sale of the mortgaged property was asked for. In para. 8 of the plaint, it was stated that on 11th November 1934 the plaintiff-appellant and defendant-respondents 1 and 2 had entered into an agreement that the rate of interest should be reduced to the Chettyars' current rate as from 15th February 1933, provided that payment of interest at this rate was made in full and regularly once a year and the principal was repaid in full within two years. It was averred that respondents 1 and 2 had committed breaches of this agreement in that, up to the time when the suit was brought, they had paid neither the interest nor the principal, and that therefore the plaintiff-appellant was entitled to claim interest from them at the rate stipulated in the promissory note. Respondent 3

did not appear in the original Court, although there has been appearance on his behalf in this Court and the suit was heard ex parte against him.

In defence respondents 1 and 2 admitted all the facts, except that they denied that they had committed any breach of the agreement of 11th November 1934 and contended that they were liable to pay interest only at the lower rate provided for in the agreement. They alleged that they had been prevented from paying the interest each year, and from paying the principal at the end of two years, that is, from carrying out their part of the agreement, by the conduct of the appellant. The agreement of 11th November 1934 had reference to other matters as well as to the mortgage now in suit. The first five paragraphs referred to the compromise of two suits between the appellant and respondents 1 and 2 then pending in this Court. According to this part of the agreement, the appellant was to accept certain transfers of immovable property from respondents 1 and 2 and certain cash payments and was then to certify to the Court that the suits had been settled outside the Court, and to obtain orders, in one case that the decree was fully satisfied, and in the other case that the suit was dismissed. Paras. 6 and 10 of the agreement deal with the settlement of the mortgage now in suit and in these paragraphs the appellant agreed to accept payment at the reduced rate of interest if interest was paid annually in full and the principal was paid within two years.

This agreement was exhibited by respondents 1 and 2 in Court soon after its execution, in connexion with the two suits aforementioned, and the appellant strenuously objected that it was not binding on him on various grounds. The matter was taken on appeal to this Bench, and by our judgments of 7th December 1936, we held that it was binding on the parties, and only on these judgments being delivered did the appellant give way and implement that part of the agreement referring to the two pending suits. By that time, not only was interest on the present mortgage overdue for more than two years, but the date under the agreement for the repayment of the principal was past.

We accept the contention advanced on behalf of respondents 1 and 2 that it was useless for them to attempt to carry out their part of the agreement while the appellant was contending that the whole agreement was voidable and not binding on him. No doubt, in regard to that part of the agreement which refers to this mortgage, time was of the essence of the contract, but respondents 1 and 2 were prevented by the appellant's persistent refusal to be bound by the agreement from carrying out their part thereof within time. Therefore the appellant cannot now be heard to say that respondents 1 and 2 have committed a breach of the agreement because they have not performed their part within the time allowed. Clearly, respondents 1 and 2 were entitled to a reasonable time to perform their part after the judgments of 7th December 1936 had been delivered. S. 51, Contract Act, is applicable. It is in the following terms:

> When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Respondents 1 and 2 could be called upon to perform their part of the agreement only if the appellant had been ready and willing to perform his promise in regard to the two suits. He was not so ready and willing; in fact he contended that in law he was not required to perform his promise. Mr. Bose, for the appellant, argues that the clauses of this agreement are separable and that that part of the agreement referring to the two pending suits ought to be considered independently from that part referring to the mortgage now in suit, but this is a contention with which we cannot agree. It is clear that the agreement is a single indivisible agreement for the settlement of all the outstanding claims between the appellant and respondents 1 and 2, and must be read as a whole. We are given to understand that since the judgments of 7th December 1936, the appellant has performed his promise. That was after the time for performance of their promise by respondents 1 and 2 has passed. Respondents 1 and 2 are therefore entitled to a reasonable time after these judgments in which to perform their promise. We accordingly agree with the learned Judge on the Original Side that respondents 1 and 2 are still entitled to rely upon the agreement of 11th November 1934 in respect of the interest payable on the mortgage now in suit.

As regards respondent 3, it is now urged on behalf of the appellant that respondent 3 was not a party to the agreement of 11th November 1934, and that therefore he is not entitled to rely upon that agreement and must pay interest at the rate mentioned in the promissory note which has never been varied so far as he is concerned. But para. 6 of the agreement mentions respondent 3 by name, and it is clear that the appellant agreed by this paragraph to accept a lesser rate of interest in repayment of the amount due on the promissory note, and that this remission or dispensation of performance referred to all the persons liable on the promissory note, and therefore to respondent 3 also. It is urged that so far as respondent 3 is concerned there was no consideration for this agreement to accept a lesser rate of interest. In 6 Rang 191[1] it was decided that a bare agreement to take less than what is due on a monetary claim (without any actual payment being made) or merely to give time for such payment, is void without consideration, but in view of the subsequent judgment of their Lordships of the Privy Council in 55 I A 154[2] at p. 160 it must be held that the decision in *Maung Pu's case*[1] does not correctly state the law. S. 63, Contract Act, is in the following terms:

> Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

In 55 I A 154,[2] referring to this Section, their Lordships said:

> In 28 Bom 66,[3] Jenkins C. J. dealt with S. 63, and held that the promisee mentioned in S. 63 can only do the acts he is by that Section empowered to do, if there be an agreement as defined by S. 2 (e) amongst the parties to that effect. The learned Chief Justice is reported to have expressed himself thus: 'Therefore we hold that, assuming that there was a legal resolution, and that it was communicated as alleged, still, inasmuch as a dispensation or remission under S. 63 requires an agreement or contract, the resolution was of no legal effect since the provisions of S. 30, Bombay Act 2 of 1884, have not been observed.' With this their Lordships are unable to agree. The language of the Section does not refer to any such agreement and ought not to be enlarged by any implication of English doctrines.

1. Maung Pu v. Maung Po Thant, (1928) 15 A I R Rang 144=110 I C 612=6 Rang 191.
2. Chunna Mal Ram Nath v. Mool Chand Ram Bhagat, (1928) 15 A I R P C 99=108 I C 678 =55 I A 154=9 Lah 510 (P C).
3. Abaji Sitaram Modak v. Trimbak Municipality, (1904) 28 Bom 66=5 Bom L R 689.

Consequently, it appears from this decision that a dispensation or a remission by a promisee of the performance of the whole or any part of a promise made to him does not require to be supported by consideration, and there need not be a proposal of the dispensation or remission which is accepted. Hence, in view of the provisions of this Section, respondent 3 is entitled to take advantage of the remission by the appellant of part performance of the contract contained in the promissory note, which remission is embodied in para. 6 of the agreement, although he is not a party to that agreement. The judgment appealed from is therefore correct except in one particular. It is admitted on behalf of the respondent that, in accordance with the ordinary practice, interest at the current Chettyar rate on the amount due on the mortgage should be allowed to run, not up to the date of the decree, but up to the date of realization. The decree will be amended accordingly. Subject to this uncontested and minor amendment of the decree of the Original Side, the appeal fails and is dismissed with costs, advocate's fee twenty gold mohurs for respondents 1 and 2 jointly and five gold mohurs for respondent 3.

Roberts C. J.—I agree. As regards the position of respondent 3, I was first inclined to entertain some doubt, for reason of the well-known English rule that a stranger to a contract cannot sue upon it for his benefit, but it now seems clear that, by reason of the rule laid down in 55 I A 154[2] the conclusion reached by my learned brother in respect of this respondent is correct and I therefore concur in the judgment which he has delivered.

D.S./R.K. *Decree amended.*

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MYA BU J.

Ma Pwa Kywe — Appellant.

v.

Maung Hmat Gyi — Respondent.

Second Appeal No. 291 of 1937, Decided on 21st February 1938, from decree of Asst. Dist. Court, Tharrawaddy, D/- 19th July 1937.

Contract — Breach — Burma Buddhist girl under eighteen years getting promise of a person to marry her—Breach of promise cannot be basis for action for damages.

The technical use of the word "promise" in the Contract Act is far narrower than the popular use. Express words of promise often are in law no more than a proposal. A proposal is merely an offer to be bound by a promise and a promise in law is an accepted proposal. It is such promise or promises only which can give rise to an agreement which if enforceable by law is a contract but if not, is a void agreement: *13 Bom 669, Rel. on.* [P 87 C 2 ; P 88 C 1]

A Burman Buddhist who is under the age of eighteen is not competent to enter into a valid or binding contract to marry in futuro, and the Burmese Buddhist law has no application in such a case. This proposition is applicable as well to a case where the promisor is a major and the promisee is a minor, for a marriage is a matter to which there must be two parties and there cannot be a valid contract to marry unless there are reciprocal promises between them amounting to an agreement to marry in futuro. Hence where a Burman Buddhist girl under eighteen has been promised by a person to accept her in marriage, the breach of the promise cannot be the basis of an action for damages for breach of promise: *A I R 1936 Rang 212, Applied.* [P 87 C 2 ; P 88 C 1]

Zakaria — *for Appellant.*

K. C. Sanyal — *for Respondent.*

Judgment. — This appeal arises out of a suit for compensation for breach of promise to marry. The plaintiff, Ma Pwa Kywe succeeded in getting a decree for compensation in the sum of Rs. 50 in the Township Court of Nattalin, which has found the following facts proved, namely that the plaintiff and the defendant, Maung Hmat Gyi, having fallen in love with each other, the defendant in the month of Wagaung 1298 B. E. (August 1936) promised to marry the plaintiff in the following Tabodwe (January 1937) and in the month of Tawthalin 1298 B. E. (October 1936) the defendant seduced the plaintiff with the result that the plaintiff found herself in the family way. The marriage alleged to have been promised did not take place in Tabodwe or at any time as the defendant subsequently refused to marry the plaintiff. In the written statement no question as to the validity of the alleged promise by reason of want of contractual capacity in either the plaintiff or the defendant was raised. It, however, transpired in the course of the plaintiff's evidence that she was still in her minority according to the Majority Act at the time of the alleged promise. But, apparently, the learned Township Judge's attention was not invited to this matter, with the result that the point was not discussed in the judgment of the Township Judge. Nor was this point raised in the grounds of appeal filed by the defendant in the lower Appellate Court; but the point was pressed on behalf of the defendant in the course of the argument in support of the appeal in the Assistant District Court.

The fact that the plaintiff was still in minority at the time of the alleged promise admitted of no doubt because the plaintiff, Ma Pwa Kywe, stated under cross-examination in the trial Court, that she was born in the month of Nadaw 1280 B. E., which shows that she was about four months short of 18 years in Wagaung 1298 B. E. Relying upon this fact the learned Assistant District Judge held that there was no valid contract between the parties which could have constituted the basis of a claim for compensation for its breach. This conclusion was arrived at on the authority of the Full Bench decision in 14 Rang 215[1] in which it was held inter alia, that a Burman Buddhist who is under the age of eighteen is not competent to enter into a valid or binding contract to marry in futuro, and the Burmese Buddhist law has no application in such a case. That case was one in which the alleged promisor was a minor at the time of the making of the alleged promise; but considering the line of reasoning leading to that decision I have no doubt that the proposition that a Burman Buddhist who is under the age of eighteen is not competent to enter into a valid or binding contract to marry in futuro, is applicable as well to a case where the promisor is a major and the promisee is a minor, for a marriage is a matter to which there must be two parties and there cannot be a valid contract to marry unless there are reciprocal promises between them amounting to an agreement to marry in futuro. The technical use of the word "promise" in the Contract Act is far narrower than the popular use. Express words of promise often are in law no more than a proposal: *see* 13 Bom 669.[2] "Proposal" is defined in S. 2 (a) of the Act thus :

When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.

Clause (b) of the same Section provides :

When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise.

1. Maung Tun Aung v. Ma E Kyi, (1936) 23 A I R Rang 212=162 I C 560=14 Rang 215 (F B).
2. Dhonbhat Narharbhat v. Atmaram Moreshwar, (1889) 13 Bom 669.

Then by Cl. (e) it is provided :

Every promise and every set of promises, forming the consideration for each other, is an agreement.

According to Cls. (g) and (h) an agreement not enforceable by law is void, while an agreement enforceable by law is a contract. According to these definitions a proposal is merely an offer to be bound by a promise and a promise in law is an accepted proposal. It is such promise or promises only which can give rise to an agreement which if enforceable by law is a contract, but if not, is a void agreement. Agreements to be contracts must have been made by the free consent of parties competent to contract for a lawful consideration and with the lawful object, and must not be such as to be expressly declared to be void by the Contract Act (Sec. 10). Every person is competent to contract who is of the age of majority according to the law to which he is subject (S. 11). The law to which he is subject is held to be the Majority Act, i. e., 14 Rang 215.[1] Judged in the light of these principles, there can be no doubt that the alleged promise upon the breach of which the plaintiff's suit was founded did not constitute a contract upon which an action for damage of breach can be based. The plaintiff (the girl) being a minor was not competent to enter into a contract at the time of the alleged promise. She was incompetent at that time to make a valid acceptance of the proposal by the defendant to marry her. The alleged promise was no better than an unaccepted proposal. In one of the grounds of appeal filed in this Court it was alleged that although at the time of the original promise the girl was in minority, she had attained majority at the time of the second promise, which is alleged in the plaint, and that therefore there was a valid acceptance by the plaintiff of the defendant's proposal. The statement in the plaint referred to runs thus :

In the month of Pyatho, that is about five months after the making of the original promise, when the defendant was asked with reference to the proposed marriage he repeated that he would marry in the following month of Tabodwe.

This was not specifically put forward as an occasion on which a ratification took place and nothing was heard of it in the course of the proceedings subsequent to the filing of the plaint. What Ma Pan Myaing, the plaintiff's mother, stated was that in the month of Pyatho she questioned the defendant if he was going to marry her daughter, but there is not a word about either what the defendant said or what the plaintiff said on that occasion. Be that as it may, as a minor's agreement is void there can be no question of ratifying it. The action is based on contract, and it is not an action for damages for seduction. The question whether any action for damages for seduction will lie or not does not arise in this case. The suit is founded upon contract; in order to succeed it is incumbent upon the plaintiff to prove a valid contract. If she proves a valid contract and a breach thereof and thus shows herself entitled to compensation for breach of contract, seduction and pregnancy may be taken into consideration in the assessment of the quantum of damages. Since no valid contract took place between the plaintiff and the defendant this suit fails, and it has been rightly dismissed by the lower Appellate Court. The appeal is dismissed. In the circumstances of the case I make no order for costs in this appeal.

D.S./R.K. *Appeal dismissed.*

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* A. I. R. 1939 Rangoon 88

MACKNEY J.

Maung Ba Gon — Applicant.

v.

The King.

Criminal Misc. Appln. No. 6 of 1938, Decided on 8th March 1938, for transfer of case.

*** Criminal P. C. (1898), S. 526—Mere fact that complaint has been filed by Deputy Commissioner of District is no ground for transfer of case to another district—Such case however should be tried by Magistrate belonging to judicial and not to executive service.**

The mere fact alone that it is the Deputy Commissioner who has laid the complaint does not afford a reasonable ground for apprehension in the mind of any person that he will not receive a fair trial in the district of the Deputy Commissioner. In order to obtain transfer to other district, he must further show that the Subordinate Magistrates in the district in which the case is being tried are in awe of the Deputy Commissioner and look upon him as a person who must on no account be crossed. However, cases of this nature which have been instituted by the Deputy Commissioner or District Magistrate of a district, should not be tried by the Magistrate who is in such immediate touch with the Deputy Commissioner or District Magistrate as is the Headquarters Magistrate of the district. Where there are Magistrates who are not executive officers, it is desirable that they should be chosen to try such cases. It cannot be denied that an accused person might feel

some apprehension that a subordinate executive officer might be unduly influenced by the expressed opinion of the Deputy Commissioner, and might be ready to pay too much deference to that opinion and might even be inclined to follow it in preference to his own. Such an apprehension could scarcely exist in regard to a Magistrate who belongs to the judicial service, and is in no likelihood of being unduly impressed by the authority of the executive head of the district. [P 89 C 2; P 90 C 1]

C. H. Campagnac — *for Applicant.*
S. B. Leong — *for Accused 1.*
Tun Byu, Government Advocate — *for the Crown.*

Order.—This is an application for transfer of a case in which Maung Ba Gon, a broker, and Maung Ba Mya, a Guard Writer of Sitkwin Police Station, are being prosecuted on the complaint of the Deputy Commissioner of Tharrawaddy District for alleged offences under Ss. 161 and 161/109, Penal Code. The proceedings were instituted by one Maung Po Mya on 8th November 1937 who filed a petition before the Deputy Commissioner setting forth the alleged facts. The offence complained of is said to have taken place on 22nd May 1937. There has been litigation in regard to the matter in the Court of the Second Additional Magistrate, Minhla. That case was decided on 23rd August 1937, but the order of the Magistrate was revised by this Court on 10th November 1937 and a re-trial was ordered. Maung Po Mya was one of the original accused in that case. On the retrial however he was not made an accused person. Possibly, the delay which ensued in the filing of Po Mya's petition had some connexion with this litigation. The Deputy Commissioner, after himself making enquiry and causing the Subdivisional Magistrate, Tharrawaddy, to make enquiry, came to the conclusion that there was some substance in the report. The report originally implicated only Maung Ba Mya, a Guard Writer, but when the witnesses were examined, it appears that Maung Ba Gon had abetted the offence.

The Deputy Commissioner, feeling that Maung Ba Mya was the principal offender and Maung Ba Gon's part was not of a very reprehensible character, suggested to Ba Gon that he should give evidence in the case, presumably as an approver. This suggestion Maung Ba Gon apparently rejected with scorn and he was accordingly included with Maung Ba Mya in the complaint which the Deputy Commissioner made before the Headquarters Magistrate of Tharrawaddy. Some of the witnesses in the case are village officials. The applicant, presumably an intelligent person wants the Court to believe that he thinks that the power of the Deputy Commissioner of the district is so great that all the subordinate officials bow in terror before him and hasten to comply with his slightest wish. I cannot believe that any intelligent person in these days has any such idea whatsoever. For these alleged reasons Maung Ba Gon thinks that he will not get a fair trial unless the case is tried outside the district. No particular reasons are advanced why in this special case the fact that the Deputy Commissioner has laid a complaint should affect the mind of the Magistrate who was trying the case, and the mere fact alone that it is the Deputy Commissioner who has laid the complaint does not afford a reasonable ground for apprehension in the mind of any person that he will not receive a fair trial in the district of the Deputy Commissioner. He must further show that the Subordinate Magistrates in that district are in awe of the Deputy Commissioner and look upon him as a person who must on no account be crossed.

I am further unable to see that the fact that the witnesses are village officials or relations of village officials would be mitigated in any way by the trial of the case in another district. It is alleged that the headman and the ten house goung are taking a great interest in the case and will be able to influence the witnesses against the applicant. How this ability to influence the witnesses will be at all affected by the trial of the case in another district, I cannot understand. It appears to me that the application for transfer of the case to another district is entirely frivolous and I am sorry that such applications should continue to be made in this Court. I do however think that in cases of this nature which have been instituted by the Deputy Commissioner or District Magistrate of a district, should not be tried by the Magistrate who is in such immediate touch with the Deputy Commissioner or District Magistrate as is the Headquarters Magistrate of the district. Where there are Magistrates who are not executive officers, it appears to me desirable that they should be chosen to try such cases. It cannot be denied that an accused person might feel some apprehension that a subordinate executive officer might be unduly influenced by the

expressed opinion of the Deputy Commissioner, and might be ready to pay too much deference to that opinion and might even be inclined to follow it in preference to his own. Such an apprehension could scarcely exist in regard to a Magistrate who belongs to the judicial service, and is in no likelihood of being unduly impressed by the authority of the executive head of the district.

I therefore direct that this case, being Criminal Regular Trial No. 5 of 1938 of the Court of the Headquarters Magistrate of Tharrawaddy, be transferred to the Court of the Additional Magistrate of Tharrawaddy who is also the Subdivisional Judge of Tharrawaddy and Zigon, for disposal in accordance with law.

D.S./R.K. *Order accordingly.*

*** A. I. R. 1939 Rangoon 90**

ROBERTS C. J. AND MOSELY J.

S. M. R. M. Venkatachalam Chettyar — Appellant.

v.

P. L. A. R. M. Firm and others — Respondents.

Letters Patent Appeal No. 7 of 1938, Decided on 22nd November 1938, from Judgment of Mackney J. in S. A. No. 261 of 1937, D/- 16th March 1938.

*** Specific Relief Act (1877), S. 31 — Mortgagor in satisfaction of mortgage debt conveying by registered sale deed mortgaged property to mortgagee — Certain property misdescribed in deed by error — Mortgagee is entitled to decree for rectification against judgment-creditor of mortgagor who has subsequently purchased property in execution of his decree.**

As a court-purchaser is bound by estoppels which affect his judgment-debtor, all the more must he be bound by an obligation binding the judgment-debtor to make a valid conveyance of property which the judgment-debtor has admittedly intended to convey but has not so conveyed in law by error. Hence, where a mortgagor in satisfaction of the mortgage debt has conveyed by a registered deed of sale the mortgaged property to the mortgagee but certain property is misdescribed by error in the deed, the mortgagee is entitled to a decree for rectification of the deed as against the judgment-creditor of the mortgagor who has subsequently attached the property and purchased it in execution of his decree against the mortgagor : *22 Cal 909 (P C); 10 C L J 150 and A I R 1923 Cal 53, Rel. on; Case law referred.*

[P 91 C 1; P 92 C 2]

Surridge — *for Appellant.*

P. K. Basu — *for Respondent 1.*

Roberts C. J.—This is a Letters Patent appeal from the judgment of Mackney J. who set aside the finding and decree of the District Court of Bassein and restored the decree of the Township Court of Kyaunggon in favour of the first respondents, P. L. A. R. M. Firm. The short question is whether these respondents are entitled to rectification of a conveyance of certain property dated 21st October 1933 and made by way of satisfaction of a mortgage debt by Ma U Ma, the predecessor-in-title of the second, third and fourth respondents. One of the items sought to be conveyed was wrongly described in the conveyance; instead of describing it as "Kyaunggon Myo" the words "Lagaung Myo" were used. It is common ground that as between the transferee and the other respondents, the former could have obtained rectification of the instrument of conveyance in conformity with S. 31, Specific Relief Act, 1877; but the appellant was a creditor and had obtained a money decree against the mortgagor and her heirs, and in execution of this decree had attached the property in August 1935. It was put up for sale by order of the Court and the appellant purchased it for value in part satisfaction of his money decree. The question as framed by Mackney J. whose judgment sets out the facts in detail, is whether rectification ought to be decreed since it can only be done "without prejudice to rights acquired by third persons in good faith and for value."

In (1938) R L R 136[1] it was pointed out that a decree-holder who was attaching property under the process of execution cannot seize property which his judgment-debtor holds subject to restrictions and ignore those restrictions. But the case in 45 M L J 770[2] was cited to us to show that where there was an agreement to sell immovable property the contracts had no right to specific performance against the auction-purchaser in the absence of notice given of the contract to the latter before purchase; and it was contended that this case is analogous and that rectification of the conveyance ought not to be decreed. Their Lordships of the Privy Council having decided that Sec. 64, Civil P. C.,

1. U Po Hla v. Ko Po Swat, (1938) 25 A I R Rang 140=176 I C 512=1938 R L R 136.
2. Noor Mohamed Peer Bhoy v. Dinshaw Hormusji Motiwala, (1922) 9 A I R P C 393=71 I C 625=45 M L J 770 (P C).

which deals with private alienation of property after attachment, had no bearing on the case, proceeded to refer to S. 40, T. P. Act. In the terms of that Section, if the plaintiff were a person entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immovable property, he would only be entitled to enforce it against a transferee provided notice had been given. In the special circumstances of the Madras case it was held that no notice had been given and consequently, the decision proceeded upon this ground.

But S. 2 (d), T. P. Act, expressly excludes from the scope of the Act any transfer in execution of a decree or order of a Court of competent jurisdiction; and it has been held in 9 I A 147[3] (which was decided after the passing of the Specific Relief Act) that an auction-purchaser was bound by an estoppel operating against a judgment-debtor and could not put himself in a better position than he was as a mortgagee. The present appellant being auction-purchaser at a court-sale, the cases cited by the learned Judge in second appeal appear to me to be conclusive in favour of the respondents. The reasons given in his judgment for decreeing rectification appear to me with respect, to be entirely correct, and accordingly this appeal must be dismissed with costs, advocate's fee 15 gold mohurs.

Mosely J. — The facts of this case have been set out at length in the judgment in second appeal of this Court against which this Letters Patent Appeal has been instituted. The present respondent 1, the P. L. A. R. M. Chettiar Firm or its predecessor took certain properties in mortgage from Ma U Ma, deceased, whose legal representatives are the other respondents. In 1933 Ma U Ma's heirs conveyed by registered deed of sale the mortgaged property to the P. L. A. R. M. Chettyar Firm but the property now in question was misdescribed by error, the township and kwin being wrongly given, though these particulars had been correctly entered in the mortgage deed. In 1935 the defendants, the present appellants, the S. M. R. M. V. Chettiar Firm, attached this property in suit and other properties in execution of a decree against Ma U Ma's heirs and purchased this property in execution, setting off the price against the decree. Some nine months later, the P. L. A. R. M. Chettiar Firm instituted the present suit against Ma U Ma's heirs and the S. M. R. M. V. Chettiar Firm for rectification of the sale deed in question or, in the alternative, they applied to fall back on their mortgage and prayed for a mortgage decree. It was held in second appeal by this Court that the decree for rectification which had been passed by the trial Court and set aside in appeal by the District Court should be restored.

Section 31, Specific Relief Act (Act 1 of 1877) gives the Court, if fraud or mistake is proved, discretion to rectify the instrument so far as this can be done without prejudice to rights acquired by third persons in good faith and for value. The sale to the S. M. R. M. V. Chettiar Firm was for value and, if in good faith, it is not denied that a purchaser other than one at a court sale would have acquired a right to this property, having no notice of the mistake. Illus. (a) to the Section itself gives a case of this kind,—one where the conveyance was fraudulently procured by the vendee. The learned Judge in second appeal however held that other considerations arose in the case of a court sale, where the right, title and interest of the judgment-debtor only are acquired by the auction-purchaser, and he held that the S. M. R. M. V. Chettiar Firm was bound by any equities that bound Ma U Ma's heirs,—who admitted the error and the plaintiff's claim for rectification. It is contended by the learned advocate for the appellants here that this was mistaken and that, as the legal title to the land still remained with Ma U Ma's heirs at the date of the court sale, the appellants had acquired a good title to the property. It is pleaded that the right acquired could only be affected by covenants running with the land, and it is said that the obligation of rectification was only a personal one.

In this connexion the case in 71 I C 625[2] at p. 627, a decision of their Lordships of the Privy Council is quoted. It was discussed in that case whether an auction-purchaser was bound under Sec. 40, T. P. Act, by an antecedent contract to sell the property to a third party. All that was held there was that, assuming S. 40 applied to a purchaser at court sales, it could only apply if the purchaser bought with notice of the contract. The second paragraph of S. 40, which is the portion of the Section

3. Pareshnath Mookerjee v. Anathnath Deb, (1883) 9 Cal 265=9 I A 147 (P C).

in point, deals with obligations arising out of contract and annexed to the ownership of immovable property but not amounting to an interest therein. I do not think it can be said that the P. L. A. R. M. Chettiar Firm's claim for rectification of a contract of sale of land, which it was admittedly intended to sell to them and which admittedly passed and has been since in their possession, can be described as such an obligation. It may be remarked here that a purchaser at a court sale is a transferee by operation of law and not therefore a transferee within the meaning of this Section, for S. 2 (d), T. P. Act, says that nothing contained in the Act (with certain exceptions in which S. 40 is not included) shall be deemed to affect any transfer in execution.

There is a long series of decisions which lay down that a court auction purchaser merely acquired the right, title and interest of his debtor. It was said recently in another Letters Patent Appeal of this Court, (1938) R L R 136,[1] that a judgment-creditor in bringing to sale the right, title and interest of his judgment-debtor is bound by all the equities which were binding on the property in the hands of the judgment-debtor, that is to say, of course, all the equities prior to the date of attachment, for the judgment-creditor is not bound by anything done by the judgment-debtor subsequent to that. (S. 64, Civil P. C.). The learned advocate for the respondents has directed our attention to several decisions both in England and India on the point: (1891) 1 Q B 230[4] 5 I A 116,[5] and 30 I A 81.[6] The learned Judge in second appeal cited two cases: 22 Cal 909,[7] a decision of their Lordships of the Privy Council, and 10 C L J 150[8] at p. 164 where it was held that an auction purchaser of the interest of the mortgagor is as much bound by the rule of estoppel not to dispute the validity of the mortgage as the mortgagor himself. In another case, 36 C L J 421,[9] it was held by Asutosh Mookerjee J. that when the mortgagor had admitted an intention to convey certain property by the deed of mortgage neither he nor the purchaser at a court sale of his right, title and interest could dispute the title of the mortgagee but were estopped from doing so. It is immaterial that the judgment concluded by a finding that the defendant there was not a purchaser for value without notice.

If, as is settled law, a court purchaser is bound by estoppels which affect his judgment-debtor, all the more, in my opinion, must he be bound by an obligation binding the judgment-debtor to make a valid conveyance of property which the judgment-debtor has admittedly intended to convey but has not so conveyed in law by error. In my opinion this Letters Patent Appeal must clearly fail and be dismissed. I agree with the order as to costs.

D.S./R.K. *Appeal dismissed.*

4. Madell v. Thomas & Co., (1891) 1 Q B 230=60 L J Q B 227=64 L T 9=39 W R 280.
5. Dorab Ally Khan v. Khajah Moheeooddeen, (1877) 3 Cal 806=5 I A 116=2 C L R 529=3 Sar 818=3 Suther 520 (P C).
6. Jiban Krishna Roy v. Brojo Lal Sen, (1903) 30 Cal 550=30 I A 81=7 C W N 425=8 Sar 444 (P C).
7. Mahomed Mozuffer Hoosain v. Kishori Mohun Roy, (1895) 22 Cal 909=22 I A 129=6 Sar 583 (PC).
8. Debendra Nath v. Abdul Samed Seroji, (1909) 10 C L J 150=1 I C 264.
9. Nanda Lal v. Jogendra Chandra, (1923) 10 A I R Cal 53=70 I C 960=36 C L J 421.

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MACKNEY J.

Maung Po Nyein — Applicant.

v.

Maung Tha Saing — Respondent.

Civil Revn. No. 396 of 1937, Decided on 25th January 1938, from order of District Court, Henzada, D/- 1st November 1937.

(a) Civil P. C. (1908), S. 115—'Case decided' includes interlocutory order—Court in revision will interfere only where there has been gross and culpable error.

The expression "case which has been decided" in S. 115 is wide enough to include an interlocutory order, and even though there may be an appeal from the final decree, that consideration will not prevent in a proper case interference in revision. The Court will not however interfere unless it seems that there has been a gross and culpable error likely to inflict grave injustice and cause irreparable injury: *A I R 1931 Rang 136, Rel. on.* [P 93 C 2]

(b) Civil P. C. (1908), O. 41, R. 27—Further evidence when should be allowed explained.

Further evidence is not intended to be ordered on special and preliminary application before the appeal on the merits has been heard and the evidence as it stood examined by the Court. It is no part of the duty of the Court nor is it necessary for the Court to act the part of counsel for either

of the parties, and on realizing that further evidence on a point on which evidence has already been introduced is available, to require that evidence to be adduced. Such evidence is not necessary for the Court to pronounce a decision because the Court must pronounce its decision on the evidence before it. Rule 27 of O. 41 is to be applied where the Court, after considering the case, finds that the parties have failed to grasp the significance of some point which is necessary for decision of the case, but on which no evidence has been brought or which has been dealt with in a way which shows that its true significance has not been understood. In such a case the Court may well feel that it is necessary that further evidence should be adduced to elucidate the point: *31 Bom 381 and A I R 1931 P C 143, Rel. on.*

[P 94 C 1, 2]

Kyaw Din — *for Applicant.*

Kin Maung Gyi — *for Respondent.*

Order. — The respondent Maung Tha Saing brought this suit against the appellant Maung Po Nyein for the recovery of money by way of compensation for breach of contract for failure to supply a certain quantity of paddy which Maung Po Nyein had contracted to supply. It was admitted that actually Maung Tha Saing had received from Maung Po Nyein a sufficient quantity of paddy to satisfy the contract but the claim was that some 2000 baskets thereof had been supplied by Maung Po Nyein and received by Maung Tha Saing, not on Maung Tha Saing's own behalf, but on behalf of somebody else. In deciding this point the trial Court had to consider the genuineness of a document, Ex. G, on the record which purported to be an agreement signed by Maung Po Nyein to supply paddy to a certain person Maung Thein Maung. Maung Po Nyein denied the genuineness of this document. Evidence in regard to the document was led by both sides and the trial Court came to the conclusion that the document was not a genuine document. The suit was dismissed. Maung Tha Saing then appealed to the District Court and requested it to take the course allowed by O. 41, R. 27, Civil P. C., and cause the evidence of a handwriting expert to be taken as to the identity of the signature on Ex. G, and also to admit some of the evidence recorded in a criminal case which Maung Tha Saing had brought against Maung Po Nyein in regard to the matter. The learned District Judge refused to accede to the latter part of the request but did order that the evidence of a handwriting expert should be taken. His reason for taking such a course is given thus :

In this case I am of the opinion that in order to enable me to arrive at the just decision of the case it is necessary to come to a definite finding on the genuine nature of the signature on the document Ex. G. Therefore, as regards the application for admission of the evidence of the handwriting expert as to the identity of the signature on Ex. G with the admitted signature of Maung Po Nyein, I see no reason why I should not grant the application, inasmuch as this will not seriously prejudice the respondent.

Against this order Maung Po Nyein applied to this Court in revision. This Court has always held that :

The expression 'case which has been decided' in S. 115, Civil P. C., is wide enough to include an interlocutory order and even though there may be an appeal from the final decree, that consideration will not prevent in a proper case interference in revision : 9 Rang 71.[1]

The Court will not however interfere unless it seems that there has been a gross and culpable error likely to inflict grave injustice and cause irreparable injury. In the present case, it is true that if after hearing the evidence of the handwriting expert the learned District Judge should decide the appeal in favour of the appellant, Maung Tha Saing, Maung Po Nyein may be able to appeal to this Court. Nevertheless, it is obvious that if the District Court is indeed acting illegally in admitting this further evidence, the circumstances are such that a grave injustice might very well be caused to the applicant. Apparently, if the evidence of the handwriting expert is against him he will not be able to adduce the further evidence of another handwriting expert as is usual, so that the opposite party is getting an extremely unfair advantage and in a sense the applicant may suffer thereby an irreparable injury. The fact that he may be successful on a further appeal need not necessarily be sufficient to repair the injury that he may receive. It is not always possible even for an Appellate Court to place the parties back into the position which they should have occupied at the beginning. As regards this document, Ex. G, the respondent cannot contend that he was not aware of the importance of proving it or that he did not have an opportunity of adducing the evidence which he now seeks to adduce. In the criminal case to which reference has already been made, Criminal Regular No. 376 of 1935, in the Court of the First Additional Magistrate, Ingabu, orders were passed discharging the accused,

1. L. P. R. Chettyar Firm v. R. K. Banerji, (1931) 18 A I R Rang 136 = 134 I C 744 = 9 Rang 71.

Po Nyein, on 29th February 1936 and the Magistrate in his judgment doubted the genuineness of this document, whilst his judgment shows the importance which must be attached to it in the case. The suit out of which the present application arises was filed on 12th May 1936. It is thus apparent that there was no reason whatsoever why the respondent should not have obtained the evidence of a handwriting expert. As he failed to do so, he must have omitted to do so of his own choice.

The learned District Judge's reason for ordering the production of this evidence does not appear to me to be a satisfactory reason as is required by Cl. (2) of Rule 27 of O. 41. He says that it is necessary to come to a definite finding on the genuineness of the document. This, no doubt, is a proposition which is perfectly true, but it does not follow from that proposition that it is necessary for the District Judge to have the evidence of the handwriting expert. What is necessary is that the learned District Judge should come to a decision on the point on the evidence which the parties have chosen to offer him, and he can do that without having recourse to further evidence. There appears to be a confusion in the mind of the learned District Judge and he has deemed that to be necessary which is in fact only necessary to the appellant and not to the Court. The principles which should govern the admission of additional evidence under Rule 27, O. 41 are expressed by their Lordships of the Privy Council in 31 Bom 381.[2] At the date of this decision, the Code of 1882 was in force, but S. 568 thereof, which was the Section then applicable, is worded in precisely the same manner as the present R. 27 of O. 41. It was pointed out that this further evidence is not intended to be ordered on special and preliminary application before the appeal on the merits has been heard and the evidence as it stood examined by the Court. At page 390, Lord Robertson observes:

> The legitimate occasion for Sec. 568 is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, not where a discovery is made, outside the Court, of fresh evidence and the application is made to import it. That is the subject of the separate enactment in S. 623. (Now O. 47, R. 1.)

These observations were approved by their Lordships of the Privy Council in 10 Pat 654.[3] At page 668 it is observed:

> The provisions of Sec. 107, Civil P. C., as elucidated by O. 41, R. 27, are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak parts of his case and fill up omissions in the Court of Appeal. . . .
>
> It may be required to enable the Court to pronounce judgment, or for any other substantial cause, but in either case it must be the Court that requires it. This is the plain grammatical reading of the sub-clause. The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but 'when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent,' This is laid down in the most positive terms by Lord Robertson in 31 Bom 381.[2] He was dealing with the words of Sec. 568 of the Code of 1882, but they are substantially the same as those of O. 41, R. 27 of the present Code. It may well be that the defect may be pointed out by a party, or that a party may move the Court to supply the defect, but the requirement must be the requirement of the Court upon its appreciation of the evidence as it stands.

It seems to me that it is no part of the duty of the Court nor is it necessary for the Court to act the part of counsel for either of the parties, and on realizing that further evidence on a point on which evidence has already been introduced is available, to require that evidence to be adduced. As I have already remarked such evidence is not necessary for the Court to pronounce a decision because the Court must pronounce its decision on the evidence before it. Rule 27, Order 41, as I understand it, is to be applied where the Court, after considering the case, finds that the parties have failed to grasp the significance of some point which is necessary for the decision of the case, but on which no evidence has been brought or which has been dealt with in a way which shows that its true significance has not been understood. In such a case the Court may well feel that it is necessary that further evidence should be adduced to elucidate the point. Such is not the case here. There is no inherent lacuna or defect in the evidence as regards the alleged contract of Maung Po Nyein with Maung Tha Saing. Such evidence as the parties chose to produce has been produced. This point has not been left untouched upon nor unelucidated. For these reasons it appears to me that the learned District Judge acted illegally in the exercise of his jurisdiction in directing that

2. Kessowji v. G. I. P. Ry. Co., (1907) 31 Bom 381=34 I A 115=9 Bom L R 671 (P C).

3. Parsotim Thakur v. Lal Mohar Thakur, (1931) 18 A I R P C 143=132 I C 721=10 Pat 654=58 I A 254 (P C).

the evidence of the handwriting expert should be taken. I allow this application and set aside his order. The respondent shall pay the costs of this application: advocate's fee two gold mohurs.

D.S./R.K. *Application allowed.*

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MACKNEY J.

Maung Shwe Ba

v.

Ma Thein Nya

Criminal Revn. No. 727-B of 1937, Decided on 1st March 1938; reference made by Sess. Judge, Tavoy and Mergui, D/- 17th December 1937.

*** (a) Criminal P. C. (1898), S. 488—Maintenance includes education of child.**

Man does not live by bread alone, nor is he like the animals. In a civilized state, a human child cannot be maintained simply by providing it with clothing and food. The mere maintenance of the body is not sufficient; provision has to be made for the child's developing mind and conscience. Hence the meaning of "maintenance" as used in S. 488 includes the education of children, that is to say, the minimum amount of education which the conventions of the country call for: *(1907-1909) 1 U B R (Cr) 17 and (1876) 1 Ch D 226, Expl.*

[P 95 C 1; P 96 C 1]

(b) Criminal P. C. (1898), S. 488—Advanced age of child is change in circumstances.

The advance in age of the child is a change of the child's circumstances: *(1893-1900) L B R 393, Rel. on.* [P 96 C 2]

Order.—Man does not live by bread alone, nor is he like the animals. In a civilized state a human child cannot be maintained simply by providing it with clothing and food. The mere maintenance of the body is not sufficient; provision has to be made for the child's developing mind and conscience: and in my opinion, in our time, "maintenance" should be held to include this. Therefore it seems to me that any calculation which fails to take these matters into account is bound to result in an inadequate sum being estimated for the maintenance of the child. I am aware that in English law the word "maintenance" is restricted to the provision of necessaries such as food, clothing and lodging, and such an interpretation of the word was in conformity, no doubt, with primitive ideas on the duties of parents and citizens. In our time however it is realized that in addition to the duty of providing such necessaries, a father has also to provide for some sort of training for his child to fit him to take a place in society. Sir William Backstone in his Commentaries on the Laws of England, Vol. 1, p. 426, Edn. 4, says:

> The last duty of parents to their children is that of giving them an education suitable to their station in life; a duty pointed out by reason, and of far the greatest importance of any. For, as Puffendorf very well observes, it is not easy to imagine or allow, that a parent has conferred any considerable benefit upon his child by bringing him into the world, if he afterwards entirely neglects his culture and education, and suffers him to grow up like a mere beast, to lead a life useless to others, and shameful to himself. Yet the municipal laws of most countries seem to be defective on this point. by not constraining the parent to bestow a proper education upon his children.

The learned commentator then points out that

> the Legislature has put education within the reach of all by the Statute 33 & 34 Vict, c. 75, under which parents may now be compelled to cause their children, between the ages of 5 and 13 to attend the schools provided by the school boards constituted under that Act, unless they are already being properly educated at some other efficient school.

Thus, it would seem that the law of England has provided for the education of chlidren otherwise than by extending the meaning of the word "maintenance," a course which it would be most confusing to take in view of the manner in which the English law develops. The same considerations do not apply to the codified law of Burma. In the Code of Criminal Procedure, there is no definition of the word "maintenance", and it seems to me that the Courts should interpret the word in conformity with the reasonable requirements of the public conscience. It does not appear to me to involve straining the meaning of the word to say that it means, not only the maintenance of the body but also of the mind. The contrary view has been taken in (1909) 1 U B R Cr 17.[1] The learned Judicial Commissioner however supports his conclusion mainly by relying on the use of the word in the English law. I have referred to the case in (1876) 1 Ch D 226,[2] which the learned Judicial Commissioner quoted but had not the opportunity of reading. It was there held that the expenses of education of children are included in

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1. Nga Hla v. Mi Hla Kyu, (1909) 1 U B R Cr 17=4 I C 758=11 Cr L J 40.
2. In re Breeds' Will, (1876) 1 Ch D 226=45 L J Ch 191=24 W R 200.

their maintenance and support: Sec. 26 of Lord Cranworth's Act (23 & 24, Vict. c. 145) applied in that particular case. The part of the Section in which the word "maintenance" occurs is as follows:

In all cases where any property is held by trustees in trust for an infant, either absolutely, or contingently on his attaining the age of 21 years, or on the occurrence of any event previously to his attaining that age, it shall be lawful for such trustees, at their sole discretion, to pay to the guardians (if any) of such infant, or otherwise to apply for or towards the maintenance or education of such infant, the whole or any part of the income to which such infant may be entitled in respect of such property, whether there be any other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education.

The Legislature seems to have realized that not only maintenance in the older meaning of the word but also education were fittingly to be provided for children, and that education was in fact merely an additional form of maintenance which the present conscience of society considers should be given to the children. I have also examined the article on "Maintenance" in Stroud's Judicial Dictionary, to which the learned Judicial Commissioner refers and I think it is clear from the Acts referred to therein that education is considered as an extended form of maintenance, for the two words seem to be constantly coupled, as if mutually explanatory, and not denoting two distinct ideas but together expressing one idea—the modern idea of "maintenance." I do not think we are bound to adopt the (according to modern thought) restricted meaning of "maintenance" found in English law; and I see no possible objection to including in the meaning of "maintenance" as used in Sec. 488, Criminal P. C., the education of children, that is to say, the minimum amount of education which the conventions of the country call for.

The applicant Maung Shwe Ba is obviously in a position to maintain his child adequately. The very fact that such a maximum as Rs. 100 has been fixed under the Code for the sum which a father may be compelled to contribute monthly to the maintenance of his child shows that it is intended that the general circumstances of the child and its parents should be taken into consideration to some extent. It is true that the circumstances of the applicant have not apparently changed since the original order for maintenance was passed, but I cannot agree with the learned Sessions Judge that the advance in age of the child is not a change of the child's circumstances. It most clearly is: *see* (1893-1900) L B R 393.[3] A child of seven would, in my opinion, cost almost twice as much to maintain as a child of four, speaking of a child in the position of the child in question. It is true that the sum of Rs. 5 was thought sufficient, three years ago, both for the child of 4 and a child of 1, and that the child of 1 having died, the child of 4 has, with the positive acquiescence of the applicant, been receiving the whole of the allowance of Rs. 5 however out of this original amount of Rs. 5 the child of 1 can scarcely have used any very appreciable amount. It must have been intended almost entirely for the elder child.

I consider that a monthly allowance of Rs. 7 is the minimum that in the present circumstances should be awarded. I agree that the amount of Rs. 12 is excessive because it is based on a calculation of the fees required to send the child to an Anglo-Vernacular School. So long as some minimum schooling is provided for the child, I do not think that its guardian can claim more under the summary procedure of the Criminal Procedure Code. If it is thought that Maung Shwe Ba should be compelled to provide for the education of his child in an Anglo-Vernacular School, the guardian might have recourse to a civil suit. The order of the headquarters Magistrate is altered and the allowance of Rs. 12 which he has directed to be paid shall be reduced to one of Rs. 7 per mensem: and the order as to costs is set aside, as there is no power to award costs under Sec. 489 of the Code, but only under Sec. 488.

D.S./R.K. *Order modified.*

3. Charles Nepean v. Ma Kyaw, (1893-1900) L B R 393.

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ROBERTS C. J. AND MOSELY J.

Mrs. G. T. Berry — Appellant.

v.

Bailiff, Insein Dist. Court — Respondent.

Letters Patent Appeal No. 8 of 1938, Decided on 15th November 1938, from decree of High Court in S. A. No. 94 of 1938, D/- 12th May 1938.

Provident Funds Act (1925), S. 3—Equitable assignment of funds held by railway cannot be created by employee agreeing to transfer them when he would receive them.

An employee of a Railway Company cannot create an equitable assignment of the provident funds held by the railway by agreeing to transfer the funds when they would be received by the employee. [P 97 C 1, 2]

A. Robertson — *for Appellant.*

Dhar (Jr.) and S. Bhattacharyya — *for Respondent.*

Roberts C. J.— The appellant, Mrs. G. T. Berry, claims that certain sums of money which were paid over to her on various dates when her husband Mr. G. T. Berry, who had been a railway employee, received them from the Railway Provident Fund were her property and could not be taken by the receiver, nor could the transaction by which they were made payable to her become voidable under Sec. 53, Provincial Insolvency Act. The receiver in insolvency sought to have these transactions declared voidable as against him. It appears from the facts that Mr. and Mrs. Berry were married on 20th February 1936, and it is alleged on behalf of Mrs. Berry that an oral agreement was entered into shortly before the marriage whereby Mr. Berry promised to hand over all the sums which he should receive from the Provident Fund, whether by way of ordinary payments or of additional gratuities, to his wife and that he also made her his nominee in the event of his death. At that time, of course, the transaction, if any, which took place would be governed directly by S. 3, Provident Funds Act, 1925, the material words of which run as follows :

A compulsory deposit in any Government or Railway Provident Fund shall not in any way be capable of being assigned or charged.

In the face of this Section, Mr. Robertson on behalf of Mrs. Berry says that there was an oral agreement between the parties constituting an equitable assignment of the fund in question when Mr. Berry received it into his hands. In my opinion, the placing of such an interpretation, upon any agreement which may have been entered into between the parties ignores the provisions of the Section to which I have referred. Since then, at the time when the alleged agreement was entered into, no assignment or charge upon the moneys in the Provident Fund could be effectuated, we have to consider what the position was without it; and in particular we have to look at S. 53, Provincial Insolvency Act. Strenuous efforts have been made by Mr. Robertson to contend that this case does not fall within S. 53, Provincial Insolvency Act, but it has been pointed out to him that one or other of these statutes makes his position as an appellant impossible. The material words of Sec. 53, so far as they relate to transfers of property made in consideration of marriage, are as follows :

Any transfer of property, not being a transfer made before and in consideration of marriage, shall, if the transferor is adjudged insolvent on a petition presented within two years after the date of the transfer, be voidable as against the receiver and may be annulled by the Court.

The transfer of property which took place occurred as soon as the moneys were received into Mr. Berry's hands from the Railway Provident Fund, and each of the payments from the Railway Provident Fund was made long after the marriage. Each of the transfers of property by Mr. Berry to his wife was a transfer made not before and in consideration of marriage, and the transfers plainly fall within the ambit of S. 53, Provincial Insolvency Act, and accordingly, are voidable on a petition presented within two years of the transfer. It is plain that the learned District Judge and the other Judges in the Courts below properly appreciated the burden of proof and had in mind the considerations which have been laid down by their Lordships of the Privy Council in 12 Rang 105.[1] The position has always been that Mr. and Mrs. Berry were unable to create an equitable assignment or indeed any charge upon the properties in the hands of a third party where that third party was a railway holding a provident fund, and so far as the subsequent transfer is concerned, S. 53, Provincial Insolvency Act is of direct application. It follows that the receiver's contentions are shown to be good by virtue of the application of these Sections alone, and, in

1. Pope v. Official Assignee, Rangoon, (1934) 21 A I R P C 3=146 I C 743=12 Rang 105=60 I A 362 (P C).

my opinion therefore this appeal ought to be dismissed with costs, seven gold mohurs.

Mosely J.—I agree.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Rangoon 98

BAGULEY AND MOSELY JJ.

B. M. Kharwar — Appellant.

v.

A. A. M. Motiwala Ltd. — Respondent.

First Appeal No. 75 of 1937, Decided on 30th March 1938, against decree of High Court in Civil Regular Suit No. 241 of 1936.

(a) Trade Mark — Infringement of—Plaintiff importing grey sheetings with trade mark consisting of nine serpents arranged in circular design and known as 'Mwe Ko Gaung'—Defendant also importing grey sheetings with trade mark consisting of nine mongooses arranged in a similar circular design with words "Mweba Ko Gaung Tazeik"— Rest of the features same — Word " Mweba " standing for mongoose unknown to lower classes of Burmese— Plaintiff acquiring reputation for his sheetings starting his business earlier than defendant — Defendant's design held colourable imitation of plaintiff's mark.

The plaintiff, a firm importing grey sheetings, sued the defendant, a firm also importing grey sheetings, for infringement of his trade mark, which consisted of nine serpents arranged in a circular design. The mark was known in Burmese as "Mwe Ko Gaung" (Mwe standing for serpents). It bore the words "M. B. M. K. (name of the firm), sole importers for Burma, Made in India." The complainant's mark complained of consisted of nine animals said to be mongooses, arranged in a similar circular design with the words "Mweba Ko Gaung Tazeik" in the centre (Mweba standing for mongoose), the "Ko" not being written in words but having the Burmese figure nine written in an extremely snakelife fashion. Below were the words "A. A. M. M. Ltd. R. (name of the firm), Made in India." The mongooses were made to look as much like snakes as possible. The mongoose is an uncommon animal in Burma and its Burmese name "Mweba" was not generally known among the lower classes. The plaintiff had been doing extensive business, starting much earlier than the defendant, and his grey sheeting had acquired a reputation in the market as the nine serpents' brand :

Held that it was perfectly clear that the highly artificial mongoose design was a colourable imitation of the snake design. Beyond that it was abundantly apparent that the defendant's motive in taking the design of a mongoose was to confuse its Burmese equivalent "Mweba" with the plaintiff's snake or "Mwe" : *(1889) 6 R P C 531, Rel. on; Case law referred.* [P 103 C 1]

(b) Civil P. C. (1908), O. 13, R. 2—Trial Court cannot base its decision on fraud never set up by defendants in written statement nor in issue, and based on document put up for first time in cross-examination.

A trial Court cannot base its decision on an allegation of fraud never set up by the defendants in their written statement, nor in issue, and based on documents put for the first time in cross-examination of the plaintiff's witnesses and can be disregarded by the Appellate Court if so admitted by the trial Court without reasons: *3 M I A 1 (P C); A I R 1923 P C 73 ; 23 Mad 227 (P C) ; (1912) 29 R P C 465 and A I R 1928 Pat 55, Rel. on.* [P 105 C 2 ; P 106 C 1]

(c) Trade Mark—Infringement of — Plaintiff need not in all cases affirmatively establish that he has not copied his trade mark.

In all cases of infringement of trade mark, the plaintiff need not affirmatively establish that he has not copied his trade mark ; all that he ordinarily does or is required to do is to say that he has adopted a certain trade mark and has acquired the sole right to use it. It is only when challenged that he has to prove that he has not copied it. It may be that if such a plea has been raised the defendants would have to show that the plaintiffs' user was deceiving the public : *(1864) 46 E R Ch 965, Expl.* [P 106 C 1]

(d) Trade Mark—Abandonment — No particular length of time is necessary.

No particular length of time is necessary for abandonment. If a trade drops out of the use of a party and another gains the reputation in the trade for goods made under the particular name, and his name is associated with the mark and the mark associated with his name, so that all who deal in the goods consider that when they see the mark they see the goods made by the plaintiff, then the original position of the competitor using the same mark has practically disappeared : *40 Cal 814 and (1898) 15 R P C 134, Rel. on ; (1875) 31 L T 285, Disting.* [P 106 C 2]

(e) Trade Mark—Infringement of— Acquiescence — When plaintiff's action amounts to acquiescence stated.

In a suit for infringement of trade mark if the defendants prove that the plaintiff stood by knowingly and let them build up an important trade until it had become necessary to crush it, then the plaintiffs would be stopped by their acquiescence : *(1878) 10 Ch D 247, Rel. on.* [P 107 C 1]

(f) Trade Mark—Infringement of — Delay in filing suit—Delay in itself may be a bar to suit.

Acquiescence is one aspect of delay. Delay will in itself, quite apart from acquiescence, be a bar to a suit, but only if such delay has caused a change in the subject-matter of the action or brought about a state of things where justice cannot be done : *(1878) 3 A C 1218, Foll.* [P 107 C 1]

B. Clark and J. K. Munshi — *for Appellant.*

F. Doctor and E. C. V. Foucar — *for Respondent.*

Mosely J.—The plaintiff-appellant, B. M. Kharwar, a Hindu firm of importers of grey sheetings, sued the defendant-respondent firm, A. A. M. Motiwala, Ltd., a Maiman Mahomedan firm also importing grey sheetings, for infringement of the plaintiffs' trade mark, which consists of

nine serpents or snakes arranged in a circular design. This mark is known in Burmese as "Mwe Ko Gaung." The defendants' mark complained of is one of nine animals said to be mongooses, arranged in a similar circular design. The Burmese for mongoose is "Mweba"; and the mark has the words "Mweba Ko Tazeik" in Burmese in the centre. The plaintiffs averred in their plaint that they first discovered that the defendant company was importing and selling grey sheetings with the nine mongoose mark in June 1936. It appears from the evidence that the plaintiffs had, for some years, been endeavouring to stop the defendants and others from importing grey sheetings with the mark of nine alligators, and that they hit upon the nine mongooses by accident (when the goods were opened at the customs). It is claimed in the plaint that the defendants' mark was not merely calculated to deceive, but was deliberately adopted with the fraudulent intent of passing off the defendants' goods as the plaintiffs'. The plaintiffs valued their loss at Rupees 2000, but alternatively claimed an account. They also prayed for the usual injunction, and an order for delivery up to them of the goods with this mark in the defendants' possession.

The written statement of the defendants was of the most evasive character. In paragraph 1 of the plaint, it is stated that the plaintiffs had been importing their mark since December 1928. In para. 1 of the written statement the defendants replied merely that they do not admit this. In para. 2 of the written statement the defendants stated that grey sheetings bearing a circular trade mark consisting of nine animals or reptiles in a circle, had been imported into the Burma market for a number of years to the knowledge of the plaintiffs, and that that form of mark was common to the trade. In para. 4 the defendants admitted that the grey sheetings sold by the plaintiffs were known in the Rangoon market as serpent brand or Nine Serpent brand, and in Burmese as "Mwe Ko Gaung" sheetings. The purchasers of grey sheetings are mostly Burmese and very little of this commodity is sold to Indians. In para. 5, the defendants stated that they had been importing and selling grey sheetings with the nine mongoose mark and the words "Mweba Ko Goung Tazeik." The defendants claimed that they had imported it since 1931, when they made a declaration of this mark which was registered in the registration office, and that their goods had acquired a reputation under the mark of nine mongooses or weasels or, in Burmese, "Mweba."

The defendants denied that their mark was a fraudulent imitation of the plaintiffs', or even that it resembled it or was likely to be passed off as the plaintiffs' mark. In para. 11, the defendants denied that the plaintiffs were entitled to the exclusive use of the nine animals in a circle, and claimed again that such a mark was common to the trade and had been used by others before the plaintiffs. It is to be noted that the defendants nowhere denied the plaintiffs' exclusive right of use of the mark of Nine Snakes or 'Mwe Ko Gaung'. They merely claimed that the use of a mark consisting of nine animals or nine reptiles in a circle was common to the trade, and that has all along been admitted by the plaintiffs. One of the other trade-marks admittedly used in the market is that of Nine Tortoises, and there are several marks of animals. What the plaintiffs claimed, of course, was the exclusive use of the mark of Nine Serpents and of the designation 'Mwe Ko Gaung'. On these pleadings, issues were framed, amongst others, as follows:

1. Has the plaintiff firm a right of exclusive user of the trade mark of Nine Serpents, which is marked as Exhibit A ?
2. Is the trade mark of the defendant company, which is marked Ex. B, a colourable imitation of the trade-mark A ?
3. Has the plaintiff firm lost its right of action by reason of delay and/or acquiescence ?

In the course of the case when witness 4 for the plaintiff, appraiser Mr. Stuart, was being examined, the defendants produced Ex. 6 on 27th April 1937. This was not produced at the first hearing of the case, but only in cross-examination of this witness. Ex. 6 is grey sheeting made by the Kanega Fuchi Spinning and Weaving Co. of Japan, and bears the firm's name, and the words, 'Made in Japan'. It consists of a circular representation of nine dragons coiled, mouths open, no tongues showing, long tails, and two hind legs and one fore leg. This, of course, is a manufacturer's mark. The plaintiffs' Nine Snake mark and the defendants Nine Mongoose mark are imported from Bombay, and bear the importer's mark on them. The plaintiffs' mark, Ex. A, consists of Nine Snakes, with forked tongues, coiled in a manner very similar to the nine dragons, with markings resembling those on the dragons. It bears

the words "B. M. Kharwar, Sole Importer for Burma—Made in India".

The defendants' mark, Ex. B, consists of nine hybrid animals described by Professor Meggitt, Professor of Biology, (P. W. 2), as having a weasel body and a mongoose tail. (The weasel belongs to the bear tribe, the mongoose to the cat tribe.) In the centre of the design are the words 'Mweba Ko Goung Tazeik,' the 'Ko' not being written in words, but having the Burmese figure nine written in an extremely snake-like fashion. Below are the words: 'Abdulla Ally Mohamed Motiwala, Ltd., Rangoon,' and 'Made in India'. Both sides adduced a considerable amount of evidence. The plaintiff cited himself and one of his assistants and a considerable number of dealers from up-country, who gave evidence not merely that the defendants' mark was calculated to deceive, but that they themselves had actually succeeded in passing off the defendants' mark as the plaintiffs. The defendants' cloth is lighter in weight, 12lb. to the piece, as against 13¼, costing something over Rs. 6 per piece as against the plaintiffs' Rs. 7-8-0 or Rs. 7-12-0, and these dealers said that they are able to pass off the defendants' commodity, or brand, as the plaintiffs' and sell it for the same price, (Re. 1-1-0 for five yards), thereby making a much larger profit. No question was put on Ex. 6, the Dragon Brand, to these Burmese witnesses, but the only Indian dealer called by the plaintiff, Pillai, (P. W. 6), was asked whether he would call the Dragon Brand by the name of Serpent Brand. His answer, I may say, was unintelligible, but he would seem to have meant to say that the dragons could not be called serpents because they had legs.

When it was seen that the defendants were endeavouring to make capital out of Ex. 6, the plaintiff Dulab Ram (P. W. 12), took it upon himself to give evidence about Ex. 6 in examination-in-chief. It appears that this Japanese mill had been exporting the Six Dragon brand grey sheeting and another Japanese firm had been exporting sheeting with a mark of two donkeys for a good many years into Burma, and that these were originally the sole exporters of grey sheeting to Burma from Japan. The Kanega Fuchi firm started exporting its manufacture to Burma about 1918. The plaintiff firm started business in grey sheeting in 1926, and then imported the Nine Dragon mark, Ex. 6. Dulab Ram says that at that time this trade-mark, Ex. 6, belonged to the Japanese manufacturer. Other firms in Rangoon imported the same mark. It is admitted by both sides that about 1928 the Japanese firm ceased exporting grey sheetings to Burma, or else that Rangoon firms ceased importing it. Then the plaintiff firm in November 1928 got another Japanese mill to make for it grey sheetings with, not the Nine Dragons, but the Nine Serpents mark. That mark, Ex. 2-W, is identical with the plaintiffs' present markings. The sheeting bears the same words as Ex. A—"B. M. Kharwar, Sole Importer for Burma," but it bears the words 'Made in Japan'—not 'India'.

The plaintiff admitted that he used the Nine Serpents mark because the Nine Dragons mark was popular, and because the Nine Serpents mark looked 'more like' the Nine Dragons mark. He said that he would not have used the Nine Serpents mark if the Nine Dragons mark goods had still been coming from Japan. In April 1930, India put on a prohibitive tariff on Japanese grey sheetings amounting to about 38 per cent. ad valorem, which stopped the importation of such commodities for good. This duty was actually raised again later. The plaintiff is admittedly by far the biggest importer of grey sheeting, and his sales of this brand are said to amount to over 40 per cent. of the sales of grey sheeting in Burma. Ex. C shows that he imported nearly a lakh and a half's worth of Ex. 2-W, from Japan in 1929 and 1930. When the duty was imposed the plaintiff got his brand in its present form, Ex. A, manufactured in Bombay. From March 1930 up to June 1936, the plaintiff sold over seven lakhs of rupees worth of Ex. 2 W and Ex. A. Against this, it appears from Ex. 25, that the defendant has imported about Rupees 90,000 worth of his Nine Mangooses Brand from 1932 to 1936, his sales being nearly uniform from the first year to the last.

The plaintiff had, it would appear from the correspondence filed, always been on the *qui vive* to prevent infringements of his mark. He says, and I think there is no possible reason to doubt him, that the only infringement of which he knew was the defendants' Nine Alligators brand. There is evidence that he stopped Karim Bros., from importing the Nine Alligators brand from Bombay when they gave a written undertaking, Ex. X, in May 1933, not to do so

in future. The plaintiff filed a suit in 1933, C. R. 61, against another firm in Rangoon, M. A. M. Motiwala, who were importing the Nine Alligators brand, and obtained an injunction by consent against them. The plaintiff also says that he got a verbal undertaking from the defendant firm after issuing the notice (filed) to them not to import the Nine Alligators brand. Although the defendants make out that they took no heed of the plaintiffs' notice, it is obvious from their stopping the importation of the Nine Alligators brand in the years 1933 and 1934, (Ex. 26), that the plaintiffs did successfully take action against them.

In the notices which the plaintiff issued, and in that suit, C. R. 61, the plaintiff claimed to have been importing the Nine Snakes brand from 1926. Really he was importing the Nine Dragons brand until 1928, and the Nine Snakes brand thereafter. It would seem that the plaintiff was trying to tack on, as it were, his importation of the Nine Dragons brand on to his importation of the Nine Snakes brand and the defendants have now endeavoured to make capital of this, and to attempt to show that the plaintiff identified the two brands. The defendants' evidence consisted of that of Essa Haji Karim, their manager, (D. W. 1), and of seven Maiman whole-sale or retail traders in sheetings. The case in the written statement disclosed obviously was that the defendants admitted that the plaintiffs' grey sheetings had acquired a reputation as the Nine Serpents brand, but they denied, in the most evasive manner possible, that he had a right of exclusive user of such a mark, and they made out that their mark was not an imitation of his, that they had a right to use it, and that it had also acquired a reputation of its own. The defence disclosed in evidence, however was on a different line altogether. It was directed to show that the plaintiff imported the Nine Snakes brand in 1929 while the Nine Dragons was still being imported from Japan or, at all events, was still in the Rangoon market for sale, and that therefore the plaintiff could never have acquired an independent reputation for his Nine Serpents mark. They tried also to show, I think, that the Nine Serpents mark was a fraudulent imitation of the Nine Dragons mark, and that therefore the plaintiff could not be entitled to relief. The law governing the issue of injunctions in cases of this nature is contained in Ss. 54 and 56, Specific Relief Act. Illustration W to S. 54 is as follows:

> *A* improperly uses the trade mark of *B*. *B* may obtain an injunction to restrain the user, provided that *B's* use of the trade mark is honest.

The words "honest use" would appear to relate to what is called in English law "false representation". S. 56 (j) lays down that an injunction cannot be granted when the conduct of the applicant has been such as to disentitle him to the assistance of the Court. The Illuss. (b) and (c) refer to this. Both are on false representation of the character or contents of the goods sold. The defendants, I may remark, did not succeed in showing that any of the goods of the Dragon mark were imported after the end of 1928 or were in the market much longer. The learned Judge of the trial Court dismissed the plaintiffs' suit. He said that the plaintiffs had openly copied the Nine Dragons design while grey sheetings were still coming from Japan, and that the Kanega Fuchi Co. had been deliberately defrauded. He believed the evidence that the original mark of the Kanega Fuchi Co. was known in the Rangoon market as the Nine Snakes mark. He said that the plaintiffs had even claimed the Dragons mark as their own. The case in 46 E R 965[1] at page 967 was relied on to show that in a passing off action the plaintiffs must establish affirmatively that the mark in question has been applied by them properly, that is to say, that they have not copied any other person's mark, and that the mark does not involve any false representation.

In reply to the argument on behalf of the plaintiffs that all evidence as regards the plaintiffs' acquisition of their Nine Snakes mark was inadmissible as the question had not been raised in the written statement, and because the written statement admitted the user and reputation acquired by the Nine Snakes mark prior to the introduction by the defendants of their Nine Mongooses mark, the Judge said that the plaintiffs' right of exclusive user of this trade mark was specifically denied in paras. 2 and 11 of the written statement, and that the question of plaintiffs' mode of acquisition of the mark went to the very root of their right of action, and therefore

1. M'Andrew v. Bassett, (1864) 4 De G J & S 380 = 33 L J Ch 561 = 10 Jur (N S) 550=10 L T 442=12 W R 777=4 N R 123=146 R R 356=46 E R 965.

would have to be considered even if it were not raised by the defendants. As regards the question of imitation, the learned Judge said that he would have no difficulty whatever in laying down that the defendants' design was a colourable imitation of the plaintiffs'. It was pointed out that the defence that the general design of nine animals or reptiles, etc., arranged in a circular form had become common to the trade was irrelevant, as the distinctive part of each design was the particular animal, reptile, etc. used. Plaintiffs' mark, Ex. A, it was said, had been on the market several years before the defendants' mark, Ex. B. (The plaintiffs' mark was on the market in 1929, the defendants' in 1932.) "In the plaintiffs' mark Ex. A" it was said,

> the snakes are shown in an unnatural, but nevertheless conventional, posture. In the defendants' design Ex. B, the mongooses are drawn in an attitude which is neither natural nor conventional, but altogether extraordinary, and it is clear that they have been made to look as much like snakes or dragons as possible. Moreover, the printing of the word 'mweba ko gaung' in the centre of the design shows an intention to imitate the name by which the plaintiffs' mark is known. The mongoose is an uncommon animal in Burma, and its Burmese name 'mweba' is not generally known among the lower classes; the liability to confussion with the very common word 'mwe', which means snake, is obvious. As regards the quality of the cloth it is sufficient to remark that the matter does not have to be judged from the standpoint of a purchaser who is able to examine both classes of goods side by side. I have no doubt that the defendants did introduce this mark with the deliberate intention of getting a footing in this lucrative trade at the expense of the plaintiffs, and that their mark is a colourable imitation of the plaintiffs' nine snake mark.

But the learned Judge went on to say that several other of the circular nine animal designs produced by the defendants resembled one another and Exs. A and B in the same way, and some of them were on the market even before Ex. A. He said that they were all, in fact, colourable imitations of the Japanese Company's design, Ex. 6. The plaintiffs, it was said, based their claim on the abandonment of the mark by the Japanese Company and on their being the first firm to reintroduce the mark — (it should have been said a somewhat similar mark of their own),— after such abandonment. It was held that the plaintiffs had deliberately infringed the Japanese mark while it was still being used by the Japanese Company, and that there was no evidence whatever of an intentional abandonment of the mark of the latter company. In this connexion the Judge relied on the circular, Ex. 19, which purports to have been issued by the Japanese Company on 7th June 1933. The learned Judge went on to hold that even if the Japanese Company had abandoned the mark, that had become *publici juris*, and that the plaintiffs could not acquire a right to the exclusive use of it, quoting, (1878) 7 Ch D 724[2] and (1894) 11 R P C 281[3] at p. 292. The design, he said, "has ceased to be distinctive of the goods of any particular person, and has become a design common to the trade in grey sheeting": (1872) 7 Ch A 611[4] at page 628.

As regards the further evidence of delay and/or acquiescence, the Judge held that this defence was not open to the defendants. He said that proof of constructive knowledge would be sufficient to discharge the burden which lay on the defendants, and that there was good reason to believe that the plaintiffs must have known of the sale by the defendants of grey sheeting bearing the Nine Mongooses mark several years before. It had been openly sold in Burma since 1932 as was shown by the evidence of the dealers called by the plaintiff himself, and with the exercise of the most ordinary diligence the plaintiff could have obtained knowledge of the import and sale of these goods as long ago as 1932. It was held that this defence was not open to the defendants because their use of the Nine Mongooses mark began in fraud. The learned Judge remarked that the defendants admitted that the plaintiffs were doing an extensive business in the Nine Snakes mark before they adopted their mark, which was a colourable imitation of the plaintiffs' mark, with the deliberate intention of attracting to themselves part of the plaintiffs' trade. 10 Rang 133,[5] was cited to show that only a defendant who has acted in ignorance of the rights or supposed rights of the plaintiff can set up the defence of acquiescence.

The main grounds of appeal are: (1) That the plaintiffs had succeeded in establishing a right of exclusive user of the design

2. In re Hyde & Co.'s Trade Mark, (1878) 7 Ch D 724=54 L J Ch 395*n*=38 L T 777.
3. National Starch Manufacturing Co. v. Munn's Patent Maizena and Starch Co., (1894) A C 275=63 L J P C 112=6 R 462=11 R P C 281.
4. Ford v. Foster, (1872) 7 Ch A 611=41 L J Ch 682=27 L T 219=20 W R 818.
5. Mohideen Bawa v. Rigaud Perfume Manufacturers, (1932) 19 A I R Rang 114=137 I C 391 =10 Rang 133.

Ex. A. (2) That in spite of the plaintiffs' objections the Judge failed to disallow evidence relating to the rights of the Japanese manufacturer who was not a party to the suit and about whom no reference was made in the written statement. (3) That the circular, Ex. 19, had not been proved. (4) That the finding that the plaintiffs had been guilty of fraud was wholly unjustified as no plea of fraud was raised in the written statement, and that the plaintiffs were taken by surprise by the defendant's line of attack. (5) That the Judge confused the right of user of the Nine Serpents mark with the question of the user of the design of nine animals arranged in a circle, and (6) that in the written statement the defendants admitted the user and reputation of the plaintiffs' Nine Serpents trade mark; that their defence was really that the design of nine animals was common to the trade, that their own design was dissimilar to the plaintiffs' and that the plaintiffs had been guilty of delay and acquiescence.

In my opinion, all these grounds of appeal are fully justified. It is not necessary to refer in much detail to the evidence; I would entirely adopt the learned Judge's remarks as to the features of the two trade marks Exs. A and B. It is perfectly clear, in my opinion, that the highly artificial mongoose design was a colourable imitation of the snake design. Beyond this, it is abundantly apparent that the defendants' motive in taking the design of a mongoose was to confuse its Burmese equivalent "mweba" with the plaintiffs' snake, or "mwe". The mongoose is an uncommon animal in Burma, and hardly known, if at all, in Lower Burma, though the name occurs in Burmese "zats" and fairy tales. There is evidence of the plaintiffs' Burmese dealers that some of them do not even know what a mongoose is like. On this question of imitation of names, *see* 6 R P C 531.[6] It was held there that the word "demotic" was an imitation of the word "demon". The Maiman witnesses called for the defence tried to make out that the Japanese dragon could have been called snake "mwe" in Burmese. That of course was to support their case and show that the serpent design was an imitation of the dragon but it is inconceivable that a Burman, who is used to the Burmese word for dragon "nga" and who sees dragons in every village monastery, could make such a mistake, nor was any question put on this by the defendants to the plaintiffs' Burmese witnesses.

It is said that the plaintiffs' dealers are not to be believed when they say that the use of the design of the Nine Mongooses and the use of the word "mweba" or mongoose facilitated their passing off of the Mongoose mark as the Snake mark because they themselves are confessedly guilty of fraud. But, they merely say what is obvious on the face of it. These witnesses admitted that the defendants' mark had been on the market since 1934. The evidence of witnesses 3, 5, 8, 9, 11, 13 and 14 is mostly to the same effect as to this and as to their passing off of the defendant's goods as the plaintiffs'. I do not see how the plaintiff must necessarily have known of these sales of the defendants' goods in the jungle. Not a single question was put him on the point. He does not maintain any supervisory or collecting staff there nor would it appear that he does so in Rangoon. Nor would he ordinarily have known of the defendants' declaration of their mark in the Registration Office in 1931. There are abundant indications in the evidence that the defendants were importing the Nine Alligators mark surreptitiously. This mark in its original form, *2 V*, bore the name of the manufacturer, Adamjee Haji Oomar Motiwala of Bombay, and so could be traced. As I have said, the defendants ceased to import this brand for two years, in 1933 and 1934. The alligators in the design had no limbs or, at most, one very rudimentary one, and resembled snakes. It appears that after 1935 the defendants changed the design of alligator, perhaps when they thought it would be safe to do so, and imported a slightly different design, Ex. 2 B, this time with their own name, Abdulla Ally Mahomed Motiwala, and not with that of the manufacturer's. These alligators have one fore and one hind leg but still the design is snake-like. It is quite clear from the admissions of defendants' agent, D. W. 1, that he looks on these alligators, Exhibit B, as dangerous, and has imported them surreptitiously.

Since the plaintiffs' action in June 1936, one consignment has been retained in Bombay. In the consignments that managed to get through, in spite of the plaintiffs putting the customs to watch, many of the

6. Slazenger v. Feltham & Co., (1889) 5 T L R 365=6 R P C 531.

bales were imported on separate invoices. This was obviously done so that if one bale was opened and found to contain the Nine Alligator brand and all the bales on that invoice were seized, then the bales on the other invoices would escape. If the defendants managed, as they must have done, to get their Alligator brand surreptitiously through the customs, there is no reason why the Nine Mongooses brand should not have similarly been surreptitiously imported. It must be remembered that the manufacturer of the Mongoose brand was not named on the sheeting, and that it would be difficult to trace him in Bombay unless a consignment was caught. As to the evidence for the defence, the defendants' agent, Essa Haji Karim, D. W. 1, admitted the plaintiffs' user of (Ex. A) Nine Serpents mark in the following terms:

> In 1929 I knew that the plaintiffs were using Ex. A mark (nine serpents) on grey sheetings. I knew it also in 1930, 1931, 1932 and all succeeding years. In 1929, I knew that this mark Ex. A was known as 'Mwe-ko-gaung' and I have known this throughout from 1930 up to date. In 1931, I only knew this much, that their mark was known as the nine serpents mark, and that it had acquired reputation.

This appears to me to be an unequivocal admission that the plaintiffs had acquired the right to use Ex. A mark, though in cross-examination, after the luncheon interval, the witness did say that he contended that they had not acquired that right. As regards the trade mark Ex. 6, this witness said that he stopped importing it after the end of January 1928. He made out vaguely, like other witnesses, that other importers imported it in the next year, 1929, but no witness could prove that he himself had done so, and the latest date of import proved was 14th December 1928; vide the invoice book and the evidence of the second defence witness, Abdul Gany Ahmed, director of Karim Bros. According to the plaintiff, the Japanese manufacturers refused to supply the Dragon brand in 1929. The first defence witness admitted that supplies ceased in 1928. The reason he gave was that the Japanese put up the price to an impossible height as there was a great demand from Manchuria for the article. It matters little what the reason was. It is really admitted that the Rangoon market was lost to the Japanese manufacturers from 1929 by their own action, and irretrievably lost when prohibitive duties were put on in March 1930 and later.

According to the second defence witness, the Dragon mark was called in Gujarati "Marking Nau Sap"—Nine Snake mark. It is possible that it was so called in Gujarati or Hindustani in default of a proper word for dragon in these languages but the Burmese market is the great bulk of the trade, and there is not the slightest doubt that the Japanese mark was called dragon (*naga*) in Burmese and not snake (*mwe*). The third defence witness bought some of Ex. 6 on 20th November 1928 from the second defence witness. He sold his last piece on 14th July 1929. This witness admitted that sixty per cent. of his sales of grey sheetings were of the Snake brand. The fourth defence witness last imported Ex. 6 in March 1928 (Ex. 31). The fifth defence witness was the secretary of the Maiman Association in 1936. This witness made out that Ex. 6 was imported until 1929 or 1930 which is obviously untrue. It would seem from his evidence that the plaintiff, a Hindu, and the defendant and his Maiman witnesses are probably not on good terms as the plaintiff had sued five firms and given notice to twenty-five Maniman firms about another mark for which the plaintiff is the agent, the Three Chinaman mark.

The sixth defence witness tried to make out that he was selling Ex. 6, the dragon mark, on 2nd November 1929, but it is clear from what is said by the other witness for the defendant, (about a dispute over these goods between the plaintiffs and Shakoor Moosa), that what he was selling was not the Dragon mark at all but was the plaintiffs' Snake mark and imported from Japan, Ex. 2-W. This witness ended by saying that he had no personal knowledge of that quarrel about which he had spoken in examination-in-chief. The seventh defence witness also made out that Ex. 6 came in late. He said that it probably ceased coming in 1930, and that he had bought Ex. 6 from the plaintiff from 17th April 1929, but he did not produce his books and the reason he gave for saying that these goods were of Ex. 6 mark and not Ex. 2-W is no reason at all. This witness admitted that the plaintiffs' nine serpent mark was known as the standard mark. The eighth defence witness admitted that most customers bought by the mark.

It is an amusing commentary on the proposition that the plaintiff must have known of the importation of the nine mongooses mark (and every other mark), that

most of these witnesses for the defence were cross-examined about the 30 odd nine animal or nine letter marks in the market, and confessed their own ignorance of a large number of these marks, nor is it correct to say, as the learned Judge did, that the mongoose mark was the most important rival of the plaintiffs' serpent mark. The nine alligators mark was coming in equal quantities with the mongoose mark. We do not know about the numbers imported of the other marks, but the importations of the mongoose mark were only about one-eighth of the defendants' serpent mark. The judgment of the trial Court is not consistent on this point. I agree with remark at p. 4 that Ex. 6 brand was being imported in 1928, and some of it, perhaps a small quantity, must still have been on sale in the early part of 1929; but it is not correct to say, as was said at p. 5, that it was imported in 1929 or 1930. It is very doubtful, in my opinion, whether this Ex. 6 mark was imported in any quantity after the middle of 1928, and I do not think it has been proved that the plaintiff copied the nine dragons design by their Ex. 2-W, Nine snakes design, while the nine dragons design was still being imported into Rangoon. This would have been dangerous, and the Kanega Fuchi firm would presumably have been informed about it by a Japanese firm at Rangoon, which imported the nine dragon mark, the Japan Cotton and Trading Co., and have taken action, had not the Japanese company abandoned the mark. As regards Ex. 19, the contents and origin of this exhibit were admittedly not proved, and I fail to see therefore how it could be used in evidence at all. What the defence say about it that one witness received it from his Kobe office and issued it to another witness must be disregarded.

This brings me to one of the most important features of this case. In my opinion Ex. 6, on which the defence was mainly founded, and Ex. 19 were inadmissible in evidence. They are not in the defendants' affidavit of documents. The only thing remotely resembling Ex. 6 is item 11 in the defendants' affidavit of documents which is: "Sale notes for goods of nine dragons purchased by the defendants' firm from Japan," and that could have given no indication to the plaintiffs of the line of defence set out. It might have referred, and should have referred, to the defence raised in the written statement that the mark of nine animal was *publici juris*. The same remark applies to Ex. 19. Not only were these two documents, Ex. 6 and Ex. 19, not in the affidavit, nor disclosed in the written statement but they were not even produced at the first hearing. Ex. 19 was only produced on 30th April 1937 in cross-examination. Order 13, Rule 1, Civil P. C., says that parties shall produce at the first hearing of the suit all the documentary evidence in their possession or power, on which they intend to rely, and Rule 2 says that no documentary evidence which has not been so produced shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof; and the Court receiving any such evidence shall record the reasons for so doing. No such reasons were recorded. The evidence was admitted in spite of the plaintiffs' objection. In my opinion this evidence should be in this case disregarded as inadmissible. The Appellate Court is entitled to interfere in such a case where the trial Court has acted without discretion: 7 Pat 589.[7]

Such a rule is even more incumbent on the trial Court where the documents produced are sought to be used to establish a charge of fraud against the plaintiff, and a fraud not even adumbrated in the written statement. In this connexion Mr. Clark for the appellants' cites the following cases: 3 M I A 1[8] at page 18: "Fraud is not to be assumed upon conjecture however probable;" 45 M L J 363[9] at p. 369: "Fraud must be proved by established facts or inferences legitimately drawn:" 23 Mad 227,[10] where it was held by their Lordships of the Privy Council that the ground on which the High Court had proceeded had not been established by evidence on an issue between the parties, and that therefore the High Court's order could not be sustained. It is undeniable, of course, that the trial Court could not base its decision on an allegation of fraud never set up by the defendants in their written statement, not in issue, and based on documents put for

7. Hari Ram v. Fori Ram, (1928) 15 A I R Pat 555=110 I C 536=7 Pat 589.
8. Sheik Imdad Ali v. Kootby Begum, (1841-46) 3 M I A 1=6 W R 24=1 Suth 124=1 Sar 227 =18 E R 398 (P C).
9. Satish Chandra v. Satish Kantha Roy, (1923) 10 A I R P C 73=73 I C 391=45 M L J 363 (P C).
10. Mohamed Mira Ravuthar v. Savvasi Vijaya Raghunadha, (1900) 23 Mad 227=27 I A 17 =10 M L J 1=7 Sar 661 (P C).

the first time in cross-examination to the plaintiffs' witnesses: (1912) 29 R P C 465.[11] But the learned Judge relied on 46 E R 965[1] for the proposition that the plaintiff had, in a passing off case, to establish affirmatively that his mark was not a copy of any other person's mark. The passage cited (page 967 *ibid*) is this :

> The essential ingredients for constituting an infringement of that right (the right to a trade mark) probably would be no other than these : (1) that the mark has been applied by the plaintiffs properly, (i. e. to say), that they have not copied any other person's mark, and that the mark does not involve any false representation ; (2) that the article so marked is actually a vendible article in the market, and (3) that the defendants, knowing that to be so, have imitated the mark for the purpose of passing in the market other articles of a similar description. All these ingredients, all these requisites, are to be found in the case before me.

I am unable to find any later case, and no case has been cited, where the first of these requisites has been quoted with approval. In what follows of the judgment there was no further reference at all to the first ingredient said to be essential to constitute an infringement, nor in that case was there any question whatever of the copying of a mark. The learned Lord Chancellor appears to have been merely animadverting in general on what were the relevant matters to decide in a trade mark case. What was meant was clearly, that the plaintiff must prove, if challenged, and if proof is tendered to the contrary, that he has not copied his trade-mark, and by copying is meant, not merely copying a design, but copying a mark which is the property of somebody else in the same trade; for a mark may be exclusive property in one trade and yet common or the exclusive property of another in other trades. Clearly, this judgment does not vouch for the proposition that in all cases the plaintiff must affirmatively establish that he has not copied his trade-mark, all that he ordinarily does or is required to do is to say that he has adopted a certain trade mark and has acquired the sole right to use it. It is only when challenged that he has to prove that he has not copied it. It may also be, as is argued for the appellant, that if such a plea has been raised the defendants would have had to show that the plaintiffs' user was deceiving the public. At all events, if the plaintiff has shown that the Japanese company abandoned the trade-mark, then it does not appear to me that the plaintiff, by appropriating it to himself successfully for some years and obtaining a reputation quite independent of the Japanese company for his own goods with this mark, not as a manufacturer's mark, but as an importer's mark, is disentitled by his conduct from obtaining the assistance of the Court. It is clear to me that the Japanese company did abandon their use of this mark as a manufacturer's mark in the Burma market.

The cases cited by the trial Court for holding that the result of this abandonment is that the mark has become *publici juris*, clearly do not support any such proposition. These are three cases where it was held that three designations of "Eureka," "Maizema" and "Bank of England" had ceased through disuse or by length and multiplicity of infringements to become the exclusive design of anyone and had become common to the trade. But there was no question in the present case of the distinctive feature of the plaintiff's design having become common to the trade. What is common to the trade is the general design of nine animals, letters, etc. as the plaintiff has admitted throughout. I may add that no particular length of time is necessary for abandonment : *vide* 40 Cal 814.[12]

In (1898) 15 R P C 134[13] at page 140 it was said :

> It seems to me that if a trade drops out of the use of a party . . . . and while that state of thing prevails another gains the reputation in the trade for goods made under the particular name, and his name is associated with the mark and the mark associated with his name, so that all who deal in the goods consider that when they see the mark they see the goods made by the plaintiff, then the original position of the competitor using the same mark has practically disappeared.

That was a case of concurrent user, but the same remarks would apply in the present case.

It is said by the defendant-respondent here that proof of actual deception of the customer (not merely of the dealer) was necessary for two reasons, firstly, that there was no intent to deceive proved, quoting (1899) 16 R P C 3[14] and, secondly, because the defendant's mark had been in the market for a long time, quoting (1875)

11. Claudius Ash Sons and Co. Ltd. v. Invicta Manufacturing Co. Ltd., (1912) 29 R P C 465.

12. Jagarnath & Co. v. Cresswell, (1913) 40 Cal 814=22 I C 372.

13. Daniel v. Whitehouse, (1898) 1 Ch 685 = 15 R P C 134=67 L J Ch 262.

14. Lever Bros. v. Beddingfield, (1899) 16 R P C 3 =80 L T 100.

31 L T 285.[15] I have held that the intent to deceive was obvious. (1875) 31 L T 285[15] was a case where the defendants had been manufacturing cutlery with the well-known Rodgers' name on it for a great many years, some 40 or 50 years, and had described their place of business Norfolk Works, the plaintiffs' place of business being in Norfolk Street. No doubt in that case proof of actual deception was necessary. The present case depends on entirely different facts. Where it is obvious that there was an intent to deceive and the goods were, on the face of it, calculated to deceive, no proof of actual deception is necessary.

As regards acquiescence, I would agree with the trial Court that the defendants are not entitled to set up such a defence. No doubt had they been so entitled, and had they proved that the plaintiffs stood by knowingly and let them build up an important trade until it had become necessary to crush it, then the plaintiffs would have been stopped by their acquiescence. But in the present case there is no reason whatever, in my opinion, to believe that the plaintiffs knew of the defendants' trade in the nine Mongoose mark at all. There could therefore be no acquiescence : (1878) 10 Ch D 247.[16] Acquiescence is one aspect of delay. Delay will in itself, quite apart from acquiescence, be a bar to a suit, but only if such delay has caused a change in the subject-matter of the action, or brought about a state of things where justice cannot be done : (1878) 3 A C 1218.[17] Such is not the case here.

To sum up: it appears to me that the plaintiffs have established their exclusive right to the use of the nine Serpent mark. I am of opinion that the defendants were not entitled in the pleadings and on the issues of this case to raise the plea that the nine Snake mark was an imitation of the nine Dragon mark, and that the plaintiffs therefore could acquire no exclusive user of it. Had such a defence been allowed, I am of opinion that, though the plaintiffs originally imitated the Dragon mark by their Snake mark, yet this was done when the Japanese company abandoned the Rangoon market, and did not disentitle the plaintiffs to the right which they claimed. I would find that the defendants are barred from raising the plea of acquiescence, and that if they were not so barred, the plaintiffs had no notice of the defendants' user and were not guilty of any delay in bringing their suit. The judgment and decree of the trial Court will have to be set aside with costs and there will be a decree that the plaintiffs-appellants are entitled to the injunction prayed for, to delivery up for the purpose of erasure, to an account of damages suffered for three years, starting from three years before the institution of the suit and for costs. The scale and amount of costs decreed in the trial Court will stand. As for costs in the Appellate Court, I assess these at 15 gold mohurs the first two days of hearing, and ten gold mohurs each succeeding day in this Court. I see no reason to certify for two counsel.

Baguley J.—I agree with my learned brother and have little that I can usefully add. It seems to me that the respondent is bound to lose on account of the fact that he was obviously imitating the appellant's mark, while the appellant had the right to use it as an importer's mark. I have little doubt that he started by getting the name "Mweba" (mongoose) as being the nearest he could get to "Mwe" (snake). He decided on a mongoose because the names sounded similar in Burmese. He did not however draw a mongoose; he drew a hybrid, which according to Professor Meggitt, is more of a weasel than a mongoose, the only feature of a mongoose being that it has a mongoose's tail attached. Having secured this hybrid he then put it into such a position that the animal could not have possibly attained without the aid of a dose of strychnine. Quite clearly, he was getting the name as near as the name of the plaintiff's mark as he could, and the figure as near as the figure in the plaintiff's mark as he could. I also emphasize the point that when fraud has not been pleaded and no issue has been framed upon it, it is impossible if fraud is raised for the first time after some of the plaintiff's witnesses have been examined, to compel the plaintiff to lose his case on the ground that his action has been fraudulent.

V.B.B./R.K. *Decree set aside.*

15. Rodgers v. Rodgers, (1875) 31 L T 285 = 22 W R 887.
16. Weldon v. Dicks, (1878) 10 Ch D 247 = 48 L J Ch 201=39 L T 467=27 W R 639.
17. Erlanger v. New Sombrere Phosphate Co., (1878) 3 A C 1218=39 L T 269=26 W R 65.

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BRAUND J.

I. E. Seedat and others — Plaintiffs.

v.

Mariam Bi Bi and others—Defendants.

Civil Regular No. 480 of 1931, Decided on 25th January 1938.

(a) Trusts — Public — Suit relating to public charity — Case involving allegations of serious breaches of trust by trustees—It is improper to allow collusive compromise between plaintiffs and defendants—It is better if Advocate-General is brought on record in all such cases.

In a matter involving public charity it is most improper procedure to allow a collusive compromise between the plaintiffs and the defendants in a case involving allegations of very serious breaches of trust by the trustees. It would be better if the Advocate-General is brought on to the record in all cases involving execution of trusts relating to public charities and takes a sufficiently active part in them to protect the interests of the public. It is as much one of his duties to do so, as it is the duty of the Attorney-General in England to represent the public interest in cases of charities. [P 109 C 1]

(b) Practice — Parties — Suit filed by many plaintiffs — Plaintiffs cannot appear and act separately—If any of them is indisposed to act with and appear by same counsel as others, proper course is to strike him off as plaintiff and add him as defendant.

It is not in any circumstances possible in a case where there are more than one plaintiffs, for such plaintiffs to appear and act separately. It is an impossibility. If any of them are not disposed to act with and to appear by the same counsel as the others, the only proper course open is to apply to strike them out as plaintiffs and to add them as defendants. It is no more possible for the plaintiffs to act and appear separately than it is for them to deliver separate plaints : *(1905) 2 Ch 460 and (1923) W N 328, Rel. on.* [P 109 C 1,2]

(c) Costs—Taxation of — Administration suit —Official referee directing payment of costs of reference cannot direct that they are to be paid out of particular property which is subject-matter of administration suit.

Even though the Official Referee has jurisdiction to give or deprive any person of costs of the reference, whether those costs are to be paid out of the property which is the subject-matter of an administration suit or not is a matter for the Judge in the administrative suit and not for the Official Referee. [P 109 C 2]

(d) Costs—Taxation—More than one plaintiff appearing in one suit — They are entitled to only one set of costs as between them.

Where more than one plaintiff appear in a suit they are entitled to one set of costs only as between them and are not entitled to appear separately. [P 111 C 1]

(e) Costs—Taxation of—In matter of taxation, which are not specifically provided by taxation rules, Taxing Master should follow taxation practice of Supreme Court in England.

In matters of taxation which are not specifically provided by the Taxation Rules the Taxing Master has to follow the taxation practice of the Supreme Court in England. He will find the proper method of taxing a number of persons costs as "one set of costs" in the notes to the rules of the Supreme Court O. 65, Rule 27 (8) at pp. 1461 and 1462 of the 1934 White Book. "One set" means the amount of costs which would have been incurred, if the parties separately represented had appeared by the same solicitor. Each individual brings in his own separate bill and the Taxing Master has then (a) to tax off all improper items and (b) to apportion between them all duplicated items, allowing of course only one such duplicated item between them all. [P 111 C 1]

(f) Costs—Taxation of—Defendants impleaded in administration suit relating to trust as trustees and having identical interest are entitled to one set of costs only.

Persons impleaded as defendants in an administration suit relating to a trust of religious and charitable nature in the capacity of trustees and having identical interests in the matter are entitled, in the absence of the most exceptional circumstances, to one set of costs only and are not entitled to appear separately : *(1840) 2 Beav 346, Rel. on.* [P 111 C 2]

B. C. Paul — *for Plaintiff 2.*

Dadachanji, and P. B. Sen—*for Defendants 5, 6 and 8, and 10 respectively.*

Judgment. — This is a suit which is drawing to a close and it is possible now to make a final order which, it is to be hoped, will dispose of the matter finally. I do not wish, at this stage to repeat unnecessarily the whole history of the matter. It has been fully dealt with on more than one occasion by the several learned Judges who have dealt with it in the course of its career. But it will be necessary for me to refer to some of the orders which have already been made, in order to explain the reasons for the final decree which I now propose to pass.

The suit began by a plaint dated 14th October 1931. The plaintiff's were four persons who claimed to be interested in the Moola Ebrahim Waqf. One of the original plaintiffs is dead and is now represented on the record by his legal representative. Inasmuch as the difficulties involved in making the final decree relate principally to the proper order for costs, it will be convenient to deal with the position of the parties as we go. The plaintiffs carried on the suit alone until 4th September 1934, when defendant 10 applied to be added as a defendant. The reason of this is quite plain. It is I think quite clear that the original plaintiffs at that point made an attempt to put an end to the suit by agreement with the defendants, or at least with some of

them. It is equally obvious that, in a matter involving a public charity, it would have been a most improper procedure to have allowed a collusive compromise of this kind in a case involving allegations of very serious breaches of trust by the trustees. It was not, I think, a manoeuvre to which the plaintiffs should have lent themselves. I cannot forbear to say that the history of far too many administration suits in this Court involving both public charities and private trusts is a history of collusive compromise sanctioned by the Court itself. It is very gratifying to find that in this case at any rate it was stopped and that the Advocate-General was brought on to the record to represent the public interest. It would be better still if the Advocate-General was brought on to the record in all cases involving the execution of trusts relating to public charities and took a sufficiently active part in them to protect the interests of the public. It is I venture to think as much one of his duties to do so, as it is the duty of the Attorney-General in England to represent the public interest in cases of charities. I think that in strictness the proper course would have been for defendant 10 to have applied to be substituted as plaintiff instead of the original plaintiffs and to have had them added as defendants. That would have been the proper practice. However that may be, defendant 10 was added as a defendant and from that point onwards assumed the conduct of the suit.

The other matter as regards the plaintiffs, that I must point out is a very serious one. There were four plaintiffs. From the beginning two of them took no interest in the suit, one of them appeared separately by Mr. Paul, an advocate, and the fourth appeared in person and took an active part. I have said many times that it has yet to be learnt in this Court, that it is not in any circumstances, possible in a case where there is more than one plaintiff, for such plaintiffs to appear and act separately. It is an impossibility. If any of them are not disposed to act with and to appear by the same counsel as the others, then the only proper course open is to apply to strike him out as a plaintiff and to add him as a defendant. That is elementary : *see* (1905) 2 Ch 460[1] and (1923) W N 328.[2] It is no more possible for plaintiffs to act and appear separately than it is for them to deliver separate plaints. Yet in this case the position has been accepted throughout of the plaintiffs not acting together. The whole vice of the matter is well-illustrated when it comes as it has come here to dealing with the costs of the suit. The absurdity of one plaintiff asking for his costs to the exclusion of the others or other, as is being done here is immediately apparent. To pursue the history of the suit further a preliminary decree for accounts was made on 9th August 1933. There, then began what I shall refer to compendiously as the 'Reference Proceedings.' The hearing before the Official Referee began on 12th June 1934 and he delivered his report with commendable despatch on 4th September 1934. I do not propose to go through that report in detail for the present purpose, except to say that it found the original defendant 1 and defendants 2, 3 and 4 liable for certain substantial sums in respect of the several breaches of trust alleged against them by the plaint. The only finding as to costs mentioned in the Official Referee's report is at page 31 where he says :

> I direct that the costs of defendants 5, 7, 8 and 10 be paid out of the waqf funds and that the plaintiffs and the other defendants bear their own costs.

I do not now propose to express an opinion as to whether the Official Referee had any jurisdiction to deal with the costs of the reference, at all. It is however quite clear that he as Official Referee had no jurisdiction to make an order for payment of them "out of the waqf funds." Even though the Official Referee had jurisdiction to give or deprive any parties of costs of the reference, whether those costs were to be paid out of the waqf funds or not was in my view quite certainly a matter for the Judge in the administration suit and not for the Official Referee. The reference to the Official Referee was only for a report on exactly the same lines as the Master's certificate in England and though he was probably right in indicating which parties ought, in his opinion, to have their costs before him, he went, I think, too far in himself purporting to deal with the waqf funds, which were still under the control of the Court in the suit. The next step was that the report came before Leach J. on exceptions. The learned Judge made certain alterations in the findings as to the several liabilities of the defendants arrived

1. In re Mathews, (1905) 2 Ch 460 = 74 L J Ch 656=93 L T 158=54 W R 75.
2. Re Kent Coal Concessions, (1923) W N 328.

at by the Official Referee and ultimately dealt with the question of costs thus :

I consider that defendants 5, 6, 7, 8, 9 and 10 are entitled to the costs of the reference from the order of the Official Referee. Defendants 5, 6, 7, 8 and 9 will be entitled to one set of costs which I fix at seven gold mohurs and defendant 10 will be entitled to another set of costs which I fix at the same amount. These costs will be paid out of the trust funds.

It has to be noticed that the order for costs deals only with the costs of "the reference from the order of the Official Referee" meaning no doubt the report of the Official Referee. The Official Referee of course had no power to make an "order". But the learned Judge in dealing only with the costs of "the reference from the order of the Official Referee" does not see fit presumably to disturb the Official Referee's own finding contained in the report as to the proper incidence of the costs of the actual reference before him. The position at that point therefore was that : (1) By the Official Referee's report, defendants 5 7, 8 and 10 were given their costs up to and including the report; but no other parties were given any costs of the reference proceedings up to that point; and (2) by the order of Leach J., dated 10th July 1935 defendants 5, 6, 7, 8, 9 and 10 became entitled to the costs of the hearing of the exceptions before him out of the waqf funds, but as to the first four of them only one set of costs fixed at seven gold mohurs. I draw attention in passing that in the formal decree drawn up upon Leach J.'s order there is a mere declaration of liability but no order for payment by the defaulting trustee of the funds found due from them. The matter was then further complicated by the order of the Appellate Court dated 4th March 1936. That order again alters the liabilities of the various parties as found by the Official Referee's report and varied by Leach J.'s order. The ultimate order for costs is to be found on page 13 :

As regards costs I am of opinion that respondents 1 and 2, "i. e. defendants 5 and 6" are not entitled to get their costs before the Official Referee in view of the fact that they have been found negligent in the discharge of their duties, they should in my opinion bear their own costs . . . . . Respondents 1 and 2 will bear their own costs before the Official Referee. In other respects the order of the trial Court will stand.

It is to be noticed that that refers to the costs "before the Official Referee." Defendants 5 and 6 are deprived of their costs "before the Official Referee." Does that refer to their costs of the hearing before the Official Referee only or does it embrace as well the costs of the hearing of the exceptions from the report before Leach J. which latter costs they had been awarded by that Judge, as part of the single set which he allowed to defendants 5, 6, 7, 8 and 9 ? I think the latter must be the true view, because in the first place the Official Referee had given defendant 6 no costs at all and so far as defendant 6 is concerned there was no alteration in the Official Referee's order and it is inconceivable that the Court of Appeal would have deprived defendants 5 and 6 of their costs of the hearing before the Official Referee on the ground of their negligence and have still left them their costs of the exceptions. But I admit that it is not clear. It is obvious too that except where varied the Court of Appeal was by implication approving of the orders as to costs made by the Official Referee and the learned Judge. The result at that point therefore was : (1) Defendants 7, 8 and 10 were still expressly entitled to their costs of the reference before the Official Referee (the Official Referee's order). (2) The plaintiffs and the other defendants (by the Official Referee's order) and defendants 5 and 6 (by the Court of Appeal's order) were entitled to no costs "of the reference before the Official Referee". (3) Defendants 7, 8, 9 and 10 were entitled to their costs of the exceptions before Leach J. as directed by his order dated 10th July 1935; and (4) defendant 10 (as the appellant in the appeal) is entitled to her costs of the appeal (six gold mohurs) out of the waqf funds but no other party is entitled to any costs of the appeal. (See order of the Appellate Court dated 14th March 1936.)

It now becomes possible to consider in what form the order for costs should be in passing the final decree. But care must be taken in distinguishing between the "costs of the suit" (as to which there have been no orders so far) and "the costs of the reference" (as to which the various orders so far made have exclusively related).

A. COSTS OF THE SUIT.

(1) Plaintiffs' costs of the suit.

I can see no reason for depriving the plaintiffs of their "costs of the suit" up to 4th September 1934, when (in effect) the conduct of the suit was withdrawn from them and committed to defendant 10. It is

true that they were parties to an attempt to compromise the suit but I do not think that that is sufficient reason for depriving them of their costs up to that point of the suit the benefit of which defendant 10 eventually took up. I think therefore that they are entitled to their "costs of the suit up to 4th September 1934" and also to such costs (if any) as they may have incurred in or about the framing and approving of the scheme subsequently. If they have incurred any costs in that respect, they are, I think, entitled to them. But quite clearly, the plaintiffs are entitled to one set of costs only between them. I have been addressed separately by Mr. Paul on behalf of Mr. Paul's plaintiff client and by plaintiff 4 in person each claiming the "lion's share" of the costs upon the ground of his individual activities in the suit. As I have already pointed out no such question can ever arise in a properly constituted suit inasmuch as plaintiffs must act together. But, in this suit the present position has been allowed to exist and I cannot alter it at this stage. All I can do is to allow on taxation one set of costs to the plaintiffs. For the benefit of the Taxing Master, who will have to deal with the taxation, I point out that, in matters of taxation which are not specifically provided for by our own taxation rules, he has to follow the taxation practice of the Supreme Court in England. He will find the proper method of taxing a number of persons' costs as "one set of costs" in the notes to the Rules of the Supreme Court: O. 65, R. 27 (8) at pp. 1461 and 1462 of the 1934 White Book. "One set" means the amount of the costs which would have been incurred, if the parties separately represented had appeared by the same solicitor. Each individual brings in his own separate bill and the Taxing Master has then (a) to tax off all improper items and (b) to apportion between them all duplicated items, allowing of course only one such duplicated item between them all.

(2) Defendants' costs of the suit.

(a) It is quite clear that I cannot allow defendants 1, 2, 3, 4, 5 or 6 any costs of the suit. They have all been found guilty of breaches of trust in varying degrees. Indeed, but for the fact that such an order would be quite valueless they ought to pay the costs of the suit. They will therefore have no costs of the suit.

(b) *Defendants 7, 8 and 9.* — These defendants are all trustees of the Surti Sunni Jumma Masjid Waqf and were added as defendants in their capacity as such trustees on 12th February 1932 as "parties interested." They had identical interests in the matter, their interest being as such trustees as aforesaid. There is I think no question but that defendants 7 and 9 are entitled to their costs as from the date of their being added as defendants. But Mr. Sen has urged me not to allow defendant 8 any costs on the ground of his obstruction of the suit. He was one of the trustees of the Masjid and as such came into the suit. He, in common with defendants 7 and 9, has been found guilty of no negligence and I do not think I ought to debar him from participation in the single set of costs to which I think the trustees are entitled. I shall accordingly order that, as regards defendants 7, 8 and 9 they are entitled to the costs of the suit as from 12th February 1932 (including such costs (if any) as they shall have incurred in or about the settling and approval of the scheme) but that they shall have only one set of costs between them. It is of course quite clear that trustees are, in the absence of the most exceptional circumstances, entitled to one set of costs only and are not entitled to appear separately: (1840) 2 Beav 346.[3] The taxing master will follow the English practice on this taxation.

(c) *Defendant 10.* — She is entitled to her costs of the suit as from the date upon which she was added as a party, including her costs (if any) incurred in or about the framing and approval of the scheme. All the above costs will, following ordinary principles, be taxed as between advocate and client and will be paid out of the waqf estate.

B. COSTS OF THE REFERENCE.

(1) *Plaintiffs' costs.*—They are entitled to none as it has been so expressly provided by the Official Referee's report and that has not been disturbed by the Court of Appeal. Even if I could, I should not be disposed to re-open that question at this stage. (2) Defendants 1, 2, 3 and 4 are in the same position as the plaintiffs. They have been given no costs.

(3) *Defendants 5 and 6*:—They have been deprived by the Court of Appeal of their costs "before the Official Referee".

3. Gaunt v. Taylor, (1840) 2 Beav 346=4 Jur 166.

That clearly includes the costs incurred up to the making of the report and in the view I have taken, also includes the costs of the exceptions before Leach J. They were of course found to be defaulting trustees by the order of the Court of Appeal. I do not therefore think that they are entitled to any costs.

(4) *Defendants 7, 8 and 9*:—(a) Of these defendants, 7 and 8 were expressly given their costs of the reference before him by the Official Referee's report. Why defendant 9 was omitted I do not know. But he was. I do not propose to disturb the Official Referee's finding at this stage. Defendants 7 and 8 will therefore have one set of costs between them. They were not, I think, being trustees entitled to appear separately and accordingly I can only allow them one set of costs; (b) defendants 7, 8 and 9 are expressly entitled to their costs of the hearing of the exceptions by Leach J.'s order of 10th July 1935, and these costs have been expressly fixed at six gold mohurs between them. I cannot now go behind that and no further order is necessary as to them; (c) the Court of Appeal made no order as to the costs of these defendants of the appeal and neither therefore can I.

(5) *Defendant 10*:—She is entitled to her costs of the reference before the Official Referee and she is also entitled to seven gold mohurs for her costs of the hearing of the exceptions. The Court of Appeal has given her six gold mohurs as her costs of the appeal. All these costs will be taxed as between advocate and client and will be paid out of the waqf funds. I have thought it right to set out at length my reasons for the order for costs I propose to make, as the matter is complicated and difficult.

I shall, accordingly, by the final decree in the suit which I now propose to make, (1) pass decrees for the payment of the several sums which have been found to be due from the several defendants; (2) appoint as trustees of the waqf the five trustees who have now been nominated; (3) discharge the Receiver, and (4) make the several orders for costs I have indicated above. I have only to add that I have thought it necessary now to pass a final decree in the suit as up to this point there has been none, the only orders made being those made in the reference proceedings.

R.M./R.K. *Order accordingly.*

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DUNKLEY J.

U Paw Tint — Applicant.

v.

U Than Daing and another — Respondents.

Civil Revn. No. 303 of 1937, Decided on 14th January 1938, from decree of Asst. Dist. Court, Pakokku, D/- 17th July 1937.

Limitation Act (1908, as amended in 1927), S. 20 — It is unnecessary that whole endorsement should have been written by person making payment.

Under the present law, all that is necessary is that the endorsement should have been signed by the person making the payment. It is quite unnecessary that the whole endorsement should have been written by the person making the payment: *5 L B R 108, Held obsolete law.* [P 113 C 1]

Kale — *for Applicant.*

Wellington — *for Respondents.*

Order.—This is an application in revision against the judgment and decree of the Assistant District Court of Pakokku in Civil Appeal No. 18 of 1937. Learned counsel for the respondents frankly admits that he is unable to support the judgment of the learned Assistant District Judge. The judgment held that the claim of the plaintiff, who is the applicant before this Court, was barred by limitation, and on this ground he reversed the judgment and decree of the Township Court of Pakokku, which granted a decree to the plaintiff-applicant for the recovery of the amount due upon a promissory note. Now there is an endorsement on the back of this promissory note regarding the payment of interest. Admittedly, the plaintiff-applicant himself wrote this endorsement; but he stated that both the defendants had signed underneath this writing. The learned Assistant District Judge relying upon a decision of the Chief Court of Lower Burma in 5 L B R 108[1] held that the order to save limitation the whole of the endorsement must be written by the debtors themselves. It is plain that he did not refer to the provisions of S. 20, Limitation Act, upon which he relied. If he had done so, he would have found that S. 20, Limitation Act, was amended in 1927 by an amendment of the proviso to sub-s. (1), and that this amendment rendered obsolete the judgment of the Chief Court in 5 L B R 108.[1] The proviso as it now stands is as follows:

1. Arunachellum Chetty v. Ismail Hussain, (1909) 5 L B R 108=4 I C 374.

Provided that, save in the case of a payment of interest made before the first day of January 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by the person making the payment.

Consequently, it is clear that under the present law all that is necessary is that the endorsement should have been signed by the person making the payment, and this is a question which the learned Judge has not considered. It is quite unnecessary that the whole endorsement should have been written by the person making the payment. Moreover, under the old law upon which 5 L B R 108[1] proceeded, no writing of any kind was required in the case of a payment of interest, and the old proviso upon which this case was decided referred to a payment of principal only. The decision of the learned Assistant District Judge was clearly wrong, and his judgment and decree are set aside, and the appeal is remanded to his Court for decision upon the merits. The costs of this application in revision will follow the result of the appeal, advocate's fee two gold mohurs.

D.S./R.K. *Appeal remanded.*

A. I. R. 1939 Rangoon 113

BAGULEY AND MOSELY JJ.

National Carbon Co. (Inc.) — Appellants.

v.

Sei Sin & Co. — Respondents.

First Appeal No. 99 of 1937, Decided on 21st February 1938, against decree of High Court, *Reported in A I R 1938 Rang 99.*

(a) Trade Mark—Fraudulent intent to imitate — Court will not be astute to find imitator guilty.

When there is direct evidence showing that the get-up of the one trader's articles is fraudulent, or is devised with the intention of imitating, as near as they dare, the labels on the another trader's articles, the task of the Court is made very much simpler for when it is proved that one man has been trying to imitate another man's trade mark, and therefore to deceive possible purchasers, the Courts will not be astute to say that he has failed in what he is trying to do : *(1887) 4 R P C 215, (1933) 50 R P C 12 and Slazengers' case, Rel. on.* [P 113 C 2]

(b) Trade Mark — Two articles only put before Court—Counterfeit nature to be determined — Eye of Judge looking from average purchaser's point of view is the determining factor.

Where all that the Court has before it is two articles and it has to decide whether one is counterfeit of another and is likely to deceive an intending purchaser, the eye of the Judge is, in the last resort, the final arbiter, but the Judge must not use, if the expression be allowed, his own eyes; he has got to look at the articles with the eyes of the public who may be expected to buy those articles, especially when, the people who buy those articles include people of all classes including many persons living in the jungle, uneducated, illiterate, and who may be regarded as equivalent to the "incautious, ignorant or unwary up-country purchasers." In such a case Court should not look at the two articles side by side and should note the points of similarity rather than the points of difference: *34 Cal 495; (1887) 4 R P C 215 and (1914) 31 R P C 196, Rel. on ; A I R 1927 All 81 and (1882) 7 A C 219, Disting.* [P 114 C 1]

Paget — *for Appellants.*

Campagnac — *for Respondents.*

Baguley J.—This is an appeal against an order passed by a Judge on the Original Side of this Court dismissing a suit for an injunction. It is a passing off case, really in the nature of a *quia timet* action. The plaintiffs are a firm which manufactures and sells batteries for electric flashlights. They have been selling these batteries in this country for many years and have built up a large business. It is in evidence that they sell more than one million a month. The defendants are a firm who have, comparatively recently taken to importing from Hongkong batteries of the same nature, and the plaintiffs claim that these batteries are covered with labels which are a fraudulent and colourable imitation of the labels of the plaintiffs' batteries and are designed to deceive purchasers. There is no direct evidence of any purchaser having been deceived, and there is no direct evidence showing that the get-up of the defendants' batteries is fraudulent, or is devised with the intention of imitating, as near as they dare, the labels on the plaintiffs' batteries. I mention this because when there is evidence of this nature, and such evidence is sometimes obtainable, [*vide* (1887) 4 R P C 215[1] and (1933) 50 R P C 12][2] the task of the Court is made very much simpler for, as was mentioned in the well-known *Slazengers' case*, when it is proved that a defendant has been trying to imitate another man's trade mark, and therefore to deceive possible purchasers, the Courts will not be astute to say that he has failed in what he is trying to do.

In this case therefore all we have are the two batteries and the labels upon them,

1. Melachrino and Co. v. Melachrino Egyptian Cigarette Co., (1887) 4 R P C 215.
2. Bryant and May Ltd. v. United Match Industries Ltd., (1933) 50 R P C 12.

and the Court has to decide on the evidence before it whether the defendants' label is likely to deceive intending purchasers. In a case of this kind the eye of the Judge is, in the last resort, the final arbiter, but the Judge must not use, if the expression be allowed, his own eyes ; he has got to look at the articles with the eyes of the public who may be expected to buy these batteries and, it is asserted, the people who buy these batteries include people of all classes including many persons living in the jungle, uneducated, illiterate, and who may be regarded as equivalent to the "incautious, ignorant or unwary up-country purchasers" referred to in 34 Cal 495[3] at page 509. I agree with the appellants' learned counsel that in the present case we should not look at the two batteries side by side and we should note the points of similarity rather than the points of difference: *vide* (1887) 4 R P C 215[1] and (1914) 31 R P C 196[4] at page 205.

The first point to note about the plaintiffs' battery is that it contains no special trade mark or picture or device. The label consists merely of words printed in certain colours on certain colours of paper, the colours arranged in a certain fashion. The learned Judge on the Original Side has described them both. The plaintiffs' battery, to my eye, represents in general a grey ground with two red labels on it, each red label having a blue band across it, on which the word "Eveready" is printed in white. Trying to reduce my eye to that of an illiterate rustic, I imagine that an illiterate rustic knows what words are; he knows they are certain marks which the literate person can interpret although he himself cannot do so; he knows that they are marks which run in line; and if he knows anything about the plaintiffs' battery he would know that these lines run horizontally; he cannot, of course, distinguish English script from Burmese script, or Tamil script or any other script which runs across the paper. But, personally with all due respect, I think that some eminent Judges appear to refer to illiterate people simply as people of an extraordinarily low standard of intelligence and powers of observation. From a long acquaintance with the junglefolk of this country, I do not think that their intelligence is as low as is made out by some of these eminent jurists. If people have never been taught to read and write they cannot do so, but I am not sure that their powers of observation are always as low as they seem to have been considered by some Judges; no doubt some of them are of this low standard of intelligence but not, I should say, those who are acquainted with some of the properties of the nature of electric torches. For instance, I do not think that the class of people referred to in 49 All 92[5] at page 107 would be the sort of people who buy batteries for electric torches. Many of these rustics are exceedingly observant on certain points and, in their own surroundings, will see and utilize signs which they may observe in a way which would beat the educated townsmen, for, it must be remembered that education (so called), which sometimes consists largely of taking down notes from lectures, learning them by heart, and trying to pass examinations afterwards, does not cultivate a man's powers of observation. The power of observing is a thing which is not usually learnt from books.

This then is what I think an illiterate man from the jungle would note on the plaintiffs' battery. It is a grey thing with long red patches, one on each side, each of which has a blue band across it, and on the band and on the red oblong path, are lines which he knows are words which run in horizontal lines; and if he observes it closely he will see that the marks which are words are a series of comparatively simple devices. If however he picks up one of the defendants' batteries, the impression he gets or so I think would be that it is red. The learned Judge in his description refers to the defendants' label as consisting of two panels on dark blue. Personally, it scarcely seems to me that this is the way it is best described. It may be regarded as having two red panels on a dark blue ground, but the amount of dark blue is so small as to be almost negligible. The distance between the two panels on one side is only about half an inch, while the space on the opposite side between the panels is very much smaller. If the panel is regarded as red surrounded, as it is, by a very narrow white, a broader blue and then another

3. Nemi Chand v. C. W. Wallace, (1907) 34 Cal 495=11 C W N 537.

4. In re Sandow's Application, (1914) 31 R P C 196=30 T L R 394.

5. Swadeshi Mills Co. Ltd. v. Juggi Lal, Kamlapat Cotton Spinning & Weaving Mills Co. Ltd., (1927) 14 A I R All 81=99 I C 353=49 All 92=24 A L J 975.

very narrow white line before the main blue ground appears, on one side, there is no blue appearing at all. The red is bounded by the very narrow white, the narrow blue and then comes another white line which begins the next panel, so that, really, the effect of the defendants' label is to convey mainly the idea that it is a red label with a band of blue down one side; on the red label, but not in the same relative position, is a dark blue label with white lettering on it. The blue is not of the same shape as the blue on the plaintiffs' label, and on one of the red panels is also white lettering in English. On the other panel however, there is no English writing at all. The writing there is all in Chinese. Chinese script, of course, is very different to English script, or any other script which contains letters, and it certainly seems to me that a person who is quite illiterate would immediately detect the difference between the English writing and the Chinese writing; the ideograms are totally different from letters; they are more complicated and most striking of all, they run in a totally different direction, i. e. vertically and not horizontally; and it seems to me that an illiterate person, whose powers of observation are so small that he would not immediately detect the difference between the English writing and the Chinese writing, would have to be regarded as being of such limited intelligence that he is beyond the help of the Court.

It is admitted that there is nothing in the shape or size of the batteries. These are common to the trade. It is admitted I think, and I should certainly have been prepared to hold, if it was not admitted, that there is no right in any particular colour and the combination of red, white and blue, the colours of the British Empire, United States of America, France, Holland and some other countries, is so common that there can be no exclusive right of combining red, white and blue. The grey of the plaintiffs' battery is completely absent from the defendants' battery; so one very distinctive feature of the plaintiffs' battery is entirely missing from the defendants' battery. The appellants rely upon (1882) 7 A C 219,[6] but in that case the distinctive feature of the plaintiffs' trade mark were two elephants, and in the present case, as I said, there is no distinctive feature of this kind in the plaintiffs' battery. The appellants refer to 34 Cal 495,[3] but in that case again, although the actual trade mark is not described in detail, it had some distinctive feature from which it was known as the rupee trade mark. In the present case I can see nothing in the plaintiffs' batteries' get-up which could be seized upon to give it a name. The plaintiff says that it is known as the "Eveready" battery. The word "Eveready" does not appear on the defendants' battery, nor does any colourable imitation of it appear. In the case in 49 All 92,[5] the plaintiffs' label bore a lotus flower and lotus buds emerging from water — again a distinctive design which the purchaser might look for either as a lotus or as a flower, but there is nothing of the kind here.

Once we get the fact that the shape and size of the batteries are common, once we hold that the combination of red, white and blue is so common as having nothing whatsoever distinctive about it, once we have the fact that one battery is grey with red panels whereas the other battery is mainly red, and has no grey upon it at all it appears to me that even the unwary and incautious purchaser is not likely to be deceived by the defendants using the get-up which they have used, unless the unwary and incautious purchaser is so devoid of power of observation that he cannot tell one thing from another; and then this misleading will be due to himself and not to the defendant. This being the view that I take of the two batteries, I am constrained to agree with the Judge on the Original Side that the case should be dismissed, and I would therefore dismiss this appeal with costs, advocate's fee 10 gold mohurs.

Mosely J.—I agree.

B.D./R.K. *Appeal dismissed.*

6. Johnston v. Orr Ewing, (1882) 7 A C 219=51 L J Ch 797=46 L T 216=30 W R 417.

A. I. R. 1939 Rangoon 115

BAGULEY AND MOSELY JJ.

U Po Mya — Appellant.

v.

Father Rioufreyt — Respondent.

Civil Misc. Appeal No. 64 of 1937, Decided on 1st March 1938, against order of Asst. Dist. Court, Pegu, D/- 6th September 1937.

(a) Civil P. C. (1908), O. 9, R. 13—R. 13 has no application to execution proceedings.

Order 9, R. 13 has no application to execution proceedings, but only to decrees in suits or in pro-

ceedings in administration or guardianship akin to suits : *17 All 106 (P C), Rel. on.* [P 116 C 2]

(b) Execution Sale—Application for postponing sale refused for default and sale confirmed —Applicant appearing subsequently and applying for re-opening — Court should hear him — But order refusing to re-open is not appealable.

Where an application for postponing confirmation of the execution sale is dismissed for default and the sale confirmed and the applicant subsequently appears for re-opening of his application, which was refused, the Court should hear him or cancel his previous order and give him subsequent opportunity of hearing. But no appeal lies from the order refusing to re-open. [P 116 C 2]

(c) Administration — Preliminary decree — Defendants cannot obtain relief under it without payment of proper court-fee.

It is the practice in the mofusil to demand payment of court-fees from defendants, who come in under a preliminary decree in administration suits and they cannot obtain relief under the decree without payment of the proper court-fee : *A I R 1918 Cal 883, Rel. on.* [P 117 C 1]

(d) Jurisdiction—Executing Court—Criterion is value of suit as instituted and not amount of decree.

The criterion of the pecuniary jurisdiction of the executing Court is not the amount of the decree but the value of the suit at the time of its institution : *A I R 1937 Rang 320 (FB), Rel. on.* [P 117 C 1]

Where the plaintiff valuing his relief for Rs. 5000 brought a suit in the Court competent to try a suit of that value (the limit of the ordinary jurisdiction being Rs. 15,000) and the Court granted a decree for Rs. 21,000, the same Court can entertain application for execution of the decree : *Case law discussed.* [P 117 C 1, 2]

Kyaw Din for Shu Maung — *for Appellant.*

Clark —*for Respondent.*

Mosely J. — This purports to be an appeal under O. 43, Rule 1, Cl. (j) but is really under Cl. (d) of O. 40, Rule 1, Civil P. C. The circumstances are as follows: The plaintiff Khin Ma Gyi filed a suit for accounts or an administration suit against the defendant judgment-debtor and the present appellant U Po Mya, in which she valued her share of the inheritance of U Po Set deceased at Rs. 5100. Three other defendants, Khin Maung Lat, Khin Maung Pyon and Ma Khin Nwe made common cause with her, and a decree was passed to the effect that the defendant, U Po Mya, should deliver to these four persons 125 acres of unspecified paddy land, or its value, Rupees 7500, plus Rs. 13,500 in cash, the total amount decreed being Rs. 21,000, and costs. The decree was passed in the District Court of Insein, where execution was opened. The decree was also transferred under S. 39 of the Code, read with O. 21, R. 5, to the District Court of Pegu, which transferred it under R. 8 to the Assistant District Court, Pegu, for disposal.

Certain property of the judgment-debtor, Po Mya, was sold in execution for Rs. 3500 on the 9th June and the 21st July was fixed for confirmation of the sale. On the 13th July the judgment-debtor filed an application to stay confirmation of the sale pending orders of the Assistant District Court of Insein. The grounds of the application appear to have been that certain payments had been made at Insein, and an application had been made there for the payment of the balance by instalments and, therefore, the order of confirmation of the sale should be postponed. Notice was duly issued to the other side for the 21st July, but the advocate for the judgment-debtor failed to appear, and it was ordered that the sale be confirmed and the certificate of execution sent to the issuing Court. Later that day the judgment-debtor's advocate and the judgment-debtor appeared. The diary merely records their appearance on the 7th August. The judgment-debtor's advocate applied for re-opening of his application which was refused as the certificate had been sent on the 21st July (after the advocate had appeared). It is clear, as is contended by the respondent in this appeal, that no appeal lies. O. 9, R. 13 has no application to the execution proceedings, but only to decrees in suits or in proceedings in administration or guardianship akin to suits : *vide* 22 I A 44.[1]

It may be that the Judge would have been acting more considerately if when the advocate appeared later he had heard him, or had cancelled his previous order and given a subsequent opportunity of hearing, but as I have said no appeal lies, and I do not consider that any case has been made out for interference in revision. There are two other matters however in the case which call for notice. The plaintiff alone has stamped her plaint, and the defendants who claim to come in under the provisions of O. 20, R. 13, sub-s. 2, have not paid any court-fees. Under S. 11, Court-fees Act, in a suit for accounts if the amount decreed is in excess of the amount at which the plaintiff valued the relief sought, the decree is not to be executed until the difference between the fee actually paid and the fee which would have been paid had the suit

1. Thakur Pershad v. Fakir-Ullah, (1895) 17 All 106=22 I A 44=6 Sar 526 (P C).

comprised the whole amount decreed shall have been paid. Under S. 149 of the Code, no doubt, the Court may allow further time for payment of the deficit court-fees. So far as I know, it is the practice in the moffusil to demand payment of court-fees from defendants, who come in under a preliminary decree in administration suits, and I see no reason why they should obtain relief under the decree without payment of the proper court-fee. There is, curiously enough, no authority for the practice in this Province. The only authority which I could find on the subject is 44 Cal 890.[2] In my opinion that authority is correct.

The other matter for consideration and the one which has occupied most of the time of the Court is the question whether the Assistant District Court of Pegu can execute a decree the amount of which is beyond the limits of its ordinary civil jurisdiction. That is the form in which the question has been raised, but I consider it a wrong form. The proper form in my opinion would be whether the Court has jurisdiction to entertain an application in execution of a decree in a suit which is beyond its ordinary pecuniary jurisdiction, and whether the suit in question was actually beyond the ordinary pecuniary jurisdiction of the Court. It was held by a Full Bench of this Court in (1937) R L R 214[3] that it is the plaintiff's valuation in his plaint which fixes the jurisdiction of the Court, and not the amount which may be found and decreed by the Court; so therefore in a suit for accounts if the plaintiff values his relief at Rs. 5100 and brings a suit in the Court competent under S. 7, Burma Courts Act, 11 of 1922, to try a suit of that value, the Court may grant a decree for Rs. 21,000 as was done here. The argument is that the original jurisdiction cannot be ousted by a subsequent finding as to the amount of the relief claimed or mesne profits, a finding which the Court is authorized by the Code to make.

M. Clark, for the respondent, contends, rightly in my opinion, that if the Court of the Assistant District Judge had jurisdiction to pass the decree for Rs. 21,000, (the limit of its ordinary jurisdiction is Rupees 15,000), then it must have jurisdiction to execute its own decree, for execution proceedings are merely further proceedings in the suit in which the decree was obtained: *vide* 8 I A 123[4] at p. 133. The same conclusion was arrived at in 10 Bom 200.[5] From this Mr. Clark argues that if the Assistant District Court, Insein, was competent to execute its own decree then the Assistant District Court, Pegu, was equally competent to execute it. The Burma Courts Act (following S. 6 of the Code) contains provisions as to jurisdiction in suits only, and has no special provision for jurisdiction in execution proceedings. Jurisdiction in suits is governed, of course, by the value placed on the subject-matter of the suit in the plaint at institution. There was under the old Code, which corresponds in this respect with the new one save in one particular, a conflict of opinion as to whether S. 223, (corresponding to S. 39, sub-s. 1 of the present Code) which allows the Court which passed a decree to send it for execution to another Court where the judgment-debtor resides or works or has property, etc., does (though not in terms) require that the executing Court shall be a competent Court.

There are two decisions of the Madras High Court, 7 Mad 397[6] and 17 Mad 309,[7] where it was held, under the corresponding Section of the old Code, [at that time the word 'competent' had not been inserted in the portion of S. 223 of the old Code which corresponds to S. 39 (2) of the present Code, or in S. 226 which corresponds to O. 21, R. 8] that where proceedings in execution were transferred under what corresponded to S. 39 (1), it was not necessary that the executing Court to which they were transferred should be a Court of competent jurisdiction. These rulings, which have been dissented from by the High Courts of Calcutta, Bombay and Patna, are obsolete since the enactment of O. 21, R. 8. In the decisions by these latter High Courts, 12 Bom 155,[8] 16 Cal 457,[9] 16 Cal 465[10] and

2. Sashi Bhushan Bose v. Manindra Chandra, (1918) 5 A I R Cal 883=38 I C 835 = 44 Cal 890=24 C L J 448=21 C W N 310.
3. Chidambaram Chettyar v. Muthia Chettiar, (1937) 24 A I R Rang 320=170 I C 39=1937 R L R 214 (F B).
4. Mungul Pershad Dichit v. Grija Kant, (1882) 8 Cal 51=8 I A 123 = 4 Sar 249 (P C).
5. Shamrav Pandoji v. Niloji Ramaji, (1886) 10 Bom 200.
6. Narasayya v. Venkatakrishnayya, (1884) 7 Mad 397.
7. Shanmuga Pillai v. Ramanathan Chetty, (1894) 17 Mad 309=4 M L J 91.
8. Sidheshwar v. Harihar, (1888) 12 Bom 155.
9. Gokul Kristo v. Aukhil Chunder, (1889) 16 Cal 457.
10. Durga Charan Mojumdar v. Umatara Gupta (1889) 16 Cal 465.

37 Cal 574,[11] it was held that the Court to which a decree was transferred for execution under S. 39 (1), must be a Court of competent jurisdiction. In 12 Bom 155[8] it was said that it was the value of the subject-matter of the suit and the amount of the decree which determined the jurisdiction of the executing Court, but in all these other cases it was implied that it was only the value of the subject-matter of the suit as fixed in the plaint by the plaintiff that determined the pecuniary jurisdiction of the executing Court. The angle from which the question was approached was whether the executing Court was competent, regard being had to the valuation of the suit as fixed by the plaint.

It is true that in none of these cases was a suit in question where the decree granted was in excess of the jurisdiction of the Court where the plaint had originally been within that jurisdiction, but there are other reasons for holding this line of approach to be correct. Sec. 6 of the Code which regulates pecuniary jurisdiction, and says that nothing shall operate to give any Court jurisdiction over suits the amount or value of the subject-matter of which exceeds the pecuniary limits of its ordinary jurisdiction applies to suits only, and makes the criterion the subject-matter of the suit, that is the amount claimed and not the amount decreed. There is an analogous provision in O. 21, R. 4, which says:

> Where a decree has been passed in a suit of which the value as set forth in the plaint did not exceed Rs. 2000 and which, as regards its subject-matter is not excepted . . . . from the cognizance of . . . . the Court of Small Causes, it may be sent to the Court of Small Causes in Rangoon . . . . for execution.

It is true that the Small Cause Court cannot take cognizance of suits for an account, and these are the suits in which as a rule the amount of the decree passed may exceed the amount claimed in the plaint, but here again the Legislature has been careful to fix the criterion as the amount claimed in the plaint. It is interesting to note a Section which it was proposed to put into the Code of 1908, but which (except a small portion not here relevant) was not so inserted. This is quoted in Woodroffe and Amir Ali's Civil Procedure Code (Edn. 2, p. 224). The explanation to this Section says that a Court which would have been competent to pass a decree shall not be deemed incompetent to execute it merely by reason of mesne profits ascertained for periods subsequent to the institution of the suit. The pecuniary limits of the jurisdiction of the Court are extended. This explanation is on the lines of 10 Bom 200[5] cited above. Sub-s. 1 of this proposed Section however reads as follows:

> Save for the purpose of rateable distribution . . . no Court shall execute a decree which, by reason of the value or the nature of the suit at the time of its institution, it would have been incompetent to pass.

I only allude to this proposed legislation as showing that the authors of it agreed with the Calcutta and Bombay decisions which I have quoted, which made the criterion of the pecuniary jurisdiction of the executing Court not the amount of the decree but the value of the suit at the time of its institution. In my opinion the Assistant District Court of Pegu was competent to entertain this application in execution. This appeal will be dismissed with costs, advocate's fee five gold mohurs.

Baguley J.—I agree.

V.B.B./R.K *Appeal dismissed.*

A. I. R. 1939 Rangoon 118

DUNKLEY J.

U Po Nyun — Appellant.

v.

Ma Ah Ma and others—Respondents.

Second Appeal No. 270 of 1937, Decided on 24th February 1938, from decree of Dist. Court, Henzada, D/- 6th June 1937.

(a) Limitation Act (1908), S. 20—Date to be looked at is not date on which endorsement is written but date on which payment is made.

Under Section 20 it does not matter in the least when the endorsement on the document was made, so long as the payment itself was made within the period of limitation, and the date to be looked at is not the date on which the endorsement is written, but the date on which the payment is made. [P 119 C 1, 2]

(b) Limitation Act (1908), S. 20 (1), Proviso — Payment made by daughters of promisor not merely as his messengers but as independent persons—To save limitation, endorsements must each be written or signed by that one of them which made each payment.

It is true that if money is sent by a person by the hands of a messenger, the messenger having no responsibility in the matter except to hand over the money, the person making the payment is clearly the person who despatches the messenger with the money. But where daughters of a promisor have made payments not merely as messengers of their father but as independent persons, actually making the payments either on

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11. Shamsunder v. Anath Bandhu, (1909) 37 Cal 574=6 I C 97=14 C W N 662.

their own behalf or on behalf of their father, in order to save limitation the endorsements must each be written or signed by that one of them which made each payment : *A I R 1926 Cal 510, Ref.* [P 119 C 2]

(c) Limitation Act (1908), S. 20 (1), Proviso —Single signature in regard to endorsements referring to payments made at different times whether sufficient under Proviso *(Quære).*

It is doubtful whether a single signature in regard to endorsements referring to a series of payments made at different times would suffice to comply with the provisions of the Proviso to Section 20 (1). [P 120 C 1]

U Ba So — *for Appellant.*

K. C. Sanyal — *for Respondents.*

Judgment.—This second appeal must be allowed on a short ground. The Subdivisional Judge, who tried the suit, did consider the provisions of the Proviso to Sec. 20 (1), Limitation Act, but wrongly construed them. The learned District Judge, on first appeal, did not refer to this Proviso at all. The suit, which was brought by the plaintiffs-respondents against the defendant-appellant, was a suit on a promissory-note, which had been executed by him, his wife and his son. His wife and son are deceased. A decree was obtained against the appellant in the Subdivisional Court, and this decree has been upheld on first appeal. The promissory note was executed on 16th December 1931 ; therefore on the face of it, was barred by limitation. In order to save limitation, the plaintiffs-respondents set out six alleged payments of interest in para. 3 of the plaint, which were made at various times between 3rd November 1932 and 17th December 1935, and they relied upon the provisions of Section 20, Limitation Act. It is admitted that none of these payments was made by the appellant himself, but that they were made by one or other of two of his daughters. It appears that long after the ordinary period of limitation had expired the plaintiffs wrote out, or caused to be written out, a statement of these payments of interest on a piece of paper, Ex. B, and obtained the appellant's signature thereon. These payments were then written out by some other person on the promissory note itself and these endorsements on the promissory note were signed by the appellant. It is agreed on behalf of the respondents that with reference to S. 20, Limitation Act, it does not matter in the least when the endorsement on the document was made, so long as the payment itself was made within the period of limitation, and that the date to be looked at is not the date on which the endorsement is written, but the date on which the payment is made. This contention is undoubtedly correct. But it is only necessary to look at the Proviso to S. 20 (1) to see that the suit of the respondents was bound to fail. This Proviso is in the following terms :

Provided that, save in the case of a payment of interest made before 1st January 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment.

The appellant did not make any of the payments. The payments were made by his daughters, and with reference to the main part of sub-sec. (1) the appellant says that his daughters were not authorized to make payments on his behalf. But, be that as it may (and it is quite unnecessary to decide the question), as the daughters made the payments they were the persons who must make the writing or sign the writing under the Proviso to that Section.

Mr. Sanyal, for the respondents, has referred me to the case in 53 Cal 163,[1] where, referring to a case of payment made by a messenger on behalf of the defendant, Page J. held that the messenger is, as he put it, "merely a conduit pipe through which the money passes to the creditor" and that the person who really made the payment was the person who sent the messenger with the money. I accept this as a correct statement of the law, and no doubt, if money is sent by a person by the hands of a messenger, the messenger having no responsibility in the matter except to hand over the money, the person making the payment is clearly the person who despatches the messenger with the money. But that is not the case here. The persons who made the payments were the daughters, and there is no suggestion in the evidence that they were sent merely as messengers of their father. They obviously made these payments as independent persons, actually making the payments either on their own behalf or on behalf of their father, and hence, in order to save limitation the endorsements must each be written or signed by that one of them which made each payment. In this case we have merely a whole series of endorsements written in bulk and then a single signature of the appellant at the bottom of the whole series.

1. Ramkumar Sewchand v. Nanuram Poddar, (1926) 13 A I R Cal 510=94 I C 657=53 Cal 163.

I have doubts myself whether a single signature in regard to endorsements referring to a series of payments made at different times would suffice to comply with the provisions of the Proviso to Section 20 (1), Limitation Act; but I have no doubt whatever that when two women make the payments these two women are the only persons who can sign the necessary endorsements. This appeal must therefore be allowed and the judgments and decrees of both the lower Courts set aside and the suit of the plaintiffs-respondents dismissed with costs in all Courts.

D.S./R.K. *Appeal allowed.*

A. I. R. 1939 Rangoon 120

MYA BU J.

Ah Sein and others — Applicants.

v.

The King.

Criminal Revn. No. 395-B of 1938, Decided on 15th November 1938, from order of Headquarters Magistrate, Tharrawaddy, D/- 18th June 1938.

Burma Gambling Act (1899), Ss. 6 (1) and 7 — Unless provisions of S. 6 (1) are strictly carried out presumption under S. 7 cannot be made—Warrant issued after merely recording information that gambling is going on at certain place without any stamp of credibility does not constitute legal basis for presumption under Section 7.

The provisions of sub-s. (1), S. 6, are all important and unless those provisions are strictly carried out, a house or place cannot be said to have been entered under the provisions of that Section and consequently the presumption specified in S. 7 cannot be made. The mere recording of the information that illegal gambling is going on at a certain place and bearing no stamp of credibility is not sufficient to meet the requirements of the law and consequently the result of the raid or the search made under such warrant does not constitute a legal basis of the presumption under S. 7: *1 L B R 120, Rel. on.* [P 121 C 1; P 122 C 1]

C. H. Campagnac — *for Applicants.*

Order.—This is an application for revision of the conviction and sentence passed on petitioner 1, Ah Sein, under S. 12 (a), Burma Gambling Act, and convictions and sentences passed on the remaining petitioners under S. 11 of the Act. The case arose out of a raid made on the Chinese joss house in Merchant Street, Zigon, on the night of 11th March last by U Maung Maung, Circle Inspector of Police, armed with a warrant issued by the Township Magistrate of Zigon and accompanied by two respectable inhabitants of the locality as witnesses of the search. In conducting the raid, due compliance was made with the provisions of S. 103, Criminal P. C. All the petitioners were found in the joss house and certain instruments of gaming and cash altogether amounting to about Rs. 50 were found and seized by the Circle Inspector of Police. An element common to the charges against all the petitioners is that the Chinese joss house in question was used as a common gaming house.

The conviction of petitioner 1 under S. 12 (a) involves the finding of the trial Court that petitioner 1 being the owner or occupier or having the use of the Chinese joss house opens, keeps or uses the same as a common gaming house which under S. 3 (1) of the Act for the purpose of the present case means a house in which instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house whether by way of charge for the use of the instruments of gaming as such or of the house or otherwise whatsoever for gaming purposes. It has been one of the grounds of revision that there is no evidence whatever to show that petitioner 1 was the owner or occupier or the person having the use of the Chinese joss house in question. The judgment of the trial Court does not bear any indication of how this fact has been proved. In fact the learned Magistrate has expressed no finding to the effect that petitioner 1 was such owner or occupier or person having the use of the house. On my perusal of the record of the evidence in the case too I fail to find sufficient material in proof of the fact. Petitioner 1 stated that he was staying in the house being a paid servant of the Chinese joss house on a salary of Rs. 25 a month. In the absence of proof that petitioner 1 was either the owner or occupier or the person having the use of the house his conviction under S. 12 (a) of the Act must be held to be bad in law. He would however be liable to be convicted of the same offence as the other petitioners would be liable to be convicted of, if the latter are liable to be convicted of any of the offences under the Act. As I have said before, the other petitioners were convicted of an offence punishable under S. 11 of the Act, that is as persons who played in a common gaming house or were there present for the purpose of gaming.

There is no direct evidence of the fact that instruments of gaming were kept or

used for the profit or gain of the person owning, occupying, using or keeping the Chinese joss house whether by way of charge for the use of the instruments of gaming as such or of the house. As in most cases of this kind, the prosecution relies on the presumption arising under S. 7, Burma Gambling Act. This Section provides :

> When any instruments of gaming are found in any house, enclosure, room, place, vessel or vehicle, entered under the provisions of S. 6, or about the person of any of those who are found therein, it shall be presumed, until the contrary is proved, that such house, enclosure, room, place, vessel or vehicle, is used as a common gaming house, and that the persons found therein were there present for the purpose of gaming, although no play was actually seen by the Magistrate or police officer, or by anyone aiding in the entry.

Section 6, sub-s. (1) provided that a Magistrate of one of the categories mentioned in the Section or the District Superintendent of Police, who on credible information or on other sufficient grounds has reason to believe that any house, enclosure, room, place, vessel or vehicle is used as a common gaming house, may, after recording in writing such information or grounds, either himself do or by warrant authorize any officer of police not below the rank of Sub-Inspector or officer in charge of a police station to do the acts enumerated in Cls. (a), (b), (c) and (d) of the sub-section. The warrant in the present case was issued by the Township Magistrate upon receipt of information which he recorded in Ex. B. The document reads thus :

> The information received is to the effect that gambling is in progress among the Chinese for big stakes, taking commission, at the Chinese joss house situated at Night Stall Road, Zigon, bounded on the north by Night Stall Road; to the east by An Pai's house; to the west by Daw Pon Lon's house; and to the south by back lane.

It has been repeatedly pointed out since the very early days of the operation of the Burma Gambling Act, 1899, that the provisions of sub-s. (1), S. 6, Burma Gambling Act, are all important and unless those provisions are strictly carried out, a house or place cannot be said to have been entered under the provisions of that Section and consequently the presumption specified in Sec. 7 cannot be made : *see* 1 L B R 120[1] which was decided in 1901. At that time S. 6, sub-s. (1), stood somewhat differently from how it stands now in consequence of the amendment introduced by Burma Act 1, of 1905. The amendment did not affect the classes of officers authorized to issue the warrant, but the words

> on credible information or on other sufficient grounds, has reason to believe that any house, enclosure, room, vessel or place is used as a common gaming house, he may, after recording in writing such information or grounds

were inserted by the Act of 1905 in substitution for the words

> upon credible information, has reason to believe that any house, enclosure, room, vessel or place is used as a common gaming house, he may, after recording in writing the substance of such information and the grounds of such belief.

In 1 L B R 120[1] which was decided in 1901 or about four years before the amendment of the Section, as stated above, it was pointed out that a Magistrate or Superintendent of Police before he can issue a search warrant is required (i) to himself record in writing the substance of the information he has received and (ii) to record the grounds of his belief that the information is credible. Again in 1902 Thirkell White J. ruled in 1 L B R 289[2] that

> the record must show that the provisions of S. 6, Gambling Act, have been strictly observed before the presumption under Sec. 7 can be drawn. The record of the information and the grounds of belief made under Sec. 6 should be filed on the trial record.

It seems obvious that the words "may record briefly the substance of such information and the grounds of such belief" in the original Sec. 6, sub-s. (1), were inserted to provide a means of ascertaining whether the Magistrate or the District Superintendent of Police properly exercised his discretion in issuing the warrant, the effect of which, if carried out, in due compliance with the provisions of Sec. 103, Criminal P. C., and if instruments of gaming were found in the course of the search, was to throw on the accused person the burden of proving that the house which was raided was not a common gaming house. If the wording of S. 6, sub-s. (1), remains the same as it was before the amendment of 1905, the prosecution in this case must fail, because although the Township Magistrate recorded what was purported to be the substance of the information upon which he acted by issuing the warrant he never recorded the grounds of his belief in such information. But since the amendment of 1905 it has become unnecessary to record both but what must be recorded is either the information or the grounds of his belief that a house, enclosure, room, place, vessel or vehicle is used as a common gaming

1. Crown v. Majun, (1900-02) 1 L B R 120.

2. Crown v. Tun Wa, (1900-02) 1 L B R 289.

house, that is to say that if the Magistrate or District Superintendent of Police believes on credible information, he has to record such information, or if the Magistrate or District Superintendent of Police believes on sufficient grounds other than credible information, he has to record such grounds in order to render valid the warrant that he issues. It is worthy of note that while under the original wording of the Section the substance of the information and the grounds of belief were required to be recorded, under the present wording it is the information or the grounds of belief. While the amendment introduced in 1905 did not require the Magistrate or the District Superintendent of Police in issuing the warrant to record both the information and the grounds of belief, it is inconceivable that the Legislature intended thereby not to provide a means of ascertaining whether the Magistrate or the District Superintendent of Police properly exercised his discretion in issuing the warrant. It is only reasonable to suppose that the amendment was designed to enable the accused to point to the information or other grounds of belief which were recorded and thereby to show that the Magistrate or the District Superintendent of Police had not properly exercised his discretion in the issuing of the warrant.

Judged in the light of these principles which I consider to be underlying the provisions of Secs. 6 and 7, Burma Gambling Act, the record made of the information upon which the Township Magistrate acted in issuing the warrant in this case is, in my opinion, not sufficient to meet the requirements of the law. It is hardly more than a mere report that illegal gambling is going on at a certain place. It is so bald as to bear no stamp of credibility. How the informer himself derived the information is not disclosed by the record. Under sub-s. (2) of S. 6 the name of the informer is not to be specified in the record, but there must be something more than a bald statement that there is gambling for money and the taking of commission in a certain house which might be deemed to have made the information appear credible to the Magistrate or the District Superintendent of Police who issues the warrant. For these reasons I hold that the warrant in this case is invalid and consequently the result of the raid or the search made under that warrant does not constitute a legal basis of the presumption under Sec. 7, Burma Gambling Act. The convictions of the petitioners cannot be sustained. They are set aside and it is ordered that they be acquitted so far as this case is concerned. Let the fines, if they have already been paid, be refunded to them.

D.S./R.K. *Convictions set aside.*

A. I. R. 1939 Rangoon 122

ROBERTS C. J. AND MOSELY J.

Chin Ah On (a) Chin Hone On — Appellant.

v.

Chin Ah Foo (a) Chin Hone Foo — Respondent.

First Appeal No. 68 of 1938, Decided on 23rd November 1938, from Judgment and decree of Sharpe J., in C. R. S. No. 203 of 1937, D/- 23rd November 1938.

Civil P. C. (1908), S. 66—Claim that purchase was on behalf of plaintiff cannot succeed unless auction sale is impugned on ground of fraud or irregularity—Particulars of fraud not pleaded before Court which took evidence cannot subsequently be allowed to be pleaded.

The consequence of S. 66 is that unless the auction sale could be impugned on the ground of fraud or of some other grave irregularity which made it a nullity, the plaintiff's suit that the purchase was on plaintiff's behalf cannot be maintainable. Fraud must be strictly pleaded and particulars of any fraud relied upon must be stated in the pleading. It is very important that one who seeks to set aside a purchase completed under sanction of the Court should state the grounds on which he claims to impeach it and should not be allowed after trial of the case to rely on other grounds which had not been the subject of trial or adjudication in the Court which took the evidence : *23 Mad 227 (P C), Rel. on.* [P 123 C 2]

N. M. Cowasjee — *for Appellant.*

U Kyaw Din — *for Respondent.*

Roberts C. J. — This is an appeal from a judgment and decree of Sharpe J. sitting on the Original Side of this Court in favour of the plaintiff-respondent in a suit for settlement of accounts and for possession of the Chinese Hotel known as Foo Nam Low at No. 681 Dalhousie Street, Rangoon. The plaintiff and defendant are brothers. The plaintiff averred that he obtained the hotel by a deed of gift from their father Chin Na Yain dated 27th June 1933, but at the time of the said gift he gave his father Rupees 4000 in cash and four promissory notes for Rs. 1000 each. In April 1934 the plaintiff who was in financial difficulties left Rangoon for China, as he candidly admits, to avoid action being taken against him by

his various creditors; and his brother, the defendant, was left in control and management of the hotel. Almost directly afterwards his father instituted a suit against him on the four promissory notes, and obtained four decrees. In execution of three of them the hotel was attached and sold for Rs. 3150. The learned Judge found as a fact that the defendant bought the hotel at the court auction including the goodwill, fixtures and fittings. I mention this because there is a controversy as to whether it was purchased by another brother Kim Kee; this is the averment of the plaintiff, but the defendant says that they have no brother named Kim Kee, and that Kim Kee is merely one of the business names of the defendant.

The issue between the parties was whether the defendant became the true owner of the hotel as auction-purchaser at the court sale, or whether, as contended by the plaintiff, he was merely a trustee for the plaintiff and was controlling and managing it on the plaintiff's behalf. The plaintiff said that the defendant was benamidar merely, and that he himself was the true owner of the property. The learned Judge in the course of his judgment remarked that it was difficult to say exactly what this father and his two sons did resolve upon as a means of defeating the plaintiff's creditors in 1937; that they did devise some scheme which they thought would be useful he had no doubt. He regarded the issue as one which in the circumstances became a pure question of fact, and held that it had been definitely arranged that the hotel was to be merely managed by the defendant during the plaintiff's absence and that on his return it should revert to his possession and control. The learned Judge had already observed that the defendant was the purchaser at the court auction, but held that the plaintiff had discharged the burden which lay upon him to show that the purchase was made on the plaintiff's behalf. No one in the trial Court drew the attention of the learned Judge to Sec. 66, sub-section (1), Civil P. C., which runs as follows :

> No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims.

Now, this Section protects the certified purchaser at an auction sale by order of the Court from any claim that his purchase was made not on his own behalf but on that of the plaintiff. This is exactly the claim that has been set up here; the defendant was the certified purchaser. The consequence of this is that unless the auction sale could be impugned on the ground of fraud or of some other grave irregularity which made it a nullity, the plaintiff's suit could not be maintainable. On behalf of the plaintiff-respondent it is now sought to say that fraud was alleged in the pleadings and reference is made to paragraph 6 of the plaint which runs as follows :

> At the time the plaintiff went to China one Kim Tun, a relative of the plaintiff and defendant and who was then employed as a clerk in the defendant's business, was plaintiff's agent who at the request of the defendant gave active support in obtaining decrees in the said suits and the sale subsequent thereto.

It is enough to say that fraud must be strictly pleaded and particulars of any fraud relied upon must be stated in the pleading. This was not done and it was not sought to pretend that the defendant did not buy the property, but it was contended that there was in fact a sale and that he was the benamidar for the plaintiff. In 23 Mad 227[1] at page 234, Lord Hobhouse, in delivering the judgment of their Lordships of the Privy Council, observed that it was very important that one who sought to set aside a purchase completed under sanction of the Court should state the grounds on which he claimed to impeach it and should not be allowed after trial of the case to rely on other grounds which had not been the subject of trial or adjudication in the Court which took the evidence. It is now sought to say that Kim Tun, the plaintiff's agent whom it is alleged he left in charge of the hotel, was a clerk of the defendant's and was in collusion with him and that they brought about the obtaining of decrees against the plaintiff and the subsequent sale in collusion and by fraud, and that the sale should be set aside altogether on this ground. In view of the provisions of Section 66 (1), Civil P. C., the only way in which the plaintiff could be successful would be by proving that the sale was a nullity. No attempt was made to do this in the Court below, and it is too late to attempt it now. For these reasons I am of opinion that the appeal must be allowed.

1. Mahomed Mira Ravuthar v. Savvasi Vijia Raghunadha Gopalar, (1904) 23 Mad 227=27 I A 17=7 Sar 661=10 M L J 1 (P C).

The appellant is entitled to his costs throughout; advocate's fee in this Court seven gold mohurs.

Mosely J. — I agree.

D.S./R.K. *Appeal allowed.*

*** A. I. R. 1939 Rangoon 124**

MYA BU AND SHARPE JJ.

Po Kun — Applicant.

v.

The King.

Criminal Appeal No. 403 of 1938, Decided on 10th May 1938, from order of Sess. Judge, Sagaing, in Sess. Trial No. 8 of 1938.

*** Penal Code (1860), S. 303—Words 'under sentence of transportation for life' interpreted —Sentence of transportation for life afterwards remitted conditionally and accused released—After release accused breaking conditions and committing offence of murder—Accused must be sentenced to death under S. 303.**

A sentence of transportation for life means a sentence of transportation for the whole of the remaining period of the convicted person's natural life : *(1893-1900) L B R 13, Rel. on.* [P 126C 2]

If the sentence of transportation for life passed on a person is conditionally remitted by the Government under S. 403, Criminal P. C., and the person is released, such person must still be deemed to be under sentence of transportation for life in spite of the fact that he is not actually under sentence or in a penal settlement. [P 126 C 2]

Where therefore such a person after his release on remission, breaks the conditions on which remission was granted and commits an offence of murder, his case falls under Sec. 303 and such person must be sentenced to death. [P 126 C 2]

B. C. Guha — *for Applicant.*

Lambert, Govt. Advocate — *for the Crown.*

Mya Bu J.—The appellant Nga Po Kun has been convicted of the murder of his wife Ma Hla Myaing and of voluntarily causing grievous hurt to a fellow-villager Maung Ba Maung by means of a da on 20th November 1937 at Kyaukka village in the Monywa District, and has been sentenced to suffer death for the former and to suffer ten years' rigorous imprisonment for the latter; the sentences to run concurrently The only prayer of the appellant in this appeal is that the sentence of death might be altered to a sentence of imprisonment for such term as this Court might deem suitable in the circumstances of the case.

The case for the prosecution is that about 3.30 P.M. on 20th November last, the appellant cut his wife with a da in his own house where he carried on the work of a blacksmith and then proceeded through the village to the house of Mg Ba Maung, whom he met in front of the latter's house and cut Mg Ba Maung with the same da. Ma Hla Myaing received three incised wounds measuring 6″ × 5″ on the back of the neck cutting through the third cervical vertebra, completely severing the vertical column and muscles, vessels and nerves on the left side, which were necessarily fatal and apparently caused Ma Hla Myaing's death instantaneously or within a few minutes. On Mg Ba Maung no less than four incised wounds were caused, of which three resulted in fractures of the bone and constituted therefore grievous hurt within the meaning of S. 326 of the Penal Code. Mg Ba Maung had to be treated as in-patient in the hospital for over sixty days, out of which he was in severe bodily pain for about forty days.

There was no eye-witness to the attack on Ma Hla Myaing but the appellant was seen proceeding from the direction of his house carrying a blood-stained da towards the compound of Maung Ba Maung's house where, on meeting Maung Ba Maung, he attacked Maung Ba Maung with the same da. The witness who first saw him as he went towards Maung Ba Maung's house was near that of Maung Ba Maung's and who is a fellow-blacksmith working in the appellant's smithy. As he saw the appellant proceeding along the village road he not only noticed the appellant carrying a blood-stained da but also noticed some blood-stains on the appellant's shoulder. Later, he saw the appellant's attack on Maung Ba Maung. Maung Po Dan's wife, Ma Chit Su, also saw practically the same thing as her husband did. Maung Ba Maung himself gives evidence of the assault on him corroborated by his wife Ma Shwe Maw. There is also evidence to the effect that after his assault on Maung Ba Maung the appellant went in, roughly speaking, a northerly direction carrying the same da to his sister Ma Shwe Mya's house. A neighbour of Ma Shwe Mya saw the appellant throw the da down at a place north of Ma Shwe Mya's house. Maung Ba Maung hurried to the headman's house, where he related to the headman of what he had seen. The headman went into the village in search of the appellant. In the meantime some witnesses had occasion to go to the appellant's house. There they found

Ma Hla Myaing lying on the ground covered with blood. The headman met the appellant in the village and took him under arrest. The report of the occurrence reached the police of Monywa shortly after 5 P.M. on the same day. The da was found at night at the place indicated by Ma Ni Ta Ma, Ma Shwe Mya's neighbour, who had seen the appellant throw it down at the place. It was duly despatched to the Chemical Examiner, the result of analysis being that it had stains of human blood. The fact that the appellant caused the wounds on Maung Ba Maung with that da cannot for a moment be doubted. It is proved by the evidence of the eye-witnesses mentioned above. In addition to such evidence there is also the appellant's confession which was recorded by the First Additional Magistrate of Monywa on the proof of the charge against the appellant of his having voluntarily caused grievous hurt with the da to Maung Ba Maung.

The circumstances spoken to by the eye-witnesses taken with the confession further constitute overwhelming evidence of the appellant's having inflicted the wounds on Ma Hla Myaing; for the admission which the appellant made in his confession coupled with the evidence of the eye-witnesses renders an inference irresistible that the wounds on Ma Hla Myaing were caused by the appellant by means of a da. The confession is to the effect that on the day of the occurrence his wife had deceived him by pretending to go to an aunt's funeral at Aukseintaw village and actually going to Monywa with her paramour Mg Ba Yin, who lived in Ba Maung's house; that when she came back he taxed her with being late, to which she answered evasively; that thereupon as he made preparation to go out of the house to try and find Maung Ba Yin to ask him what he had meant by taking his wife out, Ma Hla Myaing, seeing that he was going to beat Maung Ba Yin, threw her arms around his waist to prevent him from going out; that thereupon he waved a strip of iron taken from a barrel hoop and went away taking the strip of iron, and that as he met Maung Ba Maung he struck the latter with it as Maung Ba Maung was the go-between. The appellant also stated in addition that about twenty-five days before the occurrence he heard Maung Ba Maung, Maung Ba Yin and another person consulting together as to how they could get the appellant convicted and sent to prison so as to get him separated from his wife. The gist of the story in his confession is that he did not cut his wife with a da but she was unfortunately struck by the strip of iron which he waved on her pulling him back by throwing her arms around his waist to prevent him from going out to harm Maung Ba Yin and that he used the same strip of iron on Maung Ba Maung when he met the latter. The theory of any of the wounds having been caused by the strip of iron must be ruled out as being totally inconsistent with the nature of the wounds on the two victims of the assault and also is being contradicted by evidence of the eye-witnesses who saw the assault on Maung Ba Maung. That the appellant was guilty of an offence punishable under S. 326, I. P. C., for the assault on Maung Ba Maung and thoroughly deserves the sentence of ten years rigorous imprisonment has not been disputed in this appeal.

The sole object of this appeal is to get the conviction for the murder of Ma Hla Myaing altered to one of some lesser offence and to get the sentence reduced. In the course of his examination during the trial the appellant made statements in an attempt to throw the responsibility for the infliction of the wounds on Ma Hla Myaing on Maung Ba Maung by stating :

> Maung Ba Maung and Maung Ba Yin came. Maung Ba Maung cut me with a da while my wife pulled me. As I dodged the blow my wife was cut. Only then I struck Maung Ba Maung with the strip of iron twice.

But this incredible story has neither evidence nor probability in support of it. Therefore all that has been urged on behalf of the appellant is that in the circumstances of the case the appellant must be held to have acted under grave and sudden provocation in inflicting the wounds on Ma Hla Myaing. The learned Sessions Judge has conceded, in our opinion quite rightly, that the appellant must have had grounds for belief that there was an intrigue between his wife and Maung Ba Yin. It appears that Ma Hla Myaing was a woman of about 32 years of age, the appellant being a man of forty-five or fifty, and they were married only about three months before the occurrence. During the short coverture the appellant had occasion about twenty-five days before the occurrence to tell a Police Constable who came to the village that he had reason to suspect his wife's conduct with Maung Ba Maung and Maung Ba Yin, and also to tell the headman that he was not happy as he

thought that his wife was in love with Maung Ba Yin and that Maung Ba Maung was acting as a go-between. In the trial Court the appellant stated that he knew that his wife had gone to Monywa with Mg Ba Yin instead of going to the aunt's funeral as he saw the two coming back together. Considering these facts it must be conceded that the accused had good grounds for suspicion of his wife's infidelity towards him, but it is not his case that as he had seen his wife come back in company with Mg Ba Yin his temper was so aroused as to drive him to any act of violence. According to his own version on his wife's arrival he questioned her as to why she was late. She gave evasive answers and therefore he made preparations to go out for the purpose of finding Mg Ba Yin, whom he intended to question. At that moment his wife gave utterance to her fear that he might go and assault Mg Ba Yin and put her arms around his waist to pull him back. It was at this juncture that he waved the strip of iron. Now that we find that the strip of iron was a da, assuming that the appellant cut his wife with a da as she pulled him back to prevent him from going out, it is extremely difficult to see how he can be said to have acted under grave and sudden provocation. The appellant's version would have accounted for some amount of annoyance or anger which however is far short of any provocation likely to cause the appellant to lose his power of self-control. In my judgment, even accepting the story told by the appellant, there was no grave and sudden provocation. But when the appellant's version of his wife's conduct at the time that he cut her be rejected, as it should be, as being highly improbable and unsupported by any evidence, then it must be held that no case of any substantial provocation is made out.

In my opinion, the case has not been brought within the purview of any of the exceptions to S. 300, Penal Code. The convictions for murder must be confirmed. The fact that the appellant made a savage attack on Mg Ba Maung practically in the course of the same transaction as his murdering his wife is a very aggravating circumstance. The degree of provocation, small as it was, due to his suspicion of his wife's infidelity is, in the circumstances of the case, quite insufficient to warrant a reduction of the sentence of death to one of transportation for life, even if this Court has the power to do so. The Court has no such power in the present case as the case falls within S. 303, Penal Code, which provides :

> Whoever being under sentence of transportation for life commits murder shall be punished with death.

The appellant was convicted of murder under S. 302, I. P. C., and sentenced to suffer transportation for life on 12th May 1923 by the Court of Session, Shwebo Division, but he was released in January 1937 by an order of the Government under S. 401, Criminal P. C., remitting, subject to conditions therein set out, the remainder of the punishment to which he had been sentenced. The conditions were :

> (1) That the said Nga Po Kun will, in the event of his settling down in the Andamans, report himself periodically to the police station Officer in whose circle he intends to reside, and keep the police authorities informed of all future changes of his residence;
>
> (2) that he will not commit any offence against property or any offence attended by violence or any offence against the public peace or against the State which may be punishable by any law in force in British India;
>
> (3) that he will not associate with notoriously bad characters or lead a dissolute life.

A sentence of transportation for life means a sentence of transportation for the whole of the remaining period of the convicted person's natural life : (1893-1900) L B R 13.[1] Accordingly, in spite of the fact that the appellant is not actually in prison or in a penal settlement he must be deemed to be still "under sentence of transportation for life." His release or remittance of the sentence is a conditional one. By the commission of the two offences in this case or either of them, the appellant has broken one of the conditions and is thereby liable to be made to suffer the remaining term of the sentence passed on him in 1923, which is transportation for life. Thus, if for the offence of murder in the present case the appellant is to be sentenced to transportation for life, the practical effect will be that he gets no punishment at all for the murder. Be that as it may, I am clearly of the opinion that the mandate of the law contained in S. 303, Penal Code, is applicable and must be applied to this case. I do not think that it will make any difference whatever to this view of the applicability of S. 303 whether the remittance of the sentence was a conditional or an unconditional one. So far as the sentencing Court was concerned it was a sentence of transportation for the

1. Nga Tha Byit v. Queen-Empress, (1893-1900) L B R 13.

whole of the remaining period of the convicted person's natural life. Unless that sentence was judicially set aside I think it holds good quite irrespective of an executive order of remittance, conditional or unconditional. At the conclusion of the trial before the passing of the sentence, the learned Sessions Judge questioned the appellant as to the fact of the previous conviction and sentence which he had to admit. The appeal is dismissed.

Sharpe J. — Upon the facts of this case there can be no really substantial dispute, and, as my learned brother Mya Bu has set them out at length in the judgment which he has just delivered, I need not recapitulate them. I entirely agree with the view expressed by Mya Bu J. that, so far as the appellant's attack upon his wife is concerned, it is quite impossible to bring the case within any of the exceptions to Sec. 300, Penal Code. The conviction recorded in this case must therefore stand. I would however say something about the applicability of S. 303, Penal Code to the present case. The appellant's criminal history is this: On 12th May 1923 he was convicted of murder by the Sessions Court, Shwebo, for which he was sentenced to transportation for life. S. 401, sub-s. (1), Criminal P. C., enacted that the Governor-General in Council or the Local Government (as it then was) might,

> at any time without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

On 5th January 1937 the Local Government (as it then was) exercised the powers conferred upon it by S. 401, Criminal P. C., and remitted, subject to certain conditions which were subsequently accepted by the appellant, the remainder of the punishment to which he had been sentenced on 12th May 1923. Upon his acceptance of the abovementioned conditions the appellant was released from jail. That appears to have been in May 1937.

Section 303, Penal Code, enacts that

> Whoever, being under sentence of transportation for life, commits murder shall be punished with death.

The learned Government Advocate who has appeared before us on behalf of the Crown has urged it upon us that we have no option in the present case and are compelled to confirm the sentence of death; that the terms of S. 303 are such as entirely to preclude the possibility of our passing a sentence of transportation for life, when once we have upheld, as indeed we have upheld, the conviction.

The question for our determination, on this part of the case, is therefore: Is a man, who has been sentenced to transportation for life and whose sentence (after he has served a part of it) has been remitted by the Governor (as it now is) upon conditions, to be still considered as "being under sentence of transportation for life"? A distinction is to be observed between the powers conferred by S. 55, Penal Code, and those conferred by S. 401, Criminal P. C. If the appellant, after being sentenced to transportation for life in May 1923, had had his punishment commuted under S. 55, Penal Code, to imprisonment for 14 years (the maximum term allowed under that Section), he could not, in my judgment, upon his release in May 1937 (or earlier, if he had earned remission), have been regarded thereafter as "being under sentence of transportation for life." But as, when he was released in May 1937, he was released, not because he had served a term of imprisonment for which his sentence of transportation for life had been commuted, but because the remainder of his sentence had been remitted upon conditions which he had accepted, the appellant must, in my judgment, be regarded as still "being under sentence of transportation for life" after his release from jail and at the time of the commission of the present murder If the remission had been without conditions, different considerations might have applied. My learned brother has just expressed the view, at the close of his judgment, that it matters not whether the remission is conditional or unconditional. I am not prepared now to say that I disagree with that view, but I, for myself prefer not to express any opinion upon the point, which, to my mind, would need further consideration than I have felt it necessary to give to the present case. But on the point which does apply to this case, namely where there is a conditional remission of the remainder of the punishment, I am in agreement with Mya Bu J., that in the present case S. 303, Penal Code, does apply, and that we have no discretion in the matter. We are bound to confirm the sentence of death. I would only add this, that I also agree with my learned brother that, even if we do have a discretion in this case, this is not a case which calls for a lesser penalty than a sentence of

death. I accordingly agree that the appeal must be dismissed, and the sentence of death confirmed.

N.S./R.K. *Sentence of death confirmed.*

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SHARPE J.

U Toe Sein (a) U Ba Sein and others Applicants.

v.

The King.

Criminal Revn. No. 538-B of 1938, Decided on 1st December 1938, from review of order of 1st Addl. Special Power Magistrate, Pakokku, D/- 22nd August 1938.

Penal Code (1860), S. 376—Court should be slow to accept uncorroborated evidence of girl —Evidence in corroboration must be independent testimony—What girl has said after rape is no corroboration.

Corroboration is not essential even in a case of an offence of rape. The Court is entitled to accept the uncorroborated evidence of a girl, but it should be slow in its acceptance of it. It must scrutinize her evidence very carefully and unless her story convinces the Court so much that it does not possibly stand in need of any corroborative evidence, it should not accept her uncorroborated evidence. The evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. What the girl said after the rape is really no corroboration at all : *A I R 1934 Cal 7 and (1916) 2 K B 658, Rel. on.*

[P 130 C 1]

Order.—Applicant 1 has been convicted of rape and applicants 2 and 3 have been convicted of abetting the commission of that offence by applicant 1. The history of the matter stands in this way : The offence is alleged to have been committed on 22nd June last. The applicants were tried by the First Additional (Special Power) Magistrate of Pakokku and they were all convicted. Applicant 1 was sentenced to three years' rigorous imprisonment, applicant 2 to two years' rigorous imprisonment and applicant 3 to one year's rigorous imprisonment. From those convictions all three applicants appealed to the Sessions Judge, Pakokku. The memorandum of appeal to that Court is undated. There are only two grounds to which I desire to refer from amongst those mentioned in that memorandum of appeal.

Ground No. 3 : For that the learned Magistrate should have held that Maung Mu (P. W. 2) and Ma Sein Tin (P. W. 3) did not support the complainant.

Ground No. 9 : For that even if there had been sexual intimacy between the complainant and appellant 1, the learned Magistrate should have held that the complainant had consented to the sexual relation.

The matter came before the learned Additional Sessions Judge, Pakokku, who dismissed all three appeals. The present applicants then filed an application for revision in this Court and the matter came before me. In the application for revision to this Court, eight grounds were set forth. The seventh ground was :

That assuming that petitioner 1 did have sexual intercourse with the complainant, the Appellate Court, it is submitted, was bound to consider whether such intercourse was with the complainant's consent and erred in not doing so ;

the eighth ground was: "That the Appellate Court did not at all consider the evidence adduced by petitioners." The remaining grounds in the present application, namely grounds Nos. 1 to 6, are all matters which may be described, I think, compendiously as complaints that the lower Court preferred the evidence for the prosecution to the evidence for the defence and that they ought to have preferred the latter to the former. The matter, as I say, came before me. S. 440, Criminal P. C., provides that :

No party has any right to be heard either personally or by pleader before any Court when exercising its powers of revision.

I read the judgments in both the lower Courts which had been filed along with the application for revision and I considered the grounds of the application. The first six grounds did not seem to me to be any ground whatever for interfering in revision. Whether or not I might have come to a different conclusion upon the evidence if I had had the opportunity, as one of the lower Courts did, of seeing the witnesses, it seemed to me that it was not possible to say that the conclusions reached in the lower Courts were necessarily wrong and ought to be the subject of revision. I then considered ground No. 7 which, as I have just indicated, alleged that the Appellate Court erred in not considering whether the intercourse, if there was intercourse, between the complainant and applicant 1 was with the complainant's consent. The lower Appellate Court admittedly did not consider whether it was with the consent of the complainant, although, as I have already pointed out, ground No. 9 in the memorandum of appeal to the lower Appellate Court had raised that matter of complaint. My

view of the matter was that, having regard to the attitude taken up by applicant 1 in his examination, that there was no question of his having had sexual intercourse with the complainant (there was a flat denial of any such thing) in those circumstances it seemed to me that it was quite unnecessary for the Appellate Court to consider whether the act was done with the complainant's consent. Then came ground No. 8 in the present application, that the Appellate Court did not consider the evidence adduced by the applicants. It is true that the learned Additional Sessions Judge did not deal fully with the evidence of the defence witnesses, but it is, I think, clear that he did consider it and come to the conclusion that the witnesses for the prosecution were to be preferred to those for the defence. Mr. Rafi this morning has, at any rate as regards the first part of the Appellate Court's judgment, said that it is in very fair terms and it seemed to me when I was considering this application for revision that there was no ground for saying that the Appellate Court did not at all consider the defence evidence. That disposed, as I thought, of the whole of the application and I did not —and indeed, as I have already pointed out, it was not incumbent upon me to do so— require to hear the applicants or their advocate, but it did seem to me that there being no reason for disturbing the conviction, the sentences were on the light side. So I made this order :

> This is not a Court of second appeal and I see no reason for supposing that the decision in this case requires revision, except as regards the question of sentence. All the sentences would at first sight appear to err on the side of too much leniency.

I then directed notices to issue to all three applicants to show cause why their sentences should not be enhanced. And here we are today pursuant to that notice; and Mr. Rafi appears on behalf of all three applicants. Applicant 1 intimated his desire to be present today but the information received from the jail is to the effect that he is not well enough to be here. Mr. Rafi has told me that applicant 1 does not wish for any adjournment—he is quite content —and, I think, very wisely content being represented as he is by Mr. Rafi—that his presence here would not carry the matter any further. Mr. Rafi has said that despite my previous order, the matter is, so to speak, now at large before me having regard to the terms of sub-s. (6) of S. 439. I have felt a little doubt about that owing to the decision in 10 Lah 241.[1] Mr. Rafi has urged before me, and it is really his main point, that here there was no corroboration of the complainant's story and that although corroboration is not essential, yet one must be very satisfied before accepting the uncorroborated evidence of the complainant in a case such as this that she can be believed. "And", said Mr. Rafi,

> in the circumstances of this case, if I can get rid of what is called the corroborated evidence, the complainant's evidence ought not to satisfy any one of the applicants' guilt.

Now, that is a point which was not mentioned as a ground in the application for revision in this Court. The question of these two witnesses, for it is the evidence of Maung Mu and Ma Sein Tin which is said to be the corroboration in this case, was mentioned in the memorandum of appeal to the Sessions Court, as I have just said, for it was urged as a ground there — ground No. 3 — that the learned Magistrate should have held that the evidence of those two witnesses did not support the complainant. I am not quite sure what was meant by "did not support the complainant," but some point obviously was intended to be taken about the evidence of those two witnesses. It is unfortunate that this point was not raised in the application for revision in this Court. For if it had been, I think that I should, before I issued notice to the applicants as to the possibility of their sentences being enhanced, have desired to hear Mr. Rafi upon that particular point. Mr. Rafi urges me not to take too technical or narrow a view in this case and I have no desire to do so.

For reasons, which I will indicate in a moment, I think that there is substance in Mr. Rafi's point as to the corroboration; although, as I have said, when the matter first came before me, I did not call upon any party to appear because it did not then seem necessary for me to do so, as this point was not raised at all, I think in the absence of its being raised in the application for revision, the course I adopted was the only possible one. Now that Mr. Rafi draws my attention to this matter and desires me to take it into consideration I think it is only right that I should do so. I do not propose therefore to consider whether, strictly speaking, upon the decision

1. Emperor v. Dhanna Lal, (1929) 16 A I R Lah 797=1929 Cr C 429=117 I C 669=30 Cr L J 815=10 Lah 241=30 P L R 409.

in 10 Lah 241[1] I am precluded from going into this point. I ought, I feel, if only in common justice to the applicants to go into this point although unfortunately this was omitted from the application for revision. Now the evidence of these two witnesses, Maung Mu and his wife Ma Sein Tin, is that after the alleged offence, so they both say, the complainant told them that Ko Toe Sein who is applicant 1 had had illicit intercourse with her. A person can corroborate himself. What the complainant said after the occurrence is really no corroboration at all, as was pointed out in 62 Cal 527.[2] There is a further piece of evidence given by Maung Mu and by his wife that after this alleged occurrence applicant 1 asked him to bring out the complainant by some means or another and that he would give him (Maung Mu) and his wife Ma Sein Tin a rupee each if they would do so. Now I do not think that that really amounts to corroboration properly so called; as was pointed out by Lord Reading, the then Lord Chief Justice of England, in (1916) 2 K B 658[3] at page 667 :

> We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words it must be evidence which implicates him, that is which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.

I do not think that in the present case there was corroboration of the complainant's story. But the matter does not end there. Corroboration is not essential even in a case of this nature. The Court is entitled to accept the uncorroborated evidence of a girl but it should be slow in its acceptance of it. It must scrutinize her evidence very carefully and unless her story convinces the Court so much that it does not possibly stand in the need of any corroborative evidence it should not accept her uncorroborated evidence. Mr. Rafi has referred me to numerous instances in the evidence in this case which he says are such that it is impossible to say that the complainant's evidence does not stand in need of corroboration. It is unnecessary, I think, for me to go through the various points to which Mr. Rafi drew my attention in the course of his argument and, if I may say so, very powerful address on behalf of these applicants. Suffice it for me to say that this is not a case in which there being no corroboration, I am so convinced that the complainant's evidence can stand without any corroborative evidence.

In those circumstances it seems to me that these convictions cannot stand. It is obvious that if applicant 1's conviction goes, the convictions of the other two applicants automatically go. In the result although this point was not raised in the application for revision in this Court, I think that I must take notice of this point now that Mr. Rafi draws my attention to it and these three convictions and the sentences passed against the applicants are set aside.

D.S./R.K. *Convictions set aside.*

2. Noor Ahmed v. Emperor, (1934) 21 A I R Cal 7=1934 Cr C 23 = 155 I C 584 = 38 C W N 108=62 Cal 527.

3. Rex v. Baskerville, (1916) 2 K B 658=86 L J K B 28 = 115 L T 453 = 80 J P 446 = 25 Cox C C 524=60 S J 696.

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SHARPE J.

M. L. Friedlander and others — Plaintiffs.

v.

Corporation of Rangoon and another — Defendants.

Civil Regular No. 352 of 1937, Decided on 17th November 1938.

Rangoon City Municipal Act (6 of 1922), S. 230— Rules under—R. 7 to Sch. 1, Ch. 9— Notice to convene meeting to consider report of committee called for as result of resolution to appoint a new Legal Adviser after usual advertisement, report naming no particular individual nor hinting at his appointment without advertisement — Appointment of named individual without advertisement is irregular.

Although it is perfectly competent to the Corporation to appoint a Legal Adviser, the power to make such an appointment has not, by the constitution of the Corporation, been included among its powers except on the fulfilment of a condition, namely that the consent of the members of the Council to any appointment which may be proposed has been obtained in a legal and regular manner. [P 136 C 1]

Where a notice says that meeting is to be convened for the consideration of a report which had been called for as a result of a proposed resolution to appoint a new Legal Adviser after the usual advertisement, and when the report named no particular individual or even hinted at the possibility of any particular individual being appointed without the usual advertisement, it is irregular to go into the question of appointing forthwith a named individual without the usual advertisement. Moreover, the motion that a named individual be forthwith retained to act as the Corporation's Legal Adviser, thereby entirely dispensing with the usual advertisement is a substantive proposition within the meaning of R. 7 which cannot be

discussed unless specified in the notice: *A I R 1917 P C 52 and (1898) 1 Ch 358, Rel. on; 22 Bom 646; (1875) 10 Ch 606 and A I R 1938 Rang 404, Disting.* [P 135 C 2]

C. V. Foucar — *for Plaintiffs.*

Hay — *for Defendant* (Corporation).

Judgment. — I have already dismissed defendant 2 from the suit, and it now remains for me to dispose of the plaintiffs' claim as against the Rangoon Corporation. The material facts appear to me to be as follows: Notice of the meeting of the Corporation to be held on 5th January 1937 was duly given on 31st December 1936, and in the notice of that meeting appeared the Agenda proposed to be discussed thereat, in accordance with R. 7 of the Rules for the Conduct of Business, to which Rules I shall have to refer later, and Item 17 on the Agenda was this:

U Tin Baw will move the following resolution: Resolved that the services of the present Legal Adviser be terminated forthwith and a new Legal Adviser be appointed after the usual advertisement.

At the meeting of 5th January, held pursuant to that notice, Item 17 on the Agenda came up for consideration, and U Tin Baw's resolution, to which I have just referred was, with his permission, referred to a Special Committee consisting of the Mayor, U Tin Baw himself, Mr. Rafi—who was defendant 2 in this suit until yesterday —U Tun Aung and Mr. Nelson. The Special Committee so appointed met on three occasions and discussed in detail the relations of the Legal Advisers to the Corporation. The Committee asked the Commissioner to put before it a note on the subject, and the Commissioner did so. The Committee drew up its Report, which was signed by Dr. Murray, the Chairman, on 4th September 1937, Dr. Murray being then the Mayor. The day before Dr. Murray signed that Report, namely on 4th September, notice was given of a meeting of the Corporation to be held on 7th September, and in accordance with R. 7 the Agenda was again included in the notice. The Agenda for 17th September included the following as Item 13:

To consider the Report of the Special Committee appointed to consider the resolution of U Tin Baw regarding the Legal Adviser to the Corporation.

And the note was added: "Copies of the Report will be circulated." They were presumably not circulated with the notice because the report was not yet complete, if only for the reason that the Mayor as Chairman of the Committee, had not by that date signed it, as I have just indicated. It is admitted that before 7th September, which was the day fixed for the meeting, copies of the Special Committee's Report were in fact circulated. Any Councillor receiving that notice and Agenda for 7th September and subsequently receiving a copy of the Special Committee's Report would see that what the Committee had considered was the advisability of appointing "a" (the use of the indefinite article is of importance) Legal Adviser. The Committee were agreed that "a" Legal Adviser on fixed remuneration would be an advantage. But, though they were not unanimous, the majority agreed that the all-in fee of Rs. 1200 a month indicated in the Commissioner's Note was justified by the kind and importance of the extra work which would be entrusted to the Legal Adviser. The Councillor would also observe that the report concluded with this statement:

The Committee agreed with the Commissioner that the engagement of "a" Legal Adviser be on a contract for a period of five years.

It would also have been observed by a Councillor receiving that Notice and Agenda that the Commissioner's Note referred to the fact that personally he would welcome the idea of having "a" Legal Adviser whom he could consult at all times and without restraint, for it appears that the Commissioner's Note was attached to the Special Committee's report: the Councillors, who received the report prior to the meeting, would also receive with it a copy of the Commissioner's Note. The meeting of 7th September was duly held and Item 13 on the Agenda fell to be considered in its turn. The Corporation proceedings upon that item commenced by Mr. Nelson, who had been one of the members of the Special Committee, addressing the Corporation and moving:

That the Corporation do advertise the post of Legal Adviser on a fee of Rs. 600 a month, and that in the event of a suitable candidate not being available the Corporation make no change in their present method of seeking and paying for legal advice as required.

The suggestion contained in the motion which Mr. Nelson so moved, that the post of Legal Adviser should be advertised, followed the lines of the resolution which had stood in the name of U Tin Baw and which had been originally referred to the Special Committee. Mr. Nelson's proposition was seconded, and it was opposed by Mr. Wellington, whose concluding remarks were that he felt that they ought to have "a"

(note, again, the use of the indefinite article) whole time Legal Adviser to watch the interests of the Corporation all the time. He thought Rs. 1200 was a reasonable figure. After a speech by Dr. Dugal, Mr. Sequeira said that he had nothing to add to what Mr. Wellington and Mr. Dugal had stated and he moved, what he described as an amendment, not merely "that the report of the Special Committee be accepted," but something else in addition. It is to be particularly noted that his proposed amendment falls into two clear cut compartments. His proposed amendment concluded :

And that Mr. M. M. Rafi, Barrister-at-law, be retained to act as the Corporation's Legal Adviser on the terms and conditions contained in the Commissioner's Note.

That amendment was seconded, and was supported by U Tin Aung, and Mr. Strong also spoke on the subject, the latter suggesting in conclusion that the post be advertised. Another Councillor supported Mr. Sequeira's amendment, and then U Ba Glay moved that the question be deferred till the following month, Mr. Strong seconding U Ba Glay's motion. Dr. Dugal objected to the question being postponed and in the end U Ba Glay's motion to defer the question till the following month was put and lost. Mr. Nelson then replied to the debate and said that the Special Committee had not been asked to consider the selection of a candidate for the post of Legal Adviser and Mr. Sequeira's amendment came as a surprise to him : personally he had no objection to Mr. Rafi being appointed at the proper time, provided he was willing to accept a fee of Rs. 600 a month. Plaintiff 1, who was at that time a member of the Corporation, rose on a point of order and said that all that they were considering was the report of the Special Committee appointed to consider the resolution of U Tin Baw regarding the Legal Adviser to the Corporation. The Mayor ruled that the matter actually arose out of the resolution. Mr. Sequeira's amendment, namely that the report of the Special Committee be accepted and that Mr. M. M. Rafi, Barrister-at-law, be retained to act as the Corporation's Legal Adviser on the terms and conditions contained in the Commissioner's Note, was then put and carried.

The following day the Secretary of the Corporation wrote to Mr. Rafi and informed him that the Corporation had at its meeting the previous day accepted the proposal to retain him as the Corporation's Legal Adviser on an all-in fee of Rs. 1200 a month, the appointment to be for five years, on a contract renewable at the Corporation's option, and he asked whether Mr. Rafi was willing to accept the appointment on those terms. The receipt of that letter, I imagine, did not surprise Mr. Rafi, who had, it is admitted, been present the previous afternoon and had taken part in the various matters which were being considered by the Corporation at its meeting, although he had very properly refrained from taking any part during the discussion on Item 13 in the Agenda. It is admitted however that he was in fact present during that discussion. I desire to mention at this point that the fact that at the meeting of 7th September there had been present, out of a total of thirty-three Councillors, twenty-eight Councillors; there were five absentees, two of whom had asked for leave of absence which had been granted.

On 9th September Mr. Rafi wrote to the Secretary of the Corporation informing him that he accepted the appointment on the terms and conditions referred to in the Secretary's letter, to which I have just referred, and the same day there was executed at the City Hall an agreement between the Corporation and Mr. Rafi, signed by the latter and by the Commissioner and the Mayor on behalf of the Corporation and to which the Corporation's seal was affixed. That agreement was designed to give effect to the resolution which had been passed two days previously. I find as a fact that that agreement was executed by all the parties to it between 4 and 4.30 P. M. on 9th September. By a further letter addressed to the Secretary of the Corporation and bearing date the same day Mr. Rafi resigned his Councillorship. It is impossible, I think, to say exactly at what moment of time that letter of resignation must be taken to have been received by the Corporation or by the Secretary on its behalf, but I am satisfied that it was at least written and despatched by Mr. Rafi prior to the execution of the agreement on that day, and in all probability it was received at the City Hall also prior to the execution of the agreement. From the time of the execution of the agreement up to the present time, as I understand it, Mr. Rafi has been acting as Legal Adviser to the Corporation under and by virtue of that agreement. I have not been told whether he has received any remuneration for his services.

I think that this will be a convenient place at which to stop this afternoon. I will resume tomorrow morning at 11 o'clock. [His Lordship resumed on 18th November.] I observed in one newspaper this morning that there was what purported to be an account of these proceedings, but it omitted what I think was an important fact. The report which I saw omitted to state that the suit with which I am now dealing was also brought against Mr. Rafi and that two days ago I dismissed him from the suit. Further, from the report which I read it would appear as if I had reserved my judgment; I did not in fact do so. I had started my judgment yesterday afternoon, but owing to the lateness of the hour it could not then be completed. Now, taking up the story of the facts from where I left off last evening, I think I had come to the evening of 9th September, when the agreement between Mr. Rafi and the Corporation was executed, and Mr. Rafi had tendered his resignation as a Councillor. [Mr. Foucar said that what his Lordship said was right. His Lordship then proceeded further.] Two things happened on the following day, 10th September. In the first place, the Secretary of Corporation wrote to Messrs. Cowasjee, Anklesaria and Cowasjee expressing their regret that their long and cordial association with the Corporation as its Legal Advisers must forthwith be terminated as the Corporation had made other arrangements for its legal work. Secondly, that same day eight Councillors gave notice to the Secretary of the Corporation that they required a special meeting of the Corporation to be convened to re-consider the Report of the Special Committee and to cancel the decision at which the meeting of the Corporation had arrived in regard thereto on 7th September. One of the grounds upon which reconsideration was desired was that under R. 7 of the Rules for the Conduct of Business (Ch. 9 of Sch. 1, to the City of Rangoon Municipal Corporation Act, 1922):

> it was not competent for the meeting to decide upon the appointment of any individual, as no such appointment appeared in the business to be transacted at the said meeting.

Pursuant to that requisition, a special meeting of the Corporation was held on 27th September, at which 28 out of the 33 Councillors were present, including two who had not been present on 7th September. One of those two had been one of the eight who had signed the requisition. After an introductory statement by the Mayor and the moving and seconding of a resolution by Mr. Friedlander and Mr. Auzam respectively, that the report of the Special Committee on Legal Advisers to the Corporation be re-considered, a poll was taken upon Mr. Friedlander's resolution, the result of which was that 17 Councillors voted for the resolution and ten against it. Under R. 16 of the Rules for the Conduct of Business, no proposition to cancel, repeal, vary or add to any decision, resolution or order of the Corporation, shall be made or discussed unless either a period of not less than six months has elapsed since the date of such decision or unless at least three-quarters of the Councillors present assent to a motion, of which due notice shall have been given under R. 6. Since in this case, although there was a majority in favour of the resolution, there was not in fact a three-quarters' majority of the Councillors present, and as the proposition was in fact made less than six months after 7th September, permission to re-open the question was accordingly refused. Mr. Friedlander thereupon commenced a correspondence with the Secretary of the Corporation, but I do not think that it is necessary for me to refer to any of the letters in this judgment.

On 4th November last year the three plaintiffs gave notice to the Corporation under the provisions of S. 204, City of Rangoon Municipal Corporation Act, of their intention to institute a suit against the Corporation, and in that notice they set out what they said was their cause of action and the other matters required by that Section. It is admitted that no reply to that notice was sent by the Corporation. It is also admitted that the notice was not brought to the notice of the Corporation at any one of its monthly meetings. After the expiration of something like a little more than one month after the giving of that notice, namely on 13th December last year, these three plaintiffs instituted this suit against the Corporation asking for an injunction restraining the Corporation from giving effect to the resolution and agreement and from making any payments to Mr. Rafi purporting to be payments in respect of the agreement. In the Agenda for 4th January of this year, contained in the notice of the meeting to be held that day, there appeared an Item 44 as follows:

To consider and record the plaint filed by Mr. M. L. Friedlander, No. 86, Barr Street, Mr. A. Sattar, No. 88, 37th Street, and U Ba Yin, No. 663, Merchant Street, against the Corporation of Rangoon in Civil Regular No. 352 of 1937 of the High Court of Judicature at Rangoon.

"Copies of the plaint," said the notice, "have already been circulated." By this time a new Council had been elected as the result of an election held in November of last year, and on 4th January 1938 the first meeting of the new Council was held, at which all 33 Councillors were present, of whom 19 were newly elected members. Mr. Friedlander was no longer a Councillor. The meeting could not be concluded on 4th January, and it was adjourned till the following day. On the following day Item 44 in the Agenda came up for consideration. The attendance of the Councillors on the second day was only 26, out of the total number of 33. Item 44 was disposed of in the following way:

(i) Recorded : The plaint filed by Mr. M. L. Friedlander, etc. . . . . Copies of the. . . . . plaint were circulated and laid on the table.

The institution of the suit having been recorded, Mr. Wellington moved "that the Commissioner be instructed to take the necessary steps to defend the suit."

Mr. Sequeira, the Councillor, who, it will be remembered, had proposed the amendment to Mr. Nelson's motion on 7th September, seconded Mr. Wellington's proposal, which was put and carried. The next monthly meeting of the Corporation was held on 1st February. At that meeting Mr. Auzam proposed to ask ten questions pursuant to a notice which he had given, and Mr. Wellington proposed to move a resolution pursuant to a notice which he too had given. Mr. Auzam's proposed questions and Mr. Wellington's proposed resolution related to the matter of Mr. Rafi's appointment as Legal Adviser to the Corporation, and before either the questions were put or the resolution proposed the Mayor said that he had, after careful consideration, come to the conclusion that it would not be advisable to proceed with either the question or the resolution as the whole matter was sub judice, and he expressed the hope that both Mr. Auzam and Mr. Wellington would withdraw the questions and the resolution respectively. They both did so.

Those, I think, are the relevant facts. Before passing on to a consideration of the law applicable to this subject, I desire to point out three things as being, I think, of importance in relation to the facts. The first is that from the commencement of this controversy (I think that is perhaps the best word to use) the suggestion had been that the then Legal Adviser's appointment should be terminated and that a new Legal Adviser should be appointed after the usual advertisement. That any new appointment was to be made only after the usual advertisement is, I think, the most important fact to bear in mind. From the commencement it was apparently, so far as one can judge from the minutes, in everybody's mind that the new appointment, if any change was to be made, should be made after advertisement, which was the usual method. Mr. Hay has suggested that it would be beneath the dignity both of a member of the Bar, and also of an advocate of this Court who was not a member of the Bar, to apply for appointment as Legal Adviser in answer to a public advertisement. It does not seem to me to be in the least derogatory to the position of an advocate. Appointment after advertisement is a commonplace thing not only here in Burma, as we can see almost every day in the press, but also in England and in other parts of the Empire.

The second matter to which I wish to call attention as being an important fact—and I hinted as to its importance yesterday at the commencement of my judgment—is the use of the indefinite article in the report of the Special Committee. The resolution which had been referred to them for consideration and report was a resolution suggesting possibly a new appointment, but in any event the appointment of an unknown and unnamed individual after the usual advertisement, and the Special Committee in its report made no mention of any special individual as a proposed candidate, but followed the wording of U Tin Baw's resolution and spoke of the appointment of "a" Legal Adviser on new terms, which was what U Tin Baw had originally moved.

The third matter of importance which I think appears from the facts as I have detailed them is this: Mr. Rafi was present at the meeting of the Council on 7th September, and although he very properly, as I said yesterday, took no part in the discussion of this particular item on the agenda, he was present throughout the meeting. It is impossible, I think, to avoid the conclusion that Mr. Rafi knew before Mr. Sequeira

rose to propose what he called an amendment, that his name was at least likely to be put forward, and he did not intervene in the debate, although he could perfectly well have done so. He could, with perfect propriety, if he did not wish to have his name brought forward, have said so, but he did not intervene, and I must take it that he knew that his name would, and was quite willing that it should, be brought forward. He has not gone into the witness-box before me, although he remained in Court after I dismissed the suit as against him and he is still present in Court. The fact that the suit as against him had been dismissed in no wise prevented him from going into the witness-box as a witness on behalf of the Corporation.

Now let me turn to the issues which I have to decide. The first question is: Was there any irregularity in the proceedings of the defendant Corporation which terminated in carrying of Mr. Sequeira's amendment on 7th September? It seems to me that that issue must be answered in the affirmative. Whether such an irregularity entitles the plaintiff to the relief which they seek is another matter, which I will discuss in a moment. It seems to me that the proceedings were irregular. The Rangoon Corporation's powers, liabilities, duties and so on are regulated by the City of Rangoon Municipal Act, 1922. Attached to that Act as passed by the Legislature were certain Schedules, and Sec. 229 of the Act says:

> The Schedules attached to this Act as from time to time amended in accordance with the provisions of this Act shall be deemed to be part of this Act. . . . .

Section 230 says that the Corporation may add to the Schedules rules not inconsistent with the provisions of the Act to provide for any of the matters dealt with in such Schedules or for any other purpose specified in S. 235. There was no schedule to the Act as originally passed providing for the conduct of the Corporation's business. Almost as soon as the Act was passed the Corporation did add Chap. 9 to Sch. 1, thereby providing rules for the conduct of its business. S. 235 provided that the Corporation might make rules for any matter relating to the proceedings of the Corporation, the holding and regulation of meetings and the conduct of debate. That is provided for by S. 235 (iv) (h). The Corporation having chosen to make those rules, it seems to me that, by the combined effect of Ss. 229 and 230, those Rules for the Conduct of Business are now to be deemed to be part of the Act.

Rule 7 of those rules, which I now hold are part of the Act, provides, inter alia, that no business shall be transacted other than the business specified in the notice of the meeting, and no substantive proposition shall be made or discussed which is not specified in the said notice. Now the matter, so far as this controversy is concerned, which appeared in the notice of the meeting of 7th September was "consider" the report of the Special Committee. It is urged by Mr. Hay that under R. 7 any resolution or amendment arising out of the consideration of the report could properly be put and carried. I am not prepared to go all that way with him. I think, that under the rules, it is no doubt possible that under a notice which states that a report will be considered, a motion either to accept the report in toto or to refer it back would not infringe R. 7. Possibly it might be in order to go slightly further than either of those two courses, and to refer it back with some recommendation. But I do not think that it was possible, or that it was regular, upon the consideration of a report which had been called for as a result of a proposed resolution to appoint a new Legal Adviser after the usual advertisement, and when the report named no particular individual or even hinted at the possibility of any particular individual being appointed without the usual advertisement, to go into the question of appointing forthwith a named individual without the usual advertisement. It also seems to me that although Mr. Sequeira's motion was moved as an amendment and included also, as the first part of the motion, that the report of the Special Committee be accepted, to go further than that and to add to it that Mr. Rafi (a named individual) be forthwith retained to act as the Corporation's Legal Adviser, thereby entirely dispensing with the usual advertisement, rendered Mr. Sequeira's motion a substantive proposition within the meaning of Rule 7.

Now Mr. Hay has said that it is admitted that the Corporation had power to appoint Mr. Rafi or anybody else as its Legal Adviser if it chose to do so. It is true that S. 31 of the Act gives the Corporation power to appoint such officers and servants beyond those specified in the Act as are necessary for the efficient carrying out of

its duties for the purposes of the Act, and it may pay them in such a way as it thinks reasonable. It is claimed by the Corporation that it has power to appoint a Legal Adviser on all-in fee of so many rupees a month. That is so, but the important thing to observe is that it is only given power by a Section of the same Act of which the rules for the conduct of business form part. I think that Mr. Hay unduly expanded the admission which Mr. Foucar was quite properly prepared to make that the Corporation had power to appoint a Legal Adviser. What Mr. Foucar, as I understand it, admits is this, that if the matter proceeds upon regular lines, then the Corporation may appoint a Legal Adviser but that they have no power to appoint a Legal Adviser otherwise than strictly in accordance with the Act, of which the Rules for the Conduct of Business are to be deemed to be part. The position seems to me to be this, that although it is perfectly competent to the Corporation to appoint a Legal Adviser, the power to make such an appointment has not by the constitution of the Corporation been included among its powers except on the fulfilment of a condition, namely that the consent of the members of the Council to any appointment which may be proposed has been obtained in a legal and regular manner. Mr. Foucar referred me to the case in (1917) A C 607,[1] an appeal before the Privy Council from the Court of Appeal of British Columbia. At the bottom of p. 615 Lord Haldane said :

> The first question which arises upon these, the words on the construction of which the appeal, in their Lordships' opinion, turns is whether they make the adoption of this agreement by resolutions passed by the specified majority at a meeting called for the purpose, a condition without the fulfilment of which the agreement would remain ultra vires and therefore incapable of being made the act of the Corporation, even if every shareholder joined in attempting to make it so. In their Lordships' opinion this question must be answered in the affirmative.

As I say, I think that it was within the powers of the Corporation to make this appointment, but the agreement would remain ultra vires and therefore incapable of being made the act of the Corporation, unless the resolution upon which the agreement was based was regularly put and carried. Otherwise what is the purpose of all these rules which have become part of the Act, and which are designed to regulate the proceedings of the Corporation? For after all the Corporation is dealing with public money. R. 7 where it deals with the necessity for due notice of a substantive resolution is in my opinion a rule of perfectly good sense designed to ensure that the elected representatives of the payers of municipal taxes shall have due notice of all substantive motions, and is one which having been incorporated in the Act, as I hold that it now is, must always be followed, and if it is not followed, the proceedings become irregular, agreements such as the present one entered into pursuant thereto may not be carried out by the Corporation.

It is to be observed that on 7th September, as I have already pointed out, only twenty-eight of the thirty-three Councillors were present, and it does not appear by what majority Mr. Sequeira's amendment was carried. It does appear however that on 27th September, at the specially convened meeting of the Corporation, when two members who were not present on 7th December were present. Mr. Friedlander's resolution obtained the support of what was in fact an absolute majority (namely, seventeen) of the Councillors but owing to the three-quarters majority and the six months rules to which I have referred, it was unable to be of any effect. If those seventeen persons had been present on 7th, and admittedly two of them were not, it may well have been that Mr. Sequeira's amendment would not have been carried. It is not for me to speculate on what might or might not have happened. The Councillors who were absent must be taken to have been absent because, upon reading the notice of the meeting of the 7th and the Agenda of the business proposed to be transacted thereat, they were of opinion that their presence was not necessary. They might very well have attended if the agenda had contained a notice of Mr. Sequeira's or of anybody else's substantive resolution that a named individual should be forthwith appointed as Legal Adviser without the usual advertisement.

Let me now refer to another case cited by Mr. Foucar, namely (1898) 1 Ch 358.[2] If I may be permitted to use the words of Sir Nathaniel Lindley M. R., appearing in

1. Pacific Coast Coal Mines, Ltd. v. Arbuthnot, (1917) 4 A I R P C 52=(1917) A C 607=86 L J P C 172=117 L T 613.

2. Kaye v. Croydon Tramways Co., (1898) 1 Ch 358=67 L J Ch 222=78 L T 237 = 46 W R 405=14 T L R 244.

para. 2 on p. 370, I venture to think that here (in the present Corporation case) there "was not a full and fair disclosure of what was proposed to be done." And, if I may adapt the language of Rigby L. J. in that same case (at p. 373, about three-quarters of the way down), you must give, at any rate, a fair, candid and reasonable notice of the substantive resolutions, whatever they may be, which will be put at the meeting. Of course I am adapting the actual words he used, but I am following the lines of his judgment. And now, again adapting the words of Rigby L. J., the words which are to be found at the bottom of p. 372 and at the top of page 373, was it fairly and in language that would be understood by ordinary people disclosed that at that meeting of the Council on 7th September, a resolution which contained proposals for the appointment of a particular named individual forthwith and without the usual advertisement would be accepted and would be allowed to be put ? I think it was not.

Again adapting Rigby L. J.'s words on page 373, no man of business would ever have come to the conclusion that when a meeting was summoned for the purpose, so far as Item 13 on the Agenda was concerned, of "considering" (mark you—only "considering") the Special Committee's Report on the proposed resolution to appoint a new Legal Adviser after the usual advertisement, no man of business would in those circumstances ever have come to the conclusion that it would also be possible to pass a resolution at that meeting to appoint a particular named individual forthwith and without the usual advertisement. It is one thing to consider the appointment of "a" Legal Adviser and it is another thing to appoint there and then a particular named individual as the new Legal Adviser, especially when the Committee's Report which was circulated referred in more than one place to the appointment of "a" Legal Adviser, and nowhere recommended that the usual advertisement which U Tin Baw had originally proposed in his resolution should be dispensed with. Nay, more than that, I most certainly think that any ordinary man of business would undoubtedly expect to receive notice in advance of a proposal to appoint forthwith and without the usual advertisement a man who was himself a member of the Special Committee, when that Committee was careful in three places of its report to use the indefinite article without referring to any individual in particular as the proposed new Legal Adviser. My opinion is that the second part of Mr. Sequeira's motion on 7th September was, as I have said, a substantive motion, notice of which ought to have been specified in the notice of the meeting in accordance with R. 7. I do not know whether Mr. Sequeira's motion was purposely designed in what, if it had been purposely designed, I would describe as a skilful manner, so that it may appear in the first place to be nothing more than an amendment to Mr. Nelson's motion that the Corporation should advertise the post of Legal Adviser on a fee of Rs. 600 a month, and, in the second place, to be nothing more than a resolution that the Special Committee's Report be accepted. As I say, I do not know, and indeed for the purpose of my decision it does not really matter, whether the matter came before the meeting in the way it did as the result of a line of action carefully thought out on the part of one or more of the Councillors. I have already said that Mr. Rafi must have known that his name was going to be put forward. What does, in my judgment, matter is that, by the inclusion in the motion of the words that Mr. Rafi be retained as Legal Adviser, the amendment or resolution (whichever way it may be described in the minutes) became thereby a substantive resolution, of which no proper or sufficient notice had been specified in the notice convening the meeting. I think that the Mayor was wrong in accepting Mr. Sequeira's motion.

Mr. Hay has referred me to four cases. The first is 22 Bom 646.[3] But for the reasons, which I indicated in the course of the argument, I do not really think that that case is of assistance one way or the other in the present suit. On the one hand, a Municipality may have the power to do a certain thing, provided it does it in a regular way ; on the other hand, a Municipality may have no right to do a certain thing however regular the proceedings leading up to it may be. The two classes of cases are quite distinct. The *Sholapur case*[3] falls within the latter category, and the present case within the former. The two classes of cases are, as I say, quite distinct and for that reason I do not think that the *Sholapur case*[3] assists me in this matter. Then

3. Vaman Tatyaji v. Municipality of Sholapur (1898) 22 Bom 646.

Mr. Hay referred me to (1875) 10 Ch 606[4] and he particularly called my attention to a passage in Mellish L. J.'s judgment on page 25 which reads in this way :

> In my opinion if the thing complained of is a thing which in substance the majority of the company are entitled to do or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called and then ultimately the majority gets its wishes.

And he also referred me on the same point to the Privy Council case in (1902) A C 83[5] where Lord Davey, in delivering the judgment of their Lordships said at the bottom of p. 93 and at the top of p. 94 :

> No more informality or irregularity which can be remedied by the majority to sue, if the act when done regularly would be within the powers of the company and the intention of the majority of the share-holders is clear. This may be illustrated by the judgment of Mellish L. J. in (1875) 10 Ch 606.[4]

Mr. Hay says, in effect, that this is an irregularity in a matter of mere domestic procedure and that the Court should not interfere. Let me point out that in (1875) 10 Ch 606[4] the position was that the whole controversy was merely about adjourning a general meeting of the company. A poll was demanded and the poll could not be held there and then, and that would in itself require the meeting to be adjourned for the purpose. So I venture respectfully to agree that in those circumstances it was a purely domestic matter and also a matter of internal management about which it was no use having litigation. But I think that the present case is far from being a purely domestic matter, when the taxpayer's money is at stake and when it is necessary that their duly elected representatives on the Council should by the notices of the meetings of the Corporation be fully informed beforehand of every substantive resolution which will be proposed. Before I go to Mr. Hay's fourth case, let me just go back for a moment to Mr. Foucar's case in (1917) A C 607.[1] Immediately after the passage from Lord Haldane's judgment which I read a moment ago, the following passage appears on page 616 :

> It was argued for the respondents that the procedure directed by the Act was only one of the internal management, which had been put within the power of the Corporation, and which the members of the Corporation could therefore effectively unite, in terms or by implication from subsequent action, to treat as in reality performed, notwithstanding the absence of formalities which were necessary only if a minority was sought to be bound by the decision of a majority. It was said that four years had elapsed since the agreement was made and carried out, and that the conduct of the share-holders had shown general and complete acquiescence. The Court of Appeal proceeded on this view of the law. In their Lordships' opinion it is fallacious. No doubt where some act, such as the granting of an obligation in the course of its business, is put by the constitution of a company within its powers, and certain formalities of administration are prescribed by the articles of association which for domestic purposes regulate the duties of the directors to the share-holders, the mere failure to comply with a formality, such as a proper appointment or the presence of a quorum of directors, will not affect a person dealing with the company from outside and without knowledge of the irregularity. He is presumed to know the constitution of the company, but not what may or may not have taken place within doors that are closed to him. Lord Hatherley's judgment in (1875) 7 H L C 869[6] is for practitioners in company law the classical exposition of this principle. But the case stands quite otherwise when the act is one which has not, by the constitution of the Corporation, been put within its power excepting on the fulfilment of a condition. In that event the persons dealing with the corporation are bound to ascertain whether the condition has been fulfilled.

In my judgment this appointment of a Legal Adviser has only been put within the power of the Corporation upon the fulfilment of the condition that the proceedings leading up to and terminating in a resolution to appoint anyone to that post are conducted in a regular manner and in accordance with the rules which are, as I have held, a part of the Act itself.

Let me now go back to Mr. Hay's fourth case, which is a Rangoon decision of the Chief Justice and myself, a recent decision in a Letters Patent Appeal. It is the case of the *Municipal Committee of Myaungmya* v. *Paw Hlaing*,[7] and although at this moment it is not yet reported, it will be reported and its reference will be "1938 R L R 704.[7]" The distinction, it should be observed, between that case and this case is this : that the rule in that case was merely a rule of guidance, for the simple reason that Ss. 200 and 209 (g), Municipal Act, state in clear terms that the Local Government (as it then was) may make rules consistent with the Act generally "for the

4. MacDougall v. Gardiner, (1875) 10 Ch 606=23 W R 846=33 L T 521.
5. Burland v. Earle, (1902) A C 83=71 L J P C 1 =85 L T 553=18 T L R 41 = 9 Manson 17= 50 W R 241.
6. Mahony v. East Holyford Mining Co., (1875) 7 H L C 869=33 L T 383.
7. (1938) 25 A I R Rang 404=178 I C 817=1938 R L R 704.

guidance of committees and public officers in all matters connected with the carrying out of this Act." Both the Chief Justice and myself were careful to draw attention to the fact that the Section under which the rules in that case were made expressly stated that they were to be made merely for the guidance only of committees and public officers. No such words indicating mere guidance are to be found in the present Act, and, as I have already pointed out, when once the rules in the present case were made, they became part of the Act. They were not merely rules for the guidance of the Mayor, but were, in my judgment, rules which it was essential should be duly observed and complied with if a substantive resolution was to have any force or effect in law. Unless the proceedings leading up to a resolution are conducted in accordance with the rules, the resolution is not in order and is ineffective. From the point of view of the rules, then, the proceedings in the present case were irregular, and in my judgment regularity of those proceedings was a condition precedent to the power of the Corporation to make such an appointment as that of Legal Adviser. I answer Issue 2 (i) in the affirmative; accordingly I need not answer the remaining issues which I framed.

I am not concerned with what, as between Mr. Rafi and the Corporation, may be the consequence of my decision or of the result of this suit. If Mr. Rafi chooses now to sue the Corporation upon his agreement, he may find that there are difficulties in his way, having regard to the remarks appearing in the judgment of Lord Haldane which I have just read. He will not, I think, be able to say that he was a third party wholly unacquainted with the internal affairs of the Corporation and was under no obligation to enquire whether the proceedings were regular or not, if only for the reason that it appears that he was present and had full notice from the start of the course which the proceedings were taking. Whether or no Mr. Rafi chooses to sue the Corporation is not my concern. Suffice it for me to say that I think that the plaintiffs (and Mr. Hay has abandoned any formal objection which he might have had to their right to sue the Corporation in regard to this matter) are entitled to have the Corporation restrained by an injunction. I think this is a proper case in which I should exercise my discretion in granting relief in that way. The Corporation has already given effect to the resolution by entering into the agreement with Mr. Rafi, so I do not see how I can now restrain the Corporation from doing that. It seems to me that all I can now restrain the Corporation from doing is from giving further effect to the agreement and from making any payments to Mr. Rafi in the future purporting to be payments in respect of that agreement, that is to say from giving further effect to it. [His Lordship granted the injunction and after dealing with the question of costs concluded the judgment.]

D.S./R.K. *Order accordingly.*

A. I. R. 1939 Rangoon 139

BAGULEY J.

E. Hoe Chan Co. — Appellant.

v.

Baboo Chotalal Ujamsi — Respondent.

Special Second Appeal No. 142 of 1938, Decided on 6th January 1939, against decree of Dist. Court, Meiktila, in C. A. No. 3 of 1938.

(a) Evidence Act (1872), S. 92—*A* contracting with *B*, alleged agent of *C*—Suit on contract against *C* — Oral evidence held admissible to show that *B* was acting as *C's* agent — S. 92 held did not apply.

A entered into a contract with *B*, who as alleged by *A* was acting as agent of *C*. *A* filed a suit upon the contract against *C* on the ground that *C* was liable under the contract and adduced oral evidence in support of his allegations :

Held that the evidence was admissible and that S. 92 did not apply as that Section contemplates a case only as between the parties to the suit : *31 Mad 45 ; (1817) 7 Taunt 295 ; A I R 1921 Bom 81 and (1841) 58 R R 884, Rel. on.*

[P 140 C 2]

(b) Burma Courts Act (11 of 1922), S. 11 — Second appeal — Finding of fact can be interfered with — Concurrent finding should not be upset unless clearly wrong.

High Court in second appeal is entitled to interfere on a finding of fact, concurrent or otherwise. A concurrent finding of fact however should not be upset unless it is very clearly wrong.

[P 140 C 2; P 141 C 1]

(c) Contract — Breach — Damages — Buyer refusing to take delivery of goods — Proper measure of damages stated.

Where the buyer fails to take delivery of goods contracted to be purchased, the proper measure of damages is the difference between the market rate and the contract rate on the date of the final refusal to take delivery, and not on the date of the notice of the seller's intention to resell the goods.

[P 141 C 2]

Campagnac and Anklesaria — *for Appellant.*

Mootham — *for Respondent.*

Judgment. — This appeal arises out of a suit on a contract. The plaintiff, Baboo Chotalal Ujamsi, claimed that he had entered into a contract of sale of certain white beans to the defendant firm, E. Hoe Chan Company, and that the defendant firm, after taking delivery of some of the beans, refused to take delivery of any more, he said because the price had fallen. He therefore sued for damages. The defendant firm's first line of defence was that they had entered into no contract with the plaintiff at all. The plaintiff says that he entered into this contract by means of bought and sold notes with one Maung Pyan who acted as broker on behalf of the company. The bought and sold notes are signed by Maung Pyan only, and he does not profess to have signed them as agent for the defendant firm, although there is oral evidence produced by the plaintiff that at the time the contract was made the plaintiff was asked what name he wished to be put in the bought and sold notes and he told Maung Pyan and the defendant firm's clerk who accompanied him that he did not mind what name was put down on the bought and sold notes. On behalf of the defendant firm, it is urged that as the name of the defendant firm does not appear on the notes, and as Maung Pyan was not, on the face of them, purporting to act as the broker of anybody, they are free from liability, and reference is made to S. 230, Contract Act. This contention, in my opinion, is untenable. In 31 Mad 45[1] it was held that :

> In an action on a written contract, oral evidence is admissible to show that the party liable on the contract contracted for himself and as the agent of his partners. Such partners are liable to be sued on the contract, though no allusion is made to them in it.

There is nothing in S. 91, Evidence Act, to show that the Legislature intended to depart from this settled rule of English law. In the report there is a quotation from an English text book, which is accepted; it runs as follows :

> In an action on a written contract between plaintiff and *B*, oral evidence is admissible, on behalf of the plaintiff, to show that the contract was in fact, though not in form, made by *B*, as agent of the defendant; for the evidence tends not to discharge *B*, but to charge the dormant principal;

and reference is made to (1817) 7 Taunt 295.[2] With regard to the operation of S. 91 or S. 92, Evidence Act, it is stated that these Sections are not inconsistent since the question as to who the contracting parties are is not to be regarded as one of the "terms of a contract" withing the meaning of these Sections. With respect, I would prefer to hold that S. 92 has no application on rather different grounds, because S. 92 says that no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument. Now, on the face of it, the parties to the instrument are Maung Pyan and the plaintiff, and the parties to this suit are the plaintiff and the defendant firm. Again, in 45 Bom 1242[3] reference was made to 31 Mad 45[1] and also to (1841) 58 R R 884,[4] and there is an excerpt from the judgment of Baron Parke in that case, viz.:

> There is no doubt that where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals . . . . and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind ; but shows that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal.

A reference to (1841) 58 R R 884[4] shows that this also refers to the case in (1817) 7 Taunt 295[2] which was relied upon in the Madras case, 31 Mad 45.[1] I would hold that it is open to the plaintiffs to show that Maung Pyan, in entering into this contract, was acting as agent of the defendant firm.

The next point for consideration is whether Maung Pyan as a matter of fact did enter into the contract as agent of the defendant firm. Both the lower Courts have found as a fact that he did. This being an appeal under S. 11, Burma Courts Act, the appellant is entitled to attack this finding of fact; and I have always held that despite the rule of practice which their Lordships of the Privy Council laid down themselves, namely that they will not interfere with a concurrent finding of fact by two lower Courts, this Court in second appeal is entitled to interfere on a finding of fact, concurrent or otherwise, because S. 11 defi-

1. Venkatasubbiah v. Govindarajulu (1908) 31 Mad 45=18 M L J 1=3 M L T 259.
2. Wilson v. Hart, (1817) 7 Taunt 295=1 Moore 45=129 E R 118.
3. Ebrahimbhoy Pabaney Mills Co. Ltd. v. Hassan Mamooji, (1921) 8 A I R Bom 81=63 I C 482=45 Bom 1242=23 Bom L R 767.
4. Higgins v. Senior, (1841) 8 M & W 834 = 11 L J Ex 199=58 R R 884.

nitely states that when an appeal is filed under the provisions of that Section, any ground which would be a ground of appeal in the first appeal is open to the appellant in second appeal. A concurrent finding of fact however should not be upset unless it was very clearly wrong, and in the present case I have no hesitation in saying that the finding of the lower Court is correct. To my mind, apart from the oral evidence, the correspondence is conclusive. Maung Pyan was by profession a broker or go-between. He performed the part of a perfect broker by getting into communication with a buyer on the one hand and a seller on the other hand, then putting them in touch with one another and disappearing from the scene. No doubt, in order to preserve his good name, he used to interpose at times, and when there was friction between the buyer and the seller he would try to facilitate an agreement in order not only to improve his own position but also to make sure of getting his commission. The defendant firm say that they bought 5000 baskets from Maung Pyan as an independent seller. They say that he was not a broker and that he merely bought these beans from the plaintiff in order to re-sell them to them. Throughout, their evidence runs like a refrain, speaking of Maung Pyan that he was to make a profit or that he was to bear a loss, and yet, according to their own showing, when they had bought from Maung Pyan, as a seller, beans at a certain price and he pointed out to them that he has had to buy old beans at a higher rate than they had agreed to pay him, they promptly agreed to make up the difference, and all the time they talked about paying him a commission.

Referring to the correspondence also we have certain letters which bear the defendant firm's seal or chop mark. Ex. H is a letter written to Baboo Chotalal by E. Hoe Chan Company. It bears a signature which I think is Maung Pyan's though it is quite indecipherable. But it also bears the chop mark of E. Hoe Chan Company, and this letter relates to the delivery of beans under this contract. Ex. M is another letter referring to these beans, passing from the defendant firm to the plaintiff, and also bearing the chop mark of the defendant firm. Ex. Y is a letter from the defendant firm to Maung Pyan, addressing him as the "head broker, Ko Pyan" and instructing him to buy white beans for them, and naming a price. I have not referred to letters merely signed by Maung Pyan on behalf of the defendant firm, as, if he was passing off as the defendant firm's broker without their authority, reference to them would be unnecessary, but the letters I have referred to actually bear the chop mark of the defendant firm. I notice that the appellants did not rely very much upon the oral evidence of Maung Ba Sein as to the bought and sold notes. If that evidence is accepted it is quite clear that the buyer was really the defendant firm. The witness says later on that when difficulties arose he was asked to go to the plaintiff and persuade the defendant firm's local Chinese agent to take delivery, and that although the local Chinese agent at first disclaimed all liability, in the end he appears to have weakened on that point and agreed to write to the Rangoon office about the matter. I see no reason whatsoever for differing from the conclusion of the two lower Courts to the effect that as a matter of fact this contract was entered into between the plaintiff and the defendant firm, and in consequence the plaintiff is entitled to sue the defendant firm for damages for breach of contract if he can make out that the defendant firm had committed a breach of the contract.

With regard to the quantum of damages, it has been urged on behalf of the appellants that the plaintiff had done something very wrong indeed, because, although he gave notice on 14th January that as the defendant firm had failed to take delivery he was going to sell the beans without further reference and hold the defendant firm responsible for any loss, nevertheless he had in his plaint sought to recover as damages the difference between the contract rate and the market rate as on 11th November 1935, when the defendant firm finally refused to take further delivery. In my opinion the proper measure of damages was the difference between the market rate and the contract rate on the date of the final refusal to take delivery, and the notice of the intention to sell on 14th January is really of no value at all. The damages claimed in the plaint have been assessed in the proper way.

There remains, however, one difficulty. When reading the various letters that have passed between the parties, it is quite clear that the defendant firm had been raising difficulties with regard to the quality of the

beans that were being tendered for delivery under the contract. This objection may, of course, have been well founded or may have been merely a pretext because the market price of beans had been going down the whole time. When the plaintiff was being cross-examined a note was made in the middle of his deposition "U Ba Shin for defendant wants to put questions as to quality of beans and the question not allowed as not relevant." It seems to me that those questions were most relevant. The plaintiff was suing for damages on the ground that he had at all material times been ready and willing to perform his part of the contract. Unless he showed that he was in such a condition he was not entitled to any damages at all, and there are signs on the record that before the date of the final breach, the defendant firm had been raising the question of the quality of the beans tendered under the contract. If the defendant firm had been able to show that the stock of beans from which deliveries were said to be given was lower in quality than the quality demanded by the contract, then the plaintiff is entitled to no damages at all, but very possibly, in view of the fact that in the course of the cross-examination of witness 1 he had intimated to him that the Court was not interested with regard to the quality of the beans, it may well be that the evidence on this point was not put in afterwards, and the defendant firm might be in a position to show that the beans tendered to him were not of contract quality. As I have said, the plaintiff has got to show that he was ready and willing at all material times to perform his part of the contract and there is no evidence on the record from which this point can be determined. It is urged that this point cannot be raised in second appeal. I think it can be raised, because it was put before the trial Court and the evidence necessary for the determination of this point of law was shut out. It was not raised in the grounds of appeal in the lower Appellate Court for the simple reason that the defendant firm had won in the trial Court and the plaintiff was the appellant in the District Court. Whether the point was urged on behalf of the defendant in the lower Appellate Court it is impossible to say. There is no definite reference to the point in the judgment, but it was a point which might have been raised in the argument, and the judgment might have failed to deal with it. I think therefore that in the interests of justice the case will have to be sent back to the trial Court for determination of the issue :

"At the time that the defendant firm finally refused to take any further deliveries under this contract was the plaintiff in a position to deliver to them the quantity of beans still due and of the quality required by the contract ?"

It is possible that some evidence of custom of the trade will be necessary, because the bought and sold notes simply refer to the purchase of "old and new white beans" and the weight is also referred to. There is no reference to quality. I gather from the correspondence that an admixture of red beans was complained of and I take it there must be some standard whereby the quality of beans which would have been good tender under the contract could be fixed. The trial Court will hear such evidence as the parties may wish to adduce and come to a finding on this issue, and will then return it through the District Court, which will also come to a finding on this issue.

N.S./R.K. *Case sent back.*

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* A. I. R. 1939 Rangoon 142
SPECIAL BENCH

ROBERTS C. J., MYA BU AND MOSELY JJ.

In the matter of U, an Advocate.

Misc. Appln. No. 75 of 1938, Decided on 16th December 1938.

*** Legal Practitioner—Professional misconduct — Bribery or attempted bribery by advocate is serious professional misconduct—Advocate disbarred for such offence should not be reinstated within brief period (four years).**

Bribery or attempted bribery by advocate is grossest professional misconduct and an advocate found guilty of an offence like bribery or attempted bribery cannot in any circumstances suffer so slight a penalty as suspension for four years. It is an offence which can necessarily only be purged after strenuous efforts and after a long period during which he has tried his best to reinstate himself in society. No doubt the door is not inevitably and permanently shut to persons who are disbarred : they may after the lapse of a suitable period of time, provided their conduct has been uniformly satisfactory, ultimately reach reinstatement. But reinstatement is not a matter of course and it is not something which can be hoped for within a brief period of time. [P 143 C 1, 2]

Clark — *for Applicant.*

U Tun Byu (Govt. Advocate) — *for the Crown.*

Cowasjee — *for Bar Council.*

Roberts C. J. — This is an application for the reinstatement of an advocate of

Maubin, one U, who was disbarred in March 1935. The charge which was proved against him was that having been engaged by a gentleman to defend him in a civil suit he wrote to his client and said that the Myook had demanded a sum of Rs. 300 and that he was "still bargaining with him trying to beat him down"; and he was called upon to show cause why he should not be struck off. There were also charges that he received from his client's wife the sum to be given as a bribe and misappropriated that sum. Those charges were not proved and they did not form part of the matter in respect of which action was taken, which was limited to his guilt upon the first charge. The defence was that the document was forged by some one else, and that defence was not believed. In giving the judgment of the Court Page C. J. said :

> An advocate who stoops to such nefarious tactics is guilty of the grossest professional misconduct ; for by such means, if successful, justice is both dishonoured and betrayed.

We regard as of the highest importance that the sentiments which are expressed in that phrase should be widely disseminated throughout Burma, and we should be wanting in the discharge of our duty if we were to convey the impression that an advocate found guilty of an offence like bribery or attempted bribery could in any circumstances suffer so slight a penalty as suspension for four years. That is in effect what would happen if we were to accede to the appeal which has been made by Mr. Clark, who has said everything that could be said on behalf of the applicant. In the particular case the applicant was not proceeded against under S. 162, Penal Code ; the reason may have been that the matter was discovered too late for proceedings to be satisfactorily taken. In that respect at least he was not unfortunate ; and far from this having been a venial matter, as some of the writers of testimonials in his favour seem to think, it is an offence which can necessarily only be purged after strenuous efforts and after a long period during which he has tried his best to reinstate himself in society. It is clear from the testimonials that the applicant has been making an effort to regain the confidence of the Bar, the Bench and the profession, and we are far from saying in any case that the door is inevitably and permanently shut to persons who are disbarred : they may after the lapse of a suitable period of time, provided their conduct has been uniformly satisfactory, ultimately reach reinstatement. But reinstatement is not a matter of course and it is not something which can be hoped for within a brief period of time.

We are of opinion that the Advocate-General's view and that of the Bar Council is the proper one; whereas people who have written these testimonials have, we think, been actuated more by pity than a real regard for the realities of the situation. In particular we notice that the Bar Association of his own town passed a resolution that he was fit to be reinstated after the lapse of two years and three months from the time he was disbarred. That shows that the offence of which he has been found guilty was not regarded with that seriousness with which it should be. We have considered this matter with great care and, as I say, desire to point out that our judgment does not mean that the door is for ever shut upon applicants who have been disbarred : they may in course of time in circumstances which I have indicated be reinstated. But this case is not one in which, we are of opinion we should interfere at the present juncture, and, accordingly we reject the application.

Mya Bu J.—I agree.

Mosely J. — I was a member of the Bench which ordered the present applicant to be struck off the rolls. I agree with the judgment of my Lord the Chief Justice.

D.S./R.K. *Application rejected.*

A. I. R. 1939 Rangoon 143

ROBERTS C. J. AND MOSELY J.

Habib Sahib — Appellant.

v.

Sheik Budhoo — Respondent.

Civil Revn. No. 204 of 1938, Decided on 24th November 1938, against order of Dist. Court, Yamethin, D/- 7th May 1938.

Civil P. C. (1908), S. 115 — Petition filed before District Judge as persona designata under R. 62 (1) of Burma Municipal Rules by unsuccessful candidate in municipal election— District Judge transferring case to Additional District Judge, who is not subordinate to him, in contravention of R. 62 (1) (a) of Burma Municipal Rules — His action being without jurisdiction High Court can interfere under S. 115.

No doubt whatever a District Judge does within the exercise of his powers as a persona designata cannot be questioned by the High Court in revision but he must not go beyond the limits of these powers as laid down. [P 144 C 2]

Where on a petition being filed before him as a persona designata under R. 62 (1) of the Burma Municipal Rules by an unsuccessful candidate at an election in the municipality, the District Judge transfers the case in contravention of R. 62 (1) (a) to the Additional District Judge, who is not subordinate to him but is co-ordinate with him, for being heard and disposed of, whatever the Additional District Judge does in that behalf, if it were a ministerial action, can only be regarded as nullity and the High Court is entitled to interfere in revision, inasmuch as it has before it what purports to be an order passed without jurisdiction of a Court subordinate to the High Court in a case within the meaning of S. 115, Civil P. C. The absence of jurisdiction would be the want of power to transfer the case to the Additional District Judge: *A I R 1933 Rang 2 (S B) and A I R 1933 Rang 185 (F B), Rel. on.* [P 144 C 1, 2]

Hay and P. K. Basu — *for Appellant.*

K. C. Sanyal — *for Respondent.*

Roberts C. J.—We have come to the conclusion after some hesitation that this is a case in which we ought to interfere in revision. There was a petition filed under R. 62 (1) of the Burma Municipal Rules by the unsuccessful candidate at an election in the Municipality of Yamethin, and we are agreed that the petition made by him to the District Judge was one made to what the law terms a persona designata; that is to say it was a petition made to the District Judge to be heard by him in the exercise of his unfettered discretion but within the limits laid down by the rules and one with which his Court had no concern and over which the High Court had not any superintendence. The District Judge was bound by R. 62 (1) (a) which lays down that when the petition is presented to him, if he admits it, he shall consider it himself or transfer it for consideration to any officer exercising civil jurisdiction subordinate to himself; and it appears, and is agreed, that the learned District Judge transgressed this rule and handed this case to the Additional District Judge to hear and consider.

Now, the Additional District Judge is not like an Assistant District Judge; he holds an office and performs functions in no way subordinate to the District Judge but co-ordinate with him; and consequently in transferring the consideration of the petition to the Additional District Judge the learned District Judge was not transferring it to an officer exercising civil jurisdiction subordinate to himself. We therefore reached the opinion quite early in this case that what the Additional District Judge did in that behalf, if it were a ministerial action, could only be regarded as a nullity. What he purported to do was to sit in the District Court of Yamethin and to sign a judgment purporting to be a judgment of the Court and stamp it with the court stamp, and that was clearly outside his jurisdiction. In the form therefore in which this matter comes before us, we have come to the conclusion on the whole that we have got what purports to be an order of a Court subordinate to the High Court in a case, within the meaning of S. 115, Civil P. C., thus justifying our interference if that Court made an order which it had no jurisdiction to make as such.

In deciding the matter in this way we have paid respectful attention to the ruling in 10 Rang 517.[1] It was there said that the District Judge considering election petitions was acting as a Court subordinate to the High Court within S. 115, and the orders passed, though not subject to appeal were open to revision if the District Judge in passing them was acting without jurisdiction. In the present case the absence of jurisdiction would be the want of power to transfer the case to the Additional District Judge. Speaking for myself I am disposed to think that whatever the District Judge did within the exercise of his powers as a persona designata could not be questioned, but he must not go beyond the limits of those powers as laid down. We have also considered the decision in 11 Rang 337,[2] and without dealing with the matter in detail we think that on the authority of these two cases this is a matter in which we ought properly to interfere by way of revision and to say that the purported order of the Additional District Judge sitting in the District Court of Yamethin should in the circumstances be set aside. The applicant must have his costs, advocate's fee in this Court seven gold mohurs.

Mosely J.—I agree.

R.M./R.K. *Revision allowed.*

1. U Ba Thwin v. Maung Ba Shein, (1933) 20 A I R Rang 2=140 I C 782=10 Rang 517 (S B).
2. Maung Phye v. Yeo Win Su, (1933) 20 A I R Rang 185=144 I C 849=11 Rang 337 (F B).

A. I. R. 1939 Rangoon 146

SPARGO J.

Ma Pan Ei — Appellant.

v.

The King.

Criminal Appeal No. 576 of 1938, Decided on 11th August 1938, from order of Western Sub-Divisional Magistrate (1), Rangoon, D/- 17th May 1938.

(a) Penal Code (1860), S. 482—Complainant must prove that goods sold under his label and get-up were goods which had reputation in market as being goods manufactured or sold by him.

As a general rule in order to succeed in criminal proceedings something further has to be proved beyond what is required in civil proceedings arising out of the same transaction. An example is trespass. In some cases proof of the same facts would entitle the plaintiff to a decree in a civil case and a complainant to a conviction in criminal proceedings. [P 146 C 2]

Under S. 482 the complainant must prove that the goods sold under his label and get-up were goods which had a reputation in the market as being goods manufactured or sold by him of which the label and get-up were distinctive and well known in the particular market: *A I R 1932 Rang 114, Applied; A I R 1925 Cal 149; A I R 1934 Lah 687 and A I R 1929 Rang 322, Rel. on.* [P 148 C 1]

(b) Penal Code (1860), S. 482 — Genuine dispute between parties as to who has used false trade-mark — Complainant should be referred to Civil Court.

Where in a criminal proceeding in which the charge against the accused is that he used false trade-mark, the Magistrate is unable to decide whether the complainant or the accused used the label first and there is genuine dispute between the parties as to whose mark it is and who has used a false trade-mark, the case should be brought in the Civil Court and not in the Criminal Court: *40 Cal 281; A I R 1932 Rang 114 and 11 C W N 887, Rel. on.* [P 148 C 1]

Judgment.—The appellant is a Burmese woman named Ma Pan Ei. She has been convicted of an offence under S. 482, Penal Code, in respect of a mark that she applied to face powder made and sold by her. A sample of this mark is to be found at p. 30 of the record. The complainant is a Chinese woman named Ma Sin Nyaung. She says that she has been manufacturing face powder and selling it in packets marked as shown in Ex. A. The mark Ex. A consists of a double oval containing the figure of a guinea pig in the middle and round the rim appears in Burmese the expression: "Ma Sin Nyaung, Guinea Pig Brand, Best Face Powder." When the wrapper is used this device appears on one side of the packet and on the other side appears a rectangle in which is written in Burmese: "Ma Sin Nyaung's Face Powder, House No. 81, Garden Street, Kemmendine." Ex. B wrapper consists of a similar double oval to that in Ex. A. It has the same lettering round the oval but the oval itself is contained in a rectangle in which is written in Burmese: "Ma Sin Nyaung, Guinea Pig Face Powder, House No. 40, 11th Street, Rangoon." On the other side of the packet there appears a rectangle somewhat similar to the rectangle that appears on the said of the complainant's packet but it contains a different address. In between these two parts of the label there appear three guinea pigs in line.

The complainant claims that she had by actual user acquired the exclusive right to use the combination which is described above as Ex. A, and she said that she registered it on 4th April 1934. She said that the face powder bearing the trade-mark Ex. A had acquired a considerable reputation and was well known in the market as denoting the complainant's merchandise. About October or November 1937 she discovered that the defendant was manufacturing face powder and selling it wrapped up in the labels Ex. B and she said that this was using a false trade-mark in a manner reasonably calculated to cause it to be believed that each packet of face powder so marked is the manufacture or merchandise of the complainant. The defendant in her examination said that she did not know the complainant or her face powder. She said that she knew nothing of the complainant's having registered it in April 1934 and that "Ma Sin Nyaung" was the name of her little daughter. Asked what she had to say to the complainant's statement that the complainant's face powder is known in the market as "Ma Sin Nyaung, Guinea Pig Brand" the accused replied "Face powder of the kind mentioned is not sold in the Sooratee Bara Bazaar." The accused said that her own face powder is called "Three Guinea Pig Face Powder."

The learned Magistrate said "It is not clear whether Ex. 1 or Ex. 2 has been on market first." Ex. 1 refers here to the complainant's label which I have referred to above as illustrated in Ex. A, and Ex. 2 refers to the accused's label which I have referred to above as illustrated in Ex. B. But after further consideration the learned Magistrate concluded that Ex. 2, that is to say the accused's label, was an imitation of

Ex. 1, that is the complainant's label, and that it was put on the market in imitation of the better face powder of the complainant's. He concluded that the two marks were very similar; in fact he says:

> The only difference in this respect is that the complainant's is in stamp and the accused's is in printer's ink.

This is in reference to the fact that the complainant marks her packets with rubber stamps whereas the accused uses printed labels. He concludes:

> In my opinion the two articles could be mistaken by the ordinary unwary purchaser, and in this case it is not disputed that the class of purchasers is from villages.

The learned Magistrate remarked that the accused's intention was to defraud and in convicting her ordered her to pay a fine of Rs. 150 or in default to suffer two months' rigorous imprisonment. The accused has appealed against this decision and the principal argument that has been raised in her favour is that the complainant has failed to establish her exclusive "right of user" of the "get-up" of her guinea pig brand in dispute. It is suggested that the complainant should have been referred to a Civil Court in view of the learned Magistrate's opinion that it was not clear whether the complainant's packets were on the market first. Mr. Roy, the appellant's advocate, said that the complainant must prove that she has a right of user of the label Ex. A. "Right of user" is acquired when the complainant's goods are associated with the particular label in the market and reference was made to 10 Rang 133[1] and 6 Rang 221.[2] As to these two cases it is to be observed that they are civil cases and not criminal cases. The question that has emerged from a consideration of the cases quoted is this: How far do the principles that have been enunciated as governing a passing-off case apply to a criminal case? At p. 136 of 10 Rang 133[1] Page C. J. says:

> Now, this is a passing off suit, and it is incumbent upon the plaintiffs in such a suit in the first instance to prove that the goods sold under their label and get-up were goods which had a reputation in the market as being goods manufactured or sold by them, of which the label and get-up were distinctive and well-known in the particular market.

If this principle applies to a criminal case also, then it is binding upon me as being the decision of a Bench. Mr. Roy very fairly confessed that he was puzzled by this question and did not know how to answer it. But he pointed out this consideration in favour of holding that the principle did apply. He said if it did not apply in a criminal case the result might be anomalous. It might be impossible for the plaintiff to prove that the goods sold under his label and get-up were goods which had a reputation in the market as being goods manufactured or sold by him of which the label and get-up were distinctive and well-known in the particular market. He might fail therefore in obtaining an injunction and still if it were not necessary to prove this in a criminal case he might succeed in a prosecution. And then you would have the anomaly that a complainant might succeed in a criminal case but in a civil case arising out of the same transaction he might fail. I confess that this to me would be a somewhat startling result. As a general rule in order to succeed in criminal proceedings something further has to be proved beyond what is required in civil proceedings arising out of the same transaction. An example is trespass. In some cases proof of the same facts would entitle the plaintiff to a decree in a civil case and a complainant to a conviction in criminal proceedings. I know of no other instance in which success can be gained in criminal proceedings on proof of fewer facts than in civil proceedings. Mr. Myint Htu, for the respondent, was unable to satisfy me on this point. He admitted that the complainant did not prove that the goods sold under the complainant's label and get-up were goods which had a reputation in the market as being goods manufactured or sold by the complainant of which the label and get-up were distinctive and well-known in the particular market.

I have searched for authorities on this point and although I have read many cases I have not been able to find any directly in point. I shall refer to 31 Cal 411,[3] but this case is not in point. It was a case in which fish-hooks had been sold in boxes bearing a label which had a picture of two fish with their heads and tails turned up. This mark came to be known in the market as "Fish mark." The defendant began to sell fish-hooks in packets enclosed in labels bearing the picture of one fish with its head

1. Mohideen Bawa v. Rigaud Perfume Manufacturers, (1932) 19 A I R Rang 114=137 I C 391=10 Rang 133.
2. Adamjee Hajee Dawood & Co. Ltd. v. Swedish Match Co., (1928) 15 A I R Rang 210 = 110 I C 905=6 Rang 221.
3. Emperor v. Bakaullah, (1904) 31 Cal 411=1 Cr L J 140=8 C W N 307.

and tail turned up and confusion therefore arose because the term " Fish mark " was equally applicable to both. But the case is complicated by the fact that fish are suggested by fish-hooks and the Court propounded to itself this question :

How far in fact does the law allow a man to appropriate to his own use a name which is suggested by his trade.

And apparently it was not urged in that case that the accused's mark was a false trade mark as being such a mark as is mentioned in S. 480, I. P. C., but merely as being a mark to which the term " mash marka " is likely to be and indeed is intended to be applied. As to this case I am bound to say with great respect that I have found that report somewhat difficult to understand. On the statement of facts it appears to be a very similar case to the present case that I have to deal with. At the end of the judgment occurs this passage:

We much regret that recourse has been had to the criminal law to settle the matter at issue between the parties.

That then was a case in which it was held that criminal proceedings were not appropriate. In 40 Cal 281,[4] which was a case in which the accused was charged with using a false trade mark, there occurs this passage :

Not one of the complainant's witnesses speak to the complainant having any trade mark, meaning any design or device, nor do they suggest that his umbrellas are known by any such trade mark.

This also appears to suggest that what has been laid down by Page C. J. in 10 Rang 133[1] as necessary to be proved in a passing off suit is also necessary in a criminal case. I note also that in this case the judgment of the Bench ended with these remarks :

We may add that we agree with the contention of the appellant that this case ought never to have been brought in the Criminal Court. The dispute between the parties is one of a civil nature, and could have been much more satisfactorily dealt with by a Civil Court.

Again in 11 C W N 887[5] it was remarked:

When a bona fide dispute exists between the parties as to the right to use a trade mark, action should be taken before a Civil and not before a Criminal Court.

In 25 Cr L J 1098[6] the learned Magistrate had found among other things this :

I find from the evidence before me that this mark (the complainant's mark) has been used by the complainant's firm for the last six years and that umbrella covers bearing this mark have acquired a reputation in the market and command a large sale and that the mark has come to be regarded by customers as distinctive of the complainant's goods.

In their judgment the Bench said :

As a result of perusing the evidence I think that there is evidence to support the Magistrate's findings and to justify the conviction.

There is nothing here about the particular finding that I have quoted above being unnecessary and here is further confirmation for the view I have expressed as to what the complainant must prove in such a case as this. In 16 Lah 114[7] the point did not apparently arise before the Court but in respect of the hair dye which the complainants sold under a particular brand, Addison J. said :

The firm claimed that it had a wide sale for this particular dye and this is supported by evidence.

In Criminal Appeal No. 1192 of 1926[8] of this Court Otter J., in a case under the same Section as the case I am now dealing with, remarked :

The first question therefore for me to consider appears to be as to whether the blankets in question have become known in the market as the 'topi' blanket or the 'topi-mark' blanket.

The blankets in question were the complainant's blankets and, in my opinion, the question propounded by Otter J. asks whether the goods sold under the complainant's label were goods which had a reputation under the mark as being goods manufactured or sold by him. That the complainant's face powder is not proved to have had a reputation in the market such as I have mentioned above is admitted by Mr. Myint Htu and indeed is clear from the evidence. No reference to this point was made by the learned Magistrate and it is clear that no evidence was produced in order to prove it. I can only find vague reference in the evidence on the topic. For example Ma Khin Pu (P. W. 5) says : " Buyers referred to it as guinea pig brand Ma Sin Nyaung face powder." Ma Mya Thwe (P. W. 3) says :

Buyers used to refer to Ex. 1 as three guinea pig brand Ma Sin Nyaung face powder, and to Ex. 2 as three guinea pigs Ma Sin Nyaung face powder.

This would go to show that buyers are alive to such differences between the complainant's and the accused's labels and that would therefore go to show that there was no use of a fraudulent trade mark. The two labels are certainly very much alike

4. Anath Nath v. Emperor, (1913) 40 Cal 281=18 I C 404=17 C W N 227=14 Cr L J 68.
5. Surja Prasad v. Mahabir Prosad, (1907) 11 C W N 887=6 Cr L J 151.
6. Lakhan Chandra v. Emperor, (1925) 12 A I R Cal 149=81 I C 922=25 Cr L J 1098.
7. Faqir Chand v. Emperor, (1934) 21 A I R Lah 687=1934 Cr C 1005=155 I C 270=36 Cr L J 776=16 Lah 114=35 P L R 749.
8. P. A. Pakir Mahomed v. Emperor, *Reported in* (1929) 16 A I R Rang 322=1929 Cr C 498.

and I agree with the learned Magistrate that they are very similar and that they could be mistaken by the ordinary unwary purchaser. It is clear from the evidence that the accused claims that the label she used is her label and the learned Magistrate has confessed himself unable to decide which of them used the label first. It seems to me therefore that there is a genuine dispute between the parties as to whose mark it is and who has used a false trade mark.

For two reasons therefore I am of opinion that this appeal must be allowed and the conviction set aside. One is that the complainant must prove that the goods sold under her label and get-up were goods which had a reputation in the market as being goods manufactured or sold by her of which the label and get-up were distinctive and well-known in the particular market and that she has not proved it, and the second reason is this: the case should have been brought in the Civil Court and not in the Criminal Court. The fine if paid will be refunded.

D.S./R.K. *Appeal allowed.*

A. I. R. 1939 Rangoon 148

MYA BU J.

The King

v.

Ma E — Respondent.

Criminal Revn. No. 495-B of 1938, Decided on 25th November 1938, for review of order of Special Power Magistrate, Myingyan, D/- 2nd August 1938.

Criminal P. C. (1898), Sec. 195 (1) (b) — Sec. 195 (1) (b) does not apply to prosecution for offence for making false charge which did not reach any Court of law.

Section 195 (1) (b) does not apply to a prosecution for the offence of making a false charge which had not reached any Court of law.

[P 149 C 1]

The accused made a report at a police station charging certain persons with an offence. The police, after investigation found the report to be false and malicious and threw out the case. The accused did not carry the case any further or file a complaint in any Court, whereupon the accused was prosecuted by the police under S. 211, Penal Code :

Held that the prosecution was not barred by Sec. 195 (1) (b) : *A I R 1938 Rang 397 ; A I R 1917 Cal 593 and A I R 1928 Lah 259, Rel. on.*

[P 148 C 2]

Order.—This is a reference made against an order of discharge. The respondent, Ma E, was prosecuted under Sec. 211, Penal Code, on a complaint by the police station officer of Myingyan in the following circumstances : About two months before the filing of the complaint Ma E made a report at the police station charging one Maung San Kin and Maung Lone with having abducted her and committed rape on her. The report was duly recorded in the form of a first information report and after investigation, the police, finding the charges to be false and malicious, threw out the case. Ma E however did not carry the case any further or file a complaint in any Court. The police station officer therefore prosecuted her under S. 211, Penal Code. The learned Magistrate before whom the complaint was lodged considered that the prosecution launched against Ma E was barred by Sec. 195 (1) (b), Criminal P. C. Under that Section no Court can take cognizance of any offence punishable under Sec. 211, Penal Code, when such offence is alleged to have been committed in or in relation to any proceeding in any Court, except on the complaint in writing of such Court or of some other Court to which such Court is subordinate. The relevant portion of Sec. 211, Penal Code, runs thus :

> Whoever, with intent to cause injury to any person, institutes or causes to be instituted any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person shall be punished . . . . .

As my learned brother Baguley J. has pointed out in 1938 R L R 236[1]:

> (1) If an offender has merely falsely charged a person of any offence whatsoever by making a report to the police, and the police refuse to initiate proceedings, then what has been done is merely that a false charge has been made.
>
> (2) If the offender files a complaint before a Magistrate under S. 190, Criminal P. C., he has instituted criminal proceedings.
>
> (3) If on the offender's report the police send up a case for trial he has caused criminal proceedings to be instituted within the meaning of Sec. 211, Penal Code.

The first of these three classes of cases does not fall within the purview of S. 195 (1) (b) because the offence has not been committed in, or in relation to, any proceeding in any Court. Only those cases that fall within the second and third classes mentioned above come within the purview of that Section. It follows therefore that the prosecution against Ma E in this case is not barred by that Section.

1. The King v. Ma Ban Gyi, (1938) 25 A I R Rang 397=178 I C 644=1938 R L R 236.

The rulings in 43 Cal 1152[2] and 9 Lah 408[3] clearly show that Sec. 195 (1) (b), Criminal P. C., does not apply to a prosecution for the offence of making a false charge which did not reach any Court of law. For these reasons the order of discharge passed by the Special Power Magistrate of Myingyan in Criminal Regular Trial No. 78 of 1938 is hereby set aside and the case is sent back to the trial Court for disposal according to law.

R.M./R.K. *Order accordingly.*

2. Tayebulla v. Emperor, (1917) 4 A I R Cal 593=36 I C 845=18 Cr L J 13=43 Cal 1152 =24 C L J 134=20 C W N 1265.
3. Muhammada v. Emperor, (1928) 15 A I R Lah 259=109 I C 685=29 Cr L J 605=9 Lah 408=29 P L R 515.

A. I. R. 1939 Rangoon 149

ROBERTS C. J. AND MOSELY J.

P. H. Hamid Rowther — Appellant.

v.

K. S. Ayappa Mudaliar — Respondent.

Misc. Appeal No. 52 of 1938, Decided on 23rd November 1938, against order of High Court, in C. R. S. No. 11 of 1937, D/- 23rd June 1938.

Civil P. C. (1908), O. 23, R. 3 — In case of complicated compromise it is more desirable that its terms should be drawn up into writing before they can be strictly proved—Court must look with suspicion on cases of elaborate compromises sought to be proved by oral evidence especially when one party denies compromise.

Although the requirements of O. 23, R. 3 say nothing about any particular form in which a compromise is to be made before the Court is to be satisfied of its existence, still the more complicated the compromise the more desirable it is that its terms should be drawn up into writing before they could strictly be proved. There must be in the nature of things, compromise about small matters, which may be capable of proof orally, but the Court must always look with some suspicion on cases of elaborate compromises which are sought to be proved purely by oral evidence when one of the parties to the suit strenuously denies that he entered into any compromise at all. [P 150 C 1]

Bhattacharya — *for Appellant.*

K. C. Sanyal — *for Respondent.*

Roberts C. J. — This is an appeal from a decision of Sharpe J. who caused to be recorded under the provisions of O. 23, R. 3, the alleged adjustment of a suit by way of compromise. The position was that the plaintiff, Rowther, had filed a suit (Civil Regular No. 11 of 1937) on three promissory notes for a total value of Rupees 13,000 odd against the defendant-respondent. The defendant had filed a cross case (No. 233 of 1937) for a declaration that these notes were not executed for cash consideration and that there were other proceedings pending, a mortgage suit by the plaintiff against the defendant and another in the District Court of Hanthawaddy, the sum involved there being nearly Rs. 11,000. These cases were taken together and there was a great deal of delay and there were a great many applications to postpone the matter pending a settlement which the advocates had hoped the parties would arrive at. Ultimately the cases came on for hearing on 23rd June last, and the learned Judge had before him an affidavit which was filed by the defendant. Looking at para. 7 of that affidavit one sees that the settlement which was alleged to have been arrived at was somewhat complicated in its nature. Para. 7 has seven sub-paragraphs, from (a) to (g): it deals with a proportion of a certain sum deposited by consent with the advocate for the plaintiff: it deals with the payment of balance of the amount for which the claim was settled within four years but part payment towards the aforesaid amount to be made every year: it deals with the properties involved in the suit in the Hanthawaddy Court being offered as security. The plaintiff filed a counter-affidavit in which he says that para. 7 of the defendant's affidavit contained offers made by the defendant which were not accepted by him.

The defendant gave evidence and he called a witness, no doubt a perfectly respectable man, but one who had admittedly attended the alleged meeting between the parties as a friend and representative of the defendant. His name is Maung Saw Lwin, and he says that a settlement was arrived at at a figure of Rs. 22,000; but he by no means goes into detail nor does he follow through the conversation so as to deal paragraph by paragraph with the terms of the settlement, and in relation to a large number of matters in which the settlement is concerned he adds nothing to the testimony of the defendant. When the plaintiff was called, instead of asserting, as he had sworn in his affidavit, that he was in the tea shop where this alleged oral compromise was made, he said he never went there at all; and, no doubt, that induced the learned Judge who tried this case to disbelieve him. His own advocate appears to have

been surprised by the answer and to have wished to ask him why he did not tell the truth, but the learned Judge rightly thought that no answer to that question need be insisted upon. However that may be, supposing the plaintiff had adhered to the statement made in his affidavit and said that though in the tea shop he never assented to this offer, I think it would have been really impossible for the Court to be satisfied that a compromise had been made, and I feel in my own mind, with great respect to the learned Judge, that he was unconsciously prejudiced against the plaintiff by the plaintiff's desire to make a better case in himself than he really possessed by pretending that he was not really in the tea shop at all.

The requirements of O. 23, R. 3, say nothing, of course, about any particular form in which a compromise is to be made before the Court is to be satisfied of its existence; but the more complicated the compromise the more desirable it is that its terms should be drawn up into writing before they could strictly be proved. There must be in the nature of things compromise about small matters which may be capable of proof orally, but the Courts must always look with some suspicion on cases of elaborate compromises which are sought to be proved purely by oral evidence when one of the parties to the suit strenuously denies that he entered into any compromise at all. And we think in all the circumstances, with respect, it is more satisfactory to say that this compromise ought not to have been recorded, and, accordingly, we are of opinion that this appeal should be allowed with costs, advocate's fee seven gold mohurs.

Mosely J.—I agree. I only want to add one small point. The witness, Maung Saw Lwin, talks about conversation which was among Chulias and must therefore have been in Tamil and of which he could not presumably understand a single word. He is reduced to saying that he then asked the plaintiff in Hindustani what settlement they had arrived at, though he could scarcely have known that they had arrived at a settlement if he could not understand what they were talking about; and he says the plaintiff told him that it was settled for Rs. 22,000, but he does not say that he was informed of any other term of the settlement.

R.M./R.K. *Appeal allowed.*

A. I. R. 1939 Rangoon 150

ROBERTS C. J. AND MOSELY J.

U Po Sein — Appellant.

v.

E. M. Bodi — Respondent.

Civil Misc. Appeal No. 40 of 1938, Decided on 22nd November 1938, against order of High Court, in Insol. Case No. 49 of 1938, D/- 15th June 1938.

Presidency Towns Insolvency Act (1909), (Rangoon), S. 13 (4) (b) — "Ability to pay"—Meaning of—Expression means that the debtor is not so embarrassed as to be unable to meet his liability in the ordinary way.

What is meant by "ability to pay" is not merely that the debtor has assets, which, if liquidation proceeds, might in the result provide sufficient money to discharge his debts. The expression means that he is not so embarrassed that he could not meet his debts in the ordinary way. Where assets are not in a liquid state and therefore debts cannot be paid, it is a circumstance in favour of liquidation : *A I R 1933 Cal 417, Foll.*

[P 151 C 1]

U E Maung — *for Appellant.*

P. K. Basu and Dadachanji — *for Respondent.*

Roberts C. J.—This is an appeal by one U Po Sein against the order of adjudication passed against him. It is agreed that he committed an act of insolvency within the meaning of S. 9 (e), Rangoon Insolvency Act, which says that a debtor commits an act of insolvency if any of his property has been sold or attached for a period of not less than 21 days in execution of the decree of any Court for the payment of money. The debtor in the present case says that he is solvent within the meaning of S. 13 (4) (b), Rangoon Insolvency Act. This sub-section says that the Court shall dismiss a creditor's petition if the debtor appears and satisfies the Court inter alia that he is able to pay his debts or that for other sufficient cause no order ought to be made. And he says in effect that he has satisfied the Court that he is able to pay his debts because he has property which if he were able to liquidate in order to pay them, would be greater in value, according to his contention, than the total amount of his liabilities. U E Maung who has appeared on his behalf and said everything that could be said for him, has been obliged to concede that unless we are to differ from the decision of a Bench of the Calcutta High Court in 60 Cal 345[1]

1. Pratapmal Rameswar v. Chunilal Johuri, (1933) 20 A I R Cal 417=144 I C 142=60 Cal 345.

there is really nothing to be said in this appeal. In that case judgment was delivered by Sir George Rankin, now a member of the Judicial Committee of the Privy Council, who pointed out that what was meant by "ability to pay" was not merely that the man has assets which, if liquidation proceeds, might in the result provide sufficient money to discharge his debts. He proceeded to say that it meant that he was not so embarrassed that he could not meet his debts in the ordinary way, and that where assets were not liquid assets and therefore debts could not be paid, that was a circumstance in favour of liquidation.

There is no kind of authority which runs counter to the propositions of law laid down by Sir George Rankin and we are in complete agreement with them, and there can be no ground for seeking to argue that that decision is not good law. Accordingly, in our opinion, this appeal must be dismissed with costs, three gold mohurs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1939 Rangoon 151

BA U J.

Maung Ba Tun — Applicant.

v.

Ma Kyway — Respondent.

Criminal Revn. No. 724-B of 1937, Decided on 4th February 1938, reference made by Sess. Judge, Hanthawaddy, D/- 22nd December 1937.

(a) Criminal P. C. (1898), S. 488 (6)—Word 'ex parte' in S. 488 (6) bears same meaning as used in Orders 9 and 17, Civil P. C. — Order against absent party at adjourned hearing is ex parte order.

The proceedings instituted under S. 488, Criminal P. C., are of a quasi civil nature. Therefore, the word ex parte used in S. 488 (6) is used in the same sense as is used in Orders 9 and 17, Civil P. C. Therefore an order passed against an absent party at the adjourned hearing of a case is an ex parte order. [P 151 C 2]

(b) Criminal P. C. (1898), Sec. 488 (1) — Rs. 100 is not maximum limit for wife and child together *(Obiter).*

Under S. 488 (1) the sum of Rs. 100 is not the maximum limit of maintenance for wife and children together. Hence an award of Rs. 100 to wife and Rs. 50 to child is not invalid : *4 Bur L T 139 and A I R 1933 Cal 406, Rel. on.* [P 151 C 2]

N. Guha — *for Applicant.*

U Yan Aung — *for Respondent.*

Order.—I have no doubt in my mind that the order passed by the Magistrate against the respondent Ba Tun was an ex parte order. The word ex parte is not defined in the Code of Criminal Procedure but the proceedings instituted under S. 488 of the said Code are of a quasi civil nature. Therefore the word ex parte used in the aforesaid Section is used in the same sense as is used in Orders 9 and 17, Civil P. C. Therefore the order passed, as in this case, against an absent party at the adjourned hearing of a case is an ex parte order. In fact, the Proviso to sub-s. 6 of S. 488 itself makes this point clear. It states inter alia that :

> Provided that, if the Magistrate is satisfied that he (husband or father) wilfully neglects to attend the Court, the Magistrate may proceed to hear and determine the case ex parte.

In other words, what it means is that if he (husband or father as the case may be) wilfully neglects to attend the Court on any hearing date of the case, the Magistrate may proceed to hear and determine the case ex parte. As the order was passed ex parte, the respondent could have it set aside within three months from the date of the order provided he could show good cause why he was absent on that date. The respondent endeavoured to show it by producing two affidavits. Both the deponents state clearly that the respondent was in Pyinmana to give evidence in a criminal case on the date on which his case was fixed for hearing in Rangoon. No evidence has been produced by the petitioner Ma Kyway in rebuttal. Such being the case, the order of the Magistrate must be set aside. This I hereby do and remand the case to the Court of the Second Additional Magistrate for rehearing according to law. I note that the learned Sessions Judge in the course of his order makes the following observations :

> Incidentally the amount awarded by the Magistrate, Rs. 100 for the wife and Rs. 50 for the child, is clearly illegal under S. 488 (1) which limits the total award to Rs. 100.

This observation is not in accordance with the decisions given in the following cases : 4 Bur L T 139[1] and A I R 1933 Cal 406.[2]

D.S./R.K. *Case remanded.*

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1. Clement v. Florence, (1910) 4 Bur L T 139 = 12 I C 847.
2. Tulsi Das v. Saraju Dei Devi, (1933) 20 A I R Cal 406=1933 Cr C 584=143 I C 296=34 Cr L J 590=37 C W N 655.

A. I. R. 1939 Rangoon 152

MYA BU J.

Mg. Po Kywe — Appellant.

v.

The King.

Criminal Revn. Nos. 387-B to 394-B of 1938, Decided on 2nd December 1938, from order of Headquarters Magistrate, Kyaukpyu, D/- 22nd May 1937.

(a) Criminal P. C. (1898), S. 556 — It is only substantial interest of Magistrate giving rise to real bias that disqualifies him to try a case.

The accused whose duty as accountant in the office of the D. S. P. was to prepare bills and treasury vouchers for withdrawal of money required for official purposes and to present the same at the treasury to receive payment, was alleged to have perpetrated falsification of accounts, embezzlements, cheatings and forgeries in the office of the D. S. P. in connexion with the books and papers maintained or issued from there and no question whatever with reference to the efficiency of the work of the treasury officer who also functioned as a Headquarters Magistrate or to the discharge of the work of his office was substantially involved in any of the cases :

Held that the Magistrate who tried the case though functioned as a treasury officer had no substantial interest in the case so as to disqualify him to try the same; and hence the trial was not vitiated on that account: *15 All 192*; *(1882) 8 Q B D 303 and (1876) 1 Q B D 173, Rel. on.*

[P 154 C 1]

(b) Criminal Trial—Sentence — Falsification of accounts and embezzlements — Offences numerous — Five years rigorous imprisonment held sufficient.

Accused was charged with numerous offences of falsification of accounts, embezzlements, cheatings and forgeries, but offences when added up did not involve a very great monetary value :

Held that the gravity of the offences of dishonesty was to be judged not only by the pecuniary value involved, and it would not be proper to deal with the accused leniently; but it could not also be ignored that if the number of cases against him were not so numerous, the aggregate term of imprisonment the accused would have been sentenced to suffer would not be very high. *(Five years rigorous imprisonment held sufficient to meet the ends of justice.)* [P 154 C 1]

U Tun Byu, Govt. Advocate — *for the Crown.*

Order.—These eight revision cases have been instituted by means of one common petition filed by the applicant against the convictions and sentences passed on him in eight separate trials in the Court of the Headquarters Magistrate, Kyaukpyu, which convictions and sentences have been confirmed by the learned Sessions Judge of Arakan Division on appeal. Since there is just one petition common to all the eight revision cases in this Court and as they turn mainly on same points, I propose to deal with them all in this judgment. The applicant, Maung Po Kywe, was at all times material to these cases an accountant of the District Superintendent of Police's office at Kyaukpyu. As such, his duty was to prepare bills and treasury vouchers for withdrawal of money required for official purposes, submit them to the District Superintendent of Police or apparently in his absence to the Headquarters Assistant to the District Superintendent of Police and after they have passed and approved of them, the applicant would present the bills or vouchers at the treasury and receive payment thereon either in cash or in the shape of cash orders. It was also his duty to make payments of sums which were to be made by the District Superintendent of Police or by the office. The offences with which the applicant was charged in the eight trials were offences alleged to have been committed in connexion with the applicant's duties which also included the maintenance of accounts and cash registers including a register known as the G. R. R. which apparently means General Remittance Receipts. In Criminal Trial No. 61 of 1936 the applicant was convicted on three charges of criminal breach of trust of Rs. 10-9-0, Rs. 15 and Rs. 10 respectively, which offences were committed on or about 26th June, 17th October and 27th September 1933 respectively. The applicant was sentenced to suffer four months rigorous imprisonment on each charge. The learned Magistrate not having ordered that they are to run concurrently, these sentences are in law to run consecutively.

In Criminal Trial No. 62 of 1936 the applicant was charged with an offence of cheating under Sec. 420, Penal Code, in respect of a sum of Rs. 65-4-0, being part of the amount drawn on a contingent bill for which he dishonestly procured the signature of the District Superintendent of Police by deceitful means on or about 20th July 1934. The applicant has been convicted on this charge and has been sentenced to undergo one year's rigorous imprisonment. In Criminal Trial No. 66 of 1936 the applicant was charged under S. 468, Penal Code, for forging the signature of the District Superintendent of Police on a treasury voucher for Rs. 397-8-0 purporting to be travelling allowance due to the District Superintendent of Police on or about 25th June 1935. The applicant has been convic-

ted and sentenced to suffer one year's rigorous imprisonment on this charge. In Criminal Trial No. 67 of 1936 the applicant has been convicted of two charges under S. 477-A for wilful and fraudulent alteration of "Rs. 28" into "Rs. 280" in a treasury form and in a treasury pass book and also of "Rs.129-9-0" into Rs. 409-9-0" in a copy of the G. R. R. form on or about 8th May 1935 and for wilfully and fraudulently mutilating a portion of a folio in the treasury pass book and pasting a blank sheet of the same book in its place on or about 10th December 1935. The sentence passed against the applicant is that he is to undergo one year's rigorous imprisonment on each charge, the sentences to run concurrently.

In Criminal Trial No. 63 of 1936 the applicant was convicted on three charges of criminal breach of trust under S. 409, I. P. C., in respect of Rs. 7-8-0, Rs. 82-7-0 and Rs. 42 on or about 14th September, 6th December and 20th July 1934 respectively and was sentenced to suffer four months' rigorous imprisonment on each charge, the sentences to run concurrently with those in Criminal Trial No. 61 of 1936. In Criminal Trial No. 65 of 1936, the applicant was convicted of criminal breach of trust under S. 409, Penal Code, in respect of Rs. 217-4-0, Rs. 170-4-0 and Rs. 507-7-0 on or about 22nd February 1936, 26th February 1936 and 11th March 1936 respectively. In this case the applicant was sentenced to suffer one year's rigorous imprisonment on each of the first two charges and two years' rigorous imprisonment on the third charge, the sentences to run concurrently with the result that the aggregate term of rigorous imprisonment which the applicant has been ordered to undergo in this case is two years. In Criminal Trial No. 63 of 1936 the applicant has been convicted on three charges of forgery under S. 468, Penal Code, for forging the signatures of the District Superintendent of Police on treasury vouchers on or about 21st July 1934, 7th February 1935 and 23rd February 1935 respectively. He has been sentenced to undergo one year's rigorous imprisonment on each charge, the sentences to run concurrently.

In Criminal Trial No. 64 of 1936 the applicant has been convicted on three charges under S. 420, Penal Code, for dishonestly inducing the District Superintendent of Police to sign certain contingent bills which involved fraudulent claims and also a fictitious travelling allowance bill on 26th November 1935, on 20th December 1935 and on 11th January 1936 respectively. In this case the applicant has been sentenced to suffer four months' rigorous imprisonment on each charge, the sentences to run concurrently with the sentences in Criminal Trial No. 62 of 1936. The aggregate term of rigorous imprisonment which the trial Court has ordered the applicant to undergo in these eight cases is seven years. With reference to the merits of the cases, upon the facts, there is hardly anything which can be urged as militating against the veracity of the witnesses for the prosecution or the accuracy of the statement of facts that they made. The evidence tendered by the prosecution in each and every one of these eight cases remains unrebutted, because the applicant adduced no evidence whatever. There is therefore no ground whatever for interference with the convictions upon the facts in revision. The charges are also quite appropriate and there is no apparent error or irregularity in the conduct of the trials.

Only two questions deserve consideration: one is that which arose upon the applicant's allegation that the trials were vitiated or rendered illegal by the fact that the learned Headquarters Magistrate was personally interested in these eight cases. It is to be borne in mind that this objection was not raised in the course of the trials. The Headquarters Magistrate who tried the cases also functioned as Treasury Officer of the station and as such was responsible for the conduct of the business in the treasury. The alleged falsification of accounts, the embezzlements, the cheating and the forgeries were all alleged to have been perpetrated by the applicant in the District Superintendent of Police's office or in connexion with the books and papers maintained, or issued from there, and no question whatever with reference to the efficiency of the work of the Treasury Officer or to the discharge of the work of his office was substantially involved in any of the cases. S. 556, Criminal Procedure Code, provides :

> No Judge or Magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try or commit for trial any case to or in which he is a party or personally interested . . . .

The Headquarters Magistrate either in his capacity as the Treasury Officer or in

any other capacity was not a party and the question as to what effect should be given to the applicant's present objection depends on whether the learned Magistrate was personally interested in any of the cases. It is pointed out by Knox J. in 15 All 192[1] relying on (1882) 8 Q B D 383,[2] that it was not a mere interest in a case or in the circumstances of the case which disqualified a Magistrate or a Judge from trying a case but that which disqualified him must be "a substantial interest giving rise to a real bias and not merely to a possibility of a bias." In (1882) 8 Q B D 383[2] Lord Cave followed the principle enunciated in (1876) 1 Q B D 173[3] to the effect that the interest— where not pecuniary — must be substantial so as to make it likely that the justice has a real bias and that the mere possibility of bias is not sufficient to disqualify. Adopting the principles thus laid down I hold that there is no substance whatever in the applicant's objection on this point.

The other question which to my mind arises for consideration is with reference to the sentences passed in the cases. No doubt the offences were numerous, but when they are added up, they do not involve very great monetary value. It is true that the gravity of the offences of dishonesty is to be judged not only by the pecuniary value involved. However one cannot shut his eyes to the fact that if the number of cases against the applicant were not so numerous the aggregate term of imprisonment that the applicant would have been sentenced to suffer would not be as high. While it will not be proper to deal with the applicant leniently, I consider that a term of five years' rigorous imprisonment in the aggregate will amply meet the ends of justice. Therefore while maintaining the convictions and sentences, I direct that the sentences passed by the trial Court in Criminal Trial No. 68 run concurrently with the sentence passed in Criminal Trial No. 66 and the sentences passed in Criminal Trials Nos. 61 and 63 run concurrently with the sentences passed in Criminal Trial No. 65 of 1936.

S.G./R.K. *Sentences reduced.*

1. In the matter of Ganeshi, (1893) 15 All 192= 1893 A W N 79 (F B).
2. Reg v. Handsley, (1882) 8 Q B D 383 = 51 L J M C 137=30 W R 368=46 J P 119.
3. Reg v. Meyer, (1876) 1 Q B D 173 = 34 L T 247=24 W R 392.

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MYA BU AND MACKNEY JJ.

Daw E Thin and others — Appellants.

v.

Maung San Thein — Respondent.

First Appeal No. 90 of 1938, Decided on 6th December 1938, against decree of Dist. Court, Amherst, D/- 21st July 1938.

Buddhist Law (Chinese)—Custom — Inheritance—Illegitimate son is entitled to share with legitimate son when father recognizes his paternity and makes himself responsible for his upbringing — Casual contribution for expenses of religious ceremony does not amount to assumption of responsibilities for upbringing.

An illegitimate son of a husband would be entitled to inherit only if the latter dies without leaving any other heir, but an illegitimate son is entitled to a half share or to an equal share with a legitimate son only if the deceased father had recognized his paternity and had also made himself responsible for his upbringing. Responsibilities for the upbringing must be something analogous to the responsibilities that a man would assume for his own legitimate children, and mere compliance with a statutory obligation for the maintenance of a child, for example a casual contribution towards the expenses of a religious ceremony, cannot be regarded as denoting the assumption of responsibilities by the father for his illegitimate son's upbringing. [P 155 C 1; P 156 C 1]

Dr. Ba Han — *for Appellants.*

Khin Maung Gyi — *for Respondent.*

Mya Bu J.—This appeal arises out of a suit filed by the respondent, claiming to be the son of U Shwe Hpay, deceased, for administration of his estate. The appellants, who are the widow and children of U Shwe Hpay, were defendants to the suit. The plaintiff who was born about 23 years ago, is the son of a Burmese lady named Ma Kyin May. About the time of the plaintiff's birth or shortly after, U Shwe Hpay married defendant 1, Daw E Thin, with whom he lived until his death about six or seven years ago. U Shwe Hpay's father was a Chinaman who came to Burma and settled down at Tagundaing in the Amherst District where he married a Burmese lady known as Daw Hla Yin by whom U Shwe Hpay was born to him. For the purpose of disposing of this appeal it is unnecessary to recapitulate the points in dispute between the parties during the trial. The findings of the trial Court, which are unfavourable to the respondent, on bare questions of fact, have not been contested on his behalf in this Court. The trial Court has found that the plaintiff is an illegitimate child of U Shwe Hpay and observed that :

The plaintiff will therefore rank as a child born of illicit intercourse as mentioned in the latter half of the passage from Jamieson's book and would therefore be entitled to a half share of a legitimate son,

and consequently has awarded the plaintiff a one-eleventh share in the estate of the late U Shwe Hpay. The passage in Jamieson's book which is referred to in the judgment of the trial Court appears at page 16 and runs as follows :

As regards children in general, hereditary official rank descends only to the eldest son and his descendants born in lawful wedlock, but all family property moveable or immovable must be divided equally between all male children whether born of the principal wife or of a concubine or domestic slave. Also male children born of illicit intercourse shall be entitled to a half share, or to an equal share in event of a successor having been adopted through default of other children. If no legal successor is in existence, then such illegitimate son shall be entitled to succeed and receive the whole patrimony.

This passage must be read subject to the explanation which appears in the foot-note in these words :

By illegitimate children is meant children by a woman not forming part of their father's household and living outside (waichia). But to give them any rights the paternity must have been recognized by the father and he must have made himself responsible for their upbringing.

There is another relevant passage in the same book at page 152 which says :

The illegitimate son of a husband, that is a son by a woman not forming part of his household, would succeed failing other heirs, but no similar provision is made in the case of the woman.

The effect of these rules is that an illegitimate son of a husband would be entitled to inherit only if the latter dies without leaving any other heir, but an illegitimate son is entitled to a half-share or to an equal share with a legitimate son only if the deceased father had recognized his paternity and had also made himself responsible for his up-bringing. The passage appearing at p. 170 of the Notes and Commentaries on the Chinese Customary Law, by Alabaster, which says :

An illegitimate child follows the father, is to take his name, and be supported by him, or if he be dead by his family—but *semble* has no right to share the paternal property,

is even less favourable to the present respondent's claim. The question as to whether the plaintiff is entitled to a half share of a legitimate son in the estate of U Shwe Hpay who died leaving a widow and seven children, of whom five are sons, turns upon whether U Shwe Hpay had recognized the paternity and had also made himself responsible for the plaintiff's up-bringing. On this crucial point the learned trial Judge has given no definite finding but in one part of his judgment he stated that U Shwe Hpay had acknowledged his paternity of the plaintiff. According to the passages quoted from Jamieson's book, recognition of paternity alone is insufficient to invest an illegitimate son with the right to obtain any share in his father's estate if there are other heirs ; there must be recognition by the father of the paternity and the father must also have made himself responsible for the up-bringing of the illegitimate son in order that he may be entitled to a half share of a legitimate son if there are other heirs.

We have gone through the evidence in the case to see whether U Shwe Hpay had made himself responsible for the up-bringing of the plaintiff but the general trend of it is to the effect that, after the birth of the plaintiff, U Shwe Hpay married Daw E Thin and Ma Kyin May married one Maung Po Tok. The plaintiff lived with Ma Kyin May and Maung Po Tok and when he was a few years old Maung Tok took him to a lay school. It is not known whose name was entered in the register of that school as that of the plaintiff's father but after the plaintiff left school to join the police force he had to give his father's name which is entered in the register maintained by the police department as Maung Po Tok. The explanation offered by the plaintiff to the effect that he gave U Shwe Hpay's name as that of his father when he joined the police force cannot be accepted without very strong corroboration which is entirely absent in this case. It was not the case of the plaintiff that his expenses of schooling were borne by U Shwe Hpay or that U Shwe Hpay did anything of a very substantial character for him, but it is alleged that for a few years U Shwe Hpay used to send Rs. 36 a year through some friend to Ma Kyin May for the up-keep of the plaintiff and that, on one occasion—when he was to be shinbyued—Rs. 150 was received by Ma Kyin May for the expenses of the shinbyu ceremony. According to the evidence on this point, this sum of money was handed over by Daw Hla Yin who contributed Rs. 50 of this amount while U Shwe Hpay gave Rs. 100. These are the only incidents which have transpired in the course of the evidence which are relevant to the question as to whether U Shwe Hpay had made himself responsible for the

upbringing of the plaintiff. As regards the alleged payment of Rs. 36 a year, it does not appear to be anything more than a paltry contribution towards the maintenance of the plaintiff, and it is not quite clear that the sum was paid by U Shwe Hpay and not by Daw Hla Yin. The only other payment, viz. the alleged contribution towards the expenses of the shinbyu ceremony, was made by the hand of Daw Hla Yin and not by that of U Shwe Hpay. Be that as it may, a casual contribution towards the expenses of a religious ceremony cannot be deemed to have been made in the discharge of responsibilities for the up-bringing of the plaintiff. Responsibilities for the up-bringing must, in our opinion, be something analogous to the responsibilities that a man would assume for his own legitimate children, and mere compliance with statutory obligation for the maintenance of a child—under S. 488, Criminal P. C., an illegitimate son also has to be maintained by his father — cannot, in our opinion, be regarded as denoting the assumption of responsibilities by the father for his illegitimate son's up-bringing.

For these reasons we are of opinion that the plaintiff has failed to prove his right to a share of inheritance in the estate of U Shwe Hpay under the Chinese Customary Law. The appeal must be allowed, the decree granted by the trial Court in favour of the respondent is set aside and it is ordered that the suit stand dismissed. We make no order as to the costs either of the suit or of this appeal but under O. 33, R. 7, we direct the court-fees prescribed for the plaint to be paid to the Collector by the plaintiff.

N.S./R.K. *Appeal allowed.*

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MYA BU J.

Maung Tint

v.

The King.

Criminal Revn. Nos. 442-B and 443-B of 1938, Decided on 5th October 1938.

(a) Penal Code (1860), S. 477-A—Whether diary in judicial proceeding is "book, paper, writing, valuable security or account" *(Quære).*

Whether a diary in a judicial proceeding falls within the category of "book, paper, writing, valuable security or account" within the meaning of S. 477-A is highly debatable. [P 158 C 1]

*** (b) Penal Code (1860), Ss. 477-A and 465 —Words "intent to defraud" mean intention to deceive and thereby obtain advantage of prospective nature — Accused making false entries in diary of Court merely to screen his own negligence of his duties as clerk of Honorary Magistrate's Court is not guilty either under S. 477-A or S. 465.**

The meaning of the term "with intent to defraud" is not restricted to cases of "deceit and injury to the person deceived." The term means either an intention to deceive and by means of the deceit to obtain an advantage or an intention that injury should befall some other person or persons : *21 All 113 and A I R 1926 Cal 89, Approved ; 38 Cal 75; A I R 1926 Bom 231 and A I R 1932 Bom 545, Dissent.* [P 159 C 1]

The advantage which is intended must relate to some future occurrence or in other words must be of a prospective nature. [P 160 C 1]

Hence, where a clerk of a Court has made false entries in the diary of Court merely for the purpose of screening his own negligence of his duties as clerk of the Honorary Magistrate's Court without facilitating any misappropriation or embezzlement, there is no material advantage of a prospective nature which he can be held to have intended to gain by the deception and hence he cannot be convicted either of the offence under S. 477-A or under S. 465 : *2 N W P H C 11 ; 6 N W P H C 56; 5 All 221; 8 All 653; 36 Cal 955 and A I R 1922 All 435, Rel. on.* [P 159 C 2; P 160 C 1]

Order. — By this judgment I am disposing of both the Criminal Revisions Nos. 442-B and 443-B of 1938. These two cases arise out of Criminal Regular Trials Nos. 21 and 22 of 1938 of the Court of the Fifth Additional Special Power Magistrate, Henzada, in each of which the applicant has been prosecuted on a complaint filed by the Headquarters Assistant, Henzada. The facts in both cases are identical in character although they relate to different incidents. The applicant is a man of 53 years of age, who has been in the service of the Government in the capacity of a clerk for many years, and during the years 1936-1937 and up to the time when the facts leading to the prosecution in these two cases were discovered was working as a Bench Clerk in the Court of the Township Magistrate, Henzada, and also as the only clerk in the Court of the Honorary Magistrates, Henzada. During the latter part of December last the District and Sessions Judge, Henzada, inspected the judicial record room at Henzada, when he discovered that certain cases of the year 1936 of the Court of the Honorary Magistrates, Henzada, had not yet been sent to the record room though they had been shown in the record room list as having been

disposed of during that year. The learned District and Sessions Judge thereafter notified his intention to inspect the Court of the Honorary Magistrates on 19th January this year. The records which the learned District and Sessions Judge found missing in the record room were records of cases in which the Honorary Magistrates had imposed fines on the accused persons. From what transpires in the course of the evidence in the cases against the applicant it can safely be said that the applicant as the sole clerk of the Court of the Honorary Magistrates neglected to have steps taken for the collection of the fines or unpaid portions thereof. But on 11th, 12th and 13th January the applicant made payments into the Treasury of sums of money representing the unpaid portions of the fines imposed in those cases disposed of in 1936, and at or about the same time he had entries made in the diaries of all those cases falsely to indicate that necessary steps, such as issue of processes or warrants for the recovery of the fines or the balances, were taken from time to time during the intervening period. Not only did he have these entries written out but he had them signed by certain of the Honorary Magistrates.

These false entries were made no doubt for the purpose of concealing his omission to take or to have necessary steps taken by the Court for the recovery of the fines or the balances thereof from the convicted persons in the cases concerned. For the purpose of the complaint in each of the two cases against the applicant only three out of about 30 or 40 cases were chosen. In Criminal Regular Trial No. 21 it was alleged that the applicant as the clerk of the Court of the Honorary Magistrates, Henzada, was entrusted with (a) a sum of Rs. 3 on or about 7th July 1936 by the convicted person in Criminal Regular Trial No. 170 of 1936 as fines imposed on the latter by the Honorary Magistrate; (b) a sum of Rs. 3 on or about 7th July 1936 by the convicted person in Criminal Regular Trial No. 171 of 1936 as fines imposed on the latter by the Honorary Magistrates, and (c) a sum of Rs. 30 on or about 14th July 1936 by the convicted persons in Criminal Regular Trial No. 187 of 1936 as fines imposed on the latter by the Honorary Magistrates; and in the complaint it was alleged that the applicant had committed criminal breach of trust with respect to those fines, and the complainant prayed that action under Sec. 409, Penal Code, might be taken against the applicant. In Criminal Regular Trial No. 22 of 1938 it was alleged that the applicant in the capacity of clerk in the Court of the Honorary Magistrates had custody of Criminal Regular Trials Nos. 172, 173 and 174 of 1936 of the Court of the Honorary Magistrates, Henzada, belonging to the Government, that he made a series of false entries in the diaries of those three cases, that he admitted to the District and Sessions Judge that the fines were not realized from the respective accused persons but that he had paid them into the Treasury out of his own pocket, and upon these allegations the complainant prayed that action under Sec. 477-A, Penal Code, might be taken against the applicant.

After hearing the evidence in both cases, as I have already stated, it became quite manifest that in neither case was the applicant ever entrusted with any part of the fines which he paid into the Treasury in January 1938. The evidence of the respective convicted persons negatives the idea that the applicant had received the moneys in question. Therefore in neither case could a charge of criminal breach of trust be laid against the applicant. Consequently the learned trial Magistrate did not frame a charge under Sec. 409 in any of the cases, but in each case he has framed a charge under Sec. 477-A against the applicant. In one case the charge states that the applicant between 24th December 1937 and 13th January 1938 abetted the making of false entries in the diaries of Criminal Regular Trials Nos. 170, 171 and 187 of 1936 of the Court of the Honorary Magistrates, Henzada, while in the other the charge states that the applicant between those dates abetted the making of false entries in the diaries of Criminal Regular Trials Nos. 172, 173 and 174 of 1936 of the Court of the Honorary Magistrates, Henzada. By the applications before me the applicant prays that the proceedings in the two cases be quashed for the reason that on the state of facts which have been placed by the prosecution not only can a charge of criminal breach of trust not be laid against the applicant but no prima facie case is made out for an offence under S. 477-A in either case. S. 477-A prescribes the punishment for the offence of what is generally termed, " Falsification of

accounts." Under this Section a certain class of persons are liable to punishment who

wilfully and with intent to defraud, destroys, alters, mutilates or falsifies any book, paper, writing, valuable security or account . . . . . or wilfully, and with intent to defraud, makes or abets the making of any false entry in, or omits or alters or abets the omission or alteration of any material particular from or in, any such book, paper, writing valuable security or account.

Whether a diary in a judicial proceeding falls within the category of "book, paper, writing, valuable security or account" within the meaning of S. 477-A is highly debatable. For the purpose of disposing of the two applications before me however it is not necessary to determine this question, for even if such diary does not fall within the category described in Sec. 477-A, the applicant would undoubtedly be liable to be proceeded with for the offence of forgery or abetment thereof, if he wilfully and with intent to defraud caused the false entries which constitute the subject-matters of the charges to be made. That the applicant did wilfully cause the false entries to be made is not open to doubt. But it is not enough. For either an offence punishable under S. 477-A or an offence punishable under Sec. 465 (forgery) or an offence punishable under Ss. 465/109 (abetment of forgery) there must be intent to defraud or fraudulent intention. In the present case as there was no causation of wrongful loss or wrongful gain, there is nothing from which dishonest intention on the part of the applicant in having the false entries in the diary of the cases in question made can be inferred. The definition of the term "fraudulently" given in S. 25, I. P. C., is not of much assistance in endeavouring to find out the exact meaning of the term. In a number of cases reference has been made to the explanation of this term by Sir James Fitz James Stephen in his History of the Criminal Law of England, which is as follows :

Whenever the word "fraud" or "intent to defraud" or "fraudulently" occurs in the definition of a crime, two elements at least are essential in the commission of the crime, namely first, deceit or an intention to deceive, or in some cases mere secrecy ; and secondly, either actual injury or possible injury, or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy. This intent is very seldom the only or the principal intention entertained by the fraudulent person, whose principal object in nearly every case is his own advantage . . . . . A practically conclusive test as to the fraudulent character of a deception for criminal purposes is this : Did the author of the deceit derive any advantage from it which could not have been had if the truth had been known ? If so, it is hardly possible that the advantage should not have had an equivalent in loss or risk of loss to some one else, and if so, there was fraud.

The interpretation put upon this explanation by Banerji J. 21 All 113[1] was expressed in the following words :

Where therefore there is an intention to deceive and by means of the deceit to obtain an advantage there is fraud, and if a document is fabricated with such intent, it is a forgery.

This statement was made in a case where a police constable's character and service roll in his custody was found to have been tampered with in this way, that a page, apparently containing remarks unfavourable to the head constable, had been taken out, and a new page with favourable remarks, purporting to have been written and signed by various superior officers of police, had been inserted in its place, the intent being to favour the chances of the promotion of the said head constable. In coming to the conclusion that the false entries amounted to a forgery the learned Judge observed :

Whatever interpretation of fraud may be adopted, the false entries in the character roll of the accused were made with the intention of committing fraud. The intention was to deceive the superior officers of the accused, and by means of such deception to secure his advancement in the service, and thus to gain an advantage for him at the sacrifice of others.

The expression "intent to defraud," according to Mukerji J. in 38 Cal 75,[2] however

implies conduct coupled with an intention to deceive and thereby to injure ; in other words, "defraud" involves two conceptions, namely deceit and injury to the person deceived, that is, infringement of some legal right possessed by him, but not necessarily deprivation of property.

Thus, where the accused affixed his signature to a kabuliyat, which was not required by law to be attested by witnesses, after its execution and registration, below the names of the attesting witnesses, but without putting a date or alleging actual presence at the time of its execution, the learned Judge held that such did not amount to forgery. This interpretation was adopted in 50 Bom 174,[3] and it was definitely laid down in a later Bombay case,

1. Queen-Empress v. Muhammad Saeed Khan, (1899) 21 All 113=1898 A W N 197.
2. Surendra Nath Ghose v. Emperor, (1911) 38 Cal 75=7 I C 629=12 C L J 277=14 C W N 1076.
3. Emperor v. Harjivan Valji, (1926) 13 A I R Bom 231=98 I C 407 = 27 Cr L J 1335 = 50 Bom 174=28 Bom L R 115.

56 Bom 488,[4] that the element of injury or risk of injury to an individual or to the public is an essential ingredient in the definition of forgery in Ss. 463 and 464, I. P. C., and that it is not enough to show that the deception was intended to secure an advantage to the deceiver. That was a case in which a Sub-Inspector of Police, after the inception of proceedings against him under Ss. 330 and 348, I. P. C., altered his case diary in order to create evidence in his favour, and it was held that the act of the accused in altering the diary so as to show that he had not kept the suspects under surveillance did not amount to forgery inasmuch as the element of fraud as defined in S. 25, I. P. C., was absent. Although these two cases of the Bombay High Court were decided after the decision in 52 Cal 881[5] by Page J. of the Calcutta High Court, the late Chief Justice of this Court, it was apparently not noticed by the learned Judges of the Bombay High Court. Referring to Mookerjee J.'s interpretation in 38 Cal 75[2] Page J. observed :

> With great respect I am unable to accept the view that the term 'fraudulently' in S. 471, I. P. C., necessarily connotes deceit and injury to the person deceived. It may, but it need not, do so; in point of fact more often than not it happens that the intention of the accused is to deceive one person in order to injure or defraud another. Further, it is well settled that it is not incumbent upon the Crown to prove that any particular person was defrauded, 2 Str 901,[6] or indeed, that in the circumstances of the case it was possible that any person could have been defrauded: (1852) 2 Den C C 493.[7] In my opinion, the law was correctly laid down by Banerjee J. in 21 All 113[1] and that an offence is committed under S. 471 whenever a document known or believed by the accused to have been forged is used as genuine with the intention that some person thereby should be deceived, and by means of such deception that either an advantage should accrue to the person so using the document, or injury should befall some other person or persons.

Then quoting Sir James Fitz James Stephen's explanation of the term "intent to defraud" the learned Judge pointed out that in practice the question tends to become merely academic. In my opinion, with all due respect, the law is correctly laid down by Banerjee J. in 21 All 113[1] and by Page J. in 52 Cal 881,[5] for, I think that it is not difficult to conceive of situations where injury may result from deception practised to persons other than the person deceived and situations where some material advantage may result to the person practising the deception without corresponding injury to another person, such as where a person gains admittance to a higher class by means of a forged acquittance certificate, or as in 21 All 113[1] where the accused had attempted by means of deception to secure his advancement in the service and thus to gain an advantage for him at the sacrifice of others. In the illustrations that I have just given, in which, in my opinion, the intent to defraud is clearly manifest, I fail to see that the advantage gained by the person practising the deception causes relative harm to another person in body, mind, reputation or property. Under S. 44, Penal Code, it is only harm illegally caused to any person in body, mind, reputation or property which constitutes "injury." It is of course not possible in most cases that the advantage gained by the person practising the deception does not have an equivalent of any loss or risk of loss of some one else; but, in my opinion, with all respect, this is not sufficient reason for restricting the meaning of the term "intent to defraud" only to cases of "deceit and injury to the person deceived" or to exclude all cases where the deception was intended to secure advantage to the deceiver.

If we apply the criteria laid down in 38 Cal 75[2] and in 56 Bom 488[4] to the cases before me, the charges framed against the accused must manifestly fail for want of proof of the necessary mens rea in the accused and obviously no charge of any offence of forgery will be sustainable. But in the view that I adopt as to the meaning and effect of the term "intent to defraud" as expressed above I feel bound to hold that the prosecution has entirely failed to prove this element of the offence of forgery or of falsification of accounts : 2 N W P H C 11,[8] 6 N W P H C 56,[9] 5 All 221,[10] 8 All 653,[11] 36 Cal 955[12] and 20 A L J 662[13] are

4. Sanjiv Ratnappa v. Emperor, (1932) 19 A I R Bom 545=1932 Cr C 777 =142 I C 386 = 34 Cr L J 357=56 Bom 488=34 Bom L R 1090.
5. Emperor v. Mohit Kumar, (1926) 13 A I R Cal 89=91 I C 993=27 Cr L J 177=52 Cal 881.
6. Rex v. Crooke, 2 Str 901.
7. Reg v. Nash, (1852) 2 Den C C 493 = 21 L J M C 147=16 Jur 553.
8. Queen v. Lal Gumul, 2 N W P H C 11.
9. Queen v. Jageshur Pershad, 6 N W P H C 56.
10. Empress of India v. Jiwanand, (1883) 5 All 221=1882 A W N 236.
11. Queen-Empress v. Girdhari Lal, (1886) 8 All 653=1886 A W N 264.
12. Jyotish Chandra v. Emperor, (1909) 36 Cal 955=4 I C 416=14 C W N 82.
13. Shuja-ud-din Ahmed v. Emperor, (1922) 9 A I R All 435=68 I C 834=23 Cr L J 610 = 20 A L J 662.

some of the cases in which it was held that the alteration of accounts in order to remove evidence of prior misappropriation of money is not an offence either under S. 465 or S. 477-A, Penal Code, there being no intent to commit fraud. In the first of these cases it was held that the conduct of the prisoner who altered an office report to screen his own negligence did not fall within the definition of "forgery" in the Penal Code. In these cases, the learned Judges did not lay down what the meaning and effect of the term "intent to defraud" was; but the ratio decidendi in each case was absence of proof of intention to cause injury to anyone. In my opinion however the circumstances of those cases would equally well have justified the view that though there was deceit or an intention to deceive, there was neither intention to cause actual injury or possible injury to any person, nor intention to derive by means of the deceit any material advantage whatever. In 5 All 221[10] Mahmood J. observed that fraudulent intention, *ex necessitate rei*, relates to some future occurrence and not to the past and that it could not be said when wrongful loss or wrongful gain had already been caused, or a person had already defrauded, anything can be subsequently done which could be dictated with the intention to cause that which has already occurred. Those remarks were made in a case where a clerk who had committed criminal breach of trust subsequently made false entries in an account book with the intention of concealing such offence. Similarly, in my opinion, advantage which is intended must relate to some future occurrence, or, in other words, must be of a prospective nature.

In the present case, the applicant has not committed any offence of criminal breach of trust or criminal misappropriation but he had the false entries made merely for the purpose of screening his own negligence of his duties as clerk of the Honorary Magistrates' Court; nor has he by these false entries facilitated any misappropriation or embezzlement. By concealment of his negligence he practised deception; but it cannot for a moment be contended that he intended thereby to cause injury to any other person. The question is — Did he practise the deception in order to gain an advantage? It cannot be contended that by means of the deception the applicant intended to secure his advancement in the service as in 21 All 113.[1] There is no material advantage of a prospective nature which the applicant can be held to have intended to gain by the deception. If the deception had succeeded the applicant would at best have concealed his past negligence of his official duty and thereby removed the risk of departmental punishment to him. This, in my opinion, is quite a different thing from an advantage, the intention to gain which is a necessary constituent of fraudulent intention in the absence of intention to cause injury. This may at most be described as the removal of a disadvantage or risk, but, in my opinion, not an advantage. For these reasons I hold that the charges laid and framed against the applicant cannot be sustained. They are therefore hereby set aside. Criminal Regular Trials Nos. 21 and 22 of 1938 are accordingly quashed.

D.S./R.K. *Trials quashed.*

A. I. R. 1939 Rangoon 160

BAGULEY J.

Ko Cheik — Appellant.

v.

Secretary of State and another Respondents.

Second Appeal No. 169 of 1938, Decided on 22nd November 1938, against decree of Dist. Court, Meiktila, D/- 11th February 1938.

Upper Burma Land and Revenue Regulation (1889), S. 53 (2) (xii) — Jurisdiction of Civil Courts is barred in connexion with all claims connected with collection of land revenue — Thathameda is revenue — Bullock attached for failure to pay thathameda tax, claimed by another person as his own — Civil Courts have no jurisdiction to investigate claim.

There is nothing inherently unjust or contrary to principle of natural justice in S. 53 (2) (xii) of the Regulation. The Section does not bar the subject from all his remedies. S. 53 (2) (xii) is not confined in its application to questions as between the tax-payer and the revenue-collecting authorities. It cannot be said that the jurisdiction of the Civil Courts is barred only in cases as between the defaulter or tax-payer and the revenue-collecting authorities. The jurisdiction of the Civil Courts is barred in connexion with all claims connected with and arising out of collection of land revenue. Thathameda is revenue; where therefore bullocks belonging to a person are attached for his failure to pay the thathameda tax, and the bullocks are claimed by another person as his own, the jurisdiction of the Civil Courts to investigate the claim is barred under S. 53 (2) (xii): *19 All 127 and A I R 1927 All 532, Ref.* [P 161 C 1, 2]

Guha — *for Appellant.*

U Thein Maung, Advocate-General — *for Respondents.*

Judgment. — This is a second appeal from a decree dismissing the appellant's suit, passed by the District Court of Meiktila, confirming the judgment and decree of the Subdivisional Court of Meiktila. The facts of the case are that certain people failed to pay their thathameda tax. The Township Officer started recovery proceedings and directed the thugvi to seize two bullocks. He did so and the appellant raised a claim that the bullocks were his. The Township Officer as Assistant Collector held an enquiry and decided that the bullocks should be sold to pay the thathameda tax. The appellant applied to the Deputy Commissioner, as Collector, and the Collector had the matter investigated by a Sub-divisional Officer and in the end the bullocks were sold, and the appellant filed this suit against the Secretary of State for India in Council and the thugvi who seized the bullocks for Rs. 1200 general damages despite the fact that he had bought one for Rs. 100 and one for Rs. 35. The trial Court dismissed the suit on the ground that the Civil Courts had no jurisdiction to deal with it by reason of the provisions of S. 53 (2) (xii) of the Upper Burma Land and Revenue Regulation, 1889. The appellant filed an appeal to the District Court and the learned Judge took the same view of Sec. 53 of the Upper Burma Land and Revenue Regulation as the trial Court had taken. The appellant now comes here in second appeal. One ground of the memorandum of appeal is that S. 53 of the Upper Burma Land and Revenue Regulation is ultra vires but this has not been argued. The only point that has been argued is that the suit was not barred by reason of S. 53 (2) (xii). Under this Section it is stated that the Civil Courts

> shall not exercise jurisdiction over any of the following matters, which shall be cognizable exclusively by Revenue Officers,

and one of the matters so excepted from the jurisdiction of the Civil Courts is

> any claim connected with, or arising out of, the collection of the revenue, or the enforcement of any process for the recovery of an arrear of revenue, or any sum recoverable as such an arrear.

It is argued that this only applies to questions as between the tax-payer and the revenue-collecting authorities, but there is no limitation of this kind to be found in the wording of the Section itself. This Section does not bar the subject from all his remedies. The action of the Township Officer and his order refusing to release the bullocks from attachment was an order made by an Assistant Collector as Revenue Officer. S. 8 (a) of the Regulation gives an appeal from the Assistant Collector's orders to the Collector, and the appellate order passed by the Collector is appealable to the Commissioner and under S. 11, the Financial Commissioner may send for the record of any case disposed of by any Revenue Officer and make such order as he thinks fit; so that the appellant was by no means without any remedy in the Revenue Courts. There is therefore nothing inherently unjust or contrary to the principles of natural justice in S. 53 (2) (xii) of the Regulation.

The appellant's advocate has cited no authorities; he simply argues that this Section only applies to matters between the tax-payer and the revenue-collecting authorities. For the respondent two cases have been quoted. The first of these is 19 All 127.[1] That appeal arose out of a suit brought to recover certain property, alleged to belong to the plaintiff, which had been sold for an arrear of revenue due by some other defendants, or for the value of the property. It was held that the suit was barred by S. 241 of Act 19 of 1873 of the Governor-General of India in Council. S. 241 of that Act says that "no Civil Court shall exercise jurisdiction over any of the following matters" and sub-s. (1) of this Section refers to "claims connected with or arising out of the collection of revenue or any process enforced on account of an arrear of revenue." The similarity of the wording of that Section to the Section of the Regulation now under consideration is marked.

The other authority quoted is 49 All 701.[2] This was a matter connected with the Co-operative Societies Act, 1912. It was an appeal arising out of a suit for refund of money realized by the sale of cattle which had been sold by or on behalf of the Registrar of Co-operative Societies to recover money realizable in the same manner as arrears of land revenue. The collection of arrears of land revenue in this

1. Secretary of State v. Mahadei, (1896) 19 All 127=1896 A W N 199.
2. Abdullah v. Secretary of State, (1927) 14 AIR All 532=101 I C 626=49 All 701=25 A L J 521.

case was governed by the United Provinces Land Revenue Act, 1901, and S. 233 (m) of that Act bars the jurisdiction of Civil Courts from entertaining

claims connected with or arising out of the collection of revenue . . . . . or any process enforced on account of an arrear of revenue, or on account of any sum which is by this or any other Act realizable as revenue.

In neither of the Acts referred to in these rulings is there any mention of the Civil Courts' jurisdiction being barred only in cases as between the defaulter or the tax-payer and the revenue-collecting authorities. The jurisdiction of the Courts is barred in connexion with all claims connected with or arising out of the collection of revenue. Thathameda is revenue; the bullocks were attached in connexion with the collection of revenue; and therefore the jurisdiction of the Civil Courts is barred and the Civil Courts are unable to investigate this claim. For these reasons I dismiss this appeal with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1939 Rangoon 162

MYA BU J.

Ah Su — Applicant.

v.

P. Taraway Kaka — Respondent.

Civil Revn. No. 404 of 1937, Decided on 16th February 1938, against decree of Township Court, Yenangyaung, in S. C. S. No. 352 of 1937.

(a) Burma Rural Self-Government Act (4 of 1921), S. 2 (h) (ii)—"Public market" — To be "public market," market need not necessarily be building constructed, etc. by District Council —It is sufficient if the place belongs to District Council.

"Public market" within the meaning of Sec. 2 (h) (ii) means any place belonging to a District Council or constructed, repaired or maintained out of a District Fund, where persons periodically assemble for the sale of goods, live-stock or articles of food. To be a "public market," a market need not necessarily be a building constructed, repaired or maintained out of a District Fund. It is sufficient if the place where persons periodically assemble for the sale of goods, live-stock or articles of food belongs to the District Council. [P 163 C 1]

(b) Burma Rural Self-Government Act (4 of 1921), S. 28 (1) (a) — Fee levied under S. 28 (1) (a) is for right to expose goods or live-stock for sale in public market.

The fee leviable under S. 28 (1) (a) is not rent charged for the use or occupation of a place or a building or a stall in a public market. The fee is levied for the right to expose goods or live-stock for sale in the public market. [P 163 C 2]

(c) Civil P. C. (1908), O. 3, R. 1—Suit instituted by plaintiff through agent — Fact that agent is duly authorized agent for purposes of suit, not shown by production of power of attorney or other evidence — Objection raised for the first time in High Court — It is a mere irregularity which does not affect merits of case.

Where a suit is instituted by a plaintiff through an agent but the fact that the agent is a duly authorized agent for the institution of the suit is not shown by the production of any power of attorney and has not been proved in any other way and such objection is raised only for the first time in the High Court, it amounts to no more than an irregularity which is not material for the proper adjudication of the case. [P 164 C 1]

Wellington — *for Applicant.*

Rahman — *for Respondent.*

Order.—This is an application for revision under S. 25, Provincial Small Cause Courts Act, arising out of a suit filed by the petitioner, the holder of the license for the year 1937-38 for the right to collect fee levied by the District Council of Magwe for the right to expose goods for sale in the Twingon Bazaar at Yenangyaung. The facts of the case are that the District Council of Magwe occupied certain areas for "bazaars"; one of such areas consists of 1.40 acres of land at Twingon. Besides the bazaar buildings and other buildings constructed or maintained out of the District Fund, there are buildings or houses in that area which are occupied by stalls. The defendant was at all times material to this suit occupying one of the compartments in one of the latter buildings where he opened a tea shop. The petitioner, having bought the license for the right to collect the fees from the stall holders for the year 1937-38, demanded of the respondent for payment of the fee but in vain, the result being the petitioner's institution of this suit. In instituting the suit he did so through one U Po Thet who described himself as the agent of the plaintiff. The suit was styled as "a suit for recovery of stall rent, Rs. 7-4-0," which was the amount due calculated at the rate of two annas per diem. The only part of the defence which it is necessary to consider at this stage is the respondent's denial that the petitioner was entitled to any fee from him.

The ground upon which the defence is based is that the house or the building where the respondent holds his stall is not a public market within the meaning of S. 2 (h) (ii), Burma Rural Self-Government Act, 1921. This defence is based not only upon the fact that the building was not one constructed, repaired, or maintained

out of the District Fund but also upon the allegation that the site of that building does not fall within the area held by the Magwe District Council as a public market. This allegation however is controverted by the evidence of the Secretary of the District Council. The evidence is to the effect that the map, Ex. C, shows the area occupied by the District Council for the Twingon Bazaar which area on an enlarged scale appears in the map, Ex. A, showing besides the buildings constructed, repaired or maintained out of the District Fund those not so constructed, repaired, or maintained and that the building No. 18 in which the respondent has his tea-shop falls within the area marked out as the bazaar area. The learned trial Judge has also found, although he has not expressed his finding in a direct manner, that the building is standing on the bazaar land. In my opinion, the fact that the building in question stands within the area shown in the map, Ex. C, as the Twingon Bazaar area has been established beyond all doubt. The learned trial Judge's ground for dismissing the suit is that as the building belonged to a private individual and is not one constructed, repaired or maintained out of the District Council Fund, it is not a public market within the meaning of S. 2 (h) (ii), Rural Self-Government Act. Market is defined in S. 2 (h) (i) as meaning :

> Any place where persons periodically assemble for the sale of goods, live-stock or articles of food

and S. 2 (h) (ii) defines a public market as:

> Any market belonging to a District Council or constructed, repaired, or maintained out of a District Fund.

When these two definitions are read together, I find that public market means any place belonging to a District Council or constructed, repaired, or maintained out of a District Fund where persons periodically assemble for the sale of goods, live-stock or articles of food. To be a public market, a market need not necessarily be a building constructed, repaired, or maintained out of a District Fund. It is sufficient if the place where persons periodically assemble for the sale of goods, live-stock or articles of food belongs to a District Council.

In coming to his conclusion that the building in which the respondent keeps his tea shop, not having been constructed, repaired, or maintained out of a District Fund is not a public market, the learned Small Cause Judge overlooks the fact that according to the definition in S. 2 (h) (ii) a market need not necessarily be a building constructed, repaired, or maintained out of a District Fund in order to be a public market, but where a market belongs to a District Council it is a public market though not constructed, repaired, or maintained out of a District Fund. A good deal of confusion of thought appears to have arisen by the use of the terms " stall rent" to denote the fee leviable under S. 28 (1) (a). It is not the rent charged for the use or occupation of a place or a building or a stall in a public market. The fee is levied for the right to expose goods or live-stock for sale. The right that the licensee obtained from the District Council is the right of collecting the fee which is charged for the right to expose goods or live-stock for sale in the public market. The list of fees levied by the District Council is contained in Ex. B which enumerates not only stalls which require any particular building or structure for its business but also those which do not require the maintenance of any structure or building for the purpose.

On the merits of the case the decision of the learned trial Judge is wrong, as having proceeded upon an incorrect conception of what a public market is. The learned advocate for the respondent has called my attention to the fact that the plaintiff sued not personally but through U Po Thet who is described as the plaintiff's agent, but that U Po Thet was duly authorized agent for the institution of the suit was not shown by the production of any power of attorney and has not been proved in any other way. In these circumstances, the learned advocate urges that the suit must be held as not validly instituted. In my opinion, this objection is too late. No objection was taken to this apparent defect in the written statement and it does not appear that the attention of the learned trial Judge was called to it at any stage of the proceeding in the trial Court. The objection was raised only after the petitioner's advocate has presented his case fully and in the course of the learned advocate's reply in this Court. It is true that there is no note whatever in the record of the trial Court to show that a power of attorney was produced and examined by the Court but it is impossible to say whether the absence of such a note is due to the fact that no power of attorney was produced or examined or whether it was due to any omission on the part of the Court to make a note of the production

and examination of such power. In any event, I do not consider that the effect is more than an irregularity which is not material to the proper adjudication of the case.

For the above reasons, I direct that the decree of the Township Court of Yenangyaung dismissing the petitioner's suit be set aside and that there be a decree as prayed for in the plaint with costs in both Courts; advocate's fee in this Court is fixed at two gold mohurs.

R.M./R.K. *Decree set aside.*

A. I. R. 1939 Rangoon 164

MACKNEY J.

U Paw and another — Appellants.

v.

Ma Ye and others — Respondents.

Special Second Appeal No. 314 of 1937, Decided on 17th February 1938, against decree of Dist. Court, Katha at Shwebo, in C. A. No. 12 of 1935.

(a) Civil P. C. (1908), S. 105—Order refusing to accept award of arbitrators on reference made by Court is order affecting decision of case.

The words "affecting the decision of the case" in S. 105, mean affecting the merits or affecting questions bearing upon the merits of the case and an order refusing to accept an award of the arbitrators, on a reference made by the Court, is an order affecting the decision of the case : *A I R 1916 Cal 322, Rel. on.* [P 164 C 2 ; P 165 C 1]

(b) Arbitration — Award — Setting aside — Parties going on with award even after irregularity has occurred — They cannot challenge award on ground of irregularity.

Where the parties to an arbitration go on with the arbitration without objection, after an irregularity has occurred, they are precluded from seeking to set aside the award on the ground of the irregularity : *A I R 1923 Rang 187, Rel. on.* [P 166 C 1]

K. C. Sanyal — *for Appellants.*

B. C. Paul — *for Respondents.*

Judgment.—The parties to this appeal are in dispute in regard to the possession of a sapphire found in the ruby mines of Mogok. The plaintiffs-appellants having filed a suit for the possession of this sapphire in the Sub-divisional Court of Mogok, the parties agreed to ask the Court to refer matter in dispute to arbitration, and under Rr. 1 and 3 of Sch. 2, Civil P. C., the Court did so refer the matter in dispute to certain arbitrators. In due course the arbitrators came to a unanimous decision, but the learned Sub-divisional Judge finding that they had been guilty of corruption or misconduct, set aside the award and proceeded to try the suit. Ultimately a decree was given in favour of the plaintiffs. Against this decree the defendants appealed to the District Court. Among other grounds of appeal they took the ground that the jurisdiction of the Civil Court was barred by virtue of the Mogok Ruby Mines Regulation, and another ground was that the Sub-divisional Court erred in refusing to accept the award of the arbitrators. The learned District Judge decided the appeal in favour of the defendants on the first ground and dismissed the plaintiffs' suit. On appeal to this Court however, this decision was set aside and the District Court was directed to decide the appeal on the merits. The District Court then found on the second ground that the Sub-divisional Court had erred in setting aside the award and that it ought to have passed a decree in accordance with the terms of the award. The learned District Judge did not go into any other matters raised but allowed the appeal and directed that the award be filed in Court and a decree drawn up in accordance therewith. Against this decree the plaintiffs have appealed again to this Court. The first ground taken is : the learned District Judge has not complied with the orders of this Court and decided the appeal on the merits. Clearly however, if the learned District Judge was of the opinion that the award ought to be filed, it was not necessary for him to go into any other point whatsoever affecting the merits of the case.

It has also been urged that as there was no appeal from the order of the Sub-divisional Court setting aside the award, the defendants could not have made it an objection to the ultimate decision of the Sub-divisional Court in their memorandum of appeal, that is to say, it is urged that the matter was finally settled and could not be reopened by the District Court on appeal. I do not think there is any substance in this contention. S. 105, Cl. 1 reads:

> Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction ; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

Now I think it is clear that an order refusing to accept an award of arbitrators on a reference made by the Court is an order affecting the decision of the case. In

the present case it is obvious that that order has affected the decision of the case because instead of giving a decree in favour of the defendants, as it would have done had it accepted the award, the Court has given its decree in favour of the plaintiffs. This matter has been fully discussed in 56 Cal 21[1] and it was held that the words "affecting the decision of the case" mean affecting the merits or affecting questions bearing upon the merits of the case, and an order setting aside an arbitrator's award is one affecting the decision of the case within the meaning of S. 105, Civil P. C. If the District Court was of the opinion that the Sub-divisional Court erred in setting aside the award as the award was a good award, then clearly it was entitled to allow the appeal and pass a decree in accordance with the award.

A further ground taken is that the award of the arbitrators ought to have been stamped (it is not now urged that it should also have been registered). The case is governed by Art. 12 of Sch. 1 to the Stamp Act which exempts awards made on a reference by order of the Court in the course of the suit. There remains the main ground that the District Court erred in not holding that the arbitrators had been guilty of misconduct and in holding that the appellants had acquiesced in the misconduct. Four grounds of objection to the conduct of the arbitrators have to be dealt with. The plaintiffs complain that the witnesses produced by the defendants only were examined by the arbitrators and not those of the plaintiffs. The second objection taken was that the joint application of the parties to the arbitrators not to examine any witnesses because they were ready to accept the decision of the arbitrators, was made under pressure or under the undue influence exercised by the arbitrators. The third objection taken is that whilst the arbitrators were considering their decision the plaintiffs were ordered to leave the house of defendant 2 where the arbitrators were, whilst the defendants were permitted to remain therein. As regards this third ground it may be mentioned that both Courts have found against the plaintiffs-appellants on this point and I see no reason to differ from their finding. The fourth ground taken was that the arbitrators were feasted and filled with intoxicants by the defendants as an inducement to bias their decision in favour of the defendants.

As regards the first and second points, it is quite clear from the evidence on the record that there was a meeting of the arbitrators and parties on 7th December 1934, in the house of defendant 2. The parties did not have all their witnesses ready, one witness was examined in part, but evidently the arbitration proceedings were not very seriously taken in hand on that day. The proceedings ended with a banquet given by defendant 2 in his house to all the arbitrators and to all the parties. A good deal of whisky was drunk. The next day the parties and the arbitrators, or some of them at least, met at the Court of Mogok, the object being to file a list of those witnesses who were to be called by the Court. It was then suggested, no doubt by some of the arbitrators, that as the plaintiffs and defendants were not unconnected with one another it was a pity to prolong the proceedings by having witnesses summoned by the Court and examined at length by the arbitrators, and that it would be a good idea if the parties would not agree not to call any witnesses but to abide by the decision of the arbitrators. There is no evidence that any undue influence was exercised by any of the arbitrators or that any undue pressure was used by them. It was simply a suggestion put forward by them for their own benefit, no doubt, but also for the benefit of the parties. There is no doubt that the parties did agree to this course being followed and they signed a joint application to the arbitrators explaining that they did not wish to examine any witnesses and that they would abide by the decision of the arbitrators. It must be recollected that the arbitrators are men of the locality who knew the parties well enough and must have had considerable information at their disposal as to the nature of the dispute. I have no doubt whatsoever that the plaintiffs-appellants willingly agreed to the course proposed. This disposes of the first two grounds of the objection put forward.

As regards the fourth ground, it is to be borne in mind that this agreement on the part of the plaintiffs and defendants not to call witnesses but to abide by the decision of the arbitrators was come to after the banquet in defendant 2's house. If there had actually been any real cause for alarm in regard to this banquet on the part of the

1. Bama Charan Das v. Gadadhar Das, (1929) 16 A I R Cal 322=121 I C 675 = 56 Cal 21.

plaintiffs, surely they would not have signed the application to the arbitrators to proceed in the way suggested. It is in evidence that it was merely as it happened that defendant 2 was the donor of the feast. It had been arranged that if the arbitrators should meet in Mogok, where the plaintiffs lived, then the plaintiffs were to feast the assembled gathering. I do not think that the plaintiffs, now that the award is given against them, can say that the arbitrators were subjected to an inducement by the defendants to give the award in the defendants' favour. The plaintiffs themselves partook of the same banquet.

In 1 Rang 15[2] it was held that where parties went on with arbitration without objection after an irregularity had occurred, they were precluded from seeking to set aside the award on the ground of the irregularity. I would hold that in the present case the plaintiffs saw no irregularity in the conduct of the arbitrators until the award went against them, and indeed there is nothing to show that the arbitrators were in any way influenced by the fact that defendant 2 had feasted them. The defendants-respondents took the point that the plaintiffs had in fact accepted the Rs. 50 which the award directed that the defendants should pay to them. The award was in these terms :

> The stone already received shall be taken by the defendants. The defendants shall pay to the plaintiffs Rs. 50 towards the costs incurred by the plaintiffs.

The evidence shows that Rs. 50 was offered to plaintiff, U Paw, who waived it away and told the parties to give it to U Wan Yai as he had borne the costs of the case. The Rs. 50 was then offered to U Wan Yai who, according to some witnesses, was reluctant to accept it, but, according to others, accepted it without demur, but at any rate he did accept it. It is argued on behalf of the defendants that this implies an acceptance on the part of the plaintiffs of the award. In this doubtful state of the evidence I do not think much store can be set on this point. It is however immaterial in view of my decision on the other points in which I fully agree with the learned District Judge. There is no doubt that the arbitrators acted in a somewhat perfunctory fashion and not at all in accordance with the usual procedure of a Court, but it is clear that all the parties agreed to their so acting and were ready to accept their decision however come to. I do not think that any importance can be attached to the fact that the evidence of one witness which has partially recorded was torn up. As the parties had decided not to bring any evidence but were ready to abide by the decision of the arbitrators, it does not seem to me a matter of moment that evidence which had been taken incompletely should have been destroyed. It was not relied on either by the parties or by the arbitrators.

U Kya Myin, who was appointed an umpire in case of difference of opinion among the arbitrators, actually took part in the proceedings throughout and signed the award. However as the award was in any case a unanimous award I do not think that this affects its validity. Objection has been taken in this Court to the award because the preamble describing the actions of the arbitrators does not coincide with their evidence given in Court. This preamble was not intended to be an accurate description of the procedure adopted by the arbitrators, and I do not think that any significance need be attached to this point. It has been argued that the decision of the arbitrators is preposterous because they could have had no basis for their decision; but, it is obvious that they must have had some personal knowledge of the matter and that the parties were agreed to abide by the decision on the basis of such knowledge that the arbitrators had.

The evidence shows that the arbitrators and parties visited the mine and made some sort of a partition, but this matter was not referred to in their award. I have no doubt that they did so merely to decide to which part of the mine the appellants had a right and to which part the defendants had a right. They would have to settle that point in order to decide to whom the sapphire belongs. In any case in the award itself there is no mention of any partition. It cannot be said that the arbitrators have gone beyond their terms of reference. In my opinion the order of the District Court was correct and this appeal is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

2. U Gunawa v. U Pyinnyadipa, (1923) 10 A I R Rang 187 = 74 I C 6 = 1 Rang 15.

A. I. R. 1939 Rangoon 167

MYA BU AND MACKNEY JJ.

U Tauk Ta and another — Appellants.

v.

Ma Ohn Yin — Respondent.

First Appeal No. 62 of 1938, Decided on 20th December 1938, against decree of Dist. Court, Maubin, D/- 16th May 1938.

Buddhist Law (Burmese) — Death of one parent leaving only one child—Surviving parent remarrying—Claim of child of first marriage to one quarter share as orasa child receives fresh period of limitation beginning from remarriage — That child is entitled to one half of estate brought to remarriage by its father.

It is quite contrary to the ordinary notions current amongst the Burmese to hold that an orasa child, who does not claim his share on the death of his parent nevertheless must be regarded as having taken it, with the further consequence that he falls out of the family. By Burmese law, when after the death of one parent leaving only one child the surviving parent remarries, the only child of former marriage is entitled to claim partition. The child's claim to a one-quarter share as orasa child must be deemed to have received a fresh period of limitation beginning from the remarriage of its father and it is entitled to one half of the estate brought to the remarriage by its father : *A I R 1929 Rang 218 ; A I R 1926 Rang 211 ; A I R 1935 P C 16 ; A I R 1929 Rang 155 and A I R 1936 Rang 107, Rel. on; F. A. No. 113 of 1930, held obiter; A I R 1934 Rang 90, Dissent.*

[P 168 C 2; P 169 C 1]

U E Maung — *for Appellants.*

P. K. Basu — *for Respondent.*

Mya Bu J. — The plaintiff-respondent, Ma Ohn Yin, is the daughter of the defendant-appellant, U Tauk Ta, by one Daw Hpyu, who died about June 1922. There were some allegations that U Tauk Ta married again in 1924, but it is now admitted that there is no sufficient evidence of this marriage. It has however been established that U Tauk Ta married defendant-appellant 2, Ma Sein Tin, about June 1926. Ma Ohn Yin is the only child of U Tauk Ta and Daw Hpyu. She has claimed to be entitled to one-half of the properties which U Tauk Ta possessed at the time of his second marriage with Ma Sein Tin in virtue of her being the only child of U Tauk Ta and therefore entitled to the rights of an eldest child and of younger children. Ma Ohn Yin attained the status of orasa child before the death of her mother Daw Hypu: consequently, on the death of the latter, she became entitled to one-quarter of the estate. This claim however she did not make. The suit was filed on 24th November 1937. Therefore at that date her claim as an orasa child to partition on the death of her mother was time barred. The District Court has decreed her claim. U Tauk Ta and Ma Sein Tin now appeal against the decree of the District Court.

It is argued before us that the claim of Ma Ohn Tin as an orasa child to a one-quarter share of the estate brought by her father to his remarriage is not a different claim from her claim to partition as an orasa child on the death of her mother. On the death of her mother she became entitled to one-quarter of the estate. On the remarriage of her father she could not become further entitled to that which had already been fully vested in her. Consequently, the remarriage of her father did not start a fresh period of limitation within which Ma Ohn Yin could make her claim for her inheritance. That being so, she is now debarred from claiming as orasa child a quarter share on the remarriage of her father, the period of limitation being laid down by Art. 123, Limitation Act, as 12 years from the date when the share became recoverable. As regards the rest of her claim, if indeed she be entitled to any more than a quarter of the estate on the remarriage, then she can only claim what the younger children, had there been any, could have claimed, i. e. one-quarter of the estate remaining after the orasa's share has been distributed, that is to say three-sixteenths of the estate.

The claim that there had been a remarriage previous to that with Ma Sein Tin has been abandoned and it is not necessary to deal with the consequences which might have arisen had that alleged earlier remarriage been established. Following on the decision of their Lordships of the Privy Council in 9 L B R 56[1] to the effect that what an orasa child in the position of Ma Ohn Yin obtains is a definite one-fourth part of the estate, a right which she was at liberty to assert within any period which was not outside of that which is fixed by Art. 123, Limitation Act, it has been held by this Court that the right of an orasa child to partition is a vested right and that his quarter share becomes vested in him on the death of the appropriate parent: see 11 L B R 292,[2] 1 Rang 363[3] and numerous

1. Tun Tha v. Ma Thit, (1916) 3 A I R P C 145=38 I C 809=44 Cal 379=44 I A 42=9 L B R 56 (P C).
2. Maung Pan On v. Maung Tun Tha, (1921) 8 A I R L B 49=67 I C 769=11 L B R 292.
3. Maung No v. Maung Po Thein, (1923) 10 A I R Rang 239=76 I C 612=1 Rang 363.

other cases. From this the learned counsel for the appellants argues that the orasa's share having once become vested in Ma Ohn Yin on the death of her mother could not again become vested in her on the remarriage of her father and therefore her claim to the orasa's share became barred after the lapse of 12 years from the death of her mother. A similar argument to this has been dealt with fully in 6 Rang 427.[4] There it was held that if no claim for partition has been made on the death of one parent or on the remarriage of the surviving parent or on the subsequent death of the surviving parent, a claim for partition may be made at the death of the step-parent. In his judgment Maung Ba J. observes:

> I can find no authority for holding that because he has not claimed his vested share within that period (i. e. 12 years) he would forfeit his right to get his proper share under S. 14 (Manugye, Ch. 10) when his mother died subsequently.

Again:

> When there are two rules, one more favourable than the other, I do not see any reason why an heir entitled to come under either of them should be bound down to any particular rule. When no immediate partition is claimed, the share not claimed still forms part of the estate and all the members of the family are entitled to the advantages accruing therefrom.

And Heald J., observed:

> I am quite certain that the idea that a child who has refrained from claiming and has not received a share to which it was entitled must be regarded as having received that share is entirely foreign to Burmese Buddhist Law. That idea is directly contrary to the provisions of the dhammathats, since, if it were accepted, the children of a first marriage who had failed to claim their share on the remarriage of the surviving parent would be debarred from claiming on the death of that parent or on the death of the step-parent and the express provisions of the dhammathats which provide for such claims would be entirely nugatory.

It is true that in a later case, First Appeal No. 113 of 1930,[5] unreported, Heald J. expressed a contrary opinion, namely that the quarter share of the orasa (in the case before him) had become vested in her and she could not acquire by reason of her father's subsequent remarriage a better title to it than she had already: the legal position was that the orasa child's quarter share was already vested at the time of her father's remarriage and the basis of her suit that on that marriage she acquired a new right to a quarter share of that property was mistaken. These remarks however were obiter as it had been admitted that the claimant was a cosharer in the property. In our opinion it is quite contrary to the ordinary notions current amongst the Burmese to hold that an orasa child, who does not claim his share on the death of his parent nevertheless must be regarded as having taken it, with the further consequence that he falls out of the family. Certainly, a perusal of the dhammathats does not lend any support to such an idea. It is not wise to press to the utmost the logical sequences of a legal conception imported from another system of law into a system of Customary law; to do so will inevitably result in a conclusion which is quite contrary to ordinary practice. We have no doubt that in the present case Ma Ohn Yin's claim to a one-quarter share as orasa child must be deemed to have received a fresh period of limitation beginning from the remarriage of her father. It may be noted that, as the eldest child, Ma Ohn Yin, on the remarriage of her father, would be entitled to claim a one-quarter share of the estate, whether orasa child or not: *see* 8 Rang 396.[6] As regards the share to which Ma Ohn Yin is entitled, we are of opinion that the weight of authority is in favour of holding that she is entitled to one-half of the estate brought to the remarriage by her father: *see* 'Attasankhepa Vannana Dhammathat,' S. 159. In 7 Rang 193,[7] it was held that on the remarriage of one parent after the death of the other, the kanitha children can sue for partition of the estate. This decision followed 4 Rang 207,[8] where it was held that the eldest child, on the remarriage of the surviving parent, becomes entitled to a quarter share in the joint estate of the parents if he or she has not taken a share as orasa, and on such remarriage the younger children become entitled collectively to a quarter share.

It would seem therefore that an only child would become entitled to a one-half share: *see* 12 Rang 55[9] and the cases

4. Maung Po Aung v. Maung Kha, (1928) 15 A I R Rang 225 = 112 I C 413 = 6 Rang 427 (F B).
5. Maung Po Chain v. U Po Mya, First Appeal No. 113 of 1930.
6. Maung Kyin v. Ma Kya Gaing, (1930) 17 A I R Rang 319=128 I C 377=8 Rang 396.
7. Ma Thein v. Ma Mya, (1929) 16 A I R Rang 218=118 I C 124=7 Rang 193.
8. Maung Po Kin v. Maung Tun Yin, (1926) 13 A I R Rang 211=98 I C 4=4 Rang 207.
9. Maung Sein Ba v. Maung Kywe, (1934) 21 A I R Rang 90=150 I C 667=12 Rang 55.

quoted therein. It is true that in one part of the latter judgment words are used which would suggest that what the children are entitled to on the remarriage of their father is their mother's interest in the joint property; but, with great respect, we do not think that this can be held correctly to state the law. In 13 Rang 69[10] their Lordships of the Privy Council referred to 7 Rang 240[11] as establishing the proposition that by Burmese law, when after the death of one parent the surviving parent remarries, the children of the first marriage are entitled to claim partition, unless there has been a previous partition between them and the surviving parent, that such right has been regarded as vesting on the remarriage and that the estate subject to such partition is the estate held by the surviving parent at the time of the remarriage. Such a rule is in conformity with equity, for, it would be unreasonable to require a parent to make good to his children by a former marriage a part of the estate which, through no fault of his, might have disappeared subsequent to the death of the first wife and prior to his remarriage. It is reasonable that the estate to be divided should be the estate existing at the time the reason for partition arises. In 8 Rang 524[12] to which reference was made in 12 Rang 55,[9] it is remarked:

> It is settled law that on the re-marriage of a surviving parent the children of the former marriage acquire a vested interest in the joint property of that marriage to the extent of their deceased parent's share.

We have been unable to discover in what decisions prior to 8 Rang 524[12] such a proposition had been laid down. In 8 Rang 524[12] their Lordships were dealing with the special case of two contemporary wives one of whom had died, and they held that the children of one wife were entitled on her death to claim partition against their father and the other wife, and their manner of stating the proposition cited above seems, if we may say so with respect, to have been influenced by the particular nature of the case before them. We would add that in a more recent case, First Appeal No. 71 of 1935,[13] 7 Rang 240[11] has been followed. For these reasons, we see no sufficient cause to interfere with the decision of the lower Court and this appeal is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

10. Maung Sein Shwe v. Maung Sein Gyi, (1935) 22 A I R P C 16=153 I C 679=13 Rang 69=62 I A 1 (P C).
11. Ma Shwe Yu v. Ma Kin Nyun, (1929) 16 A I R Rang 155=118 I C 630=7 Rang 240.
12. Maung Aung Pe v. U Tun Aung Gyaw, (1931) 18 A I R Rang 32=129 I C 503=8 Rang 524.
13. Maung Sein Ba v. Maung Kywe, *Reported in* (1936) 23 A I R Rang 107=161 I C 584.

*** A. I. R. 1939 Rangoon 169**

MYA BU J.

Thakin Lay Maung — Appellant.

v.

The King.

Criminal Appeal No. 1018 of 1938, Decided on 22nd and 23rd November 1938, from order of Second Addl. Special Power Magistrate, Magwe, D/- 2nd September 1938.

*** (a) Penal Code (1860), S. 124-A—Speaker telling labourers that those in sympathy with them are unjustly prevented from telling them their rights, that Government and laws framed by it are partial to interests of employers and detrimental to those of labourers, and that Burmese people are being dominated by foreign Government—Speech held came under Section 124-A.**

Explanations 2 and 3 to Sec. 124-A have no application whatever unless the criticizms are concerning the measures of Government or the administrative or other action of Government and that, too, without exciting or attempting to excite hatred, contempt or disaffection. The object of the explanations is to protect bona fide criticizm of public measures and institutions with a view to their improvement, and to the remedying of grievances and abuses, and to distinguish this from attempts, whether open or disguised, to make the people hate their rulers. To tell a crowd of people, such as the labourers that those who are in sympathy with them are unjustly prevented from telling them their rights and are punished for doing so; that Government and the laws that are framed are partial to the interests of the employers and detrimental to those of the labourers who are therefore unable to get redress; that the Burmese people are being dominated over, meaning that the Burmese people are under the domination of a foreign rule produces such a feeling of discontent in the mind of the labourers with their lot as would give rise to feeling of disaffection towards the authority that has brought about their sad lot and the sad lot in which the Burmese people are placed. Hence the passage constitutes an attempt on the part of the speaker to create disaffection towards the Government and he is therefore guilty under S. 124-A: *(1867-71) 11 Cox C C 44 and (1886-90) 16 Cox C C 355, Ref.; 22 Bom 112, Rel. on.* [P 173 C 1, 2; P 174 C 1, 2]

*** (b) Penal Code (1860), S. 153-A—'Class' or 'classes' — Joint stock company or its shareholders as distinct from employees cannot be designated as "classes of His Majesty's subjects."**

Bearing in mind the ordinary meaning of the word 'class' or 'classes' it is impossible to designate a joint stock company as a "class of His Majesty's subjects" or to designate the share-

holders of a company, as distinct from the employees or labourers of the company, and the latter, respectively, as "classes of His Majesty's subjects." Therefore even if a speech be regarded as being calculated to create hatred or enmity against the Burmah Oil Company or the Indo-Burma Petroleum Company or the share-holders of these Companies, the making of the speech is not punishable under S. 153-A: *A I R 1933 Bom 65 and A I R 1923 Lah 61, Rel. on.* [P 173 C 1, 2]

U Chan Htoon — *for Appellant.*

U Tun Byu, Govt. Advocate — *for the King.*

Judgment. — The appellant has been convicted under Ss. 124-A and 153-A, Penal Code, in respect of a speech which he delivered at Thingone in Yenangyaung on 6th January last. His audience consisted of a large gathering of persons, mostly oilfield labourers, who had assembled in response to the notice of a public meeting convened for the purpose. The appellant was at the time president of a political organization or association known as the Dobama-asi-ayone at Rangoon. This organization has branches or kindred organizations at various centres of the country, but that at Rangoon was the main one. Its members are persons who style themselves "Thakins." Thus the appellant is known as Thakin Lay Maung. The facts which led to the holding of the meeting at Twingone and to the delivery of the appellant's speech at that meeting may be gathered from the evidence, tendered by the defence, which is free from controversy.

Towards the end of December last, the Dobama-asi-ayone of Yenangyaung passed certain resolutions to the effect, inter alia, that steps should be taken to have a Labour Protection Bill introduced in the House of Representatives and also to have more holidays and leave granted to oilfield labourers by their employers. One of the members of that association was sent to Rangoon apparently to confer with the leading members of the association at Rangoon about giving effect to the resolutions. At the same time the Dobama Labourers Asi-ayone by letter as well as by telegram requested the appellant and U Ba Hlaing (a Member of the House of Representatives representing one of the Labour Constituencies), to visit Yenangyaung in connexion with the resolutions that they had passed. The result was that the appellant and U Ba Hlaing visited Yenangyaung and a public meeting of the oilfield labourers was convened. U Ba Hlaing acted as chairman of the meeting and Thakin Lay Maung delivered the speech which was recorded by a Sub-Inspector of Police of the Criminal Investigation Department in shorthand which was duly transcribed. The speech was in Burmese and the transcript covers more than eight pages of closely written foolscap. The charges framed against the appellant are: (1) that he on 6th January 1938, at Twingone at a public meeting

by speaking the words shown in the list X annexed hereto attempted to bring into hatred or contempt or attempted to excite disaffection towards the Government established by law in British India, and thereby committed an offence punishable under S. 124-A, Penal Code,

and (2) that he on the same day and at the same time at Twingone at a public meeting

by speaking the words shown in the list Y annexed hereto attempted to promote feelings of enmity or hatred between different classes of His Majesty's subjects, namely the oilfield labourers on the one hand and capitalists (B. O. C.) on the other hand, and thereby committed an offence punishable under S. 153-A, Penal Code.

As will be seen from a perusal of the speech the appellant, in the course of it, took pains to change the mental attitude of his listeners or labourers by telling them that they were the benefactors of the companies and capitalists—not that the latter were their benefactors—because, unless the labourers did the work, the companies or capitalists would not be able to carry on their businesses and would have to leave the country. He exhorted the labourers to be united in the making of their demands for their rights and privileges from their employers and in striving to have the Labour Protection law promulgated. In his attempt to change the mental attitude of the labourers he made various statements affecting not only the companies or capitalists concerned but also Government. The principal ones are the following:

(1) Because we Burmans are slaves under foreigners we do not know about the world, nay about our country.

(2) Because we Burmans are slaves under foreigners we are not to know about our country, about our own people not to speak of the world. This is because the restrictions are imposed by someone who imposes restrictions on Dobama labourers. Although this is the case, the reason why the Dobama labourers of Burma do not know of the imposition of restrictions and how effective they are is on account of the foreign yoke as the saying 'If you examine the root, it is from the earth' goes. Being under foreign yoke, we have to give lectures to keep (the country) abreast of time and make it come up to the standard of the world. It will not do to be under the said race.

(3) Do you think that we can make a speech as we please? No. We cannot lecture. We cannot

write. On account of these restrictions, you have become backward. I want you to believe it without doubt.

(4) We want the cultivators to understand. We want to tell the labourers their rights. When we tell, the Government is displeased. They stop us by making use of various Sections of law. Although they stopped us we cannot refrain from making speeches. So long as these Sections and laws are in force, we shall go to jail, should we make speeches in contravention of them. Thakins go to jail not because they are weak, but because the laws are useless. We Thakins go to jail because we are under this alien rule.

(5) The laws in the oilfields are still bad. The Warden of the oilfields has various laws at his disposal. He can make use of them for any purpose. If one is ordered to leave within 24 hours, he shall have to leave. We cannot make a speech as we like in order that you may understand, hear and unite. The foreigner capitalist B. O. C. has the privileges and the laws to impose such restrictions.

(6) You and I are restricted under these and similar Sections. On account of such restrictions, we have the troubles of the labourers, the troubles of the students and the troubles of the cultivators. If you consider these it is not worth living.

(7) In spite of the fact that the Thakins are unable to say, make a speech, or go as they please, as I have described if they are sent to jail on account of a speech made by them according to law, let them be sent.

(8) What change must we have in the outlook ? This is the era of the labourers. Even then, the labourers think as before that because the company has provided them with work that they make a living ; that the company is their benefactor. For example, the cultivator considers that because he has to work the land of the landowner that he makes a living and the labourers consider the employer to be their benefactor. These are not true. The benefactor of the labourers is labourer. The benefactor of the cultivators is cultivator. The capitalist is not the benefactor of the labourers. The benefactor is the labourer. You ought to have the change of outlook as this. The labourer cannot achieve anything if he is labouring under the impression that he has to be grateful to his employer. What attitude had the moneyed man in Burma in the former days ? The moneyed man had sympathy for the poor. . . . . The present moneyed man looks to making himself richer. He is planning to make extensions in the neighbourhood of Yenangyaung next year, after he has extracted earth oil at Yenangyaung this year. The moneyed man has the object of extending his business from year to year and reap profit.

(9) B. O. C. is in existence in Burma for many years. It is getting prosperous from year to year. In spite of this prosperity do the employees of the B. O. C. get more salary from year to year ? No. They do not get. They even suffer reduction in their wages.

(10) To consider that you must remain in submission is wrong. If you do not know this, you cannot get to the path of progress.

(11) Why are B. O. C. and I. B. P. in existence? They exist because you all work. If you do not work, they will cease to exist. They must fail. Do not think that the fact that these big firms enjoy special benefits obtaining huge sums of money is due to the good business acumen of the directors of the B. O. C., but because the labourers really put in hard labour every day with their sweat. It is on account of you that the B. O. C. is enjoying benefits. Remember this.

(12) As England prospers, she exports tramways, motor cars, etc., into Burma. The use of these machines in Burma depends upon the oil of Burma. Moreover, bear in mind that it is due to our labour that the oil company capitalists come and stay here.

(13) There are still many concessions which you ought to get. You still have many outstanding debts to recover. You must make demand for them. The whole Burmese nation must make demand for them one day. There are still outstanding dues for you to recover, because you have toiled at personal sacrifices and hardships. You must recover them. How will you demand them ? If you go alone and make demand for them, a slap will be shown to you ; and if two of you go, both of you will be assaulted and then let go. This being so, we should be united and make a united demand. Although we may make a demand for them, we can file no case for their recovery. There is no Privy Council for us where we may file a case. But there are laws for the good of the capitalists. There is no law which will afford us protection when we make demand for the debts due to the whole Burmese nation and for our rights and privileges. No police will help us and no Court will hear our pleadings. We have nothing and no police to depend on. The Court and Parliament will not pay any heed to our demand. We are helpless. The whole Burmese nation is as helpless as you all are. Burma belongs to Burmese people ; she is their bobabaing property. Although it is the country belonging to the Burmese people, who is dominating over her now ? Is it not a fact that she has unlawfully been dominated over ? If we want to file a case against such domination, before whom shall we file it ? If we go and institute a proceeding in England, it will not be heard. It is also impossible to plead with the League of Nations. No police will help us and no Magistrate will give consideration to our case. We want our country back, but when we demand for its return, we, Thakins, have been abused. We are the original settlers of Burma and so we asked for the return of our country. It is true that it has been unjustly taken. We have no Courts, no police and no army of our own. But just consider what they have. We want our country. It is said that there will be peace only when we get back our own country. There are many people on the side of the Government and capitalists. They have police, troop and Magistrates. Police and C. I. D. officers are present at this lecture meeting. If our utterances are not approved of by them, we will be sent to prison at once. Now I am advocating justice. However, on the side of the Government and the capitalists there are detectives, Police, Magistrates, Public Prosecutors and armies: Saying that it is just they provide protection for themselves. But on our side we have nothing.

(14) Restrictions have been made by means of laws and regulations. We cannot explain this to you clearly. These laws and regulations have been framed for the good of the Government and the B. O. C.

The speech has been read several times during the lengthy hearing of this appeal

and with reference to the charge under S. 124-A. I have been guided by the principles enunciated by Fitzgerald J. in (1867-71) 11 Cox C C 44[1] where his Lordship in his charge to the jury observed :

> I invite you to deal with the case, which is a grave and important case, in a fair, free, and liberal spirit. In dealing with the articles you should not pause upon an objectionable sentence here, or a strong word there. It is not mere strong language, such as 'desecrated Court of justice,' or tall language, or turgid language that should influence you. You should, I repeat, deal with the articles in a free, fair, and liberal spirit. You should recollect that to public political articles great latitude is given ..... you should not look merely to a strong word or a strong phrase, but to the whole article ..... viewing the whole case in a free, bold, manly and generous spirit towards the defendant, if you come to the conclusion that the publications indicated either are not seditious libels, or were not published in the sense imputed to them, you are bound, ... to find a verdict for the defendant ..... If, on the other hand, on the whole spirit and import of these articles you are obliged to come to the conclusion that they are seditious libels, and that their necessary consequences are to excite contempt of Her Majesty's Government, or to bring the administration of the law into contempt and impair its functions—if you come to that conclusion, either as to the articles or prints, or any of them, then it becomes your duty honestly and fearlessly to find a verdict of conviction.

It is to be observed that promoting class hatred is not included in the offence of sedition in India but the principles enunciated by Cave J. in (1886-90) 16 Cox C C 355[2] also afford a sound guide upon the question of the intention which is one of the factors to be determined in considering the charge framed. His Lordship said :

> If you think that these defendants . . . from the whole matter laid down before you ..... had a seditious intention to incite the people to violence, to create public disturbances and disorder, then undoubtedly you ought to find them guilty. If from any sinister motive, as, for instance, notoriety, or for the purpose of personal gain, they desired to bring the people into conflict with the authorities, or to incite them tumultuously and disorderly to damage the property of any unoffending citizens, you ought undoubtedly to find them guilty. On the other hand, if you come to the conclusion that they were actuated by an honest desire to alleviate the misery of the unemployed — if they had a real bona fide desire to bring that misery before the public by constitutional and legal means, you should not be too swift to mark any hasty or ill-considered expression which they might utter in the excitement of the moment.

It seems to me impossible to read the speech in question without being impressed by the fact that, although it was a speech delivered for the purpose of getting the oilfield labourers to unite in making a demand for their real or fancied rights and privileges from their employers, and also to have some law promulgated for the protection of the labourers and for the improvement of the conditions under which they work—because the laws in existence operate favourably towards capitalists and detrimentally towards them—there was also the object of making his listeners feel discontented and dissatisfied with their lot which the appellant attributed to the unfair operations of the prevailing laws and the alien character of the Government which is favourable to the capitalists and prejudicial to the labourers. After reading the speech many times the impression that is left in me is that the appellant was out to attack not only the Burmah Oil Company or the Indo-Burma Petroleum Company, for which the oilfield labourers work, but also the laws and rules framed by Government which, according to him, are unjust to labourers and to those who are in sympathy with the labourers but partial to the capitalists or employers.

Under Explanations 2 and 3 to S. 124-A, Penal Code, comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, and comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection do not constitute an offence under that Section. The limits to which a speaker or writer can go in making such comments are summarized by Strachey J. in 22 Bom 112[3] at page 137 as follows :

> A man may criticise or comment upon any measure or act of the Government, whether legislative or executive, and freely express his opinion upon it. He may discuss the Income-tax Act, the Epidemic Diseases Act or any military expedition, or the suppression of plague or famine, or the administration of justice. He may express the strongest condemnation of such measures, and he may do so severely and even unreasonably, perversely and unfairly. So long as he confines himself to that, he will be protected by the Explanation. But if he goes beyond that, and, whether in the course of comments upon measures or not, holds up the Government itself to the hatred or contempt of his readers, as for instance, by attributing to it every sort of evil and misfortune suffered by the people, or dwelling adversely on its foreign origin and character, or imputing to it base motives, or accusing it of hostility or indifference to the welfare of the

1. Reg. v. A. M. Sullivan, (1867-71) 11 Cox C C 44.
2. Reg. v. Burns, (1886-90) 16 Cox C C 355.
3. Queen-Empress v. Bal Gangadhar Tilak, (1898) 22 Bom 112.

people, then he is guilty under the Section, and the Explanation will not save him.

Thus these Explanations have no application whatever unless the criticizms are concerning the measures of Government or the administrative or other action of Government and that too, without exciting or attempting to excite hatred, contempt or disaffection. The object of the Explanations is to protect bona fide criticizm of public measures and institutions with a view to their improvement, and to the remedying of grievances and abuses, and to distinguish this from attempts, whether open or disguised, to make the people hate their rulers.

What the appellant did by his speech was to criticize the measures of Government and its administrative or other action, but he overstepped his bounds by imputing base or improper motives to Government which he described as the foreign rule under which the position of the Burmans is reduced to that of slaves. In this case it is unnecessary for me to determine whether the speech as a whole or the passages of the speech which are reproduced in list Y attached to the charge are such as were calculated to promote feelings of enmity or hatred between different classes of His Majesty's subjects because, in my opinion, the charge under S. 153-A is misconceived and must therefore fail quite irrespective of the character of the speech or the passages set out in list Y. In the charge the different classes of His Majesty's subjects were described as oilfield labourers and capitalists (B. O. C.).

In the concluding portion of his judgment the learned Magistrate observed that the effect of the speech was to promote feelings of enmity or hatred between two classes of people—those who control the policy of the Burmah Oil Company and those who are clerks, coolies and workers of the Burmah Oil Company. I do not find any warrant for this classification in the evidence in the case. The speech was directed against the employers of oilfield labour. These employers are the two companies: the Burmah Oil Company and the Indo-Burma Petroleum Company. Bearing in mind the ordinary meaning of the word "class" or "classes" I find it impossible to designate a joint stock company as a "class of His Majesty's subjects" or to designate the shareholders of a company, as distinct from the employees or labourers of the company, and the latter, respectively, as "classes of His Majesty's subjects." Lord Lindley defines a company thus :

> By a company is meant an association of many persons who contribute money or moneys worth to a common stock and employ it for a common purpose. The common stock so contributed is denoted in money and is the capital of the company. The persons who contribute it or to whom it belongs are members.

By speaking of the Burmah Oil Company or the Indo-Burma Petroleum Company their respective share-holders are referred to and they are spoken of as capitalists. In 57 Bom 253[4] it was held that "capitalists" was an expression too vague to denote a definite and ascertainable class so as to come within S. 153-A, Penal Code, and it was pointed out that the word "classes" in that Section included any definite and ascertainable class of His Majesty's subjects although the classes may not be divided on racial or religious ground. In 3 Lah 405[5] it was pointed out that a class or section of His Majesty's subjects contemplated by S. 41, Press Act (1 of 1910) connotes a well defined group of His Majesty's subjects and it was held that police officials stationed at a certain town did not constitute a "class" or "section" of His Majesty's subjects within the meaning of the Section. In Sec. 153-A, Penal Code, the term "section" does not appear but if a group of police officials stationed at a certain town does not constitute a "class" of His Majesty's subjects, and if capitalists is an expression too vague to denote a "class" of His Majesty's subjects it is, in my opinion, impossible to conceive of share-holders of joint stock companies forming a "class" of His Majesty's subjects within the meaning of S. 153-A, Penal Code. Therefore, even if the speech be regarded as being calculated to create hatred or enmity against the Burmah Oil Company or the Indo-Burma Petroleum Company or the share-holders of these companies, the making of the speech is not punishable under Sec. 153-A, Penal Code.

According to my reading of the appellant's speech, the only conclusion that I can come to is that the appellant intended, by certain passages of his speech, to excite disaffection towards the Government. But

4. Emperor v. Maniben Liladhar Kara, (1933) 20 A I R Bom 65=1933 Cr C 182 = 141 I C 780 =34 Cr L J 231=57 Bom 253=34 Bom L R 1642.
5. Raj Pal v. Emperor, (1923) 10 A I R Lah 61= 71 I C 519=3 Lah 405=24 Cr L J 167 (S B).

whether the conviction is valid or not depends not only upon whether the speech amounted to an act calculated to excite disaffection towards the Government, but also upon the question whether, upon the charge as framed, his conviction under S. 124-A can be sustained.

It will be found that in list Y, which is referred to in the charge, certain passages of the speech were set out and the appellant was charged with having attempted to excite disaffection towards the Government by speaking the words shown in that list. The list does not cover all the passages that I have detailed above but the first extract which is set out, read by itself, may not amount to anything more than pointing out the consequences of certain restrictive laws, whereas the second extract says that the Government gets displeased when those in sympathy with the labourers and cultivators tell the latter their rights. The third extract also deals with the evil effects of the restrictive measures imposed by Government which make life not worth living in this country. The fourth extract points out the fact that Thakins have to go to jail on account of these restrictive laws when they make speeches for the benefit of the labourers and cultivators. The fifth extract stresses the hard-hearted attitude of the employers towards the labourers; urges the labourers to be united in their demands for their rights and privileges; emphasizes the fact that the laws do not afford protection to the labourers to secure their just demands; that the forces of law and order and the administration of justice were not favourable to the making of such demands and that the country belonging to the Burmese people is being unlawfully dominated over and that against this no redress is available. The sixth extract alleges that on the side of the Government and capitalists are arrayed all the forces of the Crown for the maintenance of law and order but on the side of those who preach for the benefit of the labourers and cultivators there are none. The seventh extract states that the restrictive laws and regulations have been framed for the good of the Government and the Burmah Oil Company.

There are passages which do not appear in list X which it would have been more appropriate to have inserted in this list; passages in which references are made to the alien form of Government, the foreign rule and the like. In the literal translation of the Burmese expression the term "foreigners" appears but in its real purport it means the foreign rule.

It has been contended that these passages which are inserted in list Y are not by themselves capable of producing in the minds of the audience a feeling of hatred or disaffection towards Government. If I accede to this contention I shall have to uphold the contention that on account of the defect in the framing of the charge the conviction must be set aside, but I find myself unable to accede to this contention. Even if the passages which are more obnoxious for the purpose of the charge under S. 124-A have to be overlooked in the attempt to ascertain the intention of the speaker in uttering the words contained in the passages which are reproduced in list X, I think they are in themselves calculated to create disaffection in the minds of the listeners towards Government. To tell a crowd of people, such as the labourers that those who are in sympathy with them are unjustly prevented from telling them their rights and are punished for doing so; that Government and the laws that are framed are partial to the interests of the employers and detrimental to those of the labourers who are therefore unable to get redress; that the Burmese people are being dominated over, meaning that the Burmese people are under the domination of a foreign rule, cannot in my opinion but produce such a feeling of discontent in the minds of the labourers with their lot as would give rise to feelings of disaffection towards the authority that has brought about their sad lot and the sad lot in which the Burmese people are placed. The domination that is referred to cannot be understood by the listeners to mean any other domination than that of the foreign Government. Therefore, although the charge does not refer specifically to the passages which are more directly obnoxious, I find sufficient material in the passages referred to, to constitute an attempt on the part of the appellant to create disaffection towards the Government.

For these reasons I hold that the conviction and sentence passed on the appellant under S. 153-A, Penal Code, must be set aside and the appellant must be acquitted of that charge, but I uphold the conviction under S. 124-A, Penal Code. The sentence passed by the trial Court against the appellant for this offence is nine months' rigor-

ous imprisonment. Upon the question of sentence it has been brought to my notice that the prosecution was launched after some lengthy delay. Five and a half months elapsed between the date of the speech and the date of the filing of the complaint. This may be due to many executive reasons but what I am concerned with is the degree of the gravity of the offence. The degree of the inflammatory character of the speech is, I may say, not as high as in most cases of sedition. There can be no doubt that the predominating object was to exhort the labourers to be more spirited in their attitude towards their employers, to shake off their slavish mentality, to assert their rights and privileges and their position in the industry in which they were employed. Another circumstance which weighs with me in the assessment of the punishment in this case is that the appellant was about two and a half months in custody during the pendency of the trial. Considering all these circumstances, in my opinion, the sentence awarded by the trial Court is excessive and I consider that a sentence of four months' rigorous imprisonment will meet the ends of justice. Therefore, while confirming the conviction under S. 124-A, Penal Code, I reduce the sentence to rigorous imprisonment for four months.

D.S./R.K. *Sentence reduced.*

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MOSELY J.

Daw Yi — Appellant.

v.

Maung Po Saung — Respondent.

Special Second Appeal No. 96 of 1937, Decided on 17th February 1938, against decree of Asst. Dist. Court, Mandalay, in C. A. No. 74 of 1936.

Transfer of Property Act (1882), S. 53-A — S. 53-A is retrospective in the sense that it affects suits brought after 1st April 1930 in respect of transactions effected before that date.

Section 53-A is retrospective in the sense that it affects suits brought after 1st April 1930 in respect of transactions effected before that date : *A I R 1937 Rang 402; A I R 1937 All 10; A I R 1937 Cal 467; A I R 1937 Pat 36; A I R 1935 Pat 291; A I R 1935 Cal 541; A I R 1933 Bom 381 and A I R 1934 All 768, Rel. on; A I R 1932 Mad 734 and A I R 1934 All 701, Not foll.; A I R 1934 P C 235, Expl.* [P 177 C 2]

P was a mortgagee by registered deed dated 1930 of a certain piece of land from *M*. *M* and his wife had mortgaged the same land in 1928 by an unregistered deed to *D* for Rs. 1000 with possession. The unregistered deed allowed redemption on repayment of the principal sum. *P* obtained a mortgage decree against *M* and subsequently sued *D* for possession and ejectment :

Held that S. 53-A applied and the suit by *P* for possession and ejectment could not, as it stood, succeed. *P* was however entitled to redeem the land on payment of Rs. 1000 to *D*. He was merely debarred from enforcing any claim other than that arising out of the contract itself. *A I R 1935 Rang 230 (F B), Disting.* [P 178 C 1]

Kyaw Zan — *for Appellant.*

P. K. Basu — *for Respondent.*

Judgment. — The plaintiff-appellant Daw Yi was the mortgagee by a registered deed dated 1930 of a certain piece of land from Maung Shwe Nyo. Maung Shwe Nyo and his wife Ma Sin had mortgaged the same land in 1928 by an unregistered deed to Daw Pha, deceased, mother of the defendant-respondent Maung Po Saung, for Rs. 1000 with possession. The terms of this unregistered deed might be ambiguous, but I agree with the findings of both the lower Courts to which this appeal has been remanded for this purpose that this unregistered deed allowed redemption on repayment of the principal sum of Rs. 1000 at any time after the expiry of five years from the date of the deed. That is the only construction which could be put in this country, in my opinion, on the terms of the deed, regard being had to the ordinary features of usufructuary mortgages in Burma, or, as they are called, mortgages 'Ngwe-pe-le-baw,' i. e. "money repaid, land returned." It is noteworthy that in 1934, in his application in insolvency, Shwe Nyo mentioned in his schedule Daw Pha as a creditor for Rs. 1000 on a mortgage deed with possession. Daw Yi obtained a mortgage decree against Shwe Nyo, and in the present suit she sued Maung Po Saung for possession and ejectment. Her suit was decreed in the trial Court, but was reversed on appeal in the lower Appellate Court by the Assistant District Judge. The question in the present case is whether the terms of S. 53-A, T. P. Act, apply; that is to say, whether in common parlance, that Section is retrospective in its effect as regards transactions entered into before 1st April 1930. S. 53-A reads as follows :

Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession,

continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that the contract, though required to be registered, has not been registered, or where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract :

Provided that nothing in this Section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

I have been referred by the learned advocate for the respondent, Po Saung, in this second appeal to an unreported ruling in a similar case, Second Appeal No. 196 of 1936,[1] which was referred to a Bench for hearing. It was there held, if I may use a common expression which is in controversy, that the Section was retrospective, that is to say that it is to be applied to all suits brought after the Act came into force on 1st April 1930, whether the transaction in question was effected before that date or not. I am in agreement with this finding though, with respect, I cannot concur in some of the reasons there given for it. It was said in the leading judgment that the Section only comes into operation when a suit is filed by the transferor or persons claiming under him, and that therefore it is not the making of the contract that brings this provision of the Act into operation, but the filing of the suit, and so in considering whether the Section has retrospective effect or not, it is only the date of the filing of the suit which is to be considered.

If this were so, the same thing could be said of most provisions of law, for rights to possession only come into question in a Court of law when a suit is filed. Nor, in my opinion, can any conclusion be drawn from the judgment of their Lordships of the Privy Council in 58 Bom 650.[2] In that case their Lordships merely refused to apply this Section because at the time that the suit was instituted the Section was not in force. The question whether the agreement was entered into before that Section came into force was not considered, being unnecessary for consideration. I would agree however that so far as the language of Sec. 53-A goes, there is nothing on the face of it to show that it is not intended to be retrospective, and that it leads to the opposite conclusion. It debars the transferor from enforcing against the transferee any right in respect of the property of which the transferee has taken possession other than a right expressly provided by the terms of the contract, and that is equivalent, I think, to enacting that the transferee is entitled to the rights given him by the terms of the contract.

The general presumption is against giving statutes retrospective effect so as to impair an existing right. They are construed as operating only in cases or on facts which come into existence after the statutes were passed, unless a retrospective effect be clearly intended (Maxwell's Interpretation of Statutes, p. 186). As was said in the concurring judgment in Second Appeal No. 196 of 1936[1] the words of the Section bear no indication of any distinction between the transfers made before and those made after the date of the commencement of its operation, and I would agree that the intention is clear that the Act should have a retrospective operation.

Section 53-A is S. 16 of the Amending Act 20 of 1929, and it must be remembered that this Section merely purports to enunciate the law in India as it was understood when the Section was made law. The case in 58 Cal 1235[3] where it was held that the English doctrine of part performance, Transfer of Property (Amendment) Act 20 of 1929, had not been available in India by way of defence to an action of ejectment, was only decided in 1931. In my opinion, S. 16 of the Amending Act, which corresponds to S. 53-A, T. P. Act, applies in its terms to all cases brought before the Court after the Act came into force on 1st April 1930, but this is made much clearer when S. 63 of the Amending Act is considered. S. 63 says that nothing in 22 named Sections (of which S. 16 is not one) be deemed to affect

(a) the terms or incidents of any transfer of property made or effected before 1st April 1930,

(b) the validity, invalidity, effect or consequence of anything already done or suffered before the aforesaid date,

1. Ko Po Hmo v. Maung Lu Khin, *Reported in* (1937) 24 A I R Rang 402=172 I C 929=1938 R L R 216.
2. Pir Bux v. Mohamed Tahar, (1934) 21 A I R P C 235=151 I C 326=58 Bom 650 = 61 I A 388 (P C).
3. Ariff v. Jadunath, (1931) 18 A I R P C 79 = 131 I C 762=58 Cal 1235=58 I A 91 (P C)}

(c) any right, title, obligation or liability already acquired, accrued or incurred before such date, or

(d) any remedy or proceeding in respect of such right, title, obligation or liability ; and nothing in any other provision of this Act shall render invalid or in any way affect anything already done before 1st April 1930, in any proceeding pending in a Court on that day ; and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued, as the case may be, as if this Act had not been passed.

There is only one considered ruling that I can discover where it has been held that S. 53-A is not retrospective. That is 56 Mad 169,[4] which was followed without comment in A I R 1934 All 701.[5] In the case of 56 Mad 169[4] it was held that Sec. 53-A could not have a retrospective effect as that was contrary to the usual rule that retrospective operation is not to be given to a statute so as to impair an existing right unless retrospective effect be intended. But it appears to me that the learned Judges there omitted to consider the provisions of S. 63 (2), for, if that sub-section says that nothing in any other provision of the Act (such as Sec. 16) shall render invalid anything done before 1st April 1930 in a proceeding pending in the Court on that date, it would appear to follow that where the suit was brought after that date the Section would apply even though the transactions were prior to that date. This is the view taken in I L R (1937) All 312,[6] the decision of the Bench consisting of the Chief Justice and Bennet J. with which I would agree with respect.

In 64 C L J 558[7] at page 560, the view was taken that because S. 16 was not mentioned as one of the Sections which would not affect the terms or incidents of a transfer of property made before 1st April 1930, therefore the natural inference to be drawn was that the Section would apply to suits brought after that date and would affect transfers made before that date.

In 15 Pat 786,[8] a Bench consisting of the Chief Justice and James J. held that the Section is retrospective and applies to contracts made before the passing of Act 20 of 1929. It was said there that properly speaking, the question of the retrospective nature of S. 53-A arises not with respect to the contract which is in question, but with respect to the enforcement of the right against the transferee but the distinction appears to me to be immaterial, for the real question is the debarring of the transferor from violation of a right under the old contract, which right would not have existed, according to the decision in *Ariff's case*,[3] had it not been for the enactment of this Section. In other respects this judgment agrees with I L R (1937) All 312[6] where it is said :

Now S. 53-A merely creates a bar against the transferor from enforcing against the transferee any right in respect of the property, when possession has been delivered, on the sole ground that there was no registered document. There is no reason why this bar should not come into existence by operation of law on 1st April 1930, when no litigation in respect of it was pending and the defendant was in possession. Thereafter the defendant had an absolute protection under this Section and he can resist a suit subsequently filed, on the ground of having acquired an absolute right under this Section on 1st April 1930. From this point of view, it may even be said that he is not seeking to give a retrospective effect to S. 53-A, but is really claiming protection under that Section with effect from 1st April 1930, the date on which it came into effect.

I will briefly notice some other cases cited to show the concurrence of opinion. In 14 Pat 672[9] at p. 715, a Full Bench case, it was said that S. 53-A would have retrospective effect except for the fact that the suit was pending on 1st April 1930. It would seem that the same view was taken in 62 Cal 492[10] at page 497, but the point was not decided, as that was also a suit pending on 1st April 1930. 35 Bom L R 722[11] was also a suit pending on 1st April 1930. In 153 I C 717,[12] it was also held that the Section applied to transactions entered into before 1st April 1930. It is clear, I think, then that S. 53-A is retrospective in this sense that it affects suits

4. Kanjee and Mooljee Brothers v. Shunmugam Pillai, (1932) 19 A I R Mad 734=139 I C 870 =56 Mad 169=63 M L J 587.
5. Gauri Shankar v. Gopal Das, (1934) 21 A I R All 701=151 I C 388.
6. Shyam Sunder Lal v. Din Shah, (1937) 24 A I R All 10=166 I C 812=I L R (1937) All 312=1936 A L J 1323.
7. Ashutosh Chattopadhyay v. Nalinaksha Bandopadhyay, (1937) 24 A I R Cal 467=170 I C 267=64 C L J 558.
8. Wakefield v. Sayeeda Khatun, (1937) 24 A I R Pat 36=166 I C 797=15 Pat 786=17 P L T 963.
9. Ramakrishna Jha v. Jainandan Jha, (1935) 22 A I R Pat 291=157 I C 98=14 Pat 672=16 P L T 451 (F B).
10. Durgapada Karmakar v. Nrishinghchandra Nandi, (1935) 22 A I R Cal 541=159 I C 20= 62 Cal 492=39 C W N 416.
11. Suleman Haji Ahmed Umar v. P. N. Patell, (1933) 20 A I R Bom 381 = 145 I C 557=35 Bom L R 722.
12. Gajadhar Misir v. Bechan Chamar, (1934) 21 A I R All 768=153 I C 717.

brought after the said date in respect of transactions effected before it and the present suit for possession and ejectment cannot, as it stands, succeed. The learned Assistant District Judge has expressed the opinion that the plaintiff cannot in these proceedings be given a decree for possession conditional of paying the defendant the amount of the mortgage money of Rs. 1000. He said that this was equivalent to bringing a suit for redemption of an unregistered mortgage and cited 13 Rang 274[13] as authority. That was a case where the mortgagor of land mortgaged with possession on an unregistered deed sued for redemption, and it was held that she could only sue for possession, the mortgage in that case being an oral mortgage. In the present case Daw Yi is merely debarred from enforcing any claim other than that arising out of the contract itself. Now the contract allows for redemption of the land. That is not now disputed. The decree will be altered into one that Daw Yi may get possession of the land in payment of the sum of Rupees 1000 before 1st May 1938 and all costs, for Daw Yi who made no offer of payment at any time and has failed throughout in the legal issue must pay the costs throughout.

R.M./R.K. *Order accordingly.*

13. Ma Kyi v. Ma Thon, (1935) 22 A I R Rang 230=157 I C 565=13 Rang 274 (F B).

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SPECIAL BENCH

ROBERTS C. J., MYA BU AND MOSELY JJ.

Commissioner of Income-tax, Burma.

v.

Seth Mangoomal Lunidasingh — Respondent — Assessee.

Civil Ref. No. 6 of 1938, Decided on 13th January 1939, made by Commissioner of Income-tax, Burma.

*** Income-tax Act (1922), S. 26-A — Partnership deed genuine and clearly specifying shares of individual partners — Deed is registrable under S. 26-A even though it provides that what partners actually get will depend upon time which they have devoted to business or their absence therefrom.**

It is true that no partnership can be registered if any partner under the deed is liable to have a variation of his share. But 'share' does not mean net receipts. It is the basis of computation from which, after other necessary factors are considered, one is going to arrive at them. The law looks to the shares in the partnership business and not to the receipts from it, which may happen in certain contingencies to find their way into the pockets of individual partners. It is a fallacy to say that the individual shares of partners are not "adequately" specified by reason of the fact that their drawings or receipts may be conditioned by effect being given to other stipulation in the partnership deed. Hence where the partnership deed is genuine and the shares of each partner (as a basis for computation and not as a means by themselves of calculating his net receipts) are definite and determinable and the deed definitely specifies these individual shares and the profits of each current year are shown and credited in accordance with the shares shown in the partnership deed, the deed is registrable under Sec. 26-A even though the deed provides that what the partners actually get will depend upon the time which they have devoted to the business or their absence therefrom: *(1919) 8 Tax Cas 111, Rel. on; A I R 1937 Mad 316, Disting.* [P 179 C 2; P 180 C 2; P 181 C 1]

U Thein Maung, Advocate-General—*for Commissioner of Income-tax, Burma.*

R. Clark — *for Assessee.*

Roberts C. J.—The following question regarding the respondent assessee has been referred for the determination of the High Court under S. 66 (2), Burma Income-tax Act, by the Commissioner of Income-tax :

Whether the document dated 17th October 1937 is an instrument of partnership legally registrable under S. 26-A of the Act, read with Rr. 2 to 6.

Section 26-A of the Act runs as follows:

(1) Application may be made to the Income-tax Officer on behalf of any firm, constituted under an instrument of partnership specifying the individual shares of the partners, for registration for the purposes of this Act and of any other enactment for the time being in force relating to income-tax or super-tax.

(2) The application shall be made by such person or persons, and at such times and shall contain such particulars and shall be in such form, and be verified in such manner, as may be prescribed; and it shall be dealt with by the Income-tax Officer in such manner as may be prescribed.

Rules 2 to 6 direct the manner in which a firm may apply for registration and the form in which application shall be made is set out. Para. 3 runs :

I/we do hereby certify that the profits of the current year will be actually divided or credited in accordance with the shares shown in the partnership deed.

It has been found as a fact that the document dated 17th October 1937 is a bona fide instrument of partnership. The Commissioner of Income-tax in his reference says :

(a) In para. 8 of the case stated : "I regard the deed not only as a bona fide partnership, but as a well thought out though ill drafted document comprising a very sensible and practical profit sharing partnership."

(b) In para. 10: "I therefore do not consider that this non-division of the profits at the end of the

account period on which the assessment is based is in this case an indication that the partnership is not genuine."

(c) In para. 20: "I am disposed to regard it as a genuine partnership containing unusually strict measures against those partners who contribute only their services and derive their interest in the concern therefrom."

(d) In para. 21: "I am prepared to admit that the partnership deed itself is genuine."

Paragraph 5 of the partnership deed of 17th October 1937 sets out the shares of the partners with great precision. With regard to this matter the Commissioner says (para. 11) :

The shares of the partners are thus solely confined to the profits or losses, but they are nevertheless definite and determinable and the deed definitely specifies these individual shares. The Act does not limit this specification of shares to shares in the capital of the firm. There are, however, in the deed other provisions which render the specification of the shares above mentioned inadequate.

He points out that para. 12 of the deed says that what the gumashta partners of the firm actually get will depend upon the time which they have devoted to the business, or their absence therefrom, and he says :

This is a variable contingency, effect of which could not be determined at any time prior to the closing of the accounts.

Now what is the difficulty which the Commissioner sees ? He says that determination of the profits could be upset by reason of Cl. 7 unless there were a definite settlement of accounts at the end of each year. Clause 7 merely says that the shah partner may increase or decrease the number of gumashtas and allot a share to new partners. When this is done, there is an end of the old and a creation of the new partnership, and the new partnership must apply for registration if it desires to enjoy the benefits or privileges accruing therefrom. What we have to consider is the existing partnership, and that alone. Then he says :

If the deed were accepted for registration, the profits would have to be determined in accordance with the actual shares as primarily set out, disregarding the complicating adjustments for actual business time.

It seems to me that the Commissioner is there dealing not with proportionate shares of the partners but with the actual receipts made over to them and therein, in my opinion, a fallacy lies. A partner may be asked "what is your share of the partnership ?" and he may reply two annas six pies or whatever it may be, no less because he may be ill or absent and his receipts may be reduced by the operation of another clause in the partnership agreement on this account.

To take a detailed instance, supposing *A*, *B* and *C* each have one-third share in a partnership and the total net receipts to amount to Rs. 12,000. The basis of computation is one-third share each, namely Rs. 4000. If *A* is absent for three months, he loses Rs. 1000 because he is away for a quarter of the year and he receives only Rs. 3000. *B* and *C* receive an augmented sum, namely their Rs. 4000 plus half *A's* unearned receipts which bring each of their total receipts for the year to Rupees 4000. Nobody could arrive at these figures in the distribution of the receipts without taking the one-third share as a basis for computation before making this necessary deduction and the consequent increases. The learned Advocate-General urged that no partnership can be registered if any partner under the deed is liable to have a variation of his share. I agree, but I do not think that 'share' means net receipts. In my opinion, it is the basis of computation from which, after other necessary factors are considered, you are going to arrive at them. Looked at in this light the application for a certificate of registration is in no way misleading. The profits of the current year are indeed actually credited in accordance with the shares as shown in the partnership deed. The credit given need not take place in any one year. The Commissioner himself admits that in the circumstances this is no ground for impugning the validity of the partnership. (See para 10 of the case stated.) The shares as stated are a starting point from which a calculation may be made determining the amount of the net profits which are payable having regard to the remaining provisions of the partnership deed to any individual partner. This starting point is fixed and invariable and clearly stated. In I'L R (1937) Mad 814[1] cited to us, the deed was silent as to the exact shares. The partnership was that of M. K. Naicker & Co., and it was not enough to say that two of the partners were M. K. Naicker & Sons and that they received seven annas in the rupee. The precise share of each of

1. Kanniappa Naicker & Co. v. Commissioner of Income-tax, Madras, (1937) 24 A I R Mad 316 =168 I C 13=I L R (1937) Mad 814=(1937) 1 M L J 619 (S B).

them had to be set out. This deed is clear as to the shares, that is to say as to the basis of computation from which the net receipts of each individual partner are to be ascertained.

Though the determination of this question appears to me to be quite clear, I have asked myself what would be the effect of the interpretation placed upon it by the learned Advocate-General. The registration of large partnership firms with the privilege thereby of avoiding the incidence of super-tax has been permitted by the Legislature. No well-conducted partnership business would fail to make provision for the absence of a partner either on holiday or through illness and the consequent adjustment of the remuneration due to him. If it does so, according to the argument presented before us, it will be impossible to ascertain the shares of the partner and no application for registration can be entertained.

In practice, provided all profit of a firm is accounted for, the income-tax authorities try to assess individuals (see Part 3, Notes and Instructions, para. 71 (iii)). If the whole of the profits of a registered firm exceed the amounts accounted for the personal statements of the partners, adjustment must be made to ensure that the firm though it pays an adequate amount of tax *(sic)*. Nobody could pretend that if three partners each had an equal share in the partnership business, they must receive 33⅓ per cent. of the net profits apiece, because it may be frequently politic to put income back into the business: what matters is not the amount received by each partner but the basis of computation from which those receipts are derived. The Commissioner says in para. 12 of the case stated, that absences from business in a second or third year of a settlement period affect the ratio of the distribution of profits in any previous year of the settlement period. He points out that the profits from year to year will be certain to vary. If he thought that this was evidence that anyone were seeking to evade payment of income-tax he would avoid himself of the provisions of S. 23 and could assess individual partners instead of the firm, but he agrees that the fact that an account is reached either on change of partners or otherwise about every five years can be understood in this instance, and is no indication that the partnership is not genuine. Provided he is satisfied that the partnership is genuine and the shares of each partner (as a basis for computation and not as a means by themselves of calculating his net receipts) are definite and determinable and that the deed definitely specifies these individual shares, I do not see that there is cause for complaint. In effect it is said that the shares are variable because the receipts of each individual partner may vary having regard to Cl. 12 of the deed and the effect of this upon the infrequency of accounting. The authorities may always complain provided they can show that in any accounting period the basis for computation has been lost sight of but that is not what they are doing here. They are seeking to say that the partnership cannot be registered because although the shares (or basis for computation of receipts) of each individual partner are clearly expressed, other provisions in the deed may enable the basis to be lost sight of in a proper calculation. In my opinion this partnership having been found to be a bona fide partnership and having complied with the provisions of the Act ought to be registered. It may be considered that the partnership deed introduces elements which will make it difficult to compute the net receipts of any partner in accordance thereunder for any particular year, if the accounting period is not to be an annual one. If an accounting period is, let us say, three years and the net profits for each year vary, I agree that it is difficult to make the proper deduction for one partner's absence, let us say, for three months of the second and one month of the last year. A genuine and bona fide deduction must however be made upon such materials as are available. We only have to administer the law and to see that the requirements of the Act are fulfilled and not that their fulfilment makes the necessary arithmetic or calculation easy. The profits of each current year must be shown and must be credited in accordance with the shares shown in the partnership deed. That is the basis of computation. Not only is it provided in the application for registration that the profits for each current year must be shown at the end of each accounting period but it is evident that any attempt to make deductions for absence calculated by striking an average over a longer period would lead to inaccuracy.

Supposing for example the accounting period is for three years and three partners

each have an equal share in the partnership business. If one of them is absent for six months, it will not do to say that he is to receive five-sixths of his one-third share spread over the three years. The time during which he is absent may have occurred during a year of prosperity and he may have to forfeit proportionately more than if it had occurred at a time when profits were relatively low. Consequently, though accounts may be at any reasonable time having regard to the exigencies of the case a balance must be struck for each current year. In my opinion, the law looks to the shares in the partnership business and not to the receipts from it, which may happen in certain contingencies to find their way into the pockets of individual partners. In (1919) 8 Tax Cas 111[2] Rowlatt J. said:

In the case of trading (including professional) partnerships it was enacted by a proviso to the rule already quoted that a partner claiming exemption might declare the proportion of his share and be exempted accordingly. His income for the purposes of exemption was therefore, his proportion of the partnership. His actual or permissible drawings were wholly irrelevant.

And again quoting a decision of Harridge J., he remarked that "the share of the partner in the collective profits, and not his drawings was still the figure to be looked for." These authorities, though dealing with the position according to the English law, reinforce in my mind the conviction that it is a fallacy to say that the individual shares of partners are not "adequately" specified by reason of the fact that their drawings or receipts may be conditioned by effect being given to other stipulation in the partnership deed. Accordingly I would answer the question propounded in the affirmative. The Commissioner of Income-tax must pay the costs of reference, twenty gold mohurs.

Mosely J.—I concur.

Mya Bu J.—I concur.

D.S./R.K. *Answered in affirmative.*

2. Commissioners of Inland Revenue v. Blott, (1919) 8 Tax Cas 111=89 L J K B 58.

A. I. R. 1939 Rangoon 181

BA U J.

Thakin Aung Bala — Applicant.

v.

District Magistrate, Rangoon.

Criminal Revision No. 636-B of 1938, Decided on 3rd January 1939, from order of District Magistrate, Rangoon, D/- 5th December 1938.

(a) Criminal P. C. (1898), S. 144 — Power conferred on the Magistrates under S. 144 is an extraordinary power which enables them to suspend the lawful rights of the public if they think it to be in the interests of public peace and safety.

Section 144 deals with urgent cases of nuisance and apprehended danger of breach of public peace and where such danger is apprehended and if in consequence thereof an immediate prevention is necessary, the Magistrate specially empowered in that behalf may issue instructions to individuals or the public in general to abstain from certain acts. The power thus conferred on the Magistrates is an extraordinary power which enables them to suspend the lawful rights of the public if they think it to be in the interests of public peace and safety. But the Magistrates should bear in mind that every citizen has a right to ventilate his grievances either in the public or in private and ask for redress, and this right cannot be curtailed so long as it is exercised in a lawful manner; and it is illegal assumption of power to issue an order under Sec. 144 on a pretended apprehension of danger of the breach of public peace: *A I R 1933 Cal 348; 5 Cal 132; A I R 1928 All 14 and 6 Mad 203 (F B), Foll.* [P 182 C 1, 2]

(b) Criminal P. C. (1898), Sec. 144—In his order under Sec. 144 a Magistrate must set out facts which give rise to the apprehension of breach of peace — Order should also state clearly what the public are prohibited from doing.

A Magistrate must satisfy himself that there is sufficient ground for proceeding under S. 144 and when so satisfied, he must set out material facts of the case in his order, the reason being that the public should know why their rights are to be suspended; and failure to do so is fatal to the validity of the order. Merely because the order has been drawn up on the lines of Form 21 of Sch. 5, Criminal P. C., it cannot be said to be a good and valid order: *32 Cal 935; A I R 1916 Mad 662 and A I R 1931 Bom 135, Foll.* [P 182 C 2]

The order should also state in clear and precise terms what it is that the public are prohibited from doing. It should not be vague and indefinite: *A I R 1935 Bom 33, Rel. on.* [P 183 C 1]

(c) Criminal P. C. (1898), S. 144 (5)—Application should not be dismissed without giving opportunity to applicant to support it.

Section 144 (5) is a mandatory provision. Where an application is filed for cancelling the order, the Magistrate should give the applicant an opportunity to support his application. He should not dismiss it summarily. [P 183 C 1, 2]

U Chan Htoon and U Ba U — *for Applicant.*

U Thein Maung, Advocate General — *for the District Magistrate.*

Order. — Applicant is a lower grade pleader and an Honorary Secretary of the General Council of Rate and Tax-payers Association, Rangoon. He applies for the setting aside of the order passed by the District Magistrate, Rangoon Town District,

under S. 144, Criminal P. C. The order is in the following terms:

Whereas it appears to my satisfaction that the holding of public meetings within the Rangoon Town District, for the purpose of discussing matters which may be a subject of controversy between different sections or different classes of public or which may excite public feeling is likely to cause riots and affrays or a disturbance of the public tranquillity thereby endangering life and property, and whereas immediate prevention is desirable, under the provisions of Sec. 144 (3), Criminal P. C., I, U Po Sa, District Magistrate, Rangoon, hereby order all members of the public generally to abstain from holding or taking part in or promoting any public meeting of the nature described above in the Rangoon Town District for a period of one month from the date of this order.

The learned advocate for the applicant submits that this order "is illegal and ultra vires" as it does not comply with the requirements of Sec. 144, Criminal P. C. Sec. 144 provides inter alia as follows:

In cases where, in the opinion of a District Magistrate, a Chief Presidency Magistrate, Subdivisional Magistrate, or of any other Magistrate not being a Magistrate of the third class specially empowered by the Local Government or the Chief Presidency Magistrate or the District Magistrate to act under this section, there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order stating the material facts of the case and served in manner provided by Sec. 134, direct any person to abstain from a certain act or to take certain order with certain property in his possession or under his management if such Magistrate considers that such direction is likely to prevent, or tends to prevent obstruction, annoyance or injury, or risk of obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquillity, or a riot, or an affray.

The section thus deals with urgent cases of nuisance and apprehended danger of the breach of the public peace. Where there is danger of the breach of the public peace apprehended and, in consequence thereof, an immediate prevention is necessary, Magistrate specially empowered in that behalf may issue instructions to individuals or the public in general to abstain from a certain act. The power thus conferred on the Magistrates is an extraordinary power. It enables them to suspend the lawful rights of the public if they think such a suspension will be in the interests of public peace and safety.

What however Magistrates should bear in mind is that every citizen has a right to ventilate his grievances either in public or in private and ask for redress. This right should not be curtailed so long as it is exercised in a lawful manner. It is an illegal assumption of power to issue an order under this Section on a pretended apprehension of the danger of the breach of the public peace. The principle on which Magistrates should act in exercising the power under Sec. 144 is, in my opinion, correctly laid down in 34 C L J 334,[1] wherein the learned Judge said:

Courts, Civil as well as Criminal, exist for the protection of rights, and therefore the authority of a Magistrate should ordinarily be exercised in defence of rights rather than in their suppression; when an order in suppression of lawful rights has to be made, it ought not to be made unless the Magistrate considers that other action that he is competent to take is not likely to be effective; and the order if made should never be disproportionate to but should always be, as far as possible, commensurate with the exigencies of any particular situation.

The same principle is laid down in 5 Cal 132,[2] 6 Mad 203[3] and 50 All 414.[4] In order to prevent the abuse or rather the misuse, of this Section, the Legislature has in its wisdom laid down that the Magistrate must satisfy himself that there is sufficient ground for proceeding under Sec. 144 and that when he is so satisfied he must set out the material facts of the case in his order. The reason for this is that the public should know why it is necessary that their lawful rights should be suspended. The failure to set out the material facts of the case in the order is, in my opinion, fatal to its validity: *see* 32 Cal 935,[5] 38 Mad 489[6] and 55 Bom 322.[7]

The learned Advocate-General does not seriously dispute the correctness of this proposition of the law; but what he contends is that the order in question having been drawn up on the lines of Form 21 of Sch. 5, Criminal P. C., is a good and valid order. I regret that I do not agree. The form shows that the material facts of the case must necessarily be set out in the

1. Francis Duke Cobridge Summer v. Jogendra Kumar Roy, (1933) 20 A I R Cal 348 = 1933 Cr C 420=142 I C 319=34 Cr L J 334.
2. Abdul v. Lucky Narain Mundul, (1880) 5 Cal 132.
3. Sundaram Chetti v. The Queen, (1883) 6 Mad 203=2 Weir 77 (F B).
4. Hafizud-Din v. Laborde, (1928) 15 A I R All 14=105 I C 815=28 Cr L J 991 = 50 All 414 =26 A L J 83.
5. Karulal Sajawal v. Shyam Lal, (1905) 32 Cal 935=1 C L J 216=2 Cr L J 215 = 9 C W N 864.
6. Gobinda Chetti v. Perumal Chetti, (1916) 3 A I R Mad 662=30 I C 453=16 Cr L J 629= 38 Mad 489.
7. Emperor v. Ganesh Wasudev, (1931) 18 A I R Bom 135=1931 Cr C 183=130 I C 396 = 32 Cr L J 507=55 Bom 322=33 Bom L R 59.

order. In the order under review the material facts of the case are not set out. The order cannot therefore stand.

It cannot also stand on another ground. It is defective in that it does not state in clear and precise terms what it is which the public are prohibited from doing. All it says is that the public are not to discuss matters which may be a subject of controversy between different sections or different classes or which may excite public feeling. Any subject, however innocent, may be a subject of controversy. It is impossible to get several people to agree on the same subject. The order as it stands is vague and indefinite. In 36 Bom L R 1129[8] at p. 1132 Beaumont C. J. says :

> It has been held many times that as Sec. 144 empowers a Magistrate to interfere materially with the liberty of the subject, it is necessary that he should promulgate his order in terms sufficiently clear to enable the public, or persons affected by it, to know exactly what it is which they are prohibited from doing.

What the learned District Magistrate in my opinion had in mind when he issued the order in question was the outbreak of riots resulting in murder, arson, robbery and grievous hurt to persons lawfully employed which took place in this city a few months ago as a result of the difference of opinion on religious questions, and consequently he thought apparently as a result of information which he had received that if public meetings were held in this city for the purpose of discussing communal or comparative religious questions, a breach of the public peace would again take place. If that was what was in his mind, he should have set it out in his order. There is also another point on which the present application for revision should be allowed. The point is this. A day after the order had been passed the appellant applied to the District Magistrate to cancel it. Without giving an opportunity to the applicant to support his application the learned District Magistrate dismissed it summarily saying : "I see no reason to cancel the order passed only yesterday. The application stands dismissed." This is contrary to sub-sec. (5) of S. 144, which states that :

> Where such an application is received, the Magistrate shall afford to the applicant an early opportunity of appearing before him either in person or by pleader and showing cause against the order; and if the Magistrate rejects the application wholly or in part, he shall record in writing his reasons for so doing.

This is a mandatory provision. If not for the fact that the order in question cannot stand for the reasons which I have already given above, the case would have to go back to the District Magistrate for disposal of the applicant's petition in the light of the provisions of the aforesaid sub-section. I do not propose to deal with the question as to what the expression 'frequenting or visiting a particular place' as used in sub-s. (3) of S. 144, Civil P. C., means as whatever I may say will not affect the merits of this case. For all these reasons, I set aside the order of the District Magistrate.

S.G./R.K. *Order set aside.*

8. Emperor v. Sorab Shavaksha Batliwala, (1935) 22 A I R Bom 33 = 1935 Cr C 68 = 154 I C 637=36 Cr L J 547=36 Bom L R 1129.

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SPECIAL BENCH

ROBERTS C. J., MYA BU AND MOSELY JJ.

Tajendra Chandra Dhar and others — Applicants.

v.

Tajendra Lal Ghosh and others — Respondents.

Civil Revn. No. 223 of 1938, Decided on 9th January 1939, against order of the Dist. Court, Akyab, D/- 27th June 1938.

(a) Civil P. C. (1908), S. 115 — Bona fide order of Judge upon material before him that advocate could not appear on behalf of party by reason of his being interested on behalf of opposite party in matters collateral to suit in question—High Court will not interfere in revision.

Where a Judge orders that an advocate could not with propriety appear on behalf of a party by reason of the fact of his having been interested on behalf of the other side in matters which were collateral to the suit in question and there was upon the record proof of ample material before him upon which he could make such an order and there was no suggestion that whether he was right or wrong he did not do so bona fide, then it is not a case for the High Court to intervene: *A I R 1938 Rang 241, Rel. on.* [P 184 C 1, 2]

(Per *Mosely J.*) — The order is admittedly a 'judgment' as defined in S. 2 (9) of the Code and therefore the powers of the Court are restricted as laid down in Sec. 85, Government of Burma Act and the question cannot be agitated in addition as one of general superintendence over the Courts as provided in S. 85 (1) of that Act. [P 185 C 1]

(b) Legal Practitioner—Advocates and pleaders—Duties towards clients are same—Principles applying to advocates apply to pleaders.

Though the methods of appointment of advocates and higher or lower grade pleaders are different and the discipline by which they are controlled arises from different sources, their duties as

representing their clients are similar and the principles applying in one class of legal advisers ought to be applied in the case of another. [P 184 C 2]

*** (c) Legal Practitioner—Advocate appearing for one party in a dispute should not be allowed to appear on behalf of other party and against original client in subsequent litigation between them arising out of that dispute.**

An advocate or pleader who has appeared on behalf of one party in a suit ought not to allow himself to be placed in the position in which there might be some suspicion, whether well or ill-founded, that his knowledge of his client's case would be used by him on a subsequent occasion in appearing for another party against his original client. Hence a legal practitioner who has acted for one party in a dispute should not be allowed to act for the other party in subsequent litigation between them relating to or arising out of that dispute: *A I R 1930 Rang 185; A I R 1930 Rang 355 and A I R 1917 P C 80, Rel. on.* [P 184 C 2]

K. C. Bose — *for Applicants.*

Dr. Ba Han, Zakaria, U Thein Maung Advocate-General and R. G. Aiyangar — *for Respondents.*

Roberts C. J. — This is an application for revision in connexion with an order passed by the District Court of Akyab in which the respondents and eight others by their agent sought to obtain a mortgage decree. During the progress of the suit the learned District Judge heard an objection to the appearance of Mr. Guha, an advocate of the High Court residing at Akyab, on behalf of one of the parties. Affidavits were before him to the effect that Mr. Guha could not with propriety appear by reason of the fact of his having been interested on behalf of the other side in matters which were collateral to the suit in question and Mr. Guha put in a counter affidavit; and the learned District Judge upon the materials before him decided that it would be improper to hear Mr. Guha and that accordingly he could not be heard as an advocate in this particular suit.

It is quite clear on reference to S. 115, Civil P. C. in what manner the High Court will exercise its powers in revision; and what the applicants must show here, if they are to succeed is that the District Judge exercised a jurisdiction not vested in him by law or alternatively failed to do so, or acted in the exercise of his jurisdiction illegally or with material irregularity. Where a Judge or Magistrate makes an order of this kind which upon the face of it is clearly capricious and unreasonable, no doubt the High Court might have jurisdiction to intervene in revision. But where there is upon the record proof of ample material before him upon which he could make such an order and no suggestion that whether he was right or wrong he did not do so bona fide, then in our opinion it is not a case for the High Court to intervene. Not very long ago, the case in 1939 R L R 14[1] was decided by a Bench of this Court to the same effect, and it was pointed out that the powers of interference given to the High Court by S. 85, Government of Burma Act are even more restricted than those given under S. 107, Government of India Act.

It is suggested that there is some distinction in principle between the case of advocates and higher or lower grade pleaders, but though it is clear that the methods of their appointment are different and the discipline by which they are controlled arises from different sources, their duties as representing their clients are similar and that the principles applying in one class of legal advisers ought to be applied in the case of another.

It is clear from two decided authorities, 8 Rang 44[2] at p. 47 and 8 Rang 446[3] at p. 447, that an advocate or pleader who has appeared on behalf of one party in a suit ought not to allow himself to be placed in the position in which there might be some suspicion, whether well or ill founded, that his knowledge of his client's case would be used by him on a subsequent occasion in appearing for another party and against his original client; and in both cases a quotation was made from the judgment of their Lordships of the Privy Council in 21 C W N 1137[4] at p. 1142 which it is perhaps desirable to repeat here :

> Their Lordships must express their complete assent to the observations of learned Judges of the High Court on the impropriety of a legal practitioner who has acted for one party in a dispute, such as there was in the case, acting for the other party in subsequent litigation between them relating to or arising out of that dispute. Such conduct is, to say the least of it, open to misconception, and is likely to raise suspicion in the mind of the original client and to embitter the subsequent litigation.

That was the position before the learned District Judge and we are satisfied that in

1. Maung Tha Tun v. Waddader, (1938) 25 A I R Rang 241 = 177 I C 511 = 1939 R L R 14.
2. Maung Sein Gyi v. Maneckjee, (1930) 17 A I R Rang 185 = 125 I C 262 = 8 Rang 44.
3. U Ko Ko Gyi v. U San Mya, (1930) 17 A I R Rang 355=1930 Cr C 1233=128 I C 354=32 Cr L J 115 = 8 Rang 446.
4. Mary Lilian Hira Devi v. Kunwar Digbijai Singh, (1917) 4 A I R P C 80 = 42 I C 236= 21 C W N 1137 (P C).

the exercise of his discretion, although it is not for us to say whether we should have arrived at the same conclusion — speaking for myself I think I might very well have done so—it was open for him to say that it was undesirable for Mr. Guha to continue to represent the party whom he claimed to represent and having arrived at this conclusion bona fide and given effect to it, we consider upon the authorities already cited that there are no grounds to interfere in revision. This application must accordingly be dismissed with costs 10 gold mohurs.

Mya Bu J. — I agree.

Mosely J.—I agree. I only wish to add that the order in question here is admittedly a 'judgment' as defined in S. 2 (9) of the Code, that is to say a statement given by the Judge of the grounds of a decree or order, and therefore here the powers of the Court are restricted as laid down in S. 85, Government of Burma Act and the question cannot be agitated in addition as one of general superintendence over the Courts as provided in S. 85 (1) of that Act.

D.S./R.K. *Application dismissed.*

A. I. R. 1939 Rangoon 185

MYA BU J.

Babu Brij Mohan Kemka — Appellant.

v.

Abdul Majid and others—Respondents.

Second Appeal No. 305 of 1937, Decided on 11th February 1938, against decree of Assist. Dist. Court, Amherst, in C. A. No. 29-A of 1937.

(a) Transfer of Property Act (1882), S. 58—Equitable mortgage — Intention to create security is necessary.

Where there is a loan, and document or documents relating to the property alleged to have been mortgaged are deposited, the only other fact that need be established for the purpose of proving an alleged equitable mortgage is that such document or documents have been deposited with the intention of creating a security on the property mentioned therein. It is not necessary that document or documents should disclose a title in the depositor: *(1856) 3 Drew 579 ; (1857) 24 Beav 223 and (1872) 26 L T 752, Rel. on.; A I R 1933 Rang 299 held overruled by A I R 1938 Rang 149 (F B).* [P 185 C 2; P 186 C 1]

(b) Civil P. C. (1908), O. 1, R. 1 — Father depositing conveyance in favour of sons to secure loan—Sons are not necessary or proper parties to suit against father.

Where a father deposits a conveyance of immovable property executed by some one else in favour of his three sons in order to secure a loan, such transaction is not binding on the sons either on the basis that he is the manager or the head of the family, and the sons being in a position to claim a paramount title to the father are not necessary or proper parties to the suit against the father. [P 186 C 2]

P. K. Basu — *for Appellant.*

B. C. Guha — *for Respondents.*

Mya Bu J. — This case raises the question which is covered by the main judgment delivered in Civil Second Appeal No. 373 of 1936[1] which was decided by a Full Bench of which I was a member. In that case I wrote a short judgment confirming the main decision at which my brethren arrived, but I did not deal with that part of the judgment which bears upon the question for determination in the present case, as I considered that that case could be disposed of without laying down the law that was involved in that part of the judgment and not because I considered that the law laid down therein was open to question. The part of the judgment in question runs as follows :

> In our opinion, the correct statement of the law is that in order to create a valid mortgage by deposit of title deeds, under S. 58 (f), T. P. Act, it is not necessary that the whole, or even the most material, of the documents of title to the property should be deposited, nor that the documents deposited should show a complete or good title in the depositor. It is sufficient if the deeds deposited bona fide relate to the property . . . .

In arriving at the conclusion involved in this statement the English cases in (1856) 3 Drew 579,[2] (1857) 24 Beav 223[3] and (1872) 26 L T 752[4] were among the four cases relied on. These cases do support the proposition that in order to create a valid mortgage by deposit of title deeds it is not necessary that the whole or even the most material of the documents of title to the property should be deposited or that the documents deposited need not necessarily show a complete or good title in the depositor and that it is sufficient if the deeds deposited bona fide relate to the property.

I have no hesitation in supporting this proposition. In my judgment where there is a loan and document or documents relating to the property alleged to have been

1. Chidambaram Chettiar v. Aziz Miah, reported in (1938) 25 A I R Rang 149 = 175 I C 206= 1938 R L R 316 (F B).
2. Lacon v. Allen, (1856) 3 Drew 579=26 L J Ch 18=4 W R 693=106 R R 443.
3. Roberts v. Croft, (1857) 24 Beav 223=53 E R 343.
4. Dixon v. Muckleston, (1872) 26 L T 752 = 20 W R 619.

mortgaged are deposited, the only other fact that need be established, for the purpose of proving an alleged equitable mortgage, is that such document or documents have been deposited with the intention of creating a security on the property mentioned therein. In the present case, the appellant sues the four respondents, respondent 1 being the father of the other three respondents, for a mortgage decree upon an alleged equitable mortgage. The loan in question is alleged to be Rs. 500 bearing interest at 1 per cent. per mensem secured by a promissory note executed by respondent 1 and by deposit by respondent 1 of a deed of conveyance of immovable property executed by some one in favour of respondents 2, 3 and 4. According to the ruling in 11 Rang 239,[5] the deposit of such deed of conveyance, even if such deposit was made with intent to create a mortgage on the property therein mentioned, would fail to have the effect of creating a mortgage, inasmuch as the deed did not disclose title in the depositor. But in the *Civil Second Appeal No. 373 of 1936*[1] which was decided only on 26th January of this year, the decision in 11 Rang 239[5] was to that extent overruled. The Courts below when considering this question in the shape of the preliminary issue in the case did not have the advantage of the judgment in the *Civil Second Appeal No. 373 of 1936*[1] and were bound to decide the case in accordance with the ruling in 11 Rang 239,[5] under which their decisions are correct. Now that the ruling in 11 Rang 239[5] has since been overruled, it follows that the order of the Courts below dismissing the suit on the ground that no equitable mortgage was created by the deposit of the title deed by defendant 1 must be set aside.

The real questions for determination with reference to the alleged equitable mortgage are whether the document or documents of title deposited relate to the property alleged to have been mortgaged, and whether such deposit was made with intent on the part of the alleged mortgagor to create a mortgage of such property. On the allegations as they stand, the claim for a mortgage decree not only against respondent 1 but also against the other respondents is obviously untenable. The notion of the transaction entered into by respondent 1 having a binding effect on respondents 2, 3 and 4, either on the basis of respondent 1's managership or his being the head of the family cannot be supported. In these circumstances, even if the plaintiff succeeds in getting a mortgage decree such decree would be operative only as against defendant 1 and defendant 1 alone. The deed of conveyance which has been deposited is in the name of defendants 2, 3 and 4. Their attitude and that of defendant 1 himself is that the property belongs to defendant 2, 3 and 4 and not to defendant 1. Defendants 2, 3 and 4 are therefore in this suit in a position of parties claiming title paramount to that of the mortgagor. In these circumstances defendants 2, 3 and 4 are not necessary or proper parties to the suit upon the alleged mortgage. The question as to who is the true owner will arise only in subsequent proceedings, if any, where the title of the mortgagor to the property alleged to be mortgaged is questioned.

Therefore in setting aside the decree of the Court of first instance and in remanding the case to the trial Court, I direct that defendants 2, 3 and 4 be struck out from the suit, and that they are therefore no longer to be parties to the suit. Their costs in the Court of first instance and half of their costs in the District Court and in this Court are to be borne by the plaintiff-appellant. The case is now remanded to the trial Court for trial on the merits. As between defendant 1 and the plaintiff, costs will abide by the final result. There will be a certificate for return of court-fee on the memoranda of appeal in the District Court and in this Court under S. 13, Court-fees Act.

S.G./R.K. *Case remanded.*

5. V. E. R. M. A. R. Chettyar Firm v. Ma Joo Teen, (1933) 20 A I R Rang 299 = 147 I C 1105 = 11 Rang 239.

*** A. I. R. 1939 Rangoon 186**

ROBERTS C. J. AND MOSELY J.

Ah Chone — Appellant.

v.

P. A. Mohamed Ali and others — Respondents.

Miscellaneous Appeal No. 35 of 1938, Decided on 16th November 1938, against order of Dist. Court, Amherst, D/- 1-4-1938.

*** Insolvency—Priority—Insolvent permitted by Official Assignee or creditors to trade—Person advancing money to insolvent for carrying on business — Official Assignee and creditors cannot claim upon such person to have these assets applied for their own benefit—Claim of such person has prior charge over that of receiver.**

If the Official Assignee or creditors have permitted the insolvent to trade, they cannot claim upon the person, who may be allowed to supply him with stock-in-trade, materials or cash for the purpose of carrying on his business, to have those assets taken and applied for their own benefit in the insolvency. Their object in allowing him to trade must be taken to be with a view to obtain some advantage out of the surplus profits which have been acquired when the trading is over and all necessary outgoings incident to the trading have been paid. The claim of person who has supplied money for business constitutes a prior charge over any claim by the receiver : *(1766) Amb 630 ; (1853) 4 De G M and G 395 ; 8 M I A 339 (P C) and (1875) 44 L J C P 396, Rel. on.* [P 187 C 2]

P. K. Basu — *for Appellant.*

K. C. Sanyal — *for Respondent 1.*

Roberts C. J. — This appeal comes before us in the following circumstances: One Ah Yin was adjudged insolvent under the Provincial Insolvency Act on 11th April 1935. His discharge was refused in January the following year, and in September 1936, being desirous of carrying on business as a contractor, he made an application to the District Judge of Amherst in order that his position might be ascertained and regularized. Thereupon, on 12th September 1936, the learned District Judge made a general order in the following terms :

Mr. Rahim files an application for an order to deposit one-fifth of the nett income into Court. No such order can be made now as discharge has been refused, no conditional discharge being granted with any stipulation as to future earnings. There is no prohibition against the insolvent undertaking work, but he will be liable to account for all his earnings and pay the surplus into Court after necessary expenditure for the subsistence of himself and his family.

After this order had been made the insolvent went to the present appellant Ah Chone to whom he disclosed the position and to whom he showed the order and obtained advances from him whereby to carry on his business as a contractor. When the bills came, one of the creditors moved for payment into Court, and it is now sought to say that the words "account for all his earnings" in the order of the learned District Judge must mean "account for all his gross receipts from all sources," and that all property acquired by him at any time after the date of his adjudication and before his discharge, by reason of the words of the Provincial Insolvency Act, vests forthwith in the receiver. I notice in the judgment of the learned District Judge an observation that even if the insolvent created a charge in favour of his creditor, the latter would have no remedy in the Insolvency Court. This conclusion was arrived at by reason of the fact that the relevant authorities were not cited to the learned District Judge.

It is clear from a long line of English cases that if a man having a lien stands by and lets another make a new security, he shall be postponed. Those were the words of Lord Camden in (1766) Amb. 630[1] and the same principle was laid down in (1853) 4 De G M & G 395.[2] The English authorities have been applied in 8 M I A 339[3] in which Lord Kingsdown, who delivered the judgment of the Board, dealt with the then Indian Statutes (11th and 12th Vict, c. 21), under Sec. 7 of which the assignee obtained rights over the insolvent's property. Another case which is in point is that in (1875) 44 L J C P 396,[4] and the cases which I have cited have never been seriously questioned. Again in (1894) 1 Q B 425,[5] it is clear that the distinction which was discussed there between the personal earnings of an insolvent and the profits of his trade was one between nett earnings and nett profits. It has never been at any time suggested that if the Official Assignee or creditors permitted the insolvent to trade, they can claim upon the person who may be allowed to supply him with stock-in-trade, materials or cash for the purpose of carrying on his business, to have those assets taken and applied for their own benefit in the insolvency. Their object in allowing him to trade must be taken to be with a view to obtain some advantage out of the surplus profits which have been acquired when the trading is over and all necessary outgoings incident to the trading have been paid.

Accordingly, in my opinion, the decision of the learned District Judge was wrong, and this appeal must be allowed and the Judge directed to deal with Ah Chone's application upon its merits, his claim, if substantiated, being one which constitutes

1. Troughton v. Gitley, (1766) Amb 630=27 E R 408.
2. Tucker v. Hernaman, (1853) 4 De G M and G 395=22 L J Ch 791=17 Jur 723=1 Sm and G 394=43 E R 561.
3. Moses Kerakoose v. Benjamin Brooks, (1859-61) 8 M I A 339=4 W R P C 61=1 Suther 426=1 Sar 778 (P C).
4. Engelback v. Nixon, (1875) 44 L J C P 396=10 C P 645=33 L T 831.
5. In re Rogers ex parte Collins, (1894) 1 Q B 425 =63 L J Q B 178=10 R 469=70 L T 107= 1 Manson 387.

a prior chage over any claim by the receiver. Costs seven gold mohurs.

Mosely J.—I agree.

D.S./R.K. *Appeal allowed.*

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MOSELY J.

Maung Ba — Appellant.

v.

Maung Tha Kyu and another — Respondents.

Second Appeal No. 340 of 1937, Decided on 5th April 1938, from Judgment of Asst. Dist. Court, Thayetmyo in C. A. No. 13-T of 1937.

Registration Act (as amended in 1929), S. 49—Proviso—Suit against mortgagee for redemption of usufructuary mortgage effected in 1900 for Rs. 95 by unregistered deed but accompanied by delivery of possession — Suit against purchaser—Property assessed in mortgagee's name and sold in execution of decree—Terms of document held could only be proved by document even though there was delivery of possession—Document held inadmissible in evidence under S. 49—No evidence whatever could be given of terms of transaction—Proviso to S. 49 held did not apply.

P sued for redemption of a usufructuary mortgage of certain lands made in 1900 for Rs. 95 to *D* by an unregistered deed but accompanied by delivery of possession. The lands were assessed in *D's* name for about 14 years prior to the suit. *D's* interest in the land was sold in execution of a decree and was purchased by *A* :

Held since the amendment of 1929 of the Registration Act the terms of a mortgage in suit could only be proved by the document itself even though there was delivery of possession and the document was inadmissible in evidence under S. 49, Registration Act. No evidence whatever could therefore be given of the terms of the transaction in suit. The proviso to Sec. 49 did not apply as right conferred by Sec. 53 (A), T. P. Act, was a right only available to a defendant to protect his possession. In any case the purchaser *A* had no notice of the mortgage, the land being entered in the mortgagee's name : *A I R 1918 Cal 828 ; A I R 1931 Mad 352 ; 8 All 405 and A I R 1936 Cal 628, Ref. ; A I R 1928 All 726 ; A I R 1917 Bom 203; A I R 1921 Mad 337 and A I R 1921 U B 3, Disting.* [P 189 C 1, 2]

K. C. Sanyal — *for Appellant.*

Kyaw Din — *for Respondents.*

Judgment.—The parents of the plaintiff-respondents Maung Tha Kyu and Maung Tha Htu sued for redemption of a usufructuary mortgage of certain lands made in 1900 for the sum of Rs. 95 to defendant 1, U Khan Sit, by unregistered deed Ex. B, accompanied by delivery of possession. It would appear from the evidence that the land has been assessed in U Khan Sit's name from about 14 years ago. Recently U Khan Sit's interest in the land was sold in execution of a decree in favour of defendant 2 Chettyar firm and purchased by defendant 3, appellant Maung Ba. The plaintiffs obtained a decree in the trial Court which was upheld on appeal by the learned Additional District Judge. The question for decision is whether there was any admissible evidence of the terms of the transaction in question, for of course the plaintiffs could only succeed in their suit on proof of the terms of the contract and in particular of the amount for which they were entitled to redeem.

Section 59, T. P. Act, enacts that where the principal money secured is less than Rs. 100 a mortgage may be effected either by a registered instrument or (except in the case of a simple mortgage) by delivery of the property. S. 4 lays down that S. 59 shall be read as supplemental to (that is to say added to) the Registration Act. S. 17 Registration Act, makes registration compulsory only in the case of mortgages to the amount of Rs. 100 and upwards. S. 49 of the same Act provides that no document required by S. 17 *or by any provision of the Transfer of Property Act* to be registered shall (c) be received as evidence of any transaction affecting such property unless it has been registered. (The words italicized were inserted by Sec. 10, Transfer of Property Supplementary Act, 1929.) The proviso to the Section however enacts that unregistered documents affecting immovable property and required by the Registration Act or the Transfer of Property Act to be registered may be received as evidence of a contract in a suit for specific performance or as evidence of part performance of a contract for the purposes of S. 53-A, Transfer of Property Act. Provided that nothing in the Section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

In addition, we have to consider the effect of S. 91, Evidence Act, which says that when the terms of a contract have been reduced to the form of a document, no evidence shall be given in proof of terms of such contract except the document itself or secondary evidence of its contents where admissible. Both the lower Courts found that the unregistered document in question was admissible in evidence. It is clear however that this could no longer be held

to be the case since the amendment of the Registration Act in 1929. It was previously held that the effect of S. 4, T. P. Act, was merely to add to the list of documents of which registration was compulsory, and not to include them in S. 17 so as to bring them within the scope of S. 49: *see* 50 All 986,[1] the judgment of Macleod C. J. in 41 Bom 550[2] and 44 Mad 55.[3] These cases, it may be remarked, were not cases where the terms of the documents were in question, but only where the nature of the contract or the nature of possession was in dispute. The case cited by the lower Appellate Court —4 U B R 80[4]—was a case on all fours with the present one, and it was held there that such a document was admissible in evidence because the Registration Act then in force did not require registration of it. That case was decided prior to the amendment of Sec. 49, Registration Act in 1929, which came into force on 1st April 1930. Another decision is 21 C W N 1149.[5] It was said there:

> Where there is a grant and a writing to support it, oral evidence of the terms of the grant is excluded. That would seem to be so even when the grant is made not by the document, but by the delivery of possession which accompanies it . . . . Though the document does not confer title and is merely evidentiary, it still seems to be the only admissible evidence of the nature and terms of the transaction.

60 M L J 293,[6] a case decided after 1st April 1930, dealt with an unregistered lease of 1924. The amendment to S. 49, Registration Act was not considered there, though as was said in 8 All 405[7] the question of admissibility being a matter of procedure is governed by the present law. I agree with the learned authors of Mulla's Commentary on the Transfer of Property Act (*see* p. 262, Edn. 2), that the right conferred by S. 53 (a) is a right only available to a defendant to protect his possession. That is sufficiently plain from the language of the Section: *see* 62 Cal 294.[8] But in any case it is evident here that the transferee defendant-appellant Maung Ba had no notice of the usufructuary mortgage—the land being in the mortgagee's name. It is clear, I consider, since the amendment of the Registration Act that the terms of the mortgage now in suit could only be proved by the document even though there was delivery of possession, and this document is inadmissible in evidence under Sec. 49, Registration Act. No evidence whatever therefore can be given of the terms of the transaction in suit. This appeal will be successful and the decree of the Appellate Court reversed with costs throughout.

R.M./R.K. *Appeal allowed.*

1. Sohan Lal v. Mohan Lal, (1928) 15 A I R All 726=118 I C 177=50 All 986=26 A L J 1084 (F B).
2. Dawal v. Dharma, (1917) 4 A I R Bom 203=41 I C 273=41 Bom 550=19 Bom L R 622.
3. Rama v. Gowro, (1921) 8 A I R Mad 337=59 I C 350=44 Mad 55=39 M L J 639 (F B).
4. Maung Po Din v. Maung Po Nyein, (1921) 8 A I R U B 3=66 I C 360=4 U B R 80.
5. Sheik Juman v. Mohammad Nobineoaz, (1918) 5 A I R Cal 828=41 I C 779=21 C W N 1149.
6. Gnanaprakasam Pillai v. F. S. Vaz, (1931) 18 A I R Mad 352=131 I C 621=60 M L J 293.
7. Khuda Bakhsh v. Sheo Din, (1886) 8 All 405 =1886 A W N 170.
8. In re Jambad Coal Syndicate, Ltd., (1936) 23 A I R Cal 628=163 I C 845=62 Cal 294.

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MYA BU AND SHARPE JJ.

Rev. Po Tun — Petitioner.

v.

Ma Chit and another — Respondents.

First Appeal No. 128 of 1937, Decided on 23rd December 1937, from Judgment of Dist. Court, Pokokku, in C. R. No. 5 of 1936.

(a) Practice—Pleadings — All material facts should be pleaded concisely—Duty of pleaders explained.

Only material facts should be pleaded. All material facts must be pleaded, but they should be pleaded concisely. The pleading stage of a suit is the most important stage, for there the foundations ought to be so laid that success may be achieved. Slackness in pleadings is unfair both to the Courts in which they are filed and also to the litigants. Judges have many and various cases to deal with, and it is the duty of the advocates and pleaders to assist them from the inception of a suit by a proper presentation of their cases. It is for Judges to decide as between contesting parties the points raised by the issues; Judges ought not to have to find out what the plaintiff's real case is as distinct from the one pleaded, and then to find out what the defendant's real case is, and then decide the matter. Advocates and pleaders have a duty to their clients to give due attention to their cases from the start and not merely when the hearing stage is reached. The drafting of the pleadings is as important, and may frequently be as difficult, as the presentation of the case in Court. Good pleadings take time, and it is the pleader's duty to take time over and to give careful thought to the pleadings which bear his name.

[P 192 C 1, 2]

(b) Divorce Act (1869), S. 14—Conviction of husband or wife for criminal offence is no ground for desertion by other party.

The conviction and imprisonment of a husband or wife for an offence against the criminal law is

no justification to the other party for refusing to live with him or her. However painful it may be for a respectable man to have a wife who has been convicted of felony, such conviction does not justify him in deserting her : *(1882) 7 P D 76, Foll.* [P 194 C 2]

(c) Divorce Act (1869), S. 14 — Wife convicted and imprisoned—After release from jail, wife living with her parents and earning her livelihood—Adultery of wife—Husband's neglect of wife held did not conduce to her adultery.

A wife was convicted and imprisoned for commission of a criminal offence. After release from jail, she got a job and was earning her livelihood and lived with her parents. While being so, she committed adultery :

Held that the neglect of the wife by the husband was not such as to conduce to her adultery. [P 194 C 2 ; P 195 C 1]

(d) Divorce Act (1869), Ss. 55, 14 — Case falling under Proviso to Sec. 14 — High Court can in appeal decide whether decree for dissolution should be passed if evidence on record is sufficient.

Section 55 read with O. 41, Rule 24, Civil P. C., gives the High Court, sitting on appeal, power, when the case falls within the Proviso to S. 14, to say whether or not a decree for dissolution of marriage should be passed, if it is of opinion that the evidence upon the record is sufficient to enable it to do so. [P 195 C 2]

Williams — *for Petitioner.*

Sharpe J. — On 2nd April 1923 petitioner, who was then a widower, 33 years of age, married the respondent Ma Chit, who was then a widow and one year his junior in age. She was already the mother of two children. The marriage took place at the Methodist Church at Pokokku, and at Pokokku they lived together after their marriage. The wife, apparently, was engaged in employment after the marriage as a nurse in the Pokokku Civil Hospital ; the husband was, and still is, a Methodist Minister.

Prior to his marriage the petitioner had opened a deposit account in the Post Office Savings Bank. Within a week or ten days of their marriage the wife was in need of money and the petitioner gave her his Savings Bank Pass Book and application for withdrawal of Rs. 400, which the respondent wife duly withdrew. This only left Rs. 6-10-0 in the account. Six months later the wife was again in need of money, and went to Mr. Breadon and asked if he would sell his wife's " nagats " and hair pin to a Mr. Ram Chandra. Mr. Breadon thereupon entrusted her with the jewellery and took as security, pending either the return of the jewellery or receipt by him of the purchase money, the petitioner's Savings Bank Book, the entries in which the wife had forged so as to show an apparent credit balance of Rs. 1106-10-0 instead of only the Rs. 6-10-0 which was the true figure. The price which Mr. Breadon required was Rs. 3500. The wife never attempted to sell the jewellery to Mr. Ram Chandra but pawned it with U Po Pe for Rs. 2000. When the petitioner came to know of the wrongful pledge of the jewellery, he not unnaturally wanted to save his newly married wife or at least delay the institution of the prosecution which threatened. He managed to get his pass book from Mr. Breadon and saw that he apparently had Rs. 1106-10-0 to his credit. He begged U Po Pe not to prosecute his wife and told him he would withdraw Rs. 1000 at once and wire for another Rs. 1000 from his wife's relations in Lower Burma. U Po Pe agreed to accept Rs. 1000 at once and to wait a few days for the balance. So the husband took his pass book to the Post Office and applied to withdraw Rs. 1100. The pass book itself was so well forged that at first it was thought by the Post Master that the credit balance was Rs. 1106-10-0 but the forgery was discovered when the Savings Bank Registers were referred to. The wife was arrested and on 3rd December 1923 she was convicted, under S. 406, I. P. C., of a criminal breach of trust in respect of the jewellery, for which she was sentenced to nine months' rigorous imprisonment. In respect of the Savings Bank account transaction, the wife was subsequently, and while in prison serving her sentence, prosecuted for forgery of the pass book and the husband for attempted cheating. The wife's confinement while in Myingyan Jail caused the duration of the second criminal proceedings to be somewhat lengthened, and it was not until 4th August 1927 that the case was concluded. The wife was found guilty of forgery, under Sec. 467, I. P. C., and sentenced to three years' rigorous imprisonment, such sentence to run concurrently with the one for the criminal breach of trust. The husband was acquitted, the Magistrate who tried the case remarking :

> I doubt that he had any intention of cheating the Government. It is very doubtful that he knowingly tried to cheat the Post Office. I will give the benefit of doubt to him. He is acquitted accordingly.

In January of the following year (1925) the husband was transferred from Pokokku to Pyawbwe. On 26th August 1926 the

husband, presumably anticipating his wife's early release from jail, caused a notice to be inserted in "The Rangoon Gazette" informing the public that he would not be responsible for any debts incurred or to be incurred, by his wife, who, so said the notice, had left his protection on 22nd October 1923, which be it noted, is the date upon which the wife *(sic)* had attempted to withdraw the Rs. 1100 from her husband's deposit account with the Post Office Savings Bank. The date upon which the wife was released from jail does not appear; it may probably have been in the early part of 1927. The husband's own evidence in the present case is that he did not know when his wife was released from jail, and that she did not go to him after release. He must however have had some idea as to when it was likely to occur. His own child which was born in jail, was, according to the petitioner, sent to him on 15th May 1927, that was the first time, he says, that he had seen it. At some unspecified date in 1927 he was transferred from Pyawbwe to Mandalay, and he further admits that, after his wife's release from jail, not only did he hear that she went and lived at Bassein, but she wrote to him asking for maintenance—a request which he refused to grant. Some correspondence passed between him and a Mrs. Shwe Hla, acting for the wife, with a view to their resuming the married life, but the husband, despite his position as a Christian Minister of Religion, took up the attitude—I quote his own words : "So long as she did not give up her bad habits, I cannot receive her in my house." Neither Mrs. Shwe Hla nor his wife made any further move in the matter, nor did the husband. The parties remained apart, he in Mandalay and she in Bassein, where she took up employment as midwife under the Bassein Municipality. Subsequently she met respondent 2, Maung Thein Maung, who was a clerk also employed by the Bassein Municipality. That he and the respondent wife have since committed adultery admits of no doubt. It is not possible to say from the evidence when it first took place but on 24th August 1932 the respondent wife gave birth to a child of which Maung Thein Maung was the father.

The petitioner husband says that he knew nothing of his wife's adultery until he heard in 1932 of the birth of the child born to her and Maung Thein Maung in the previous years. Both the husband and the wife are domiciled in Burma and profess the Christian religion, and so, on 14th September, the husband presented a petition to the District Court of Pokokku, under Sec. 10, Divorce Act, praying that his marriage might be dissolved on the ground of his wife's adultery with Maung Thein Maung. The wife sent her written statement by post. In it she alleged that her conviction at Pokokku for the offences to which I have already referred was due to her

> shouldering the fault of the petitioner, and since her release, as her home town was Bassein, and as there was nobody to meet her and her son, who was given birth to while undergoing imprisonment, she returned to Bassein.

According to her, she

> wrote to the petitioner several times, but there was no answer . . . . in reality the petitioner had deserted the respondent for the last 13 years without supporting either the child or the respondent.

She added however that in any case she was not desirous of contesting the case and was quite willing that the marriage should be dissolved. Maung Thein Maung also sent a written statement by post but neither he nor the wife appeared at the hearing to contest that suit. The learned District Judge found that the respondent did commit adultery with Maung Thein Maung, but, quite properly, having regard to the wife's written statement which was before him, he did not thereupon pronounce a decree under the first part of Sec. 14 of the Divorce Act; for the reason that the proviso to that Section enacts that

> the Court shall not be bound to pronounce such decree . . . . if the petitioner has, in the opinion of the Court, been guilty of unreasonable delay in presenting or prosecuting such petition, ... or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct of or towards the other party as has conduced to the adultery.

It was therefore necessary for the learned District Judge first of all to find whether or not the petitioner had been guilty of such conduct as made the pronouncement by him of a decree not a matter of obligation under the first part of Sec. 14 but a matter of discretion under the proviso to that Section; and then, if he came to such findings as made it a matter of discretion, to exercise his discretion as to whether, on the particular facts and in the particular circumstances of this case, he would grant the relief prayed for by the petitioner. It was here that the learned District Judge fell into some confusion of thought. I think he

was undoubtedly led into making at any rate part of his mistake by the petitioner's advocate inserting para. 4 in the petition. Time and again I find that plaints, petitions and written statements infringe the most elementary rules of pleadings. The general function of pleadings was well stated by Lord Jessel M. R. in (1876) 3 Ch D 637,[1] at p. 639 where he said :

> The whole object of pleadings is to bring the parties to an issue. . . . The whole meaning of the system is to narrow the parties to definite issues, and thereby to diminish expense and delay.

I often wonder whether some of the pleaders whose names appear on the pleadings which come before me, have ever heard of O. 6, R. 2, Civil P. C :

> Every pleading shall contain, and contain only a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be.

Only material facts should be pleaded, all material facts must be pleaded, but they should be pleaded concisely. How often do pleaders fail to realize that the pleading stage of a suit is the most important stage, for there the foundations ought to be so laid that success may be achieved. It is by no means uncommon for a case to come up to this Court on second appeal, there to be decided upon a point which was never taken or argued in either of the Courts below, simply because it did not appear upon the pleadings to be a point in the case. At a late stage a case comes into the hands of a fresh advocate who sees the true point, and then raises it. Slackness in pleadings is unfair both to the Courts in which they are filed and also to the litigants. Judges have many and various cases to deal with and it is the duty of the advocates and pleaders to assist them from the inception of a suit by a proper presentation of their cases. It is for Judges to decide as between the contesting parties the points raised by the issues; Judges ought not to have to find out what the plaintiff's real case is as distinct from the one pleaded, and then to find out what the defendant's real case is, and then decide the matter. We in this Court are frequently asked to vary the decision of the Courts below, not because a Judge has wrongly decided a point of law but because a Judge has omitted to decide some point of law to which his attention was never drawn by either advocate and which he himself inadvertently overlooked, and then it is urged before us that injustice will be done to the appellant if we do not go into this new point. The possibility of any injustice being done arises directly from the appellant's advocate's failure to do his duty in the early stages of the case. Advocates and pleaders have a duty to their clients to give due attention to their cases from the start and not merely when the hearing stage is reached, as so many practitioners apparently think. The drafting of the pleadings is as important, and may frequently be as difficult, as the presentation of the case in Court. Good pleadings take time, and it is the pleader's duty to take time over, and to give careful thought to, the pleadings which bear his name. Now what happened in the present case? This is a husband's petition for dissolution and accordingly, by Sec. 10 of the Divorce Act, the only ground upon which the petitioner can ask for the dissolution of his marriage is that his wife has been guilty of adultery. Para 4 of the petition alleges

> that since the petitioner's wife had left the threshold of the jail after serving the term of imprisonment, the petitioner's wife never came back to the petitioner and that she had been living in separation up to the present time at Bassein.

That paragraph therefore contains wholly immaterial allegations and accordingly infringes O. 6, R. 2. The mischief which is done by these irregularities in pleading is shown by the fact that in the present case the learned District Judge was led to frame the following issue (3): "Did she" (meaning thereby the wife) "desert her husband, the petitioner as alleged in para. 4 of the plaint?" It was wholly unnecessary to determine any such issue. Although neither of the respondents appeared to contest the case, it was the duty of the learned District Judge, having regard to the allegations made by the wife in the first three paragraphs of her written statement, to consider, in the event of his being satisfied that the wife had committed adultery, whether the petitioner had been guilty (a) of unreasonable delay in presenting his petition, (b) of having deserted or wilfully separated himself from his wife before the adultery complained of, and without reasonable excuse, or (c) of such wilful neglect or misconduct of or towards his wife as had conduced to the adultery. It will thus be seen that one of the issues proper to be determined was whether the husband had deserted his wife, not whether the wife had deserted her husband, which is how

1. Thorp v. Holdsworth, (1876) 3 Ch D 637=45 L J Ch 406.

the matter was put in the third issue framed in the Court below. The three matters which I have mentioned did receive the attention of the learned District Judge although he framed no specific issues about them ; he considered them when he was deciding the latter part of the fifth issue which he had framed in the following terms :

> Whether respondent 1 committed adultery with respondent 2 and did they have an issue to the union as alleged ? If so, is the petitioner entitled to the relief claimed ?

The learned District Judge held that the wife had not deserted her husband ; that finding was however for reasons hereinbefore appearing, an entirely immaterial consideration, and I feel certain that it was his initial error in permitting himself to enter upon that unnecessary enquiry that created the confusion in his mind which finally resulted in his never considering whether he ought to exercise his discretion in the petitioner's favour.

The learned District Judge's findings on the other three points may be summarized as follows : It was the duty of the petitioner to enquire from the jail authority as to the time of his wife's release and as to her whereabouts; and, if he failed to do so, it was only natural for his wife to return to her parents at Bassein. The petitioner admitted (a) that he heard that that is what in fact she did do after her release, (b) that he did not send her any maintenance although she wrote and asked for it, and (c) that he wrote and said that so long as his wife did not give up her bad habits, he could not receive her in his house. The learned District Judge found that, from the time of her release in 1927, the petitioner did not take the slightest trouble either to maintain his wife or look after her and give her his protection, and that, by that neglect he "allowed her to fall into temptation with other men. Even then the petitioner waited until the end of the year 1936 before he filed this petition for divorce . . . I am of opinion," the learned District Judge went on,

> that the petitioner, the Reverend U Po Tun, absolutely neglected his wife on account of the fact that she had been sent to jail for criminal breach of trust and forgery and allowed her to remain at the mercy of the world without offering any kind of maintenance. Besides, there has been undue delay in spite of the explanation of the petitioner that he had to apply for permission to the Methodist Clergymen in England and collect evidence. It seems that he has taken about 9 or 10 years to do so. Therefore the petition will stand dismissed.

In effect, the learned District Judge found that the petitioner had been guilty (a) of unreasonable delay in presenting his petition; (b) of having, without reasonable excuse, deserted his wife before the adultery complained of, and (c) of such wilful neglect of his wife as had conduced to the adultery. The pronouncement of a decree of dissolution of marriage therefore became a matter of the discretion of the Court instead of a matter of right for the petitioner. The fact that the learned District Judge arrived at the conclusions on this point which he did, did not necessarily debar the plaintiff from obtaining relief; it was for the Judge then to consider which way he would exercise his discretion. Unfortunately, the learned District Judge does not appear to have considered that matter. Having found the abovementioned three facts against the petitioner, he said "therefore the petition will stand dismissed." It is clear that he read the opening words of the Proviso to S. 14, Divorce Act, as if it read "Provided that the Court shall be bound not to pronounce such decree if . . . . "instead of the actual words, which are : "Provided that the Court shall not be bound to pronounce such decree if . . . . ." He read the word "not" in the wrong place.

The petitioner, being aggrieved, appealed to this Court. His main grounds of appeal are that the learned District Judge erred in holding (a) that it was the petitioner's duty to enquire from the jail authorities as to his wife's whereabouts on her release, and (b) that she fell into temptation as a result of being neglected by the petitioner after her release; further, that his wife never replied to the letter in which the petitioner said that he could not have her back so long as she did not give up her bad habits; also, that there was a reasonable explanation of such delay as there was in presenting the petition; and finally, that in any event the petitioner had reasonable excuse for neglecting his wife and had just and sufficient cause for living apart from her. In the eleventh ground of appeal it is said that "the trial Court erred in not exercising its discretion in favour of appellant and granting him a divorce."

I will first deal with the question of the delay in the presentation of the petition. The petitioner's own evidence is that the first he knew of his wife's adultery was when he learnt that she had given birth to a child which he knew could not possibly

be his. He says he did not know of that event until 1933. The petition was presented in September 1936. He had, he says, first of all to obtain permission from the Methodist Clergymen's Conference in England to file his petition, and he was not granted that permission until about January 1936. No doubt he being a Methodist Minister, would have to obtain such permission, and no doubt it took some time to obtain. Presumably, the petitioner would have got his evidence together before applying for that permission, and therefore it may well be that he was not ready to make his application to England till, say, 1934. I have no reason to doubt his word when he says that he did not obtain that permission until January 1936. There was then some, but not, in my opinion, too much delay till September 1936. It is, perhaps, somewhat unfortunate that the learned District Judge did not examine the petitioner more thoroughly on this part of the case but it is quite clear that the learned Judge was wrong in saying that it took the petitioner nine or ten years to obtain the necessary permission and to collect his evidence. It can be no more than three or three and a half years, according to the month in 1933 (which is unspecified) in which the petitioner first knew of his wife's adultery. A period of nine or ten years takes us back to the time of the wife's release from jail, which is not the proper date from which to start, having regard to the petitioner's evidence as to the date of his first knowledge of his wife's adultery. I think that in all the circumstances of this case, the delay in the presentation of the petition was not unreasonable.

I will now consider the learned District Judge's findings as to the petitioner's desertion and neglect of his wife. I think there was ample evidence, largely to be found in the petitioner's own admissions, that he did desert his wife before the adultery complained of, and that there was no reasonable excuse for his doing so. Not only was there ample evidence to support the learned District Judge's finding on that point but in my judgment the finding of the Court below was the only possible one upon the evidence. In (1882) 7 P D 76,[2] a case to which I myself called attention during the argument before us and which is a very similar case to the present one, Sir James Hannen held that

> the conviction and imprisonment of a husband or wife for an offence against the criminal law is no justification to the other party for refusing to live with him or her. However painful it may be for a respectable man to have a wife who has been convicted of felony, such conviction does not justify him in deserting her.

Mr. Williams, on behalf of the appellant, called our attention to the case in 10 Rang 299[3] wherein it was held that the dicta of Judges in England cannot be regarded as laying down principles or rules of practice by which the discretion of a Judge in any other case is fettered or limited. But that ruling in 10 Rang 299[3] does not affect this part of the present case. I have not yet reached the point where the exercise of discretion has to be considered. It is only where the dicta of Judges in England explain the tests which they would respectively apply in exercising their discretion to grant or refuse a divorce in the particular cases before them that it must be borne in mind that they are, to use the words of the Master of the Rolls in *Wickins* v. *Wickins*,[4] "merely illustrations of matters to which the Court will have regard in coming to a judicial determination on the matter," namely as to how it will exercise its discretion. In my judgment, Sir James Hannen laid down in (1882) 7 P D 76[2] a definite proposition of law; the passage which I have quoted was not dealing with the way in which he would exercise his discretion in that particular case. It was a general proposition of law. In my view, it is still sound law, and in my judgment the learned District Judge was quite right in holding that the petitioner had deserted his wife without reasonable excuse.

Then comes the question as to whether the petitioner's neglect of his wife was such as to conduce to her adultery. This is a more difficult question. The petitioner's third ground of appeal is that the learned District Judge erred in holding

> that his neglect had allowed her to fall into temptation when there is evidence that respondent 1 was employed as a midwife in the Bassein Municipality after her release from jail and was able to maintain herself.

I feel the force of that contention very strongly, for not only was the wife earning her own livelihood but she was also living with her parents. Reluctant as I always am to disturb on appeal findings of fact arrived at by the Court who had the opportunity of seeing as well as of hearing

2. Williamson v. Williamson, (1882) 7 P D 76=51 L J P 54=46 L T 920=30 W R 616.

3. Swaine v. Swaine, (1932) 19 A I R Rang 172=139 I C 479=10 Rang 299.

4. (1918) L R P 265=87 L J P 155=119 L T 268=34 T L R 447=62 S J 583.

the witnesses, yet in this case I feel that the petitioner's neglect of his wife was not such as to conduce to her adultery. I wish to stress the fact that in arriving at that conclusion I am deciding a question of fact upon the particular facts of this particular case and I have not come to that conclusion because in (1882) 7 P D 76[3] Sir James Hannen further held that the husband's refusal to resume cohabitation with his wife when she asked him to live with her again could not be said to have conduced to her adultery. In that part of his judgment, Sir James Hannen is not stating a general proposition of law nor, incidentally, is he uttering a dictum as to how he will exercise his discretion. He is deciding an issue of fact on the particular evidence in that case, and therefore that part of his judgment does not help us. My conclusion is based entirely upon the particular facts of this case. I therefore disturb the first and third of the learned District Judge's findings and uphold the second. As a finding adverse to the petitioner of any one of the three facts was sufficient to make the granting of a decree a matter of discretion and not of right, it follows that it still remains to be considered whether or not the petitioner should be granted a decree despite the fact that he has, as is now established, deserted his wife without reasonable excuse.

As I have already pointed out, the learned District Judge never addressed himself to the question as to the way in which he should exercise his discretion; even if he had done so, he would have been exercising it after finding three facts adversely to the petitioner, and, as only one fact is now established adversely to the petitioner, the discretion would have now to be exercised all over again in the light of the new findings of fact. The question therefore now is : shall we decide how the discretion is to be exercised, or shall we send it back to the District Judge to do so in the light of the facts and circumstances appearing in the judgments of this Court? S. 55, Divorce Act, provides that appeals from a refusal of a District Judge to grant a decree for dissolution of marriage may be appealed from in the like manner as a decree of a District Court made in the exercise of its original civil jurisdiction may be appealed from under the laws, rules and orders for the time being in force. O. 41, R. 24, Civil P. C., provides that where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may finally determine the suit. In my judgment the Section and the Rule between them give this Court, sitting on appeal, power, when the case falls within the Proviso to S. 14, to say whether or not a decree for dissolution of marriage should be passed, if we are of opinion that the evidence upon the record is sufficient to enable us to do so. In some cases, where the exercise of a discretion under S. 14 is concerned, it may well be that the Appellate Court will think that it is desirable that the discretion should be exercised by the Judge who saw the petitioner in the witness-box. But I do not think that that is necessary here. In my judgment we have all the necessary materials before us to enable us to say whether or not a decree should be pronounced.

How, then, are we to exercise it in the present case? It must be borne in mind that the petitioner has been guilty neither of unreasonable delay in presenting his petition nor of such wilful neglect as has conduced to his wife's adultery. The only finding against him is that he deserted his wife without reasonable excuse. As I have already pointed out on the other part of the case, respondent 1 was living with her parents and earning her own livelihood; and I have already held that the petitioner's neglect was not such as to conduce to her adultery. I am of opinion that, although he deserted his wife without reasonable excuse, even for the length of time which he did, yet in all the circumstances of this case it would be proper that a decree of dissolution of marriage should be pronounced, and I would exercise my discretion in the petitioner's favour accordingly. At the conclusion of the hearing of this appeal some argument arose as to what form our order should take. We are pronouncing a decree for dissolution of marriage, and we are a High Court. Therefore, it may be said, that our decree must, by virtue of S. 16, Divorce Act, be a decree nisi in the first instance, not to be made absolute till after the expiration of the time directed by the Rules.

No doubt S. 16 was really intended for the Original Side of a High Court and S. 17 for the District Court, and the possibility of such a case as this was overlooked, but the words in S. 16 are "a High Court" (which by S. 3, means, in Burma, the High Court of Judicature at Rangoon) and there is not, either in S. 16 or in S. 3, any limitation of

the words "High Court" to the Original Side of this High Court. If we had thought this a case in which it was desirable that the learned District Judge, having seen the petitioner, should be the tribunal to say how the discretion was to be exercised and if we had then remitted the case to him for that purpose, the decree, if he had decided to exercise his discretion in the petitioner's favour, would have been one made by a District Judge and would have come under S. 17 and would therefore have required confirmation by three Judges of this High Court. But, as we are exercising our own discretion, it may be that our decree should be a decree nisi under S. 16, Divorce Act. On the other hand, we are really doing what the District Judge ought to have done. If the words in S. 17 had been "made by a District Court," then our decree might possibly not have been a decree nisi but a decree under S. 16. But the words in that Section are "made by a District Judge" and we are not a District Judge.

To my mind, a difficulty arises as to whether ours is a decree nisi under S. 16 or a decree under S. 17, for, if it is the former, who is to make it absolute, a single Judge of this Court on the Original Side? Although that may not appear to be an entirely suitable course to follow, I believe however that, if the analogy of the practice in England is to be applied here, that is what would happen, though I am not sure. If our decree is to be one under S. 17, then are three Judges of this Court to be required to confirm what two Judges have done on appeal? The distinction between Ss. 16 and 17 should be noted in regard to the taking of steps during the six months period to have a decree rescinded. Not only is there no reported case on the subject but the Deputy Registrar of the appellate side tells us that, although he has caused a thorough search to be made in the office, there is not to be found any record of similar appeal, namely one from a District Judge's refusal to grant a decree, which has been allowed and a decree passed by this Court on appeal. The point being, to my mind, a difficult one, entirely free from guiding precedents, I am of opinion that there should be a reference to a Full Bench* to determine what form of decree should be passed in circumstances appearing in this judgment, the question put to be in the form proposed by my learned brother. I venture to think that such Full Bench would be greatly assisted if it were possible to issue notice to the Advocate-General in his capacity of King's Proctor, to which position he has, I understand, been appointed under S. 17-A, Divorce Act.

Mya Bu J. — Upon the merits of this particular case I agree with my learned brother in his findings on the evidence regarding the points arising for the determination by the Court, and in his conclusions on the points of law involved in the case, and that a decree for dissolution of marriage should be pronounced.

The question as to the form of the decree which we should pass in this case is not free from difficulty. While it admits of a reasonable argument that it may be a decree nisi, there appears to me an equally reasonable line of thought urging that the decree should be of the nature that the District Judge should have passed in the case. That there is fundamental difference between a case originating in the High Court and that originating in the District Court admits of no doubt, for, under S. 16, Divorce Act, matters such as may be raised after the decree nisi and before such decree is made absolute may be raised in a proceeding originating in the District Court only during the progress of the suit. According to the general principles, the decree that we may pass while sitting as an appellate Court is in effect a decree which the District Court (or in this particular case the District Judge) should have passed. It is in pursuance of this principle that the definition of "Court which passed a decree" in Sec. 37, Civil P. C., in my opinion, has been framed in relation to the execution of decrees.

In Civil Ref. No. 2 of 1917,[5] a Full Bench of the Chief Court of Lower Burma ruled in a case that comes from a Divisional Court in which a decree nisi had been passed that such a decree could be pronounced only by a High Court. This however leaves the matter in doubt as to whether the Original Side of High Court only is meant or both the original and the appellate sides. As it is a matter of considerable importance to the practice in the proceedings for dissolution of marriage under the Divorce Act and as there is an absence of judicial opinion on the point, I agree with my

* This Full Bench decision has already been reported in A I R 1938 Rang 204.

5. Ma Waing v. Ebrahim, Civil Ref. No. 2 of 1917.

learned brother that this point should be referred for the decision of a Full Bench, the question that I propound being :

When the High Court on the appellate side passes a decree for dissolution of marriage in an appeal from an order of the District Judge dismissing the petition, is the decree to be a decree nisi such as is mentioned in S. 16, or to be a decree such as is mentioned in S. 17, Divorce Act?

K.S./R.K. *Order accordingly.*

[Note: The decision of the Full Bench has already been reported in A I R 1938 Rang 204—Ed.]

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FULL BENCH
ROBERTS C. J., MYA BU AND MOSELY JJ.

Maung Thein — Applicant.

v.

U Tha Byaw and others—Respondents.

Civil Ref. No. 4 of 1938, Decided on 2nd February 1939, made by Mya Bu Offg. C. J. and Mackney J.

(a) Buddhist Law (Burmese) — "Auratha" child means also "eldest born child."

The "auratha" or "orasa" child literally means "child of the body" and is used in Burmese Buddhist Law as meaning also "eldest born child." [P 198 C 1]

(b) Buddhist Law (Burmese) — Adoption — Child adopted in keittima form can claim share of estate of father of his adoptive father where latter having acquired status of auratha has died before death of former — But he cannot become auratha of his adoptive parent.

A keittima adopted child succeeds not only to the estate of his adoptive parents but also to property left by the parents' relatives. An adoptive child is for all purposes in the footing of a natural born child except that the special rights of auratha child do not and cannot appertain to him because those rights arise not only from relationship but from the special claims of the natural born eldest child within the family of the parents by whom it has been begotten and conceived. Hence a child adopted in the keittima form according to Burmese Buddhist law can claim a share of the estate of the father of his adoptive father where the latter having acquired the status of auratha has died before the death of the former; but the keittima adopted child cannot become auratha of his adoptive parent. His share is claimed by virtue not of personal representation of his adoptive father but of an independent right of inheritance given by Burmese Buddhist Customary law. As an out of time grandchild, he shares equally with the younger brothers of his adoptive father, the latter being auratha according to the rules laid down in the law of Menoo, Vol. 10, page 277 ; but he has no claim, by virtue of his adoptive father having been an auratha child, to be considered as an auratha child himself : *5 L B R 89 ; A I R 1915 L B 99 ; (1892-96) 2 U B R 176 ; A I R 1926 Rang 148 (F B) and A I R 1935 P C 16, Rel. on.* [P 197 C 2 ; P 198 C 1]

Dr. Ba Han — *for Applicant.*

U E Maung — *for Respondents.*

Roberts C. J.—The question referred to this Full Bench is as follows :

What right of inheritance has the child adopted in the keittima form according to Burmese Buddhist Law in the estate of the father of his adoptive father, where the latter having acquired the status of auratha son has died before the death of the former ?

In 5 L B R 89[1] it was held by a Bench of the Chief Court of Lower Burma that under Burmese Buddhist Law a keittima adopted child possessed rights of inheritance not only from his adoptive parents but from collaterals in the adoptive family, and the principle of this decision was followed in 8 L B R 113.[2] In that case, the respondent was the adopted son of Ma Shwe Ein who was the orasa daughter of U Thet and Ma Bwin. She was however displaced as an orasa child when her younger brother Po Hman, the appellant, reached a competent age, and since there cannot be an orasa daughter as well as an orasa son in the same family, the respondent could only claim the share of an "out of time" grandchild. It seems to have been established by these two decisions that a keittima adopted child succeeds not only to the estate of his adoptive parents but also to property left by the parents' relatives: *see also* May Oung's Buddhist Law, Part 2 (Edn. 2) at page 156. In an Upper Burma case, (1892-96) U B R 176,[3] it was stated that it had been the practice both there and in Lower Burma to treat the keittima adopted child generally as filling the same position as the natural child, and that equitable principles seemed to be in favour of that view. Although the rights of a keittima adopted child were at first held to be of an inferior nature, for many years judicial decisions have recognized the right of the keittima child to share equally with the natural born children: *see* 4 Rang 184[4] at p. 200 where a Full Bench declared that the special right of the auratha was an exception to this general rule of equal partition amongst children and that it should not be extended to give to a keittima child the rights of an auratha child. This is now settled law and was recognized

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1. Ma Thaw v. Ma Sein, (1909) 5 L B R 89 = 3 I C 716.
2. Po Hman v. Maung Tin, (1915) 2 A I R L B 99=29 I C 756=8 L B R 113.
3. Ma Gyan v. Maung Kywin, (1892-96) 2 U B R 176.
4. Maung Po An v. Ma Dwe, (1926) 13 A I R Rang 148=98 I C 621=4 Rang 184 (F B).

as such by their Lordships of the Privy Council in 13 Rang 69[5] at page 81. Sir Lancelot Sanderson there said :

> It must now be taken that apart from the question relating to any rights of an eldest child, the keittima adopted sons are entitled to share equally with the natural sons of the adopter.

It is important to observe that the rights of an eldest child are expressly excepted from this recognition of keittima adopted children. The "auratha" or "orasa" child literally means "child of the body" and is used in Burmese Buddhist Law as meaning also "eldest born child." I see no ground for the extension of the contrast between keittima and natural born children and am of opinion that the decision in 5 L B R 89[1] should be followed and affirmed. The exception referred to in 13 Rang 69[5] applies only to the auratha child in contrast to the keittima child. It is the only instance of any exception in the Burmese Buddhist law of inheritance which discriminates against the position of a keittima child. An adoptive child is for all purposes in the footing of a natural born child except that the special rights of an auratha child do not and cannot appertain to him because those rights arise not only from relationship but from the special claims of the natural born eldest child within the family of the parents by whom it has been begotten and conceived.

Accordingly, I would answer the question referred by saying that a child adopted in the keittima form according to Burmese Buddhist law can claim a share of the estate of the father of his adoptive father where the latter has died before the death of the former: but the keittima adopted child cannot become auratha of his adoptive parent. His share is claimed by virtue not of personal representation of his adoptive father but of an independent right of inheritance given by Burmese Buddhist Customary Law. As an out of time grandchild, he shares equally with the younger brothers of his adoptive father, the latter being auratha according to the rules laid down in the laws of Menoo, Vol. 10, page 277 ; but he has no claim, by virtue of his adoptive father having been an auratha child, to be considered as an auratha child himself.

Mya Bu J.—I concur in the judgment of my Lord the Chief Justice. The true notion is, in my opinion, that keittima adoption creates not only heirship of the adopted to the adopter but also the relationship of a parent and child and by virtue of such relationship the adoptee acquires the rights of an ordinary natural child of the adopter in the estate of the adopter's collaterals or ascendants. This notion justifies the decisions in 5 L B R 89[1] and 8 L B R 113[2] and the fact that the special right of the orasa child to claim a quarter share from the surviving parent on the death of the parent of the same sex as the child is not extended to a keittima child does not seem to me to support the contention that the right of inheritance enjoyed by a keittima child is restricted to the estate of his adopter or adopters only.

Mosely J.—I agree with my Lord, the Chief Justice. It is settled law that the keittima adopted child can inherit not only from his parents but from collaterals in the adoptive family. As regards the question which exercised the learned Judge who made this reference whether the keittima adopted son of the orasa son inherits by representation of his father or directly from his grandparents, I do not think that this is of importance or affects the share which he will receive. In the present case the keittima adopted son was the only child of the orasa son. In 1 L B R 198,[6] it was said that the only child who ranked with the surviving uncles and aunts was the eldest representative of the eldest child. In that case there is a mistranslation on p. 200 of S. 12 of the Attathankhepa where "eldest born child" is a mistake for "eldest child" (Thagyi Thamigyi). This ruling was however dissented from in 6 L B R 77[7] at p. 84 and 7 L B R 27,[8] where it was pointed out that the majority of the Dhammathats lay down that it is the children of the eldest son who get preferential treatment and get the share of the father and not a quarter of it. Most of the Dhammathats quoted at S. 162 of the Kinwun Mingyi's Digest say that it is the eldest son of the eldest son or the children of the eldest son (not the children of the orasa) who are so preferred. For the distinction between orasa and eldest son, *see* 4 Rang 184[4] at page 199, and also the judgment of Baguley J. in 13 Rang 412[9] at

5. Maung Sein Shwe v. Maung Sein Gyi, (1935) 22 A I R P C 16=153 I C 679=13 Rang 69=62 I A 1 (P C).

6. Ma Saw Ngwe v. Ma Thein Yin, (1900-02) 1 L B R 198.

7. Ma Su v. Ma Tin, (1912) 6 L B R 77=18 I C 466.

8. Po Zan v. Maung Nyo, (1913) 7 L B R 27=20 I C 327.

9. Maung Thein Maung v. Ma Kywe, (1935) 22 A I R Rang 248=158 I C 131=13 Rang 412 (F B).

p. 445. Of course the child or eldest son of the orasa could not represent his father in the sense that he could take upon him his duties or his privileges other than those relating to his quarter share, but much less could the younger children of the orasa or eldest son do so, and in this connexion by representation is, I conceive, merely meant taking the place of the father and therefore his share. This is what was said in 1 Rang 316[10] by May Oung J. and Robinson C. J. As it was put there, grand-children occupy the same position as their parents in respect of the inheritance. They do not inherit by virtue of nearness of kin exactly, nor do they inherit directly from the grand-parents. If they inherited directly from the grand-parents, they would presumably be in the same position and get the same share as the children of the younger children. All that can be said is that this share is the preferential share of the children of the orasa son who has an independent right which has been expressly given by Burmese Buddhist Customary Law, as was said in 11 Rang 158.[11] In that case the head-note says :

> Where an orasa dies during the lifetime of the parent, the child of the orasa does not acquire the interest of an orasa but acquires an independent right to a share in the estate of the grand-parent which is equal to that of the parent's brothers and sisters.

It is clear therefore in my opinion that the keittima adopted child if he has brothers and sisters can have an equal share with them in the preferential share of the children of the orasa son, and if, as in the present case, he is the sole child, he can obtain the whole of that preferential share.

D.S./R.K. *Answer accordingly.*

10. Po Thu Daw v. Po Than, (1924) 11 A I R Rang 73=83 I C 10=1 Rang 316 (F B).
11. U Sein v. Ma Bok, (1933) 20 A I R Rang 50 = 144 I C 306=11 Rang 158.

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ROBERTS C. J. AND MOSELY J.

The King

v.

Nga Shwe Hpi and another

Respondents.

Criminal Revn. Nos. 592-B and 593-B of 1938, Decided on 10th January 1939, for enhancement of sentences passed by Dist. Magistrate, Mandalay, D/- 3-11-1938.

Penal Code (1860), Ss. 298 and 295-A—To a charge under Section 298, fact that accused intended to wound religious feelings to draw attention to some matter in need of reform would not be defence—But it would be defence to charge under S. 295-A—Fact that accused wrote pamphlet in order to retort to one written by member of another religion is no defence to charge under Section 295-A.

It is no defence to proceedings under Sec. 298 that religious feelings were deliberately shocked or wounded by the defendant in order to draw attention to some matter in need of reform. Under Sec. 295-A, however, the prosecution must prove more than under Sec. 298, they must show insult for the sake of insulting and with an intention which springs from malice and malice alone. To a charge under this Section therefore it would be a defence to say: "I had no malicious intention towards a class, but I did intend to wound or shock the feelings of an individual so that attention might, however rudely, be called to the reform which I had in view." What is punishable under S. 295-A is not so much the matter of the discourse, written or spoken as the manner of it. If the words used caused person to feel insulted but were only such as might possibly wound and in fact did so, then there would be no offence under the Section; if the words used were bound to be regarded by any reasonable man as grossly offensive and provocative, and were maliciously intended to be regarded as such, then an offence would have been committed. It is no defence to a charge under Sec. 295-A for anyone merely to say that he was writing a pamphlet in reply to one written by an adherent of another religion who has attacked his own religion. If he chooses to write such a pamphlet, he must take care of the language which he employs. [P 200 C 1, 2 ; P 201 C 1]

U Tun Byu, Government-Advocate — *for the Crown.*

R. Clark and U Aung Thin — *for Respondents.*

Roberts C. J. — These are two connected applications in revision made on behalf of the Crown, and praying for enhancement of sentences passed upon U Shwe Hpi and U Sin. The respondents were each convicted on 3rd November last of an offence against Sec. 295-A, Penal Code, by the District Magistrate, Mandalay ; he took into consideration the fact that they had already been in custody for 13 weeks or more, ten weeks of which had been spent in Mandalay Jail, and ordered that they should each be imprisoned until the rising of the Court. The High Court in hearing this application applies the provisions of S. 439, Criminal P. C., and accordingly the respondents may not only show cause against enhancement of sentence, but are entitled (by virtue of sub-s. 6) to show cause against their convictions : we have heard Mr. Clark who represents them on this matter as well and he has urged upon us that their convictions ought not to be sustained. S. 295-A, Penal Code runs as follows :

Whoever with deliberate and malicious intention of outraging the religious feelings of any class of His Majesty's subjects, by words, either spoken or written, or by visible representations, insults or attempts to insult, the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

This Section first became law in 1927. Up to that time such conduct, if the words were spoken, fell within S. 298, which still forms part of the Penal Code and which runs as follows :

Whoever, with deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person, or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

The two Sections still stand together in the Code but the offence under S. 295-A is the more serious. "Outraging" is a stronger word than "wounding", and the intention to outrage must be malicious as well as deliberate, and must be directed to a class of persons and not merely to an individual. It is no defence to proceedings under S. 298 that religious feelings were deliberately shocked or wounded by the defendant in order to draw attention to some matter in need of reform ; because that is not the proper way to secure reforms. There is a constitutional way which the Courts will support, and an unconstitutional way which the Courts will condemn, of giving effect to every legitimate grievance which any one of His Majesty's subjects may entertain. Under Sec. 295-A, however, the prosecution must prove more than under S. 298 ; they must show insult for the sake of insulting and with an intention which springs from malice and malice alone. To a charge under this Section therefore, it would be a defence to say : "I had no malicious intention towards a class, but I did intend to wound or shock the feelings of an individual so that attention might, however rudely, be called to the reform which I had in view."

Now, in the state of the law before 1927, if the words complained of were not spoken but written as here, Sec. 298 could have no application, and generally prosecutions took place in respect of written words, and in some cases convictions ensued under S. 153-A. That Section runs :

Whoever by words, either spoken or written, or by signs, or by visible representations or otherwise, promotes or attempts to promote feelings of enmity or hatred between different classes of Her Majesty's subjects shall be punished with imprisonment which may extend to two years, or with fine, or with both.

The writings complained of, not seldom, represented an attempt to promote such feelings of hatred or enmity but it was necessary to prove that fact in order to establish that an offence had been committed. Accordingly, S. 295-A, was placed upon the statute book. What is punishable under S. 295-A is not so much the matter of the discourse, written or spoken, as the manner of it. We must therefore look with great care at the words used. If the words used caused persons to feel insulted but were only such as might possibly wound and in fact did so, then there would be no offence under the Section ; if the words used were bound to be regarded by any reasonable man as grossly offensive and provocative, and were maliciously intended to be regarded as such, then an offence would have been committed.

Now the facts here are that the respondent U Shwe Hpi caused a book to be printed in 1931 at the National Press in Mandalay. He distributed a thousand copies of it free of charge amongst the inhabitants of Mandalay, Shwebo, Katha, Namme, Wuntho, Kawlin and Kanbalu. It consisted of three parts. Part 1 was written by U Pan Nyo who has since died, and was a criticizm of or attack upon the Moslem religion. Part 2 was written by the respondent U Sin and Part 3 by the respondent U Shwe Phi, and these parts were in the nature of a refutation, or attempted refutation, of U Pan Nyo's arguments and a counter attack upon the Buddhist religion. It is quite clear that parts 2 and 3 were written by the respondents to deal expressly with what U Pan Nyo had written. This first part had been written first and was in circulation before the second and third parts were written. Nevertheless, the second and third parts were not published independently but the first part was incorporated with them and all three parts were published together. We have read all the relevant passages to which our attention has been directed both on behalf of the Crown and on behalf of the respondents in all three parts of this work. Some of the passages were unobjectionable, but other passages in each of the three works made use of most intemperate and provocative language. The trouble has been that the respondents were incensed by the manner and method of U Pan Nyo's controversy

and became resolved to retort with even less restraint. By doing so they brought themselves within the reach of the criminal law.

We do not propose to quote verbatim any of the passages complained of, since an extended publication of them through the medium of this Court or indeed through any other medium would be undesirable. It is enough to say that in Part 2 written by the respondent U Sin there is a reference to the manner of the death of the Lord Buddha which must be held to constitute the offence charged. We also agree that the portion which the District Magistrate marked in blue pencil on pp. 16 and 17 of the book falls within a similar category. With regard to U Shwe Phi, we also agree with the District Magistrate's conclusions and we consider that the parts which he has selected as constituting an offence against this Section, and those parts alone, do constitute an offence.

There can be no question of matter of this kind being published in the heat of the moment; all three books were the subject of deliberation by their authors and we agree with the District Magistrate that it is no defence to a charge under S. 295-A, I. P. C., for anyone merely to say that he was writing a pamphlet in reply to one written by an adherent of another religion who has attacked his own religion. If he chooses to write such a pamphlet, he must take care of the language which he employs. It is urged by the defence that the prosecution were quite unable to call a single witness to say that the publication and distribution of this book in 1931 caused any resentment or outraged the religious feelings of anyone, and that a man's intentions must be judged by the consequences of his acts. Neither of the respondents followed up the publication of this book, when they saw that it had aroused no serious adverse comment, by any further writings of a similar nature, and it is said that this shows they had no malicious intention to insult religious or to outrage religious feelings when they published the book of which complaint is made. In our opinion this is a wrong view to take of the matter. We think that if there had been a prosecution in 1931 after dissemination of the copies of this book, it must have been successful even in the absence of proof that any class of persons were actually insulted. The attempt to insult them would none the less have been proved from the language employed. In the course of the argument the learned Government Advocate said:

> These are very bad books. If their contents had been widely known, it would have outraged the feelings of the Buddhist community at any time,

and we must agree with that contention. Accordingly the conviction against each of the respondents must be affirmed. Perhaps the reason that no actual harm was occasioned in 1931 was that none of the three books were of any real importance, nor were they written by persons of learning or special influence. They attracted no attention beyond a limited circle of persons, happily tolerant, who treated them with the contempt which they deserved. In those circumstances, it is quite clear that no service whatever was done to the cause of any religion by reprinting and republishing books such as these. It was a great disservice to the community and it was a thousand pities that they were not allowed to remain in well deserved oblivion. Indeed, this republication, which took place comparatively recently, was just as much a calculated outrage upon the feelings of the Buddhist community and an insult to their religion and (consequently) an offence against the Penal Code as their original publication. It was the republication of the books and the attention drawn to their contents, apparently long since forgotten, which ensured that the ashes of religious controversy should be fanned into flame. With this reprinting and republication, it is important to observe, the respondents were in no way concerned. We are not told whether any prosecution for this offence was instituted, as it well might have been, against some person or persons not now before the Court, for we are satisfied that the republication was infinitely more harmful than what took place in 1931. And it is right, in considering what is the proper penalty to inflict upon the respondents, to bear this fact steadily in mind. Now, it is true that when the respondents saw that no serious notice was taken of their work after its distribution in 1931 and that there was nothing to show that any class of persons had been actually insulted, they made no further effort to persist in their attempted insults; and it is also true that at the time of the original publication they had been goaded or provoked into this unjustifiable manner of retorting by the intemperate expressions in the book to which they were seeking to reply. These two factors are both of considerable weight.

Even so, we consider that the sentence of imprisonment till the rising of the Court would still have been quite inadequate but for the fact that each of the respondents had already undergone ten weeks in prison awaiting trial and a further period in police custody. This circumstance was the governing factor in the Magistrate's decision, and we hold that he rightly took it into consideration, and we therefore reject the application for enhancement which has been made before us. The special circumstances of this case should afford no ground for any illusion that an offence against this Section is one which is likely to receive lenient treatment, by whomsoever, and against whatsoever religion or class of the community it is committed.

Mosely J.—I agree.

D.S./R.K. *Order accordingly.*

*** A. I. R. 1939 Rangoon 202**

BA U J.

Maung Saw Maung — Applicant.

v.

Ma Me Shwe — Opposite Party.

Criminal Revision No. 266.B of 1938, Decided on 26th August 1938.

*** Criminal P. C. (1898), S. 197 — Right of prosecution — Public servant— Receiver — To prosecute receiver for criminal offence, sanction of Court which appointed him is not necessary.**

The right to prosecute any person or body of persons, by whom one may have been injured, is a common right which can only be limited by special legislation; and in considering whether the right has been taken away it must be seen that it is taken away by express words or by necessary implication : *3 Cal 758, Rel. on.* [P 203 C 1]

A receiver appointed by a Civil Court is not a public servant within the meaning of S. 197 and so no sanction of the Court which appointed him is necessary for his prosecution for a breach of the ordinary criminal law of the country : *15 I C 491 ; A I R 1928 Bom 493 and A I R 1934 Bom 306, Foll. ; A I R 1928 Rang 175, Disting.; A I R 1919 Cal 647, Dissent.* [P 203 C 1, 2]

Kya Gaing — *for Applicant.*

Respondent in person.

Order.—This is a reference made by the District Magistrate of Myaungmya under the following circumstances : In Civil Regular No. 125 of 1937 of the Township Court of Wakema, Maung Soon Hwat sued Saya Kyai for recovery of a certain sum of money alleged to be due on the mortgage of a piece of paddy land. On the same date on which he filed the suit, he applied for the appointment of a receiver to take charge of the mortgage property. Saw Maung, Headman of Wegyi, was appointed interim receiver. Two days after his appointment he went with some villagers to take charge of the mortgaged property. The property was at the time in the possession of Ma Me Shwe, daughter-in-law of the defendant Saya Kyai. In spite of her protest Saw Maung took possession of the land and its produce. In consequence thereof she filed a complaint in the Court of the Sub-divisional Magistrate of Wakema, charging Saw Maung and his companions with having committed an offence punishable under Ss. 392/114, Penal Code. The Magistrate accepted the complaint and after an examination of the complainant and her witnesses he charged Saw Maung under S. 506 (1) and his companions under Ss. 506 (1)/109, Penal Code. Saw Maung therefore applied to the District Magistrate to move this Court to quash the proceedings on the ground that a receiver cannot be prosecuted criminally for acts or omissions made by him in his capacity as receiver without the sanction of the Court which appointed him. This submission was accepted by the learned District Magistrate and in so doing he relied on 6 Rang 268[1] and 46 Cal 432.[2] The first case does not apply. What it lays down is that

> a receiver cannot either sue or be sued without the permission of the Court which appointed him and that if a Court entertains a suit or appeal arising out of such suit without such leave, it acts without jurisdiction.

It thus deals with the jurisdiction of Civil Courts only and not with the jurisdiction of Criminal Courts. The second case does however in a way support the view of the learned District Magistrate. What it lays down is that

> a receiver appointed by the High Court, who has, under its order, taken possession of property cannot be prosecuted for criminal breach of trust in respect of the same without first obtaining the leave of the Court.

This view has however been dissented from by the High Court of Bombay in two cases, namely 52 Bom 898[3] and A I R 1934 Bom 306.[4] In the first case, Patkar J., with the concurrence of Baker J., said :

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1. U Ohn Maung v. Ebrahim, (1928) 15 A I R Rang 175=110 I C 622=6 Rang 268.
2. Santok Chand v. Sugan Chand, (1919) 6 A I R Cal 647=46 I C 836=29 Cr L J 820=46 Cal 432=28 C L J 115=22 C W N 910.
3. Khimchand N. Bhavsar v. Devkaran Mulji, (1928) 15 A I R Bom 493= 115 I C 387 = 30 Cr L J 465=52 Bom 898=30 Bom L R 1273.
4. Lukmanji Kamruddin v. Valibhai, (1934) 21 A I R Bom 306=1934 Cr C 1038=151 I C 707 =35 Cr L J 1403=36 Bom L R 649.

With regard to criminal prosecution the matter stands on a different footing. Part 6, Chap. 15, Cl. B, Criminal P. C., lays down the conditions requisite for institution of proceedings. Ss. 195, 196, 196-A, 196-B, 197, 198, 199 and 199-A lay down the provisions as to when the Court shall take cognizance of the offences specified in those Sections. There is no provision in the Criminal Procedure Code requiring the leave of the Court to prosecute a receiver before taking criminal proceedings against him. It may be desirable to bring to the notice of the Court, which appointed the receiver, the offence committed by the receiver in execution of the orders of the Court and obtain the leave of the Court before prosecution. But we think that we shall be trespassing on the function of the Legislature if we were to hold that the leave of the Civil Court is a condition precedent to the Magistrate's taking cognizance of a complaint against the receiver appointed by the Court. A criminal offence by a receiver would be clearly in respect of an act committed in excess of the authority of the receiver appointed by a Civil Court, and the reason of the rule requiring leave of the Court before suing the receiver would not apply to a criminal prosecution against the receiver for violation of the criminal law.

In the second case, Murphy J. said with the concurrence of Divatia J. that

a receiver is not one of the public servants mentioned in S. 197, Criminal P. C., and that therefore no sanction is necessary for his prosecution.

Even Fletcher J. of the Calcutta High Court took a view similar to the view taken by the Bombay High Court in 13 Cr L J 491[5] where the learned Judge said that

no sanction is necessary to proceed against a receiver appointed by the Court for a breach of the ordinary criminal law of the country.

In my opinion, the Bombay High Court and Fletcher J. have laid down the law correctly,

The right to prosecute any person, or body of persons, by whom one may have been injured is a common right which can only be limited by special legislation; and in considering whether the right has been taken away, we must see that it is taken away by express words, or by necessary implication : Per Ainslie J. in 3 Cal 758.[6]

The only check placed on such a right by the Legislature is to be found in Ss. 195, 196-A (in a limited manner) and S. 197, Criminal P. C. Of these Sections, S. 197 is the one that is applicable. Even in the case of this Section, unless the person concerned is a Judge, Magistrate or public servant not removable from office save by or with the sanction of the Government and unless the act complained of has been committed by the accused while acting or purporting to act in the discharge of his official duty, he is liable to prosecution. A receiver is not a public servant within the meaning of S. 197, Criminal P. C., and so no sanction of the Court which appointed him is necessary for his prosecution for a breach of the ordinary criminal law of the country. With these remarks the proceedings may be returned.

N.S./R.K *Proceedings returned.*

5. Nagendra Nath v. Jogendra Nath, (1912) 13 Cr L J 491=15 I C 491.
6. Empress v. Municipal Corporation of the Town of Calcutta, (1877) 3 Cal 758=2 C L R 520.

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* A. I. R. 1939 Rangoon 203

ROBERTS C. J. AND MOSELY J.

Taw Chew Kean and others —

Appellants.

v.

Taw Kock Tyon and others —

Respondents.

First Appeal No. 84 of 1938, Decided on 10th January 1939, against decree of Sharp J., in C. R. S. No. 204 of 1937, D/- 21st June 1938.

*** Civil P. C. (1908), S. 92—Nature of trust explained—Gift for charitable purposes should be construed as one for public purposes unless contrary intention is clearly expressed — In creating charitable trust settlor directing preference to be given to relations—Trust is still deemed to be for public purposes.**

Where the words used in a trust are "charitable and benevolent" purposes any object to be benefited must possess both characteristics. Accordingly these words will constitute a good charitable trust, that is to say a charitable trust of a public character. But where the words are "public, benevolent or charitable purposes" the gift is expressed in another form admitting non-charitable objects, for example objects of private benevolence only, or public non-charitable purposes and the trust will fail. A bequest to charitable purposes may by its very terms show that those purposes are of a private nature. In such a case the bequest would not fall under S. 92. Where a gift is to purposes which are charitable, whatever else they may be in addition, then unless the charitable purposes expressed are clearly stated to be of a private nature, the Courts will administer the trust as one for public purposes of the charitable nature.

[P 204 C 2 ; P 205 C 1]

Where a testator's intention is to benefit only the members of his own family who are poor, this is not "a public purpose of a charitable nature" within the meaning of S. 92. But, where charity, prima facie for public purposes, is the expressed object of the settlor, these purposes are not in any way defeated by the reminder that members of his own family are eligible to benefit with other members of the public at large : *English case law relied on.* [P 205 C 1, 2]

Hay and U Tha Kin — *for Appellants.*

Krishnaswamy — *for Respondents.*

Roberts C. J.—This is an appeal from a judgment of Sharpe J., dismissing a suit brought by the appellants under Sec. 92, Civil P. C., on the ground that it was not maintainable. The learned Judge held that the trust was not "created for public pur-

poses of a charitable or religious nature" within the meaning of S. 92. The deed of trust is dated 7th May 1908, and after various provisions for the maintenance and education of certain relatives of the transferor recites

> and the balance in and upon such charitable or religious and pious purposes as the said transferor shall during his lifetime direct and after his death as to the trustees shall for the time being seem fit and proper at their absolute discretion, it being understood that charitable purposes shall include the providing of sustenance or support to such members of the family of the said transferor as may be in indigent or straitened circumstances.

The learned Judge having examined the connotation of the word 'pious' arrived at the conclusion that the trust fund in the present case must necessarily be used for purposes which were either charitable or religious, but he considered that these purposes were not necessarily public purposes, and that therefore the trust fund was not one which came within the scope of S. 92. In particular he observed that the whole fund might be expended upon the needy members of the settlor's own family in which case, he said, it would certainly not be devoted to public purposes. Apart from that the trustees might, he thought, devote the money at their disposal to charitable purposes which were not public, according to the terms of the trust; or to religious and pious purpose of a private nature, such as the erection of a private place of worship to which none might be admitted save certain specified individuals. Now it is quite true that if the trustees were given a discretion to utilise the trust funds for purposes which were charitable but not public, or religious but not public, S. 92 would not be applicable, and the suit which was brought by the appellant would not be maintainable. This conclusion would be arrived at, in my view from a consideration of the words of the Section itself.

In (1893) 2 Ch 41[1] Lindlay L. J. pointed out that prima facie, at any rate, a bequest for a "religious" purpose was a bequest for a "charitable" purpose and that the law applicable to charitable bequests as distinguished from the law applicable to ordinary bequests ought to be applied to a bequest to a religious institution or for a religious purpose. In other words, once a gift is shown to be for religious purposes it must be treated as a gift for charitable purposes unless the contrary be shown. If it is "for religious and pious purposes" the same is surely true, such a bequest being for purposes which are not only religious but also pious. In a case in which a testator directed that "in case there is any money remaining, I should wish it to be given in private charity" it was held that there was no instance in which a private charity had been made the subject of disposal in the Crown or been acted upon by the Court for the charities recognized by the Courts were public in their nature and capable of execution by the Court: (1823) Turn & Russ 260.[2] Upon this ground are excluded all such bequests or settlements as are enjoined to be for purposes which are benevolent or philanthropic merely; or trusts which may be charitable but need not be so. Thus in (1902) A C 37,[3] the direction "such charitable or public purposes as my trustees may think proper" was void for uncertainty. Lord Davey was careful to point out on page 44:

> If therefore the words in the present case were merely 'charitable purposes' or were 'charitable and public purposes' I think effect might be given to them.

Where the words used are "charitable and benevolent" purposes any object to be benefited must possess both characteristics: (1904) 2 Ch 354.[4] Accordingly, these words will constitute a good charitable trust, that is to say a charitable trust of a public character. But, where the words used are "public, benevolent or charitable purposes", the gift is expressed in another form admitting non-charitable objects, for example objects of private benevolence only, or public non-charitable purposes and the trust will fail: (1918) A C 337.[5] But it is clear that where a gift is to purposes which are charitable whatever else they may be in addition, then unless the charitable purposes expressed are clearly stated to be of a private nature, the Courts will administer the trust as one for public purposes of a charitable nature. In (1823) Turn & Russ 265*n*,[6] the testatrix in a codicil said "If there is any money left unemployed I desire it

1. White v. White, (1893) 2 Ch 41=62 L J Ch 342=2 R 380=68 L T 187=41 W R 683.
2. Ommanney v. Butcher, (1823) Turn & Russ 260=24 R R 42=37 E R 1098.
3. Blair v. Duncan, (1902) A C 37=71 L J P C 22=86 L T 157=50 W R 369=18 T L R 194.
4. In re Best; Jarvis v. Birmingham Corporation, (1904) 2 Ch 354=73 L J Ch 808=53 W R 21.
5. Houston v. Burns, (1918) A C 337=87 L J P C 99=118 L T 462=34 T L R 219.
6. Legge v. Asgill, (1823) Turn & Russ 265*n*=24 R R 51.

may be given in charity." It was held that the general residue of her estate, including a sum in which she had a vested reversionary interest at the time of her death, passed under these words to charity and was rightly claimed by the Attorney-General in the absence of trustees. Now, it was pointed out in 14 Rang 575[7] by Braund J. that a trust, the income of which is to be applied in perpetuity for the benefit of poor relations or poor descendants of a testator or settlor, is charitable in English law; this is in conformity with the decisions in another case in (1802) 7 Ves Jun 423[8] and other cases cited by the learned Judge. But he held, and if I may say so with respect, it seems to me rightly, that where a testator's intention is to benefit only the members of his own family who are poor, this is not "a public purpose of a charitable nature" within the meaning of S. 92 of the Code. We have been referred to the case in (1809) 16 Ves Jun 206[9] which shows that where the object of a charity is general but there is a preference to poor relations, which is not confined to them, the bequest is valid as a charitable trust. The case follows the decisions which I have just mentioned and is therefore by itself of little assistance in concluding the present appeal. But it does seem to show that the mere eligibility or preference of a certain class of beneficiaries will not by itself, turn a trust of a public charitable nature into one of a merely private charitable kind. A bequest to charitable purposes may by its very terms show that those purposes are of a private nature: in such a case though the bequest may be good in England it would not fall under S. 92, Civil P. C. But, where nothing is said as to the charitable purposes being private or public, they are presumed to be of a public nature. In other words, if the direction be similar to that in (1823) Turn & Russ 265*n*[6] the case here would fall under S. 92.

It is therefore necessary to consider whether there is anything in the present case to make it possible for the trustees (in the words of the learned Judge) to devote the money at their disposal to charitable and pious purposes which are not public. I cannot see that there is. If the directions to the trustees had run "in and upon such charitable purposes as to the trustees shall for the time being seem fit and proper at their absolute discretion" I do not see how it could possibly be contended that the trust was otherwise than a charitable trust for a public purpose; but it is urged that the directions comprised in the next words make it possible for the trustees to administer the trust fund as if it were a private charity merely. Now, these directions do not say even that the trustees shall include in the disposal of the moneys the indigent members of the transferor's family; what they say is "it being understood that charitable purposes shall include" provision for them. In my judgment, that means they are eligible to receive some or all of the balance in the hands of the trustees and not that they shall be necessarily selected to do so. They would be eligible in any event if they were in indigent or straitened circumstances not as members of the transferor's family but as members of the general public. It is only a direction that (though they are not expressed to have even a priority) their claims are not to be shut out of consideration. It may be that the words were inserted *ex abundanti cautela* lest it should be thought they were ineligible because related to the transferor. Where charity prima facie for public purposes is the expressed object of the settlor, these purposes seem to me in no way defeated by the reminder that members of his own family are eligible to benefit with other members of the public at large. If the trustees in their direction were to dispose of the funds in their possession in such a way as continuously to defeat the public purposes of the trust, they might, I think, be restrained from so doing; but they are not to be debarred at any time for considering the claims of all persons who may be indigent and in straitened circumstances whether they belong to the settlor's family or no: and in a particular distribution I do not say that members of the family might not prove to have the best claim to the exclusion of other members of the public of whom they form part. All that is necessary in the present appeal is to decide whether the objects of the transferor were "public purposes of a charitable or religious nature." I should hold that they were. I agree that from the wording used, specious argument might appear to justify a distribution amongst members of the transferor's family alone from which the rest of the general public were excluded.

7. Attia v. Madha, (1936) 14 Rang 575.
8. White v. White, (1802) 7 Ves Jun 423=32 E R 171.
9. Waldo v. Caley, (1809) 16 Ves Jun 206=33 E R 962.

But that, I think, is not the meaning of the direction. The provision of sustenance or support to such members of the family of the transferor as may be in indigent or straitened circumstances is merely understood to be included in the charitable purposes of a public nature for which the trust is formed. And accordingly I have reached the conclusion that this appeal ought to be allowed. The remaining issues should therefore now be framed and the suit proceed to trial. The appellants are entitled to their costs on this preliminary issue here and in the Court below; advocate's fees in this Court seven gold mohurs.

Mosely J.—I agree.

N.S./R.K. *Appeal allowed.*

A. I. R. 1939 Rangoon 206

MYA BU AND MOSELY JJ.

Shira Khatoon — Appellant.

v.

Maung Pan — Respondent.

Special Second Appeal No. 182 of 1938, Decided on 20th January 1939.

Transfer of Property Act (1882), S. 53-A — Document evidencing receipt of advance against sale reciting that balance should be paid within certain time—Document held could not be construed as agreement under S. 53-A.

Document contemplated by S. 53-A need not be a formal agreement or contract, nor need it purport to be in its entirety an agreement, but part of the document at least must be in essence an agreement or contract. It is not sufficient to say that the terms of an agreement can be ascertained from a document which purports to be on the face of it merely a receipt. [P 207 C 2]

Where therefore a document recited that a certain sum of money was received as an advance against the sale of a piece of land for a certain sum and the balance to be paid within a certain period:

Held that by merely mentioning the period within which the balance of the purchase money was to be paid, the document could not be construed as an agreement much less in essence an agreement of the kind contemplated by S. 53-A: *A I R 1934 Rang 304 and A I R 1938 Rang 356, Expl.* [P 206 C 2; P 207 C 2]

C. A. Soorma — *for Appellant.*

K. C. Bose and R. M. Sen—*for Respdt.*

Mosely J.—This appeal has been referred to a Bench for hearing. The plaintiff bought certain land from Mohammad Hussein by a registered deed. Before that the defendant purported to have entered into an agreement to buy the said land and to have paid part of the purchase price for which he obtained a receipt. The defence was on the ground of part performance—S. 53-A, T. P. Act. The receipt was on an unstamped piece of paper and reads as follows:

Received from Maung Pan the sum of Rs. (100) one hundred only being advance against sale of a piece of paddy land at Ngante for Rs. 400 balance to be paid within 15 days.

The trial Court held that this receipt did not come within the four corners of S. 53-A and decreed the suit. In appeal the learned Additional District Judge said that the provision in the document that the balance should be paid within 15 days turned it into an agreement, and that the references to part payments, the purchase price and the description of the land sold were the terms necessary to constitute the transfer. He therefore reversed the judgment of the lower Court and directed the suit be dismissed. S. 53-A, T. P. Act, reads:

Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part-performance of the contract, taken possession of the property or any part thereof, or the transferee being already in possession, continues in possession in part-performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that the contract though required to be registered, has not been registered or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession other than a right expressly provided by the terms of the contract.

Provided that nothing in this Section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

I do not think that the mere mention of the date within which the balance of the purchase money is to be paid is sufficient in itself to turn the receipt into an agreement of the kind contemplated by S. 53-A. The clause in question is not expressed as a condition, and may be a mere memorandum of the date fixed for payment of the balance of the purchase money. It is common of course to get such clauses in memoranda attached to any receipt, for example, a receipt for part payment of goods purchased may recite "received so much, the balance to be paid within such and such a time." A somewhat similar case was considered in 13 Rang 17.[1] In that case however the document which was written in a book recited that the transferor

1. Ma Thet v. Ma Se Mai, (1934) 21 A I R Rang 304=154 I C 13=13 Rang 17.

sold it (the land) outright to Ma Se Mai by asking from her the sum of Rs. 150 and Ma Se Mai having agreed to buy the land for that sum paid the earnest money for which Ma Thet (the vendor) signs this receipt.

In that case it was held that the essential terms of the contract for sale were mentioned in the document, and were sufficient to form the basis of a suit for specific performance of a contract. It was found that the document was an agreement or a contract to transfer immovable property by writing signed, and that there the terms necessary to constitute the transfer could be ascertained with reasonable certainty from the document. It was remarked that as an agreement for sale the document was insufficiently stamped with a one anna stamp. In the present case, of course, the document does not contain any mention of an agreement for sale. Another case is I L R (1938) Rang 692[2] reproduced in the judgment in the Letters Patent Appeal against it. In that case, Mya Bu Off. C. J. dealt with a similar case where a receipt was given. This receipt was in very detailed terms and not merely admitted part receipt of the consideration but recited "as it has already been agreed to sell the house and land to Ko Maung Ohn, the house and land are sold for Rs. 350." In that case it was held that unless the document in question could be held to be an agreement or a contract of sale it would not by the mere fact that from it the terms necessary to constitute the transfer could be ascertained with reasonable certainty be sufficient to satisfy the requirements of the Section, as what the Section required was not the document from which the terms necessary to constitute the transfer could be ascertained with reasonable certainty, but a contract or an agreement in writing from which such terms could be ascertained. The Bench which heard the Letters Patent Appeal from this decision evidently approved of that statement of the law. In the judgment of the learned Chief Justice it was said :

It has been urged upon us that the mere production of a writing from which can be ascertained matters referring to a pre-existing oral contract is sufficient to come within the protection of the Section; but, in my opinion, the Section clearly contemplates that the contract itself shall be in writing and not that there shall be a writing referring to some part or parts of a contract which may previously have been oral.

By the concluding words what the learned Chief Justice was conveying was obviously that the contract should be in writing and that it is not enough that there should be a writing which was not in itself an agreement, referring to some part or parts of the contract which may previously have been oral. This will be clear also from the concluding words of Dunkley J.'s judgment. In my opinion, the document need not be a formal agreement or contract, nor need it purport to be in its entirety an agreement, but part of the document at least must be in essence an agreement or contract. A document may often start as an agreement and then recite the receipt of money. Conversely, a document may start as a receipt and then recite the terms of the agreement in pursuance of which the money has been paid and be also in essence an agreement. It is not sufficient to say that the terms of an agreement can be ascertained from a document which purports to be on the face of it merely a receipt. It is true that the essential terms of the agreement are all, or nearly all, mentioned in the receipt in this case, Ex. 1. I say "nearly all" because the receipt does not contain anything referring to a very common feature in these transactions, namely forfeit of advance or penalty for non-performance. But in my opinion it is clear that the document could not ever be construed as an agreement, much less that it is in essence an agreement. For these reasons I consider that the judgment of the District Court must be reversed and the judgment of the trial Court restored with costs throughout.

Mya Bu J. — I concur in the judgment of my learned brother as to the principle of law enunciated in the Letters Patent Appeal, ILR (1938) Rang 692.[2] The learned Additional District Judge gave his judgment before the decision in the Letters Patent Appeal was published and therefore did not have the guidance of that judgment in his decision in first appeal. I agree that the appeal must be allowed and the judgment and decree of the Township Court restored with costs throughout.

N.S./R.K. *Appeal allowed.*

2. Maung Ohn v. Maung Po Kwe, (1938) 25 AIR Rang 356=177 I C 977=1938 R L R 692.

A. I. R. 1939 Rangoon 207

SPARGO J.

Maung Pahtan — Applicant.

v.

Ma San — Respondent.

Criminal Revn. No. 624-B of 1938, Decided on 17th January 1939.

Criminal P. C. (1898), S. 488 — Buddhist woman married by Mahomedan is 'wife' for purposes of Sec. 488.

A Buddhist woman married by a Mahomedan is a "wife" for purposes of S. 488, although the marriage is not strictly valid according to Mahomedan law. It is in accordance with justice, equity and good conscience that she should be regarded so. Even in the eye of the Mahomedan law she appears to be so regarded : *(1897-01) 2 U B R 497 and 21 Cal 666, Disting.* [P 208 C 2]

Kyaw Thaung — *for Applicant.*

Shu Maung — *for Respondent.*

Order.—This is an application for revision of an order passed by the learned Subdivisional Magistrate, Yamethin, directing Maung Pahtan who is a Mahomedan to pay to Ma San who claims to be Maung Pahtan's wife maintenance at the rate of Rs. 12 per mensem. It is urged that there could be no valid marriage between the present petitioner Maung Pahtan and Ma San on the ground that the former is a Mahomedan and the latter is a Buddhist. As to this Mr. Kyaw Thaung for the present applicant Maung Pahtan argued that the presumption was that Ma San was a Mahomedan. He said that this presumption followed from the fact that there was a marriage between Maung Pahtan and Ma San at which a Mahomedan priest officiated. I do not think that this is so at all and Ma San has certainly never said that she became a Mahomedan. When she was examined in Court she said that she was a Buddhist. Mr. Kyaw Thaung suggested that that was only in the particulars at the head of her deposition and since these are given mechanically no attention need be paid to what appears there. I am bound to assume however that if the form makes it appear that Ma San said that she was a Buddhist, she did say so and knew what she was saying and meant what she was saying.

Reference was made to (1897-01) 2 UBR 497[1] to show that no marriage took place between these persons. That case refers to 21 Cal 666[2] and quotes that case as authority for the proposition that there is a personal disability attaching to Mahomedans in respect of marriage with Buddhists. In respect of these two cases, it is necessary to point out that (1897-01) 2 U B R 497[1] above cited differs from the present case because that concerns the marriage of a Mahomedan woman to a Buddhist man. In the case now being decided we have the marriage of a Mahomedan man to a Burmese Buddhist woman. Further, it is to be noted that both (1897-01) 2 U B R 497[1] and 21 Cal 666,[2] which are referred to in it are concerned with questions of legitimacy from the point of view of Mahomedan law. What clearly falls, in this case, for determination is whether this woman is a wife for purposes of the Code of Criminal Procedure. In S. 200 of the Principles of Mahomedan Law written by Sir Dinshah Mulla it is laid down that a Mahomedan male may contract a valid marriage not only with a Mahomedan but also with kitabia that is a Jewess or Christian but not with an idolatress or a fire-worshipper. A marriage however with an idolatress is not void but merely irregular. In Sec. 204-A the distinction between void and irregular marriages is described. An irregular marriage is one which is not unlawful in itself but "for something else." In the case of a marriage prohibited by reason of difference of religion the objection may be removed by the wife becoming a convert. Apparently, therefore, the full force of the marriage is held in abeyance until some such thing as that happens. But it is to be noted that under S. 206, if consummation has taken place the issue of the marriage is legitimate.

It is clear therefore in the eyes of Mahomedan law, something has taken place which has changed the status of the woman; at any rate to this extent that if she has children by the man they are legitimate. The question is then, is she a wife for purposes of the Code of Criminal Procedure ? I think that the conclusion that she must be so regarded is unavoidable. Even in the eye of the Mahomedan law, she appears to be so regarded and in my view it is in accordance with justice, equity and good conscience that she should be so regarded. There appears to have been every effort made by the present applicant to make her his wife and as I have said if she had any children by him, they would be legitimate. I therefore see no reason to interfere with the order that was passed and the application is therefore dismissed. The Court below ordered Maung Pahtan to pay to Ma San costs in that Court and that order remains undisturbed and Maung Pahtan must also pay the costs in this Court two gold mohurs.

R.M./R.K. *Application dismissed.*

1. Ma Le v. Maung Kye, (1897-01) 2 U B R 497.
2. Abdul Razak v. Aga Mohamed Jaffer, (1894) 21 Cal 666=21 I A 56=6 Sar 389 (P C).

A. I. R. 1939 Rangoon 209

SPARGO J.

Nga Ohn Saing — Appellant.

v.

The King.

Criminal Appeal No. 57 of 1939, Decided on 7th February 1939, from order of 7th Addl. Magistrate, Rangoon, D/- 6th January 1939.

Penal Code (1860), S. 338—Failure by motorist to sound horn is not necessarily negligence and sounding of horn does not negative rashness or negligence — Each case must be determined on its own facts—Mere fact that motorist strikes pedestrian walking on road does not give rise to presumption that accident was caused by his carelessness.

Failure by a person, driving a motor vehicle, to sound the horn is not necessarily negligence, and to sound a horn does not necessarily negative rashness or negligence in driving. Each case must be decided on its own facts. The mere fact that a motorist strikes a pedestrian walking on the road does not give rise to a presumption that the accident was caused by his carelessness. Such a presumption is ill founded as a great many such occurrences are due to accidents. If the car was being driven at an excessive speed, that in itself would be evidence to show that there was negligence. A speed of about 20 to 25 miles an hour cannot however be said to argue ipso facto that there was negligence. [P 209 C 2 ; P 210 C 1]

Judgment. — The appellant Nga Ohn Saing has been convicted of the offence of causing grievous hurt by doing an act so rashly or negligently as to endanger human life or the personal safety of others. It was said that he drove a motor car up Godwin Road from the direction of Strand Road and knocked down an old Burmese woman at the junction of Godwin Road and Dalhousie Street. Unfortunately, the victim of the accident died in hospital some time later. She was very old and it is probable that she was unable to recover from injuries from which an ordinary person would have been able to recover. The appellant's plea was that he did not think that it was his car which knocked down the old woman as another car was following his. I do not think that there is any reason to believe this as nobody else in the case mentions this other car and somebody would certainly have seen it had it been there. But the evidence in the case has been recorded in the barest outline. The learned Magistrate appears to have thought that if a motorist strikes a pedestrian that argues that he has been negligent and that there is no need to prove that there is anything more, especially if he has not sounded his horn.

The rule in respect of horns is No. 27 of the General Rules published in Part A of the Rules framed for the purpose of carrying into effect the provisions of the Motor Vehicles Act, 1914, and it states that

> every motor vehicle shall be equipped with a horn . . . capable of giving audible and sufficient warning of the approach of the vehicle and available for immediate use.

Failure to sound the horn is not necessarily negligence and to sound a horn does not necessarily negative rashness or negligence in driving. Each case must be decided on its own facts. In the present case the evidence, as recorded, leaves it completely undeterminable whether the affair was a pure accident or not. It may be, from all one can tell, from the evidence that the old woman crossed the road without noticing that a car was coming and when she became aware of it dodged about in front of it and so was run into. Accidents happen in that way very frequently. In fact the majority of accidents, I imagine, take place in a way something like this. Of course, if the car was being driven at an excessive speed, that in itself would be evidence to show that there was negligence. But in this case the only estimate of the speed of the car was given by Kyin Kyaing (P. W. 4) a Chinese half caste, who said that the car was being driven at about 20/25 miles an hour. Such a speed as that cannot be said to argue ipso facto that there was negligence. It is true that the appellant drove his car away immediately after the accident had happened but that might be due to fright and he may have been upset at having knocked down the old woman and he has been punished for that offence separately. Ardan in his evidence gives very few details of the accident; there is nothing from which one can say that negligence is proved. Ma Shwe Hone who was with the old woman when she went out did not see how the accident happened but only turned round and looked and then saw the old woman being knocked down by a car. Maung Myaing gives no details except that he says:

> I saw one car coming up from the Strand Road dashed against one woman on the left side of Godwin Road.

The learned Magistrate remarked in his judgment:

> The road was clear from all other traffic at that time as stated by Ardan and there was no reason why the accused's car should have knocked down the old woman had he been careful and cautious in driving.

The argument appears to be therefore that if a motorist strikes a person walking on the road the presumption is that the accident was caused by the motorist's carelessness. As I have pointed out above, this presumption is ill founded as a great many such occurrences are due to accidents. I therefore set aside the conviction and order that the appellant be acquitted.

R.M./R.K. *Conviction set aside.*

A. I. R. 1939 Rangoon 210

BA U J.

Maung Paik—Applicant.

v.

Ma Ohn Sint — Opposite Party.

Criminal Revn. No. 515-B of 1938, Decided on 7th February 1939, for review of order of First Addl. Magistrate (1), Pagan, D/- 26th July 1938.

Criminal P. C. (1898), S. 488 (3) Proviso — Burmese Buddhist having two wives—One wife refusing to live along with other is justified in doing so and is entitled to claim maintenance.

Two wives of a Burmese Buddhist can never live amicably in the same house. If therefore one of them living separately, refuses to come and live with her husband along with the other wife, she is justified in doing so and is entitled to claim maintenance : *(1904) 1 U B R Cr 10, Disting.*

[P 210 C 2]

U Yan Aung — *for Applicant.*

Order.—The parties are Burmese Buddhists. They became man and wife several years ago. There is one child of the marriage. The child is about six years of age. Over two years ago they separated from each other and since then the applicant has not been supporting the respondent and her child. She therefore sued in the Court of the First Additional Magistrate, Pagan, for a maintenance allowance for herself and her child. The substantial defence raised by the applicant Maung Paik was that the respondent had refused to live with him and that he had never refused or neglected to maintain his wife and child. This point was not considered by the trial Magistrate. On that ground it is now submitted that the order of the Magistrate is not sustainable. It is further submitted that the First Additional Magistrate, Pagan, had no jurisdiction to try this case inasmuch as the applicant had been living outside the jurisdiction of the trial Magistrate. Dealing with the second point, I may say that it was never pleaded in the trial Court. Though the applicant might not have been living during the last two years within the Pagan Township, yet, if it is proved that he did last reside together with the respondent within the Pagan Township, the Pagan Court had undoubted jurisdiction to try this case. In any event Sec. 531, Criminal P. C., cures the irregularity, if there be any, unless the applicant can show that he has been prejudiced thereby. He has not been able to do it. As regards the other point, the learned counsel for the applicant relies on the case in (1904) 1 U B R Cr 10.[1] I have read the case and the facts, I regret to say, have not been very clearly set out. They do not show whether the respondent Ma Chit was asked by the applicant Maung Waing to live in the same house with his chief wife or in a separate house at Myittha. In these circumstances that case cannot be taken as a guide for the purpose of deciding the present case. What the Proviso to sub-s. 3 of S. 488, Criminal P. C., states is that:

> If such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this Section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Speaking as a Burman I have never come across a case where two wives of a Burmese Buddhist do live or can live amicably in the same house. Furthermore, in the present case what is most significant is that not a single question was put to the respondent as to whether she was ever asked by the applicant to come and live in his house. It is true that he brought forward some witnesses to show that he did ask the respondent to come and live in his house but their evidence does not show how and where the respondent would be kept if she agreed to go and live with the applicant in his village. Therefore I am of opinion that even if the respondent was asked to live with the applicant and even if she did refuse she was perfectly justified in doing so. For all these reasons I dismiss the application.

N.S./R.K. *Application dismissed.*

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1. Maung Waing v. Ma Chit, (1904) 1 U B R Cr 10=1 Cr L J 545=10 Bur L R 319.

*** A. I. R. 1939 Rangoon 211**

MYA BU AND MACKNEY JJ.

Ma Thein Shin and another —
Appellants.

v.

Ma Ngwe Nu and another —
Respondents.

Special Second Appeal No. 27 of 1938, Decided on 9th December 1938.

*** Transfer of Property Act (1882), Sec. 3— "Attested" — Signatures of Registrar and witnesses on endorsement relating to admission of execution and identification are not sufficient attestation.**

It is the instrument that an attesting witness has to sign in order to comply with the terms of the definition of the word "attested." When the Registrar, (or Sub-Registrar) appends his signature to the endorsements or to the particular endorsement relating to the admission of execution and when the witnesses append their signatures to the endorsement as to the identification, it cannot be said by any stretch of imagination that they are signing the instrument. Therefore the signatures of the Registrar and of the witnesses identifying the executant at registration, made in the manner required by Secs. 58 and 59, Registration Act, are not sufficient attestation of the deed for the purpose of the Transfer of Property Act, even if they signed the deed in the presence of the executant after receiving acknowledgment from him of his signature or mark thereon : *Case law referred.*
[P 212 C 2]

U Aye — *for Appellants.*

U Zeya — *for Respondents.*

Mya Bu J. — The question referred for the decision of this Bench is :

Whether the signatures of the Registrar and of the witnesses identifying the executant at registration are sufficient attestation of the deed for the purpose of the Transfer of Property Act, if they signed the deed in the presence of the executant after receiving acknowledgment from him of his signature or mark thereon.

"Attestation" is defined in Sec. 3, T. P. Act, as follows :

"Attested," in relation to an instrument means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary.

The signatures of the Registrar are, under Sec. 59, appended to certain endorsements which are required to be made under Ss. 52 (1) (a) and 58 (1), Registration Act. Among such endorsements there is one relating to the admission by the executant of the document and one relating to the identification by some witness or witnesses of the executant or his representative or agent as the case may be. The endorsement relating to the admission of execution is signed by the executant or his representative or agent and that relating to the identification is signed by the witness or witnesses identifying the executant or his representative or agent. The question before us therefore resolves itself into whether the signature of the Registrar (or the Sub-Registrar) and the signature or signatures of the witness or witnesses identifying the executant at the registration of a document made in the manner required by Ss. 58 and 59, Registration Act, satisfy the term "attestation" as defined in Sec. 3, T. P. Act.

There has been a conflict of judicial opinion on the subject. There is a long string of cases according to which the question under consideration must be given an affirmative answer: 6 Cal 17,[1] 11 Cal 429,[2] 27 Cal 169,[3] 47 C L J 118,[4] 1 Pat 300,[5] 52 Mad 123,[6] 56 Cal 598,[7] 61 Cal 525[8] and 58 Mad 220.[9] The general trend of thought which underlies the decisions in the first eight of these cases is that where the executant admits execution to the Registrar (or the Sub-Registrar) in the presence of the witness or witnesses identifying him there are two or more witnesses each of whom has received from the executant a personal acknowledgment of his execution and as they themselves have signed the document by making their signatures under the respective endorsements the ingredients of the definition of "attestation" have been fulfilled; while in the ninth case it was added that the

1. Horro Sundari Dabia v. Chunder Kant, (1881) 6 Cal 17=6 C L R 303.
2. Nitye Gopal v. Nagendra Nath, (1885) 11 Cal 429.
3. Amarendra Nath v. Kashi Nath, (1900) 27 Cal 169.
4. Radha Mohun v. Nripendra Nath, (1928) 15 A I R Cal 154=105 I C 422=47 C L J 118.
5. Sarada Prasad Tej v. Triguna Charan Ray, (1922) 9 A I R Pat 402 = 70 I C 402 = 1 Pat 300.
6. Veerappa Chettiar v. Subramania Ayyar, (1929) 16 A I R Mad 1=116 I C 367=52 Mad 123= 55 M L J 794 (F B).
7. Abinash Chandra v. Dasarath Malo, (1929) 16 A I R Cal 123 = 114 I C 84= 56 Cal 598=48 C L J 281=32 C W N 1228.
8. Neelima Basu v. Jaharlal Sarkar, (1934) 21 A I R Cal 772=151 I C 1063 = 61 Cal 525= 38 C W N 753.
9. Nagamma v. Venkatramayya, (1935) 22 A I R Mad 178 = 154 I C 777 = 58 Mad 220 = 68 M L J 191.

Registrar's (or Sub-Registrar's) signature must have been made in the presence of the executant in order that, other conditions being fulfilled, he may be regarded as an attesting witness. Opposite view is to be found in 6 Luck 619[10] and 54 All 1051.[11] They lay down that the signatures of the Sub-Registrar and of the witnesses identifying the executant at registration are not sufficient attestation of a mortgage deed for the purpose of the Transfer of Property Act even assuming that the Registrar and the witnesses had received from the executant a personal acknowledgment of his signature or mark and that they did sign in the executant's presence. The learned Judge proceeded upon the footing that the signatures of the witnesses identifying the executant at registration are appended simply and solely to the endorsement that they have identified the executant and that therefore they cannot be regarded as having signed the document with the intention of attesting the execution of the document by the executant; and as regards the Sub-Registrar, his signature is also made not with the intention of attesting the document, but merely for the purpose of signing the endorsement which he made with reference to the admission of execution by the executant. In 5 Rang 772[12] Carr J. observed:

> I note that a Bench of the Calcutta High Court has held in 47 C L J 118[4] that the signature of the Sub-Registrar to the registration endorsement to the effect that the mortgagor had admitted execution to him now makes that officer an attesting witness. This goes very far, and without expressly refusing to accept that decision as correct, I am not at present prepared to follow it.

As the judicial decisions are not concurrent, I do not consider it necessary to discuss these cases in detail; but, in my opinion, the question under reference must be answered in the negative. The reasons given in 6 Luck 619[10] and 54 All 1051[11] appear to me to be sufficient to support the conclusions which the learned Judges came to on this point. But still another reason which appears to me to be of great weight as to why the signing by the Registrar (or Sub-Registrar) of the endorsements and the signing by the witnesses of the endorsement relating to the identity of the executant should not be regarded as satisfying the requirements of the definition given in S. 3 is that according to the definition the witness attesting the instrument must sign the instrument in the presence of the executant. It is the instrument that an attesting witness has to sign in order to comply with the terms of the definition of the word "attested." When the Registrar, (or Sub-Registrar) appends his signature to the endorsements or to the particular endorsement relating to the admission of execution and when the witnesses append their signatures to the endorsement as to the identification it cannot, in my opinion, be said by any stretch of imagination that they are signing the instrument. For these reasons I would answer the question in the negative.

Mackney J.—I agree with my learned brother that the question put to us must be answered in the negative. The learned Judge who has made the reference has used the expression "if they signed the deed": but I take it that it is not meant to imply that the signatures of the Registrar and of the witnesses identifying the executant at registration, when applied in compliance with the provisions of the Registration Act, are signatures to the deed, for that would be, in my opinion, to beg the question. The provisions of the law which require certain instruments to be attested must be deemed to have the effect of making those signatures form part of the instrument to which they are affixed. Hence in the definition "attested" to be found in S. 3, T. P. Act, we find the phrase "each of whom has signed the instrument in the presence of the executant." I find it impossible to hold that the signature of the registering officer who under S. 59, Registration Act, affixes his signature to an endorsement signed by the executant on the paper containing the instrument in question is a signature of that instrument; and I find it even more difficult to hold that the signature of the person who has identified the executant before the registering officer appended on the aforesaid paper can be considered to be a signature of the instrument itself. The decisions of the Calcutta High Court to which reference has been made by my learned brother all seem to assume that the registering officer and the identifying witnesses sign the instrument. But this is the whole question. In my opinion they cannot be said to sign the instrument.

10. Chandrani Kuar v. Sheo Nath, (1931) 18 A I R Oudh 146=132 I C 337=6 Luck 619=8 O W N 194.
11. Lachman Singh v. Surendra Bahadur, (1932) 19 A I R All 527=139 I C 1= 54 All 1051 = 1932 A L J 653 (F B).
12. S. M. A. R. A. L. Firm v. R. M. M. A. Firm, (1928) 15 A I R Rang 101=109 I C 469=5 Rang 772.

This idea, I think, was in the minds of the learned Judges who decided the case in 54 All 1051[11] when they say that the attesting witness must sign with the idea of bearing testimony to the execution and with the idea of permitting himself to be cited as a witness to prove the execution, and where they point out that the effect of the Registration Act and the Acts requiring the attestation of certain documents is that a document must already have been duly executed, and duly attested, that is to say, it must have been completed before it is presented for registration. So, in the cases decided by the Privy Council to which reference is made in the Allahabad case, what was considered was, what was it that the signatories signed? Was it the will itself or did their signatures merely signify the fact that the testator had made the will with their consent or, in another case, whether the signature had been appended to the deed of mortgage in token of attestation or in token of the signatory's approval of the transaction? No doubt in deciding whether a person has signed an instrument or not, it is of great assistance to look to his intention in placing his signature on the paper: but the question to be decided is, did he sign the instrument? In 52 Mad 123[6] the learned Chief Justice says:

The registering officer and the identifying witnesses had exactly the same duty imposed upon them by the Registration Act as would have rested upon them as attesting witnesses under the Transfer of Property Act, and that duty they discharged.

With respect, I find it difficult to understand how an identifying witness, whose duty is merely to identify before the registering officer the person who apparently executed the deed, can be said to discharge the same duty as an attesting witness under the Transfer of Property Act. Surely, neither the registering officer nor the identifying witness can be said to discharge any duty under the Transfer of Property Act as attesting witnesses, because they do not in fact sign the instrument.

N.S./R.K. *Answer in the negative.*

A. I. R. 1939 Rangoon 213

MACKNEY J.

Maung Than Gyaung — Appellant.

v.

Maung Than Hmo — Respondent.

Special Second Appeal No. 298 of 1937, Decided on 2nd March 1938, against decree of Dist. Court, Lower Chindwin at Monywa, in C. A. No. 15 of 1937.

(a) Appeal—Competency—*G's* suit against *H* and *S* for cancellation of mortgage deed by *H* to *S* decreed as to *G's* half interest in mortgage land — In appeal by *H*, *G's* suit dismissed — *G* preferring appeal from appellate decree only making *H* as respondent but seeking to add *S* as respondent when appeal against *S* was time-barred—Appeal held was incompetent.

G sued *H* and *S* for the cancellation of a mortgage deed executed by *H* in favour of *S*, on the ground that the land mortgaged belonged to *G* and *H* jointly. The trial Court granted a decree cancelling the mortgage as to *G's* one-half interest in the land. In appeal by *H* against the decree making only *G* as party, *G's* suit was dismissed. *G* appealed from the appellate decree and joined only *H* as respondent and subsequently sought to join *S* as respondent but obviously after the appeal against *S* was time-barred:

Held that the appeal was incompetent because the prayer of *G* in the second appeal being the restoration of the trial Court's decree he could not succeed in the appeal unless *S* was made a party to it and since the appeal against *S* was time-barred he could not afterwards be made a party to the appeal: *A I R 1927 P C 252 and A I R 1932 Rang 16, Rel. on.* [P 214 C 1]

(b) Civil P. C. (1908), O. 41, R. 33—Scope—Party to suit not joined in appeal found not to be necessary party to appeal—Appellate Court can pass decree even in his favour if this can be done without prejudice to other party.

Rule 33 of Order 41 should not be exercised so as to deprive a party of a valuable right which he might have acquired in consequence of the opposite party's failure to appeal against decree so far as it affected him. There is nothing in the wording of the Rule to show that the power can be exercised only in the case of a person who is interested in the appeal: *A I R 1927 P C 252, Rel. on.* [P 214 C 2]

If therefore once it is found that a certain party to the suit who is not joined in the appeal is not a necessary party to the appeal and to pass a decree in his favour in appeal would do him no prejudice but on the contrary would be a benefit to him, whereas it can in no way prejudice the opposite party, then the Appellate Court has power to pass a decree in his favour also. [P 214 C 2]

S. Loo-Nee — *for Appellant.*

A. N. Basu — *for Respondent.*

Judgment. — This appeal must fail on the preliminary objection set up by the respondent. In the original Court the appellant, Maung Than Gyaung, sued Maung Than Hmo and Maung Po Shan for the cancellation of a deed, whereby Maung Than Hmo had purported to mortgage to Maung Po Shan a certain piece of land, on the ground that the land belonged jointly to Maung Than Gyaung and Maung Than Hmo. The Township Court granted the plaintiff a decree cancelling the mortgage of Maung Than Gyaung's one-half interest in the land. Against this decree Maung Than Hmo appealed to the District Court of Monywa, making Maung Than Gyaung

alone the respondent and not joining Maung Po Shan. The learned District Judge reversed the finding of the Township Court and passed a decree setting the judgment and decree of the Township Court aside and directing that the plaintiff's suit be dismissed. Against this decree Maung Than Gyaung has now appealed to this Court. He, in turn, has made only Maung Than Hmo the respondent and has failed to join Maung Po Shan. The decree of the District Court is undoubtedly a decree which operates in favour of Maung Po Shan. It is not possible now for the plaintiff-appellant to join Maung Po Shan as a respondent, the decree of the District Court having been passed on 26th July 1937. In these circumstances, it appears to me that the decision in 6 Rang 29[1] applies. Maung Po Shan having this decree in his favour, it would not be just for this Court to pass any decree against him which would operate in his disfavour. On the other hand, it is clear that unless Maung Po Shan is made a party the plaintiff-appellant cannot succeed in this appeal, in which the prayer is for the restoration of the decree of the Township Court. That decree cannot be restored to Maung Po Shan's detriment without his having been made a party, and he cannot now be made a party : *see* 9 Rang 624.[2]

The learned counsel for the appellant has sought to distinguish both the cases cited from the present case, because those cases related to proceedings on first appeal to the High Court, whereas the present case is an appeal from an appellate judgment of the District Court. I do not think that this makes the slightest difference, if the decree of the District Court is in order. The learned counsel for the appellant then attempted to maintain the view that the decree of the District Court was not in order, because Maung Po Shan was a necessary party to that appeal in that Court and had not been joined. I am unable to agree that Maung Po Shan was a necessary party to that appeal. The question which the Appellate Court was asked to decide was a question which was vital to the suit — namely as to whether Maung Than Gyaung had or had not any interest in the property — which had been decided adversely to Maung Than Hmo in the original Court. It appears to me that the District Court could decide this point without Maung Po Shan's presence. If the appeal were dismissed Maung Po Shan was in no worse position than he was before, and the decree of the original Court would obviously stand against him. On the other hand, if the appeal was successful, then the decree which Maung Than Gyaung held against Maung Than Hmo was not of the slightest use to him. The effect of deciding the appeal in Maung Than Hmo's favour was to decide that Maung Than Gyaung had no interest in the land. It is true that the original Court's decree had cancelled the decree so far as concerned its effect on Maung Than Gyaung's one-half of the property but it having been decided that Maung Than Gyaung had no interest whatsoever in the property, it would clearly have been absurd for the District Court to leave the Township Court's decree against Po Shan standing, inasmuch as Maung Than Hmo admitted the mortgage. The obvious course to take was to use the powers provided by R. 33 of O. 41, Civil P. C., and pass a decree in favour both of Maung Than Hmo and Maung Po Shan.

The learned counsel for the appellant contends that the District Court did not have the power to do this; but once it is found that Maung Po Shan was not a necessary party to the appeal and that to pass a decree in his favour would do him no prejudice but on the contrary would be a benefit to him, whereas it can in no way prejudice the opposite party, then it seems to me that we must hold that the District Court rightly passed a decree in his favour also. There is nothing in the wording of R. 33 of O. 41 to show that this power can be exercised only in the case of a person who is interested in the appeal in the sense explained in 6 Rang 29.[1] It may be noted that in that case their Lordships did not commit themselves to the opinion that the Court would have no power under this Rule in a proper case to add a party for the purpose of passing a decree against him, let alone in his favour. The Rule should not be exercised so as to deprive a party of a valuable right which he might have acquired in consequence of the opposite party's failure to appeal against the decree so far as it affected him; but that consideration would not apply as regards either Po Shan or Maung Than Gyaung in the District Court. The learned counsel for the appellant asks the Court to bring Maung

1. Chokalingam Chetty v. Seethai Ache, (1927) 14 A I R P C 252=107 I C 237=6 Rang 29=55 I A 7 (P C).
2. Ma Thaw May v. Mohamed Eusoof, (1932) 19 A I R Rang 16=135 I C 645=9 Rang 624.

Po Shan on the record as a respondent to this appeal; but this it will be obviously impossible to do at this stage, for the reasons already indicated. This appeal is therefore dismissed; advocate's fee two gold mohurs.

N.S./R.K. *Appeal dismissed.*

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ROBERTS C. J. AND MOSELY J.

Kesanakoorthi Yenkana — Appellant.

v.

Kesanakoorthi Letchana — Respondent.

Civil Misc. Appeal No. 49 of 1938, Decided on 2nd February 1939, against order of Dist. Court, Myaungmya, D/- 7th May 1938.

(a) Succession Act (1925), S. 263—Application for revocation of grant of letters of administration by person who contested grant as respondent is maintainable only if applicant urges new grounds in support of his application or if his application falls within limits of application for review—"New grounds" is meant to cover contingencies quite different in character from mere discovery of evidence, which if it had been available might have induced the Court to take a different view.

An application for revocation of a grant of letters of administration or probate by a party, who contested the order at the time at which it was made is on an entirely different footing from such an application made by a party, who was a stranger to the proceedings, which led to the making of the order and had no notice of them. In the former case, the matter is prima facie res judicata as between the parties. It is an elementary principle that where a party had an opportunity to put forward a particular just cause and had not chosen to put it forward, he cannot be heard to agitate the same cause later. The real question is whether the party applying for revocation had an opportunity, before the grant was made, of urging the very grounds he now puts forward or whether he urges any new grounds that have arisen since he had that opportunity, which he refused to utilize. The phrase "new ground" does not mean additional evidence on old grounds. It is meant to cover contingencies quite different in character from the mere discovery of evidence, which if it had been available before, might have induced the Court to take a different view. Where there is an allegation of fraud as a ground for vacating the order, the fraud proved must be extraneous to everything which has been already adjudicated upon by the Court. Subject to the rule relating to new grounds, the only other way in which the grant can be attacked by a party who contested the order at the time it was made and who relies on fresh evidence merely, is by bringing his application within the comparatively narrow limits of an application for review : *A I R 1916 Mad 364 and A I R 1924 Mad 578, Rel. on.* [P 216 C 2]

(b) Succession Act (1925), Ss. 263, 268—Application for revocation of grant by person who contested grant, in substance an application for review—Provisions of Civil Procedure Code apply and application is defective and not maintainable if it is not accompanied by copy of order appealed from.

An application for revocation of a grant of letters of administration made in favour of opposite party, by a party who contested the order when it was made, which is in substance an application for review and falls under O. 47, Rule 1, Civil P. C., when it is not accompanied by a copy of the order or a decree appealed from, is defective and is not maintainable. By S. 268, Succession Act, the proceedings relating to the matter are to be regulated by the Code of Civil Procedure. [P 216 C 1]

U Tun Tin — *for Appellant.*

P. B. Sen — *for Respondent.*

Roberts C. J.—This is an appeal from an order passed by the District Judge, Myaungmya, dismissing the application of the appellant for revocation of letters of administration granted to the respondent in the estate of Kesanakoorthi Yenkat Reddy. Ch. 4, Succession Act, deals with the practice in granting and revoking probates and letters of administration, and S. 299 of the Act makes this order appealable. Both the appellant and respondent applied for letters of administration : the appellant said he was the son of a sister of the deceased, and the respondent said that he himself was the grandson of the deceased's brother. Letters were granted in December 1937 to the respondent as the sapinda, both parties being Hindus subject to the Mitakshara law. The appellant then petitioned the District Court on 28th February 1938 : he said that he had no prior knowledge of the respondent and prayed for time to make further enquiries. On 12th March he lodged a further petition stating that respondent based his claim on being the grandson of the Pamathy whom he alleged to be deceased's brother. But, said the appellant, Pamathy in registered deed of mortgage No. 105 of 1911 in the office of the Sub-Registrar of Bassein described his own father as one Nagana; whilst the deceased Yenkat Reddy in registered deed of mortgage No. 1532 of 1923 in the office of the Sub-Registrar of Myaungmya described his own father as Sattaya; consequently Pamathy and Yenkat Reddy could not be brothers. These two men were both working as dhobis in Bassein together and were thought to be somehow related, but they were friends merely and thus, said the appellant, the respondent's claim has been discovered to be false.

The learned District Judge held: (1) that as the appellant was respondent in the letters of administration suit he could not file an application for revocation of probate under S. 263, Succession Act; (2) his application could only be considered if it fell within O. 47, R. 1, and was an application for review: in that respect it was defective not being accompanied by a copy of the decree appealed from, for, by O. 47, R. 3, such an application must comply with the provisions as to the form of preferring appeals, mutatis mutandis. O. 41, R. 1 therefore applies, and this has not been complied with. It is clear that the appellant is seeking to adduce fresh evidence which would convince the Court that the respondent's claim for letters of administration was unwarrantable. Such new evidence even if admitted would not necessarily show that the respondent's claim was fraudulent, though it might show that it was ill-founded. By S. 268, Succession Act, the proceedings in the Court of the District Judge in this matter shall, so far as circumstances permit, be regulated by the Code of Civil Procedure. O. 47, R. 1 lays down the procedure and in my opinion the learned District Judge was right in dismissing the application. If appellant's contentions were right, his application to revoke for just cause the letters of administration could be made with complete disregard of the formalities enjoined by the rule and he would even be exempt from proof of having exercised due diligence in presenting his case before the Court which granted the letters. He could watch the proceedings to which he was a party with indifference and could subsequently make an application for the revocation of the grant as though he had never been cognizant of them at all. In 38 Mad 203[1] at p. 208 it was said:

> But where two parties fight at arm's length, it is the duty of each to question the allegations made by the other to adduce all available evidence regarding the truth or falsehood of it. Neither of them can neglect this duty and afterwards claim to show that the allegation of his opponent was false.

This is an application of the broad principle of res judicata. In 46 M L J 383[2] at p. 388 Wallace J. said:

> It is an elementary principle that where the party had an opportunity to put forward a particular just cause and had not chosen to put it forward, he cannot be heard to agitate the same cause later. No Court would in my opinion allow a 'just cause' already agitated and decided upon before the grant of probate to be again made the subject of an application to revoke that grant, and I see no difference in principle between disallowing such an application on the ground of res judicata and disallowing it on the ground that the party already had a full opportunity of putting forward his just cause and omitted to do so. So that the question before us, as I view it, is whether appellant 1 had an opportunity before the grant was made of urging the very grounds he now puts forward, or whether he urges any new grounds that have arisen since he had that opportunity which he refused to utilize.

In my opinion the phrase "new grounds" does not mean additional evidence on old grounds; it might apply, for instance, to a case in which the person to whom letters of administration were granted had subsequently become of unsound mind. It is meant to cover contingencies quite different in character from the mere discovery of evidence which if it had been available before might have induced the Court to take a different view. In the present case the learned District Judge by implication at least held that the appellant had not exercised due diligence. Whether by doing so he could have found out about these registered mortgage deeds or not, I think we need not trouble to inquire. It is enough to say that the appellant was bound to comply with the provisions of O. 47, R. 1 and in other respects at all events he failed to do so.

An application for the revocation of a grant by a party who contested the order at the time at which it was made is on an entirely different footing from such an application made by a party who was a stranger to the proceedings which led to the making of the order and had no notice of them. In the former case the matter is prima facie res judicata as between the parties. Where there is an allegation of fraud as a ground for vacating a judgment or order, the fraud proved must be extraneous to everything which has already been adjudicated upon by the Court. Subject to what I have already said in relation to "new grounds" the only other way in which the grant can be attacked by a party who contested the order at the time it was made and who relies on fresh evidence merely is by bringing his application within the comparatively narrow limits of an application for review. Accordingly in my

1. Chinnaya v. Ramama, (1916) 3 A I R Mad 364=19 I C 579=38 Mad 203=25 M L J 288.
2. Venkataratnam v. Satyavati, (1924) 11 A I R Mad 578=79 I C 44=46 M L J 383.

opinion this appeal fails and must be dismissed with costs five gold mohurs.

Mosely J.—I agree.

R.M./R.K. *Appeal dismissed.*

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MOSELY J.

A. M. M. R. M. Chettyar Firm — Appellant.

v.

Saw Eu Hoke — Respondent.

Special Second Appeal No. 287 of 1938, Decided on 27th January 1939, against decree of Dist. Court, Amherst, D/- 26th July 1938.

Receiver — Agreement to receive interest—Decree declaring charge on property and lien on policies but no interest provided—Decree-holder appointed receiver to take charge of property and recover money under policies—Offer of Insurance Company being low, judgment-debtor asking receiver to wait and agreeing to pay interest on decretal amount — Agreement kept from knowledge of Court—After money paid into Court receiver claiming to deduct interest—Agreement being fraud on Court is not enforceable—Claim for interest held could not be sustained.

No secret agreement can be enforceable which puts the receiver in a position which might affect his advice to the Court, and consequently the Court's decision as to whether time should be granted. [P 218 C 2]

A decree passed against the judgment-debtor declared a charge on certain properties and lien on some insurance policies but did not provide interest on the decretal amount. Decree-holder wasappointed as receiver to take charge of the properties and to collect insurance money. In course of those proceedings, the Insurance Companies made an offer of a certain amount. But the judgment-debtor who expected a still better offer requested the receiver by letter to wait for some more time and in consideration agreed to pay the decretal amount with interest at a certain rate. The receiver accepted the agreement but did not communicate it to the Court. After the money was realized and paid into Court the decree-holder receiver asked to be allowed to deduct interest as per agreement. This being disallowed he filed a suit to recover the amount of interest on the basis of the agreement :

Held that as under the agreement, the receiver undoubtedly got something more by way of interest to which he was not entitled under the decree it was his duty to report the agreement to the Court and get it ratified. As the agreement was kept from the knowledge of Court it amounted to fraud on Court. The agreement thus being not enforceable at law, claim for interest could not be sustained : *(1908) 1 Ch 546, Applied ; A I R 1935 Mad 421 and A I R 1932 Cal 672, Ref.; 22 Cal 648 and 30 Cal 696, Rel. on.* [P 219 C 1, 2]

R. Clark — *for Appellant.*

A. A. Darwood — *for Respondent.*

Judgment. — The plaintiff-appellant, A. M. M. R. M. Chettyar was a decree-holder in another suit, Suit No. 5 of 1936 of the District Court of Amherst, against the defendant-respondent. In that suit a decree of compromise was passed for Rs. 31,000 with a charge on the suit land and a lien on the fire insurance money obtained under a policy on the mill. The decree-holder was to be at liberty to execute the decree personally against the defendants if they failed to realize the decretal amount out of the insurance money or from the sale of the land. It was also there agreed in the application for a compromise decree that the plaintiff should be appointed receiver for the collection of the insurance money without remuneration and that he should pay the surplus money to Saw Eu Hoke through the Court immediately after realizing the amount due on the decree. The Chettyar Firm was accordingly appointed on 18th June 1936 in Miscellaneous Case No. 18 of 1936 of the District Court of Amherst to take charge of the rice-mill and to collect the fire insurance money. On 8th August, the agent of the Chettyar Firm in his capacity as receiver filed a report stating that the companies concerned had offered a sum of Rs. 118 only though the total loss was assessed at over Rs. 69,000, that when Saw Eu Hoke had been informed accordingly he wrote to the companies protesting against this low offer and that the companies had written to the receiver stating that they were not prepared to offer a higher amount. Orders were passed on this report on the same day that the receiver should take further steps to get an adequate amount from the Insurance Companies as the amount offered was considered to be inadequate, and a date was fixed for further report by 29th August. On that date the agent as receiver filed another report stating that the Insurance Companies would not enhance their offer, and he asked that Saw Eu Hoke be called upon to state whether he would finance such legal action as might be advised by the Court against the companies concerned to recover the full claim, failing which, sanction, it was prayed, might be given to the receiver to accept the offer made by the companies. On this the defendant asked for an adjournment and several further adjournments were given to allow Saw Eu Hoke to prosecute his claim before the Insurance Companies. On 7th December an order was passed

that these negotiations should be conducted through the receiver. On 8th April 1927 the receiver reported that Saw Eu Hoke had arrived at an agreement in November 1936 with the companies. On 12th June the receiver reported that it was only two companies who had communicated to him their willingness to pay their proportionate two-third share of Rupees 47,118 and that the third company had not yet replied. The receiver finally reported on 16th July 1937 that he had received that amount from the Insurance Companies and deposited it in Court. On that date, for the first time the receiver in his application mentioned that Saw Eu Hoke had agreed on 22nd August 1936 to pay him interest on the decretal amount of Rs. 31,000. (The compromise decree had not provided for any interest to be paid.) The receiver's application to be allowed to deduct the interest which he claimed was disallowed and he then filed the suit now under appeal for Rs. 4019 odd as interest. This claim was allowed in the Subdivisional Court but reversed on appeal by the District Judge and the Chettiar is now appealing against that decree.

The agreement in question (Ex. H) is a letter dated 22nd August 1936 from Saw Eu Hoke to the Chettiar Firm promising to pay the decretal amount of Rs. 31,000 as per the terms of the compromise of 4th June 1936 together with interest at the rate of one rupee per cent. per mensem from the date of the decree up to the date of realization in full of the decretal amount. The letter ends thus: "I request you to wait for two months' time." The plaintiff's case was that he had received an offer of Rs. 47,118 from the Insurance Companies in July and that he then advised Saw Eu Hoke to accept it but that the latter thought he could get more from the companies and promised to pay him interest if he would wait. He communicated with his principal and on getting a reply from the Insurance Companies on 21st August that they could not increase their offer he asked Saw Eu Hoke on the 22nd to give an agreement in order to pay the stipulated interest of one per cent. if he wanted further time to get a better offer. Both Courts accepted this version of the transaction. The District Court on appeal held that though the word "Receiver" was not mentioned in Ex. H it must follow that the Chettiar Firm was asked to stay its hand as receiver for two months to enable the defendant to get a better offer. However the plaintiff tried to make out that the contract was entered into with him only qua decree-holder. The District Court went on to hold that the promise given in consideration of the receiver promising to stay his hand was enforceable. The cases in 156 I C 949[1] and 139 I C 186[2] were cited where it was held that a purchase by a receiver of property included in his receivership was invalid without the previous permission of the Court. In the latter case the general principle followed was that laid down in (1908) 1 Ch 546[3] that no one should be allowed to get into a position where his interest conflicts with his duty, and that the Court carries out this principle not by examining each particular case and weighing the details of the conflict, but by certain prohibitions with regard to persons who hold positions in which a conflict might arise. The learned District Judge said that in the present case he had no doubt that the promise given by the plaintiff was one which was likely to create a conflict between the plaintiff's personal interest and his duty as receiver. If no promise to pay interest was given it would be in the interest of the plaintiff to advise the Court to accept the offer so that the decretal amount might be realized without further delay. On the other hand, on account of the promise to pay interest at a profitable rate it might be in the interest of the plaintiff to prolong the receivership even if the defendant had no further hope of obtaining better terms.

I consider that this principle was rightly applied here. No secret agreement could be enforceable which put the receiver in a position which might affect his advice to the Court and consequently the Court's decision as to whether time should be granted. It is argued before me for the plaintiff-appellant that the receiver was approached as the other party to the suit, the decree-holder, and not in his capacity as receiver. But I think it is obvious that the plaintiff was approached in a dual capacity. No doubt had the receiver not been a party to the suit the defendant

1. Subramanyam v. Venkatasubba Reddi, (1935) 22 A I R Mad 421=156 I C 949=68 M L J 597.
2. Jiteswari Dassi v. Sudha Krishna, (1932) 19 A I R Cal 672=139 I C 186=59 Cal 956=55 C L J 85=36 C W N 125.
3. Nugent v. Nugent, (1908) 1 Ch 546=77 L J Ch 271=98 L T 354=52 S J 262=24 T L R 296.

would ordinarily have gone to the other party to get his consent and then to the receiver. It was only the receiver who could stay his hand or rather agree to an application filed by the other side to the Court to stay the proceedings until a better offer was made. It is clear in this case that the receiver did qua receiver acquiesce in prolonged adjournments for this purpose, and what is more the receiver kept this agreement from the knowledge of the Court until the claim was realized. It is argued that it cannot necessarily be inferred that the receiver was making a profit on the agreement which the Court would not have allowed had the circumstances been reported to it. It may or may not be that the Court would have allowed an agreement to pay this interest at one per cent. per mensem or at least interest at the court rate, which is a little less, 9 per cent. per annum. The Court would have granted further time if the Court thought that there was a reasonable prospect of getting a better offer within a reasonable time, but it does not follow that the Court would have allowed interest to be exacted. It seems to me clear that the party could only in his capacity as receiver give time, or rather agree not to oppose applications for adjournment, and as the receiver undoubtedly got something out of the agreement to which he was not entitled under the decree, it was his plain duty to report the agreement to the Court and get it ratified by the Court.

For the respondent two very apposite decisions have been quoted. One is 22 Cal 648[4] where it was stated that when a receiver appointed by the Court had entered into two private agreements, one prior, the other subsequent to the date of his appointment with one of the defendants, restricting and controlling his powers, these agreements were a gross contempt of Court. Another case is 30 Cal 696.[5] There it was held that a promise to pay the salary of a receiver without leave from the Court being in contravention of the law is not binding on the promisor. A receiver being an officer of the Court, the Court only is to determine his remuneration and the parties cannot by any act of theirs add to, or derogate from the functions of the Court without its authority. Here the receiver was appointed by the Court to do a certain act, and he could not, without permission from the Court agree to give further time to the defendant other than the time allowed by the Court. The agreement was entered on 22nd August and it must be remembered that the Court had ordered on 8th August that the receiver should take further steps and report by 29th August. On the latter date both sides kept the agreement from the knowledge of the Court. This was clearly a fraud on the Court. In my opinion the agreement is one not enforceable by law. The order of the District Court will be upheld and the appeal dismissed with costs.

N.S./R.K. *Appeal dismissed.*

4. Manik Lall Seal v. Surret Coomaree Dassee, (1895) 22 Cal 648.
5. Prokash Chandra Sarkar v. Adlam, (1903) 30 Cal 696.

*** A. I. R. 1939 Rangoon 219**

BA U J.

The King

v.

Saw Min — Respondent.

Criminal Appeal No. 245 of 1938, Decided on 1st June 1938, from order of Third Addl. Magistrate (1), Sagaing, in Criminal Trial No. 56 of 1937.

(a) Evidence Act (1872), S. 31—Meaning of S. 31 explained.

What S. 31 means is that an admission, unless it amounts to an estoppel, is not conclusive as against the maker, as it is open to him to prove that it was made under a mistake of law or fact or that it was made under threat or inducement. [P 220 C 2]

(b) Evidence Act (1872), S. 24—Use of word 'appears' in S. 24—Object explained.

The Legislature used the word 'appears' in Sec. 24 to provide a safeguard in the interests of accused persons. It connotes less positive proof. If it appears to the Court from the circumstances of a particular case that the confession has not been made voluntarily it must be rejected as irrelevant. Such circumstances should be presumed to exist in cases where an accused person in police custody made a confession : *2 C W N 702, Rel. on.* [P 221 C 2]

*** (c) Criminal P. C. (1898), Ss. 164, 364 and 533 — Accused when produced before Magistrate for remand making statement admitting guilt—Statement recorded by Magistrate without complying with provisions of Ss. 164 and 364—Magistrate examined as witness—Statement admitting guilt is not admissible.**

If a Magistrate has made no attempt to comply with the requirements of Ss. 164 and 364, in recording the confession of an accused person, such a confession is not admissible in evidence. Where such an attempt has been made, but there is a formal defect in the procedure thereof, then it will become curable under S. 533. [P 223 C 1]

Where therefore the accused when produced before a Magistrate for remand makes a statement

admitting that he had committed the crime and the Magistrate is examined as a witness in the trial, the statement is inadmissible in evidence if the Magistrate who recorded the statement had made no attempt to comply with the provisions of Ss. 164 and 364 : *A I R 1934 Rang 78, Dissent.*; *A I R 1936 P C 253, Rel. on.* [P 223 C 1]

Tun Byu, Govt. Advocate — *for the Crown.*

Bharadwaj — *for Respondent.*

Judgment. — This is an appeal filed by the Government from an order passed by the Third Additional Magistrate, Sagaing, acquitting the respondent of the charge of dacoity. The allegation against the respondent was that he was one of the men concerned in a dacoity committed in the house of one Ma E Hla of Chaung U village, Sagaing District, on the night of 16th August 1937. To prove this allegation the prosecution relied on the evidence of Pye Din, Tun Hla, Chit E, Maung Myaing and U Hla. Pye Din said that he was asked to join in the dacoity by the respondent and two others but he refused to do so. Tun Hla and Chit E said that they recognized the respondent as one of the dacoits. Maung Myaing said that on the night of the dacoity he saw the respondent and one unknown man coming from the direction of Chaung U and heard him say: "We slept too much or we would have got more property," as they passed by his hut. The last witness U Hla was the Township Magistrate of Myinmu at the time of the occurrence of this case. He said that when the respondent was produced before him on 20th August 1937 for remand, he asked him (respondent) whether he had anything to say and the respondent replied: "I committed the offence, and I have nothing to say against a remand being granted." U Hla made a note of it on the back of the application for remand.

The evidence thus produced, if believed, can leave no room for doubt about the guilt of the respondent; but the learned trial Magistrate said that he did not believe the evidence of any of these witnesses except that of U Hla. Though he said that he believed the evidence of U Hla, he refused to act on it on the ground that "an admission is not conclusive proof under S. 31, Evidence Act." I have read the evidence carefully and I have no doubt in my mind that the Magistrate was perfectly justified in rejecting the evidence of Pye Din, Tun Hla, Chit E and Maung Myaing. It is nothing but a mere fabrication. I do not however think that the Magistrate was right in his interpretation of S. 31, Evidence Act. What this Section means is that an admission, unless it amounts to an estoppel, is not conclusive as against the maker, as it is open to him to prove that it was made under a mistake of law or fact or that it was made under threat or inducement.

In the present case the respondent denied having made any admission to U Hla as alleged, but he could not produce any evidence in support thereof. It must, therefore, be held that he did make an admission of his complicity in the crime in question to U Hla but the point is whether such an admission is admissible in evidence. The learned Government Advocate submits that it is, and in support thereof he relies on the case in A I R 1934 Rang 78.[1] There the learned Judge said :

> Furthermore on 9th March the appellants were brought before U Thit, First Additional Special Power Magistrate of Henzada for a remand, and when U Thit called upon them to show cause against remand, Shwe Wa, Ba Khin and Thein Pe admitted to him that they had taken part in this dacoity, alleging that they had done so at the request of Po Dwe and Sami and that Po Dwe was their leader. The statements made by these appellants were recorded by the Magistrate on the reverse of the application for remand, but unfortunately he did not take down their statements in accordance with the law relating to the record of confession made before a Magistrate by accused persons in police custody. However this error is cured by the fact that the Magistrate has been examined on oath as a witness and has given evidence that these statements of these appellants were actually made before him; and, consequently, his error in not recording their confessions in the proper way is cured by the provisions of Sec. 533, Criminal P. C. S. 26, Evidence Act, lays down that a confession made by a person while in the custody of the police shall not be proved unless it was made in the immediate presence of a Magistrate; but S. 29 provides that a confession does not become irrelevant because it was made in answer to questions which the accused need not have answered, whatever may have been the form of these questions, or because he was not warned that he was not bound to make such a confession and that evidence of it might be given against him. Consequently, the statements made by these three appellants to U Thit when they were produced for purposes of remand are admissible in evidence.

What has, in my opinion, greatly influenced the learned Judge in holding that a confession made by an accused person in the circumstances disclosed and recorded in the manner indicated in this case is S. 29, Evidence Act. All this Section says inter

1. Nga Po Dwe v. Emperor, (1934) 21 A I R Rang 78=1934 Cr C 401=148 I C 1002 = 35 Cr L J 823.

alia is that if a confession is otherwise relevant, it does not become irrelevant merely because he (accused) was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

What is emphasized is relevancy. Therefore this Section must be read with Ss. 24 to 28 and 30, Evidence Act, which deal with confessions made by accused persons. S. 24 provides:

A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat, or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the Court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

Put briefly, what this Section means is that if it appears to the Court that a confession has not been made voluntarily, it becomes irrelevant and consequently inadmissible in evidence. What is significant about the Section is the use of the word "appears." This word must have been used by the Legislature designedly. What purpose the Legislature had in mind in using this word in S. 24 will become apparent if reference is made to the history relating to the enactment of the Criminal P. C., and the Evidence Act. Prior to 1861, the Police had power to record the confessions of accused persons and a confession made to a police officer could be used as evidence against the maker: *see* Regulation 20 of 1817. In 1861 the first Code of Criminal Procedure was enacted and Section 148 of that Code provided that

no confession or admission of guilt made to a police officer shall be used as evidence against a person accused of any offence.

Sec. 149 of the same Code provided that

no confession or admission of guilt made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be used as evidence against such person.

Why the Legislature took away the power from the police to record confessions and enacted that a confession made to a police officer was inadmissible in evidence was because of the malpractices employed by the Police to get confessions from accused persons: *see* the observations of the learned Judges made in 5 W R Cr 6[2] and 7 W R Cr 3[3] at p. 5. In order to check the spread of this evil some more stringent provisions were enacted when the Code was amended and the Evidence Act enacted in 1872. Ss. 148, 149 and 150 were taken out of the Code and engrafted with slight alteration in language as Secs. 25, 26 and 27, Evidence Act. From this history it will become quite apparent why the Legislature used the word "appears" in S. 24, Evidence Act. It was to provide a safeguard in the interests of accused persons. It connotes less positive proof. If it appears to the Court from the circumstances of a particular case that the confession has not been made voluntarily it must be rejected as irrelevant. Such circumstances should be presumed to exist in cases where an accused person in police custody makes a confession. That was also the view taken by Maclean C. J. in 2 C W N 702[4] where his Lordship said:

The three statements here, though not amounting to confessions, are, to my mind, of an incriminating character, and that being so, they cannot in my judgment be admissible unless they are shown to be voluntary. To revert for a moment to the law of England upon this point from which in a great measure the law of India derives its source, any such statement, to be admissible against an accused must be free and voluntary, and this principle appears to me to find expression, in substance, in Secs. 21, 24, 25 and 26, Evidence Act, coupled with S. 164, Criminal P. C., though Ss. 25 and 26, Evidence Act, are apparently peculiar to this country, and the safeguards in India, in favour of the accused, are in some sense more pronounced than in England.

At page 708 the learned Chief Justice repeated it by saying:

In other words, I do not think that these statements, containing as they do incriminating matter and made to a Magistrate by the accused when in the custody of the police can be admissible as an admission under S. 21, Evidence Act, unless they be shown to be voluntary.

That this view is, in my opinion, the correct view finds support from the wording of S. 164, Criminal P. C. When the Code was amended in 1872, a new Section, namely S. 122, was put in. It was the same as Sec. 164 of the present Code prior to its amendment in 1923. It ran inter alia as follows:

No Magistrate shall record any such confession unless, upon enquiry, he has reason to believe, that it was given voluntarily, and he shall make a memorandum of any such confession to the following effect.

This portion still remains substantially the same in the present Section, S. 164, as it was originally drafted. Why, then, if such a presumption as set out above is not to be drawn, does the Legislature insist

2. Queen v. Kodai Kahar, (1866) 5 W R Cr 6.
3. Queen v. Behary Singh, (1867) 7 W R Cr 3.
4. Queen-Empress v. Bhairab Chnder, (1898) 2 C W N 702.

that no Magistrate shall record a confession made by an accused person in police custody unless he is satisfied upon enquiry that the confession is voluntary? S. 164 of the Code should therefore in my opinion be read together with Ss. 24, 25, 26 and 29, Evidence Act. If so read, we get the following result : (1) that a confession shall not be made to a police officer ; (2) that if a person in police custody desires to make a confession, he must do so in the presence of a Magistrate ; (3) that the Magistrate shall not record it unless he is, upon enquiry from the person making it, satisfied that it is voluntary ; (4) that when the Magistrate records it, he shall record it in the manner provided for in S. 164 of the Code ; (5) and that only when so recorded the confession will become relevant and admissible in evidence. I go into this matter rather at length in order to show that the view of the learned Judge who decided the case in A I R 1934 Rang 78[1] is untenable. If the view of the learned Judge is correct, it will have the effect of reducing the wholesome provisions as contained in S. 164, Criminal P. C., to a nullity. For these reasons I respectfully dissent from that view.

I am fortunately relieved from the duty of referring this case to a Bench as there is an authoritative pronouncement on this point by their Lordships of the Privy Council made in 63 I A 372.[5] In that case the appellant Nazir Ahmed was charged with dacoity with murder. While he was in police custody he was taken by one Mr. L. D. Vasisht, a First Class Magistrate, to the scene of the dacoity. There the appellant was alleged to have made a confession of his participation in the dacoity and firing a revolver in the course of the pursuit. At the trial, Mr. Vasisht was called as a witness by the Crown and he deposed that he made rough notes of what the appellant had told him and after dictating to a typist a memorandum from the rough notes he destroyed them. He produced the memorandum and it was put in evidence. The memorandum was signed by him and at the end, above the signature, there was appended a certificate somewhat to the same effect as that prescribed in S. 164 and in particular stating that the Magistrate believed that "the pointing out and the statements were voluntarily made." Mainly on the evidence of Vasisht the appellant was convicted. On appeal their Lordships of the Privy Council rejected the oral evidence of Vasisht and the memorandum as inadmissible in evidence on the following grounds :

On the matter of construction Ss. 164 and 364 must be looked at and construed together, and it would be an unnatural construction to hold that any other procedure was permitted than that which is laid down with such minute particularity in the Sections themselves. Upon the construction adopted by the Crown, the only effect of S. 164 is to allow evidence to be put in a form in which it can prove itself under Ss. 74 and 80, Evidence Act. Their Lordships are satisfied that the scope and extent of the Section is far other than this, and that it is a Section conferring powers on Magistrates and delimiting them. It is also to be observed that, if the construction contended for by the Crown be correct, all the precautions and safeguards laid down by Ss. 164 and 364 would be of such trifling value as to be almost idle. Any Magistrate of any rank could depose to a confession made by an accused so long as it was not induced by a threat or promise, without affirmatively satisfying himself that it was made voluntarily and without showing or reading to the accused any version of what he was supposed to have said, or asking for the confession to be vouched by any signature. The range of Magisterial confessions would be so enlarged by this process that the provisions of S. 164 would almost inevitably be widely disregarded in the same manner as they were disregarded in the present case.

As a matter of good sense, the position of accused persons and the position of the magistracy are both to be considered. An examination of the Code shows how carefully and precisely defined is the procedure regulating what may be asked of, or done in the matter of examination of, accused persons, and as to how the results are to be recorded and what use is to be made of such records. Nor is this surprising in a jurisdiction where it is not permissible for an accused person to give evidence on oath. So with regard to the magistracy : it is for obvious reasons most undesirable that Magistrates and Judges should be in the position of witnesses, in so far as it can be avoided. Sometimes it cannot be avoided, as under S. 533 ; but where matter can be made of record and therefore admissible as such there are the strongest reasons of policy for supposing that the Legislature designed that it should be made available in that form and no other. In their Lordships' view, it would be particularly unfortunate if Magistrates were asked at all generally to act rather as police officers than as judicial persons ; to be by reason of their position freed from the disability that attaches to police officers under S. 162 of the Code ; and to be at the same time freed, notwithstanding their position as Magistrates, from any obligation to make records under S. 164. In the result they would indeed be relegated to the position of ordinary citizens as witnesses, and then would be required to depose to matters transacted by them in their official capacity unregulated by any statutory rules of procedure or conduct whatever. Their Lordships are however clearly of opinion that this unfortunate position cannot in future arise because, in their opinion, the effect of the statute is clearly to prescribe the mode in which confessions are to be dealt with by Magistrates when made during an investigation, and to

5. Nazir Ahmed v. Emperor, (1936) 23 A I R P C 253=1936 Cr C 752=163 I C 881=37 Cr L J 897=17 Lah 629=63 I A 372 (P C).

render inadmissible any attempt to deal with them in the method proposed in the present case. The evidence of Mr. Vasisht should therefore in the opinion of their Lordships, have been rejected by the Court. The admission in evidence of Mr. Vasisht's memorandum, such as it was, is a minor point. It does not appear to have been used by him merely to refresh his memory, but to have been put in as a document. This is of no great importance, because if the oral evidence was allowed perhaps no more mischief was done by the admission of the memorandum ; but it has always to be remembered that weight, or apparent weight, is lent to oral testimony by a written version of it closely related in time to the events described, and it is an additional objection to the proceedings under review that such a record as this should have been admitted in evidence.

From this what is now clear is that in cases where a Magistrate has made no attempt to comply with the requirements of Ss. 164 and 364, Criminal P. C., in recording the confession of an accused person, such a confession is not admissible in evidence. Where such an attempt has been made, but there is a formal defect in the procedure thereof, then it will become curable under S. 533, Criminal P. C. In the present case no attempt to comply with the requirements of Ss. 164 and 364, Criminal P. C., whatsoever was made by U Hla in recording the confession of the respondent. When the respondent admitted to him that he had committed the crime he should have asked him whether he (respondent) wanted to make a confession. If the respondent replied in the affirmative, then he should follow the procedure as laid down in Ss. 164 and 163, Criminal P. C. If Magistrates only follow the instructions as given by this Court in Para. 633 of the Burma Courts Manual, they can never go wrong. For these reasons the confession alleged to have been made to U Hla by the respondent is inadmissible. If it is rejected then there remains no evidence to connect the respondent with the dacoity in question. The appeal fails and it is dismissed.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Rangoon 223

DUNKLEY J.

Ma Saw Nwe — Plaintiff.

v.

U Aung Soe — Defendant.

Civil Regular No. 227 of 1937, Decided on 10th January 1939.

(a) Buddhist Law (Burmese) — Suit by wife for maintenance—She cannot get arrears.

In a suit for maintenance by a Buddhist wife against her husband, a claim for arrears of maintenance cannot be sustained : *(1872-92) L B R 258, Rel. on.* [P 223 C 2]

(b) Buddhist Law (Burmese)—Maintenance—Suit by wife for maintenance against husband who is living separately is maintainable.

Under Buddhist law there is a positive duty cast on the husband to maintain his wife or wives. Where by law, a person is under a duty towards another person, there is vested in that other a corresponding right to have that duty performed. Hence a suit for maintenance by Burmese Buddhist wife against her husband, who is living separately from her, is maintainable : *6 M I A 348 (P C) and 11 M I A 551 (P C), Rel. on.* [P 224 C 2]

Dr. Ba Han — *for Plaintiff.*

U E Maung — *for Defendant.*

Judgment.—This is a suit by a Burmese Buddhist wife against her husband for maintenance. The plaint asks for a decree for maintenance at the rate of Rs. 166 per mensem from the date of suit, and also for arrears of maintenance at this rate from the date on which the defendant first failed to maintain the plaintiff. It is now admitted that, in view of the judgment of their Lordships of the Privy Council in (1872-92) L B R 258[1] the claim for arrears of maintenance cannot be sustained, and the parties have agreed that, if a suit for future maintenance is maintainable, the amount to be decreed for such maintenance shall be fixed at Rs. 150 per mensem. Consequently, the sole question which falls for decision is whether a Burmese Buddhist wife can bring a suit for maintenance against a husband from whom she has separated.

No evidence has been called by either party, and the case has been argued on an agreed statement of facts. The plaintiff and the defendant were married on 28th December 1931. They are still wife and husband. They cohabited until the beginning of February 1937, when they separated on the defendant contracting a second marriage. They have since been living separately. Since their separation, the defendant has not contributed anything to the maintenance of the plaintiff. The defence of the defendant to the present suit is that no suit for maintenance lies by a Burmese Buddhist wife against her husband. Sec. 9, Civil P. C., enacts that :

> The Courts shall . . . . have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

A suit for maintenance is a suit of a civil nature. But U E Maung, for the

1. Maung Hmun Taw v. Ma Pwa, (1872-92) L B R 258.

defendant, contends that the cognizance of a suit for maintenance between a Burmese Buddhist wife and husband is barred by the Burmese Buddhist law. It is conceded that the question at issue is a question regarding marriage and therefore has to be decided according to the Burmese Buddhist law. In 6 M I A 348[2] at pp. 372 and 373 a case which was decided in 1856, their Lordships of the Privy Council said :

> Marriage, whatever the form of contract may be, constitutes, if not an express, at all events an implied contract between the parties that the husband shall maintain his wife. In Christian countries a breach of this contract cannot be enforced by the wife in a Civil Court directly against the husband, because the law considers a man and his wife as one person, and will not permit an action by the wife against her husband; but no such principle is known to the Mahomedan, Hindu or Parsee law; and the Supreme Courts at Calcutta and here have always treated native married women as *femmes sole*, and indeed it is quite impossible upon any *a priori* or natural reasoning to treat them as anything else.

U E Maung, for the defendant, urges that in this respect a Burmese Buddhist marriage is similar to the Christian marriage. He does not suggest that in law a Burmese husband and wife are one person; in fact, he could not possibly do so. But he argues that, because all the property acquired by them during marriage is their joint property, therefore the position in regard to an action by the wife for maintenance is just the same. He says that to allow such an action would be tantamount to allowing the wife to sue for her own property which is in her possession through her husband, and that it would lead to the anomalous result that the wife would, in the form of maintenance obtain some part of her share in the joint property, and yet still be able to claim her full interest in the remainder.

The answer to this argument is, in my opinion, that if the husband, has obtained control over the whole of the joint property and, by living separately from his wife and refusing to maintain her, denies her the right to be maintained out of that property, there is nothing opposed either to law or to reason in granting her a cause of action to enforce that right; and that as the wife would be maintained out of the joint property if she were living with her husband and would still retain her full rights in the surplus remaining after the maintenance of the joint household, there is nothing anomalous in her receiving, when they are living separately, a portion of the joint property for her maintenance and still retaining her rights in the balance of such property. In (1872-92) L B R 258[1] their Lordships said (at page 259) :

> It is the duty of the husband to provide subsistence for his wife, and to furnish her with suitable clothes and ornaments.

On behalf of the defendant it is urged that this opinion was not necessary to the decision of the question before their Lordships and therefore must be treated as obiter dictum. But as I have already pointed out in 6 M I A 348,[2] their Lordships said that marriage, whatever the form of the contract may be, constitutes, if not an express, at all events an implied contract between the parties that the husband shall maintain his wife. Moreover, all the Dhammathats declare that it is the duty of the husband to maintain the wife: *see* Manugye, Vol. 5, Sec. 17, and the extracts of the Dhammathats collected in U Gaung's Digest, Vol. II, Secs 208, 236, 244 and 253. It is clear that under Buddhist law there is a positive duty cast on the husband to maintain his wife or wives. Where by law, a person is under a duty towards another person, there is vested in that other a corresponding right to have that duty performed. In 11 M I A 551[3] their Lordships said :

> If the law which regulates the relations of the parties gives to one of them a right, and that right be denied, the denial is a wrong; and unless the contrary be shown by authority or by strong arguments, it must be presumed that for that wrong there must be a remedy in a Court of justice.

The plaintiff, as a Burmese Buddhist wife, has a right to be maintained by her husband, and that right has in this case been denied by her husband. It has not been shown, either by authority or by argument, that she has not a remedy in a Court of justice to enforce that right which has been denied to her. Hence, it must be held that a suit for maintenance by a Burmese Buddhist wife against her husband, who is living separately from her, is maintainable. Whether such a suit could be successful if the wife had at her disposal sufficient means to maintain herself it is unnecessary to decide, because it is not alleged in the present case that the plaintiff has such means. I hold that the present suit is maintain-

2. Ardaseer Cursetjee v. Perozeboye, (1856) 6 M I A 348 = 4 W R 91 = 10 Moo P C 375 = 1 Suther 265 = 1 Sar 548 (P C).

3. Moonshee Buzloor Ruheem v. Shumsoonissa Begam, (1866-67) 11 M I A 551 = 8 W R 3 = 2 Suther 59 = 2 Sar 259 (P C).

able and must be decreed. There will be a decree ordering the defendant to pay to the plaintiff the sum of Rs. 150 per mensem as her maintenance with effect from the date of institution of this suit (i. e. 4th August 1937) and for so long as the marriage between them may subsist, or for so long as they continue to live separately. The defendant will pay to the plaintiff her costs of this suit, assessed proportionately on the amount which has been decreed, viz. Rupees 18,000.

D.S./R.K. *Suit decreed.*

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* A. I. R. 1939 Rangoon 225

SHARPE J.

Nga Chit Tin and others

v.

The King

Criminal Appeals Nos. 797, 872, 879, 968, 985, 1030, 1044, 1052 and 1146 of 1938, Decided on 31st January 1939.

*** (a) Penal Code (1860), Ss. 299, 300—Cases under—Proper mode of approaching such cases stated — Stages by which case should be dealt with enumerated — Questions of knowledge, intention, etc. are questions to be decided on facts of each case.**

The proper way to approach facts and apply law in cases where one man has by his act caused the death of another is to deal with the case in the four stages given below:

Stage 1.—It should first be established to the satisfaction of the Court that the accused person has done an act by doing which he has caused the death of another. This is the starting point.

Stage 2.—Next it should be considered whether the act on the part of the accused amounts to culpable homicide.

Stage 3.—It is only after considering the two stages that S. 300 comes into operation. Therefore the next thing to do is to ascertain whether the ingredients of S. 300 have been satisfied.

Stage 4.—Lastly it must be considered on the facts of the particular case whether the culpable homicide is brought from the higher plane of murder to which it has been raised, to the lower plane of culpable homicide not amounting to murder by reason of the case falling within any of the exceptions of S. 300.

If culpable homicide is not murder, the only matter to be considered at the fourth stage is whether the accused has established (if such is his case) the right of private defence as a complete defence under Section 96.

If culpable homicide is murder and it is not established that the case comes under any of the exceptions to Sec. 300 then it remains a case of murder.

Questions of knowledge, intention and the like such as these which arise in such cases are always essentially questions of fact falling to be decided solely on the particular facts and circumstances of each individual case: *A I R 1937 Rang 396 (F B) and A I R 1937 Rang 83 (F B), Ref.*

[P 227 C 2 ; P 228 C 1, 2 P 229 C 1 ; P 230 C 2 ; P 245 C 1, 2]

(b) Penal Code (1860), Ss. 299 and 300 — Unless culpable homicide is proved to have been committed question of murder does not arise.

The basis of murder under S. 300 is culpable homicide as defined in Sec. 299. Therefore it is necessary in every case in which one person has by his act caused the death of another to inquire whether culpable homicide has or has not been committed by the accused, for unless it has been, no question of murder can arise. [P 227 C 2]

(c) Penal Code (1860), Ss. 299 and 300 — Knowledge is sufficient to establish offence of murder—Accused during altercation going out, fetching yoke-pin and striking it on deceased's head with great force — Knowledge—Accused held guilty of murder.

Intention to cause death is a part of both Secs. 299 and 300, but it is not a necessary ingredient of the offence of murder and knowledge alone without intention whatsoever being proved is sufficient to establish offence of murder. [P 228 C 1, 2]

Where the accused during an altercation between himself and the deceased deliberately went outside and fetched a yoke-pin and returning after more than 5 minutes had elapsed struck the deceased on the head with the pin with great force and the deceased died shortly afterwards :

Held that the accused must have known that his act was imminently dangerous that it must in all probability cause death or such bodily injury as was likely to cause death and since he had no reasonable excuse for causing such bodily injury he was guilty of murder. [P 242 C 1]

(d) Penal Code (1860), Ss. 299 and 300 — Right of private defence may afford complete defence to culpable homicide and murder.

The possibility of murder being reduced to culpable homicide through the exercise of right of private defence is also bound up with the possibility of such right going so far as to afford a complete defence not only to a charge of murder but also to a charge of the lesser offence of culpable homicide. [P 229 C 1]

(e) Penal Code (1860), S. 96 — Question of right of private defence arises only when offence is proved by prosecution.

No question as to the exercise of the right of private defence can arise unless and until the prosecution has proved what would, but for the exercise of this right, be an offence. [P 229 C 2]

(f) Penal Code (1860), Ss. 299 and 300—Exceptions—If culpable homicide is not proved to have amounted to murder, it is improper and useless to consider whether case falls within one of the exceptions of S. 300.

The question as to whether the case falls within one of the exceptions of S. 300 does not arise for determination unless and until the prosecution has established a case of murder. If the prosecution has proved that culpable homicide (under Sec. 299) has been committed by the accused but has failed to prove that such culpable homicide amounted to murder (under S. 300), it is improper, and indeed useless, to consider whether any of the excluding factors are present. [P 230 C 2]

(g) Penal Code (1860), Ss. 100 and 300, Exception (2)—Merely causing injury sufficient to cause death does not deprive person of his right of private defence — *A* inflicting injury on *B* and raising weapon to strike second time — *B*, to prevent second blow, striking *A* with dah on *A's* head — *A* subsequently dying — *B* held did not exceed his right of private defence.

Merely to cause, even with great force, an injury sufficient in the ordinary course of nature to cause death necessarily is not itself sufficient to deprive a person of the right of private defence of his body. [P 232 C 1]

Where *A* after inflicting an injury on *B* was on the point of cutting *B* a second time and had his dah raised for that purpose while *B* in order to prevent the second blow falling upon him struck *A* with a dah on his head which stroke resulted in the death of *A* :

Held that *A's* action in getting ready to strike a second time had reasonably caused *B* to apprehend that grievous hurt, if not death, would befall him if he did not strike *A* as he did and it could not therefore be said that *B* had exceeded the right of private defence given to him by law. [P 232 C 1]

(h) Penal Code (1860), S. 304 — When sentence under first or second part of S. 304 to be passed stated.

Whether culpable homicide not amounting to murder is punishable under the first part or whether under the second part of Sec. 304 depends entirely upon whether the act by which the death was caused was done with one of the two intentions, or whether it was done with the knowledge mentioned in Sec. 299 Therefore unless that is first ascertained it is not possible to pass sentence under the second part of Sec. 304 rather than under the first. [P 232 C 2]

*** (i) Penal Code (1860), S. 300, Exception (4) — First test to be applied is whether act of accused causing death was done without premeditation — Effect of bringing case within Exception stated.**

Whether or not the killing was premeditated is not the first test to be applied when considering whether the exception of " a sudden fight in the heat of passion" is applicable to any given set of facts. The first test is whether the act of the accused which caused the deceased's death was done without premeditation. The distinction is not to be ignored. And if other matters necessary to bring the case within the exception are also established such as whether accused acted in a heat of passion or in a cruel and unusual manner, and the exception is thereby brought into play, the effect would be to reduce what would otherwise be murder to culpable homicide not amounting to murder. [P 233 C 2]

(j) Penal Code (1860), Sec. 300, fourthly — "without any excuse for incurring risk of causing death, etc."—S. 300 fourthly when to be considered stated.

The consideration as to whether the accused struck the blow without any excuse for incurring the risk of causing such bodily injury as was likely to cause death arises only when knowledge under S. 300 is established on the part of the accused but does not arise when one of the three intentions under S. 300 is established. [P 235 C 2]

(k) Penal Code (1860), S. 300, Exception 1—Two or three slaps on back is not sufficient to deprive person of his power of self-control.

Merely because a person is slapped two or three times on the back does not amount to grave provocation though it may be sudden, and not sufficient to deprive the person of his power of self-control especially when the person slapping has no weapon in his hand at the time of slapping. [P 236 C 1]

(l) Penal Code (1860), S. 300—Injury caused by accused and ordinarily sufficient to cause death is not sufficient to support conviction of murder unless intention is present in accused's mind.

An injury inflicted by the accused and sufficient in the ordinary course of nature to cause death is not by itself sufficient to support a conviction of murder unless the accused intended that injury should be sufficient in the ordinary course of nature to cause death. [P 237 C 2]

(m) Penal Code (1860), S. 300, Exception 4—If there is no quarrel, exception does not apply—Other facts necessary for bringing case within exception need not be considered.

In order to bring a case within exception 4 to S. 300, it is necessary to establish inter alia that the act was done upon a sudden quarrel. Where therefore there is no quarrel either sudden or otherwise it is unnecessary to look further and inquire whether there have been established any of the other facts which are essential for the purpose of bringing the case within Exception 4. [P 238 C 1]

(n) Criminal Trial—Practice—Accused convicted of murder sentenced to transportation or imprisonment—High Court on appeal should not, on confirming conviction, enhance sentence to one of death.

Where in a murder case the Sessions Judge finds the accused guilty of murder but sentences him to transportation for life or for a long term of imprisonment and an appeal from that decision is heard by the High Court a long time afterwards, the High Court even if it confirms the conviction of murder should not open revision proceedings with a view to consider the desirability of enhancing the sentence to one of death since the accused has been led to believe that his life has been spared : *A I R 1937 Rang 254 and A I R 1938 Rang 331, Rel. on.* [P 238 C 1]

(o) Penal Code (1860), S. 96—There is no restriction as to weapon or mode of using it, when exercising right of private defence, provided circumstances of case are considered together.

The Penal Code puts no restriction either upon the weapon or upon the mode of using it, in those particular cases in which it provided that the voluntary causing of death is justified when acting in exercise of the right of private defence of the body, but, of course, all the circumstances of the case must be considered together. [P 239 C 2]

(p) Penal Code (1860), S. 100—Accused on being only threatened, going out, bringing heavy stick and striking person on head—Injury on skull causing person's death—Accused held could not bring himself under S. 100.

Where the accused upon being only threatened by another person left the place without being followed and returned a short while afterwards

with a long heavy stick in his hand and struck the other person on the head with that stick and that person received a severe wound on the skull from which he died shortly afterwards :

Held that as the accused was able to leave the place quite unscathed it was impossible to hold that at the time he returned to the place and struck the person the alleged exercise of the right of private defence of the body was occasioned by any offence committed by the other person and hence the accused could not bring himself within Section 100. [P 240 C 2]

(q) Criminal Trial — Punishment — Murder case falling under exceptions to S. 300, I. P. C., reduced to culpable homicide — If only knowledge under S. 299 is imputable to accused, maximum term of imprisonment is 10 years.

A case of murder which, owing to the application of one of the Exceptions to S. 300 is reduced to culpable homicide not amounting to murder, is punishable, so far as imprisonment is concerned, with a maximum term of ten years, if no intention is imputable to the accused under S. 299 but only the knowledge therein mentioned. [P 241 C 2]

(r) Evidence Act (1872), Sec. 33 — Unless record shows that deposition comes under Sec. 33, bare statement that it falls under S. 33 is not sufficient to bring such evidence within terms of Section 33.

Where the deposition of a witness is recorded by a committing Court and is presumably admitted under S. 33 but there is nothing on record to show that such evidence comes within the terms of S. 33, the bare statement that the deposition is admitted under S. 33 is not sufficient to bring such evidence within the terms of S. 33. [P 244 C 2]

Lambert, Govt. Advocate (in 968) and Tun Byu, Govt. Advocate (in 1044) — *for the Crown.*

Sharpe J.—I am dealing with these nine appeals together in a single judgment because although they are quite distinct cases each was a case where the appellant was charged with murder and the same Sections of the Penal Code fall to be considered and, for other reasons which will appear in a moment, it will be convenient to deal with them all together. As it was over three-quarters of a century ago that Ss. 299 and 300, I. P. C., became law, it may be thought that all that could be said by way of guidance in such cases has been said long ago, and that no more judgments are necessary in order to expound what may be called the fundamental principles of those two Sections, as distinct from explaining the various phrases which go to make them up. But the state of affairs disclosed, not only in the present appeals, with all of which I was required to deal within a period of less than two months, but also in several other cases of the like nature which have come before me, lead me to believe that it will be useful if I set out in what I hope is simple phraseology and in what I believe will prove to be an easily understood form, the proper way, as it seems to me, in which those who have to conduct criminal trials in this country should approach the facts and apply the law in those cases where one person has, by doing some act, caused the death of another person. I will deal with the matter by stages.

Stage 1: The first stage requires that it shall be established to the satisfaction of the Court that the accused person has done an act by doing which he has caused the death of another person. There is, of course, no difficulty in appreciating that that is the starting point, but that is almost the only step in such cases which is invariably taken correctly. Even this first stage may give rise to difficulties, and such cases as 1937 R L R 384[1]—I refer to the Full Bench decision—may have to be considered. But difficulties at this first stage are infrequent. From the very next stage onwards however difficulties frequently appear to creep in, as they have done in all the cases now under appeal.

Stage 2: The trial Court must next consider whether that act on the part of the accused amounts to culpable homicide. More than one Judge of a Court of Session has considered that the second step is immediately to address his mind to the question whether the accused is guilty of murder as defined in Sec. 300, Penal Code. That almost invariably leads to confusion. S. 299 defines culpable homicide and S. 300 says that, except in certain specified cases, culpable homicide is, in certain events, murder. In fact it is not out of place to describe the two offences defined in Ss. 299 and 300 as "culpable homicide not amounting to murder" and "culpable homicide amounting to murder," respectively. It will thus be seen that the basis of murder under Sec. 300 is culpable homicide as defined in Sec. 299. Therefore it is necessary in every case of the class with which I am now dealing to inquire, as the second step in the proceedings, whether culpable homicide has or has not been committed by the accused, for unless it has been, no question of murder can arise. Therefore I will at once make clear what culpable homicide is.

Section 299 enacts that the doing of an act which causes death is culpable homi-

1. The King v. Abor Ahmed, (1937) 24 A I R Rang 396 = 171 I C 574 = 38 Cr L J 1097 = 1937 R L R 384 (F B).

cide if it is done either (i) with one of two intentions, that is to say, with the intention of causing either (a) death or (b) such bodily injury as is likely to cause death, or (ii) with the knowledge that death is likely to be caused by such act.

My headings (i) and (ii) are, it will be noticed, alternative, the one to the other, so that it follows that culpable homicide may be committed without any intention on the part of the accused, if he has the knowledge indicated under my heading (ii). S. 304 lays down what shall be the punishment for culpable homicide not amounting to murder: if the act is merely done with the knowledge that death is likely to be caused thereby and without either of the intentions mentioned in my heading (i), *supra*, [that is to say, if the case falls under my heading (ii), *supra*], a lesser punishment is provided under the latter part of S. 304. If it is not possible to hold in any given case that the act which caused death was done either with one of the two necessary intentions or with the necessary knowledge, culpable homicide (and, *a fortiori*, murder) has not been committed, and other Sections of the Penal Code (for example, Ss. 321 and 322) must be taken into consideration with a view to seeing what (if any) other offence the accused has committed.

Stage 3: Section 300 now, and only now, comes into operation. If it is established that an act which caused death was done either with one of the two intentions or with the knowledge necessary to cause that act to amount to culpable homicide, then, and then only, S. 300 comes into operation, and therefore the next thing to do is to ascertain whether such act was done either (i) with one of three intentions, that is to say, with the intention of causing either (a) death, or (b) such bodily injury as the offender knew to be likely to cause the death of the person to whom the harm was caused, or (c) such bodily injury as was sufficient in the ordinary course of nature to cause death, or (ii) (A) with the knowledge that the act was so imminently dangerous that it must, in all probability, cause either (a) death, or (b) such bodily injury as was likely to cause death, *and* (B) without any excuse for incurring the risk of causing either (a) death or (b) such bodily injury as was likely to cause death.

It will have been observed that an intention to cause death is a part both of S. 299 and also of S. 300. Therefore, if in the earlier part of the inquiry, under S. 299, which I have called the second stage, it appears that the act was done with the intention of causing death, then stage 3 will present no difficulties, for, it at once amounts to murder, under Sec. 300, unless the case comes within one of the exceptions in the latter Section. But if the act is not done with the intention of causing death, but is done either with what may be called the alternative intention—my heading (i) (b) under Sec. 299—or with the knowledge mentioned in Sec. 299—my heading (ii) under that Section—then it must be ascertained whether it was done either with one of the intentions which I have marked as (i) (b) and (i) (c) under S. 300, or with the knowledge, but without the excuse, mentioned in that Section. Hence, it will be seen that intention is not a necessary ingredient of murder. If the act is done with the knowledge that death is likely to be caused thereby, it is culpable homicide; and if it is done with the further knowledge that the act was so imminently dangerous that it must, in all probability, cause either death or such bodily injury as was likely to cause death, then that culpable homicide is murder. Thus knowledge is sufficient to establish murder without any intention whatever being proved. It will be seen in a moment that that point was overlooked by the learned trial Judges in four of the appeals now before me. If the culpable homicide is found to be murder, then it is necessary to consider more than one matter at stage 4; if it is not so found, then it remains culpable homicide and there is only one further matter to be inquired into, namely whether the right to private defence has been established by the accused. With that defence I will deal in a moment.

Stage 4 (I) If the culpable homicide is murder: If the prosecution has proved that the act either (a) was done by the accused with the intention of causing death, or (b) fulfilled one of the other requirements of S. 299 and also fulfilled one of the other requirements of Sec. 300, then it, must further be considered whether, on the facts of the particular case, the culpable homicide is brought down from the higher plane of murder, to which it has been raised, to the lower plane of culpable homicide not amounting to murder, by reason of the act having been done, either (1) in an excessive but bona fide exercise of the right of private defence, or (2) whilst the accused was

deprived of the power of self-control, by grave and sudden provocation, or (3) in a sudden fight in the heat of passion, or (4) in such circumstances as are mentioned in either Exception 3 or Exception 4 in Section 300, exceptions into which, having regard to the infrequency with which they are, or are likely to be invoked, I do not propose to go in this judgment. I have placed the question of the right of private defence at the head of the exceptions, although it is Exception 2 in Sec. 300, because the possibility of murder being reduced to culpable homicide through the exercise of such right is also bound up with the possibility of such right going so far as to afford a complete defence not only to a charge of murder but also to a charge of the lesser offence of culpable homicide. It is for this reason that I think that it will be convenient if I deal with the whole question of the right of private defence not merely limiting my remarks to cases where there is an excessive but bona fide exercise of the right.

(II) If the culpable homicide is not murder : If the culpable homicide is not murder, the only matter to be considered at stage 4 is whether the accused has established (if such is his case) the right of private defence as a complete defence under Section 96.

(1) The right of private defence : The voluntary causing of death in the exercise of this right calls for a somewhat careful analysis of the legal principles involved, for the meaning and effect of Ss. 96 to 100 (both inclusive), 102, 103, 105, 106, 299 and 300, Penal Code, must all be considered together. As I have just indicated, the effect of a bona fide exercise of such right falls into two categories : (i) it may afford a complete defence to what would otherwise be either murder or culpable homicide not amounting to murder, or (ii) in a case of culpable homicide which would otherwise be murder it may render the accused not guilty of murder but guilty only of culpable homicide not amounting to murder.

(i) The right of private defence as a complete defence : The right of private defence will, in certain circumstances, completely absolve the accused from all guilt, even where the accused has voluntarily caused the death of another person. The words of Sec. 96 are simple : "Nothing is an offence which is done in the exercise of the right of private defence." It is clear from those words that no question as to the exercise of the right of private defence can arise unless and until the prosecution has proved what would, but for the exercise of this right, be an offence. If and when the prosecution have established that, then and then only the question of the right of private defence will arise.

The following are the circumstances in which the right of private defence will completely absolve the accused from all guilt, even when he has voluntarily caused the death of another person.

(A) Where the right is exercised in the private defence of the body of the accused, it affords a complete defence, (a) if the deceased was the actual assailant of the accused, and (b) if the defence committed by the deceased which occasioned the exercise of the right was of any of the six descriptions enumerated in Sec. 100, Penal Code. (B) Where the right is exercised in the private defence of the property of the accused, it equally affords a complete defence if the offence the committing of which, or the attempting to commit which, by the deceased occasioned the exercise of the right was of any of the four descriptions enumerated in Sec. 103, Penal Code.

Such right of private defence commences, if it is of the body of the accused, as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed, and it continues as long as such apprehension of danger to the body continues ; if it is of the property of the accused, such right of private defence commences when a reasonable apprehension of danger to the property commences, and its continuance is regulated by the provisions of S. 105, Penal Code. But the right of private defence, whether of the body or of the property of the accused, will not afford a complete defence where there was time for the accused to have recourse to the protection of the public authorities, or where he inflicted more harm than was necessary for the purpose of defence, or in those cases mentioned in the first two paragraphs of, and in the two Explanations to, S. 99, Penal Code. On the other hand, the accused, in the exercise of the right of private defence of the body against an assault which reasonably causes the apprehension of death, may incur the risk of harm to an innocent person if he (the accused) be so situated that he cannot

effectually exercise that right without incurring such risk.

(ii) The right of private defence as a means of preventing culpable homicide which would otherwise be murder from being murder:

A person accused of murder may be unable to establish such a right of private defence as I have just been considering and so fail to obtain an acquittal on that charge, yet, it is possible for him to be convicted only of culpable homicide not amounting to murder, if (A) he exercised his right of private defence, whether of person or of property, in good faith, although he exceeded the power given to him by law, and (B) he caused the death of the deceased against whom he was exercising such right of defence both (a) without premeditation and (b) without any intention of doing more harm than was necessary for the purpose of defence. I will now return to the other two exceptions to which I referred above, namely those covering what are usually called "grave and sudden provocation" and "a sudden fight in the heat of passion."

(2) Grave and sudden provocation: In order to bring a case within this exception it is necessary that the following facts should be proved, that is to say, that (i) the offender did the act whilst deprived of the power of self-control, and (ii) he must have been so deprived by provocation (A) which was both grave and sudden and (B) was neither sought nor voluntarily provoked by the offender as an excuse for killing or doing harm to any person, and (C) was not given by anything done either (a) in obedience to the law or (b) by a public servant in the lawful exercise of his powers as such or (c) in the lawful exercise of the right of private defence. (Whether the provocation was grave and sudden enough to prevent the offence amounting to murder is a question of fact.) It will be noticed that to establish a case of grave and sudden provocation there must be proved my heading (i) plus (ii) (A), plus (ii) (B) and plus (ii) (C). If the above facts are established the plea of grave and sudden provocation is established, and it will extend not only to causing the death of the person who gave the provocation but also to causing the death of any other person if the offender caused the death of such other person by mistake or accident.

(3) A sudden fight in the heat of passion: In order to bring a case within the exception generally known as "a sudden fight in the heat of passion" it must be proved that the fact was due (i) without premeditation and (ii) in a fight which was sudden and (iii) in the heat of passion and (iv) upon a sudden quarrel and (v) without the offenders having either (A) taken undue advantage or (B) acted in a manner which was either (a) cruel or (b) unusual. (It is immaterial in such cases which party offers the provocation or which commits the first assault.) Here again, it will be seen that there are no facts amongst those to be proved from which there may be made, so to speak, a selection; all must be proved. Further, it should be noticed that the word "sudden" appears in two places in the Exception; not only the fight but also the quarrel must be sudden. If in a case of culpable homicide amounting to murder, it is not established that the case comes within one of the Exceptions mentioned above, then it remains a case of murder. I desire here to emphasize the fact that the question as to whether the case is within one of those exceptions does not arise for determination unless and until the prosecution has established a case of murder. If the prosecution has proved that culpable homicide (under S. 299) has been committed by the accused but has failed to prove that such culpable homicide amounted to murder (under S. 300), it is improper, and indeed useless, to consider whether any of the excluding factors are present, save the one which I have just mentioned. I know that to some persons I shall appear to be stating the obvious in what I have just said, but I have had to deal with more than one appeal in which the trial Judge has considered (and come to a conclusion on the point) whether one of the Exceptions mentioned in S. 300 applied, before he ever considered whether the culpable homicide in question amounted to murder.

I hope that the foregoing sets out in simpler language and in a more easily understood form than appears in the Penal Code the essential features of a case where one person has, by some act of his, caused the death of another. It was not, of course, possible for those who framed the Code to adopt the semi-diagramatical form which I have done. It is not the purpose of the present judgment to discuss the question of the burden of proof in cases under Ss. 299 and/or 300, Penal Code, and I purposely refrain from doing so, if only for the reason that the question has been very fully and

recently discussed by a Full Bench of this Court in 14 Rang 666;[2] I will content myself with a mere reference to that case and to S. 105, Evidence Act. My main purpose in the present judgment has been to analyze the material Sections of the Penal Code with a view to indicating the proper method of approach to the facts of any case in which the charge is one of murder. I will now turn from the general to the particular and examine the facts of the nine cases now under appeal and point out what appear to me to have been the errors into which the learned trial Judges respectively fell. In all these cases, as I have already said, the charge was one of murder.

NGA CHIT TIN'S CASE

In the first of these cases, the appeal of Nga Chit Tin, the facts are as follows : The appellant, a young cooly only 17 years of age, living in a small village, went along one evening with two young companions, aged only 14 and 15 years respectively, to visit a man living on the edge of the same village. That same evening the deceased, who lived in a neighbouring village, about a mile away, paid a visit to a friend in the appellant's village. The deceased had a dah with him that evening; he had told a friend whom he met on the way that he was going to meet a *bo* (brave man) who lived in the southern quarter of the appellant's village, which is the quarter in which the appellant lived. On their way back from their visit the three young men passed the house where the deceased was visiting; they were seen to do so by those who were sitting with the latter. The appellant also happened to have a dah with him that evening. As soon as he and his two companions had passed, the deceased left his friend's house; although he did so suddenly, on the pretext that he wanted to pass water, he took his dah with him. Outside, the deceased went straight up to the appellant and, after exchanging a few words with him, caught hold of him by his hand, dragged him a short distance and, when the appellant asked him (the deceased) to let go of his hand, the deceased struck the appellant a blow with his dah, at the same time challenging him to fight. At the hospital, where he was detained as an in-patient for a week, the appellant was found to have an incised wound on his right arm, three inches long, a quarter of an inch wide, by a quarter of an inch deep. Having inflicted this injury, the deceased was on the point of cutting the appellant a second time, and he had his dah raised for the purpose, when the appellant struck the deceased with the dah which he (the appellant) was carrying. The deceased, I should mention, was 11 years older than the appellant, who, as I have already mentioned, is only 17 years of age. The injuries inflicted on the deceased by the appellant were an incised wound six inches long, half an inch wide, and three quarters of an inch deep, on the left side of the head, and an incised wound, two inches long, a quarter of an inch wide, and only skin deep, on the inside of his right forearm. The former injury was caused by a blow struck with great force and was sufficient in the ordinary course of nature to cause death. The deceased was admitted to hospital about 20 hours after receiving his injuries and he died a week later, just after the appellant was discharged from the same hospital. There was every likelihood that the deceased's life would have been saved if prompt medical aid had been given on the spot.

Such are the material facts of the case and they are taken entirely from the evidence given by the witnesses for the prosecution. The appellant still frankly admits in this appeal, and has throughout admitted that he struck the blow which resulted in the deceased's death. He relied however and he still relies, upon his right of private defence. In his judgment the trial Judge dealt with the case in the following way : He first recounted the facts somewhat more fully than I have thought it necessary to do. He then referred to the medical evidence and speaking of the head injury inflicted on the deceased, said :

> A great force was required to cause it. The accused must therefore be held to have intended to cause death. But his plea was plea of self-defence.

The learned Additional Sessions Judge then expressed the opinion—and I entirely agree with him — that the deceased began the attack with a dah, having first picked a quarrel with the appellant. The learned Judge concluded :

> It was the deceased who picked the quarrel. It was he who attacked first and that was with a dah. He was a dangerous person in the village. I therefore hold that the accused has the right of private defence. But I think he exceeded the right. He received one injury only and that was a superficial one. But he delivered two cuts on the

2. Emperor v. U Damapala, (1937) 24 A I R Rang 83=168 I C 193 = 38 Cr L J 524 = 14 Rang 666 (F B).

deceased after he had received such simple injury. One of the injuries given by him was sufficient in the ordinary course of nature to cause death. It was also caused with a great force. The accused therefore exceeded the right. So, the offence falls not under S. 302 but under Part 1 of Section 304.

He convicted the appellant accordingly and ordered him to be detained in a Borstal Institution for five and a half years. In my judgment to hold that merely to cause, even with great force, an injury sufficient in the ordinary course of nature to cause death necessarily, and itself, suffices to deprive a person of the right of private defence of his body is to ignore entirely the provisions of S. 100, I. P. C. But let me take the case by stages. *Stage 1* : There is no difficulty here, for, it is admitted that it was the appellant's act which caused the death of the deceased. *Stage 2* : I do not think that the appellant can be said to have had either of the intentions mentioned in S. 299 but he must, in my view, be taken to have known that death was likely to be caused by his act. *Stage 3* : I am satisfied that the appellant had none of the intentions mentioned in S. 300. I shall in a moment point out that in my judgment the appellant has established his right of private defence and that I think that he had an excuse for incurring the risk of causing such bodily injury as was likely to cause death; it is therefore unnecessary to enquire whether he must be deemed to have had the knowledge mentioned in S. 300. Accordingly this culpable homicide was not murder. *Stage 4* : In this case it will be what I have called stage 4 (ii). It appears to me that the appellant merely intended to cause such harm to the deceased as would prevent him from striking the appellant a second time and I am also prepared to find that the deceased's action in getting ready to cut the appellant a second time reasonably caused the appellant to apprehend that grievous hurt, if not, indeed, death, would befall him if he did not strike the deceased as he did, and I do not think that in the particular circumstances of this case he exceeded the power given to him by law. Such being my view of the facts the defence put forward by the appellant, Nga Chit Tin, succeeds. I accordingly allow his appeal and set aside his conviction and sentence. I have already directed a release warrant to issue.

Before passing to the next case I desire to add this : Assuming that the learned trial Judge had been correct in holding, as he did, that the appellant's plea of the right of private defence failed as a complete defence to the charge, he ought, as I have done, to have gone through the various stages which I indicated earlier in this judgment. It might well be that he would have come to the conclusion that culpable homicide had been committed; but until he was further satisfied that that culpable homicide was murder no question could arise as to the right of private defence being a means of preventing the culpable homicide which would otherwise have been murder from being murder (as distinct from affording a complete defence). And again how was the learned trial Judge able to say that, because the appellant exceeded the right of private defence, therefore the offence fell under Part 1 of S. 304? Whether culpable homicide not amounting to murder is punishable under Part 1 or whether under Part 2 of Sec. 304 depends entirely, as I have already pointed out, upon whether the act by which the death was caused was done with one of the two intentions, or whether it was done with the knowledge, mentioned in Sec. 299. To that question the learned Judge never applied his mind in this case. The necessity for going through the various stages which I have enumerated can now, I think, be readily understood.

NGA MAN NWE'S CASE

In the second of the present appeals (Nga Man Nwe's case) the essential facts although lying within a narrow compass cannot be ascertained too easily. Apparently the appellant and the deceased had not been on speaking terms with each other for about three years. They had fallen out over the appellant paying unwanted attention to the deceased's widowed daughter. There is no doubt whatever that the deceased received an incised wound on the lower part of the left side of his chest, his sixth rib being clearly cut through lengthwise in the middle, and that that injury was inflicted by the appellant is also beyond question. The deceased died a week later. According to the medical evidence the injury was sufficient in the ordinary course of nature to cause death, but was not necessarily fatal. Death was due to septic pericarditis and pleuro-pneumonia, the latter being the result of infection set up by the wound. The infection which was a contributory cause of the deceased's death, was introduced by a dirty wrapping being applied to

the wound in the first place. Both men were armed with dhamas at the time of the occurrence. The learned Judge in his judgment jumped straight to the conclusion that, subject to the application of Exception 4 to S. 300 the case was one of murder because it must be presumed that the appellant gave the blow with the intention of causing bodily injury sufficient in the ordinary course of nature to cause death. In other words he jumped straight to what I call stage 3. Let me go through the proper stages myself.

Stage 1 : In this case even this stage is not entirely free from difficulty. Did the appellant cause the death of the deceased by cutting him with his dhama? The medical evidence showed, in addition to what I have already stated, that only a few cases of septic pericarditis prove fatal and that, had the wound been clean, the deceased might have recovered. I think it is clear that the wound was not clean because of the dirty wrapping which had been put upon it. There is no evidence to show when, how or by whom the dirty wrapping was applied. In 14 Rang 643[3] Leach J. at the very bottom of page 646, said :

> The real question was whether in the end the wound inflicted by the prisoner was the cause of death.

In 1937 R L R 384,[1] when that case was before a Full Bench, the occasion was taken to point out that the head-note in 14 Rang 643[3] was in terms which were too wide and should read :

> Where a person wilfully and without justifiable excuse inflicts a wound which is ultimately the cause of death of another person, he shall be deemed to have caused the death of that other person.

I am satisfied in the present case that in the end the wound inflicted by the appellant was the cause of the deceased's death. I can accordingly now pass to the next stage.

Stage 2: At the end of his judgment the learned Sessions Judge said :

> As the blow with the dah was given by accused over deceased's heart, it must be presumed that he gave the blow with the intention of causing bodily injury sufficient in the ordinary course of nature to cause death.

It will thus be seen that the learned trial Judge jumped straight to Sec. 300 *(Stage 3)*. I must therefore myself deal with Sec. 299. In my judgment the appellant must be held to have intended to cause such bodily injury as was likely to cause death.

Stage 3 : I agree with the learned trial Judge that the appellant "gave the blow with the intention of causing such bodily injury sufficient in the ordinary course of nature to cause death." It was therefore a case of murder.

Stage 4 : Immediately after the above quoted words the learned trial Judge said :

> But the act is, I consider, reduced from murder to culpable homicide not amounting to murder as it is covered by Exception 4 to S. 300, Penal Code. There is no evidence that accused premeditated the killing but rather that there was a sudden fight as result of a sudden quarrel; nor did the accused take undue advantage as both the parties were armed with dahs. The medical evidence establishes that deceased's wound was most probably caused by a deliberate cut.

There are two main criticisms which I think it necessary to make in regard to the above-quoted, the all important, part of the judgment of the trial Court. Firstly, in regard to the learned Judge's finding that the case is covered by Exception 4 to Sec. 300. The trial Judge said that there was "no evidence that accused premeditated the killing." Whether or not the killing was premeditated is not the first test to be applied when considering whether the exception of "a sudden fight in the heat of passion" is applicable to any given set of facts. The first, that is whether the act of the accused which caused the deceased's death was done without premeditation. The distinction is not to be ignored. Secondly, as regards the other essentials necessary to bring a case within this Exception, the learned Sessions Judge found not only that there was a sudden fight as the result of a sudden quarrel but also that the appellant did not take undue advantage. The learned Judge however entirely failed to apply his mind either to the question whether the appellant acted in the heat of passion or to the possibly more important question whether the appellant acted in a manner which was either cruel or unusual.

Owing to such failure on the learned Judge's part, I must now myself consider whether the appellant can be said to have discharged the burden of proving the existence of circumstances bringing the case within this Exception. I have earlier in this judgment made a passing reference to Sec. 105, Evidence Act, which expressly places that burden upon the appellant; that Section provides that "the Court shall" (not "may") "presume the absence of such circumstances." Applying my mind now,

3. Emperor v. Nga San Pai, (1936) 23 A I R Rang 442=1936 Cr C 866=165 I C 245=37 Cr L J 1119=14 Rang 643.

as I must do, to the matters which fall to be considered in this connexion, I come, in the first place, to the question whether the act of the appellant was done without premeditation. That is the starting point. I regret that I am unable to persuade myself that the act of the appellant in striking the deceased on the chest with his dhama was done without premeditation. I agree with the learned Judge that the killing was not premeditated, but in my opinion the act which caused the killing was premeditated. It is therefore useless for me to consider this aspect of the case further, for whether or not I agree with the learned Sessions Judge that the act was done in a sudden fight upon a sudden quarrel without the appellant taking undue advantage, and whether or not, on applying my own mind to the matters which the learned Judge failed to consider, I come to the conclusion that the act was done in the heat of passion without the appellant having acted in a manner which was either cruel or unusual, the appellant has, in my judgment, failed to satisfy me that the act which caused the deceased's death was done without premeditation. Accordingly, having regard to the terms of S. 105, Evidence Act, I must presume the absence of such circumstances as would reduce the case from one of murder to one of culpable homicide. It follows therefore that in my judgment the appellant is guilty of murder. He has had the good fortune to be convicted only of culpable homicide not amounting to murder. His appeal will be dismissed, as regards both conviction and sentence.

NAZIR ALI'S CASE

In the third of these appeals, the case of Nazir Ali, the facts are as follows : The appellant and the deceased were two coolies who were, at the time of the occurrence, both employed in loading kabine sticks on to a cargo boat lying along side a jetty at Akyab. The deceased was considerably older than the other coolies. The latter were teasing him, and one of them pulled his testicles, "playfully", as one of the witnesses described it. The deceased thereupon became angry and, after putting down one of the kabine sticks which he happened to have in his hand at the time, "slapped the accused" (the appellant) "twice or thrice on the back." Then the appellant picked up the kabine stick which the deceased had just put down, the diameter of which is approximately the same as that of a rupee coin, and struck the deceased on the head with it. The deceased fell into the water, which thereabouts was only knee-deep, but was helped out. The other coolies were anxious to hush up the whole affair, and the matter was not reported to the police for some time, with the result that the deceased did not receive medical treatment as soon as he might have done; he died about twenty-four hours after the injury had been inflicted upon him. From the medical evidence, it appears that the injury was not necessarily fatal, and, if prompt medical aid had been given, the life of the deceased could have been saved. The injury was however, to use the words of one of the medical witnesses, "likely to cause death in the ordinary course of nature." The same witness said that, with the kabine stick which was in fact used, only moderate force was necessary to cause the injury. Those are the material facts as found by the learned Additional Sessions Judge, a finding in which all the assessors apparently concurred, and I see no reason for disturbing that finding. The appellant was charged with murder. The learned Additional Sessions Judge, however came to the conclusion that the offence which had been committed was only culpable homicide, and that, as the case fell within the terms of the latter part of S. 304, the appellant was only liable for the lesser of the two punishments provided by that Section. All the assessors thought that the accused was guilty only of voluntarily causing grievous hurt, an offence punishable under S. 325, I. P. C. Upon the abovementioned facts what, if any, offence has the appellant committed? Let me go through the various stages enumerated earlier in this judgment.

Stage 1 : There is, in the first place, no doubt that it was the act of this appellant which caused the death of the deceased.

Stage 2 : Does it amount to culpable homicide? The learned Additional Sessions Judge held that the appellant, when he struck the deceased on the head as he did, must have had the knowledge that death was likely to be caused by such act. In that finding I concur. Therefore at least a case of culpable homicide was established.

Stage 3 : Is the case one of murder, as defined by Sec. 300? Some confusion has arisen, I think, in this case from the phraseology used by one of the medical witnesses for the prosecution. It will be seen that under heading (i) (c) of my analysis of S. 300 one of the matters which

has to be considered is whether the accused intended to cause such bodily injury as was sufficient in the ordinary course of nature to cause death, while under heading (ii) (A) (b) of my analysis under the same Section another matter, which may have to be considered, is whether the accused knew, from the imminently dangerous nature of his act, that it must, in all probability, cause such bodily injury as was likely to cause death. The first part of the sentence in the doctor's evidence to which I have called attention employs the words "likely to cause death", which come under my heading (ii) (A) (b), while the concluding words are "in the ordinary course of nature," which come under my heading (i) (c). In the course of his judgment the learned Additional Sessions Judge says:

> From the nature of the act done by the accused i. e. dealing a blow with the stick on the head, which is the vital part of a human body, it can be presumed that the accused had the knowledge that the injury inflicted by him was likely to cause death, but the question is whether he had any intention of causing the death of the deceased or to cause such bodily injury as was likely to cause death.

It will be appreciated that the learned Judge should at least have said "or to cause such bodily injury *as the accused knew* was likely to cause death." But the omission of the words which I have underlined (italicized) is, by comparison with the error to which I am about to call attention, a minor error on the part of the learned trial Judge. He continued:

> In every case of murder or culpable homicide not amounting to murder the prosecution have to prove affirmatively the existence of the requisite intention or the existence of such facts as will justify the Court in presuming the existence of such intention. Of intention in the present case there is none.

A few lines further on he says that the evidence "clearly shows the non-existence of intention to kill the deceased," and he "therefore" he says, holds that the offence committed was only one of culpable homicide not amounting to murder. It will thus be seen that he entirely failed to consider the possibility of the blow having been struck by the appellant either (1) with the intention of causing either (a) such bodily injury as the appellant knew to be likely to cause the death of the deceased or (b) such bodily injury as was sufficient in the ordinary course of nature to cause his death, or (2) with the knowledge that his act was so imminently dangerous that it must, in all probability, have caused either death or such bodily injury as was likely to cause death, which are headings (i) (b), (i) (c) and (ii) (A), respectively, under my analysis of S. 300. If the learned Additional Sessions Judge had considered this aspect of the case, I do not think that he could have avoided coming to the conclusion, to which I myself have come, namely that, putting it in the way most favourable to the appellant, he must have known that his act was so imminently dangerous that it must, in all probability, cause at least such bodily injury as was likely to cause death [my heading (ii) (A) (b) under S. 300].

Where knowledge on the part of an accused person is established under S. 300, a further question arises, which does not arise where one of the three intentions is established under that Section. As will be seen from my analysis of S. 300, it now has to be considered in the present case whether the appellant struck this blow without any excuse for incurring the risk of causing such bodily injury as was likely to cause death. I am quite unable to persuade myself, upon the facts of this case, that the appellant had any such excuse. In my judgment therefore, this is a case of murder, unless one of the appellant's pleas, either that of the right of private defence or that of grave and sudden provocation, is established.

Stage 4: I will deal with those two defences. I will deal first with the plea of the right of private defence. It is possible, as I have already explained, for that plea to afford a complete defence to a charge of murder. On the facts of this case however I think it quite impossible even to suggest that the deceased assaulted the appellant in such a way that the latter had a reasonable apprehension that either death or grievous hurt would befall him. Therefore the appellant cannot be absolved from all guilt. The question remains: Can, what would otherwise amount to murder, be reduced to culpable homicide not amounting to murder? That can be done by establishing either such right of private defence as falls short of completely absolving the appellant of all guilt but which is otherwise sufficient for that purpose, or the alternative defence of grave and sudden provocation. In regard to the former, I am prepared to hold that the deceased's death was caused without premeditation on the part of the appellant [my heading (ii) (B) (a) when dealing with the right of private defence], but it is quite impossible to hold that the appellant did not intend to do more harm than was

necessary for the purpose of exercising the right of private defence of his person [my heading (ii) (B) (b) on that same topic]. In my judgment therefore there is no ground upon which the plea of the right of private defence in this case can succeed either to the extent of entitling the appellant to an absolute acquittal or even to the lesser extent of reducing what would otherwise be murder to culpable homicide not amounting to murder. I now turn to the defence of grave and sudden provocation, which, as I have already indicated, was also raised by the appellant at the trial. It is, to my mind, quite impossible to hold that the appellant was deprived of the power of self-control merely by being slapped, even two or three times, on the back. The deceased, it will be remembered, had, before slapping the appellant, put down the kabine stick which he had had in his hand; not only is the inference to be drawn that the slapping was done by the deceased merely with his hand—indeed the word "slap" indicates, of itself, that no weapon whatever was used, but merely the accused's own hand—but from the memorandum of appeal it appears that the appellant says that it was only with his fist, as he put it, that the deceased struck him. The appellant's deprivation of the power of self-control is the first fact which must be established: see my (i) under this heading, p. 11 ante. Therefore, it is quite useless to proceed further with a consideration of this defence. But even assuming that the appellant was deprived of the power of self-control, it would be impossible to hold on the facts of the present case that he was so deprived by grave and sudden provocation which was neither sought nor voluntarily provoked by him as an excuse for doing harm to the deceased. In any event I cannot persuade myself that being slapped on the back was sufficient provocation. It may have been sudden but it was certainly not grave. As will be seen from my analysis of this Exception, all the facts which I there set out must be established. In my judgment a defence of grave and sudden provocation cannot be sustained in the present case.

I have already said that my view of the matter is that, unless the plea either of the right of private defence or of grave and sudden provocation is established, this is a case of murder. As, for the reasons which I have just given, neither of those pleas has been established, the appellant ought, in my judgment, to have been convicted of murder, and he has had a stroke of good fortune, not only in being convicted of culpable homicide not amounting to murder, instead of murder, but also in being sentenced, under part 2 of S. 304, to only seven years' rigorous imprisonment. His appeal must be dismissed as regards both conviction and sentence.

NGA SET'S CASE

I have already dismissed this appeal, but did not then give my reasons for doing so, intimating that I would give them on a future occasion. This I will now do. The facts in Nga Set's case appear to be that about 4 P. M. on 16th March last, three men were drinking tari with the deceased (who was 51 years of age) at the latter's house, when they were joined by the appellant (a young man of 20) and another man called Maung Hla Pe, who asked the deceased to give him some tari. The deceased replied that there was no more tari, and thereupon Maung Hla Pe lost his temper and became abusive, and a fight ensued between them, that is to say, between the deceased and Maung Hla Pe. The appellant interfered in the fight, and stuck his knife into the abdomen of the deceased. The knife entered the abdominal cavity and penetrated one loop of the intestines; the injury so inflicted was sufficient in the ordinary course of nature to cause death and the deceased in fact died in hospital 12 hours later. The appellant admits that he was one of those present at the deceased's house at the time of the occurrence and, further more, that he interfered in the fight; he says however that he tried, but unsuccessfully, to stop the fight, and he denies that he stabbed the deceased. The learned Sessions Judge, after stating the above facts (but more fully than I think it necessary for me not to do) concluded his judgment as follows:

> On the facts established I am satisfied that the accused was the assailant of Maung Kya (the deceased). In view of the medical evidence (which the learned Judge had referred to quite shortly; indeed I have already quoted in full his entire reference to it in his judgment) the offence seems clearly to be murder; but I do not regard it as a bad case of murder; there was no premeditation and no real intention to cause Maung Kya's death. The assessors have found in favour of a verdict of not guilty.

His conclusions could hardly be stated more briefly. I will deal with the case in the stages indicated at the commencement of this judgment.

Stage 1 : Did the appellant do an act which caused the death of the deceased? The learned Sessions Judge has found that he did, and as to that, it is, I think, sufficient for me to say that in that finding I entirely concur.

Stage 2 : Did the appellant do that act either with one of the two intentions, or with the knowledge mentioned in S. 299? The learned trial Judge held, as will have been seen, that the appellant committed murder, but that he had no real *(sic)* intention to cause the deceased's death. It is impossible to know, and I do not think I ought to speculate as to, what the learned Judge meant by "no real intention." I must, I think, take it that he held that the appellant had no intention to cause the deceased's death. The learned Judge, having come to that conclusion, ought then to have considered whether the appellant stabbed the deceased with his knife either with the intention of causing such bodily injury as was likely to cause death or with the knowledge that death was likely to be caused by his act [my headings (i) (b) and (ii) under S. 299]. But the learned Sessions Judge entirely failed to consider that aspect of the case at all, and therefore never completed what I have called the second stage. I will therefore now state my own conclusions on this second stage. I am not at all sure that I agree with the learned Sessions Judge's finding (if indeed it be the fact that he intended to, and did, find) that the appellant had no intention of causing the death of the deceased, but I will assume in the appellant's favour that he (the appellant) had no such intention. Be that however as it may, I have no doubt that the appellant, in inflicting the abdominal injuries which he did, intended at least to cause such bodily injury as was likely to cause death. Accordingly he is, at the very least, guilty of culpable homicide.

Stage 3 : Does that culpable homicide amount to murder? It will only do so if the appellant inflicted the injury with one of the three intentions, or with the knowledge (but without the excuse) mentioned in S. 300. Here, again, the learned Sessions Judge, having come to the conclusion, (to which, as I have already said, he must, I think, be taken to have come), that the appellant did not intend to cause the death of the deceased, failed to consider any of the other alternative aspects of the case which would, if established, cause the culpable homicide committed by the appellant to amount to murder; he therefore never completed what I have called the third stage. Accordingly, I must now state my own conclusions on this third stage of the case also, and, for the purpose of arriving at such conclusions, I will continue to assume in the appellant's favour that he did not intend to cause the death of the deceased. Even starting this stage with that assumption in his favour, I find it impossible to resist coming to the conclusion not only that the injury inflicted by the appellant was sufficient in the ordinary course of nature to cause death—that, of itself, would be insufficient to support a conviction for murder, as was pointed out by the Chief Justice in the recent case of 1937 R L R 384[1]—but also that the appellant intended that the injury should be sufficient in the ordinary course of nature to cause death. In my judgment, therefore the culpable homicide committed by the appellant in this case was murder.

Stage 4 : Does the case fall within any of those exceptions which reduce that murder to the lower plane of culpable homicide not amounting to murder? The only exception which can in any way be prayed in aid by the appellant is the one dealing with a sudden fight in the heat of passion. It is in this Exception that the words "without premeditation" occur—and this is the only place in either S. 299 or S. 300 where those words are used—and presumably the learned Sessions Judge had them in mind when he said "I do not regard it as a bad case of murder; there was no premeditation." This again serves, I think, to show the confusion in the learned Judge's mind. A finding that the act was done by the appellant without premeditation is the first step towards bringing the case within the exception of a sudden fight in the heat of passion, and if the other matters necessary to bring the case within that exception are also established, and the exception is thereby brought into play, the effect of bringing the case within the exception will be to reduce what would otherwise be murder to culpable homicide not amounting to murder. The way however in which the words "there was no premeditation" were introduced into the judgment now under appeal make it somewhat difficult to know exactly what was in the learned Judge's mind. I do not think that he was considering this exception when he used those words; I think that he was intending to put his finding that

the appellant did not intend to cause the deceased's death upon the basis that the act was done without premeditation. But, as those words appear only in Exception 4 in S. 300 I feel that I must give a decision about the applicability of that exception to the present case. There was no quarrel, either sudden or otherwise, as between the appellant and the deceased. Therefore as, in order to bring a case within this exception, it is necessary to establish inter alia that the act was done upon a sudden quarrel, it is unnecessary to look further and enquire whether there have been established any of the other facts which are essential for the purpose of bringing a case within this exception. I am quite satisfied that it is impossible to bring the present case within this or any other exception in S. 300. The culpable homicide committed by the appellant remains therefore murder.

Accordingly, in the result I agree with the learned Sessions Judge's decision that the appellant is guilty of murder. Although the learned Judge arrived at what I think was a correct conclusion upon the facts, it was a conclusion to which he jumped, if I may say so, without, so far as one can see from reading his judgment, in any way considering the undoubtedly difficult and complicated clauses, sub-clauses, exceptions, explanations and illustrations of Ss. 299 and 300, Penal Code. There remains the question of sentence. I am not at all sure that, if I had been the trial Judge and had had to consider the appropriate sentence for this murder, I could have found any real reason for abstaining from passing a sentence of death. This appeal did not come before me for hearing until over two months after the learned Sessions Judge had passed judgment. That is the fact, whatever the reasons for the delay may be, I have not thought fit to open revision proceedings in this case with a view to a Bench considering the desirability of passing a sentence of death, because this Court not infrequently allows an appellant to benefit by some good fortune which he has had in the trial Court, and it almost always allows him to do so and refuses to substitute a sentence of death for a sentence of transportation for life, where, as in the present case, the appellant has believed for some weeks that his life will be spared. See both the reported cases in 1937 R L R 169[4] and the unreported case in Cri. Appeal No. 455 of 1938.[5] This appellant Nga Set has undoubtedly benefited by a stroke of good fortune. I have allowed him to benefit by it by my merely dismissing his appeal.

NGA TUN'S CASE

In the fifth case now under consideration the appellant, Nga Tun, and a companion, while taking a walk in their village one evening at sun set met the deceased and two other men walking in the opposite direction. There is, I think, no doubt that the appellant and his companion were, what I might describe as roystering and singing. As the two parties met, the deceased, who was convicted of an offence in connexion with the rebellion a few years ago and was, at the time of his death, still considered a bully in the village, told the appellant that he was not behaving properly, whereupon the appellant replied "What does it matter?" As to what exactly happened at that stage there is a conflict of evidence but I am certainly prepared to agree with the learned trial Judge that the fight was by no means one-sided. It appears to me however that the appellant was in no wise the aggressor, and that it was only after he had been assaulted by the deceased and his companion that he (the appellant), who had a small knife or dagger with him stabbed the deceased with it in the chest on the left side below the collar bone; that injury was sufficient in the ordinary course of nature to cause death, and the deceased died within half-an-hour. The appellant then ran off and did not return to his village for about ten days. The appellant pleaded the right of private defence.

Stage 1 : The learned Judge took the first step correctly and found—and as to the correctness of that finding there can be no doubt—that it was the act of the appellant which caused the death of the deceased. But the learned Judge then proceeded at once to *Stage 4*, and immediately considered whether the appellant had established the right of private defence, and, being of opinion that he had not done so, then discussed the possibility of it being a case of "a sudden fight in the heat of passion." I have already pointed out that it is improper to consider the question of the exercise of the right of private defence unless and until the prosecution has proved

4. Emperor v. Nga Bo Thin, (1937) 24 A I R Rang 254 = 171 I C 285 = 38 Cr L J 1051= 1937 R L R 169.

5. Tun Khine U v. The King, *Reported in* (1938) 25 A I R Rang 331=178 I C 298=40 Cr L J 49.

what would, but for the exercise of that right, be an offence. The learned Judge in this case overlooked that matter and never considered for a moment whether any of the different intentions or the varying degrees of knowledge mentioned in Ss. 299 and 300 had been established. I must therefore now remedy his omissions.

Stage 2: I myself do not think that the appellant intended to cause either death or such bodily injury as was likely to cause death, but I cannot avoid the conclusion that he must be taken to have known that death was likely to be caused by his act. He therefore committed at least culpable homicide.

Stage 3: The next question is whether that culpable homicide was murder. I am prepared to hold that the appellant had not any one of the necessary intentions, but I think that he must also be taken to have known that what he did was so imminently dangerous that it must, in all probability, cause at least such bodily injury as was likely to cause death. Therefore I must now consider whether the appellant had any excuse for incurring the risk of causing such bodily injury as aforesaid. For reasons which will appear in a moment, I think that he did have an excuse for incurring that risk. The case therefore is not one of murder; at most, it is a case of culpable homicide not amounting to murder.

Stage 4: As in the first of the present appeals, this stage will in this case be what I have labelled Stage 4 (II). Has the appellant established the right of private defence as a complete defence under S. 96?

It is clear I think that the deceased first assaulted the appellant; the question then remains: Was the offence committed by the deceased which occasioned the exercise by the appellant of the right of private defence of any of the six descriptions enumerated in S. 100, Penal Code? The only two of those descriptions which need be considered in the present case are the first two; the question therefore is: Did the deceased commit such an assault upon the appellant as might reasonably cause the apprehension that either death or grievous hurt would otherwise be the consequence of such assault? I think he did. It is unnecessary for me in this judgment to give my reasons for so thinking. It will suffice if I merely say that I think that this particular assault upon the appellant committed in the circumstances in which, and by the man by whom it was,—the appellant knew the deceased's record—did reasonably cause the appellant to apprehend that grievous hurt would be the consequence of the deceased's assault upon him unless he (the appellant) did something to defend himself. The Penal Code puts no restriction either upon the weapon, or upon the mode of using it, in those particular cases in which it provided that the voluntary causing of death is justified when acting in exercise of the right of private defence of the body, but of course, all the circumstances of the case must be considered together. In the present case, I have already held that it has not been established that the appellant did this act with any one of the intentions mentioned in Ss. 299 and 300, while I am satisfied that the deceased was a bully—and that the appellant knew that the deceased was a bully—who had committed a very serious assault indeed upon the appellant. In my judgment, upon the particular facts of this case, the appellant has established the right of private defence of his body as a complete defence to his act. No further point need therefore be considered in this case. I think the learned Sessions Judge was wrong in rejecting the appellant's plea, and his appeal is accordingly allowed. His conviction and sentence are set aside and he is acquitted. Before passing to a consideration of the next case, I desire to point out that the learned Sessions Judge came to the conclusion that although the appellant had not established his plea of the right of private defence he had succeeded in bringing the case within the exception known as "as sudden fight in the heat of passion", and consequently he held that what would otherwise have remained on the higher plane of murder was restored to the lower plane of culpable homicide not amounting to murder. He found the appellant guilty and sentenced him under the first part of Sec. 304, Penal Code. I am quite at a loss to know how he arrived at the conclusion that the appellant was punishable under the first part, rather than under the second part, of Sec. 304, because he had never apparently considered, and he certainly never in terms decided, whether the act of the appellant was done with one of the two intentions, or whether it was done only with the knowledge mentioned in S. 299.

NGA SHWE KYAN'S CASE

In this, the sixth, appeal now under consideration the facts can be stated quite shortly. One afternoon seven men, includ-

ing the deceased, were taking tea together in the hut of one San Mying who was himself one of the party of seven. The appellant happened to pass by the hut at the time and, at San Mying's invitation, he went in and joined the party. Three different versions of what then took place were given by the various witnesses who were called, but the learned Sessions Judge thought (and I agree with him) that the probabilities were that what then happened was this: A certain amount of abuse was bandied about by various members of the tea party, in the course of which the deceased, from his squatting position, picked up a dhama from the floor and slashed with it at the appellant, who thereupon went outside the hut. The latter returned, however, armed with a stick and, from a standing position, struck the deceased with it on the head. The deceased sustained a fractured dislocation of the entire length of the coronal suture of his skull, the thickness of which was less than the normal quarter of an inch but more than an eighth of an inch, and from that injury he died in hospital about twelve or fourteen hours later. The material part of the judgment now under appeal is in the following terms:

According to the witnesses, deceased was a very short tempered man .... I hold that the accused Shwe Kyan in assaulting the deceased had received grave and sudden provocation and also in the course of a sudden fight. I do not think that this is a case where the accused can claim the right of private defence of the body as the accused went out first and re-entered the hut after arming himself with the exhibit stick in order to assault the deceased Tun Kyaing. The accused was also intent upon a fight with the deceased after the latter had abused him and showed violence by picking up the dhama from the floor.

The learned Judge then found the appellant "guilty of culpable homicide not amounting to murder, an offence punishable under Sec. 304, Part 1", although he had not come to any finding under S. 299, and sentenced him to seven years' rigorous imprisonment. Here again, it will be seen that the learned Judge straightway passed to a consideration of the possibility of the case falling within the exception either of "grave and sudden provocation" or of "a sudden fight in the heat of passion." All the first three stages were entirely ignored. Let me go through them myself.

Stage 1 : There can be no real doubt that the deceased's death was caused by the act of the appellant. (The medical evidence, I ought to mention, is in part, difficult to follow. The doctor said that "the injury found was sufficient in the ordinary course of nature to cause death .... the wound certainly caused death. It is not '*(sic)*' necessarily fatal.")

Stage 2 : I now turn to consider whether the case is within the terms of S. 299. I do not think, taking into consideration all the circumstances of the case, that the appellant intended to cause either death or such bodily injury as was likely to cause death, but he struck the deceased on the head, and the stick he used was thirty inches long and weighed as much as 93 tolas. He must however be taken to have known that death was likely to be caused by his act, for there is no doubt that he struck the deceased on the head. Therefore the case is at least one of culpable homicide.

Stage 3 : Turning now to S. 300, I do not think the appellant had any of the intentions mentioned in that Section, but he must, in my judgment, be held to have known that his act was so imminently dangerous that it must in all probability cause at least such bodily injury as was likely to cause death. The question therefore remains to be decided, as it did in Nga Tun's case (the fifth and immediately preceding appeal), whether the appellant had any excuse for incurring the risk of causing such bodily injury as was likely to cause death.

That question is, as indeed it must always be, bound up with the right of private defence of the body, which is the present appellant's plea. Had then the appellant such a right? The important thing to bear in mind in this connexion is the fact that, after being threatened—only, be it noted, threatened — by the deceased with the dhama, the appellant left the hut. It is not for a moment suggested that he was followed by the deceased. The appellant returned to the hut — he did that of his own free will—and then he struck the deceased on the head with this heavy stick. As the appellant was able to leave the hut quite unscathed, I find it impossible to hold that, at the time when he returned to the hut and struck the deceased, the alleged exercise of the right of private defence of the body by the appellant was occasioned by any offence committed by the deceased. Therefore the appellant has failed to bring himself within Sec. 100, Penal Code, and I agree with the learned Sessions Judge that the appellant's plea of the right of

private defence of the body must fail as a complete defence to the charge. But the question of the right of private defence of the body does not end there, because it may yet prevent the culpable homicide from being murder, even if it cannot wholly excuse the appellant's act. It appears that this aspect of the case was also entirely overlooked by the learned trial Judge. It is impossible however upon the facts of this case—and, in particular, having regard to the fact that the appellant left the hut, and returned armed with this heavy stick — to hold that he was exercising his right of private defence of his body in good faith. That being so, it is useless to consider any of the other matters mentioned in Exception 2 to S. 300. In the result therefore, it is clear, returning to the terms of Sec. 300, that the appellant had no excuse for incurring the risk of causing such bodily injury as was likely to cause death. It accordingly follows that the culpable homicide committed by him was murder unless he can bring the case within one of the exceptions of "grave and sudden provocation" or "a sudden fight in the heat of passion," which are the only two exceptions which can now be applicable to the present case.

Stage 4. — I will deal with the former Exception first. As will have been observed, the learned Sessions Judge merely said "I hold that the accused Shwe Kyan in assaulting the deceased had received grave and sudden provocation." He never examined closely the various ingredients of this Exception nor any of the Provisos thereto, as set out earlier in this judgment. I myself have therefore done so, and it will suffice, I think, if I say that after carefully considering the possibility of Exception 1 of Sec. 300 being applicable to the present case, I am of opinion that the case does not fall within that Exception. I am unable, for one thing, to hold that even if the appellant was deprived of the power of self-control when he left the hut, he was still deprived of it when he returned. I cannot therefore find that the appellant did this act "whilst deprived of the power of self-control." I must therefore now consider whether the other Exception mentioned—that of "a sudden fight in the heat of passion"—can be applied. I do not think it can, if only for the reason that there was no fight, which is an essential part of that Exception. The result is that, in my judgment, the appellant ought to have been convicted of murder. Like the appellants Nazir Ahmed and Nga Po Soe, this appellant has had a stroke of good fortune by which he will be allowed to benefit. I must point out that the learned trial Judge in this case punished the appellant under the first part of Sec. 304, and not under the second part of that Section. I do not know why the learned Judge decided to sentence the appellant under the first part of that Section: as he had never considered under which portion of Sec. 299 the case fell, it must have been just a matter of pure chance as to which part of Sec. 304 he sentenced the appellant under. From my finding given above, it follows that in my judgment the appellant ought to have been sentenced under the second part of S. 304 and his conviction must be altered accordingly. I desire here to point out something which is apparently liable to be overlooked. A case of murder which, owing to the application of one of the Exceptions to Sec. 300, is reduced to culpable homicide not amounting to murder is punishable, so far as imprisonment is concerned, with a maximum term of ten years, if no intention is imputable to the accused under Sec. 299 but only the knowledge therein mentioned.

NGA TUN MAUNG'S CASE

The facts of the seventh case are as follows: One evening the appellant, the deceased, and another man were playing a game of "ket" (a kind of dominoes, apparently) for two pice a hundred, and during the course of the game a dispute arose between the appellant and the deceased. The man in whose compound the game was being played went to push the deceased outside through the gate. While he was trying to do this, the appellant got hold of a piece of firewood and went towards the deceased. The owner of the compound pushed them both outside, and they had a fight on the roadway during the course of which the appellant got hit on the head. The appellant went away saying that he was going to complain to the Ywagaung, and the deceased came back inside the compound. A little more than five minutes later, the appellant returned to the compound carrying in his hand a yoke-pin, which he had just borrowed from a friend in a house near the compound in question. He went up to the deceased and hit him on the head with it and then ran away. Later he was caught; when apprehended he said "I hit him because he hit me." The

deceased died in hospital about sixty hours later; he had sustained a soft contusion on the right side of the forehead, but no fracture of the skull was traced. Great force was necessary to cause the injury with the yoke-pin; the injury was sufficient in the ordinary course of nature to cause death. The material part of the trial Judge's judgment is very short; it reads as follows:

> The exhibit yoke-pin is not heavy. It weighs only 18½ tolas. It is impossible therefore to hold that when the accused struck the deceased with it he had any of the intentions which bring the accused within the definition of murder. The skull was not even cracked. In the light of the considerations set out in 5 Rang 817,[6] I say that the accused is guilty of culpable homicide not amounting to murder.

He then sentenced him to five years' rigorous imprisonment. It will be observed that this learned Sessions Judge did the same as some of the other Judges whose judgments I have had occasion to criticize in the course of this judgment, namely he went straight to S. 300, and, even supposing that he had gone there by way of Sec. 299, he entirely overlooked the fact that murder can be committed without the prosecution proving any intention on the part of the accused. Let me now take this case by stages myself.

Stage 1. — It is clear that the appellant did the act which caused the death of the deceased.

Stage 2. — I think that this is a case in which, having regard to the fact that the appellant deliberately went and fetched this yoke-pin and returned after more than five minutes had elapsed and struck the deceased on the head with it with great force — I think that in view of those facts I must hold that the appellant intended to cause such bodily injury as was likely to cause death. Now comes S. 300.

Stage 3.—I am disposed to agree with the learned Sessions Judge that it is not possible to hold that the appellant had any of the intentions mentioned in S. 300, but the question remains as to whether the appellant must be taken to have known that his act was so imminently dangerous that it must in all probability cause at least such bodily injury as was likely to cause death, for, it is quite clear in this case that the appellant had no excuse for incurring the risk of causing such bodily injury as was likely to cause death. As I have already pointed out, the learned Sessions Judge entirely failed to consider this question. I am by no means sure that, if the matter were before me as the trial Judge, I would not answer that question in a way adverse to the appellant. I do not however propose to express my opinion upon the point, and for this reason, even if I were to be of opinion that the appellant must be taken to have known that his act was so imminently dangerous that it must in all probability cause death, and therefore that he, having no excuse for incurring the risk of causing such bodily injury as was likely to cause death, was guilty of murder—even so, as there has been no cross-appeal under S. 417, Criminal P. C., nothing can be done about it.

Stage 4.—In the foregoing circumstances this stage does not arise. It suffices therefore for me to say that there is absolutely no reason for disturbing the conviction for the lesser offence of committing culpable homicide not amounting to murder. What about the question of sentence? I have already pointed out that the learned trial Judge entirely ignored Sec. 299, and as a result of such omission, there is no finding by him as to whether the appellant did the act which caused the deceased's death with the intention of causing such bodily injury as was likely to cause death or whether he did it with the knowledge that death was likely to be caused by his act. How, in the absence of any finding on that point, he was able to say that the sentence was to be passed under the second part of S. 304 rather than under the first part of that Section I do not know. I myself have already indicated by my finding above that this was a case where the appellant ought to have been sentenced under the first part of S. 304, under which he may be punished with either transportation for life or ten years' rigorous imprisonment. He was, as I have already said, sentenced to only five years' rigorous imprisonment. That, in my opinion, was too light a sentence and, had the learned Judge considered S. 299, as he ought to have done, I feel sure that he would have come to the same conclusion as I have done and would have passed a more severe sentence than he did. But it is now over seven months since the appellant committed this offence. I do not propose at this late date to open revision proceedings and to call upon him to show cause why his sentence should not be

6. Baba Naya v. The King, (1928) 15 A I R Rang 64=109 I C 215=29 Cr L J 487=5 Rang 817.

enhanced. He too will be allowed to benefit by his good fortune at his trial. I dismiss his appeal, but alter the conviction to one under the first part of S. 304.

NGA PO SEO'S CASE

The learned Sessions Judge's judgment in this case is in a curious form. First he recited at length the deceased's injuries and then he stated what the appellant's story was. Then, almost at the end, he set out very briefly the evidence of one only of the witnesses for the prosecution and he concluded by saying that he felt

> compelled to the finding that accused's act in cutting the deceased was merely with the intention of causing such bodily injury as was likely to cause death,

and he found the appellant guilty of culpable homicide not amounting to murder. I will now state the facts as I find them. The appellant was the captain of a salt boat, of the crew of which the deceased was a member. According to the evidence of the witnesses for the prosecution, early one morning, while the boat was in the open sea off Tavoy Point, the deceased was asleep in the cabin when the appellant went in and struck him on the head twice with an axe. The appellant then ran out of the cabin, and after the crew, in accordance with his (the appellant's) orders, which he gave while still armed, had lowered a boat into which he put his belongings, he paddled away in it towards the mainland. The salt boat made for Mergui and on its arrival there, the deceased was admitted to hospital, where he died eleven days later after developing tetanus. The doctor said in evidence that "tetanus was the sole cause of the deceased's death"; he also said that one of the deceased's head injuries "was likely to cause death". The appellant admits that he cut the deceased. His story is that he had overheard members of his crew saying that, he (the appellant had complained of slackness and inefficiency among the crew, they (the crew) were going to tie him up and throw him overboard; and that when, on the morning of the occurrence, the deceased and another member of the crew entered the appellant's sleeping quarters, the latter thought that those two men had come to carry out that plan. Accordingly, so goes his story, he picked up an axe which was lying near him and brandished it at the intruders, and in the course of doing so struck the deceased. The learned Sessions Judge rejected the appellant's story, and after carefully considering all the evidence, I can see no reason for saying that he ought not to have done so. The case must accordingly be dealt with on the basis that the appellant deliberately struck the deceased twice on the head with an axe while he (the deceased) was asleep.

Stage 1.—As in the second of the present appeals (Nga Ma Nwe's case), a question here arises as to whether the appellant's act caused the death of the deceased, as the latter died from tetanus occasioned, so the evidence shows, by the dirty rags with which the other members of the crew dressed his wounds. For reasons given by me when considering Nga Man Nwe's case, this appellant's act must be taken to have caused the deceased's death.

Stage 2.—The learned Sessions Judge has, and in my judgment quite rightly, found that the appellant intended to cause such bodily injury as was likely to cause death. It is therefore at least a case of culpable homicide.

Stage 3.—The learned Sessions Judge quite failed to deal with this all important stage as he should have done; in fact, he did not deal with it at all. I think that, on the particular facts of this case, it is impossible to avoid holding that the appellant intended to cause such bodily injury as he knew to be likely to cause the deceased's death. Accordingly, in my judgment, the culpable homicide which the appellant committed was murder.

Stage 4.—As it cannot be suggested that any of the Exceptions to S. 300 applies, it remains a case of murder. This appellant, like the appellants Nazir Ahmed and Nga Shwe Kyan, has had a stroke of good fortune in being convicted of something less than murder, and in not being sentenced to death. His appeal must be dismissed.

PAN WA GYI'S CASE

In this case the deceased sustained three injuries on the head and neck, apparently inflicted with a dah, from which injuries he died nine or ten hours later. All three injuries were obviously caused by the use of great force, and one of the blows struck was such that the dah, or whatever it was, cut through the entire thickness of the skull bone and partly the brain itself as well. There had been a drinking party after a Pwe. When the party broke up, a quarrel and fight took place between the appellant and the deceased. The latter used a loaded stick and the former a dah. The appellant himself also sustained some head

injuries, for which he received hospital treatment as an in-patient for fifteen days, after which he was discharged as cured. Two of the deceased's three injuries were sufficient in the ordinary course of nature to cause death. The learned trial Judge concluded his judgment in this way :

> The quarrel and fight between the accused and the deceased were no doubt sudden ones without premeditation or deliberate design to kill the other. But in the heat of passion, the accused cut the deceased with the dah, with the result that the deceased met his death. If, on any sudden quarrel, blows passed without any intention to kill or injure another materially, and in the course of the scuffle, after the parties are heated by the contest, one kills the other with the deadly weapon, it is culpable homicide and not murder. Therefore, in my opinion, the case falls within Exception 4 to S. 300, I. P. C. The medical evidence further shows that the death was accelerated by the delay in bringing the wounded man to the hospital and his life could have been saved if proper remedy and skilful treatment were given on the spot . . . . So it is very difficult to bring the case within S. 302, I. P. C. However from the fact that the accused had used a formidable weapon which is the exhibit dah on the vital part of the human body, it must be presumed that he did inflict the injuries with the intention of causing such bodily injury as is likely to cause death. Moreover, since the accused killed the deceased in the course of the sudden quarrel and fight in the heat of passion without premeditation and without any deliberate design for killing, I am of opinion that the case falls within the purview of S. 304 (1), I. P. C.

He then sentenced the appellant to ten years' rigorous imprisonment. The memorandum of appeal in this case is a very lengthy one. I have considered the points raised in it, almost all of which are directed to showing that it was not through any act of the appellant that the deceased met his death. I have considered also the evidence, and as will appear in a moment, in my judgment, upon the evidence, I, like the learned trial Judge, must hold that it was the appellant's act which caused the death of the deceased. I shall later on discuss shortly the evidence : at this point I will merely point out that the learned Judge, having held that the appellants act caused the deceased's death then jumped straight to a consideration of whether one of the Exceptions to S. 300 applied before deciding whether S. 300 was itself applicable. The unfortunately confused course of reasoning on the part of the learned Judge will be apparent from the extract from his judgment which I have quoted, without my saying anything further about it. I will content myself with pointing out only (a) that the learned Judge overlooked Expln. 2 to S. 299—it should be noted that that is an Explanation to S. 299 and not to S. 300—and (b) that having in the earlier part of the above extract said "without any intention to kill or injure another materially," he said, a little further on, that it must be presumed that the appellant inflicted the injuries "with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death."

Stage 1.—The major dispute in this case is in regard to the question whether the appellant caused the injuries to the deceased which resulted in the latter's death. The evidence for the prosecution on this part of the case falls in the main into five groups : (1) The evidence of an alleged eye-witness, Aung Myint; (2) the evidence of witnesses who say that the deceased, almost immediately after the occurrence denounced the appellant as his assailant; (3) the evidence of witnesses who say that the deceased, later on, on arrival at Kyebin landing stage when he was being taken to Sandoway, again denounced the appellant as his assailant; (4) the evidence of a witness who says that the appellant orally admitted to him that he had struck a man that night; and (5) the evidence of a village headman who detailed the facts related to him by the appellant's then co-accused (who was acquitted in the Sessions Court) regarding the cutting of the deceased by the appellant. The learned Additional Sessions Judge carefully considered and discussed in his judgment the above five groups of evidence. He rejected the evidence comprised in the first of those two groups, but accepted the remainder. I entirely agree that Aung Myint's account of what he says he saw is worthless—it is clear that he was far too drunk to know what was happening on the night of the occurrence; I also accept the conclusion arrived at by the learned trial Judge in regard to the second, third and fourth groups, and for the reasons which he gave, save that he ought not to have admitted in evidence the deposition of Maung Po Tun recorded in the committing Court, as there is nothing on the record to show that such evidence came within the terms of S. 33, Evidence Act: the bare statement "admitted under S. 33, Evidence Act," signed by the learned trial Judge, which appears on the face of the deposition is insufficient. But, as a matter of fact that evidence, although wrongly admitted, was in the appellant's favour, so no harm has been done. In

regard to the fifth group, the headman's evidence could not be taken into consideration if only for the reason that the so-called confession of the appellant's then co-accused did not implicate the person confessing to the same extent as it implicated the appellant. In the result there is at least the evidence comprised in the third and fourth groups, which is sufficient, if accepted, as it was by the learned trial Judge and as it is by me, to support a finding that it was the act of the appellant which caused the death of the deceased.

Stage 2.—I agree with the learned trial Judge that the appellant must be held to have intended to cause such bodily injury as was likely to cause death.

Stage 3.—This stage the learned trial Judge entirely omitted. I think it quite impossible to avoid holding that the appellant intended that the bodily injury which he then inflicted should be sufficient in the ordinary course of nature to cause death. Therefore the culpable homicide committed by the appellant was raised to what I have described as the higher plane of murder.

Stage 4.—Have any facts been proved which will restore that murder to the lower plane of culpable homicide not amounting to murder? I will deal at once with the case from the point of view of the possibility of "a sudden fight in the heat of passion." I do not propose to go into the details of the evidence on this point and it will suffice if I say that in my opinion all the essentials necessary to bring into play Excep. 4 of S. 300 are present in this case. This is therefore a case of culpable homicide not amounting to murder and as the act was done by the appellant with one of the intentions specified in S. 299, the offence is punishable under the first part of S. 304. The sentence passed in this case does not appear to me to be unduly excessive. This appeal must be dismissed.

I have dealt with the facts of these cases comparatively shortly because I do not desire that this judgment should ever be taken as in the smallest degree binding upon any Court in the future so far as facts are concerned. It may well be that another tribunal would have found the facts of some of these nine cases in a different way. But I think, and certainly hope that my methods of approach to the facts of these cases have been along correct lines. Questions of knowledge, intention, and the like — such questions as have arisen in these nine appeals—are always essentially questions of fact falling to be decided solely upon the particular facts and circumstances of each individual case. The sole object of this judgment apart from disposing of these nine appeals, is to afford some guide to the legal principles involved in cases where the charge is one of murder, and to indicate a correct method of approach to the facts and circumstances of such cases, so that a proper decision can be arrived at upon the particular facts and circumstances of each individual case of that description. The results of this judgment are (a) that the appeals of Nga Chit Tun (797) and Nga Tun (985) are allowed, their convictions and sentences are set aside, and they are acquitted; (b) that the conviction of Nga Tun Maung (1044) is altered to one under the first part, instead of under the second part of S. 304, his sentence stands, and subject to the alteration I have just mentioned, his appeal is dismissed; (c) the appeals of all the other appellants are dismissed, both as regards convictions and sentences.

N.S./R.K. *Order accordingly.*

A. I. R. 1939 Rangoon 245

DUNKLEY J.

Ma Tin — Appellant.

v.

Ba Thet and another — Respondents.

Special Second Appeal No. 58 of 1938, Decided on 13th June 1938, from Judgment of District Court, Myaungmya, in C. A. No. 32 of 1937.

(a) Civil P. C. (1908), O. 21, R. 16—Until assignee of decree applies under O. 21, R. 16, original decree-holder is entitled to execute decree.

Until the necessary application under O. 21, R. 16, has been made to the Court which passed the decree by the assignee thereof, the only person who can execute it, is the person whose name appears on the record as the decree-holder, i. e. the assignor, though he may not be able to execute it for his benefit: *Case law relied on ; A I R 1928 Rang 25, Disting.* [P 246 C 2]

(b) Civil P. C. (1908), O. 21, R. 16—Judgment-debtor omitting to oppose substitution of assignee is not debarred from questioning rights of assignee to execute decree especially when the previous application has not fructified —If judgment-debtor who is also real assignee pleads in execution by benamidar assignee, real nature of transaction in bar of execution, benamidar being party to fraud cannot prevent real assignee from doing so.

Judgment-debtor's omission to oppose the substitution of the assignee of a decree in place of the

original decree-holder does not preclude the judgment-debtor from questioning the rights of such assignee to proceed to execution of the decree by reason of any bar imposed by law especially where the previous application for execution did not fructify : *A I R 1933 Cal 919, Foll. ; A I R 1936 All 21, Rel. on ; A I R 1918 Mad 1167, Disting.; A I R 1916 All 219 and A I R 1925 All 117, Ref.* [P 247 C 1, 2]

In such a case if the assignee is a benamidar and the real assignee is one of the judgment-debtors, and in execution by the benamidar, the real assignee pleads the nature of the transaction in bar of execution under O. 21, R. 16, Proviso (2), the benamidar cannot have an equity to prevent the real assignee from pleading his fraud on the Court to which benamidar himself was equally a party. [P 247 C 2]

G. R. Rajagopaul — *for Appellant.*

E. Hay — *for Respondent 1.*

Judgment.—This appeal arises out of execution proceedings. The N. P. L. Chettyar firm obtained a decree in the Subdivisional Court of Wakema against Maung Ba E and his wife Ma Mya Me, and Maung Sein Hone and his wife Ma Tin. The last named is the present appellant, and Maung Sein Hone is respondent 2. The N. P. L. firm assigned its decree to one Maung Ba Thet, who is respondent 1. In execution case No. 90 of 1929 Maung Ba Thet applied for execution against Maung Ba E alone. At the same time he applied, under Proviso 1 of O. 21, R. 16, Civil P. C., for notice of the assignment to him to be issued to the original decree-holder, the N. P. L. firm, and all four judgment-debtors, although notice to the judgment-debtors was unnecessary under Proviso 1 as amended by the Rule Committee of this Court. These notices were duly served, but only the agent of the N. P. L. firm appeared, and he admitted the assignment. The judgment-debtors did not appear. Subsequently, the execution application was dismissed for default, having been entirely infructuous. In the following years there were a number of infructuous applications in execution against Maung Ba E alone. In 1933 (C. E. No. 13 of 1933) there was an application against Maung Ba E and Maung Sein Hone, but this was closed, without anything having been done, at the request of the assignee of the decree, Maung Ba Thet. In 1936 (C. E. No. 20 of 1936) there was an application in execution against all four judgment-debtors, but this was closed at the request of Maung Ba Thet without any of the judgment-debtors having appeared. Then was filed the execution application out of which the present appeal arises, namely No. 19 of 1937. It was originally filed against all four judgment-debtors, but was pursued against Maung Sein Hone and Ma Tin only.

The appellant Ma Tin took two objections to this execution application, namely (1) that Maung Ba Thet was merely the benamidar of the decree for herself and her husband Maung Sein Hone. She alleged that she and her husband had paid the decretal amount to the original decree-holder, who had transferred the decree at their request to Maung Ba Thet, so that he could execute it against the other two judgment-debtors Maung Ba E and Ma Mya Me, although he had no beneficial interest in the decree ; (2) that Maung Ba Thet had transferred the decree by a deed of assignment to one Maung Po Hnan on 30th April 1930, and therefore he was from that date debarred from executing the decree. Dealing with the second point first, the appellant relies entirely on 5 Rang 595[1] but this case dealt only with the rights of a transferee of a decree as against the judgment-creditor of the original decree-holder, and is no authority for the proposition that from the date of assignment of his decree the assignor decree-holder is precluded from executing the decree. The contrary has been consistently held by all the High Courts, and it is now settled law that, until the necessary application under O. 21, R. 16, has been made to the Court which passed the decree by the assignee thereof, the only person who can execute it is the person whose name appears on the record as the decree-holder, i. e. the assignor. He may not be able to execute it for his own benefit, but that is beside the point. This was laid down as long ago as 1869 in 11 W R 271[2] and this rule has since been followed by all the High Courts. It was followed by this High Court in 4 Rang 426[3] at p. 428, which was not overruled on this point in the further appeal in 5 Rang 595.[1] I propose to mention only four of the numerous cases of other High Courts in which this rule has been followed, namely 18 Cal 639,[4] 37 Bom L R

1. Co-operative Town Bank of Padigon v. Raman Chettyar, (1928) 15 A I R Rang 25=106 I C 853=5 Rang 595.
2. Khettur Mohun Chuttopadhya v. Ishur Chunder Surma, (1869) 11 W R 271.
3. Co operative Town Bank of Padigon v. S. V. K. V. Raman Chettyar, (1927) 14 A I R Rang 55=99 I C 309=4 Rang 426.
4. Jasoda Deye v. Kritibash Das, (1891) 18 Cal 639.

489,[5] 14 Lah 744[6] and 33 A L J 1179.[7] It is common ground that Maung Po Hnan has never made an application under O. 21, R. 16, to execute the decree, and therefore there is no substance in the second point.

As regards the first point, both the lower Courts have held that the principle of res judicata, as enunciated in S. 11, Civil P. C., is applicable and that because the appellant failed to appear and raise this point when served with notice in Execution Case No. 90 of 1929 she cannot now be heard to raise it. For their decision, they have relied upon 38 All 289[8] and 47 All 86.[9] The learned Subdivisional Judge also referred to the case in 40 Mad 1016,[10] but that case is hardly an authority for the application of the principle in the circumstances of the present matter. The law on the subject of res judicata as applied to execution proceedings has recently been exhaustively considered by a Full Bench of the Allahabad High Court in 58 All 313.[11] One of the propositions laid down in that case, with which proposition I am, with respect, in entire agreement, is that where no objection is taken, but the application for execution does not fructify, the judgment-debtor is not debarred by the principle of res judicata from raising the objection in a later application. Execution Case No. 90 of 1929 did not fructify; it was dismissed for default without any of the judgment-debtors having appeared before the Court, or without any effective step in execution having been taken. Moreover, it was unnecessary for any of them, except Ba E, to be served with notice or to appear. I would also refer to 60 Cal 1181,[12] which is authority for the proposition that the judgment-debtor's omission to oppose the substitution of the assignee of a decree in place of the original decree-holder does not preclude the judgment-debtor from questioning the rights of such assignee to proceed to execution of the decree by reason of any bar imposed by law. Hence the principle of res judicata has no application. It is urged that Proviso 2 to O. 21, R. 16, does not in terms prevent the benamidar transferee from executing the decree against the real transferee, and that to permit the real transferee to plead the true nature of the transaction in bar of execution would be tantamount to permitting her to plead her own fraud. The answer to this argument is that both the benamidar and the real transferee are *in pari delicto*, and that, in this case, Maung Ba Thet cannot have an equity to prevent Ma Tin pleading her fraud on the Court to which he himself was equally a party. Moreover, if Ma Tin succeeds in establishing her contention, the decree will become wholly extinguished, and Maung Ba Thet will not be able to execute it against the other judgment-debtors, who were not parties to the fraud.

This appeal is therefore allowed with costs in favour of the appellant, Ma Tin, against the respondent 1, Ba Thet, in all Courts; advocate's fee in this Court five gold mohurs. The learned Subdivisional Judge is directed to enquire into and come to a decision on the allegations contained in paragraphs 2 and 3 of Ma Tin's written objection of 9th October 1937. If the alleged facts of this objection are found in favour of Ma Tin, Ba Thet's application for execution must be dismissed. If Ma Tin is unable to substantiate her allegations, Ba Thet's application for execution should be dealt with in accordance with law.

N.S./R.K. *Appeal allowed.*

5. Sitabai Rambhau v. Gangadhar Dhanram, (1935) 22 A I R Bom 331 = 159 I C 358 = 37 Bom L R 489.
6. Harnand Rai Phul Chand v. Rup Chand Chiranji Lal, (1933) 20 A I R Lah 638 = 146 I C 872=14 Lah 744=34 P L R 1066.
7. Umrao Singh v. Pahlad Singh, (1935) 22 A I R All 1001=158 I C 238=(1935) 33 A L J 1179.
8. Taj Singh v. Jagan Lal, (1916) 3 A I R All 219=35 I C 234=38 All 289=14 A L J 370.
9. Dwarka Das v. Muhammad Ashfaqullah, (1925) 12 A I R All 117=80 I C 722=47 All 86=22 A L J 928.
10. Subramania Ayyar v. Rajeswara Sethupathi, (1918) 5 A I R Mad 1167 = 38 I C 627 = 40 Mad 1016.
11. Genda Lal v. Hazari Lal, (1936) 23 A I R All 21=160 I C 394 = 58 All 313 = 1935 A L J 1189 (F B).
12. Gopendraprasad Shukul v. Ramkishore Shaha, (1933) 20 A I R Cal 919=149 I C 386=60 Cal 1181=37 C W N 901.

A. I. R. 1939 Rangoon 247

DUNKLEY J.

Daw Kyin — Appellant.

v.

Ko Ba Tin and another — Respondents.

Second Appeal No. 136 of 1938, Decided on 2nd August 1938, from Judgment of Dist. Court, Insein in C. A. No. 38 of 1937.

Transfer of Property Act (1882), S. 67-A—Scope—If suit on two consecutive mortgages cannot be brought in same Court, S. 67-A does not apply.

Where a person executes two mortgages one after the other in favour of the same mortgagee, then unless there is something in the second deed

of mortgage to show a contrary intention, the creditor must be presumed to have intended to keep the earlier security alive for his own protection, and prima facie the provisions of S. 67-A are applicable in such a case : *16 Cal 523, Rel. on.*

[P 248 C 2]

But if in such a case a suit on both the mortgages cannot be brought in same Court then Section 67-A does not apply : *41 C W N 854, Foll.*

[P 249 C 1]

Irvine-Jones — *for Appellant.*

Sim — *for Respondents.*

Judgment. — The defendant-appellant, Daw Kyin, mortgaged to the plaintiffs-respondents, Ko Ba Tin and Ma E Kin, three holdings of agricultural land for a sum of Rs. 3000, by a registered deed of mortgage dated 3rd October 1934. These paddy lands are situated in the Insein District. On 10th October 1934 Daw Kyin executed another mortgage, for a principal sum of Rs. 8000 in favour of the respondents also of eight holdings of agricultural land which are situated in the Pegu District. On 29th July 1935 a third mortgage by registered deed for a principal sum of Rs. 8600 was executed by Daw Kyin and four other persons in favour of the respondents as mortgagees, the property mortgaged being the same lands which were mortgaged to the respondents by Daw Kyin by the mortgage of 10th October 1934. The suit out of which the present appeal arises, being Regular Suit No. 26 of 1937 of the Subdivisional Court of Insein, was a suit by the plaintiffs-respondents against the defendant-appellant on the mortgage of 3rd October 1934. The main ground of defence in the suit (and the only point which has been argued before me in this second appeal) was that the provisions of S. 67-A, T. P. Act, were applicable ; that the mortgage of 10th October 1934 was still subsisting ; and that as this mortgage was between the same parties the respondents could not bring a suit on their mortgage of 3rd October 1934, without consolidating in the same suit the mortgage of 10th October 1934. This argument did not find favour with the Subdivisional Court, and the suit of the respondents was decreed. On appeal to the District Court the decision of the learned Subdivisional Judge was upheld. The learned District Judge said that the mortgage of 10th October 1934, had merged into, or become extinguished by the mortgage dated 29th July 1935 and in these circumstances it seems to me quite apparent that the mortgagee has not at present any right to obtain a decree by reason of the mortgage dated 10th October 1934.

The learned District Judge then went on to say that it was pointed out in argument that in certain circumstances the respondents might be able to fall back on the mortgage of 10th October 1934, but it was not at that time subsisting and he was only concerned with the present circumstances. With the greatest respect, this was scarcely the proper way of looking at the matter. The doctrine of merger is not applicable to mortgages, and the real question is whether there was a novation of contract, that is, whether the mortgage of 10th October 1934 had been novated by the mortgage of 29th July 1935. In 16 Cal 523[1] at p. 529, where the circumstances were similar to those obtaining in the present case, a Bench of the Calcutta High Court held that unless there was something in the second deed of mortgage to show a contrary intention, the creditor must be presumed to have intended to keep the earlier security alive for his own protection. In the present case, there might exist circumstances, which can readily be imagined, such as an earlier undisclosed mortgage, which would render the mortgage of 29th July 1935, either useless to the mortgagees, or of less value to them than their earlier mortgage ; and consequently, the presumption arises, in the absence of anything to show a contrary intention, that the mortgagees intended to keep the earlier mortgage of 10th October 1934 alive for their benefit. That they intended to do so can be gathered from the express terms of the deed of mortgage of 29th July 1935, for in Cl. 5 of that deed there occurs the following :

If the principal and the interest due on this document are fully satisfied, the mortgagees shall have no claim on the original mortgage deed, and the said original document shall be cancelled;

that is, until the principal and interest due on the deed of 1935 had been fully satisfied the deed of 10th October 1934 still remained in existence. Consequently, the decision of the learned District Judge of Insein was based upon wrong grounds, and prima facie the provisions of S. 67-A, T. P. Act, are applicable in this case. On further consideration however, it appears that the provisions of this Section are not applicable, and for the reason that the property which is included in the mortgage of 3rd October 1934 is situated in a different district to the property which is

1. Gopal Chunder v. Herembo Chunder, (1889) 16 Cal 523.

included in the mortgage of 10th October 1934, and consequently, under the provisions of Sec. 16, Civil P. C., a suit on the mortgage of 10th October 1934 could not be brought in the Subdivisional Court of Insein, or any Court of the Insein district. This limitation on the application of Sec. 67-A has been pointed out by the Calcutta High Court in 41 C W N 854[2] at p. 867. In this case the application of Sec. 67-A, T. P. Act, was fully considered, and the learned Judges came to the conclusion that the provisions of the Section had no application unless a suit on both the mortgages could be brought in the same Court. In the course of his judgment Panckridge J. said :

As to S. 67-A, T.P. Act, I may observe that it is never easy to construe a statutory enactment which imposes an obligation but is silent as to what is to happen in the case of a breach of that obligation. It appears to me to be unreasonable to suppose that the statute compels a plaintiff mortgagee to do what the respondent did here, namely include in his suit mortgage claims over which the Court has no jurisdiction. If this is so, the inclusion cannot be pleaded as a compliance with the obligation whatever it may be . . . . The Section, which was added to the Transfer of Property Act by Act 20 of 1929, and which cuts down the former rights of the mortgagees, should not in my opinion be construed more widely than the language clearly warrants. Applying this principle the words 'all the mortgages in respect of which the mortgage money has become due' must be limited to those mortgages which the Court, in which the mortgagee sues, has jurisdiction to enforce.

With the greatest respect, I am in entire agreement with these observations, and for this reason I am of opinion that this appeal fails and that, although based on wrong grounds, the decisions of the lower Courts were correct. The appeal is therefore dismissed with costs.

N.S./R.K. *Appeal dismissed.*

2. Premsukh Mahata v. Mangal Chand, (1937) 41 C W N 854.

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* A. I. R. 1939 Rangoon 249

SPARGO J.

Chinnayar — Applicant.

v.

Maung Mya Thi and others — Respondents.

Criminal Revn. No. 619 B of 1938, Decided on 17th January 1939, against order of Sess. Judge, Henzada, D/- 1st November 1938.

*** Criminal P. C. (1898), Ss. 350 and 537— Magistrate recording evidence succeeded by another Magistrate — Succeeding Magistrate delivering judgment written by his predecessor without adopting it as his own judgment — Defect is not mere irregularity curable under Section 537.**

Under S. 350 it is quite possible that the succeeding Magistrate may take the judgment left by his predecessor and compare it with the evidence recorded in the case and discover that it expresses what he himself would have decided on the case. In that case, if there is no demand for a new trial on the part of the accused, he may deliver that judgment as his own. In fact by so doing it becomes his own judgment. But where the succeeding Magistrate has delivered judgment not as his own judgment but as that of his predecessor without signing it himself or dating it, the defect in the delivery of such judgment goes beyond a mere irregularity curable under S. 537. It is not contemplated in the Code that a Magistrate shall deliver any judgment other than his own and if he does so it is not an irregularity in the form of delivery ; it is not delivering judgment at all : *A I R 1930 Rang 77; A I R 1925 All 299 and 23 Cal 502, Disting.; A I R 1917 Mad 340, Dissent.* [P 250 C 2; P 251 C 1]

P. K. Basu — *for Applicant.*

U Khin Maung Gyi for U E Maung (1) — *for Respondents.*

U Tun Byu, Govt. Advocate — *for the Crown.*

Order. — In Criminal Regular Trial No. 164 of 1938 the learned Township Magistrate of Ingabu, who at the time of recording of the evidence was U Ba Aung, had, on 21st September 1938, fixed 27th September for judgment. In the interval he was placed under suspension and at some moment of time during that interval, which it is not possible for me to determine, he ceased to exercise jurisdiction in the Court. He had to hand over charge to another Magistrate named U E Maung. Under date 24th September 1938 there is a note in the diary : "In this case judgment is already written. I will keep in my almirah." Under date 27th September 1938 there appears this diary entry: "Called. All three accused persons present. U Kyaw Shein and U Ant appeared. Judgment delivered. . . . . " The judgment which is filed in the proceedings bears the signature of U Ba Aung and not that of U E Maung and is dated 24th September 1938 and not 27th September 1938.

How it came about that this judgment, which had evidently been written by U Ba Aung, or typed at his dictation, was signed and dated by him 24th September I do not know. It is possible that it was an attempt by him to dispose of the case by an informal delivery of the judgment before he had to hand over charge. This however is mere conjecture and I am bound to admit that I cannot do more than guess at the

circumstances. The question that has arisen here is, does this merely constitute an irregularity in the judgment or does it constitute something more than an irregularity ? If it is a mere irregularity, S. 537, Criminal P. C., says that unless the irregularity has occasioned some failure of justice, the finding, sentence or order shall not be reversed on account of the irregularity.

In the decision of this question it is necessary also to refer to S. 350, Criminal P. C., which deals with the case where a Magistrate is succeeded by another Magistrate after he has recorded the whole or any part of the evidence in a trial. It lays down that the Magistrate so succeeding may act on the evidence recorded by his predecessor. There is a proviso to the effect that the accused may when the second Magistrate commences his proceedings demand that the witnesses or any of them be resummoned and reheard. S. 367 (1), Criminal P. C., provides the procedure for delivery of judgment. Mr. P. K. Basu for the applicant admitted that there was an irregularity in respect of the delivery of judgment and cited a number of cases to show that the finding and sentence should be allowed to stand because the irregularity was cured by Section 537.

7 Rang 370[1] does not seem to me to help in the decision of the present case because in that case the Magistrate concerned clearly purported to be pronouncing his own judgment and not one written by somebody else as in this case. 47 All 284[2] was a case where the Magistrate was delivering his own judgment but forgot to sign and date it. 23 Cal 502[3] was a case where the Magistrate pronounced sentence before he wrote his judgment. The judgment was written on the evening of the same day. In this case it was held that this was a mere irregularity. The case which appears to me to come closest to the facts of the present case is 40 Mad 108.[4] In this case it was decided obiter that in the absence of a demand for a new trial it would be in the discretion of the successor to date, sign and pronounce his predecessor's judgment.

As to this decision it is to be noted that the point had not been raised for decision in that case and therefore it is obiter ; and if the meaning intended is that the new Magistrate can take the judgment written by his predecessor and deliver it as the judgment of his predecessor, that is to say without adopting it as his own judgment, then I venture very respectfully to disagree. In my opinion the only way in which such a judgment could be delivered by the second Magistrate would be in virtue of S. 350, Criminal P. C. It would otherwise have to satisfy the test, namely was the succeeding Magistrate in so acting acting on the evidence recorded by his predecessor ? It is quite possible that he may take the judgment left by his predecessor and compare it with the evidence recorded in the case and discover that it expresses what he himself would have decided on the case. In that case I see no reason why if there is no demand for a new trial on the part of the accused he should not deliver that judgment as his own. In fact by so doing it becomes his own judgment. If I thought that that had happened here, I should be prepared to say that the defect in this case amounted only to an irregularity which could be cured by S. 537. But I see no reason to suppose that that was what happened. Everything seems to point to the conclusion that U E Maung when he delivered judgment on 27th September delivered it not as his own judgment but as that of his predecessor. He did not sign it himself nor did he date it ; there is nothing to show that he even read it though probably he pronounced the sentence.

Nowhere is there any note in the diary or elsewhere showing that on 27th September U E Maung purported to be deciding the case in virtue of S. 350 of the Code on the evidence recorded by his predecessor. Nowhere does it appear that the accused were asked whether they had any objection to his so acting. Probably this does not matter a great deal because a duty is cast upon the accused to demand a new trial, if they desire it, and not upon the Magistrate to offer it. But the point is of interest because I think that if U E Maung had purported to act under S. 350 he would certainly have told the accused that they were entitled to a new trial. This is routine practice. I am therefore of opinion that

1. Mohamad Hayet v. Emperor, (1930) 17 A I R Rang 77=1930 Cr C 203=120 I C 225=7 Rang 370=30 Cr L J 1166.
2. Emperor v. Ram Sukh, (1925) 12 A I R All 299=86 I C 64=26 Cr L J 688=47 All 284 =23 A L J 8.
3. Tilak Chandra Sarkar v. Baisagomoff, (1896) 23 Cal 502.
4. Savarimuthu Pillai In re, (1917) 4 A I R Mad 340=33 I C 646=17 Cr L J 166=40 Mad 108=32 M L J 81.

the defect in the delivery of this judgment went beyond a mere irregularity curable under S. 537. It is not contemplated in the Code that a Magistrate shall deliver any judgment other than his own and if he does so it is not an irregularity in the form of delivery; it is not delivering judgment at all. This application for revision is therefore dismissed.

D.S./R.K. *Application dismissed.*

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* A. I. R. 1939 Rangoon 251

DUNKLEY J.

Mohamed Afzal — Applicant.

v.

Mohamed Ismail — Respondent.

Civil Revn. No. 121 of 1938, Decided on 14th June 1938, from Judgment of Small Cause Court, Rangoon, in C. R. No. 7649 of 1937.

*** Civil P. C. (1908), O. 2, R. 2 (2)—Bond providing payment by instalments—Creditor at liberty to recover whole amount due when certain number of instalments fall in arrears—On such instalments falling due, creditor suing only for some instalments—His subsequent suit for recovering amount of remaining instalments is barred.**

Where a debtor enters into a written agreement with the creditor for the payment of a certain amount by instalments and covenants that in the event of his failure to pay a certain number of consecutive instalments when the same become due the creditor shall be at liberty to claim from the debtor the whole of the balance then due after giving credit to the debtor of the amount of instalments already paid by him, such bond is exclusively for the benefit of the debtor and furnishes only one cause of action viz. the right of the creditor to recover the amount of the debt. The creditor in such a case will be deemed to have agreed not to enforce his remedy in respect of that cause of action so long as the debtor regularly pays the instalments and until at least a certain number of instalments are in arrears. When those instalments are in arrears the remedy upon the cause of action becomes enforcible and that is to sue for the whole of the amount due. If the creditor in such circumstances elects to sue, upon those instalments falling in arrears, only for some instalments instead of suing for the whole amount due to him, then in the terms of Order 2, R. 2 (2), he will be deemed to have omitted to sue in respect of a portion of his claim which he was entitled to make for the single cause of action arising under the bond. Therefore his subsequent suit for recovering the amount of the remaining instalments is barred by the provisions of O. 2, R. 2: *AIR 1935 All 461 and AIR 1932 P C 207, Disting.* [P 252 C 1, 2]

Rauf — *for Applicant.*

Dadachanji — *for Respondent.*

Order. — The defendant-applicant owed the plaintiff-respondent a sum of Rs. 3350 and being unable to pay the whole amount at once, he entered into an agreement, dated 22nd August 1935, which is Ex. D on the record of the Rangoon Small Cause Court, for the payment of this amount by instalments of Rs. 30 per month, and the plaintiff-respondent on his part agreed not to exercise his right of action for the recovery of the debt until at least three monthly instalments were in arrears. It is necessary, I think in order to understand this case properly, to set out the terms of this agreement Ex. D. The following are the two operative clauses:

1. That in pursuance of the said agreement and in consideration of the sum of Rupees three thousand three hundred and fifty (Rs. 3350) due as aforesaid by the debtor to the creditor (the indebtedness whereof the debtor hereby acknowledges) the debtor hereby covenants to pay to the creditor the said sum of Rs. 3350 by monthly instalments of Rs. 30 commencing from the first week of October 1935 and thereafter month by month during the first week of each succeeding month and shall also pay to the creditor interest on the principal sum at the rate of four annas per cent. per month with each instalment of principal on the date fixed for payment thereof.

2. The debtor hereby further agrees and covenants that in the event of the failure of the debtor to pay three consecutive instalments of Rs. 30 or three consecutive instalments of interest when the same shall become due the creditor shall be at liberty to claim from the debtor the whole of the balance then due giving credit to the debtor of the amount of instalments already paid by him to the creditor with all interest due thereon and the debtor shall on demand pay the same to the creditor.

No instalments were paid, and in 1936 the respondent filed a suit against the applicant in the Small Cause Court of Rangoon for recovery of ten instalments, which were then overdue, and interest thereon (Civil Regular No. 6205 of 1936); the applicant confessed judgment and a decree was passed. Subsequently, in the next year, the suit out of which the present application arises was filed for the recovery of a further fourteen instalments and interest (Civil Regular No. 7649 of 1937), and in defence the applicant raised the point that this second suit was barred by the provisions of O. 2, R. 2, Civil P. C. The learned Second Judge of the Small Cause Court has held that the suit was not barred by the provisions of this Rule, and this is the question which has been argued before me on this application in revision. O. 2, R. 2, Civil P. C., reads as follows:

2 (1). Every suit includes the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2). Where a plaintiff omits to sue in respect of or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

Now were it not for the judgment of a Bench of the Allahabad High Court in 57 All 838,[1] I should have had no difficulty in holding that the judgment of the learned Second Judge of the Small Cause Court was incorrect and that the second suit was clearly barred by the provisions of this rule. The judgment of the Allahabad Court was based upon the decision of their Lordships of the Privy Council in 7 Luck 442,[2] but with the greatest respect it seems to me that this latter case hardly touched the point for decision. Like all the other cases which have been quoted before me in the course of the argument, it is a decision on a question of limitation arising out of a suit on a mortgage, and therefore can scarcely be an authority for a decision on a question under O. 2, R. 2, arising out of a suit on a bond for the payment of money. The ratio decidendi of the judgment of their Lordships is to be found on page 452 where it is said that "a proviso of this nature is inserted in a mortgage deed exclusively for the benefit of the mortgagees."

The Bench of the Allahabad High Court, as I have said, purported to follow this judgment in 57 All 838.[1] Unfortunately, the terms of the bond in the Allahabad case are not set out in the judgment, which proceeds upon the footing that the creditor had two options given to him under the terms of the bond, namely an option to sue for the instalments as they became due and on option to sue for the whole amount of the debt and that therefore two separate and distinct causes of action arose under the bond. The basis of the judgment is that this option was given by the bond to the creditor, and as the learned Judges purported to follow the judgment of the Judicial Committee in 7 Luck 442,[2] I am obliged to conclude that there must have been such an option "exclusively for the benefit of the creditor" expressed in the bond itself. Now that is not the case in the present bond. I have set out the terms of the bond and it is only necessary to read these terms to see that, so far from their being exclusively for the benefit of the creditor, they were obviously intended exclusively for the benefit of the debtor. There was only one cause of action under this bond, and that was the right of the respondent to recover the amount of his debt. Under the bond he agreed not to enforce his remedy in respect of that cause of action so long as the debtor paid him a sum of Rs. 30 a month, and he agreed also that he would not enforce his remedy until at least three of these instalments of Rs. 30 a month were in arrears. The meaning of the bond is, to my mind, perfectly plain namely that although a cause of action for the recovery of the whole amount of the debt existed, the creditor agreed to forbear and not to sue upon this cause of action so long as the debtor paid him the sum of Rs. 30 a month and until the monthly payments were at least three months in arrears. When three monthly instalments were in arrears, the remedy upon this cause of action became enforceable and that was to sue for the whole amount of the debt. When the respondent, by an unfortunate error, decided to sue for ten instalments only instead of suing for the whole amount due to him he obviously in the terms of sub-rule (2) of R. 2, O. 2 omitted to sue in respect of a portion of his claim which he was entitled to make in respect of the single cause of action arising under the bond. Consequently, his second suit was barred by the provisions of this rule, and therefore the judgment and decree of the learned Second Judge of the Small Cause Court are set aside, and the suit of the plaintiff-respondent is dismissed with costs in both Courts. Advocate's fee in this Court four gold mohurs.

N.S./R.K. *Suit dismissed.*

1. Ram Sarup v. Peare Lal, (1935) 22 A I R All 461=158 I C 53=1935 A L J 456=57 All 838.
2. Lasa Din v. Mt. Gulab Kunwar, (1932) 19 A I R P C 207=138 I C 779=59 I A 376 = 7 Luck 442 (P C).

A. I. R. 1939 Rangoon 252

BA U J.

Ma Mya Tin—Applicant.

v.

Maung Ah Lon — Respondent.

Criminal Revn. No. 64 B of 1939, Decided on 7th March 1939. Reference made by Sess. Judge, Henzada, D/. 2nd February 1939.

Buddhist Law (Burmese)—Marriage—If man and woman are sui juris their mutual consent to live together as husband and wife is sufficient evidence of their marriage.

The law that is applicable to the union of Chino-Burman Buddhist and a Burmese Buddhist woman is the same as is applicable to the case of Burmese Buddhist man and Burmese Buddhist woman. All that is required, so long as they are

sui juris, is their mutual consent to live together as husband and wife. If such consent is proved then the woman would be deemed to be the legally married wife of the man. [P 254 C 1]

J. R. Chowdhury — *for Applicant.*

U E Maung (1) — *for Respondent.*

Order.—I must confess that this is a very difficult case to deal with as there is a lot to be said for both sides. The case is for payment of a maintenance allowance. The petitioner alleges that the respondent is her husband but that he has refused to maintain or support her for some time. She claims Rs. 30 a month for her support. The circumstances under which, according to her, she and the respondent became man and wife are these: Maung San and his wife Ma Pon acted as go-between between her and the respondent; then one day she eloped with the respondent and they lived for about eighteen days in the house of War Hmein. She was then taken back to her sister, Ma E Myun's house, where in the presence of certain elders of the quarter a formal marriage ceremony took place between her and the respondent. After the marriage the respondent lived with her for about a month and then went away, refusing thereafter to maintain or support her. The case for the respondent however is this. It was not he who was the lover of the petitioner but a man called Maung San and with Maung San the petitioner eloped. The respondent admits that he and War Hmein took the petitioner to the house of the petitioner's sister and restored her there in the presence of certain elders. Now, the first point that will present itself to one's mind is whether the petitioner whose reputation has never been tarnished in any way would not only fall in love with a married man but elope with him knowing that he can hardly maintain a wife, leave alone two. The answer will and, in fact, must in my opinion be "No". On the other hand some of the letters which were admittedly written by her to Maung San are couched in tender terms. Take, for instance, the letter Ex. 2 which states, inter alia, as follows:

My elder brother San, I respectfully write this letter to you. Do you, my elder brother San, still remember me, your younger sister? I, your younger sister, do not forget you, my elder brother San, at any hour out of twenty four hours in a day. . . . .

The next letter is Ex. 5. It runs inter alia as follows:

But when you said you did not want to come on account of the people of the quarter, I think you gave this excuse because you did not want to come. If anything is to happen to you on account of the people of the quarter, I shall place myself in front of you and die.

These letters would never have been written by a woman to a mere go-between. They express not only tender feelings but solicitude also. No one would express tender feelings for and be solicitous about another unless that person happens to be some one near and dear to her. Looking at this case from this point of view it looks as if Maung San was the lover of the petitioner and not the respondent. Therefore, if the case were to rest there, the decision of the first Court must be upheld. The case does not however rest there. The explanation given by the petitioner as to how and under what circumstances these letters were written and why they were written in this manner is as follows :

The letters Exs. 1 to 5 were sent to the respondent through Ko Maung San. These letters were the only means to see Ah Lon. Ko Maung San was the only proper channel to send my letters to Ah Lon. The letters have no bearing of love with Maung San and myself. As I dare not go to Ah Lon who is the clerk in the office of the D. S. P. being Government servant, I got to send these letters through Maung San.

The explanation as it stands does not seem to be quite satisfactory. If it were to come from a girl of a position and education higher than that of a girl of the petitioner's status, I would reject it without much ado. Now, having regard to the difference in social position between that of the petitioner and that of the respondent and having regard to her untutored mind the explanation should not be rejected summarily. The matter should, in my opinion, be probed more deeply. Now, the first point that will strike one as being very peculiar is the tearing up of the lower portion of most of the letters. Why were they torn away? The answer to my mind is that they were torn away as they contained references to the respondent. Again, what does the expression "Ko Maung San and the other" in letter Ex. 3 mean? The expression "the other" can only mean some one whose name should not and in fact dare not be mentioned because of a previous understanding or arrangement. If the matter is now approached from this angle, and in my opinion it is the right angle from which the approach to the discussion of this case should be made, then the whole case becomes quite easy of solution. What is not now in dispute is that it was the respondent and his friend War Hmein who took the petitioner and restored her to her sister. If the respondent had nothing to do

with the petitioner why did he go with her? The explanation given by him is that he was asked by Maung San to send the petitioner back to her sister as an elder. If he went along as an elder why did he then not say anything in reply when Po Shwe asked him whether he had anything to say. If he had nothing to do, but simply took the girl to the house of her sister as an elder, one would expect him to say that he brought the girl back as an elder on behalf of Maung San. In view of his silence the evidence of the elders who were admittedly present on that occasion becomes very significant. I may refer to the evidence of the headman, U Po Daung, who says :

When I arrived I met U San Nyun, U Po Thaung Gale. Later U Ba On, Maung Thant Gyi, Maung Kin and others came. There I found Ah Lon and Ma Mya Tin. Maung Po Shwe said that the parents of Ma Mya Tin had made him to be the agent to receive Ah Lon and Ma Mya Tin. Po Shwe told us that he would receive Ah Lon and Ma Mya Tin. Thereupon Maung Po Shwe asked Ah Lon whether it was merely reception or both reception and formal marriage. In this Ah Lon replied that it was both reception and formal marriage. One of the elders asked Ah Lon whether he was going to take away his wife or keep her there. Ah Lon said that he would keep his wife there and live together. After U San Nyun offered the prayer Ah Lon and Ma Mya Tin gave respect to the elders and the marriage ended.

That the evidence given by this witness and other elders is true is proved by the fact that the respondent never pleaded in his written statement that it was Maung San with whom the petitioner eloped and not with him. The contention put forward by the learned counsel for the respondent is that even if there was a restoration and assembly of elders as alleged, it does not prove marriage. I cannot accept this contention. The law that is applicable to the union of a Chino-Burman Buddhist and a Burmese Buddhist woman is the same as is applicable to the case of a Burmese Buddhist man and a Burmese Buddhist woman. All that is required, so long as they are sui juris, is their mutual consent to live together as husband and wife. From the evidence on the record there was, in my opinion, such a consent in this case. I therefore hold that the petitioner is the legally married wife of the respondent and direct that the respondent should pay Rs. 15 per month with effect from the date of the institution of the case in the first Court. I accept the order of the learned Sessions Judge as regards costs. No order as to costs in this Court is made.

N.S./R.K. *Order accordingly.*

*** A. I. R. 1939 Rangoon 254**

BRAUND J.

I. E. Aboo and others — Plaintiffs.

v.

G. H. S. Aboo — Defendant.

Civil Regular Suit No. 107 of 1937, Decided on 25th May 1938.

(a) Civil P. C. (1908), Sec. 92 (2) — Trust falling under Sec. 92 — Consent of Advocate-General applied for and refused does not relax provisions of Sec. 92 (2).

If a trust is in fact one which falls within Sec. 92, then the fact that the Advocate-General's consent has been applied for and refused would afford no ground for relaxing the provisions of sub-section (2). [P 255 C 2]

*** (b) Civil P. C. (1908), S. 92—Legal significance of 'trust' explained—"Breach of trust" — Meaning of—Settlor creating primary trust for benefit of members of family and secondary trust for charitable and religious purposes — Secondary trust to take effect only when there were no primary objects or when those objects did not exhaust whole income — Suit against trustee for breach of trust brought by beneficiaries under the primary trust held did not come under S. 92 (1).**

In its true legal sense the word 'trust' denotes that obligation to administer property in a certain defined way which attaches to a trustee in whom property is vested upon trust. A 'trust' is really an 'obligation' attaching to a trustee which the law or equity will enforce. It is except in a loose sense, neither the property over which a trust exists nor that condition which results from property being held in trust. It consists of the personal equitable obligation or series of obligations, attaching to the trustee. It is necessarily in this sense that the word 'trust' is used when it is found in the context 'breach of trust.' What is meant is a breach by the trustee of the confidence or duty that the law or equity imposes in him in the particular respect complained of in the case. Therefore under Sec. 92 there has to be alleged a breach by a trustee of an obligation or duty, which obligation or duty is one which exists for the furtherance of a public purpose of a charitable or religious nature and in such cases the true question is whether the particular trust, obligation or duty, a breach of which is alleged, is an obligation or duty of that kind : *A I R 1937 All 786, Expl.; AIR 1929 Oudh 225, Ref.* [P 257 C 2; P 258 C 1]

By a deed of wakf a lady settled all her property upon a trustee with a direction that the income of such property should be utilized towards certain trusts. The benefactions consisted of a primary trust for the benefit of the poor members of the settlor's, her father's and grand-father's, family and subject thereto a secondary trust for the benefit of wider class of poor people of a certain community and other objects which were unquestionably charitable and religious. The secondary public trust was however to take effect only in the event of there being no primary objects or those objects not exhausting the whole of the income. Certain persons who called themselves relatives of the settlor and thus described themselves as beneficiaries under the first or primary trust brought a suit against the trustee alleging breach of the

trust on his part and for his removal and appointment of a new trustee. The breaches complained of were all breaches affecting the income of the property as opposed to capital :

Held that the trust of which the breach was alleged was not a trust for public purposes of a charitable nature and the plaintiffs were not persons having an interest in such trust. The case therefore did not fall under Sec. 92 (1) and the consent of the Advocate-General was not necessary to the institution of the suit: *14 Rang 575, Ref.* [P 258 C 1]

Bhattacharya — *for Plaintiffs.*

F. S. Doctor — *for Defendant.*

U Thein Maung, Advocate-General in person.

Judgment.—The point I have now to decide arises out of a deed dated 4th March 1922 by which a lady named Fatima Bee Bee created a waqf. By that deed Fatima Bee Bee appointed the defendant to be the sole trustee of the waqf property which she thereby dedicated. After sundry immaterial provisions relating to the power of appointing new trustees she declared that the trustee should stand possessed of the nett rents and profits of the property upon the following trusts :

(a) To give pecuniary or other help to the poor members of the families of my father, Soolayman Aboo and his descendants in the male or female line and of the family of my grandfather and his descendants in the male or female line and the poor members of the Aboo family and their relatives as may be destitute or in indigent circumstances or in need of pecuniary help.

(b) In the event of none of the descendants of my father and grandfather and members of the Aboo family being in poor indigent circumstances or if there be any balance left after giving help or relief to such descendants and relations as aforesaid to spend the said income or balance income in or for all or any of the objects hereinafter mentioned—

(i) To give pecuniary and other help or to feed poor and indigent members of the Variav Sunni Borah Jumat in Rangoon Variav and any other place or places.

(ii) To give donations to Madressas mosques and other religious or charitable institutions or for such other pious or religious purposes as the trustee may deem fit.

These provisions of the deed of 4th March 1922 make it clear that Fatima Bee Bee's benefactions comprise what may aptly be described as a "primary" trust for the benefit of the poor members of her, her father's and her grandfather's families and, subject thereto, a secondary trust for the benefit of the wider class of poor comprised in the Variav Sunni Borah Jumat at Rangoon, Variav and elsewhere or for certain other subjects which are unquestionably charitable or religious. This suit was begun by a plaint which in its amended version, is dated 30th March 1937. Its purport may be very briefly stated as consisting of allegations of breaches of trust by the defendant followed by a prayer for his removal and the appointment by the Court of a new trustee or new trustees. I shall indicate presently what exactly the allegations of the breaches of trust were. To this suit the fiat of the Advocate-General was sought under S. 92 (1), Civil P. C. The Advocate-General refused his consent upon the ground that the trust was a "private," and not a "public," trust. The defendant has now taken the preliminary objection that notwithstanding the Advocate-General's refusal of his consent under S. 92, this is, nevertheless, such a suit as falls within that Section and in consequence of sub-s. (2) of S. 92, cannot be instituted without the Advocate-General's consent. It would seem — and the Advocate-General agrees — that, if the trust is in fact one which falls within Sec. 92, then the fact that his consent has been applied for and refused would afford no ground for relaxing the provisions of sub-s. (2). And I have therefore to determine whether the breach of trust alleged in the suit is "of any express or constructive trust created for public purposes of a charitable or religious nature" within the meaning of sub-s. (1) of S. 92, Civil P. C.

I have myself already held in 14 Rang 575[1] that a trust created for the benefit of the poor members of the settlor's own family is not a trust for "a public purpose of a charitable nature" as that expression ought to be construed in S. 92 (1) of the Act. That decision has not yet been dissented from in this Court. I should in consequence have been compelled to hold that if what I have described above as the "primary" trust for the benefit of the poor members of Fatima Bee Bee's own family had stood alone, that trust would not by itself have constituted a "trust created for public purposes of a charitable . . . . . nature." The difficulty however in the present case is that there exists a secondary trust, which is unquestionably for a "public purpose of a charitable or religious nature," to take effect in the event either of there being no objects of the primary trust or in the event of those objects not exhausting the entire income. It is perhaps worth observing that the direction to the trustee to expend the income of the trust property — presumably in each year — upon the

1. D. I. Attia v. M. I. Madha, (1936) 14 Rang 575.

objects of the primary trust is peremptory so long as such objects exist and that the secondary trust only arises if either there are no objects of the primary trust or such objects do not exhaust the whole income. I must now point out that the breaches of trust on the part of the defendant alleged by the plaint consist of (a) failure by the trustee to deliver accounts, (b) mis-management of the trust property by a failure to exercise ordinary energy and prudence in certain litigation connected with the recovery of the rents of the trust property from cultivators, (c) failure to recover certain arrears of the rents and profits of the trust property from tenants and (d) failure to distribute the net income of the trust property among the settlor's family in accordance with the trusts of the deed. It is, I think, necessary for me, for the purpose of this preliminary point, to take the pleadings and the allegations of breaches of trust contained in them as I find them without at this stage examining their merits. I should perhaps have pointed out that the plaintiffs in the suit by para. 4 of the plaint allege themselves to be the nephews and brothers respectively of Fatima Bee Bee — i. e. descendants of her grandfather and father respectively or at least, members of the Aboo family — and, as such, I think I must assume that, when in the plaint they describe themselves as "all beneficiaries under this wakf," they intend to plead that they are beneficiaries under the first or primary trust in favour of the relatives of the settlor.

What therefore I have to determine is this, whether a person who is an object of the primary, or non-public purpose trust, can be described as a person "having an interest in" . . . . an "express or constructive trust created for public purposes of a charitable or religious nature" in a case in which that particular part of the entire trust disposition which affects him is not for a public purpose at all. I have already pointed out that by their plaint they plead their interest as members of the family and not as members of the Variav Sunni Borah Jumat of Rangoon. There is nothing in the written statement pleading that they are within the secondary trust in addition, or in preference, to the primary trust. I think I must therefore for the present purpose assume that their interest in respect of which they bring this suit arises under the primary trust only. Now, the difficulty is this. The breaches of trust alleged are all breaches of trust affecting income as opposed to capital. It would seem to me to follow from what I have already said that the interest of the plaintiffs which is affected by the breaches of trust alleged is an interest in income which arises from that particular one of the trusts of the deed which provides for the distribution of income to them. If therefore the "trust," an alleged breach of which is referred to in Section 92 (1), may consist of a particular one of the series of "trust obligations" imposed upon the trustees by the wakf deed—as distinct from the "trust" constituted by the wakf deed as a whole—then I should incline to the view first that in this case the trust of which the breach is alleged is not a trust for public purposes of a charitable nature and secondly that the plaintiffs are not—upon the face of the pleadings—persons having "an interest in" such a trust. On the other hand, if the trust of which the breach is alleged is to be taken as being the entire and undivided trust disposition contained in the deed, then it may be argued that, inasmuch as that trust does contain a contingent class of "public" charitable beneficiaries — the contingency being, of course, the existence of surplus income — the "trust" itself of which there has been a breach is regarded as a whole a "trust for public purposes of a charitable nature" and the plaintiffs are persons having an interest in such a trust.

The real answer to this question depends, in my opinion, upon what meaning is to be attributed to the word "trust" in S. 92 (1), Civil P. C. The disposition with which we are now dealing is, as I have pointed out, a compound one, being partly within and partly outside the Section. If therefore the word "trust" is to be taken to embrace the whole compound disposition, it would be possible to contend that any breach of any provision of the deed, whether in the public part or not, constituted a breach of the trust, which was for a public purpose of a charitable nature. On the other hand, if the word "trust" is to be limited to that particular fiduciary obligation of which a breach is complained, then it would appear to follow that in this case a breach only of the primary or "non-public" trust is alleged and that the case does not fall within S. 92 (1) at all. This point is, I think, a novel one and, with one exception, the authorities to which my attention has been called afford very little assistance. In a very recent case however before a Bench

of the Allahabad High Court the meaning of the words "trust for public purposes" was considered in reference to S. 3, Charitable and Religious Trusts Act 1920 in a case in which the dispositions of the trust deed were partly for a public purpose and partly not. Up to a point the wording of S. 3, Charitable and Religious Trusts Act, is materially the same as that of S. 92 (1), Civil P. C. It says that

> save as hereinafter provided in this Act, any person having an interest in any express or constructive trust created or existing for a public purpose of a charitable or religious nature may apply by petition to the Court . . . .

It does not however speak of "any alleged breach" of such a trust. In I L R (1938) All 1[2] the learned Chief Justice of the Allahabad High Court discusses the question by reference to an earlier Full Bench case of the Oudh Chief Court: 4 Luck 429.[3] The significance of the learned Chief Justice of Allahabad's observations at pp. 6, 7 and 8 of the report appears to be that he treats the "trust" as comprising the entire series of dispositions of the deed, whether they be charitable or not. The object of the inquiry in this particular case had no reference to any breach of trust but was directed to ascertaining whether "the trust" was for a public purpose of a charitable nature. As I read the judgment, it means that the Court looks at the trust disposition as a whole and where such disposition is partly for a public and partly for a private purpose, it endeavours to ascertain which predominates so as to impress the entirety of the trust with a public or non-public character as the case may be.

> First, the Act of 1920 uses the words 'public purposes,' and does not use the expression 'partly public and partly private purposes.' But the Act also does not use the words 'partly public purposes.' The question in each case must depend on the interpretation of the document after taking into consideration all the provisions in it. If the trust is in substance a trust for public purposes, then even though a part of the income might have been specifically allotted to purposes which cannot be regarded as public, the trust would nevertheless be for public purposes. On the other hand, if the trust is substantially for private purposes, then even though a small and negligible amount may be set apart for public purposes either in the present time or in a future eventuality, the trust in itself would not be for public purposes.

In that passage it seems to me to be inferred that the "trust" itself is the entire disposition whether public or private. And indeed with great respect I should agree. In my judgment however this case affords no safe guide to the proper construction of the terms of S. 92, Civil P. C. Here we are dealing with a case of "any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature . . ." What we have to consider is not, as in the Allahabad case, whether a trust for public purposes exists but whether a breach of a trust for public purposes has occurred or, in other words, whether that which has been broken is a trust for public purposes. When one comes to think of it, the expression "breach of trust,' though in the commonest possible use, is a peculiar one. What do you break? You don't, as it seems to me, break the trust as an abstract whole but some one or more of the particular fiduciary obligations which are imposed on the trustee by it. A "trust" is a word which is often loosely used. It is used sometimes to denote the property over which the trust exists. It is used more often to denote also that condition which results from property being held in trust. In that sense it is used when one speaks of a person being interested in a "trust". What is meant is that he is interested in property held in trust. But in its true legal sense the word "trust" denotes that abstract obligation to administer property in a certain defined way which attaches to a trustee in whom property is vested upon trust. A "trust" is really an "obligation" attaching to a trustee which the law or equity will enforce. It is, except in a loose sense, neither the property over which a trust exists nor that condition which results from property being held in trust. It consists of the personal equitable obligation or series of obligations attaching to the trustee. Now, in my view, it is necessarily in this sense that the word "trust" is used when it is found in the context "breach of trust." What is meant is a breach by the trustee of the confidence or duty that the law or equity imposes in him in the particular respect complained of in the case. When therefore in S. 92 (1), Civil P. C., the words are found "in the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature . . . . . ." they mean, I think, that there has to be alleged a breach by a trustee of an obligation or duty, which obligation or duty is one which exists for the furtherance of a public purpose of a

2. Pratap Singh v. Brijnath Das, (1937) 24 A I R All 786=172 I C 945=I L R (1938) All 1= 1937 A L J 1183.
3. Shabie Shabbir Husain v. Ashiq Husain, (1929) 16 A I R Oudh 225 = 117 I C 739 = 4 Luck 429=6 O W N 316 (F B).

charitable or religious nature. And I think therefore that in each of these cases the true question is whether the particular trust obligation or duty, a breach of which is alleged, is an obligation or duty of that kind.

In my view, upon the face of the plaint in this case no breach of trust in the sense which I have endeavoured to explain is "alleged." The only allegations of the plaint are by the plaintiffs as objects of the primary or non-public purpose. They do not "allege" anything except that they in that capacity have been the objects of a breach of trust by the trustee and ex hypothesi that is not an allegation of a breach of an obligation, duty or trust for a public purpose because they are in the capacity in which they have described themselves by their own plaint, the objects of no such trust at all. Had they pleaded that they were objects of the secondary trust and pleaded a breach of that trust affecting them in that capacity, the result might, I think, have been otherwise. In the circumstances therefore I am disposed to hold that the consent of the Advocate-General under S. 92, Civil P. C., was not necessary to the institution of this suit.

N.S./R.K. *Order accordingly.*

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* A. I. R. 1939 Rangoon 258
SPECIAL BENCH

ROBERTS C. J. BAGULEY AND SHARPE JJ.

Commissioner of Income-tax, Burma

v.

M. A. Baporia and others — Assessees.

Civil Ref. No. 7 of 1938, Decided on 20th February 1939, made by Commissioner of Income-tax, Burma.

*** (a) Income-tax Act (1922) (Burma), S. 3 — Words "association of individuals" — Construction.**

The words "association of individuals" in S. 3 are not to be construed with the word "firm" which precedes them according to the rule of ejusdem generis : *A I R 1937 Cal 583, Expl.* [P 258 C 2 ; P 260 C 2]

*** (b) Income-tax Act (1922) (Burma), S. 3 —Individual, by merely inheriting share under Mahomedan law and without committing any act, cannot be member of association of individuals.**

By merely inheriting a share of property no person can become a member of an association of individuals, unless there is some forbearance or act upon his part to show that his intention and will accompanied the new status which he had been asked to receive. Hence an individual, by merely inheriting a share in property under Mahomedan law and without committing any act or omission of his own volition, cannot be a member of an association of individuals under S. 3, Burma Income-tax Act. [P 258 C 2 ; P 260 C 2]

(c) Income-tax Act (1922) (Burma), S. 3— Mahomedan dying leaving several children and houses—Rent of houses divided among children — Children however not realizing shares of property, left by father but appointing certain person as common agent for managing properties—Such relation continued for 35 years— Facts held sufficient to constitute association of individuals.

It would be unfortunate indeed if a decision, which must necessarily depend in each particular case upon a different set of circumstances, were taken as being an attempt to define, or to lay down a hard and fast rule as to what may amount to an association of individuals. The matter in all cases resolves itself in the last resort to a pure question of fact, provided there is any material upon which the Commissioner of Income-tax can come to a conclusion : *63 Cal 538, Rel. on.* [P 259 C 1]

A Mahomedan died leaving a widow and nine children. The deceased had two houses the rents of which after his death were divided amongst his children and widow until the latter's death. The children did not however realize the shares of the property left to them by their father and mother under Mahomedan law which they were free to realize at any time. They continued in that relationship for a period of thirty-five years and retained the property alike through times of general financial prosperity and depression. Moreover they for the purpose of managing these properties confided their interest each of them to one and the same individual :

Held that these facts were sufficient to constitute them an association of individuals within the meaning of S. 3. [P 259 C 2 ; P 260 C 2]

U Thein Maung, Advocate-General — *for the Commissioner of Income-tax.*

Dr. M. A. Rauf — *for Assessees.*

Roberts C. J. — This reference under Sec. 66, sub-s. (2), Burma Income-tax Act, comes before us for the determination of the following questions of law which have been propounded : first,

Are the words 'association of individuals' in S. 3, Burma Income-tax Act, to be construed with the word 'firm' which precedes them according to the rule of ejusdem generis ;

secondly,

If the first question is answered in the negative can an individual, by merely inheriting a share in property under Mahomedan law and without committing any act or omission of his own volition, be a member of an association of individuals under S. 3, Burma Income-tax Act ?

and thirdly,

Is the omission of the nine co-heirs in the present case to realize the shares of the property left to them by their father and mother under Mahomedan law and which they are free to realize at any time and the appointment of one of their number as their agent, sufficient to constitute them an association of individuals within the meaning of S. 3, Burma Income-tax Act ?

The facts which give rise to these questions are that one A. M. Baporia died in the year 1904 leaving a widow and nine children. His widow died in 1915. The deceased gentleman had two houses in Rangoon, the rents of which after his death, were divided amongst his children and widow until the latter's death. One M. A. Baporia, who resided in Rangoon, managed the property as the agent of those beneficially interested. One of the questions put before us deals with the application of the rule of ejusdem generis to certain sets of words in S. 3, Income-tax Act. In 63 Cal 538[1] at p. 542 Derbyshire C. J. asked whether the individuals joined in a common purpose or common action, and thereby became an "association of individuals," and he mentioned in that case three elements, namely the joint purchase of the property at a time 15 years before the suit, the continuance as owners during the period from the purchase to the date of the suit, and, thirdly, the joining together for the purpose of holding the property, using it for the purpose earning an income to the best advantage of them all: and there was no difficulty in deciding in that case that the individuals concerned were associated together, within the meaning of the Income-tax Act. Costello J. said:

> Mr. Banerjee invited us to take upon ourselves the difficult, if not indeed impossible, task of laying down a general definition of the expression 'association of individuals.' In my opinion, that is not desirable from any point of view whatever. Each case must be decided upon its own peculiar facts and circumstances. When we find, as we do find in this case, that there is a combination of persons formed for the promotion of a joint enterprise banded together, if I may so put it, as co-adventurers—to us an archaic expression—then I think no difficulty whatever arises in the way of saying that in this particular case these four persons did constitute an 'association of individuals' within the meaning of both S. 3 and S. 55, Income-tax Act, 1922.

With that passage I respectfully agree. It would be unfortunate indeed if a decision, which must necessarily depend in each particular case upon a different set of circumstances, were taken as being an attempt to define, or to lay down a hard and fast rule, as to what may amount to an association of individuals.

The only matter before us is whether in the present case the Commissioner of Income-tax had before him material from which he could draw the conclusion that such an association of individuals had been formed and was in existence and was therefore assessable to income-tax under the Section mentioned. I am clearly of opinion that he had before him such material. The members of the family, who enjoyed, each of them, a share of the rents of these two houses in Rangoon, had not, it is true, become members of the association by a joint purchase or any common enterprise, but they had become so involuntarily, being the recipients of the estate of their father. However they continued in that relationship over a period of nearly 35 years. They retained the property alike through times of general financial prosperity and depression: when the price was low they retained it, and when it was high the property was still retained: and, in my opinion, the length of time during which they consented to the continuance of this association is strong evidence that they combined voluntarily together in order to obtain gain or profit from their association. The association, which originally came into being outside their own volition, was maintained, and that in itself, to my mind, was evidence upon which the Court might find in a particular case (though it would not be bound to find in any given case) that there was an association within the meaning of the Section. Not only that, but we are informed that they had, for the purpose of managing these properties, confided their interest, each of them, to one and the same individual, Mr. M. A. Baporia, and in the case which Dr. Rauf cited to us in support of his contention that there was no real measure of agreement among co-sharers of the property, the Bench carefully reserved from their consideration the existence of any such circumstances. In I L R (1937) All 108[2] at p. 112 the judgment remarks:

> We express no opinion as to what the position would be if the co-owners of an income producing property appointed one or more persons, whether from among themselves or from outside, to perform all the functions of a common scheme of management.

There is, it is true, no express evidence of a common scheme of management here but there is evidence that all the beneficial owners confided the business matters connected with this house property to one and the same gentleman, who managed it doubtless for them upon the same terms and with the same object in view. There

1. In re B. N. Elias, (1936) 63 Cal 538=40 C W N 476.

2. Commissioner of Income-tax v. Mufti Muhammad Aslam, (1936) 23 A I R All 817=169 I C 969=I L R (1937) All 108=1936 A L J 1109.

has been pressed upon us an apparent difference between the judgment of Panckridge J. in I L R (1937) 2 Cal 358[3] and the judgment of Beaumont C. J. in 5 I T R 716.[4] I am in agreement with the views expressed by Beaumont C. J. who explained that they had already followed the decision in 63 Cal 538,[1] to which I have already alluded, in 39 Bom L R 910.[5] The learned Chief Justice remarked that the only distinction between that case and the present one was that the original association in the present case was not a voluntary act on the part of the assessees (they received it under a will), but as soon as they elected to retain the property and manage it as a joint venture producing income, it seemed to him that they became an association of individuals within the meaning of the Income-tax Act. In the case to which I have referred, which Panckridge J. decided, the question for decision was whether the members of a formerly undivided Mitakshara family were an association of individuals after the passing of a preliminary decree for partition, and Panckridge J. said :

> With regard to the contention that the owners are an association of individuals within the meaning of S. 3, it is enough to say that this point is not raised in the letter of reference.

His subsequent observations are therefore in the nature of obiter dicta. He continued :

> In my opinion however the words 'other association of individuals' must be construed according to the ejusdem generis rule with reference to the word 'firm' preceding it and they do not cover members of a formerly undivided Mitakshara family after a preliminary decree for partition has been made.

This expression of opinion would have, no doubt, been stated in more meticulous language if the learned Judge had not been conscious that he was giving expression merely to an opinion which was not necessary for the decision of that case and, in my view, he can by no means be held to have meant to say that the words "association of individuals" were to be construed with reference to the word "firm" preceding them only and had his attention been drawn to the point he would doubtless have held that they should be construed ejusdem generis with all the other groups of persons mentioned, namely Hindu undivided family, company, as well as firm. Accordingly, in my view too much has been made of the alleged difference of opinion, and I am of opinion the answer to the first question should be in the negative.

With regard to the second question, I also think that the answer should be in the negative. But the question is framed so as to put before us a proposition that an individual might, merely by inheriting a share, be a member of an association. The position as it appears to me is this. When he inherits a share in property he has the opportunity of deciding whether he will by reason of having inherited that share, form an association of individuals or renounce such a relationship; and if there is evidence that he has chosen the former alternative, it will be a matter upon which the commissioner can base his ultimate decision. By merely inheriting a share of property however I am satisfied that no person can become a member of an association of individuals, unless there is some forbearance or act upon his part to show that his intention and will accompanied the new status which he has been asked to receive.

With regard to the last question, I think the answer should be in the affirmative. The matter, as I have said before, in all these cases resolves itself in the last resort to a pure question of fact, provided there is any material upon which the Commissioner of Income-tax can come to a conclusion. It is not for us to say how many facts, or of what nature, in each particular case, he should desire to see before arriving at the conclusion that there is an association of individuals within the meaning of this Section : it is enough for our purpose if we say here that such facts were present. Therefore in my opinion, this reference should be answered accordingly. The applicant will have to pay the costs of the reference fifteen gold mohurs.

Baguley J.—I agree.

Sharpe J.—I agree.

D.S./R.K. *Answered accordingly.*

*** A. I. R. 1939 Rangoon 260**

BA U J.

A. H. Mohamed Ismail & Co. — Appellant.

v.

S. M. Ashgar & Co. — Respondent.

Civil Misc. Appeal No. 83 of 1938, Decided on 17th January 1939.

3. In the matter of Keshar Deo Chamaria, (1937) 24 A I R Cal 583=172 I C 807=I L R (1937) 2 Cal 358.
4. In re Dwarakanath Harischandra, (1937) 5 I T R 716.
5. Commissioner of Income-tax, Bombay v. Laxmidas Devidas, (1938) 25 A I R Bom 41=173 I C 482=I L R (1937) Bom 830=39 Bom L R 910.

*** Civil P. C. (1908), S. 95 — Order of attachment before judgment passed but attachment not actually effected—Person whose property was ordered to be attached cannot claim compensation under S. 95.**

Compensation will be granted only where damage has resulted. [P 261 C 2]

Where only an order of attachment before judgment has been passed but the property has not been actually attached in pursuance of the order, it cannot be said that the mere order of attachment has resulted in damages and hence the person whose property has been ordered to be so attached cannot claim compensation under S. 95 : *A I R 1917 Mad 145 and A I R 1925 Bom 357, Rel. on.* [P 261 C 2]

C. A. Soorma — *for Appellant.*

Sahney — *for Respondent.*

Judgment.—This is an appeal from the order of the Second Judge of the Court of Small Causes, Rangoon, awarding Rs. 100 as compensation to the respondent under S. 95, Civil P. C. The facts of the case are these: The appellant company sued the respondent company for recovery of a certain sum of money alleged to be due to it, in the Court of Small Causes. On the same date another company called the Star Trading Company sued the respondent company for recovery of money in the same Court. Both the plaintiff companies then applied for attachment of the defendant-respondent's goods before judgment. The application filed by the Star Trading Company was dealt with by the learned Chief Judge of the Court of Small Causes and the application was granted. Attachment of the defendant-respondent's goods was effected. As regards the application filed by the plaintiff-appellant company, it went before the Second Judge. The Second Judge directed notice to issue to the defendant-respondent company. Subsequent to that the plaintiff-appellant company filed an application asking that attachment before judgment might be made as the application of the Star Trading Company for attachment before judgment had already been granted by the Chief Judge. The Second Judge granted the prayer and an order was issued to the Bailiff to effect attachment; but according to the judgment of the Second Judge of the Small Cause Court, all that the Bailiff did was that he noted the order. He did not however effect an actual attachment. Later, an inquiry was held into the allegations made by the plaintiff-appellant company, and as a result thereof the plaintiff-appellant company's application for attachment before judgment was dismissed. Subsequent to that the defendant-respondent company filed an application to lay a complaint against an agent of the plaintiff-appellant company for making false allegations, and also another application asking for compensation under S. 95, Civil P. C. The application to file a complaint against the agent was dismissed, whereas the application for compensation was allowed. The first point to note is whether, where there is no effective attachment, an application for compensation under Sec. 95, Civil P. C., should be allowed. As pointed out above, no attachment of the defendant-respondent's goods was effected in this case. The learned Judge himself noticed that, for he states that

> the goods had already been attached in Civil Miscellaneous No. 101 of 1938 and the premises of S. M. Ashgar and Company sealed by the Bailiff the previous day, i. e. 10th February 1938, and when the Second Judge's order reached the Bailiff, in respect of Civil Miscellaneous No. 105 of 1938 no actual attachment was made but the order was noted.

In connexion with such a state of affairs it is, in my opinion, desirable to refer to two cases. The first is 39 Mad 952,[1] the head-note of which is in the following terms :

> Procuring an order for attachment before judgment maliciously, does not of itself afford a cause of action for damages, as damage does not necessarily and naturally flow from an application for attachment before judgment.

The second case is 49 Bom 629[2] where Taraporewala J. states :

> Section 95, Civil P. C., which provides for compensation in the case of wrongful attachment of the goods of a party, clearly shows that it is applicable only where the attachment is in fact effected and does not apply to a case where the attachment is applied for and has not in fact been levied.

I respectfully agree with these views. Compensation will only be granted where damage has resulted. It is however submitted on behalf of the defendant-respondent company that in the present case attachment was in fact effected in that the goods of the defendant-respondent company remained in the custody of the Bailiff for two days and watching fees in respect thereof were paid by the plaintiff-appellant company. It might be so, but then, how attachment is to be effected is pointed out in O. 21, R. 43, Civil P. C. Attachment in the present case, as held by the Second

1. Rama Ayyar v. Govinda Pillai, (1917) 4 A I R Mad 145 = 32 I C 448 = 39 Mad 952 = 30 M L J 180.
2. Kedarnath Tulsidas v. Beharimal Jagmal, (1925) 12 A I R Bom 357=87 I C 1026 = 49 Bom 629=27 Bom L R 525.

Judge of the Small Cause Court himself, was not effected in the manner indicated therein. Even assuming for the sake of argument, that there was in fact an attachment, as alleged by the defendant-respondent company, I am not satisfied that, on the material on the record, the case for compensation has been made out. There is a certain amount of evidence produced by the plaintiff-appellant company that the defendant-respondent company did in fact, during the time material to this suit, part with, or dispose of certain of its properties. Furthermore, the defendant-respondent company had to compromise the claim of the Star Trading Company on payment of six annas in the rupee. From these admitted facts there can hardly be any doubt that what some of the witnesses for the plaintiff-appellant have stated is true. Therefore I am satisfied that, both on the facts and law, the defendant-respondent company has not made out a case for compensation under S. 95, Civil P. C. For these reasons I set aside the order of the lower Court and dismiss the application of the defendant-respondent company with costs, two gold mohurs.

N.S./R.K. *Order set aside.*

A. I. R. 1939 Rangoon 262

ROBERTS C. J. AND SHARPE J.

In re *U Sein Pe, a Lower Grade Pleader.*

Civil Misc. Appln. No. 106 of 1938, D/- 23rd February 1939.

Legal Practitioners Act (1879), Sec. 13 (b)— Sec. 13 (b) is not intended to punish pleader guilty merely of failure to make careful arrangements in any particular case — Conduct of pleader held not fraudulent or grossly improper.

The words of Sec. 13 (b) are as strong words as could well be imagined, and they plainly import in all cases moral turpitude to the pleader whose conduct is impugned. Although of course a pleader who is habitually guilty of carelessness or laxity is no good example to his profession and will in the end find his laziness results in pecuniary loss to himself, the Section is not intended to punish a pleader who has been guilty merely of failure to make careful arrangements in any particular case. [P 263 C 1]

A pleader who was engaged to defend an accused asked for a long adjournment. He was, in conformity with his application, granted a comparatively long adjournment up to certain date but when that date arrived he failed to put in an appearance at the Magistrate's Court. In the meantime he had asked a pleader of some standing to accept the case for him. The accused told the substitute not to conduct the case :

Held that there was no ground for suggesting that the conduct of the pleader in the circumstances was either fraudulent or grossly improper, though it showed a laxity which deserved no encouragement : *A I R 1928 Lah 448, Disting.* [P 263 C 1, 2]

K. C. Sanyal — *for Applicant.*

Roberts C. J. — This is a case which comes before us by reason of the provisions of S. 13 (b) and S. 14, Legal Practitioners Act, 1879, in respect of one U Sein Pe, a Lower Grade Pleader of Pantanaw. He was charged before the Additional Magistrate at an inquiry held in pursuance of Sec. 14 of the Act, with gross professional misconduct in having failed to appear either personally or by proxy to defend one Maung Po Saw on 8th June 1937, Maung Po Saw being an accused person in Criminal Regular Trial No. 110 of 1937, and having paid to the applicant fees in respect of the case. The evidence goes to show that the applicant, U Sein Pe, filed his power on 25th May 1937 and asked for a long adjournment as he desired to go to Rangoon. Whether or not he told the Magistrate that his visit was on medical grounds seems to me to be immaterial. He was, in conformity with his application, granted a comparatively long adjournment to 8th June, but when that date arrived he failed to put in an appearance at the Magistrate's Court. In the meantime, according to his own story, he had asked U Kyin, a pleader of some standing in Pantanaw, to accept the case for him, and U Kyin gave evidence to that effect. He said :

> U Sein Pe told me to conduct the case of Maung Po Saw during his absence as he was to go to Rangoon to take medicine . . . . On the date fixed for the hearing of the prosecution witnesses, respondent's brother Thaung Pe came and fetched me and I came to Court. When I saw the accused he told me not to conduct the case and that he would not give me any fees.

It seems quite clear that there was, therefore some misunderstanding and it may be through very great carelessness, abundant confusion, when this case came on for trial. U Sein Pe seems to have gone to Rangoon and to have submitted himself to medical treatment, which was likely to leave him in an enfeebled condition for some time, without making any proper arrangements, not only to see that the documents connected with the case in which he had been engaged were transferred to a capable person, but that in the event of his non-appearance his client would know and would understand and accept the circumstances. As it was, Maung Po Saw was extremely indignant and he applied for an adjournment which, in our opinion the

First Additional Magistrate might have been well advised to grant. However, in the exercise of his rights the adjournment was declined, and it is now suggested that U Sein Pe is guilty of fraudulent or grossly improper conduct which unfits him to be a pleader of the Court. The words of the Section are as strong words as could well be imagined, and they plainly import in all cases moral turpitude to the pleader whose conduct is impugned. Although of course, a pleader who is habitually guilty of carelessness or laxity is no good example to his profession and will in the end find his laziness results in pecuniary loss to himself the Section is not intended to punish a pleader who has been guilty merely of failure to make careful arrangements in any particular case.

In the report of the District Magistrate it is suggested that the case of F. K. Byrne which was dealt with in an unofficial report from Lahore, A I R 1928 Lah 448,[1] and occurred in 1928, covers this case. That is an erroneous view to take of the matter. In Mr. Byrne's case he was engaged at a high fee to defend a person for murder and at the last moment he disappeared, thrusting his papers without any instructions, into the hands of an advocate who had comparatively little experience and whom the accused person was totally unwilling to accept instead of Mr. Byrne. In the circumstances, there existed in that case facts which were, as I say, totally different. There is evidence that the pleader engaged to defend Maung Po Saw tried to get an adjournment which he thought would be sufficient and tried to make some arrangements, although they were not satisfactorily concluded, in case the matter should come on in his absence. He was detained beyond 8th June, but he nevertheless appeared at a late date on behalf of his client and was in Court to say anything, if anything could have been said: not only that he actually examined some of the defence witnesses on behalf of Maung Po Saw. Maung Po Saw, being dissatisfied with his conviction, appealed but his appeal was summarily dismissed.

We do not think that there is the least ground for suggesting that the conduct of U Sein Pe in the circumstances was either fraudulent or grossly improper though we agree with the District and Sessions Judge that it shows a laxity which deserves no encouragement. In the circumstances which I have related, we are glad to be able to say that U Sein Pe should be and he accordingly is acquitted of the charge against him.

Sharpe J. — I agree that U Sein Pe should be acquitted of the charge under S. 13 (b), Legal Practitioners Act.

D.S./R.K. *Order accordingly.*

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MYA BU AND MOSELY JJ.

Nga Than and another — Appellants.

v.

The King.

Criminal Appeal No. 154 of 1939, Decided on 9th March 1939, from order of Sess. Judge, Toungoo, D/. 31st January 1939.

(a) Penal Code (1860), Ss. 302 and 326 — Common intention merely to attack with dahs knowing that probable result would be grievous hurt—No common intention to cause death or injury sufficient in ordinary course to cause death — Accused should be convicted under S. 326 and not under S. 302.

Where the common intention of the two accused was to effect an attack on some one with dahs knowing that the probable result of that attack at least would be to cause grievous hurt with a deadly weapon but there is no sufficient proof to show that there was a common intention of the two accused to cause death or injury sufficient in the ordinary course of nature to cause death, they can be convicted under Sec. 326 and not under S. 302. [P 266 C 1, 2]

(b) Criminal P. C. (1898), Sec. 367 — What judgment should contain stated.

It is not necessary for a judgment to contain everything recorded in the evidence; when an appeal is heard the evidence is read. The judgment should contain sufficient of the evidence as is necessary to ascertain the facts deposed to, and the importance of and the value to be attached to the evidence of the witnesses, and the reasoning based on this evidence on which Judge founds his decision and his sentence; to put more than this into a judgment is merely to confuse. [P 266 C 2]

N. N. Guha — *for Appellants.*

U Tun Byu, Govt. Advocate — *for the Crown.*

Mosely J.—The appellants, two brothers, Nga Than aged 28 and Nga Shan aged 27, the sons of Saya Tar of Nyaungsakhan village on the river bank just near Toungoo, were sentenced to death under S. 302 read with S. 34, Penal Code, for the murder of Maung Tun U, a man of 45, who came from the adjoining village of Letpantaga. The murder took place at a little after lamp lighting time on the night of the 5th lazan of Tazaungmon (27th October 1930). There is very little dispute about the facts of the

B, In the matter of, (1928) 15 A I R Lah 448 = 108 I C 257 = 29 Cr L J 362.

case, and the defence set up cannot rebut the strong prosecution evidence even though it be circumstantial that the two accused, or at all events one of them, were the assailants of the deceased. The deceased was going along the Letpantaga village road with several others who are witnesses in this case. He was a little distance in front of them. His companions were U Pu Toe (P. W. 2), Maung Wi (P. W. 5), Maung On (P. W. 6) and U Toe (P. W. 12). According to Pu Toe and Maung Wi, the deceased was about 40 cubits in front; Maung On makes it 20 cubits and U Toe, who must have been mistaken, makes the distance only a fathom. Pu Toe had a two celled torch and U Toe a lamp.

According to these witnesses they saw a torch flashing on the deceased from the north where there was a natsin and then they heard several sounds of blows —the witnesses indicate two or three sounds— and then Pu Toe flashed his torch in Tun U's direction, ran towards him and, at the same time, saw the figures of two men running away. These men ran west into a thorny part and then turned and ran north. Pu Toe had heard Tun U let fall the basin which he had with him but they do not say that they heard Tun U fall. It is indicated however in the evidence of the witnesses that Tun U was not struck again after he had fallen and indeed there would have been no time for it.

The two accused were seen running away from within a few yards of the scene of the crime by Maung Sein, a clerk in Macgregor's Depot (P. W. 9), Maung Bo (P. W. 10), his assistant clerk, and Maung Po Hla (P. W. 11), a raftsman. These witnesses live at Letpantaga. Maung Sein had seen the two accused a short time before at about lamp lighting time, going from the north (their village is on the north) to the south. He noticed that Maung Than had a torch at his waist. He noticed their dress : Maung Than was in white, Maung Shan had a white outer garment with black pants. He did not notice if they had any weapons. He suspected the men because they were going south, that is away from the pongyibyan in the north, and he was afraid for his rafts from which thefts of rope and cane were frequent; so he went back to Maung Bo's house to which he had already gone, and warned him and Po Hla on the road in front of Maung Bo's house to look after the rafts. As he was doing so he heard a sound "gwan" and footsteps come running from the south, and he flashed a torch which he had, and saw Nga Shan come running towards him along the road with a dashe in his hand and Nga Than behind him some 15 cubits behind with a dashe in one hand and the torch in the other. The cells in Maung Sein's torch were all new, and Maung Shan and Maung Than ran right past him, and there is no doubt that he could see them. Maung Bo gives exactly the same account of the men, their weapons and their dress, and Po Hla does the same except that he did not know what Nga Than was carrying besides the dashe. The deceased's companions joined these men and they all went to the headman U Maung Gale (P. W. 1), brother-in-law of the accused, and made a report to him.

The headman took down Maung Sein's statement in writing (Ex. A and Ex. B) in which Maung Sein definitely stated that he saw the two accused, though the headman in his first information report (Ex. C) puts it as vaguely as possible, and says that Maung Sein told him that he suspected Maung Shan and Maung Than, and said that they seemed to be (tu gyaung) the culprits. However Maung Sein of course did not profess to have seen the crime committed. There is other corroborative evidence. Maung Mya (P. W. 3), for instance, met the two accused at lamp lighting time on the road. He did not notice if they had weapons. He spoke to their clothes, and he corroborated Maung Sein who said that he (Maung Sein) had asked Maung Mya who the men were (not because Maung Sein did not know himself but for Maung Sein to get a witness). Then Maung Ba Sein (P. W. 13), a cousin of the accused, and his uncle Po Yi (P. W. 14) speak to meeting the accused after lamp lighting time going armed from east to west near the headman of Nyaungsakhan's house. Nga Shan had a dahlwe in a sheath and Nga Than had a dashe. These witnesses also describe their dress in the same way as the other witnesses referred to. I presume that this was after the crime.

If Nga Shan's dahlwe was in a sheath then it is to be noted that Maung Sein and his two companions saw Nga Shan with a naked dah running away from the scene of the crime. Possible motives for the crime are testified to by U Toe (P. W. 12). He gives three possible motives : (1) that the deceased Tun U was a rival candidate for the headmanship with the accused's brother-

in-law, who is headman U Maung Gale (P. W. 1), and that the deceased had filed a petition against U Maung Gale for bribery, (2) that a pupil of the accused's father had prosecuted one Hla Maung (brother of Ba Sein, P. W. 13) for an assault for which Hla Maung was convicted, and Tun U was taking a keen interest in the case for Hla Maung, and (3) that the accused's father Saya Tar and the deceased Tun U were rival preachers, or perhaps rather story-tellers (sabyaw saya).

There is one other piece of evidence against the accused Nga Than, and that is that the investigating officer Tun Shwe (P. W. 19) found a small stain of blood about as big as the tip of the little finger on the outer side of the pocket of his shirt. This is a place where a stain could not have come from inside. The accused gives the usual sort of excuse that he was bitten by a bug in the police station, and he talks of a leech-bite a month before when he went rafting. He would not have had to kill either a bug or a leech on the outside of his shirt. The defence of the two accused was a denial. I need not discuss at any length the defence evidence. It has been sufficiently dealt with by the learned Sessions Judge and there is really nothing in it. I may say briefly that San Ba (D. W. 1) and Paw Kyaing (D. W. 2) were to give Nga Than an alibi that Nga Than was at San Ba's house and gave him an advance for paddy, but Paw Kyaing makes out that they merely talked about it; San Ba says that half of it was paid. Than Po Yin (D. W. 3) and San Hla (D. W. 4) are to give Nga Shan an alibi at Nga Shan's father's house. These witnesses say they were having tea with Nga Shan for an hour before the crime and after it, and were there when the headman came to arrest Nga Shan, but they met a woman who came and told about the crime a little before the headman arrived, and they knew all about the crime and must have known it when the headman came ; yet they said nothing at all to him and made no protest to him when Maung Shan was arrested for the crime. Nor was a word of this put to the headman in his evidence. Some of the evidence is merely negligible, to say, for example, that U Toe was crying out that Tun U had been cut and that he did not know who did it. He does not say, of course, that he knew. Ma Sein Shwe (P. W. 15), wife of Maung Sein (P. W. 9), had given evidence of an attempt by the defence to tamper with her ; so, of course, there is symmetrically corresponding evidence that Ma Sein Shwe or her husband said that they did not know the real culprit. Other evidence is to show that Maung Sein had suspected Nga Shan and Nga Than a year before of theft and that there had been a dispute over this. (Maung Sein had said that he suspected them that night for the first time because he saw them going out after dark.)

According to the medical evidence, the deceased had four injuries on the neck: (1) the fatal injury on the left side of the neck, which severed the carotid artery, the jugular veins and the spinal cord. This was probably delivered from the front and left of the deceased, (2) an incised wound on the lower one-third of the right collar bone, cutting into half the thickness of the bone, (3) an incised wound, skin deep, in the upper part of the front of the neck, and (4) an incised wound, skin deep, two inches to the left of injury No. 2. The medical witness was not asked the direction of the last three injuries, but from his report of them (Ex. D-1) it would not appear that he had sufficient materials to do so. The Judge assumed that the two accused "waylaid" the deceased, and held that under the circumstances of the case they must have had the common intention to murder him.

The accused were seen hanging about the vicinity for some 10 or 15 minutes before the crime, both of them armed with dahs. They then, it would seem, hid in the dark by a natsin, but there is nothing to show that they knew that the deceased, who lived in a different hamlet from theirs, would be going to the pongyibyan that night. It is true that a motive has been given for their being on bad terms with the deceased, but they or one only of them may have been on bad terms with others as well. It cannot be held on this evidence that they were waiting for the deceased in particular. It is perhaps likely from the direction and number of the injuries that they were inflicted by more than one person, but it is possible, I think, that they could have been inflicted by one person, if the deceased had turned round when struck. It is likely that the fatal injury was the last one, and in that case it is probable that the deceased turned to the left after being first assaulted on the right ; but it is also possible, I think, that the fatal injury was not the last one, and that the deceased turned

away from the blow and was again struck on the right. However any argument on this must be inconclusive. It may be doubted, too, whether there was sufficient time for the assailant to inflict four blows before the deceased's party ran up to the deceased, but that is only a matter of supposition, and no questions were put to the witnesses to elucidate this.

It must undoubtedly be assumed that the two accused had the common intention of assaulting someone with dahs. They hid near the natsin in the dark, armed with dahs, in a village not their own, and one of them flashed a torch on the deceased and then he was attacked. It is clear that the common intention of the two accused was to effect an attack on some one with dahs, and they must have known that the probable result of that attack at least would be to cause grievous hurt with a deadly weapon.

I am however compelled to come to the conclusion in this case that there was no sufficient proof to show that there was a common intention of the two accused to cause death or injury sufficient in the ordinary course of nature to cause death. I do not propose to discuss the leading cases on the subject : 8 Rang 603,[1] 11 Rang 354[2] and 13 Rang 210.[3] It is sufficient to say in the present instance that it cannot be shown that there was an overt act by both the accused to evince a common intention such as, e. g. a joint chase of a man, a circumstance which existed in *Nga E's case.*[1] There is no evidence of previous concert of an attack in the action of the accused in laying in wait. I do not think it can be said, in the words of Baguley J. in 13 Rang 210,[3] that

> a certain course of action in which they were taking part would in certain circumstances most probably result in death being caused.

Nor could it be said that either of them, "with that knowledge, persisted in his course of action." It is quite conceivable in the present case that the common intention was, as I have said, merely to cut and one man may have stood by (and done nothing), not knowing that his companion would commit an assault of this fatal kind on anybody, for the assault was committed more or less at random in the dark. It cannot be assumed from the mere fact that blood was found on Nga Than's clothes that he was the assailant, for both of them must have been close to the deceased. I would hold on this evidence that the common intention of both of the two accused was to cause grievous hurt with dahs, an offence under S. 326, I. P. C. In appeal the convictions under S. 302, I. P. C., will be set aside, and the sentences of death not confirmed, but in lieu thereof the appellants will be convicted under S. 326, I. P. C., and each of them sentenced to transportation for life.

Mya Bu J.—I agree.

Note. — I must note that the case was not well presented nor, in my opinion, well tried. The witnesses for the prosecution were examined in a haphazard order; they were not asked the usual questions about the time or light and no questions were put to elicit the respective parts played by either of the two assailants. The judgment would have been far easier to follow if it had not contained a mass of matter irrelevant to the decision of the case and the determination of the respective guilt of the two accused. It is not necessary for a judgment to contain everything recorded in the evidence: when an appeal is heard the evidence is read. The judgment should contain sufficient of the evidence as is necessary to ascertain the facts deposed to, and the importance of and the value to be attached to the evidence of the witnesses, and the reasoning based on this evidence on which the Judge founds his decision and his sentence; to put more than this into a judgment is merely to confuse.

D.S./R.K. *Order accordingly.*

1. Nga E v. Emperor, (1931) 18 A I R Rang 1 = 1931 Cr C 17=130 I C 355=32 Cr L J 495=8 Rang 603 (F B).
2. Nga Po Kyone v. Emperor, (1933) 20 A I R Rang 236=1933 Cr C 907=146 I C 392 = 35 Cr L J 41=11 Rang 354.
3. Emperor v. Nga Aung Thein, (1935) 22 A I R Rang 89=1935 Cr C 264 = 154 I C 881 = 36 Cr L J 605=13 Rang 210 (F B).

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BRAUND J.

Maung Nyi Pu — Plaintiff.

v.

East End Films — Defendant.

Civil Regular Suit No. 206 of 1937, Decided on 21st February 1938.

(a) Contract Act (1872), Sec. 11 — Contract with minor is no legal contractual relationship —It makes no difference whether or not parties themselves regarded that they were bound by contract.

A person who is by Sec. 11 made incompetent to contract—as, for instance, an infant—cannot make a contract at all. In other words, if a minor does

purport to contract, that contract is not, as it is in England, voidable only at the minor's instance but is completely void. A contract by a person with a minor is no legal contractual relationship. It makes no difference whether or not the parties themselves and their advocates considered that they were bound by the contract. [P 268 C 2]

*** (b) Minor — Minor girl entering into contract with person that she would act in certain films produced by that person — During her employment another person enticing her to leave that employment—Suit by former person against latter for damages must fail.**

A man may be liable for inducing another to commit an actionable wrong, whatever means he employs, or he may be liable for inducing another to do something, though not wrongful, to the detriment of a third party, if the means he employs for so inducing him are themselves illegal. [P 269 C 2]

Where a minor girl enters into a contract with a person that she would act in certain films produced by that person, the contract is not binding on her on account of her being a minor. She is free to leave the service and in doing so she does not commit any actionable wrong. Hence if another person induces her to leave that service and former person brings a suit against the latter for damages on account of actionable wrong the suit must fail because in inducing her to leave the service the person commits no actionable wrong and it does not matter with what motives she was so induced. The suit also fails on the ground that the means employed by that person in inducing her are not in themselves illegal as persuasion is not illegal means. It is not illegal to offer a person a salary larger than that which he is at the moment receiving : *(1898) A C 1 and (1891) 45 Ch D 430, Rel. on.* [P 270 C 1, 2]

*** (c) Copyright Act (1911), S. 1—"Authorization" of publication — Cinema company taking photograph of actress as stationary figure for its own purpose — Another cinema company engaging that actress and placing order for advertisement with cinema journal—Publisher of journal publishing advertisement with photograph of that actress reproduced from original one—Proprietor of latter cinema company knowing or having reason to suspect that owner of journal would publish photograph in infringement of copyright — There is " authorization " of infringement of copyright by latter cinema company.**

The copyright of ordinary photographs of an actress as a stationary figure taken by a film company for its own purpose and with its own apparatus belongs to that company. [P 270 C 2]

Where another film company which has engaged that actress has placed an order for advertisement with the publisher of a cinema journal and the publisher of that journal inserts in the advertisement a photograph of the actress which is reproduced from one taken by the first company, there is "authorization" by the second film company of the infringement of the copyright if the proprietor of that company either knew or had reason to anticipate or suspect that the owner of the cinema journal would publish the photograph of the actress in infringement of the copyright. [P 271 C 2; P 272 C 2]

Foucar — *for Plaintiff.*
Rauf — *for Defendant.*

Judgment. — I do not in this case propose to reserve my judgment, and I shall compress it into as small a space as I can, because, in my view, the issues are really quite simple. The suit is one by a gentleman named Maung Nyi Pu, who is the sole proprietor of a film-producing business called the "A-1 Film Company." The plaintiffs, under that name, have been engaged for some little time in producing Burmese films for exhibition in Rangoon and in Burma generally. The suit is brought against a rival concern called "the East End Films," of which the sole proprietor is an Indian gentleman named Anand Singh. The subject-matter of the differences which have arisen between the plaintiffs and the defendants is a young film actress by the name of Ma Than Tin, otherwise called Gracie May Than.

The plaint puts the matter in this way. It says by para. 2 that Ma Than Tin in the years 1935 and 1936 had entered into a contract with the plaintiffs to act in a number of films of their production and, in particular, it seems — there is no dispute about this—that on 22nd June 1936 Ma Than Tin together with her mother purported to enter into a contract with the plaintiffs that she would act in five films for the plaintiffs at a salary which, I think I am right in saying, was to be Rs. 300 for each of the five films. It is right that I should say that this so-called contract was the third of three contracts that Ma Than Tin had had with the plaintiffs, the other two being earlier ones in point of time. And I am prepared to accept it for the purposes of this judgment, on the evidence that I have heard, that it is fair to say that such reputation as an actress as Ma Than Tin enjoyed in Burma had been acquired through the medium of the plaintiff's pictures in which she had been engaged. It seems that only two of those five pictures had been completed by May 1937. The first one was a comparatively short one. But the other — a picture by the name of "Webagi"—was of such a character that considerable difficulty arose both in the photography and in the setting of it and, in consequence, it occupied a period, I think, of nine months or more. In the result, therefore up to May 1937 there had, as I have said, been completed only two out of the five pictures in which Ma Than Tin was engaged to act. I am prepared to believe that by that time there may have been present in the minds of Ma Than Tin and

her mother some disappointment at the length of time which it had taken to fulfil the former engagement, because it should be remembered that her remuneration was not based on a time scale but upon a fixed remuneration for each picture.

The plaint then goes on to allege by para. 4 that the defendants induced Ma Than Tin to leave the plaintiff's service. I think, perhaps, I had better read para. 4 in its entirety :

> That in the month of May 1937 whilst the said Ma Than Tin was actually and in fact in the employment of and in receipt of wages from the plaintiffs she was approached by the defendants and wrongfully and improperly induced by them to leave the service of the plaintiffs.

And it proceeds, upon that basis, to claim against the defendants damages for enticing Ma Than Tin away from them and inducing her to leave their service. The amount of damages for that claimed by the plaintiffs is Rs. 8000. There is a second cause of action pleaded by the plaint, which is to the effect that, after Ma Than Tin had left the plaintiffs and had entered into an engagement with the defendants, the defendants caused to be published in the Burmese Cinema Journal of June 1937 an advertisement or announcement of their forthcoming productions in which Ma Than Tin was to perform and—so the plaintiffs allege—there was reproduced in that advertisement or announcement a photograph of Ma Than Tin which photograph was the copyright of the plaintiffs. And upon that footing the plaintiffs claim against the defendants an injunction to restrain them from infringing their copyright in the photograph and Rs. 100 by way of nominal damages.

That, then, is, in short, the case with which I have to deal. And I will deal with it in the order in which I have set it out, namely the question of enticing Ma Than Tin away from the plaintiffs will be dealt with first. Now, the first question that arises in this case is whether, as the defendants have pleaded, Ma Than Tin was, on 22nd June 1936 and in May 1937, a minor. The relevancy is this. If Ma Than Tin was a minor, then it is contended that she was a person incapable of contracting and, accordingly, that there could ex hypothesi have been no relationship founded in contract between her and the plaintiffs. And it is said that if that is so, then there can be in law no enticing away so as to give rise in the plaintiffs to any right of action in damages against the person who enticed her. I have therefore first to determine the question what the age of Ma Than Tin is.

I have heard some evidence upon this question. In particular I have seen the girl's father in the witness box. He has sworn quite definitely that she was born on 30th September 1921, which, if it is true, would make her now rather less than 17 years of age. In addition to that the defendants have had her medically examined by a lady doctor in Rangoon (Dr. Ferguson), who has come here and expressed an unequivocal opinion that Ma Than Tin is still under the age of 18 years. I have no real evidence to the contrary and in face of this I do not find it possible to doubt but that I must accept it that Ma Than Tin is still a minor. That being so, the next question that I have to consider is the effect of that fact. The contractual capacity of a minor is dealt with by S. 11, Contract Act, which says :

> Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

And it has been conclusively decided by the Judicial Committee of the Privy Council, upon that Section, that a person who is thereby made incompetent to contract — as for instance, an infant — cannot make a contract at all in India. In other words, if a minor does purport to contract, that contract is not, as it is in England, voidable only at the minor's instance but is completely void. Upon that view of the matter, I am bound to come to the conclusion that, as between Ma Than Tin and the plaintiffs, there existed in May 1937 no legal contractual relationship. Such attempts as there have been to create such a relationship were, in my judgment, clearly void. And it makes no difference whether or not the parties themselves and their advocates considered that they were bound by the contract. It is, I think, clear that there was no contractual relationship between Ma Tha Tin and the plaintiffs at the date on which she left their employment in May 1937.

Now, I have heard without interruption all the evidence on both sides relating to whether, as a matter of fact, the defendants did or did not entice Ma Than Tin from the service of the plaintiffs. But before I discuss that question it is right that I should as briefly as possible, consider how the law stands upon questions of

this kind. If, as the result of a consideration of the law, it should appear that even if there were inducement no cause of action would result from it, then it would I think become unnecessary for me to discuss the question of fact whether yea or nay the defendants did induce Ma Than Tin to leave the plaintiffs' service. Perhaps I should add that it is quite clear that by 15th May 1937—if not earlier—Ma Than Tin had definitely expressed to the plaintiffs her intention of severing her connexion with them. That is contained in a letter of 15th May 1937—which is Ex. A.2 — from a higher grade pleader named Maung Po Ba, acting on behalf of Ma Than Tin, addressed to the plaintiffs. In that letter she complains of certain breaches by the plaintiffs of their agreement and says that as they have failed to carry out the terms of the contract, she now treats it as rescinded. It is quite true that Ma Than Tin in that letter is treating herself as being in a contractual relationship with the plaintiffs. But, as I have already said, in view of S. 11, Contract Act, it does not matter in the least in what relationship to each other the parties themselves considered they stood. The substantial thing is that by the Contract Act it is definitely provided that, whatever their relationship was, it could not be one of contract because the minor was incapable of contracting. It is quite clear also upon the evidence that at this date, 15th May 1937, Ma Than Tin had in fact ceased to do any work for the plaintiffs, and indeed it is one of their complaints that she refused to take part in the remaining three pictures. On the same day Ma Than Tin signed a contract to appear in a picture for the defendants.

In my judgment the whole of the law upon this question is to be found in the English case in (1898) A C 1.[1] That, of course, is one of the best known cases in English law. It is a decision of the House of Lords, and it still stands as representing what the law really is. I do not think I am concerned with the facts of the case, because they are quite different from the facts of this case. The whole matter may be put quite briefly by taking the well-known passage from the speech of Lord Watson at p. 96 of the report. He says there:

> There are, in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case, according to the law laid down by the majority in (1853) 2 El & Bl 216,[2] the inducer may be held liable if he can be shown to have procured his object by the use of illegal means directed against that third party.

So, there are two alternatives. A man may be liable for inducing another to commit an actionable wrong, whatever means he employs; or he may be liable for inducing another to do something, though not wrongful, to the detriment of a third party if the means he employs for so inducing him are themselves illegal. And at the bottom of page 97 Lord Watson explains what he means by "illegal means." He says:

> According to the decision of the majority in (1853) 2 El & Bl 216,[2] already referred to, a person who by illegal means, that is means which in themselves are in the nature of civil wrongs, procures the lawful act of another, which act is calculated to injure, and does injure, a third party, commits a wrong for which he may be made answerable.

There is only one other passage that I desire to refer to. It is from the speech of Lord Macnaghten. He says at p. 151:

> I do not think that there is any foundation in good sense or in authority for the proposition that a person who suffers loss by reason of another doing or not doing some act which that other is entitled to do or to abstain from doing at his own will and pleasure, whatever his real motive may be, has a remedy against a third person who by persuasion or some other means not in itself unlawful, has brought about the act or omission from which the loss comes, even though it could be proved that such person was actuated by malice towards the plaintiffs, and that his conduct if it could be inquired into was without justification or excuse.

And he proceeds to give instances of the many cases in which a man may with impunity cause loss to another, even maliciously, so long as he employs no unlawful means to cause such loss. And he adds at the bottom of p. 152 the words:

> The truth is that questions of this sort belong to the province of morals rather than to the province of law.

The statement with the greatest respect is in my view true.

There is only one other case that I desire to refer to, and that is the case in (1891)

1. Allen v. Flood, (1898) A C 1=67 L J Q B 119 =77 L T 717=46 W R 258.

2. Lumley v. Gye, (1853) 2 El & Bl 216=22 L J Q B 463=17 Jur 827=95 R R 501.

45 Ch D 430.[3] I refer to that case because it appears to me to be so exactly in point in this case. There, certain infants were engaged by an apprenticeship-deed to serve the plaintiff for a period of time and they were induced by the defendant to commit a breach of their obligations under the apprenticeship-deed, whereupon the plaintiff sued the defendant for damages. Now, the point of that case was this. Normally, an apprenticeship-deed may be binding upon an infant but it is not binding if there are provisions in the deed which are unreasonable. It was held, as a matter of fact, that this particular apprenticeship-deed was not binding on the infants by reason of the fact that there was therein something which was unreasonable. We have therefore to my mind an almost exact parallel to the present case. We have infants purporting to bind themselves by contract, which contract proves in reality to be not binding upon them at all. Ma Than Tin in this case purported to bind herself by contract and it proves that that purported contract does not exist. In (1891) 45 Ch D 430[3] it was held that inasmuch as the infants were not in law in any way bound to the plaintiff, the act of the defendant, whatever it may have been, could have induced no wrongful breach of contract by the infants. It is summed upon in the concluding words of Fry L. J. in which he says:

> I hold therefore this instrument is one by which the infants are not bound; and consequently Mr. Barnum having only enticed them away from an employment or contract of a nature which is not binding upon them, no action can be maintained against Mr. Barnum.

I have, I think, said enough to indicate that, in my judgment, the plaintiffs must fail in their suit so far as it is based upon the footing that the defendants, even if they did as a matter of fact entice Ma Than Tin away, committed an actionable wrong towards the plaintiffs. At the time this happened, in the first half of May 1937, Ma Than Tin was bound by no contract with the plaintiffs. She was free to leave them, as she in fact did, at her will and the plaintiffs could have had no complaint against her. In leaving the plaintiffs she committed no wrong and accordingly, upon the authority of (1898) A C 1,[1] it does not in my judgment matter whether or not she was induced to do it or what were the motives of the defendants in inducing her, if they did induce her. The suit fails for that reason under the first branch of the law laid down in (1898) A C 1.[1] It fails equally under the second, for, it cannot be contended that the defendants employed any means which were in themselves illegal in enticing Ma Than Tin away from the plaintiffs' service, if, indeed, they did entice her. Persuasion is not an "illegal means". It is not illegal to offer a person a salary larger than that which he is at the moment receiving. It is not illegal to persuade. And, as is finally settled, by (1898) A C 1[1] it matters not at all what the motive is and whether it is a malicious one or not. Upon that part of the case the plaintiffs must, in my opinion, fail also.

That brings me to the other branch of the case, which is a comparatively minor one, namely the question of copyright. While in the plaintiffs' employment Ma Than Tin was, of course, photographed many times. And it appears to be the practice of film companies to take what they call "Stills", that is to say, ordinary photographs of an actress as a stationary figure. It goes without saying, I think, that the copyright of any such photograph when taken by a film company for its own purpose and with its own apparatus belongs to that company. That is what happened in this case, the photograph in question being Exs. E-1 and E-2. Shortly after May 1937 the defendants were minded to insert in the Burmese Cinema Journal the announcement or advertisement which I have mentioned and for that purpose they placed an order with the publishers of that journal. The actual announcement or advertisement is a full page one consisting principally of letterpress describing the character of the defendant company and mentioning a number of its directors and officials together with the name of Ma Than Tin as one of the film stars employed by the defendant company. It occupies, as I say, one whole page. On either side in the middle of the page, there appear two photographs, a photograph of Ma Than Tin being on the right and a photograph of Saya Shwe on the left. There is no question in this case but that the photograph of Ma Than Tin is a reproduction of the photograph Ex. E-1.

By S. 1, sub-s. (2), Copyright Act, 1911, the meaning of "copyright" is defined. It is defined as meaning "the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever" and is made to include, among

3. De Francesco v. Barnum, (1891) 45 Ch D 430 =60 L J Ch 63=63 L T 438=39 W R 5.

other things, the sole right to produce, reproduce, perform or publish any translation of the work and to "authorize" any such production or reproduction, performance or publication. It is quite clear upon the facts in this case that there was no actual publication by the defendants. The block made from the photograph, Ex. E-1, from which this advertisement was produced, was admittedly at all material times in the possession of the proprietor of the Burmese Cinema Journal and was never the property, nor under the control of the defendants. There is therefore no question of actual publication in this case by the defendants. The question that does arise is whether or not the defendants "authorized" that publication.

Before I deal with the facts, it will be necessary for me to consider for a moment what is meant by "authorizing" the publication of a work in such a way as to infringe a copyright. As I have said, in this particular case the defendants had no actual control over either the photograph itself or over the block made from it. But of course, the defendants had control in this sense, namely that it was within their power to direct what should or what should not be inserted in their advertisement. In other words, although they did not control the means of reproduction, they did control the question of whether their should be reproduction at all. And I find that in English law a very wide meaning has been given to the word "authorized" in Sec. 1, Copyright Act of 1911. In (1926) 2 K B 474[4] Bankes L. J. referring to certain earlier decisions approves of the word "authorized" in this context being construed to mean "sanction," "approve" and "countenance." Those, of course, are extremely wide words. And again in *Performing Right Society Ltd.* v. *Ciryl Theatrical Syndicate Ltd.*,[5] Bankes L. J. again, sitting in the Court of Appeal with Scrutton L. J. and Atkin L. J., accepts a view of the word "authorized" which covers anything done with the knowledge and connivance of a person. In that case the company and its Managing Director engaged a band to produce a play of theirs. The band on two occasions performed musical works, the copyright of which the plaintiffs were the owners. But that was done without the knowledge of the Managing Director of the company. It was accepted for purposes of this case that the band were not the servants of the Managing Director or of the company. But nevertheless it is clearly indicated in the judgments that, if anything in the nature of even indirect evidence of permission or countenance of the performance of the works could be found, it would be sufficient to constitute "authorizing." Bankes L. J. at page 9 says :

> In order to succeed the respondents had to adduce evidence either of authority given by the appellant for the performance, or of permission to use the theatre for the performance, of these pieces. I agree with Mr. Henn Collins that the Court may infer an authorization or permission from acts which fall short of being direct and positive; I go so far as to say that indifference, exhibited by acts of permission or omission, may reach a degree from which authorization or permission may be inferred. It is a question of fact in each case what is the true inference to be drawn from the conduct of the person who is said to have authorized the performance or permitted the use of a place of entertainment for the performance complained of.
>
> In the present case I cannot draw the inference which the learned Judge drew from the conduct of the appellant. The band was employed and paid by the Syndicate; in July 1921, the appellant was abroad; there is no evidence that he either knew or had reason to anticipate or suspect that the band in his absence were likely to give performances which would be infringements of copyright.

Now, reverting to the case actually before me, what upon those principles I have to consider is whether there is anything in the facts of this case to give rise to a reasonable inference that the proprietor of the defendant company either knew or had reason to anticipate or suspect that the owners of the Burmese Cinema Journal would publish the photograph of Ma Than Tin in infringement of the copyright. First of all I am entitled to look at the defendants' own written statement. One would have thought that, if the defendants had nothing whatever to do with this publication and did not even know of it, that would have been pleaded quite simply and emphatically by the defendants. But that is not so, because all the defendant had to say by Para. 6 of their written statement is this :

> That the defendant has not yet used the services of Ma Than Tin but intends to do so and admits that he had advertised the fact of his intention. That the defendant denies that he has utilized the photograph of Ma Than Tin and further denies that such photograph if used is the copyright of the plaintiff. The defendant also denies that the name May Than is the copyright of the plaintiff or that he has any rights therein.

It is a singular omission that, if in fact the defendant knew not the least thing

4. Falcon v. Famous Players Film Co., (1926) 2 K B 474=96 L J K B 88 = 135 L T 650= 70 S J 756=42 T L R 666.

5. (1924) 1 K B 1 = 92 L J K B 811 = 129 L T 653=68 S J 83=39 T L R 460.

about it, he did not plead that in his defence because it would of course have been conclusive. The defendant Mr. Anand Singh has himself given evidence, which is to this effect :

He was asked this :

When you saw that photograph in the magazine did you recognize as to where it came from ?

Answer : No.

Question : Did you recognise it as coming from the A-1 Film Co. ?

Answer : No.

Question : Did the publisher of this magazine tell you that he had this photograph and that he would use it ?

Answer : He said he had blocks and that he would use them.

Question : And you agreed to his doing so ?

Answer : After that. When he published it I never knew.

Question : Before it was published you asked him to put in the photograph if he had any ?

Answer : No.

Question : Was Mr. Talukdar instructed that these photographs had been published without your consent ?

Answer : I never went myself to instruct.

Question : Did you tell your clerk who went ?

Answer : Yes.

Question : That these photographs had been published without your knowledge and consent ?

Answer : I did.

The particular answer to which I want to draw attention is the answer "He said he had blocks and that he would use them."

That must, of course, in grammatical English refer to some period before the actual publication. I am not prepared upon my estimate of the reliability of Mr. Anand Singh's evidence which I formed when he was in the witness-box, to accept this story that he was unaware of the fact that these photographs were going to be used in this advertisement. The proprietor of the Burmese Cinema Journal has also been in the witness-box and has told me that he received no instructions from Mr. Anand Singh and that he did not communicate with him in any way in respect of these advertisements. That, if it is true, supports Mr. Anand Singh and I am bound equally to reject it. I am much fortified in taking that course by the correspondence. On 28th June 1937, Messrs. Hartnoll, Paget and Foucar, on behalf of the plaintiffs, wrote to the East End Film Company complaining, inter alia, about the insertion of this picture in the advertisement and on 1st July 1937, Mr. Talukdar, on behalf of the defendants, replied to that letter. Again, it is striking that Mr. Talukdar had at that time no instructions to put forward what, had it been true, would have been the simplest of all defences, namely that it was done without the defendants' knowledge. Instead what Mr. Talukdar does write (and I must assume that it was in accordance with instructions) was this:

My clients have no knowledge whether Ma Than Tin's photograph is your clients' copyright. The publication with her photograph was done by my clients with her consent.

In the face of that, in the face of the improbability of the proprietor of a cinema journal putting in a photograph into a client's advertisement without any instructions at all and in the face of the pleading I am not, as I have already said, prepared to accept the denial of Mr. Anand Singh to the effect that he knew nothing about this. That being so, I have come to the conclusion as a matter of law, that there has been an "authorization" by the defendants of the infringement of the copyright which has taken place in this case. That being so the plaintiffs will succeed upon that issue. The result therefore of this case will be this. So far as it claims any relief other than relief in respect of the infringement of copyright I have mentioned it will be dismissed. So far as the infringement is concerned the defendants have offered the Court an undertaking, for themselves and on behalf of their servants and agents, that they will not infringe the plaintiffs' copyright in the photograph E.1 exhibited in this case. In addition to accepting that undertaking there will be a decree upon that issue for damages of Rs. 100.

As regards costs, the defendant have succeeded upon the major issue and failed upon the minor issue. As a matter of calculation I have come to the conclusion that the costs as between these two issues ought to be apportioned in the proportions of four and one. In other words, I think that the defendant should be entitled to four-fifths of their costs of this suit, and the plaintiffs should be entitled to one-fifth of their costs of this suit. And I think that can be best expressed if I order the plaintiffs to pay to the defendants three-fifths of the defendants' costs of the suit. Accordingly, I shall make an order for the payment by the plaintiffs to the defendants of three-fifths of the defendants' costs in the suit, advocate's fee ten gold mohurs for each day of hearing. The advocate's fee will, of course, be similarly apportioned between the parties. Dr. Rauf will be good enough to settle a draft of the minutes of the decree for the assistance of the Registrar.

D.S./R.K. *Order accordingly.*

*** A. I. R. 1939 Rangoon 273**

SPARGO J.

D. D. Dawson — Appellant.

v.

The King.

Criminal Appeal No. 1230 of 1938, Decided on 31st January 1939, from order of Addl. Magistrate, Rangoon, D/- 16th November 1938.

*** (a) Companies Act (1913), S. 4 (2)—Existence of legal relation need not be established between share-holders of company — Unregistered company started for carrying on business — Subscribers paying money for object of company become share-holders though share certificates not issued—If subscribers are more than 20, case comes under S. 4 (2).**

In order to constitute an association within the meaning of S. 4, the existence of the legal relation between more than twenty persons giving rise to joint rights or obligations or mutual rights and duties is absolutely necessary : *29 Mad 477, Rel. on.* [P 273 C 2]

But where the object is to form a company it does not and there is no need to show the existence of a legal relation between the persons forming the company. [P 274 C 1]

Where a person starting an unregistered company for carrying on business having acquisition of gain as its object collects money from its subscribers who number more than twenty then the moment money is collected the bargain is clinched and turned into an actual contract by acceptance and the subscribers become share-holders as such because they must be deemed to have paid the money for the very object of the company and the mere fact that share certificates are not issued does not make them any less share-holders and hence the case comes under sub-s. (2) of S. 4. [P 274 C 2]

(b) Companies Act (1913), Ss. 4 (5) and 283 —Offences under—Investigation of offences by police under Ch. 14, Criminal P. C., does not debar Magistrate from trying these offences.

It is true that offences under S. 4 (5) and S. 283 are non-cognizable and cannot be investigated by the police under Ch. 14, Criminal P. C. But the mere fact that the offences were wrongly investigated and sent up by the police is not an obstacle to their being tried by a Magistrate : *26 Bom 150, Ref.* [P 274 C 2]

A. C. Rodriguez — *for Appellant.*

Judgment. — The appellant Dawson, described as an accountant, has been convicted of an offence under Sec. 4, sub-s. 2, Companies Act, 1913, punishable under S. 4, sub-s. 5 of the Act. It is said that he formed a company known as the "Indo-Burma Union Limited" for the purpose of carrying on business that had for its object the acquisition of gain by the company without registering the same.' Nothing was mentioned in the charge of the requirement for an offence under sub-s. (2) that the company must consist of more than twenty members, but I do not consider that any miscarriage of justice has been caused by this omission as appellant was throughout defended by counsel and evidence was given to show that there were many more than twenty members who subscribed for shares. He was also convicted of carrying on 'business under the name and style of Indo-Burma Union Ltd., using the word limited without the company being incorporated with limited liability' an offence under S. 283, Companies Act. As to this second charge Mr. Rodriguez who argued the appeal for the appellant said that he could not contest that appellant had so carried on business and it will not therefore be necessary to say any more about this conviction.

I have read all the evidence in the case with care, a task which was not made any easier by the fact that the sheet that is numbered 50 should apparently be numbered 38. What is proved by the evidence and is indeed apparently not contested is that several "district organizers" were appointed numbering seven, who were induced by Dawson to subscribe money for shares in the Indo-Burma Union Ltd. These district organizers induced other persons at Dawson's instance to subscribe money for shares in the company and they were designated agents of the Company. The evidence shows that U Aindawtha, one of the district organizers, brought in six agents; another, Ba O, brought in five ; Saw Joseph brought in seven ; Maung Saw Maung brought in one. Apparently subscriptions were collected in small sums from other persons who were not designated agents, perhaps because their subscriptions were too small, for Saw Joseph says he sold more than 400 shares of the Company whereas those taken by the agents he introduced totalled only 210, and there is a list of subscribers numbering 250. San Kyaw who was employed as executive officer of the Company says that there were about 250 shareholders in the Company and actually 34 members were carrying on the business of the Company. There can be no doubt therefore that the Company consisted of more than twenty persons. The main point argued by Mr. Rodriguez is that in order for an association of persons to be illegal it must be shown that there is a legal relationship between more than 20 persons inter se giving rise to joint rights or obligations or mutual rights and duties. He says that

all that the prosecution has been able to do here is to show that each of the so-called shareholders has entered into a contract with Dawson either with him personally or through his agents and there is no relation established between one share-holder and any other. Reference was made to 29 Mad 477.[1] This case concerned a chit fund and it was contended that the managers of the chit fund with the subscribers formed an association and the Full Bench found that

> the parties to the instrument are not an association within the meaning of S. 4, Companies Act, 1882.

The basis of the decision was that in order

> to constitute an association within the meaning of the Section, the existence of the legal relation between more than twenty persons giving rise to joint rights or obligations or mutual rights and duties is absolutely necessary.

Mr. Rodriguez says this authority applies to the present case. The shareholders, agents, organizers, and appellant together form an association of persons just as the subscribers and managers of the chit fund did in the Madras case. He says that it makes no difference that in the case under appeal the object was to form a trading company whereas in the Madras case it was to form a chit fund. In fact he said that in order that sub-s. 2, S. 4 should apply to an association of persons they must be shown to be in partnership. He would read the Section as though in sub-section 2 the words "Company" and "Association" were left out. If that had been the intention of the Section, it would have been very easy so to frame it. I consider that there are many ways in which people can be associated together. One is, they may be members of a company, another is they may be partners; and the other ways are grouped together under the word "Association." One such way in the formation of a chit fund, and in such a case 29 Mad 477[1] will apply. But where the object is to form a company it does not and there is no need to show the existence of a legal relation between the persons forming the company. Then it is said that there has only been an offer on the part of the subscribers asking for shares accompanied by a sum of money; that offer has not been clinched and turned into the form of an actual contract by acceptance. The money is still in deposit but nothing was done to clinch the contract. Then how can it be said that the individual subscribers were share-holders in this concern or entitled to joint rights—rights as share-holders? Mr. Rodriguez said that if there had been a meeting between these so-called share-holders, legal relations might have been established between them so as to make sub-s. 2 of S. 4 apply. This argument is based on the notion that legal relations must be shown to exist between the subscribers for shares to a company before the sub-section applies and I have dealt with this argument above. In my opinion as soon as the appellant collected the money for the shares the bargain was clinched. The subscriber paid his money for shares in the Indo-Burma Union Limited and for no other purpose. Appellant and his fellow directors were carrying on a business under that name, and it is idle to say that this does not come under sub-s. 2 because no share certificates were issued. In my view sub-section 2 of S. 4 did apply to the case.

Mr. Rodriguez spent some time describing appellant's efforts to get his company registered. He applied for registration on 30th March 1937 but the memorandum had to be returned for amendment. It was re-submitted on 4th September 1937 and 12th October 1937 and each time had to be returned so as to comply with the regulations. Then no further application was made. The fact then remains that the company was not registered. The efforts to register it seem to have been genuine. Appellant went to the length of printing his memorandum of association and paying over Rs. 140 in stamp fees. I do not know why he did not secure the registration of his company as the defects in his memorandum seemed easy to put right. But he did not and therefore the offence is proved. It was argued that as the offences are non-cognizable, the police should not have investigated them and the Court should not have tried them. It is true that the offences are non-cognizable but I cannot find that the case was investigated under Chap. 14, Criminal P. C. It was not sent up under that Chapter but apparently by a private complaint by U Tin. Even though the case were wrongly investigated and sent up by the police there seems to me to be no obstacle to its being tried by the Magistrate. 26 Bom 150[2] referred to by Mr. Rodriguez does not show that there is any such

1. Neelamega Sastri v. Appiah Sastri, (1906) 29 Mad 477=16 M L J 385.

2. King-Emperor v. Sada, (1902) 26 Bom 150=3 Bom L R 586.

obstacle. I am of opinion that the fine imposed on the appellant for the first offence is heavy in view of the fact that he made genuine efforts to register his company, though they may have been clumsy efforts and I reduce the fine for the first offence to Rs. 40 and in default of payment of the fine one month's simple imprisonment. The sentence for the second offence is unaltered except that the imprisonment in default is to be simple and shall not run concurrently with the imprisonment in default of payment of the fine imposed for the first offence.

N.S./R.K. *Order accordingly.*

A. I. R. 1939 Rangoon 275

BRAUND J.

Maung E Maung—Appellant.

v.

R. M. N. L. V. Firm — Respondent.

Second Appeal No. 128 of 1938, Decided on 22nd July 1938, from Judgment of Dist. Court, Myaungmya, in C. A. No. 1 of 1938.

Burma Land and Revenue Act (2 of 1876), S. 19—Rules under, R. 51 (1) — Waste land—Suit for possession—Scope of R. 51 and meaning of terms "land-holder" and "eviction" explained—Constructive eviction — Refusal by Government to recognize original occupier as its permissive occupant and definitely recognizing another person to be its occupant amounts to eviction of former—Original occupier having no right to possession cannot maintain suit for possession against person subsequently recognized as occupier.

A suit for possession may be founded upon the mere fact of possession without any actual title : *(1893-1900) L B R 484 and A I R 1915 L B 75, Rel. on.* [P 278 C 1]

According to the provisions of Rule 51 (1) an occupier does not obtain the status of a land-holder until he has been in occupation of the waste land for over 12 years. The possession of an occupier of available land, who has not yet become a "landlord," is purely permissive: he holds at the pleasure of the Government for so long as and no longer than, the Government is pleased to leave him in possession and any moment the Government may dispossess him. It follows that the Government may install, instead of the original occupant, some one else, or may recognize the de facto occupation of some one else, who has come to occupy the land instead of the original occupier. As between the occupier and the Government at any rate the occupier has no right or interest in the land; he has a merely permissive foot-hold from which, to use the words of R. 51, he is liable to be evicted at any time before he has become a land-holder. [P 276 C 1, 2]

The word 'eviction' need not necessarily have a limited sense : *(1855) 17 C B 30 and A I R 1925 Rang 203, Rel. on.* [P 276 C 2]

Eviction in a narrow sense may mean the physical turning of a person out of possession of property. But as used in R. 51 eviction really means the termination by the Government of that permissive relationship arising under R. 51. If the Government does anything which unequivocally points to its intention no longer to recognize the permissive occupation of any particular occupier, and definitely recognizes another person as Government's permissive occupant of the land, then Government will be deemed to have evicted that particular occupier within the meaning of R. 51. If the occupier is already de facto out of physical possession such eviction would amount to constructive eviction as no physical eviction is either necessary or possible. The first occupier thus constructively evicted has no right of possession and has therefore no *locus standi* to file a suit for possession against the other person who is subsequently recognized by the Government as its permissive occupant. [P 276 C 2]

Eunoose — *for Appellant.*

Kalyanvala — *for Respondent.*

Judgment.—This is a second appeal in a case which was originally tried in the Court of the Sub-divisional Judge of Wakema. The facts out of which the suit arose are these. The plaintiff was a Chettyar Firm while the defendant was a cultivator who was in possession at the time of the commencement of the suit of a small parcel of paddy land comprising some 9 acres or so. This land was divided into two parts which are holdings Nos. 218 and 219. For the purpose of the judgment which I am about to deliver I need not distinguish between these two parts, although I note that in the Courts below there has been some argument as to what the history of the two individual parts has been. For my present purpose, it is sufficient if I deal with the question as if there were one piece of land. The land, from what I know about it, was originally a piece of jungle land uncultivated, lying waste and in that condition at some date prior to the year 1930 a man named Maung Po Han and his wife Ma Thein took possession of it. They seem to have cultivated it for two years or so, and on 22nd October 1930 there is a record of a sale by Maung Po Han and Ma Thein of 4·33 acres, which represents, I think, holding No. 218, to the plaintiff. From 1930 onwards until 1935 or 1936 the plaintiff enjoyed the land. He did not himself cultivate it but he let it out to tenants. For the years 1930-31 and 1931-32 he let it to the persons who sold it to him, namely Maung Po Han and Ma Thein. For the years 1932-33 and 1933-34 there was a lease, which is Ex. G, to a person named Maung Ba In. For the year 1934-35 there was a lease of this land together with other land to three people, Saya Gale (a) Ko Ismanin, Hyder Ali and Ful Mahomed (Ex. H). In 1935-36 there was a lease,

which is Ex. J to Hyder Ali and Ismanin, and for the year 1936-37 there was a lease (Ex. K) to the same persons. Up to the year 1934 there is no doubt that the plaintiff was the person who was entered upon the assessment roll and was assessed to and paid Government land revenue in respect of the land. But, in the year 1934-35, it is equally plain, indeed I think it is conceded, that the land revenue at any rate was not paid by the plaintiff, although there has been some dispute of fact in the Courts below as to whether the tenants of the plaintiff in that year actually did cultivate this land together with other land they had leased or whether they did not. At that point I think perhaps I had better consider, by a reference to the Lower Burma Land Revenue Manual, what is the position of a person who occupies waste land for purposes of cultivation in the manner in which this land was first occupied by Maung Po Han and his wife Ma Thein. The Lower Burma Land and Revenue Act, 1876, by S. 19 gives power to the Local Government from time to time to make rules to regulate temporary occupation of waste land and to empower any Revenue Officer to eject any person occupying, or continuing to occupy, such land in contravention of such rules. By rules made by the Local Government the provisions were brought into force relating to temporary occupation of available land. That is in Chapter 9 of the Lower Burma Land Revenue Manual, 1911, at p. 54. It is R. 51 that is the relevant rule for the present purpose. It says :

> *51. (1)* Any person entering for purposes of cultivation upon any land over which no person has any rights specified in S. 6 or which has not been allotted by Government under S. 20 or S. 21 or reserved for any purpose under any provision of law (hereinafter referred to as 'available land'), or the successor of such person, shall ordinarily be permitted to occupy such land on payment of land revenue, but shall be liable to eviction so long as he has not obtained the status of a landholder.

I should say that an occupier does not obtain the status of a landholder until he has been in occupation for 12 years. As I read Rule 51, the possession of an occupier of available land, who has not yet become a "landholder", is purely permissive : he holds at the pleasure of the Government for so long as, and no longer than, the Government is pleased to leave him in possession and any moment the Government may dispossess him. And I think it follows that the Government may install, instead of the original occupant, some one else, or may recognize the de facto occupation of some one else, who has come to occupy the land instead of the original owner. It is abundantly clear that as between the occupier and the Government at any rate the occupier has no right or interest in the land : he has a merely permissive foothold from which, to use the words of R. 51, he is liable to be evicted at any time before he has become a landholder. I may perhaps now consider, because something may turn upon it, what is meant by eviction. Eviction in a narrow sense may mean the physical turning of a person out of possession of property. But the meaning to be put upon the word in this rule must of course be governed by its context. I am sure that it does not refer merely to a purely physical eviction. Indeed, that cannot be so, because it does not follow that the occupier need be in physical occupation. He may, as in this case, have let it out to a tenant. What I think eviction really means is the termination by the Government of that permissive relationship which I have described as arising under Rule 51. In my judgment, if the Government does anything which unequivocally points to its intention no longer to recognize the permissive occupation of any particular occupier, then I think it has "evicted" that particular occupier within the meaning of R. 51. As I have already pointed out, no physical eviction may be necessary, or even possible. If the occupier is already de facto out of physical possession then no eviction in that sense is either necessary or possible. In (1855) 17 C B 30[1] Jervis C. J. in dealing with the word "eviction" gave this—I will not say definition—explanation. The facts of this case can have no bearing on ours but I refer to it merely for the purpose of showing that the word "eviction" need not necessarily have a limited sense :

> It is extremely difficult at the present day to define with technical accuracy what is an eviction. Latterly, the word has been used to denote that which formerly it was not intended to express. In the language of pleading, the party evicted was said to be expelled, amoved, and put out. The word eviction — from evincere, to eviot, to dispossess by a judicial course—was formerly used to denote an expulsion by the assertion of a title paramount, and by process of law. But that sort of eviction is not necessary to constitute a suspension of the rent, because it is now well-settled, that, if the tenant loses the benefit of the enjoyment of any portion of the demised premises, by the act of the landlord, the rent is thereby sus-

1. Upton v. Townend, (1855) 17 C B 30 = 25 L J C P 44=1 Jur (N S) 1089=104 R R 562.

pended. The term "eviction" is now popularly applied to every class of expulsion or amotion. Getting rid thus of the old notion of eviction I think it may now be taken to mean this — not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises. If that may in law amount to an eviction, the jury would very naturally cut the knot by finding whether or not the act done by the landlord is of that character and done with that intention.

That leads me to think, as I have said, that anything done by the Government with the intention no longer of recognizing the occupier as the permissive occupier of the Government amounts to an "eviction" within the meaning of R. 51. I have dealt with that, I am afraid, at some length; but having done so, it is necessary for me now to return to the facts of the case. On 28th May 1935, a revenue proceeding was opened in the Myaungmya district at the instance of the present plaintiff. I have already said that the revenue for 1934-35 was not assessed in the plaintiff's name. He, accordingly, applied to be assessed for that year. An enquiry was held by the Township Officer of Moulmeingyun at which he heard evidence as to who had worked the land—that of course is not evidence in these proceedings—and eventually he made a report which finally found its way to the Deputy Commissioner; and the Deputy Commissioner in those proceedings made a final order on 26th November 1935 in these words :

Paragraph 539, Land Records Manual justifies the treatment of this holding as abandoned. I see no reason to differ from my predecessor's order, which indeed I doubt if I have any right to review. The applicant may be informed.

I am not quite sure what his predecessor's order had been, but the effect of that order was that, to my mind, the Deputy Commissioner declined to recognize the plaintiff as any longer the permissive occupier from the Government of this land. I may say in passing that there was no appeal from that decision to the Commissioner, as there might have been if the plaintiff had desired. At some date during 1935 or 1936 we know as a fact that the present defendant went into actual occupation of this land. There is a dispute as to the exact date upon which he did so, but it is conceded that by June 1936, the defendant was in physical occupation of the land. And on 24th June 1936, the defendant Maung E Maung filed a revenue proceeding by which he asked to be assessed to land revenue in respect of this land upon the ground that he was the permissive occupier of it under the Government. That again was enquired into : evidence was taken and finally on 14th June 1937 a final order was made by the Deputy Commissioner in which he found that the land was being worked by E Maung and that E Maung's name should be entered in the register as the assessee of this land. To my mind these two events, first of all the refusal by the Deputy Commissioner to recognize the plaintiff any more as the Government's permissive occupant of the land, and secondly, the Deputy Commissioner's definite recognition of the defendant as the Government's permissive occupant of this land, amount in substance and in fact to an eviction by the Government of the plaintiff under Rule 51. The Government has, in short, expressly recognized and acted upon a condition of affairs which is inconsistent with any further recognition of the plaintiff as the Government's permissive occupier. In these circumstances I feel no doubt myself but that there has been a constructive eviction in this case. I say constructive eviction because, as I have already pointed out, no physical eviction was possible, the plaintiff being already out of possession. In 3 Rang 171[2] a two Judge Bench of this Court seems also to have been willing to adopt a liberal construction of the word " evict ". They say this :

But if S. 19 of the Act and Rr. 51 and 52 be read together, we think that a broader construction must be put on the provisions of these rules. It is quite clear from Sec. 19 and R. 51 that the intention of the Legislature and of the Local Government was that the temporary occupier should be in the position of what is known in England as a tenant-at-will, and that the duly constituted Revenue Officer should have the power to evict such tenant if the land were required for other purposes. In the present case the Deputy Commissioner passed orders that the plaintiffs should leave the land after the conclusion of the cultivation season. That being so, and having regard to the clause in R. 51 to the effect that the temporary cultivator is liable to eviction, we are of opinion that if the cultivator had at the end of the cultivating season refused to leave the land he would have been occupying the land in contravention of Rule 51, and would therefore have made himself liable to eviction under R. 52. We do not think that it is open to the Civil Courts to consider the propriety of the order of the Revenue Officer in such a case. The plaintiffs had no right as against Government beyond that of temporary occupation. That is clear from the clause in R. 51 as to liability to eviction. And that liability exists independently of any reason there may be for evict-

2. Maung Po Cho v. Maung San Bwin, (1925) 12 A I R Rang 203=86 I C 531=3 Rang 171.

ing them. If the plaintiffs were dissatisfied with the order of the Revenue Officer, their remedy was to apply to the Commissioner, which they did actually do.

The difference between this case and that is that in the case before me the occupier was already out of possession, while in that case he was still in possession. No order by the Deputy Commissioner for him to leave was either possible or proper in the case before me, because he had already left; but nonetheless, in my view, the order of the Deputy Commissioner is not consistent with a state of affairs which any longer recognizes the permissive occupancy of the plaintiff. If that be right, then, the position in this suit is as follows. I do not propose at this stage to embark upon an analysis of what the legal characteristics are of the permissive occupancy conferred upon a cultivator under R. 51. But it is quite clear, if the view I take is the right view, that in this case the plaintiff is a person who no longer has even the status of a permissive occupier. On the contrary, upon the view I have taken of the effect of the Deputy Commissioner's order in 1936, the defendant is the person who now occupies the position of permissive occupier under R. 51. For that reason, it seems to me to be clear that there is not at the present moment even a right to possession upon which the present plaintiff can base his cause of action. For the present purpose I am quite prepared to accept the rulings in (1893-1900) P J 484[3] and 8 L B R 227.[4] Both those cases have decided that a suit for possession may be founded upon the mere fact of possession without any actual title. Possession alone is sufficient to support a suit. And if, indeed, this plaintiff were in that type of permissive occupation that I have endeavoured to describe in relation to this land, it is quite clear upon these two authorities that he would be enabled to maintain his suit against another person who endeavoured to dispossess him. But of course it is an entirely different thing when it is found (as I have found) that the right to permissive occupation in this case rests not with the plaintiff but with the defendant. Upon that view of the matter, I think that this appeal must succeed. The Subdivisional Judge who tried this case, although on grounds somewhat different from those upon which I have rested my judgment, dismissed the plaintiff's suit for possession. I shall accordingly order that the decree of the Subdivisional Court be restored. The appellant, I think, is entitled to costs in this Court and in the District Court and I shall assess the costs in this Court at five gold mohurs.

N.S./R.K. *Appeal allowed.*

3. Maung Kyaw v. Maung An, (1893-1900) L B R (P J) 484.
4. Maung Naw v. Ma Shwe Hmat, (1915) 2 A I R L B 75=30 I C 772=8 L B R 227 (F B).

A. I. R. 1939 Rangoon 278

ROBERTS C. J. AND BRAUND J.

Mariam Bibi and another — Appellants.

v.

Cassim Ebrahim Malim and another — Respondents.

First Appeal No. 144 of 1937, Decided on 1st May 1939, against order of High Court, in C. R. S. No. 62 of 1936, D/- 27th August 1937.

(a) Contract Act (1872), S. 16—Mahomedan lady dying leaving her minor daughters and husband as beneficiaries under will—Husband appointed sole executor and being natural guardian of person and testamentary guardian of property of daughters — Daughters brought up in pardanashin conditions — Father, immediately after daughters had attained age of legal majority, obtaining from daughters full and unconditional release in respect of their shares in mother's property — Facts held sufficient to lead to inference of undue influence by father over daughters.

The influence is to be inferred from the special relationship between the parties, quite apart from proof of actual fraud or unfair advantage. In English law a special relationship of confidence does exist between parent and child, notwithstanding that the child is actually of age at the time the transaction takes place. These principles are equally applicable to a case under S. 16. [P 283 C 1]

A Mahomedan lady died leaving two minor daughters and husband as beneficiaries under her will. The husband was appointed sole executor and was natural guardian of person of daughters and testamentary guardian of their property. The daughters were brought up in pardanashin conditions. Their father, immediately after the daughters had attained the age of legal majority, obtained from them in his favour full and unconditional release in respect of their shares in mother's property :

Held that the actual relationship of parent and child and *a fortiori* the added relationship of executor and beneficiary and of guardian and ward were amply sufficient to raise a prima facie case for attributing to the father that "dominating position" which is the first of the statutory requirements of S. 16. The transaction was on the face of it unconscionable. [P 283 C 1, 2]

(b) Will—Executor is not entitled to release from beneficiary.

An executor is not as of right entitled to a release from his beneficiary. [P 284 C 2]

(c) Limitation Act (1908), Art. 91—'Instrument' referred to is one which plaintiff has

actually asked to set aside and not one which he ought to have set aside.

The instrument to be cancelled or set aside which is referred to in Art. 91 is that instrument which the plaintiff himself has actually asked to have cancelled or set aside and not one which he ought to have set aside. [P 284 C 2 ; P 285 C 1]

N. M. Cowasjee — *for Appellants.*

R. Clark and P. B. Sen — *for Respondent 1.*

Roberts C. J. — This is an appeal in which the facts are a little complicated. But we think that the judgment of this Court will not be improved by their being set out again at any great length. They have been exhaustively dealt with in the judgment of the learned Judge on the Original Side, and it is not, in our view, necessary for us to re-state them here. Reduced to its simplest terms, the suit is one which was brought by two young Muslim women against their father, defendant 1, for the administration of their mother's estate. The mother, Khatiza Bibi, died on 5th May 1918, having by her will, dated 23rd November 1916, appointed her husband, defendant 1, to be her sole executor and the guardian of the property of her minor children. There were three children of the marriage of the said Khatiza Bibi and defendant 1, namely the two plaintiffs, Mariam Bibi and Rasool Bibi, and defendant 2, Ebrahim. To put the matter as shortly as it can be put, the effect of Khatiza Bibi's will was that defendant 1 and the three children were beneficially entitled to her residuary estate in the same shares and proportions as would, under Mahomedan law, have been applicable thereto had the testatrix died intestate.

The only actual provisions of the will which we conceive it necessary to mention specifically are that as regards the three children, the residuary estate under the will became divisible upon the youngest of them attaining the age of eighteen years, while the share of the father, defendant 1, was payable to him at once. The will contained certain powers and provisions under which defendant 1 was entitled, out of the income of the children's shares, to defray their marriage expenses and the expenses of their maintenance and the provision of other necessaries of life for them, with an express provision that as regards marriage expenses only, resort might be had to capital, and it was provided that, so far as the balance of income was not expended in defraying such expenses as aforesaid, it was to be accumulated and invested and, in effect, was to become an accretion to the capital of the children's shares. This is, shortly stated, the effect of paras. 5 and 6 of the will.

The will was duly proved by defendant 1 in Civil Miscellaneous Proceedings No. 100 of 1920. Plaintiff 1, Mariam Bibi, was born in 1910 or 1911 and, accordingly, attained the age of majority in 1928 or 1929. Plaintiff 2, Rasool Bibi, was born in 1912 or 1913 and, accordingly, attained the age of majority at some date in 1930 or 1931. The third child, defendant 2, Ebrahim, was born in 1913 or 1914 and, accordingly, attained the age of 18 in 1931 or 1932. It seems that, at the relevant date in 1932 when the matters with which we have to deal in this suit took place the youngest of the three children had attained the age of 18 years and the time for distribution had arrived. The original estimate of Khatiza Bibi's estate which was filed in the miscellaneous proceedings for probate showed the value of the net estate as Rs. 1,11,802, upon which footing the share of capital of each of the two plaintiffs would have amounted to a value of approximately Rs. 21,000, while that of the son would have amounted to double that sum. It is fair however to point out that at a later stage a corrected statement was filed in consequence, it is said, of a mistake having been discovered in the original estimate, and under the revised estimate the shares of the two plaintiffs would have amounted to between Rs. 14,000 and Rs. 15,000 each only.

There has been a good deal of discussion in this appeal as to what exactly the cause of action set up by the plaintiffs is and it is important in this, as in all other cases, that it should be accurately appreciated at the outset. There is no doubt that the plaintiffs have pleaded and we concede that they put it forward as their principal plea that they were induced by a substantive fraud on the part of their father to give him a full and unqualified release and discharge in respect of their shares in their mother's estate. They have pleaded that on 25th October 1932 their respective signatures were fraudulently obtained by defendant 1 to two documents which turned out to be powers of attorney authorizing three gentlemen in Rangoon to execute on the plaintiffs' behalf and in their names an unqualified and absolute discharge in

defendant 1's favour in respect of the plaintiffs' shares in the estate. Those powers of attorney were in fact acted upon on 16th November 1932 and, accordingly, the two ladies found themselves in the position of having to overcome the two releases of that date before being in a position to maintain this suit for the administration of their mother's estate. In order to do that they set up, as we have said, in the first place a case of positive fraud against their father consisting in substance of an allegation that they were tricked by him, with the assistance of a lawyer of Surat, into executing the powers of attorney upon the misrepresentation that they were merely documents required "for the management of the estate" in Rangoon. And upon that footing they have, quite consistently, asked for a declaration that the two releases are of no effect and are not binding on them. Put shortly, their case under that head is that their minds never went with their signatures and that, accordingly, the powers of attorney are not their acts and are void.

But, in our view, upon a fair construction of the plaint, the plaintiffs' case went a good deal further than that. The plaint, as is unfortunately so often the case in this Court, is not well drafted. But, in our opinion, it pleads quite plainly, not merely a case consisting of the fraud to which we have drawn attention but also that defendant 1 both as the plaintiffs' father and in his added capacity as the sole executor of the will, occupied a fiduciary position as between himself and his children, and that the plaintiffs executed the powers of attorney as a result of the "undue influence" of their father. In our view, there are, upon the face of the plaint, pleaded all the ingredients of this cause of action. Defendents 1's position as the executor of the will and the father and guardian of his minor children is clearly set out. The position of the two plaintiffs as pardanashin ladies who, throughout their lives, relied upon their father is distinctly pleaded. And it is specifically alleged, by para. 9 of the plaint, that defendant 1 took advantage of his position and exercised "undue influence" over the plaintiffs in obtaining the two powers of attorney in question from them. By para. 13 of the plaint it is alleged that the two releases in question which were executed on 16th November 1932 were "obtained from the plaintiffs by undue influence, fraud and misrepresentation as stated in paras. 7, 8, 9 and 10" of the plaint. And the declaration asked for that the two releases are of no effect and are not binding on the plaintiffs is as appropriate, if not more appropriate, to a case of "undue influence" than to a case of fraud. If we had entertained any doubt as to whether the plaint was understood by defendant 1 as raising a case against him of "undue influence," that doubt would have been dispelled by para. 10 of his own written statement, in which he says :

> This defendant emphatically denies that he, at any time, exercised undue influence upon the plaintiffs, or induced them to do anything against their will, or that he ever acted fraudulently towards the plaintiffs or perpetrated any fraud upon them in any manner at any time.

It seems to us that defendant 1 is there answering disjunctively a case both of undue influence and of fraud. Though, as we have said, the pleadings in this case are not elegant, they are sufficient, to our minds, to raise a distinct case of undue influence in addition to the case of substantive fraud to which we have referred. We have been closely pressed by Mr. Clark on behalf of the appellant to say that we cannot allow a case of "undue influence" to be set up upon these pleadings. He refers to the case in 9 Luck 178.[1] We have carefully considered that case but we do not think that it offers any obstacles to the conclusion, in this respect, at which we have arrived. In the first place, in no nice a matter, as the consideration of the form of particular pleadings, it is improbable that any one case will form a reliable criterion as regards any other and, in any event, we have not the benefit of knowing exactly in what form the pleadings in the case before the Privy Council actually were. The conclusion at which their Lordships of the Judicial Committee arrived upon the facts and pleadings in that particular case was that the facts constituting and pointing to "undue influence" were there pleaded, not as a cause of action in themselves, but merely as ancillary and incidental to, and in the course of, the pleading of a substantive fraud only. Upon that view of the matter their Lordships came to the conclusion that it was impossible for the plaintiffs to allege more than the actual fraud they had set up. As we read the pleadings in this case however they go a great deal further than that and it is, we think, possible from the complex bundle of facts which have

1. Someshwar Dutt v. Tribhawan Dutt, (1934) 21 A I R P C 130=149 I C 480=61 I A 224 = 9 Luck 178 (P C).

been set out in the plaint in a rather confused way to distinguish a definite cause of action relating to "undue influence" in addition to the one relating to a charge of positive fraud.

It is convenient in this case perhaps that we should take the issue of fraud first. The story of the plaintiffs is that they observed strict purdah and that at the time at which the powers of attorney were obtained from them by their father and they were made to give blank forms of receipt for monies which their father claimed to have disbursed on their behalf during their minority, the husband of plaintiff 1 was away from home, whilst the husband of plaintiff 2 was told that she was to be taken to a doctor in Surat at a time when she was ill. In those circumstances, defendant 1 took his two married daughters to Surat and got their thumb impressions upon a number of blank papers which were produced. Each of the plaintiffs made thumb impressions on two such papers. They then went to the Fort, in which the Registration Office at Surat is now situated, and there they say they executed the powers of attorney. Rasool Bibi says:

> We then asked our father what these papers were for and he told us that they were the papers which were required to be given to our uncle for the management of our estate.

Mariam Bibi told a similar story. She says:

> My father did not tell me that I was to execute a release document stating that I had received all my share. If he had stated that I would not have signed.

It is then said that they were taken home and asked to sign a number of further blank papers, which they did, trusting to their father that everything would be all right. The next day their father left Rander and after that remittances were sent for a period of about two years. They then ceased and after this, and not until they told their husbands what had happened. Suspicions were aroused and it then became clear to them that they were the victims of a fraud. Their case is that the blank papers which they signed were filled in as receipts afterwards, each share totalling Rs. 21,000, and that this money was never paid to them by their father at all. Mr. Cowasjee urges that if it is proved that the receipts up to the time of 25th October 1932 were in respect of moneys actually paid and as the full share of their inheritance, it was quite unnecessary for their father to send them further remittances and that this was done in order to allay their suspicions after the release had been executed by their uncle in Rangoon.

There is a strong conflict of evidence as to what took place in Rander before defendant 1 left for Rangoon with the power of attorney. His case is that he had been given receipts by his daughters at various times in respect of payments of money which were their share of the inheritance under their mother's will. The earliest of these are dated 15th June 1930 and they deal with sums alleged to have been paid from 6th May 1918 to 7th May 1924, i. e. for payments out of the estate, starting from the day after their mother's death. Defendant 1's story is that he carefully explained his disbursements on different occasions to his daughters and kept an account book and went through the accounts with them. At the time of the signing of the power of attorney, there was a balance due and receipts had not been given for the sums which had been finally paid. He took his daughters to Mr. Gandhi, an advocate in Surat. They removed their veils and Mr. Gandhi then had the receipts in his possession and the daughters acknowledged the receipt of the amounts. This, of course, is in flat contradiction of the story that some of the receipts were obtained after visiting the Fort to sign the power. It is also said that the situation was carefully explained to them by this advocate and that they executed the powers of attorney knowing exactly what they were and entirely of their own free will.

The learned trial Judge has been unable to accept the story of the plaintiffs and has come to the conclusion that they were well aware of the contents of the powers on the date on which they executed them. We are not prepared to disturb this finding of fact which arises out of a very difficult conflict of evidence in circumstances in which the learned trial Judge had the parties before him. It is true that the evidence of some of the defence witnesses was taken on commission. But as the learned Judge has found that the plaintiffs have failed to discharge the burden of proof cast upon them in the circumstances, this fact alone must have great weight with the Appellate Court.

In the course of the protracted hearing before us we have been satisfied that much that has been stated on either side is untrue. The plaintiffs tried to make out that they were not on good terms with their father after their marriage and that he

gave them no gifts at all. This is strenuously denied and there are marked discrepancies in the evidence given on behalf of the plaintiffs in an endeavour to substantiate it. If the plaintiffs' story be true, the receipts were prepared subsequent to the date upon which Mr. Gandhi says he saw them and we feel difficulty in accepting their version on this account. Rasool Bibi's husband, Hassan Ali Sadater, says that he had no idea that his wife would be taken by her father to a doctor and that, if Ariff Bham, his sister-in-law's husband, said that he was so given to understand it is not true. This is plainly pleaded in para. 8 of the plaint.

Then Rasool Bibi says that they were induced to sign blank sheets of paper, some of which bore stamps and some did not. On the other hand, it is clear that all the receipts produced were stamped. There are many small discrepancies in the evidence for the plaintiffs. In respect of the cessation of remittances from their father the daughters say that they grew suspicious because payments had been stopped. But from the letters which were written to them on 12th June 1935 and 14th September 1935 by their father it is clear that this is not true.

It is elicited that in 1927 the two husbands of the plaintiffs made a trip to Rangoon. This was admitted by Rasool Bibi's husband, Hassan Ali Sedater, and by Rasool Bibi herself. But Mariam Bibi's husband denies that he ever came to Rangoon about a year after his marriage. It has been suggested that his reason for concealing that is that the two husbands came to Rangoon in order to make inquiries about the estate of Khatiza Bibi and that they knew all along that their wives were getting sums of money under her will. Upon the issue of positive fraud therefore we have come to the conclusion that the plaintiffs have not succeeded in proving that this fraud was practised upon them and that the finding of the trial Judge ought not to be disturbed.

As to the case of undue influence, we are informed by the very first paragraph of the plaint that the two plaintiffs are purdanashin ladies and Mr. Clark, on behalf of the plaintiff, has displayed no little anxiety lest we should deceive ourselves into regarding that condition as constituting some sort of automatic disability on the part of these plaintiffs in their dealings with their father which have resulted in this suit. We desire to reassure the appellant that there is no misunderstanding in our minds. We accept however the fact that the two plaintiffs if not actually pardanashin ladies, were at least persons who conformed to some considerable extent to pardanashin habits. But we do not propose to allow that fact any greater weight than is due to it as one only of the surrounding circumstances in which we have to consider the question of undue influence. But having said that it is equally right that we should say that we do regard the circumstance that the plaintiffs were two young Muslim women and that they had been brought up under their father's care in conformity with pardanashin principles as an important one which has to be taken into account, with the other circumstances of the case in considering the length to which the respondent ought to have gone to see that in their transactions with him the plaintiffs were altogether free from his influence. We propose now to consider the position which defendant 1 occupied.

Defendant 1 was the father of the two plaintiffs who since their mother's death in 1918 and until they were given in marriage in 1926 had lived under his care. He was also the sole executor of their mother's will. And he was the natural guardian of their persons and the testamentary guardian of their property. No Court has ever attempted a precise definition of "undue influence." It is a question for the Judge in the circumstances of each particular case. But in India and Burma there is contained in S. 16, Contract Act, a statutory definition of "undue influence":

16. (1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another :

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other ; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

We entertain no doubt that, in relation to the release obtained by defendant 1 in this case from his own children, immediately after they had attained the age of legal majority, the actual relationship of parent and child and *a fortiori* the added relationship of executor and beneficiary and of guardian and ward, are, taken in conjunction with the facts of this case, amply sufficient to raise a prima facie case for attributing to defendant 1 that "dominating position" which is the first of the statutory requirements of S. 16, Contract Act. In saying that we have taken no account of the fact that the two plaintiffs in this case were Muslims and were pardanashin or semi-pardanashin women. The later circumstance by no means weakens the conclusion at which we have arrived and if it has any influence at all, it points rather to a fiduciary relationship than to a condition of emancipation. We see no reason in considering what is or is not a "dominating position" to discard altogether the well-known equitable principles which are applicable to the same relationship in England. The influence is to be inferred from the special relationship between the parties, quite apart from proof of actual fraud or unfair advantage. It is established beyond doubt in English law that a special relationship of confidence does exist between parent and child, notwithstanding that the child is actually of age at the time the transaction takes place: *see* 1 Edn 338;[2] (1845) 7 Beav 551.[3] In the latter case, Lord Landgale M. R. observed :

> Nobody has ever asserted that there cannot be a pecuniary transaction between a parent and a child, the child being of age; but everyone will affirm in this Court that if there be a pecuniary transaction between parent and child, just after the child attains the age of 21 years, and prior to what may be called a complete "emancipation" without any benefit moving to the child, the presumption is that an undue influence has been exercised to procure that liability on the part of the child . . . .

In our view, these principles are equally applicable to a case under S. 16, Contract Act. Having regard to the relationship between the plaintiffs and defendant 1, to the plaintiffs age, to the circumstance that they were pardanashin or semi-pardanashin women, to their natural confidence in their father and to the absence of their husbands and of any independent person to advise them, we have no doubt that in this case defendant 1 was "in a position to dominate the will" of the plaintiffs at the time he obtained from them the powers of attorney which ultimately gave rise to the releases in question.

We have then to consider whether, "on the face of" the transaction itself and "on the evidence adduced," the transaction was unconscionable. We have equally little doubt that it was. The effect of what these two young women did was to furnish their father with a full unqualified discharge, to which he was not in law entitled as of right, in respect of his dealings with their shares in their mother's estate over a period beginning with the day after that on which she died. They in fact surrendered to their father for no consideration their right to require a strict account of how their money had been dealt with and of what it consisted. It will be seen later in this judgment that we cannot accept the view that any serious attempt was made by defendant 1 to furnish the plaintiffs or either of them with such accounts as were within their comprehension or with any independent means of understanding and questioning them. In our view, therefore, the transaction was, on its face and on the evidence, 'unconscionable' in the sense that defendant 1 obtained from it for no consideration a complete discharge from his obligation to account. In those circumstances, under sub-s. 3 of S. 16, Contract Act, the onus of proving that the power of attorney and the consequent releases were not obtained by 'undue influence' lies upon defendant 1.

For these reasons, in our view, the burden lay heavily upon defendant 1 to establish that the two plaintiffs were when on 25th October 1932, they executed the two powers of attorney of that date, in such a position as would, having regard to all the circumstances, enable them to form a free and unfettered judgment, independent altogether of his control. That is the question, then, to which we have addressed our minds and again we do not propose to relate the facts at length. In our view, defendant 1 has failed, and failed signally, to discharge the burden which lies upon him. The two plaintiffs were, at the time the transaction took place, both married women. Yet no attempt was made by the father to procure for them the advice even of their own husbands. The whole transaction, involving an extremely complicated question of account, was hurried through

2. Carpenter v. Heriot, 1 Edn 338.
3. Archer v. Hudson, (1845) 7 Beav 551 = 8 Jur 761.

in the course of four days at most. The two plaintiffs were, on defendant 1's own story, taken to the office of a lawyer of Surat of his own choice and there, in the course of what seems to us to have been a most perfunctory interview, they were asked, in their father's presence, whether they desired to execute the documents in question.

As far as we know, Mr. Gandhi, the lawyer, took no trouble to procure the will itself or to explain its terms to the two plaintiffs. He did not go through with them meticulously and item by item the books of account which defendant 1 says he had. And we are by no means satisfied upon the evidence that any such books of account relating to the plaintiff's shares and the income from them ever existed. If they did exist, there is no evidence whatever on the record to show that they were in a form which the two plaintiffs could possibly have understood. And moreover we have difficulty in understanding why defendant 1 should have parted with them seeing that they were the only record of what his transactions had been. Even if the accounts existed and had been kept properly and well, it is to our minds difficult to believe that, without assistance, the two plaintiffs could have understood what the meaning of them was and to what extent their rights and the interests were affected by them.

When we look at the power of attorney itself we find that it contains an unqualified acknowledgment by the two plaintiffs both of the fact that the value of the capital and the income of their shares amounted to Rs. 21,000 and that by driblets over a period commencing with the day after their mother's death they had received that sum in full. Not only that, but it is said that they had received it partly in cash and partly in the form of maintenance, payment of expenses and so forth. We can conceive no case in which it was clearer that a heavy duty lay upon defendant 1 to see to it that his children had all the means of understanding how the capital and income of their shares had been disposed of, that they were advised from an independent source of their rights in relation to the estate and that they were in a position to give him the complete and absolute discharge which he asked for of their own free will and not because of their affection, respect or fear of their parent. This becomes, in our view, all the more apparent when one considers that defendant 1 was asking his children to give him a release to which he had no legal right whatever. An executor is not as of right entitled to a release from his beneficiary, and it seems to us that in asking the two plaintiffs to give him a full discharge in respect of the estate, an unusually heavy burden lay upon him to make sure that they knew and understood exactly what they were doing. In all these respects we think that defendant 1 has failed to displace the presumption of undue influence which rests upon him.

Mr. Clark however has contended that, even if this view is to prevail, the suit must, nevertheless, fail on the ground of limitation. The powers of attorney were executed on 25th October 1932 and the two releases were executed on 16th November 1932. This suit was begun by a plaint dated 2nd March 1936. The relevant Article of the Sch. 1 to the Limitation Act 1908, is Art. 91, which provides that the period of limitation within which a suit to cancel or set aside an instrument of the character of these releases is a period of three years from the time "when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him." It seems to us that the first question to consider is, what is "the instrument" which the plaintiffs are seeking to have cancelled or set aside in this suit? To our minds, the answer to that question admits of no doubt whatever. It seems to us that the proper answer is to be found in the plaint itself. It is as plain as anything can be that what the plaintiffs are asking to have met aside by their plaint are the releases of 16th November 1932. The relevancy of this question in this case lies in the fact that the learned Judge in the Court below has accepted the view—and we also accept it—that the two plaintiffs were fully aware at the time when they executed the powers of attorney of their contents. If that is so, then, apart altogether from the question of undue influence, it is difficult to see how, as regards the powers of attorney, they could escape the provisions of Art. 91. And the view therefore that Mr. Clark has been persistent in pressing upon us is the view that what the plaintiffs ought, if they are right, to have set aside are the powers of attorney and not the releases. We are quite unable to accept that view. In the first place, the instrument to be cancelled or set aside which is referred to in Art. 91 is that

instrument which the plaintiffs themselves have actually asked to have cancelled or set aside. The plaintiffs for the purpose of answering the plea of limitation, are entitled to require the Court to take the plaint and to look at the instrument, whatever it is, that they have actually asked to have set aside. If that is done in this case, then it is plain, beyond all possible argument, that they have by their plaint in this case asked to have set aside the releases, and not the powers of attorney, and, in our view, in having done that they were quite right. The obstacles to their success in this administration suit are the releases and not the powers of attorney. The powers of attorney, as such, afford no obstacle to this suit. And indeed, in order to cancel or set them aside, no suit was necessary at all, because the plaintiffs themselves were in a position at any moment to revoke them. What had to be set aside in this case was the releases and those are the documents which, in our view, the plaintiffs have rightly attacked in this suit. The relevant question therefore under Art. 91, Limitation Act, is, in this case whether the plaintiffs were aware of the facts entitling them to have the releases cancelled or set aside more than three years before the suit began.

In our opinion upon the evidence they were not so aware. We have considered the evidence carefully and we accept it as a proved fact that the plaintiffs, although they may have been aware of the contents of the powers of attorney, had no knowledge that releases had actually been executed in pursuance of them until some date in 1935. The central fact, as it seems to us, entitling a person to have an instrument set aside is the fact that that instrument exists. The plaintiffs did not know, as we think, of the existence of the releases until 1935 and, accordingly, it was not until the date that any period of limitation began to run against them under Art. 91, Limitation Act. Mr. Clark has cited no authority to show that, by any doctrine of constructive notice, they are to be deemed to have had knowledge of the existence of the actual releases at any earlier date. Nor, as far as we are aware, does any such authority exist. And, in any case, we should have been reluctant in a case such as this to apply any equitable principle to assist defendant 1 to take advantage of his own undue influence in procuring the execution of the powers of attorney.

In the circumstances therefore and in view of the fact that this suit is—in our view rightly—a suit to set aside the two releases dated 16th November 1932, the plaintiffs were entitled, first, to a declaration that they are not bound by those two releases, and, secondly, to the full and complete administration order for which they ask. That is not quite the end of the matter. Mr. Clark, on behalf of the appellant, now seeks, with admirable resource, to contend that even if he has to submit to an administration order on the ground that he cannot avail himself of the two releases obtained by defendant 1, he is entitled to have a declaration which in effect was made by the learned Judge in the Court below that defendant 1 is entitled to credit for Rs. 21,000. He bases that contention, as we understand him, upon the facts that the two powers of attorney contained recitals to that effect, that the releases contained recitals to that effect, that certain receipts said to have been executed by the plaintiffs in October 1932 acknowledged that they have received Rs. 21,000 and that certain other verbal acknowledgments were made by the plaintiffs.

In our view this contention is unsound. This suit is an administration suit, in which the plaintiffs have asked, quite simply, for administration of their late mother's estate. To that claim a simple answer was given, namely that inasmuch as they had given defendant 1 a release, they were not entitled to an administration order. No question whatever arises on these pleadings at this stage as to whether, if there is to be an administration order, the plaintiffs have received particular sums or not. It is true that in the Court below the plaintiffs' evidence was directed, wrongly in our opinion to this question. And it is true, also, that to some extent it was impossible to get the facts upon which the Court could exercise its discretion in granting or refusing an administration order without dealing also with the facts relating to the circumstances in which the receipts were given. But, in our opinion, the important thing to bear in mind is that this is an administration suit in which, if an administration order is made, the ordinary accounts and inquiries will follow.

It would, we think, be altogether premature at this stage to prejudice the question—one way or the other—as to whether defendant 1 will succeed in accounting or not. When an administration order has been

made, the question which arises on making it and which has to be worked out in the administration proceedings is not simply whether defendant 1 has paid sums of money to the plaintiffs or applied sums of money on their behalf. The question is far more complex than that. The question will be, first, what was the capital of this estate and how it has been dealt with? The second question will be what was the income of this estate and how it has been dealt with? And in determining those questions—and particularly the latter of them—it is not a matter merely of what has been paid or applied by defendant 1 but whether what he has paid or applied—whatever it may be—has been rightly paid or applied by him or not, having regard to his duties under the will as executor. It may or may not be a fact that the plaintiffs have received Rs. 21,000 in cash or in kind. Even if it is a fact, it by no means follows that defendant 1 is entitled to a credit for that sum or for any other particular amount. What will have to be considered when the plaintiffs ask for credit for particular items will be whether he is entitled to that credit, having regard to his legal obligations as executor.

Upon that view of the matter, it will readily be seen how easily the plaintiffs' position could be prejudiced by any such sweeping declaration as defendant 1 now asks to have inserted in the administration order. It is just by taking such short cuts as this that the working out of administration suits in this Court is made so difficult and confusion so often follows. We cannot too strongly say that it almost invariably follows that a departure from the established course of working out an administration decree results in the long run in confusion and delay and very often in injustice to the parties. In our judgment, what the plaintiffs are entitled to in this suit is, first, a declaration that the two releases dated 16th November 1932 are not binding upon them, and, secondly, a full and clean administration order in the usual form.

This Court has more than once drawn attention to the form in which decrees are drawn up. The decree which was drawn up in this case is an example of what has been pointed out many times before. The officer of the Court who is responsible for drawing up the decree of 27th August 1937 has merely copied out a few words from the judgment of the learned Judge. That is not the proper way in which the work should be done. And we have no doubt that the learned Judge on the Original Side himself, had he been aware that such a decree was to follow his judgment, would himself have disapproved. What the plaintiffs are entitled to have is an administration decree in the proper form, prefaced by the proper declaration and with such adaptations as the nature of the case may require. It is not right that this Court should issue an order, purporting to be an administration order, in the form that defendant 1 "do render a full and true account of the properties of his wife, Khatiza Bibi deceased, and their income." It is quite meaningless. The Deputy Registrar has only to turn to the Code of Civil Procedure, as adapted by the Rules and Orders of this High Court, to see in what form an administration decree should be. And we much deprecate the sort of work which results in decrees of this kind. In this connexion it is impossible not to blame also the advocates for the parties, who are indifferent as to the form in which the decrees they obtain are drawn up. The advocates in this case owed a duty not only to their own clients but to the Court to see that the decree was drawn up properly and there are provisions in the rules of the Court which are particularly designed in order that they may have the opportunity of doing so.

In our judgment, this appeal must succeed to the extent we have indicated in this judgment. A decree must now be drawn up declaring in proper language that the two plaintiffs respectively are not bound by the respective releases of 16th November 1932 and for the administration of the estate of Khatiza Bibi, deceased. As to the costs of the hearing on the Original Side and of this appeal, we think that a special order must be made. In the Court below an issue of positive fraud was raised by the plaintiffs against defendant 1 which failed and which necessitated the taking of a great deal of evidence. We are satisfied, upon the evidence, that a large part of the story told by the plaintiffs of the manner in which they were induced to execute the documents of 25th October 1932 was untrue. On the other hand they have succeeded upon the issue only of undue influence. In all the circumstances we think that the proper order to be made as to costs is that each side shall bear its own cost of the suit on the Original Side. We think however that as regards this appeal the appellants are entitled to their costs as

against defendant 1 and we shall make an order accordingly fixing a special advocate's fee of twenty gold mohurs over and above the scale fee. The costs of the proceedings consequent upon the administration decree will, of course, be dealt with at a later stage upon the further consideration of the suit. As regards defendant 1's cross-appeal it must be dismissed with costs.

D.S./R.K. *Appeal partly allowed.*

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* A. I. R. 1939 Rangoon 287

BA U AND MACKNEY JJ.

U So Maung and another—Appellants.

v.

J. Thom — Respondent.

First Appeal No. 53 of 1938, D/- 31st March 1939, against decree of Asst. Dist. Court, Bassein, D/- 15th January 1938.

(a) Limitation Act (1908), S. 20 — Agent — Burmese Buddhist (Per *Mackney J.*).

A Burmese Buddhist husband is not necessarily the agent of his wife : *A I R 1931 Rang 262 (S B), Rel. on.* [P 288 C 1]

(b) Limitation Act (1908), S. 20 — Agent — Implied authority must at least be shown (Per *Mackney J.*).

It may be that no formal authorization is required under S. 20 but it must be shown that there was at least implied authority : *A I R 1929 P C 297, Rel. on.* [P 288 C 2]

*** (c) Limitation Act (1908), S. 21 (2)—Term "joint contractors" includes joint mortgagors — Payment of interest by one does not save limitation as against other — Claim against other is barred personally as well as against share of property pledged by him.**

The term "joint contractors" in S. 21 (2) also includes joint mortgagors : *A I R 1929 Mad 881 and A I R 1938 Cal 129, Rel. on.* [P 288 C 2]

Section 21 (2) must be read in conjunction with Ss. 19 and 20. Hence payment of interest as such by one of the joint mortgagors who is not an agent of the other does not itself serve to keep alive the debt as against the other who has not authorized the payment. The claim against the other is barred personally as well as against the share of the property pledged by him. For, each of the contractors is a principal (although it may appear that one is as it were a surety for the other); the one does not give authority to the other to pledge the share of the one for the other's debt. The relationship of principal and surety does not exist between joint contractors; each does the pledgings in respect of his own liability; that liability extends to the whole debt while the liability exists, and so the pledge refers to the whole debt; but it is not a pledge which can be dissociated from the liability incurred. It could only be so if there were an express agreement to that effect. Consequently, when the liability of one of the joint contractors ceases, his share of the property pledged as security is also discharged from liability: *Case law discussed.* [P 289 C 1, 2]

(d) Buddhist Law (Burmese) —Husband and wife have equal rights in jointly acquired property.

The Burmese Buddhist husband and wife have equal rights in their hnapazon or jointly acquired property. [P 291 C 1]

U Sein Tun Aung — *for Appellants.*

E. Hay — *for Respondent.*

Mackney J.— This appeal arises out of a suit filed on 8th January 1937 for recovery of Rs. 10,000 with interest by sale of certain properties mortgaged by equitable mortgage by the defendants-appellants U So Maung and Ma Chaw who are husband and wife. It has been established that the plaintiff-respondent, J. Thom, lent the defendants-appellants Rs. 10,000 on 18th January 1924; that they executed a promissory note in his favour for that amount; that as security for the payment of the amount they deposited the title deeds of certain properties with the object of creating an equitable mortgage thereon in favour of the plaintiff; that interest on the loans had been paid at various times the last time being on 10th February 1928; and that these payments had been made by U So Maung alone and not by his wife, Ma Chaw. The suit was not opposed by U So Maung, but Ma Chaw, whilst admitting the execution of the promissory note and the deposit on the title deeds, contended that the claim against her was time-barred. In the original Court this claim was disallowed and a decree for sale was granted against both the defendants. Both the defendants now appeal to this Court.

It has been urged before us, for the first time, that the memorandum evidencing the deposit of the title deeds was such as to need registration, and not having been registered was inadmissible to prove the alleged mortgage. I do not think that there is any force in this contention. It was never suggested in the original Court that the note on the back of the promissory note was anything more than a note of the title deeds which had been deposited. There is nothing to show that it was intended to record the agreement between the parties. It is headed: "Deposit of title deeds," and then follows a list of property signed by U So Maung and Ma Chaw; whereas the promissory note itself is written by hand; this list is typewritten. It is not suggested that the list was made out at the time the promissory note was executed. I do not think that the words "deposit of title deeds" can be construed to mean "we deposit the title

deeds of the undermentioned property as security for the loan we have taken today." I think it means no more than what it purports to be, namely a list of holdings the title deeds of which had been deposited. In any event, as this point was never raised in the lower Court, no evidence was adduced to show that the writing was intended to be the record of the agreement between the parties.

The next point taken is that U So Maung can in no sense of the word be held to have acted as Ma Chaw's agent; nor was there any evidence that at the time he made any of the admitted payments of interest he was doing so as the agent of Ma Chaw. S. 20, Limitation Act, there, could not be invoked to extend the period of limitation; and under S. 21, Cl. 2 of the Act, U So Maung and Ma Chaw being joint contractors, Ma Chaw, by reason only of a payment made by U So Maung could not become chargeable in view of anything enacted in S. 20. I do not think that it can be disputed with any success that there is no evidence whatsoever to show that U So Maung was acting as the agent of Ma Chaw. A Burmese Buddhist husband is not necessarily the agent of his wife. In this particular case it has to be shown that he was in fact her agent : *see* 9 Rang 524.[1]

It is stated that for some years U So Maung had transacted all business relating to the joint property as his wife suffered from a weak heart. This however is surely not sufficient to establish that in this particular case also he was acting as his wife's agent in paying interest so as to renew the period of limitation as against her. Mr. Christiansen, a witness for the plaintiff, states that on one occasion he went to see U So Maung and Ma Chaw and spoke to them about the repayment of the loan : he says that they told him that it was not the proper time when properties would fetch good prices, and they asked him to write to Mr. Thom asking him to await payment. Later U So Maung came to him and said :

> Mr. Christiansen, ask Mr. Thom to wait, and in future please do not mention about money matters within the hearing of my wife, who has a weak heart.

How this can be said to prove that U So Maung was acting as his wife's agent in the payment of interest, I do not understand. U So Maung says :

> My wife and myself do not have separate properties or money. For petty expenses my wife gives out the money. But for expenses involving large sums it is I who pay out the money. And for debts amounting to large sums it is I who pay out the money.

Here, again, these words cannot be construed to mean that U So Maung had *carte blanche* from his wife to act as he thought fit with the joint property. It may be that no formal authorization is required under the Section, but it must be shown that there was at least implied authority : 57 I A 1.[2]

The circumstances of the case must indicate that there was this implied authority. There is nothing in the circumstances of the present case from which we could infer that U So Maung had authority to pay interest on the loan on behalf of Ma Chaw. It has now to be considered whether the appellant, Ma Chaw, can show that she comes under the benefit of Sec. 21, Cl. 2, Limitation Act. It has not been seriously disputed by the respondent that U So Maung and Ma Chaw, in respect of the equitable mortgage made by them, were not joint contractors. It seems to me obvious that joint mortgagors are also joint contractors, and this view has been taken by other High Courts : *see* for instance 53 Mad 119[3] and 42 C W N 18.[4] No difficulty should be created by the special mention of "mortgagees" in this Section, because it was desired to cover the special case where an acknowledgment of liability under Sec. 19 has been made by one of several joint mortgagees so as to save limitation for a suit for redemption by the mortgagor.

It is conceded by the learned counsel for the respondent that S. 21, sub-cl. 2 of the Act, certainly exonerates Ma Chaw from personal liability under the bond, *see* 59 Cal 1128[5] at p. 1130 where it was held that the payment of interest by a debtor does not save limitation against his co-debtors whose agent the payer was not. In that case a reference was made to the case

1. N. A. V. R. Chettyar Firm v. Maung Than Daing, (1931) 18 A I R Rang 262=134 I C 1252=9 Rang 524 (S B).

2. National Bank of Upper India, Limited v. Bansidhar, (1929) 16 A I R P C 297=121 I C 193=57 I A 1 (P C).

3. Thayammal v. Mutukumaraswami Chettiar, (1929) 16 A I R Mad 881=121 I C 858=53 Mad 119=57 M L J 588.

4. Azizur Rahaman Osmani v. Upendra Nath Samanta, (1938) 25 A I R Cal 129=66 C L J 104=42 C W N 18.

5. Jogeshchandra v. Monindranarain, (1932) 19 A I R Cal 620=138 I C 740=59 Cal 1128=55 C L J 347=36 C W N 487.

in 90 I C 774,[6] and it was stated that in the latter case it was merely decided that: the expression 'person liable to pay' in Sec. 20, Limitation Act, does not mean the entire body of persons liable to pay the debt, but each individual debtor who would be liable for the whole debt. Under the law, each co-mortgagor is liable for the entire debt secured by the mortgage, and a payment by any of them towards interest would operate to extend limitation. But it is not said in so many words that the period of limitation is extended against co-mortgagors by a payment made by one of them.

In the case in 90 I C 774,[6] S. 21, Limitation Act, was not considered. The learned counsel for the respondent contends that the security given by Ma Chaw was given for the debt and operates so long as the debt is alive against either herself or U So Maung. He argues that the position of Ma Chaw is the same as that of a person who without taking any money himself, allows a friend to take and offer his private property as security for a loan taken by the friend. I do not think that this is a correct interpretation of the contract entered into by the parties.

It does not appear to me reasonable to say that, although Ma Chaw is not chargeable by the act of U So Maung, yet her property is chargeable. The money was jointly borrowed and jointly security was given: each of them was severally liable for the whole amount. But if the liability of anyone of them ceases, then clearly the security given by that person also ceases to operate: each of the contractors is a principal, (although it may appear that one is as it were a surety for the other); the one does not give authority to the other to pledge the share of the one for the other's debt. The relationship of principal and surety does not exist between joint contractors: each does the pledging in respect of his own liability; that liability extends to the whole debt while the liability exists, and so the pledge refers to the whole debt; but it is not a pledge which can be dissociated from the liability incurred. It could only be so if there were an express agreement to that effect. Consequently, when the liability of one of the joint contractors ceases, his share of the property pledged as security is also discharged from liability.

Reference was made by the learned counsel for the respondent to certain cases dealing with the position of the mortgagor and the purchaser of the equity of redemption when interest has been paid by the mortgagor or by the purchaser after the purchase: *see* 32 Cal 1077,[7] 33 Cal 1278[8] and 54 Cal 179.[9] But these cases turn on the interpretation of Ss. 19 and 20, Limitation Act, and the meaning of the expression "liable to pay," and it cannot be said that such a purchaser and the original mortgagor are joint contractors so as to enable the purchaser or mortgagor to take the benefit of S. 21, Cl. 2 of the Act.

In (1886) 11 A C 639[10] their Lordships of the Privy Council did not have to consider the effect of S. 21, Limitation Act; they were dealing with the law of limitation as it stood in New Brunswick, and it does not appear that there was there any enactment similar to S. 21 of the Indian Act. 44 Mad 544[11] is a similar case dealing with the position of the purchaser of the equity of redemption who pays interest and thereby gives a further period of limitation for execution of the decree. He is "a person liable to pay" the mortgage debt within S. 20, Limitation Act. Of course, no reference was, nor could be, made to S. 21 of the Act.

In 58 Mad 418[12] it is pointed out that there is a conflict of decisions among the High Courts in India as to whether the restriction in Cl. 2 of S. 21 applies only to the personal liability of the joint contractors, or even to the liability of the mortgaged property. It was not however necessary for the learned Judges to base their decision in the case on that point, and they said no more about it than that if they had to base their decision on that point they would be bound to follow the decision of the Madras High Court and apply the restriction to the liability of the mortgaged property or refer the matter for the decision of a Full Bench. The decisions of other High Courts to the contrary, which are cited by the learned Judges, appear in cases not reported in the authorized reports, and no cases to the contrary have been

6. Achola Sundari v. Doman Sundari, (1926) 13 A I R Cal 150=90 I C 774.

7. Krishna Chandra Saha v. Bhairab Chandra Shaha, (1905) 32 Cal 1077=9 C W N 868.

8. Domi Lal Sahu v. Roshon Dobey, (1906) 33 Cal 1278=11 C W N 107.

9. Bhuban Mohan Singh v. Ram Gobinda Goswami, (1926) 13 A I R Cal 1218=98 I C 204=54 Cal 179=44 C L J 188.

10. Lewin v. Wilson, (1886) 11 A C 639=55 L J P C 75=55 L T 410.

11. Askaram Sowcar v. Venkataswami Naidu, (1921) 8 A I R Mad 102=62 I C 393=44 Mad 544=40 M L J 218.

12. Lakshimi Naidu v. Gunnamma, (1935) 22 A I R Mad 101=154 I C 1053=58 Mad 418=68 M L J 470.

cited before us. I am of the opinion therefore that the suit as against the appellant, Ma Chow, was barred by reason of S. 21, Cl. 2, Limitation Act.

This appeal must be allowed to that extent, and the decree of the lower Court modified accordingly, so as to show that the suit against Ma Chaw is dismissed. Ma Chaw is not liable to repay the amount found due from U So Maung, and that her property is also not chargeable in respect of that amount. Ma Chaw is entitled to her costs in both Courts. (Advocates fee in this Court, however, Rs. 225 only.) It is fair that U So Maung pay half (i. e. Rs. 225) the advocates fees of respondent in this Court, as his appeal is disallowed.

Ba U J. — I agree that the appeal of appellant 2, Ma Chaw, should be allowed. She is the wife of appellant 1, U So Maung. They are Burman Buddhists. On 18th January 1924 they borrowed a sum of Rs. 10,000 from the plaintiff-respondent on a promissory note and deposited the title deeds of some of their immovable properties in Bassein to secure the said amount. The evidence on the record shows that from the date of the loan up to the filing of the plaint on 8th January 1937, the interest due on the loan was paid by the husband alone. It has therefore been argued before us that the claim against appellant 2, Ma Chaw, is barred by time. A large number of cases alleged to be bearing on this question has been cited to us. All these cases are cases decided by the High Courts of India and no case of this Court has been cited to us. I have however found one, A I R 1935 Rang 473[13] where Braund J. said :

> A payment by one joint promisor liable to pay the debt is for the purpose of S. 20, Limitation Act, sufficient to operate against all the joint debtors, for a fresh period of limitation begins not merely in respect of the liability of the one who pays but in respect of the liability upon the whole debt.

In support of this proposition of law, the learned Judge relied on certain decisions of the Calcutta and Allahabad High Courts. In none of these cases, and the majority of the cases cited to us at the Bar, the question of the applicability of sub-s. 2 of S. 21, Limitation Act, was considered. The sub-section is in the following terms :

> Nothing in the said Sections renders one of several joint contractors, partners, executors or mortgagees chargeable by reason only of a written acknowledgment signed or of a payment made by, or by the agent of, any other or others of them.

The term "joint mortgagors" is not used in the sub-section but it is obvious that the said term also includes "joint mortgagors." A simple mortgage or a mortgage by deposit of title deeds consists of two parts : A covenant on the part of the mortgagor to pay the debt and an agreement empowering the mortgagee to realize his money out of the property pledged to him. Therefore, if the term "joint mortgagors" is substituted for the term "joint contractors" and the words not necessary for the purpose of this case are left out, the sub-section will read thus : "Nothing in the said Sections (19 and 20) renders one of several joint ..... mortgagors chargeable by reason only of a written acknowledgment signed or of a payment made by, or by the agent of, any other or others of them." In other words, what it means for the purpose of this case is : "that a payment of interest as such by one of the joint mortgagors, who is not an agent of the others, does not of itself serve to keep alive the debt as against the others, who have not authorized the payment." This sub-section must be read in conjunction with Ss. 19 and 20. This is the view taken by the Madras, Calcutta and Allahabad High Courts in their later decisions. In 53 Mad 119[3] a Bench of the Madras High Court said :

> It is then contended for the respondent that under S. 20, Limitation Act, it is enough if the interest on the debt is paid as such by any person liable to pay the debt. It is true that the words "the person liable to pay the debt" were construed to mean any person liable to pay the debt : *vide* 44 Mad 544,[11] relying on (1863) 1 De G J & S 122[14] and (1864) 11 H L C 115.[15] But that was a case to which S. 21 of the Act would not apply and there could be no suggestion that the operation of S. 20 was cut down by that of S. 21, Cl. (2). In the case of several joint contractors, partners, executors or mortgagees, the operation of S. 20 seems to be cut down or limited by S. 21 (2) of the Act.

The Bench added :

> Whatever may be the law as to executors, it is impossible to say that of two joint contractors which term has been held to include two mortgagors in this Court, *vide* 55 I C 763,[16] one contractor is bound by the payments of the other.

In 59 Cal 1128[5] a Bench of the Calcutta High Court said :

13. U Sin v. U Tun Si, (1935) 22 A I R Rang 473 =160 I C 314.

14. Bolding v. Lane, (1863) 1 De G J & S 122=32 L J Ch 219=9 Jur (N S) 506=7 L T (N S) 812 =11 W R 386=137 R R 174=46 E R 47.

15. Chinnary v. Evans, (1864) 11 H L C 115=10 Jur (N S) 855=11 L T (N S) 68=11 E R 1274 =13 W R 20=4 N R 520=145 R R 79.

16. Muthu Chettiar v. Muhammad Hussain, (1920) 7 A I R Mad 418=55 I C 763.

When interest on a debt is paid as such by one of the executants of a simple money bond before the expiration of the period of limitation, a fresh period of limitation shall not be computed from the time of the payment against the other executants of the bond who did not make the payment.

In I L R (1937) All 272[17] a Full Bench of the Allahabad High Court said :

We think that the proper interpretation to put on S. 21 is that if at the time when the acknowledgment is made or the payment is made there are more than one person in existence who stand in relationship to each other as joint contractors, partners, executors or mortgagors, then the acknowledgment or payment made by one would save limitation as against that person and would be of no avail against the others.

Such, in my view, being the law I am clearly of the opinion that until and unless it is proved that when appellant 1, U So Maung, made payments he did so as an agent of his wife, appellant 2, the claim against her must be held to be barred by time. There is no evidence to this effect. It is however argued that though the claim against appellant 2 is barred, the mortgagee can still proceed against the property that has been given as security. The law as regards the rights of the Burmese Buddhist husband and wife in their jointly acquired property is so well-known and settled that it is not necessary to refer to any authorities. The law is that they have equal rights in their hnapazon or jointly acquired property. Therefore when the appellants borrowed money from the respondent, they each pledged their share as security. When the claim against appellant 2 is barred, her share in the property in suit cannot, in my opinion, be rendered chargeable for the debt. I may refer to the observations made by the learned Judges who decided the case in 53 Mad 119.[3] There the learned Judges said:

The word 'chargeable' in S. 21 must prima facie mean every kind of chargeability possible by reason of Ss. 19 and 20 of the Act, that is, every kind of chargeability under the original contract and the term cannot be limited to personal liability only.

For all these reasons I agree to the order proposed by my learned brother.

D.S./R.K. *Decree modified.*

17. Muhammad Taqi Khan v. Raja Ram, (1936) 23 A I R All 820=166 I C 106=1936 A L J 1140=I L R (1937) All 272 (F B).

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MYA BU AND MOSELY JJ.

Ma Tin — Plaintiff — Appellant.

v.

Ko Sein Hone and others — Defendants — Respondents.

First Appeal No. 135 of 1938, Decided on 5th April 1939, against decree of Asst. Dist. Court, Myaungmya, D/- 3rd October 1938.

(a) Burmese Law (Chinese) — Wife, on divorce, is entitled to take away her jewellery and wearing apparel.

Under the Chinese customary law the wife upon divorce is entitled to take away her jewellery and her wearing apparel with her : *A I R 1926 Rang 172, Rel. on.* [P 292 C 1]

(b) Burma Laws Act (13 of 1898), S. 13— Chinese Buddhist is Buddhist.

A Chinese Buddhist is a Buddhist within the meaning of that term both in S. 13, Burma Laws Act, and in the Succession Act : *A I R 1932 Rang 59, Rel. on.* [P 293 C 1]

(c) Burmese Law (Buddhist)— Applicability —Validity of marriage contracted between Chinese Buddhist in Burma—Burmese Buddhist law applies — Succession to estate of Chinese Buddhist dying intestate in Burma is governed by Chinese customary law.

As regards validity of the marriage between Chinese Buddhists contracting marriage in Burma, the Burmese Buddhist law is applicable as the *lex loci contractus*, but as regards inheritance or succession to the estate of Chinese Buddhists dying intestate in Burma the Chinese customary law is applicable as the customary law of the Chinese Buddhists. [P 293 C 1]

(d) Buddhist Law (Burmese or Chinese) — Marriage—Chinese Buddhist husband and Burmese Buddhist wife—Claim for partition of property on divorce—Personal law of husband and wife how ascertained — In absence of authority which law applies, question of partition of property should be decided under S. 13 (3), Burma Laws Act.

There is no prima facie ground for applying the personal law of the man and disregarding personal law of the woman in a case where Burmese Buddhist wife demands a partition of property on divorce from her Chinese Buddhist husband. It is the community or religious denomination to which the parties belong by which the personal law which forms the rule of decision in such a case has to be ascertained. But the personal law of the husband is not *ad idem* with the personal law of the wife. In absence of any sufficient authority either judicial or legislative to show that either the Chinese customary law or the Burmese Buddhist law should govern the question as to the respective interests of the Chinese Buddhist husband and the Burmese Buddhist wife in the property held by either or both, the question as to the division of property between the parties upon divorce should be decided according to justice, equity and good conscience under S. 13 (3), Burma Laws Act : *Case law discussed ; A I R 1927 Rang 265 (F B), Explained; (Mode of partitioning property in such cases explained.)* [P 293 C 1, 2 ; P 294 C 1]

G. R. Rajagopaul — *for Appellant.*

E. Hay — *for Respondents.*

Mya Bu J.—This appeal arises out of a suit by a Burmese Buddhist wife against her Chinese Buddhist husband for divorce and partition of property. The trial Court granted the plaintiff-appellant a decree for divorce but dismissed her prayer for division of property on the ground that under the Chinese customary law the wife had no interest in the property of the marriage. This appeal therefore relates only to that part of the decree which dismissed the appellant's prayer for division of the property set out in the schedules attached to the plaint. If the question as to the division of property between parties is to be decided in accordance with the Chinese customary law the decision of the trial Court must be held to be unassailable except as regards the jewellery mentioned in the schedules attached to the plaint; for even under the Chinese customary law it would appear that the wife upon divorce would be entitled to take her jewellery and her wearing apparel away with her: *see* 4 Rang 110[1] at p. 115. The trial Court should have ordered an inquiry to be made at least as to the ownership of the jewellery before disposing of the plaintiff's claim. On behalf of the appellant it is contended that Burmese Buddhist law forms the proper rule of decision regarding the division of property in this case. As lending support to this contention certain observations appearing in the Full Bench case in 5 Rang 406[2] and in a single Judge case in 1937 R L R 90[3] have been brought to our notice. The Full Bench case was upon a reference made by Maung Ba J. who propounded the question for decision as follows :

> In the case of Chinese Buddhists, is the Burmese Buddhist law regarding marriage applicable to them as the 'lex loci contractus' or, if not, which is the law applicable ?

The Full Bench answered the question in the affirmative and accordingly the headnote of the case in the report appears in the following words:

> That the Burmese Buddhist law regarding marriage is prima facie applicable to Chinese Buddhists as the *lex loci contractus.*

This led to the following observation by the learned Judge who decided in 1937 R L R 90[3]:

> If the decision given in 5 Rang 406[2] were to be followed to its logical conclusion I should say that the Burmese Buddhist law should also govern the succession to the estate of a Chinese Buddhist. The question of marriage and succession are so intimately bound up that one follows the other as night follows day and so one part of one's life should not be allowed to be governed by one law and the other part should be allowed to be governed by another law.

With all due respect I am unable to adopt the view that the decision in 5 Rang 406[2] to the effect that the Burmese Buddhist law regarding marriage is prima facie applicable to Chinese Buddhists contracting marriage in Burma as the *lex loci contractus* necessarily leads to the conclusion that the Burmese Buddhist law should also govern the succession to the estate of a Chinese Buddhist. After examination of the judgment in 5 Rang 406[2] I have come to the conclusion that the words "regarding marriage" appearing in the question propounded by the learned referring Judge and in the decision as reported in the headnote were not deliberately employed. In my opinion it was not in contemplation of the learned Judges that the Burmese Buddhist law should govern questions relating to the incidents of marriage as distinct from the validity of marriage turning upon observance or omission of certain formal requisites. The matter under consideration in 5 Rang 406[2] was a contest between the well-known rule of Burmese Buddhist law that there need be no formality or ceremony to effect a marriage and the equally well-known rule of Chinese customary law that marriage to be valid must have been performed by observance of certain formalities and ceremonies. Both the learned Sir Guy Rutledge C. J. and Maung Ba J. adopted the principle of Private International Law recognized and enforced under the English system of jurisprudence that the *lex loci contractus* governs the formal requisites of a marriage and the former went on to observe :

> And the English Courts have gone so far as to include consent as a part of the ceremony of marriage and not a matter affecting the personal capacity of the parties to contract a marriage : *see* (1859) 29 L J Mat 97[4] and (1878) 3 P D 1[5] at p. 7.

The English authorities quoted by Sir Guy Rutledge C. J. are cases in which the

1. Man Han v. R. M. A. L. Firm, (1926) 13 A I R Rang 172=97 I C 876=4 Rang 110.
2. Ma Yin Mya v. Tan Yauk Pu, (1927) 14 A I R Rang 265=104 I C 478=5 Rang 406 (F B).
3. Ma Kyin Hlaing v. Maung Kyin Swi, (1937) 24 A I R Rang 29=166 I C 577=1937 R L R 90=38 Cr L J 274.
4. Simonin v. Mallace, (1859) 29 L J Mat 97=2 Sw & Tr 67=6 Jur (N S) 561=2 L T 327.
5. Sotto-mayor v. Be Barros, (1878) 3 P D 1 = 47 L J P 23=37 L T 415=26 W R 455.

English law of marriage was applied as the *lex loci contractus* regarding the formalities of the marriage only. The Burma Laws Act provides that in any suit or other proceeding in Burma when the Court has to decide any question regarding succession, inheritance, marriage, caste or any religious usage or institution the Buddhist law shall form the rule of decision except in so far as such law has by enactment been altered or abolished, or is opposed to any custom having the force of law, and it has been laid down that a Chinese Buddhist is a Buddhist within the meaning of that term both in S. 13 Burma Laws Act, and in the Succession Act: *see* 10 Rang 97[6] in which it was also pointed out :

> The true meaning of S. 13 (1), Burma Laws Act, is that in matters regarding succession, inheritance, etc. where the parties profess the Buddhist or Mahomedan or Hindu religion, the rule of decision shall be the personal law that governs the community or religious denomination to which the parties belong, except in so far as that law in Burma has been altered or abolished by the Legislature or is opposed to any custom having the force of law. The personal law of the Chinese Buddhist in Burma is Chinese customary law.

Thus, it is settled law that as regards succession and inheritance to the estate of a Chinese Buddhist dying intestate in Burma the Chinese customary law is applicable. The state of the law therefore is that as regards validity of the marriage between Chinese Buddhists contracting marriage in Burma, the Burmese Buddhist law is applicable as the *lex loci contractus*, but as regards inheritance or succession to the estate of Chinese Buddhists dying intestate in Burma the Chinese customary law is applicable as the customary law of the Chinese Buddhists. There is however an absence of direct authority covering the main question that falls for determination in this appeal. The respondent is not a full Chinese. His father was a full Chinese who came from China and settled down in Burma many years ago and married a Burmese Buddhist woman by whom the respondent was born to him. The fact that the respondent is accordingly a Sino-Burman however does not seem to alter the legal position of the parties from what it would be if he were a full Chinese for there is nothing to show that so far as blood and manner of living are concerned he is to be regarded as a Burman rather than a Chinese. Be that as it may, there is no prima facie ground for applying the personal law of the man and disregarding the personal law of the woman in the present case. It is the community or religious denomination to which the parties belonged by which the personal law which forms the rule of decision in the case has to be ascertained. But the personal law of the husband is not *ad idem* with the personal law of the wife. In 4 Rang 110[1] where a Chinese Buddhist wife claimed her share of interest in certain property attached in execution of a money decree against her Chinese Buddhist husband, Chari J. observed :

> There are certain passages in Jameson's Family and Commercial Law which seem to show that a Chinese wife can never have a separate estate. If this is the law I am sorry for Chinese wives. It is hardly applicable to Chino-Burmese women who actively helped their husbands in the acquisition of property and I have no hesitation in refusing to apply this rule as being contrary to justice, equity and good conscience.

This observation applies a fortiori to the present case where the wife is a full Burmese woman. Chari J. decided that as the whole of the property under attachment belonged to the wife, it was not liable to attachment in execution of the decree against the husband. That decision was subjected to a further appeal under Cl. 13, Letters Patent. It is to be noted that after that decision the Full Bench cases in 5 Rang 406[2] and 5 Rang 296[7] were decided before the hearing of the Letters Patent Appeal before Heald and Cunliffe JJ. in 5 Rang 443.[8] The decision in 5 Rang 296[7] which was subsequently overruled in 9 Rang 524,[9] was that in Burmese Buddhist law, in respect of the property of the marriage whether that property be the payin property of either party or lettetpwa property of the marriage, a Burmese Buddhist husband and wife were partners and all the property of the marriage, whether payin or lettetpwa, was partnership property, and that it was indivisible and indeterminate during the subsistence of the marriage. In the Letters Patent Appeal the learned Judges applying the decision in 5 Rang 296[7] reversed the judgment of Chari J. The question as to the applicability of the Burmese Buddhist law or the Chinese custo-

6. Tan Ma Shwe Zin v. Tan Ma Ngwe Zin, (1932) 19 A I R Rang 59 = 137 I C 211 = 10 Rang 97.

7. Ma Paing v. Maung Swe Hpaw, (1927) 14 A I R Rang 209 = 103 I C 568 = 5 Rang 296 (F B).

8. V. R. M. A. L. Chettyar Firm v. Man Han, (1927) 14 A I R Rang 299 = 105 I C 244 = 5 Rang 443.

9. N. A. V. R. Chettyar Firm v. Maung Than Daing, (1931) 18 A I R Rang 262 = 134 I C 1252=9 Rang 534 (S B).

mary law was however not considered, owing probably to the assumption that the Burmese Buddhist law was applicable. There is thus no sufficient authority either judicial or legislative to show that either the Chinese customary law or the Burmese Buddhist law should govern the question as to the respective interests of the Chinese Buddhist husband and the Burmese Buddhist wife in the property held by either or both.

In the result the question as to the division of property between the parties upon divorce in this case is to be decided according to justice, equity and good conscience under S. 13 (3), Burma Laws Act. The peculiar rule of the nissia and nissita under the Burmese Buddhist law and the peculiar rule of the wife's acquisition during marriage belonging to the husband under the Chinese Buddhist law will have to be ruled out in this case as not being just or equitable to both parties. For the same reason the presumption ordinarily applicable in the case of Burmese Buddhist couples under which property acquired through the labour or industry of one only of the couple during coverture is deemed to be jointly acquired property (hnapazon) of both must also be ruled out. The result of this process of elimination is that upon divorce between a Chinese Buddhist husband and a Burmese Buddhist wife: (1) each party takes the property which he or she brought to the marriage; (2) each party takes the property which he or she acquired during the coverture through his or her skill, labour or industry or by gift or inheritance to him or her alone and (3) (a) they share equally in the property which they have jointly acquired, such as property acquired through the joint labour or industry of both or by the employment of funds to which they have equally contributed or by jointly carrying on business; (b) where respective contributions to the funds employed in jointly acquiring property are unequal they share such property in the same proportions as their contributions; (c) debts incurred in jointly acquiring property or in jointly carrying on of business shall be borne in the same proportions as their respective shares of interest in the property or in the assets of the business. The decree of the trial Court is, accordingly, set aside and the case is remanded to the trial Court for disposal of the suit on the lines indicated above after the making of necessary inquiries. The appellant will obtain costs of this appeal ad valorem on the amount that may be decreed in her favour by the trial Court.

Mosely J.—I agree with the view of the law taken by my learned brother and in the order proposed by him. I had already held in Special Second Appeal No. 12 of 1937[10] that in the case of such a marriage the wife does not own half the husband's property during the continuance of the coverture.

N.S./R.K. *Case remanded.*

10. Ah Pein v. M. C. Deva, *Reported in* (1937) 24 A I R Rang 543=174 I C 390.

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BAGULEY J.

G. M. Eusoof — Appellant.

v.

S. V. S. T. Chettyar Firm — Respondent.

Special Second Appeal No. 61 of 1939, Decided on 3rd April 1939, from decree of Dist. Court, Insein, D/- 22nd December 1938.

Civil P. C. (1908), S. 2—Judgment — After passing preliminary decree, decree-holder filing application for final decree and judgment-debtor filing application for extension of time — Two applications heard together —On 8th May 1935, Court making diary note rejecting prayer for extension and ordering final decree to be drawn up — Diary note held amounted to judgment—Execution application filed on 25th June 1938 held time-barred.

A preliminary decree for sale was passed in a mortgage suit in 1934. Early in 1935, the Court had before it two applications, one by the judgment-debtor asking for more time to pay off the decretal amount and another by the decree-holder for a final decree for sale. The two applications were heard together and on 8th May 1935 the Judge recorded in the diary a note as follows: "No enlargement of time can be given: Draw up final decree as applied for by the decree-holder." The typed decree form which was filled up did not contain at the bottom the usual note "given under my hand and seal, this day" etc. The Judge signed that form on the reverse and put 29th June 1935 as the date of signature. On 25th June 1938 the decree-holder applied for the sale of the property :

Held that the diary note of 8th May 1935 was a judgment within the meaning of S. 2 and the decree which had no date of its own must by virtue of O. 20, R. 7 be held to be dated on the day on which the judgment was pronounced i. e., 8th May 1935 and hence the execution application of 25th June 1938 was time-barred : *A I R 1934 Mad 198, Expl. ; A I R 1930 Mad 20, held dissented ; A I R 1927 Bom 131, Ref.* [P 296 C 1, 2]

P. K. Basu — *for Appellant.*

Bharadvaj — *for Respondent.*

Judgment. — The facts in this case are simple, and the appeal is argued solely on a point of law. In Civil Regular 10 of 1934 of the Subdivisional Court of Insein the S. V. S. T. firm filed a suit on a mortgage. A preliminary decree for sale was passed on 24th August 1934. Early the next year, 1935, the Court had before it two applications, one filed by defendant 1 asking for more time in which to pay the decretal amount, and one filed by the S. V. S. T. firm asking for a final decree for sale. The two applications were heard together, and on 8th May 1935 the Judge recorded in the diary the following note: "No enlargement of time can be given. . . Draw up final decree as applied for by the decree-holder".

A final decree for sale was drawn up and signed. Apparently the Court had no printed decree form; so a form was typed out and filled up. Whoever typed it did not put in the usual note at the bottom. "Given under my hand and the Seal of this Court this . . day of . . 19 ."; but at the bottom of the reverse is merely the signature of the Judge with the words "Subdivisional Judge, Insein, 29th June 1935." On 25th June 1938, the decree-holder applied for sale of the mortgaged property, and was met with the objection that the final decree was passed on 8th May 1935, more than three years before the date of the application for sale. The Subdivisional Court held that the application was time-barred. On appeal, the learned District Judge allowed the appeal, holding that the date of the decree must be regarded as 29th June 1935, the date on which it was signed. The learned District Judge relied upon the case in 57 Mad 437.[1] This case was relied upon by the appellant before me, which shows, I think, there is room for misunderstanding with regard to it, and the cause of this misunderstanding is, in my opinion, quite clear. It is the use of the word "order" in three separate and distinct senses. After the headnotes, if we turn to p. 438, on the first line, we see the case referred to as an "appeal against the order of the Court of the Subordinate Judge." It is quite obvious the word "order" here in line 1 must be "order" as defined in S. 2, Civil P. C. "Order" means the formal expression of any decision of a Civil Court which is not a decree. Under the Civil Procedure Code the only things that can be appealed against are orders and decrees. Going down the page, on line 8, we find: "The order of the Court was delivered by Sundaram Chetti J." Here we get "order" clearly in a different sense. The word "order" here must mean appellate judgment, or judgment in appeal. On line 11 we come across the word "order" in the sense of one of the divisions of Sch. 1, Civil P. C. Three lines later we find: "The order stands in the place of the judgment;" so here we go back to the meaning used in line 8. Lower down we have a reference to an order directing the drawing up of a final decree, which seems really to be a fourth meaning, the word 'order' there meaning a direction. It is necessary therefore to be very careful as to what meaning the word has on each particular occasion when it is used. The learned District Judge speaks of the order made by the Judge in the case diary on 8th May 1935, the passage which I have referred to, as not being a judgment. He says he has no hesitation in saying that that order was not a judgment, and was merely an order as distinguished from a judgment. I gather from this that he was of the opinion that it was not a judgment, but whether he meant it was an order as defined in S. 2, Civil P. C., or whether it was merely a direction to one of his clerks, I am not quite sure. It cannot, I think, possibly be an order as defined in S. 2, because that definition says that an order is a formal expression of any decision of a Civil Court and this diary note is certainly not a formal expression of anything. It is a direction to a clerk so far as it can in any way be said to be an order.

When the Judge had these two applications before him, he had got to dispose of them both, by rejecting one or allowing one, wholly or in part. If he rejected the application for extension of time and allowed the application for a final decree for sale then the formal expression of his decision would come out in the form of a final decree for sale and there would be no order as defined by S. 2 at all. S. 2 defines a judgment as the statement given by the Judge of the grounds of a decree or order. As I understand this note the reason for which he decides to pass a final decree was that he was not disposed to give any enlargement of time, the indulgence that defendant 1 asked for. The preliminary mortgage decree having been passed, if no extension of time was allowed and the decree-holder asked for a final decree for sale, the final decree for sale would issue.

1. Ramachandrarao v. Rattayya, (1934) 21 A I R Mad 198 = 148 I C 134 = 57 Mad 437 = 66 M L J 178.

The plaintiffs' right to apply for a final decree for sale arises from the preliminary decree for sale, and I am unable to see what the diary note can be except a judgment, which forms the basis of the final decree for sale because it gives the reason—very perfunctorily and incompletely, but still the reason—for allowing the decree-holder's prayer for a final decree for sale. I have been referred to 53 Mad 155.[2] This was referred to in 57 Mad 437[1] and it would appear dissented from. In any event it is a ruling of a single Judge only; so far as I understand it, in this case there had been a preliminary mortgage decree and an application for a final decree for sale which was objected to by the judgment-debtors. The Subordinate Judge directed the final decree to be drawn up, and the learned Judge appears to have found that this "provisional order" could be appealed against in a miscellaneous appeal. With respect in the ordinary way this would not be a formal expression of the decision of a Civil Court; the formal expression of the Court would come out in the final decree itself, and if the direction to draw up a final decree was regarded as formal order, it is not one of the orders appealable against under O. 43, Civil P. C.

I have been referred to some other cases which are not of much help because they date from a time when there was no such thing as a final decree for sale. Its place was taken by what was known as an 'order absolute' under the Transfer of Property Act. There is one case, however, 51 Bom 125,[3] which is of interest. That was a case in which there was a preliminary mortgage decree, and application was made for the final decree for sale. The Court wrote: "the defendant does not appear. Decree for sale made absolute," but, as a matter of fact, no final decree was ever formally drawn up. The Court however decided that it was really only a formal defect, and acted as though a final decree for sale had been passed on the day that the direction for it to be passed was made. This, I take it, must have been done because the provisions of O. 20, R. 7, say that a decree shall bear the date of the day on which judgment is pronounced. In my opinion the diary note of 8th May must be regarded as a judgment. The decree which has no date of its own must, by virtue of O. 20, R. 7, be held to be dated on the day on which judgment was pronounced, i. e. 8th May 1935, and this being so, the application for execution was time-barred. I set aside the decree of the lower Appellate Court, and restore that of the trial Court. Respondent 1 shall bear the costs throughout; advocate's fee three gold mohurs.

N.S./R.K. *Decree set aside.*

2. Ranga Raju v. Ethirajammal, (1930) 17 A I R Mad 20=124 I C 303=53 Mad 155=57 MLJ 718.

3. Chhaganlal Sakarlal v. Jayaram Deoraj, (1927) 14 A I R Bom 131=100 I C 956 = 51 Bom 125=29 Bom L R 107.

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ROBERTS C. J. AND DUNKLEY J.

Maung Maung and another — *Judgment-debtors* — Appellants.

v.

V.V. R. Chettyar Firm—*Decree-holders* — Respondents.

Special Second Appeal No. 47 of 1939, Decided on 17th May 1939, against decree of Dist. Court, Thaton, D/- 24th November 1938.

(a) Execution—Limitation—Plea of—Execution application not fructified but withdrawn and dismissed—Judgment-debtor is not barred by principles of res judicata or estoppel from raising question of limitation at later stage.

Orders in execution proceedings are binding upon the parties thereto on the principles analogous to those of res judicata or estoppel : *6 All 269 and 8 Cal 51, Rel. on.* [P 297 C 1]

But where no objection to execution is taken and the application for execution does not fructify but is withdrawn and dismissed, no order for execution having been made the judgment-debtor is not debarred by principles of estoppel or res judicata from raising the question of limitation at a later stage: *A I R 1939 Rang 245 and A I R 1936 All 21 (F B), Rel. on; A I R 1918 Mad 1167 Explained ; 35 Cal 1060 and 10 W R 8 (F B), Ref.* [P 297 C 2 ; P 298 C 1]

(b) Limitation Act (1908), Art. 182 (5) — Application—Plaint in suit under O. 21, R. 63, Civil P. C., is not application under Art. 182 (5)—Nor is such suit application for execution to proper Court.

A suit is a proceeding which is instituted by the presentation of a plaint and is in its nature different from an application under the Limitation Act : *A I R 1933 P C 63, Rel. on.* [P 298 C 1]

The application which is to save limitation under Article 182 (5) must be made to the proper Court for execution and does not include a suit to have an order in claim case set aside : *17 Cal 268, Ref.* [P 298 C 2]

A suit under O. 21, R. 63, Civil P. C., cannot keep the execution proceedings pending when there has been a definite order of the executing Court dismissing the execution application. In such a case if the decree-holder succeeds in the suit, he will have to file a fresh application for execution and re-attach the property. Therefore a plaint in such a suit cannot be treated as an application

within the meaning of Art. 182 (5): *A I R 1930 Oudh 468, Disting.* [P 299 C 2]

Nor can the filing of such a suit be treated as an application for execution to the proper Court when the filing of the suit in Court which has jurisdiction to execute the decree or in some other Court must depend upon the fortuitous circumstance of the value of the attached property. [P 299 C 2]

U Kyaw (1) for U Kyaw Htoon — *for Appellants.*

M. A. Rauf — *for Respondent.*

Roberts C. J. — The respondents, the V. V. R. Chettyar firm, obtained a decree against the appellants, Maung Maung and Ma The Yin Mai, in the Subdivisional Court of Thaton on 22nd May 1931, for the sum of Rs. 1270. They made an application for execution, but the attachment was removed at the instance of a third party, who claimed the paddy land which had been attached as his own property; and the case was closed on 11th January 1932. On 1st July 1935 fresh execution proceedings were taken out, and the question of whether these proceedings were time-barred was never agitated: notices were issued directed to the appellants and were served on them, but the respondent firm discontinued the proceedings on 12th July 1935. A third application was made by the respondents on 28th June 1938. It is quite plain that the period of three years within which application must be made begins to run in the words of Art. 182 (5) from the date of the final order passed on an application made in accordance with law to the proper Court for execution or to take "some step-in-aid of execution of the decree or order." The learned Subdivisional Judge seems to have overlooked this provision in holding that the application was time-barred; and on appeal to the District Court this omission was rightly pointed out. But then there arises the further question as to whether the application made on 1st July 1935 was time-barred, or rather whether the appellants could contend that it was, and as it was whether once the respondents' remedy was barred by statute the decree could be revived against the judgment-debtors. The learned District Judge was of opinion that the present appellants (respondents in the Court below) could not raise the matter at that stage: it is from this decision that the present appellants have appealed. Now, it is perfectly true that their Lordships of the Privy Council have held that orders in execution proceedings are binding upon the parties thereto on principles analogous to those of res judicata, or of estoppel: 6 All 269[1] and 8 Cal 51.[2] But where no order for execution has been made the question of limitation appears to me to remain still open for determination.

The principle involved was considered in 40 Mad 1016.[3] In that case notice went to the sons of a deceased judgment-debtor to show cause why they should not be brought on the record as legal representatives of their father, a decree-holder having applied for execution by attachment and sale of properties in the respondents' possession: they did not appear and an order was made ex parte against them: it was held that they were not estopped from moving to set aside the attachment on the ground that the properties did not belong to the judgment-debtor. It was observed that the party who is sought to be affected by the bar of res judicata should have notice of the point which is to be decided against him and should have an opportunity of putting forward his contentions against such a decision. Again in 35 Cal 1060[4] it was pointed out that in 8 Cal 51[2] their Lordships of the Privy Council had declined to differ from a Full Bench decision, 10 W R 8,[5] in which it was held that the mere service of notice on the judgment-debtor to show cause why an execution should not proceed after the decree was barred was not a proceeding in execution merely because the judgment-debtor did not come in and oppose it. In 58 All 313[6] a Full Bench of the Allahabad High Court held that where no objection to execution is taken but the application for execution does not fructify, the judgment-debtor is not debarred by the principle of res judicata from raising the question of limitation later. The principles underlying these decisions have been applied in this High Court in 1939 R L R 152,[7] and I respectfully agree with the decision of my learned

1. Ram Kirpal v. Rup Kuari, (1884) 6 All 269 = 11 I A 37=4 Sar 489 (P C).
2. Mungal Pershad Dichit v. Grija Kant Lahiri, (1882) 8 Cal 51=8 I A 123 = 11 C L R 113= 4 Sar 249 (P C).
3. Subramania Ayyar v. Raja Rajeswara Sethupathi, (1918) 5 A I R Mad 1167=38 I C 627= 40 Mad 1016.
4. Umed Ali v. Abdul Karim, (1908) 35 Cal 1060 =8 C L J 193.
5. Bisseshur Mullick v. Mahatab Chunder, (1868) 10 W R 8=Beng L R Sup Vol 967 (F B).
6. Genda Lal v. Hazari Lal, (1936) 23 A I R All 21=160 I C 394=58 All 313=1935 A L J 1189 (F B).
7. Ma Tin v. Ko Ba Thet, (1939) 26 A I R Rang 245=1939 R L R 152.

brother in that case. There must be orders in the execution proceedings which bind the parties, before it can be said that the question of limitation has been finally disposed of; a mere application for execution which is withdrawn and dismissed does not fall within the principle of the decisions of their Lordships of the Privy Council to which I have referred. I have come to the conclusion therefore that there is no rule of estoppel nor application of the principle of res judicata which precluded the appellants here from raising the contention that the earlier application was time-barred.

Dr. Rauf urges that even if this is so the respondents filed a suit on 25th January 1932, for a declaration that certain properties were those of the judgment-debtor. This suit was not disposed of till January 1933, and it is contended that the second application for execution is thus saved from limitation since it was brought within the requisite period of three years, namely on 1st July 1935. In other words, he says that the plaint in this suit is an application made in accordance with law to the proper Court for execution, within the meaning of Art. 182 (5). He cites 6 Luck 234[8] as an authority for the proposition that a plaint in such a declaratory suit can be treated as an application under Art. 182 (5). Now the Chief Court of Oudh seems to be alone in taking this view: on the facts before them they held that the effect of the suit was to keep the execution proceedings pending till the suit was decided. Even though the application in execution proceedings was ordered to be "filed" they held that this was not a final decision in respect of it. In the present case however, the execution proceedings had been brought to an end at the instance of the decree-holder himself on 11th January 1932. They were not "pending" when the suit was filed on 25th January: on the contrary the application for execution had been dismissed. Apart from this, S. 2, Limitation Act, declares that "suit" does not include an appeal or an application. A "suit" is a proceeding which is instituted by the presentation of a plaint and is in its nature different from an "application made" under the Limitation Act: *see* 54 All 1067.[9] Again the application which is to save limitation under Art. 182 (5) must be made "to the proper Court for execution." Now if a suit is brought for a declaration under O. 21, R. 63, the extent of the Court's jurisdiction will be the governing factor in deciding whether to bring it in the same Court as that which had cognizance of the execution proceedings; it will be a matter of chance whether it is brought in the proper Court for execution or not. I cannot therefore hold that such a suit should be treated as an application under Art. 182 (5) and in the circumstances of the present case I am satisfied that the respondent's contention is of no weight and that this appeal ought to be allowed. I concur with the order proposed by my learned brother with regard to costs.

Dunkley J.—The final order passed on Execution Application No. 63 of 1931 was passed on 11th January 1932, and it was to the effect that the application was dismissed at the request of the advocate for the decree-holder. The next application was Execution Application No. 42 of 1935, which was filed on 1st July 1935. Consequently, on the face of it, this application was time-barred. Objection on this ground was not taken at the time by the judgment-debtors, who did not appear. In fact, the record of Execution Application No. 42 of 1935 shows that all that was done on that application was to issue notices to the judgment-debtors, and on the day fixed for the return of these notices, the advocate for the decree-holder asked that the case might be closed and it was closed at his request. The objection that execution of the decree is barred by limitation has been taken by the judgment-debtors in the third application for execution No. 25 of 1938 and the learned District Judge on first appeal has correctly appreciated that the question for decision is the application of the principle of res judicata to execution proceedings. I have recently dealt with this question in 1939 R L R 152[7] the report of which was not available to the learned District Judge, and the arguments which we have heard in the present appeal have served to convince me of the correctness of my judgment in that case. I relied mainly on the decision of a Full Bench of the Allahabad High Court in 58 All 313.[6] Part of the headnote of the report of that case reads as follows:

If the judgment-debtor does not appear and offer any objection, and the Court had issued notice on the supposition that the application for execution

8. Hasan Shah v. Mohamed Amir Mirza, (1930) 17 A I R Oudh 468=128 I C 728=7 O W N 887=6 Luck 234.

9. Hansraj Gupta v. Dehra Dun Electric Tramway Co. Ltd., (1933) 20 A I R P C 63=142 I C 7=60 I A 13=54 All 1067 (P C).

was in time, no occasion arises for the Court to enter upon an inquiry as to whether the application is or is not barred by time. A mere order that the decree should be executed, which under O. 21, R. 23 (1), has to be automatic, cannot be regarded as a definite adjudication, as between the decree-holder and the judgment-debtor, of any objection which might have been raised if the judgment-debtor had appeared, so as to operate as a bar by implication at all subsequent stages of the proceeding. If the application does not fructify and is struck off, there is no bar of res judicata against the judgment-debtor. If, on the other hand, some further step is taken, which amounts to the application for execution fructifying, so as to become analogous to a suit being decreed, then the judgment-debtor would be barred by the principle of res judicata from raising the question subsequently.

Now in Application No. 42 of 1935, even if the judgment-debtors had appeared in response to the notices, they would have had no opportunity of raising an objection because on the day fixed for their appearance the application was withdrawn by the decree-holder. Hence the principle of res judicata has no application to the present matter and it is open to the judgment-debtors to object to execution on the ground that it is barred by limitation. For the decree-holder it is argued that Execution Application No. 42 of 1935 was made within time and for this purpose reference is made to Suit No. 8 of 1932 of the Sub-divisional Court of Thaton. This was a suit under the provisions of O. 21, R. 63, Civil P. C., which was brought by the decree-holder after the attachment in Execution Application No. 63 of 1931 had been removed and the execution application had been dismissed. The plaint was filed on 25th January 1932 and the suit was finally decided on 12th January 1933. The argument is that a plaint in a suit under O. 21, Rule 63, is an application to take a step-in-aid of execution of the decree within Cl. 5 of Art. 182, Limitation Act, and that if the plaint is filed in the proper Court for execution then such a suit satisfies completely the conditions of Cl. 5 of Art. 182, so that the date of the final judgment in the suit forms a fresh starting point for the running of time under that clause. Reliance is placed on the case in 6 Luck 234,[8] but that case is readily distinguishable because the ratio decidendi of the learned Judges is to be found at the close of their judgment, where it is stated:

> We are of opinion that the effect of such a suit (under O. 21, R. 63) is to keep the execution proceedings which have given rise to it pending till the decision of the suit. If the suit succeeds, proceedings continue. If the suit fails, the proceedings fail simultaneously. The order cancelling or maintaining an attachment is liable to be affected by the result of the suit. This is clear from the terms of R. 63 itself. If that is so, it follows that an order cancelling or maintaining an attachment becomes final only on the date of the disposal of the suit. In this particular case what the Court did was that it ordered the application to be "filed." This we are unable to construe as a final decision of the application.

Consequently, what the learned Judges really held was that there was no "final order" on the execution application until the suit under O. 21, R. 63 had been decided. With the greatest respect, that was undoubtedly true in the case before them; but if this is to be taken as a general proposition of law applicable in every instance in which a suit under O. 21, R. 63 is filed, then, in my opinion, it is too broadly stated. A suit under O. 21, R. 63 cannot keep the execution proceedings pending when there has been a definite order of the executing Court dismissing the execution application; in such a case, if the decree-holder succeeds in the suit he will have to file a fresh application for execution and re-attach the property. In the present case, Execution Application No. 63 of 1931 was dismissed by the Court at the request of the decree-holder. I am prepared to concede that a suit under O. 21, R. 63, is a step-in-aid of execution, but, with the greatest respect, I am unable to agree that a plaint can be treated as an application, within the meaning of Cl. 5 of Art. 182. This construction appears to me to be contrary to the express provisions of the Limitation Act, Sec. 2, sub-s. (10) of which enacts that in the Act, unless there is anything repugnant in the subject or context, "suit" does not include an appeal or an application. A suit means a civil proceeding instituted by the presentation of a plaint: 54 All 1067[9] at p. 1074. Nor am I able to hold that the filing of such a suit can be an application to the proper Court for execution when the filing of the suit in the Court which has jurisdiction to execute the decree or in some other Court must depend upon the fortuitous circumstance of the value of the attached property. In 17 Cal 268[10] a Bench of the Calcutta High Court held that Cl. 4 of Art. 179, Limitation Act of 1877 (now Cl. 5 of Art. 182) contemplates an application made in the course of execution to the Court whose duty it was to execute the decree, and cannot be taken to include a suit to have an order in a claim case set

10. Raghunandun Pershad v. Bhugoo Lall, (1890) 17 Cal 268.

aside. With all due respect, this is, in my opinion, the correct interpretation of the law. Hence execution of the decree obtained by the respondent against the appellants in Suit No. 23 of 1931 of the Subdivisional Court of Thaton is barred by limitation. This appeal is therefore allowed, the judgment and decree of the District Court of Thaton in Civil Miscellaneous Appeal No. 65 of 1938 are set aside, and the order of the Subdivisional Court of Thaton, dated 11th August 1938, in Execution Application No. 25 of 1938, is restored. The respondent must pay the appellants' costs in all Courts; advocate's fee in this Court five gold mohurs.

N.S./R.K. *Appeal allowed.*

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* A. I. R. 1939 Rangoon 300

FULL BENCH

ROBERTS C. J., MYA BU AND MOSELY JJ.

Maung Hlay — Defendant — Applicant.

v.

U Ge — Respondent.

Civil Revn. No. 171 of 1938, Decided on 2nd January 1939, from order of Dist. Court, Thaton, in C. A. No. 10 of 1938.

*** (a) Civil P. C. (1908), O. 23, R. 3, S. 89 and Sch. 2—Scope of O. 23, R. 3—Meaning of 'adjustment' — Award in arbitration without intervention of Court during pending suit—One party disputing it — Award is not adjustment by lawful agreement or compromise within O. 23, R. 3 :** *9 Rang 39=A I R 1931 Rang 58 =131 I C 57, Overruled.*

It is entirely wrong to import into the meaning of words used in O. 23, R. 3, some connotation which is at variance with the provisions of S. 89 or Sch. 2. O. 23, R. 3 deals with adjustment by compromise and not with compromise merely. Adjustment means settlement and the harmonizing of disputes and where there exists no settlement and no harmony the dispute cannot be said to have been adjusted by lawful agreement or compromise. [P 303 C 2]

A party to a suit setting up an award by arbitration out of Court must satisfy the Court that there has been an adjustment by lawful agreement which entitles him to ask that the suit should be stopped and a decree passed in terms thereof. The Court must then decide on the general principles of the law of contract whether or not there has been such an adjustment. Where, subsequent to the making of the award, it has been shown that the parties themselves treated it as a concluded adjustment by agreement within the meaning of O. 23, R. 3, then the Order applies. It matters not how the parties came to terms provided a genuine compromise of their dispute has been reached. [P 301 C 2]

Where therefore an award expressed to be made in an arbitration without the intervention of Court during the pendency of a suit is disputed and challenged by one of the parties, such award is not an adjustment by lawful agreement or compromise within the meaning of O. 23, R. 3 : *9 Rang 39=A I R 1931 Rang 58=131 I C 57,* **Overruled;** *Case law discussed.* [P 301 C 1, 2; P 304 C 2]

(b) Civil P. C. (1908), S. 89 — Scope—S. 89 is exhaustive.

Section 89 is intended to be exhaustive in all cases in which the parties choose of their own free will to adopt a reference to arbitration as the method of settling their disputes. The Section does not forbid them to adjust their differences by recourse to third party. But unless the procedure prescribed in Sch. 2 is followed there can be no award enforcible thereunder in the strict sense of the term : *A I R 1927 Bom 565 (F B), Dissent.* [P 302 C 2; P 303 C 1]

(c) Civil P. C. (1908), S. 89 — Words "any other law for the time being in force" do not include O. 23, R. 3.

The words "any other law for the time being in force" in S. 89 do not include O. 23, R. 3. They mean an enactment relating to arbitration and cannot be construed as meaning some other part of the Code itself : *A I R 1925 All 503, Ref.* [P 303 C 2]

(d) Civil P. C. (1908), O. 23, R. 3 — Agreement to proceed to arbitration is not "adjustment by any lawful agreement or compromise."

The agreement to proceed to arbitration is not an "adjustment by any lawful agreement or compromise" because it is an agreement to enter upon proceedings which are under the supervision of the Courts. It is not complete in itself, since the validity of the acts to be done and the methods by which they are done remain open to challenge in the Courts according to the rules laid down in Sch. 2 : *33 Bom 69, Rel. on.* [P 304 C 1]

Darwood—*for Applicant.*

E Maung—*for Respondent.*

Roberts C. J.—This is an application for revision of a judgment of the District Court of Thaton dismissing an appeal from the Subdivisional Court which passed a decree in the respondent's favour in the following circumstances: The appellant was prosecuted at the instance of the respondent for the theft of a buffalo, and he was convicted, but his conviction was set aside by the High Court after he had suffered three and a half months imprisonment. He thereupon brought an action for malicious prosecution against the respondent. In the course of that action the Court was informed that the parties had referred their case to arbitration without the intervention of the Court. It is agreed that the parties mutually consented to accept the award of a majority of the arbitrators, but when the award was made the defendant (applicant in the present revision) contested its validity. Upon application being made the Court filed the award as being an adjustment by lawful agreement or compromise, within the meaning of O. 23,

R. 3 and passed a decree in accordance therewith. It is clear that this was the only course open to the Subdivisional Judge having regard to the decision in 9 Rang 39[1] by a Bench of this Court. I had occasion to remark in 14 Rang 766[2] that the time might come when that case would have to be considered by a Full Bench of this Court and that time has now arrived. The question is whether an award expressed to be made in an arbitration without the intervention of the Court in a pending suit is a compromise within the meaning of the Order to which I have just referred. O. 23, R. 3 runs as follows :

> Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit.

By S. 89 (1) of the Code :

> Save in so far as is otherwise provided by the Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration, whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in Sch. 2.

As Mukerji J. pointed out in 47 All 637[3] exhaustive provision has been made in Sch. 2 for every kind of arbitration. The first 16 paragraphs deal with cases in which the parties to a suit apply to the Court for an order of reference; paras. 17 to 19 deal with cases in which the parties to a dispute which has not been crystallized into a suit agree to make a reference to arbitration and application is made that such reference should be under the supervision of the Court; and the remainder of the Schedule beginning with para. 20, deals with references to arbitration without the intervention of a Court. The mode by which the award may be enforced is laid down in para. 20; any person interested therein may apply to any Court having jurisdiction over the subject-matter of the award that the award be filed in Court. This application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants. The provisions of the schedule are perfectly clear. No attempt has been made to comply with them. In 40 Bom 386[4] action had been brought for the price of goods sold and delivered to the defendant. During the pendency of the suit and without the intervention of the Court the parties agreed to refer the matters in dispute to arbitration and an award was made which was disputed by the defendant on the ground that the arbitrators exceeded their jurisdiction and that the defendant was not given a proper opportunity of calling witnesses: the plaintiff sought a decree on the award as an adjustment of the suit by agreement within the meaning of O. 23, R. 3; Macleod J. refused to grant a decree under this order but treated the application as one under para. 21 of Sch. 2. In 45 Bom 245[5] a Bench of the same Court overruled this decision and the same learned Judge, then Chief Justice, said he was satisfied he was wrong in treating the application in the way he did. At p. 263 he said :

> It all comes to this; that a party to a suit setting up an award by arbitration out of Court must satisfy the Court that there has been an adjustment by lawful agreement which entitles him to ask that the suit should be stopped and a decree passed in terms thereof. The Court must then decide on the general principles of the law of contract whether or not there has been such an adjustment.

With respect, I agree with this part of his judgment, and that is exactly what was held by this Court in 14 Rang 766.[2] Where, subsequent to the making of the award, it has been shown that the parties themselves treated it as a concluded adjustment by agreement within the meaning of O. 23, R. 3, then the Order applies. It matters not how the parties came to terms provided a genuine compromise of their dispute has been reached. This principle is by no means a new one and was accepted in 6 L B R 55[6] by a Bench of the Chief Court of Lower Burma. It is to be observed in passing that Macleod C. J. had disagreed with the dictum of Davar J. in 37 Bom 639[7]

1. Laljee Serang v. Chander Bhan, (1931) 18 A I R Rang 58=131 I C 57=9 Rang 39.
2. Alagappa Chettyar v. Chettyar Firm, (1937) 24 A I R Rang 287=170 I C 434=14 Rang 766.
3. Gajendra Singh v. Durga Kumari, (1925) 12 A I R All 503=88 I C 768=47 All 637=23 A L J 561.
4. Shavakshaw Dinshaw v. Tyab Haji Ayub, (1916) 3 A I R Bom 125=37 I C 140=40 Bom 386=18 Bom L R 559.
5. Manilal Motilal v. Gokaldas Rawji, (1921) 8 A I R Bom 310=59 I C 53=22 Bom L R 1048=45 Bom 245.
6. K. T. T. Shanmugam Chetty v. Annamalay Chetty, (1912) 6 L B R 55=15 I C 959=5 Bur L T 125.
7. Harakbhai v. Janmabai, (1912) 37 Bom 639=19 I C 786=15 Bom L R 340.

that O. 23, R. 3 came within the definition of "any other law for the time being in force" contained in S. 89, Civil P. C. The learned Chief Justice added :

> It is only by treating an agreement to refer, combined with the award, as an adjustment by lawful agreement or compromise, that arbitration proceedings can possibly be brought within the scope of that Rule.

In 49 Cal 608[8] Rankin J. dealt with the precise point now before us. In that case there was an agreement to refer to arbitration without the intervention of the Court in a suit which was already pending. The order of reference is contained in the report and contains an agreement to abide by the decision of the arbitrators. As to an allegation that only one of the defendants signed the submission the learned Judge expressly refrained from saying anything; but he held that there was no provision except in Sch. 2 for a submission to arbitration of matters in difference in a suit, and disagreed with the contention that it was open to the parties to put aside the provision thus made and to have an award behind the back of the Court and without its order. I respectfully agree with his observations that

> informal and uncontrolled arbitrations between the parties to a suit leading up to litigation upon the bare issues as to whether there is in fact a valid adjustment are the very things from which Sch. 2 was meant to deliver litigants.

In 54 Bom 197[9] it was held by a single Judge that an agreement to refer to arbitration matters in difference between the parties in a pending suit without the order of the Court under paras. 1 to 3 of Sch. 2 was illegal and could not be filed under para. 17. In 51 Bom 908[10] Amberson Marten C. J. had already considered (at p. 937) that the better view was that para. 20 did not apply to arbitrations in a pending suit. But this view did not lead him to the conclusion that there could be no room for the informal or uncontrolled arbitrations to which Rankin J. had referred. Adopting the definition of "compromise" in Ainsworth's Latin-English Dictionary as "a bond or engagement wherein two parties oblige themselves to stand to the arbitration of award of the umpire" he considered that such an award could form the basis of a decree under O. 23, R. 3, Civil P. C. The parties to a dispute are never, of course, obliged to go to arbitration, and Sch. 2 only says they "may" do so. Within the compass of Sch. 2, as it appears to me, lie all the rules relating to arbitration, subject to the Proviso contained in S. 89 of the Code. If the parties to a dispute purport to go to arbitration but ignore these rules, it seems to me that there can be no award of which the Courts will take notice as such. Whether by some means, other than the methods of arbitration which are recognized by the Courts, they arrive at a lawful agreement or compromise which adjust their suit wholly or in part does not depend upon any matter relating to arbitration or award, but depends upon a plain issue of fact, independent of any reference to an informal or uncontrolled arbitration. In order to support the conclusion at which he arrived, Marten C. J. referred to the judgment of Sir Lawrence Jenkins in 26 Bom 76.[11] But this was under the old Code which contained no such rule as has been enacted in S. 89 of the present Code, and Sir Lawrence Jenkins expressly said that he could find nothing in Ch. 37, that is of the old Code, which invalidated a proceeding not in accordance with its provisions. When dealing with S. 89, Marten C. J. said :

> I think however it is sufficient to give full force to the word 'shall' in Sch. 2 if one holds that Sch. 2 governs any particular case so far as applicable but that it is not intended to be exhaustive or to prevent parties resorting to arbitration in some manner different from that expressly provided for in Sch. 2.

I am unable to follow the argument that because reference to arbitration is permissive and not obligatory, a reference when made can be made outside the rules which have been carefully drawn up to cover, so far as can be seen, every class of arbitration and to ensure a proper supervision by the Court in each of them. I must respectfully dissent from his conclusion that S. 89 is not intended to be exhaustive in all cases in which the parties choose of their own free will to adopt a reference to arbitration as the method of settling their disputes. It is not that they are forbidden to adjust their difference by recourse to a third party; far from it. But unless the procedure prescribed in Sch. 2 is followed, there

8. Amar Chand Chamaria v. Banwari Lall, (1922) 9 A I R Cal 404=69 I C 808 = 49 Cal 608.

9. Dinkarrai v. Yeshvantrai, (1930) 17 A I R Bom 98=124 I C 119=54 Bom 197=31 Bom L R 1403.

10. Chanbasappa v. Basalingayya, (1927) 14 A I R Bom 565 = 105 I C 516 = 51 Bom 908 = 29 Bom L R 1254 (F B).

11. Pragdas v. Girdhurdas, (1902) 26 Bom 76 = 3 Bom L R 431.

can be no award enforceable thereunder in the strict sense of the term; nor can there be any adjustment of the dispute by lawful agreement by reason of a submission alone or unless the third party to whom they have recourse brings them in fact to an adjustment by lawful agreement. In such a case the introduction of language describing his intervention as that of an arbitrator is inaccurate and serves merely to confuse the issues. In 55 Cal 538[12] the earlier Calcutta decision was followed by a Bench, and is now settled in Bengal: *see* 62 Cal 229.[13] Similar decisions are to be found in 3 L L J 162[14] and 14 Pat 799.[15] In the last mentioned case the matter came before the Court by way of revision. It is clear that if a decree under O. 23, R. 3 cannot be made there was a want of jurisdiction in the Subdivisional Court to make it. Apart from the cases already mentioned, two important authorities were cited to us by Mr. Darwood who preferred in his argument to deal at once, rather than by way of reply, with every decision which could be found unfavourable to him. The first of these is 47 All 637,[3] but on careful perusal of the judgments it will be observed that it is by no means a strong authority for the contention of the respondent here. Walsh J., in one of the majority judgments, explained that he did not propose to consider the differences which had arisen in various cases cited from different High Courts with regard to the difficulties in applying R. 3, O. 23. His reason was that he was satisfied that the facts in the case brought it within the provision of the Code:

> The transaction proved before us seems to me to be an agreement, compromise and satisfaction of the whole of the subject-matter in appeal.

Whether he was right in reaching such a conclusion appears to me to be beside the point. Having arrived at it, he could ignore these differences. But Mukerji J. did not view in the same light and he proceeded to make a careful examination of the question of law which thereby became in his opinion a vital one. One of the questions which has arisen is whether the words "any other law for the time being in force" in S. 89, Civil P. C., can include O. 23, R. 3. I am firmly of opinion that they cannot. As Mukerji J. dealt with this matter amongst others exhaustively in the judgment referred to I am content to say first, that "any other law for the time being in force" must, in my opinion, mean an enactment relating to arbitration, as where in certain classes of agricultural disputes reference may be made by the application of some local enactment to the decision of the Collector for the final determination of matters in issue; secondly that in my opinion a reference in the Code to "any other law' cannot be construed to mean some other part of the Code itself; and thirdly, that it would have been easy for the Legislature, if recourse to O. 23, R. 3 in cases of arbitration had been intended, to include some words making this plain rather than deliberately to employ words which do not relate to arbitration at all and would appear to have no connexion with it, except by dint of meticulous research in the Latin dictionary. I do not see how a dispute can be said to have been adjusted when one of the parties thereto energetically denies that the adjustment is satisfactory. The rule deals with an adjustment by compromise and not with a compromise merely. In my opinion adjustment means settlement and the harmonizing of disputes, and where there is no settlement and no harmony a dispute cannot be said to have been adjusted by way of lawful agreement or compromise, or at all. It appears to me entirely wrong to import into the meaning of the words used in O. 23, R. 3 some connotation which is at variance with the provisions of S. 89 and of Sch. 2. I respectfully associate myself with the conclusions of law arrived at by Mukerji J. so far as they relate to the present application, as well as with those of Rankin J. to which I have already referred. The remaining case cited to us is that in 51 Mad 800.[16] A Full Bench in that case agreed with the meaning which had been given to the word "compromise" by Marten C. J. in the Bombay case. Phillips J. said:

> It is difficult to see on what principle parties who agree to accept a fixed sum in satisfaction of a claim can be said to compromise that claim, whereas if they agree to accept a sum which is to

12. Girimoni Dasi v. Tarini Charan, (1927) 14 A I R Cal 887=104 I C 360= 55 Cal 538=47 C L J 59=33 C W N 390.
13. Mahammad Mia v. Osman Ali, (1935) 22 A I R Cal 239=155 I C 915=62 Cal 229= 60 C L J 173=39 C W N 480.
14. Hari Prasad v. Mt. Soogni Devi, (1921) 8 A I R Lah 232=67 I C 123=3 L L J 162.
15. Bhimraj Kanai Lal Firm v. Munia Sethani, (1935) 22 A I R Pat 243= 156 I C 1050 = 14 Pat 799=16 P L T 280.
16. Subbaraju v. Venkataramaraju, (1928) 15 A I R Mad 1025 = 113 I C 632=51 Mad 800 =55 M L J 429 (F B).

be fixed by some one else that does not amount to a compromise.

Now the governing word in O. 23, R. 3, appears to me to be not "compromise" but "adjustment" and in the former instance given it is clear that the parties have adjusted their dispute; in the latter case if their agreement is merely a reference to arbitration then it appears to me that they must conform to the rules under which the Court will enforce awards. The agreement to proceed to arbitration is not an "adjustment by any lawful agreement or compromise" because it is an agreement to enter upon proceedings which are under the supervision of the Courts. It is not complete in itself, since the validity of the acts to be done and the methods by which they are done remain open to challenge in the Courts according to the rules laid down in Sch. 2. True, the parties may agree to accept the award of an arbitrator; but the Courts will refuse to enforce the award if his task is performed mala fide, as for instance if he takes a bribe or refuses to hear one of the parties. They keep a check upon the proceedings, and once the parties enter into such an agreement their method of enforcing the award is that which is laid down by Sch. 2 and none other. If they mutually agree to the terms of the award after it is made it may become an adjustment by lawful agreement; but if they do not, it cannot be so recorded. Thus, I concur with the observation of Beaman J. in 33 Bom 69[17] at page 74 that

> a mere agreement to refer a matter to arbitration cannot, logically and without unduly straining language, be fairly called an adjustment of a suit.

It would be unconscionable to say that parties to a dispute may make an agreement to accept as binding an award of an arbitrator, and then to afford to an honest party to such an agreement no remedy if he were defrauded by a corrupt bargain between the arbitrator and the other party. But it seems that the logical conclusion of what is contended for here would be to say that the Court is obliged to record such a corrupt bargain and to pass a decree in accordance therewith; and this upon the ground that the confidence reposed in the arbitrator by the party defrauded prevents him from saying that the matters in dispute have not been adjusted by lawful agreement or compromise. With these considerations in mind I pass to consider the case in 9 Rang 39[1] which in my opinion can no longer be regarded as good law and which must be overruled. It is somewhat unsatisfactory to be unable to learn from the report whether the parties had agreed to accept the award after it had been made and had thus by a lawful agreement arrived at an adjustment of their disputes. That this may have been so appears likely from a passage in the leading judgment of Cunliffe J. at p. 44:

> Quite apart from the interpretation of the language used in O. 23, R. 3, I should have thought also that the Court had an inherent power to confirm any reasonable agreement between the parties appearing before it.

The existence of an agreement arrived at after the award had been made would of course have enabled the Court to record it as an adjustment upon that basis alone. But the Court proceeded to consider not whether the award had been accepted by both parties, but whether, apart from its acceptance, it could be recorded and confirmed in the terms of a decree. In determining whether the words "any other law for the time being in force" could refer to an order under the Code itself having no express reference to arbitration, Cunliffe J. was content to observe that he knew of no other law to which these words could possibly be appropriate. I do not find it necessary to inquire more precisely whether such a law exists here, or may have existed at some time in some part of India. In my opinion the construction to be placed upon the words is not that some enactment must be found to fit them. In other respects my reasons for differing from the conclusions arrived at by this Bench have been sufficiently explained. I am therefore of opinion that this case must go back to the Subdivisional Judge with the instructions that in the light of these proceedings he has no jurisdiction to pass the decree under O. 23, R. 3 against the defendant; and the decree passed must accordingly be, and is, set aside, with costs ad valorem.

Mya Bu J. — I concur.

Mosely J. — I concur.

N.S./R.K. *Decree set aside. Case remanded.*

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17. Rukhanbai v. Adamji, (1909) 33 Bom 69 = 1 I C 622=10 Bom L R 366.

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FULL BENCH

ROBERTS C. J., MYA BU, BAGULEY, MOSELY AND BA U JJ.

A. R. L. P. Firm — Appellant.

v.

U Po Kyaing and another — Respondents.

Letters Patent Appeal No. 9 of 1938, Decided on 2nd February 1939, from judgment of Braund J. in S. A. No. 99 of 1938, D/- 17th August 1938.

(a) Burma Laws Act (13 of 1898), S. 13—Question as to effect of ordination or admission as rahan of Burmese Buddhist on properties in his ownership or possession is question regarding religious usage or institution.

The question whether a Burmese Buddhist by reason of his having become a rahan has renounced his worldly life and becomes automatically divested of all his property and relinquishes all title to the same, in other words, what is the effect produced by the ordination or admission as a rahan of Burmese Buddhist upon properties in his ownership or possession at the time is clearly a question regarding a religious usage or institution and Buddhist law will therefore form the rule of decision : *A I R 1929 Rang 354 (F B), Disting.* [P 306 C 1]

(b) Buddhist Law (Burmese)—Burmese Buddhist becoming rahan permanently — He is divested of all his property and relinquishes title to it *(Per Full Bench).*

According to the underlying principles of Vinaya, a Burmese Buddhist on his becoming rahan renounces his worldly life and if the ordination as rahan is not temporary but permanent, he becomes automatically divested of all his property and relinquishes all title to the same : *Case law reviewed.* [P 306 C 2]

(c) Buddhist Law (Burmese)—Rahan is not civilly dead — But he becomes ineligible to receive inheritance from his lay relations *(Obiter).*

It is inaccurate to describe a rahan as civilly dead. But his legal position is changed by ordination. He becomes ineligible to receive an inheritance from his lay relatives, and he becomes so because of the religious usages affecting monkhood: *A I R 1924 Rang 101, Dissent.* [P 307 C 1, 2]

(d) Buddhist Law (Burmese)—Re-acquisition by purchase or gift of property divested on ordination as rahan is not contemplated.

The rules of Vinaya do not contemplate the re-acquisition by purchase or gift of property which the rahan has been divested of, on his ordination as rahan. If the acquisition is made the matter is one for the notice of the ecclesiastical authorities and not of the Courts. [P 308 C 2]

(e) Buddhist Law (Burmese) — Question to candidate for ordination as rahan as to whether he had any debt—Untruthful answer to this question does not invalidate ordination.

It is true that the Vinaya texts expressly lay down that one of the questions to be put to a candidate for ordination as rahan is "have you no debts?" However, if an untruthful or misleading answer to such a question is given the subsequent ordination is not thereby invalidated. [P 309 C 1]

(f) Buddhist Law (Burmese) — Vinaya is ecclesiastical Code for Buddhist monks of Burma and has force of law.

What is contained in the Vinaya is the law laid down by Lord Buddha for the guidance of the members of the Sangha inasmuch as the breach of any of the rules is visited with punishment. From another point of view the rules contained in the Vinaya have the force of customary law inasmuch as they have become hallowed by practice and usage for over 2000 years. The Vinaya may therefore be termed the ecclesiastical Code for the Buddhist monks of Burma. [P 310 C 2 ; P 311 C 1]

(g) Contract Act (1872), S. 23—Word 'law' used in first clause means juridical law—'Law' as used in second clause means personal or customary law.

The word 'law' as used in cl. 1 of S. 23, means juridical law, that is, the law enacted by any competent Legislature and the word 'law' as used in cl. 2, means personal or customary law. According to Buddhist law, a rahan is forbidden by his personal law, that is the Vinaya, to engage in trade. Therefore to permit a rahan to buy and sell property means enabling him to defeat his own personal law, and that is opposed to S. 23, Contract Act. [P 312 C 1]

E. Hay — *for Appellant.*

U E Maung — *for Respondents.*

Roberts C. J.—This appeal raises an important point of Burmese Buddhist law. One U Po Saw, otherwise called U Po Soe, with his wife Ma Tok and his son Maung Tun, mortgaged certain immovable properties, with which this appeal is not immediately concerned, to the appellants in July 1932. In February 1934 U Po Saw became a rahan and entered a Kyaungdaike. In July of the same year the appellants filed a mortgage suit, and having obtained a decree therein brought the properties to sale in execution. There was still a balance due to the appellants over and above the sale proceeds; they therefore obtained a personal decree against U Po Saw, his wife, son and daughter-in-law, in execution of which, they attached certain paddy land which may be shortly described as "Holding No. 5-A." This holding had been purchased by the present respondents in May 1934, two months before the mortgage suit was filed, from Ma Tok and Maung Tun for good consideration, and there had been a properly executed and registered deed of sale. The vendors would have been the natural heirs of U Po Saw.

The purchasers were other creditors, and Ma Tok and Maung Tun having been adjudged insolvents on 1st July 1934, the transfer to the respondent-purchasers was impeached as a fraudulent preference but

those proceedings proved ineffectual, and the transfer was upheld. The appellants now say that U Po Saw has a good title to half of Holding No. 5A and the respondents contend that this is not so, because at the time of the transfer in May 1934, U Po Saw by reason of his having become a rahan had renounced his worldly life and became automatically divested of all his property and relinquished all title to the same. We have to consider whether this is indeed the effect produced by the ordination or admission as a rahan of a Burmese Buddhist.

By S. 13, Burma Laws Act, 1898, omitting all but material words, where in any suit or other proceeding in Burma it is necessary for the Court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, the Buddhist law in cases where the parties are Buddhists shall form the rule of decision except in so far as such law has by enactment been altered or abolished, or is opposed to any custom having the force of law. In the opinion of the learned Judge in second appeal the question to be decided was one of succession and therefore fell within this part of the Section. That may be so, but at all events it seems to me to be clearly a question regarding a religious usage or institution. In 7 Rang 677[1] at p. 684, Carr J. said:

> The question before us is whether a Buddhist monk is competent to contract or not, and in my view that is not 'a question regarding any religious usage or institution.'

The case I have cited, and to which it will be necessary to refer again, must be regarded as settled law on this point. But in the present appeal the question does not relate to the competency of a Buddhist monk to contract, but to the effect, if any, of his ordination upon properties in his ownership or possession at the time. That the Buddhist monkhood is a religious institution cannot be doubted. If a Buddhist monk's conduct raises a question regarding this institution, the Buddhist law, by which is meant the Burmese Buddhist law in this connexion, is recognized by S. 13, Burma Laws Act, as forming the rule of decision. But a sale is a pure matter of contract; and, when it has no reference to any religious usage or institution, questions arising out of it must be decided by reference to the Contract Act and to the ordinary civil law applicable to laymen and rahans alike. The civil laws of the State do not interfere with monks who choose to take part in worldly transactions; this is a matter for the discipline of the religious authorities; but where a matter affecting religious usage or institution is directly concerned the Civil Courts administer the Burmese Buddhist Law as the law of the land.

The question raised in the present appeal does not merely concern the conduct of a monk whilst he is a monk but relates directly to a religious usage and to the institution of monkhood. It asks whether something happens by operation of law because of religious usage, and whether the religious institution of monkhood can contemplate the entry into it of persons who are possessed of worldly goods or property. To answer this question it is necessary to look at the Buddhist law. The first case cited to us in support of the contention that on becoming a rahan a man thereby renounces all his property is that in (1897-1901) 2 U B R 54.[2] The decision is directly in point but the Judicial Commissioner discovered no text in the Vinaya or other authoritative compilations which expressly declared what became of a man's property when he embraced a religious life. He said however that the sacred books indicated this by clear enough implication; and held that upon ordination or admission as a rahan a man became automatically divested of his property.

It was subsequently pointed out in 7 Rang 677[1] at p. 695 that this earlier case introduced the idea that a Buddhist monk was *civiliter mortuus*, and Heald J. considered this idea mistaken, but he said nothing which disapproved of the actual decision. No doubt this idea of civil death goes too far, and is in conflict with the decision in 7 Rang 677.[1] It is also clearly established that a rahan is liable for the maintenance of his child after he becomes a rahan though his liability in this respect depends upon the application of the Criminal Procedure Code (S. 488): 4 U B R 138[3] and 11 Rang 226.[4] It was at one time held that there was nothing to prevent a monk from acquiring by inheritance property

1. U Pyinnya v. Maung Law, (1929) 16 A I R Rang 354=121 I C 705=7 Rang 677 (F B).

2. Ma Pwe v. Maung Myat Tha, (1897-1901) 2 U B R 54.

3. U Thiri v. Ma Pwa Yi, (1923) 10 A I R Rang 131=72 I C 368 = 4 U B R 138 = 24 Cr L J 368.

4. Maung Tin v. Ma Hmin, (1933) 20 A I R Rang 138=1933 Cr C 728=144 I C 187=34 Cr L J 815=11 Rang 226 (F B).

which he proceeded to devote to religious purposes: 2 Chan Toon's L C 235.[5] This was a case from Mandalay. But in 9 L B R 220[6] this view was dissented from by a Full Bench of five Judges. On p. 244 of the judgment it is said:

In the question referred to us it is assumed that a pongyi may inherit paddy land from his lay relatives and that he may accept a gift of such land. As regards gifts, for the reasons noted above it appears that there is nothing unlawful in the dedication of paddy land to a pongyi as a religious gift. But the case of inheritance is different and we are not prepared to hold that a pongyi can inherit from his lay relatives.

The judgment later proceeds:

If therefore land is allotted to a pongyi by his relatives as his share of the family inheritance and the pongyi accepts it in accordance with the kappiya method it can only be regarded as a religious gift to that pongyi.

The Buddhist monkhood is a mendicant order, and the only properties which a monk could originally possess were articles which fell within the category of the four requisites or resources—food, clothing, lodging and medicine, but the ancient texts recognize a vicarious possession on behalf of the rahan by a lay steward who is called kappiya and the existence of what has been termed the kappiya system is recognized by the Civil Courts. The kappiya may receive gifts offered to a monk after his ordination but he does not enter into possession of the property of a layman when the latter becomes a monk. When paddy land is given to a monk after ordination it is given for future requirements in order that the four requisites may be satisfied.

In 3 U B R 91[7] the Lower Burma decision was followed in Upper Burma, and in 4 U B R 159[8] it was held that a rahan cannot revive the right of inheritance which he would possess as a layman by renouncing his religious vows after the death of the relative from whom he could have inherited if he had not been a rahan. In 1 Rang 430,[9] Duckworth J. said that by becoming a monk a layman divested himself of all earthly ties of relationship and property and died a civil death. Though I respectfully agree with the observation of Heald J. that it is inaccurate to describe a rahan as civilly dead, it appears to be nonetheless true that his legal position is changed by ordination. He becomes ineligible to receive an inheritance from his lay relatives, and he becomes so because of the religious usages affecting monkhood. Formerly in 2 U B R 61[10] it was decided that he was prohibited from engaging in any monetary transactions and could not sue to redeem a mortgage, and in 5 Rang 626[11] that he was not competent to engage in the purchase of a house. In the latter case it was again said that a layman on entering the order dies a civil death and becomes divested of all his property possessed by him as a layman. These two cases were overruled by the decision in 7 Rang 677[1] for the reason that the conduct of a monk within his order does not necessarily involve a question of religious usage or institution and that unless and until it does so, the rules of the Vinaya do not form part of the law to be administered by the Civil Courts.

U E Maung, who has appeared for the respondents, urges that the reason, there is no express text in the Vinaya which says that a layman becomes automatically divested of his property on becoming ordained is because it was an elementary principle. There has been no serious contention to the contrary since the case in (1897-01) 2 U B R 54[2] in 1897. In the first Khandhaka of the Mahavagga, which relates to the admission to the order of Bhikkhus, under the sixth heading, para. 8, it is related that the Blessed One addressed Upaka the Agivaka in the following stanzas:

I have overcome all foes; I am all-wise; I am free from stains in every way; I have left everything; and have obtained emancipation by the destruction of desire.

Meeting the five Bhikkhus he addressed them as follows, para. 12:

I will teach you. To you I preach the doctrine. If you walk in the way I show you, you will, ere long, have penetrated to the truth, having yourselves known it and seen it face to face; and you will live in the possession of that highest goal of the holy life, for the sake of which noble youths fully give up the world and go forth into the houseless state.

In para. 17 the Bhikkhus are addressed as to "the two extremes which he who has given up the world ought to avoid." The story of Yasa, which follows, is that of the seventh venerable person to reach absolute

5. Ma Taik v. U Wiseinda, 2 Chan Toon's L C 235.
6. Shwe Ton v. Ton Lin, (1919) 6 A I R L B 81 =49 I C 317=9 L B R 220.
7. Maung Pwe v. U Inguya, (1918) 5 A I R U B 6=47 I C 681=3 U B R 91.
8. Maung Ni v. Maung Thet She, (1925) 12 AIR Rang 150=76 I C 161=4 U B R 159.
9. Ma Shwe The v. Maung Kan, (1924) 11 A I R Rang 101=76 I C 672=1 Rang 430.
10. U Tilawka v. Nga Shwe Kan, (1914) 1 A I R U B 39=29 I C 613=2 U B R 61.
11. U Teza v. Ma E Gywe, (1928) 15 A I R Rang 3=106 I C 201=5 Rang 626.

holiness as an Arahat. He is described as "leaving the world and going forth into the houseless state, and afterwards it is related that "the mother and the father and the former wife of the venerable Yasa offered food to the Blessed One and to him." The reference to the "former wife" here is of some account. When a Buddhist layman becomes a rahan his wife may take another husband after a lapse of seven days, but her first husband on casting aside his yellow robes may reclaim her even if he has entered and left the priesthood as often as seven times. It was held in (1893-1900) P J 611[12] that ordination does not bring about the complete severance of the married state in that if the rahan returns to the world and divests himself of his robes he is bound to maintain his former wife until she marries again or he re-enters the priesthood. But his status whilst he remains a rahan is inconsistent with a claim of relationship towards any woman. If a monk resorted to the wife whom he had formerly married for the purpose of intercourse with her, he would be guilty of a Paragika offence and would thereby cease to be a monk and would become ineligible for re-ordination. It is only when he leaves the religious institution of monkhood that his marital rights and liabilities revive. Thus, his ordination brings about by operation of law a change in status for the husband, and if she desires it, for his wife also.

Resuming the examination of texts which appear to show that those who were ordained became divested of their property, it will be seen that in the third Bhanavara the meeting of the Blessed One with Gatilas or ascetics wearing matted hair is recounted. On their ordination they flung their hair, their braids, their provisions, and articles for sacrifice into the river (para. 18). The fifth Bhanavara concludes with the rebuke of the Blessed One to a Bhikkhu who "embraced the religious life for his belly's sake" and gave rise to the address as follows :

I prescribe, O Bhikkus, that he who confers the upasampada ordination (on a Bhikkhu), tell him the four Resources :

The religious life has morsels of food given in alms for its resource. Thus you must endeavour to live all your life. Meals given to the Sangha, to certain persons, invitations, food distributed by ticket, meals given each fortnight, each uposatha day (i. e. the last day of each fortnight), or the first day of each fortnight, are extra allowances.

The religious life has the robe made of rags taken from a dust heap for its resource. Thus you must endeavour to live all your life. Linen, cotton, silk, woollen garments, coarse cloth, hempen cloth are extra allowances.

The religious life has dwelling at the foot of a tree for its resource. Thus you must endeavour to live all your life. Viharas, addhayogas, storied dwellings, attics, caves are extra allowances.

The last of the resources which I need not set out here relates to medicine. It is pointed out almost directly afterwards in the text that the nature of the resources should be told to the newly ordained Bhikkhus immediately after their ordination and not before: but it seems impossible to regard a layman as being ignorant of the sacred texts to the extent of being unaware of their existence. Village life throughout Burma has daily presented before it the spectacle of the mendicant rahans with their begging bowls; the nature of the life which they lead is well known, and the fact that many of the laity have been, at one time or another, rahans themselves ensures that the extent of their obligations is not a matter of esoteric but of widespread knowledge.

According to the Dhammathats the three kinds of heritable property belonging to rahans are (1) the alms bowl and robes, (2) the lahubhan and (3) the garubhan property. The latter is Sanghika property and not subject to partition amongst lay heirs, whereas lahubhan property is partible according to elaborate rules with which we need have no concern for the purposes of this case. But there is no provision for any property brought into the order by the rahan himself, because he could not bring any.

It has been contended that it would be wrong for the Courts to say that effect should be given to a religious usage which divests a man of his property on ordination, when at the same time there is no objection in law to his re-acquisition of it by purchase or gift on the day after he has been ordained. The answer to this objection is that the rules of the Vinaya do not contemplate such a purchase or gift; and, if it is made, the matter is one for the notice of the ecclesiastical authorities and not of the Courts. We have also been pressed to remember the fact that many persons become ordained for short periods only and revert to the life of laymen after a few weeks' religious seclusion. It must be clear therefore that we are dealing in the present appeal with a rahan who has

12. Ma Thin v. Maung Maung, (1893-1900) P J 611.

remained as such for a period of three years or more and that there is no evidence of any kind that he possesses the least intention to renew his contact with the outside world. Each case must be judged upon its merits and in the light of its special circumstances: in a particular instance there might be ample evidence that a candidate for ordination intended to be what is known as a dullaba rahan. The position of persons who become ordained whilst retaining an *animus revertendi* to their lay state may yet fall to be considered by the Courts; the evidence here is that there was a total renunciation of the lay status. In First Appeal No. 156 of 1935,[13] a Bench of this Court gave judicial recognition to the custom of assuming the yellow robe for a temporary period only as being widespread among the Buddhist community.

Mr. Hay has argued that U Po Saw never became a rahan at all because he was a debtor at the time of becoming ordained and the Vinaya texts expressly lay down that one of the questions to be put to a candidate for ordination is "Have you no debts?" This appears from the 76th heading to the admission of the order of Bhikkhus in Mahavagga. It seems however to be universally regarded that if an untruthful or misleading answer to such a question is given, the subsequent ordination is not thereby invalidated. No case has been cited to us in attempt to prove the contrary, and nothing appears from the texts to support it. It appears to me to be impossible to say that U Po Saw was not validly admitted to ordination and is not now a rahan at all. In my opinion at the time of his ordination he was incapable of retaining any further interest in his property, and after he had become ordained his former wife and son became the ostensible owners in possession. But in any event lapse of time would give implied consent to their sale to the respondents, as the learned District Judge has observed, and the sale took place before the filing of the mortgage suit in relation to other properties. Accordingly I hold that the respondents have acquired a good title to the property and I am of the opinion that this appeal ought to be dismissed with costs ad valorem.

Baguley J.—I agree.

Mosely J.—I agree.

Mya Bu J.—I agree that this appeal must be dismissed. As my Lord the Chief Justice has fully discussed the relevant judicial and textual authorities relating to the questions under consideration, I desire to add only a few general observations in support of the conclusions at which his Lordship has arrived and in which I concur. As the main question on which this appeal hinges is as to the effect of the entry by a Burman Buddhist into the Buddhist monkhood upon his legal status, it is a question of religious usage which must be decided according to the Buddhist law under S. 13, Burma Laws Act. The law pertaining to religious usages among Burman Buddhists is to be found in the Vinaya. It is true that there is no express text in the Vinaya which lays down that a layman becomes automatically divested of his property or severed from earthly ties on entering the Buddhist monkhood, but the underlying principle of the rules in the Vinaya leaves no room for doubt that the immediate effect of entry into monkhood or of ordination as a monk is renunciation of the worldly life involving an intentional severance from all earthly ties not only personal but also proprietary. It is impossible to conceive of a man so renouncing the world being still capable of carrying into monkhood with him the proprietary interests and personal relationships existing prior to such renunciation. Such an idea is manifestly opposed to the fundamental object of renunciation and of embarkation upon a life which is aimed at the ultimate annihilation of desire. Thus, it was pointed out in the Full Bench case in 9 L B R 220[6] at page 224 that

> the order is essentially an order of mendicants who have renounced the world and although they make no actual vow of poverty they divest themselves of all worldly possessions at the time of ordination . . . .

In that case it was also pointed out (at page 245) that it is

> inconsistent with a pongyi's personal status that he should inherit from his natural family with whom all ties of relationship have been annulled.

Whether a Buddhist monk is a person competent to contract within the meaning of S. 11, Contract Act, or whether an order under S. 488, Criminal P. C., can validly be passed against a member of the Buddhist monkhood are questions which are governed by considerations quite irrelevant to the question as to the effect of a man's entry into Buddhist monkhood. Normally, the renunciation of the world is permanent renunciation and the rules in the Vinaya

13. U On Kin v. Daw On Bwin, First Appeal No. 156 of 1935.

appear to me to be designed to deal with such renunciation. There have however been instances of men entering into monkhood for short periods such as a few weeks or months and there have also been instances of men who, having entered the priestly order in the ordinary way ostensibly for life, revert to the laity. The observations that I have made are not meant to cover cases of temporary renunciation of the world or questions which may arise as to the status of those who, having entered the monkhood ostensibly in the normal way, revert to the laity in social life, after such renunciation. These points do not arise in the present case. Confining my observations to the facts and circumstances of the present case I have no hesitation in holding that U Po Saw lost all his interest in or title to the property in dispute on his becoming a monk.

Ba U J.—The question for decision in this case is what effect the ordination of a Burman Buddhist as a rahan has on his property. Does he take it with him into the Order or does he divest himself of it on ordination? This question cannot be solved unless one knows what law must be applied. S. 13, Burma Laws Act, says inter alia that to questions relating to marriage, inheritance, succession, religious institution, or usage the Buddhist law shall be applied where the parties concerned are Buddhists. The Buddhist law as used therein is the law applicable to the Burman Buddhists. The Burman Buddhists are divided into two sections: one is the laity and the other is the Sangha. What is applicable to the one is not applicable to the other. One of the questions referred by a Full Bench of the late Chief Court to the Thathanabaing was:

> When a matter concerning rahans, which involves a dispute about property either between monks themselves or between monks on the one hand and laymen on the other, comes before an ecclesiastical tribunal, by what written authorities should the tribunal be guided?

After enumerating the number of the texts which an ecclesiastical tribunal would consult the Thathanabaing said:

> There is no precedent for the Thathanabaing in Council to recognize the authority of the Dhammathats. They are accustomed to decide according to the Vinaya: 9 L B R 220.[6]

It has however been said that the Vinaya contains mere rules of conduct imposed by Lord Buddha upon the members of the Order of Buddhist monks and that therefore it should not be confounded with the civil law which governs the secular relations of its inhabitants. Law as defined by Blackstone is a rule of action prescribed or dictated by some superior which an inferior is bound to obey: Book I, pp. 38 and 39. And Austin gives the definition as follows:

> A law is a command to a course of conduct: a command being the expression of a wish or desire conceived by a rational being that another rational being shall forbear, coupled with the expression of an intention in the former to inflict some evil upon the latter, in case he comply not with the wish. (Austin's Jurisprudence, Lectures I and V).

Considered in this light, what is contained in the Vinaya is the law laid down by Lord Buddha for the guidance of the members of the Sangha inasmuch as the breach of any of the rules is visited with punishment. One who infringes any of the rules is guilty of a sin. There are seven kinds of sin, namely (1) Parazikam; (2) Sanghadisara; (3) Thullaya; (4) Suddha pacittiya; (5) Nissaggi pacittiya; (6) Dukkata; and (7) Dubbhari.

One who commits murder or theft of property worth five ticals or more or one who indulges in sexual pleasure or professes to be possessed of supernatural powers is guilty of parazikam and ceases to be a rahan. By the commission of any other classes of sin the offender does not lose the character of a rahan. He must however confess his sin and also do penance in expiation therefor. If he does not do it, he is liable to be excommunicated from the sangha. In the Ninth Khandaka, Sacred Books of the East, Vol. 20, p. 299, the following text appears:

> "The night, Lord, is far spent. The first watch is passing away. For a long time has the Bhikkusamgha been seated here. Let my Lord the Blessed One recite to the Bhikkus the Patimokkha."
>
> When he had thus spoken, the Blessed One remained silent. And a second time when the second watch was passing away (he made the same request with the same result). And a third time, when the third watch had begun, and the dawn was breaking (he made the same request).
>
> "The assembly, Ananda, is not pure."
>
> Then the venerable Maha Moggallana thought, "what individual can the Blessed One be referring to in that he says, 'The assembly, Ananda, is not pure'." And the venerable Maha Moggallana considered the whole Bikkhu-samgha, penetrating their minds with his. Then the venerable Maha Moggallana perceived who was that individual,—evil in conduct, wicked in character, of impure and doubtful behaviour, not a Samana though he had taken the vows of one, not a religious student though he had taken the vows of one, foul within, full of cravings, a worthless creature,—who had taken his seat amongst the Bhikkhu-samgha. On perceiving which it was, he went up to that individual and said to him, 'Arise, Sir! The Blessed One has found you out. There can be no communion between you and the Bhikkhus!'

At p. 303 of the same book, Lord Buddha said :

Just, O Bhikkhus, as the great ocean will not brook association with a dead corpse; but whatsoever dead corpse there be in the sea that will it—and quickly—draw to the shore and cast it out upon the dry land—just so, O Bhikkhus, if there be any individual evil in conduct, wicked in character, of impure and doubtful behaviour, not a Samana though he have taken the vows of one, not a religious student though he have taken the vows of one, foul within, full of cravings, a worthless creature ; with him will the Samgha brook no association, but quickly, on its meeting together, will it cast him out. And what though that man should himself be seated in the midst of the Bhikkhu-samgha, verily, both is he afar off from the Samgha and the Samgha from him. This is the third (of such qualities).

Looking again from another point of view, the rules contained in the Vinaya have the force of customary law inasmuch as they have become hallowed by practice and usage for over 2000 years. Ever since the introduction of Buddhism into Burma the questions affecting the Sangha in all their implications have been decided in accordance with the Vinaya. The Vinaya may therefore be termed the Ecclesiastical Code for the Buddhist monks of Burma. The rules of Vinaya as pointed out by Maung Kin J. in 9 L B R 220[6] at p. 232, are to be found in : (1) Vinaya Pitaka; (2) Vinaya Pali Atthagathas ; and (3) Vinaya Tikas.

Some of the texts of the Vinaya show by clear enough implication that a Burman Buddhist divests himself of his property on his ordination as a rahan. Besides the texts already referred to by my Lord the Chief Justice in his judgment, I may refer to the following: In Mahavagga, Sacred Books of the East, Vol. 17, p. 5, a youth named Sona Kolivisa addressed the Blessed One in the following manner when he asked to be ordained as a rahan : "As I understand the Dhamma proclaimed by the Blessed One, it is not easy to a person living as a layman to lead a wholly perfect and pure and altogether consummate life of holiness. What if I were to cut off my hair and beard, and to put on yellow robes and give up the world, and go forth into the houseless state ? I desire, Lord, to cut off my hair and beard, and to put on yellow robes, and to give up the world, and to go forth into the houseless state. May the Blessed One, Lord, ordain me !

Thus Sona Kolivisa received from the Blessed One the pabbagga and upasampada ordinations. And the venerable Sona, soon after his upasampada, dwelt in the Sitavana grove." After his ordination Sona went about unshod with the result that he received blisters on the soles of his feet. Thereupon the Lord Buddha said to him:

You, Sona, have been delicately nurtured. I enjoin upon you, Sona, the use of shoes with one lining.

Sona replied :

I have gone out from the world, Lord, into the houseless state, abandoning eighty cart-loads of gold, and a retinue of seven elephants. It will be said against me for this matter : 'Sona Kolivisa went out from the world into the houseless state, abandoning eighty cart-loads of gold, and a retinue of seven elephants ; but the very same man now accustoms himself to the use of shoes with a lining to them.' If the Blessed One will enjoin their use upon the order of Bhikkhus I will also use them. If the Blessed One will not enjoin their use upon the order of Bhikkhus, neither will I use them.

Then the Blessed One, on that occasion, having delivered a religious discourse, thus addressed the Bhikkhus :

I enjoin upon you, O Bhikkhus, the use of shoes with one lining to them. Doubly lined shoes, Bhikkhus, are not to be worn, nor trebly lined ones, nor shoes with many linings. Whosoever shall wear such, is guilty of a dukkata offence.

Next, the following discourse was delivered by Lord Buddha on the eve of his death. [After quoting the passage as given in Burmese his Lordship proceeded further.] The liberal translation of these passages is that Bhikkus are to inherit nothing but Dhamma (teaching) only. Besides Dhamma they can have robes, food, shelter (kyaung) and medicine, but they are not to keep store by them. These, of course, refer to the case of a man who joins the Order with the intention of remaining therein permanently. In the case of those who join the Order temporarily with the object of gaining merit different considerations will arise.

The learned counsel for the appellant however contends that if a member of the Sangha is liable under the Criminal Procedure Code to pay a maintenance allowance for his child it will be inconsistent to hold that he cannot take his property into the Order on his ordination. Next he urges that if a rahan can, according to the decision given by the Full Bench in 7 Rang 677[1] buy and sell property according to the civil law of the land, it will follow that a Burman Buddhist does not divest himself of his property on his ordination unless he divests himself of it in the manner laid down by the civil law of the land; in other words what the learned counsel contends is that a man, once an owner, will

always remain an owner of his property unless in the case of moveable property he parts with possession thereof and in the case of immovable property he transfers it by means of a registered deed.

Dealing with the first contention, the decision of this Court in 11 Rang 226[4] and that of the Additional Judicial Commissioner, Upper Burma, in 4 U B R 138[3] are not only correct according to the civil law of the land but also perfectly consistent with the Vinaya. No man can be ordained as a rahan as pointed out by Page C. J. in the first case when a maintenance order remains outstanding against him. Further a rahan ceases to be a rahan once he has sexual intercourse. As regards the second contention I must confess that it appears to my mind that there is a good deal of force in what the learned counsel for the appellant contends. Once it is held that the rules contained in the Vinaya have the force of law and that they are applicable to the members of the Sangha as their personal law, Sec. 23, Contract Act in my opinion comes into play at once. S. 23 provides :

> The consideration or object of an agreement is lawful, unless — it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral or opposed to public policy.
>
> In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

The qualification of the word "law" in cl. (2) by the adjective "any" is quite significant in view of the fact that the same word in cl. (1) is not qualified. In view of this qualification, I am of opinion that the word "law" as used in cl. (1) means juridical law, that is the law enacted by any competent Legislature and the word "law" as used in cl. (2) means personal or customary law. I am fortified in this view by what the learned authors of the Contract and Specific Relief Acts by Pollock and Mulla say in their books, Edn. 6, pp. 149, 154 and 155. The texts quoted by Mya Bu J. in 7 Rang 677[1] show clearly that a rahan is forbidden by his personal law, that is the Vinaya, to engage in trade. Therefore to permit a rahan to buy and sell property means, in my opinion, enabling him to defeat his own personal law, and that is opposed to S. 23, Contract Act. This much is admitted by Carr J. himself for the learned Judge says :

> If the rule of Vinaya under discussion is law I think it would have to be held that a monk is disqualified from contracting, but if it is not law there is no such disqualification.

If the decision of Rutledge C. J. and Maung Ba J. in 7 Rang 677[1] had been allowed to prevail, it would, with due respect to the other Judges sitting on that Full Bench have in my opinion the effect of consistency and of keeping the members of the Sangha to their proper mode of life. On a suitable occasion I hope that decision will be reconsidered. For the purpose of this case it cannot be taken as a guide as the question for decision in this case is entirely different from the question for decision in that case. For all these reasons I would dismiss the appeal with costs.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Rangoon 312

ROBERTS C. J. AND DUNKLEY J.

In the matter of Maung Tun Shin, Lower Grade Pleader, Budalin —
Respondent.

Civil Misc. Appln. No. 5 of 1939, Decided on 8th May 1939.

Legal Practitioner—Pleader endeavouring to appear on behalf of a person by whom he had never been instructed and attempting to justify his conduct by production of forged document — Charge if proved proper course would be to strike his name off the roll.

If a pleader is found guilty of endeavouring to appear on behalf of a person by whom he had never been instructed and seeks to justify his conduct by the production of a forged document, it would not be a matter for suspension for a month or a year: he would be totally unfitted to exercise the responsible duties of a pleader and would have to be struck off the rolls of pleaders forthwith. [P 313 C 1]

[The charge of deliberate forgery which was preferred was not made out, and therefore no action was taken.] [P 313 C 2]

G. D. Williams — *for Respondent.*

Roberts C. J.— This is an application in respect of the conduct of Maung Tun Shin, a lower grade pleader of Budalin, and it comes before us for such action as may be deemed to be necessary, under S. 13 (b) or (f), Legal Practitioners Act, the allegations being that the pleader in question has been guilty of fraudulent or grossly improper conduct in the discharge of his professional duties, or, alternatively, that he should be suspended or dismissed for some other reasonable cause : and the charge against him is that he made an

application to set aside the sale of a piece of land on behalf of Ma Pwa Hmi, never having been engaged by Ma Pwa Hmi nor authorized to do so. The allegation is a grave one, because the pleader in question is said to have justified his position by putting forward a document which, if the evidence against him is to be believed, is a forged document because it purports to be something which it is not, namely an authorization by the lady in question to retain his services for the purpose of this application. And the first thing that strikes us in relation to the whole matter is that, if the pleader were found guilty of endeavouring to appear on behalf of a person by whom he had never been instructed and sought to justify his conduct by the production of a forged document, it would not be a matter for suspension for a month or a year: he would be totally unfitted to exercise the responsible duties of a pleader and would have to be struck off the rolls of pleaders forthwith. It is therefore, as the learned District Judge has said, important to consider the matter carefully and to weigh the evidence and see that before such action as is contemplated by the Section might be taken in so gross a case as this, if the allegations are true, what is alleged against him should be proved beyond all reasonable doubt. But the learned District Judge, in confirming the report of the Township Judge, having prefaced his remarks with considerations of this kind concludes them by saying that the balance of evidence lies in favour of Ma Pwa Hmi, and in my opinion he has allowed himself to be drawn away from the real consideration of the degree of proof which is necessary by the observations at the conclusion of his judgment. There was clearly no doubt in his mind and he resolved it on what he thought was a preponderance of the evidence against the respondent and treated the matter finally, perhaps unconsciously, as though it were a civil case and not a matter involving a penal statute.

Now the whole question in this case is whether Ma Pwa Hmi authorized the respondent as he avers she did. He called a large number of witnesses who alleged that they were present at the time she gave instructions to him to appear for her, and he explains that he guided her to put a cross mark upon the document because she herself was illiterate and that the instructions were taken from her in that way. There is no suggestion that the nature of the matter was never explained to her or that she was alone with him: on the contrary, a number of villagers came forward to say that they saw the actual instructions given. Their evidence is supported very strongly by the fact that the old lady appeared twice in the Township Court when the case was called upon and appears to have answered her name. It is difficult to imagine that she left the place without ascertaining what was going on or why her attendance would be required again. She put in an appearance on the second occasion and Ma Pan Thu, her daughter, explains what happened; this witness says that they went there merely in order to bring about a mutation of names on a mortgage deed and this is Ma Pwa Hmi's story. But it is, to our minds, the strongest possible confirmation of the story of Maung Tun Shin, who armed himself with this document, that this old lady and her daughter should have been on two occasions to the Court when this matter was being investigated. It appears that on the second occasion they were told by the Township Judge's clerk to come again the following day, but on that day no one put in an appearance and the application was accordingly dismissed with costs. And there may be some ground for supposing that the old lady was annoyed with her pleader; it is therefore not difficult to see that she may very well have decided, when execution proceeded and her lands were sought to be attached in order to get these costs paid, that she would say that she never instructed Maung Tun Shin at all. That has been her story and she had been consistently angry that her land has been attached. We see nothing strange in that, nor in the fact that the respondent, when faced with the allegations against him, wanted to settle the case out of Court. It is enough to say that the charge of deliberate forgery which is preferred has not, in our opinion, been made out, and, on the evidence it ought to have been held by the learned Township Judge, or, alternatively, by the learned District Judge, that a charge of so grave a nature has not been proved. Accordingly, in our opinion, no action should be taken in this matter and the recommendations of the learned Township Judge and the learned District Judge respectively will not be carried into effect.

D.S./R.K. *Application dismissed.*

A. I. R. 1939 Rangoon 314

MOSELY J.

Maung Po Kwe — Respondent.

v.

Ma Pwa Shein — Applicant.

Criminal Revn. No. 141-B of 1939, Decided on 11th May 1939, from order of Township Magistrate (2), Kyunhla (Shwebo District), D/- 15th March 1939.

(a) Criminal P. C. (1898), S. 488 — Decree for restitution of conjugal rights in favour of husband does not affect his liability to maintain child.

Where a wife and child have obtained order for maintenance in their favour, subsequent decree of Civil Court for restitution of conjugal rights in favour of husband does not affect his liability to maintain the child : *6 L B R 127, Rel. on.* [P 314 C 2]

(b) Criminal P. C. (1898), S. 488—Order for maintenance in favour of wife — Subsequent decree for restitution of conjugal rights — Failure of husband to comply with terms of decree—Order for maintenance should not be cancelled—Suit for restitution simply to evade payment of allowance—Order for maintenance should not be cancelled.

Where subsequent to the order for maintenance in favour of wife the husband obtains the decree of the Civil Court for restitution of conjugal rights, that decree has to be considered and if the wife persists without cause in refusing to live with the husband then the order for maintenance is to be cancelled : *1 Bur L T 104 ; A I R 1916 L B 17 ; 23 Bom 484 and 27 All 483, Rel. on.* [P 314 C 2]

Of course, the party who obtains a decree for restitution must comply with the conditions of the decree, and failure to comply with those conditions would justify the Magistrate in holding that the order for maintenance should not be cancelled : *4 P R 1906 Cr, Rel. on.* [P 314 C 2]

Another case where the Magistrate would be justified in not cancelling the order for maintenance is where the suit for restitution is brought, not with a view to take the wife back, but simply to evade the payment of the allowance awarded. [P 314 C 2 ; P 315 C 1]

Shu Maung — *for Applicant.*

Order.—The applicant, Ma Pwa Shein, obtained an order for maintenance of herself at the rate of Rs. 3 a month and of her child at the rate of Re. 1 per month on 2nd January 1936. Immediately afterwards, on 25th January 1936, the respondent, her husband Maung Po Kwe, filed a suit for restitution of conjugal rights, which was resisted. Ma Pwa Shein had left the house because her husband brought a lesser wife to it. She was willing to go back to him on condition that she was provided with a separate house, and there was a decree accordingly for restitution of conjugal rights on condition that the plaintiff provided his wife with a separate house for dwelling in in their village, Tawbo. In January 1939, Ma Pwa Shein applied under S. 490, Criminal P. C., for arrears of maintenance for herself from 2nd January 1938 to 2nd January 1939, Rs. 36, and the child from 2nd August 1938, until the same date Rs. 5, Rs. 41 in all. Maung Po Kwe objected that he had obtained a decree for restitution of conjugal rights, but this objection was not gone into. In the order now under revision, recorded in the diary of 28th February 1939, the Magistrate held that the order of the Civil Court did not affect the order for maintenance, and directed Maung Po Kwe to pay the Rs. 41 in question and costs. This order, of course, was erroneous, and is contrary to S. 489 (2), Criminal P. C. The law reads as follows :

Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under S. 488 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

The order of the Civil Court does not affect the question of Maung Po Kwe's liability to maintain the child: 6 L B R 127.[1] As regards the order for maintenance of the wife, the law itself is clear enough. The decree of the Civil Court has to be considered, and if the wife persists without cause in refusing to live with the husband, then the order for maintenance is to be cancelled. There is no reported ruling of this Court on the subject. There are two judgments reported in unauthorized reports, 1 Bur L T 104[2] and 9 Bur L T 162,[3] which quotes 23 Bom 484[4] as authority. 27 All 483[5] is to the same effect. Of course, the party who obtains a decree for restitution must comply with the conditions of the decree, and failure to comply with those conditions would justify the Magistrate in holding that the order for maintenance should not be cancelled. A decision of the Chief Court of the Punjab to this effect is 4 Cr L J 73.[6]

Another case where the Magistrate would be justified in not cancelling the order for

1. Nan Saw Shwe v. Maung Hpone, (1912) 6 L B R 127=18 I C 658=14 Cr L J 98.
2. Maung Pan Aung v. Ma Hmwe Bon, (1907) 1 Bur L T 104.
3. Maung Tha U v. Maung Mya Khin, (1916) 3 A I R L B 17=35 I C 972=17 Cr L J 412=9 Bur L T 162.
4. In re Bulaki Das, (1899) 23 Bom 484.
5. Nur Muhammad v. Avesha Bibi, (1905) 27 All 483=2 A L J 160=1905 A W N 54=2 Cr L J 104.
6. Devi Ditta v. Ganga Devi, (1906) 4 Cr L J 73 =4 P R 1906 Cr=115 P L R 1907.

maintenance is where the suit for restitution is brought, not with a view to take the wife back, but simply to evade the payment of the allowance awarded, and there the Bombay High Court have passed a rule that the order of the Magistrate must remain in force until the husband has executed the decree against his wife by taking her home (Bombay High Court Circular Rule "Bombay Gazette" 8th January 1892). The High Court of Madras has held also that where the object of getting the decree for restitution was merely to get the maintenance order cancelled, as was shown by the husband's refusal to provide proper accommodation for his wife the Magistrate ought not in the exercise of his discretion under S. 482 (2) to cancel the order for maintenance.

In the present case it would seem that the husband after obtaining his decree for restitution, took no steps to execute it, and actually paid the maintenance until 2nd January 1938. That is a matter however which should be properly established. There is nothing either to show that the husband either provided separate accommodation for his wife, or refused to do so, and that, again, should be judicially established. The Magistrate's order for payment of the arrears, Rs. 5, for the child will be maintained, but the order for payment of Rs. 36, arrears of maintenance for Ma Pwa Shein, will be set aside, and the Magistrate directed to make further enquiry in the light of these remarks and pass proper orders accordingly.

D.S./R.K. *Order accordingly.*

A. I. R. 1939 Rangoon 315

BRAUND J.

Roshan N. M. A. Karim Omer & Co. — Appellants.

v.

Mohamed Ebrahim and another — Respondents.

Second Appeals Nos. 126 and 127 of 1938, Decided on 28th July 1938, from judgment of District Court, Mandalay, in C. A. No. 53 of 1937.

(a) Stamp Act (1899), Sch. 1, Art. 1 — To come within mischief of Art. 1, document, in addition to being acknowledgment of debt, must be one created to supply evidence of such debt — Document held did not fall within mischief of Art. 1.

In order to bring a document within the mischief of Art. 1, what has to be established is that it is an acknowledgment of a debt created in order to supply evidence of such debt. The Article requires something more than an acknowledgment of a debt. The primary question is whether the document was brought into existence with the "dominant intention" of supplying evidence of the debt. The fact that the document is apt to serve other purposes does not absolve the Court from enquiring, as it is enjoined to do by Art. 1, what was the purpose for which it was meant. [P 318 C 1, 2]

By an agreement between *A* and *B*, *A* from time to time lent money to *B* while *B* from time to time supplied *A* with hides. There was thus a running account between them throughout the period of transaction consisting on the one hand of the loans by *A* to *B* and on the other hand of price of hides supplied by *B* to *A*. During the currency of the arrangement it was the practice at the end of each month for *A* to submit to *B* a statement. Each statement opened by bringing forward from previous month the balance of the account. The statement then stated the cash loans made by *A* to *B* and on the other side value of the hides supplied by *B* to *A*. At the end, a balance was struck beneath which *B* placed his signature accompanied by no other writing and handed over it to *A*, which then remained in his possession :

Held that taking into consideration that these transactions were continuing transactions and at no point of time was it ever contemplated that any of these particular balances would ever become payable in cash by *B* to *A*, the real purpose for which these documents were brought into existence was not the supply of evidence of an actual debt. The balance was struck and signed, not for the purpose of being evidence that that money was then due but simply as one of a series of statements of account which, for the convenience of the parties, were exchanged at fixed intervals. Hence it was not a document required to be stamped under Art. 1, Sch. 1. [P 319 C 2; P 320 C 1]

(b) Stamp Act (1899), Sch. 1, Art. 1—Question whether certain document falls within mischief of Art. 1 — One decision is no authority for another.

On the question whether a particular document in suit amounts to an acknowledgment of a debt created to supply evidence of debt, one decision can hardly be an authority for another, for each case must depend on its own circumstances : *39 Cal 789, Rel. on.* [P 319 C 1]

K. C. Sanyal — *for Appellants.*

Chari — *for Respondents.*

Judgment. — This is a point which lies within a very small compass but is nevertheless not quite free from difficulty. The suit was originally tried in the Court of the Subdivisional Judge of Mandalay. The plaint discloses that the plaintiffs were merchants dealing in, among other things, hides while the defendants were alleged to carry on a bussiness in partnership as butchers. It is then said—and this much is common ground between the parties—that for some years past there had been an arrangement between them under which moneys were from time to time lent by the plaintiffs to the defendants, while the

defendants from time to time supplied the plaintiffs with hides which were no doubt derived from the animals used by the defendants in their capacity as butchers. And between the plaintiffs and the defendants there was, therefore, throughout the period during which this arrangement lasted, a state of running account consisting on the one hand of the loans by the plaintiffs to the defendants and upon the other hand of the price of hides supplied by the defendants to the plaintiffs. It is for the balance of that account as on 31st March 1934, which is the date on which the arrangement is said to have come to an end, that this suit has been brought.

The balance is said to have been Rupees 504-9-6 to which is added an almost equal sum for interest, making the total claim Rs. 988-6-6. I need not, I think, for the present purpose deal with the defence. It is sufficient for me to say that the case was tried by the Subdivisional Judge who came to a conclusion, based, as it seems to me, upon the circumstance that he was unable to admit in evidence a certain document, which is Ex. A in the case. That document is in the form of an account signed by one of the defendants and by means of it it was sought by the plaintiffs to prove the debt. The Subdivisional Judge in the course of his judgment observes that if that set of accounts is admissible then the case is concluded in favour of the plaintiffs. But he went on to hold that the document in question was inadmissible in evidence for any purpose and, accordingly, upon the remaining materials before him he was unable to find the plaintiffs' debt established. That was taken on appeal to the District Court of Mandalay and the learned Judge of that Court took the same view of the document which is Ex. A.

Upon appeal in this Court the primary point that I have to consider is whether, as a matter of law, the Subdivisional Judge was right in excluding Ex. A from his consideration. The ground upon which it has been said that Ex. A is admissible in evidence for no purpose is that it is a document which falls within the mischief of Art. 1, Sch. 1, Burma Stamp Act. And, for the purpose of determining whether or not it is a document such as is described in that Article, it will be necessary for me to consider carefully both the nature of Ex. A itself and the circumstances in which it is brought into existence. But before I do that I must refer to the terms of Art. 1, Sch. 1, to the Act itself. That Article reads thus :

1. Acknowledgment of a debt exceeding twenty rupees in amount or value, written or signed by, or on behalf of, a debtor in order to supply evidence of such debt in any book (other than a banker's pass-book) or on a separate piece of paper when such book or paper is left in the creditor's possession.

Then follows the Proviso with which I am not concerned. Thus, there are a number of conditions to be fulfilled before any particular document qualifies as an acknowledgment of a debt so as to be liable to a one anna stamp duty under this Article. First and foremost, it must be an acknowledgment of a debt exceeding Rs. 20 in amount or value; secondly, it must be written or signed by or on behalf of a debtor; thirdly, it must be so written or signed in order to supply evidence of such debt; fourthly, it must be so written or signed in a book or on a separate piece of paper and fifthly, if it is in a book, that book, or if it is on a paper, that paper must be left in the creditor's possession. I may say at once that in this case the document in question was constituted by a separate piece of paper and there is no dispute but that such separate piece of paper was left in the plaintiffs' possession. We are therefore not concerned with the fourth and fifth of those conditions. I have in dealing with a statutory provision of this kind to deal with the matter strictly. It has been pointed out in more than one place that the penalty for omitting to stamp with a one anna stamp a document that should be so stamped under this Article is important because the Act, whether by design or not I do not know, has omitted to give any opportunity for having it stamped under the usual penalty.

If the document offends against this Article then it is admissible in evidence for no purpose whatever and by no means can it be made so admissible. It has been rightly pointed out that that is a very severe penalty for what after all is not a very serious loss to the revenue. However that may be, and however inclined a Judge might be on that account to take a generous view of the requirements of the Article, nevertheless one must, when faced with this question, decide it strictly and judicially. I shall have again to refer to this Article but I propose now to deal with the document itself and the circumstances in which, so far as I can tell from the evidence, it was brought into existence.

During the currency of the arrangement between the plaintiffs and the defendants, to which I have already drawn attention, it was the practice at the end of each month for the plaintiffs to submit to the defendants a statement which the defendants, or rather defendant 1 in particular, in the circumstances that I have before me signed and then handed back to the plaintiffs. I have been in some doubt as to whether the defendants obtained or were given each month a copy for themselves; but upon a reference to Ex. E written by the plaintiffs to the defendants, so far as I can see, it would seem that a copy of the account was either retained by or given to the defendants. The monthly statements, at any rate in three instances, namely those for January, February and March, 1934, which I have before me, are written upon sheets which are I think the ordinary bill sheets of the plaintiffs. It may be that it is the notepaper of the plaintiffs, or it may be that it is their bill form. I do not think it matters much. In either case, it contains in print the plaintiffs' name, their description, their address and all the other items of business interest that are usually found in documents of this kind.

The first of these statements, that for January—and I emphasize that the exhibited statements are only three instances of the statements that were delivered regularly each month during the term of the arrangement—is in this form. It opens by bringing forward from the previous month the balance of the account. In this case there was at the beginning of the month of January a debit against the defendants for Rs. 419-1-6. They are then debited with a sum of cash which may have been a cash loan and on 20th January they are debited with another cash loan of Rs. 100 and there are two trifling items of three annas each to their debit, the meaning of which I do not know. On the other side of the account they are given credit in that month for Rs. 37 and Rs. 44 which no doubt represent the value of hides supplied by them during the month. And, as a result of that, the month closes with a debit of Rs. 468-3-0 in favour of the plaintiffs against the defendants. Beneath that is placed the signature of defendant 1. It is accompanied by no writing; it is simply signed by defendant 1.

The account for February is in the same form and is similarly signed. The concluding balance against the defendants is Rs. 399-13-6. The March statement again is precisely similar and ends with a balance of Rs. 504-9-6 in the plaintiffs' favour. That is the principal sum which is now sued for and that document, like its predecessors, has been signed by Ebrahim without a comment of any kind. The point I desire to emphasize again is that those three documents are the three concluding documents of a series which as far as I know—I think it is admitted by the parties—lasted throughout the term of the business relations between the parties.

There is one other matter of fact which I think I ought to mention, which is that the plaintiffs held two promissory notes for Rs. 100 each. One or both of these promissory notes are unstamped and are of course inadmissible in evidence; but that does not, I think, prevent me from taking notice of the promissory notes themselves and the fact that the promissory notes were unstamped, I think, is a matter extraneous to the point I have to decide. So far as the oral evidence in the case goes, it is remarkable having regard to the contest involved in this suit that no really explicit evidence is given as to why the monthly statements of which Exhibits A are the samples were brought into existence by the parties. Abdul Shakur says in his evidence-in-chief :

> Every month we used to make statements of accounts. We used to take the signature of one of the defendants on these statements. The defendants had had dealings with us for the last 13 years. Exs. AA and B are the extracts from our books of accounts.

I should perhaps have said, in order to make it quite clear, that the statements, the contents of which I have been explaining, were really only extracts from the plaintiffs' books. We have the relevant pages of the plaintiffs' books themselves in evidence and it is clear that each of the monthly statements was a mere copy of the plaintiffs' own account. Abdul Shakur goes on to say :

> Exhibits A, A-1 and A-2 were the statements of accounts made and the signatures thereon are those of Ebrahim, defendant 1. These exhibits are in my handwriting. Ebrahim signed them in my presence.

And in cross-examination he says :

> The accounts were settled once in a month or once in two months. Then sometimes we took back such receipts from the butchers but we did not do so sometimes.

And later on in cross-examination he says :

> When I made out statements of accounts I required the butchers (that, of course, is the defendants) to bring the receipts which they had obtained from the durwan.

That refers to the receipts for hides delivered by the defendants to the plaintiffs during the course of the arrangement. And a little later on he says :

The butchers brought receipts issued by the durwan when I made out statements. The money we gave to the butchers are not loans but advances for supply of hides though promissory notes were taken.

Abdul Gaffar, the assistant manager of the plaintiffs, says :

The procedure adopted in all offices is to advance money to butchers on promissory notes as well as without promissory notes and such advances are entered in the books of accounts. When hides are supplied we pay one-anna less than the market price. When the butchers stop supplying hides to us we charge interest on the advances and file suits against them.

Abdulla, the sixth plaintiffs' witness, said in examination-in-chief :

The accounts were settled once a month. The durwan kept a small book in which he noted receipts. The plaintiffs kept a small box. When accounts were settled entries were made in the big book maintained by the plaintiffs.

Ebrahim himself, defendant 1, says : " .... we settled accounts once in ten days or once in two or three months." Now that is really the whole of the evidence so far as it has been given in this case; but, having regard to the real point which has emerged, I cannot say that it is either very explicit or very helpful. Having explained therefore what Ex. A is and the circumstances in which it came into existence as well as I can, I must now refer for a moment to Art. 1, Sch. 1 to the Act. In order to bring a document within the mischief of this Article, what has to be established is that it is an acknowledgment of a debt created in order to supply evidence of such debt. When this case was first opened, I was inclined to take a strong view that where you find a document of any kind with a balance struck and a debtor's signature attached to it, it must necessarily be an acknowledgment of a debt. But having regard to the authorities that I have been referred to and to a further consideration of Art. 1, I have been reluctantly compelled to admit that the question is not quite so easy to decide.

It may well be that the view which I have admitted I was in the first place inclined to take contains part of the truth. It may well be that, when you find a document either in the form of this Ex. A or in one of the numerous other forms upon which litigation has arisen in the various cases to which my attention has been drawn, the signature of a debtor attached to a statement does, among other things, amount to an acknowledgment of a debt. But it has to be appreciated—and it is not easy to appreciate at first sight — that this article requires something more than an acknowledgment of a debt. It requires an acknowledgment of a debt brought into existence in order to supply, that is for the purpose of supplying, evidence of such debt. When a man writes a figure on a piece of paper and signs it, it may well be that in one sense that is an acknowledgment of a debt; but the purpose for which he writes it may or may not be the purpose of furnishing his debtor with evidence of the debt. There may be a hundred and one reasons why such a piece of paper is brought into existence. I have endeavoured in saying that to express in my own words what is shortly and better expressed in the words of Sir Walter Schwabe C. J. of Madras in 46 Mad 948.[1] He says :

The first question that arises is whether any particular document is given to supply evidence of the debt. It is quite clear to my mind on the authorities that the question is whether it is given with the dominant intent to supply evidence of the debt and it has been held that where the document contains other entries from which it is right to deduce that the intention is to arrive at a statement of account or to put on record payments on either side, the intention to be inferred from the sending of the document, although it contains a balancing item at the end, is not to supply evidence to the creditor.

It is the first part of that passage to which I am drawing attention, namely, that the primary question is whether the document was brought into existence with the "dominant intention" of supplying evidence of the debt. The fact that the document is apt to serve other purposes does not absolve the Court from enquiring, as it is enjoined to do by Art. 1, what was the purpose for which it was meant; that is the reason why I have endeavoured to point out that a document may well be a document which is an acknowledgment of a debt and may still not be a document which is an acknowledgment of a debt within the meaning of Art. 1. Even though it is an acknowledgment of a debt it does not come within the mischief of Art. 1 unless it was created in order to supply evidence of such debt; so that what we have to seek here is the intention of the plaintiffs and the defendants in bringing into existence Ex. A. I have been referred to a large number of

1. Surjimull Murlidhar v. Ananta Lal, (1924) 11 A I R Mad 352=74 I C 1029=46 Mad 948= 45 M L J 399.

authorities, but I may say at once, that except in so far as any authority contains any statement of principle other particular cases are not of assistance in this case; each case must depend upon its own facts as was pointed out by Woodroffe J. in 39 Cal 789.[2] The learned Judge in that case in his opening words points out :

> On the question whether a particular document in suit amounts to an acknowledgment of a debt, one decision can hardly be an authority for another, for each case must depend on its own circumstances.

With that I respectfully agree and it is for that reason that I do not propose to refer to the many authorities which have been cited to me. I have to search for the intention with which Ex. A was created. Mr. Chari, on behalf of the respondents to this appeal, says that I cannot reasonably find that Ex. A was created for any other purpose than the purpose of furnishing evidence of a debt. Mr. K. C. Sanyal on the other hand, on behalf of the appellants, says that the view I should take upon the facts and the history of this particular case is that the series of documents, of which Ex. A contains three, are merely periodical documents brought into existence for the purpose of record.

Now it has to be borne in mind in this case what the nature of the transactions was. On the one side, namely on the plaintiffs' side it is quite definite that particular sums of money were advanced from time to time. But on the defendants' side entries, it is not quite so clear cut. The defendants were supplying hides apparently through the plaintiffs' durwan who entered the number of hides received in his notebook. No particular price was fixed for the hides, but they were to be supplied at the market price less one anna, and bearing that in mind, it supplies, in my opinion, an intelligible reason why at the end of each month a statement should be made of the hides supplied; because the defendants could then see first of all the number of hides for which they had been given credit and the price at which they have been brought into the account. That is the first point which has struck me.

The second point is this. As I have already pointed out more than once, this was a running account and the last of these accounts, although it happens to coincide with the date on which the agreement seems to have terminated, is no different from any of the earlier accounts. If therefore we take, for instance, the January account, it is dated 31st January. Whether or not it was actually signed on that date I do not know. But bearing in mind that these transactions were continuing transactions and went on almost from day to day one has to appreciate that at no given moment except possibly upon the very day on which the document was signed is this document evidence of what the defendants were actually owing to the plaintiffs. I am not sure whether I have made the point clear. For instance, if on 15th February 1934, the plaintiffs had been minded to sue the defendants, then on that date the first of the documents comprised in Ex. A is not evidence of what the debt was. There is no doubt that it is capable of being used as evidence of what was owing on 31st January. But at no given point except possibly at the moment at which it is signed is it evidence of any particular debt.

Now bearing these considerations in mind, bearing in mind the course of business between these two parties, bearing in mind that these transactions were continuing transactions and bearing in mind that at no point of time was it ever contemplated that any of these particular balances, except possibly the last one, would ever become payable in cash by the defendants to the plaintiffs, it seems to me to be impossible for me to say that the real purpose for which these documents were brought into existence was the supply of the evidence of an acutal debt. As I have said if you take any one of the balances other than the last one on 31st March 1934 it would be quite impossible for anybody to contend that it was ever within the contemplation of either party that the actual sum so stated as the balance would be paid by the defendants to the plaintiffs. Take the January one; nobody contemplated that Rs. 468-3-0 should be paid by the defendants to the plaintiffs. It was contemplated by the parties that the transaction would go on and that the balance would in the course of time become more or less than that and it seems to me that the balance was struck and signed, not for the purpose of being evidence that that money was then due but simply as one of a series of statements of account which for the convenience of the parties were exchanged at first intervals. That seems to me to be the real purpose of Ex. A. The question is not free from difficulty and I have had to determine it as

2. Galstaun v. Hutchison, (1912) 39 Cal 789=15 I C 279=16 C W N 945.

best as I can. I regret to take a different view from the view taken by the learned Judge in first appeal because as I have said I think it admits of much argument each way. Having taken that view, I am bound to come to the conclusion that the document in question was wrongly excluded from evidence by the Township Judge inasmuch as, in my opinion, it was not a document required to be stamped under Art. 1 of Sch. 1. It seems to me therefore that the proper course to take is to allow this appeal and to remand the case to the Township Judge now to be tried upon the footing that the document has been wrongly excluded from evidence and should now be admitted. It will be remanded to the District Court to retry it upon all the issues other than issues 1, 2, 3, 4 and 11. The costs of this appeal which I assess at five gold mohurs will be costs in the suit.

D.S./R.K. *Case remanded.*

A. I. R. 1939 Rangoon 320

MOSELY J.

The King

v.

Maung Po Shein and others.

Criminal Revn. No. 179-B of 1939, Decided on 10th May 1939, for review of order of Township Magistrate (1), Monyo, D/- 9th March 1939.

Penal Code (1860), S. 225-B—Arrest in execution of decree—Warrant issued under O. 21, R. 8, Civil P. C., not bearing seal of Court — Resistance to arrest is not offence under Section 225-B.

In order that an offence under S. 225-B be constituted, the apprehension must be lawful, that is to say the warrant on which the arrest was made must have been executed with all due formalities of law. Where it is sought to arrest judgment-debtor in execution of civil decree but the warrant issued under O. 21, R. 8, Civil P. C., did not bear the seal of the Court the resistance to the arrest is no offence under S: 225-B : *A I R 1915 Cal 237, Rel. on.* [P 320 C 2]

Order.—Respondent 1 was sentenced to a fine of fifteen rupees and respondents 2 and 3 to a fine of ten rupees each under S. 225-B, Penal Code for intentionally offering resistance to the lawful apprehension of respondent 1 whom it was sought to arrest in execution of a civil decree. This reference is made by the learned Sessions Judge, Tharrawaddy, who recommends that the convictions and sentences be set aside on the ground that the warrant did not bear the seal of the Court. The warrant, Ex. A, in the criminal case, does not bear the seal of the Court, though it was duly signed and in other respects valid. In order that an offence under S. 225-B be constituted, the apprehension must be lawful, that is to say the warrant on which the arrest was made must have been executed with all due formalities of law. The warrant was one issued under O. 21, R. 8, Civil P. C., and required the seal of the Court under O. 21, Rule 24 (2). A case nearly exactly in point is that in 42 Cal 708[1]; the only difference is that there the warrant was one issued under S. 75, Criminal P. C., which similarly requires that the warrant bear the seal of the Court. It was held there by Jenkins C. J., and Teunon J., that as the seal of the Court is essential to the validity of a warrant, the absence of the seal made the warrant void, and that, consequently, there was no legal arrest. There are other cases where the absence of formal requisites to the validity of a warrant has in the same way been held to invalidate it, so that resistance to arrest is no offence. It is, however, unnecessary to cite further authority. In my opinion the law is quite plain. For these reasons the convictions and sentences passed on the three respondents-accused will be set aside, and the fines which have been paid will be refunded to them.

I should note, as the learned Sessions Judge has noted, that the process-server made a direct complaint to the Criminal Court, and that the provisions of Para. 1057 of the Burma Courts Manual appear not to have been obeyed, which require a report to the Civil Court concerned, and an enquiry by that Court, and then preferably a complaint by the Court itself under S. 195 (1) (a), Criminal P. C. It is only where that is not possible that the Court will direct the process server to make a complaint, giving him a letter addressed to the Magistrate, informing the Magistrate that the complaint is being made by the direction of the Court, and that the Court has prima facie satisfied itself before permitting the complaint to be made.

D.S./R.K. *Convictions set aside.*

1. Mahajan Sheikh v. Emperor, (1915) 2 A I R Cal 737=28 I C 672=16 Cr L J 336=42 Cal 708=19 C W N 224.

**** A. I. R. 1939 Rangoon 321**
FULL BENCH

ROBERTS C. J., MYA BU, BAGULEY, BA U AND BRAUND JJ.

Ma Hnin Yeik and others — Appellants.

v.

K. A. R. K. Chettyar Firm — Respondents.

Civil Ref. No. 3 of 1939, Decided on 4th April 1939, made by Mya Bu and Mosely JJ. in Misc. Appeal No. 87 of 1938, D/- 1st March 1939.

(a) Transfer of Property Act (1882), S. 58 (b) — Simple mortgage — Right of mortgagee to bring property to sale must be worked out in execution proceedings (Per *Roberts C. J.*).

In case of a simple mortgage the security which the mortgagee obtains before making an advance is that of the land itself; if the mortgagor makes default the mortgagee has the right to cause it to be sold. This does not mean that he can sell it himself without the intervention of the Court; the right to bring the land to sale must be worked out in execution proceedings, under the supervision of the Court. [P 322 C 1]

(b) Mortgage—Simple mortgage—Rents and profits of mortgaged property do not form part of security. (Per *Roberts C. J.*).

In the absence of express provision to the contrary, the rents and profits from the property forming the subject-matter of simple mortgage belong to the mortgagor and do not form part of the security for the repayment of the mortgage money or the interest on the loan. [P 322 C 1]

****(c) Civil P. C. (1908), O. 40, R. 1 (1) and (2)—Court has jurisdiction to appoint receiver in simple mortgage suit—Whether it is just and convenient to do so does not depend upon application of English rules—Considerations to be borne in mind in deciding whether receiver should be appointed stated—That interest is in arrears or that security is likely to become insufficient is not the sole criterion—They are only some of factors to be considered :** *6 Rang 261= A I R 1928 Rang 176 = 110 I C 620, Overruled.* (Per *Full Bench*).

The Court has jurisdiction to appoint a receiver in a simple mortgage suit but whether it will do so must depend upon what is just and convenient in each particular case having regard to the reason for which he is appointed, to the precise nature of the security in the particular contract whereby a simple mortgage has been created and bearing in mind the limitations imposed by sub-r. (2) of the Rule itself. Whether it is just and convenient to appoint a receiver in such a case does not depend upon the application of rules laid down in England in connexion with equitable mortgages by deposit of title deeds in that country. The Court must see what is the object of the application. If it is plainly that the receiver should act in breach of sub-r. (2) it is neither just nor convenient to appoint him, since he cannot perform such a task, nor can the Court authorize him to do so. But, if it be shown that there is a reason for his appointment upon the grounds of justice and convenience which will enable him to preserve the security of the mortgagee without infringing the sub-rule, the power of the Court to appoint him, which is unfettered, may be exercised upon these grounds. But it can never be just and convenient to appoint a receiver for the sole purpose of taking possession of rents and profits unless they have been expressly made part of the security for the debt by the instrument creating the mortgage, even if, having done so, the Court could put the receiver into possession. The fact that interest on the mortgage debt is in arrear, or substantially in arrear, can only be a factor in deciding whether a receiver should be appointed. The fact that the security is likely for any reason to become insufficient may be another factor; but the governing words of the rule are whether it is just and convenient and in deciding this matter due weight must be given to all relevant considerations including those mentioned in sub-rule. (2) of O. 40, R. 1. *(Difference between the nature of English mortgage in England and simple mortgage in India explained) : Case law fully discussed ; 6 Rang 261=A I R 1928 Rang 176=110 I C 620,* **Overruled.** [P 324 C 2; P 325 C 1, 2]

(Per *Ba U J.*) — By appointing a receiver the Court neither substitutes a new contract for the one entered into by the parties nor enlarges the security. The Court simply keeps the security intact so that the parties may be able to carry out the terms of their contract. Therefore a receiver can be appointed in a simple mortgage suit even though the rents and profits are not part of the mortgage security. [P 329 C 1]

(d) Civil P. C. (1908), O. 39, R. 1—Temporary injunction—Nature of. (Per *Baguley J.*).

A temporary injunction like an attachment order is not final but is merely an action which delays something being done which may cheat the plaintiff of his lawful rights. [P 327 C 1]

(e) Civil P. C. (1908), O. 40, R. 1 (2) — Scope. (Per *Ba U J.*).

Sub-r. (2) of O. 41, R. 1 refers to a third party and not to a party to the suit: *A I R 1915 Cal 35; A I R 1925 Lah 590 and 20 I C 767, Rel. on.* [P 328 C 2]

(f) Receiver—Appointment—Object of. (Per *Braund J.*).

The appointment of a receiver is neither a measure of punishment nor does it operate to enlarge or to restrict existing beneficial rights of property. [P 330 C 1]

Hay and S. C. Mukherjee — *for Appellants.*

Kalyanwalla — *for Respondents.*

OPINION

Roberts C. J. — The questions referred to this Court are as follows:

1. Can a receiver be appointed in a suit for sale based upon a simple mortgage ?

2. If the answer to the first question is in the affirmative can a receiver be appointed merely because the mortgage debt is in arrear, or because it is substantially in arrear, or can he only be appointed when the security is likely to become insufficient either by reason of accumulation of interest or by reason of depreciation of the value of the property itself ?

The characteristics of a simple mortgage in this country have often been lost sight of.

In default of payment a simple mortgage gives to the mortgagee a right, not to possession but to sale, which he must work out in execution pro-

ceedings : Per Lord Hobhouse in 19 Mad 249[1] at p. 253.

The borrower or mortgagor remains in possession of the mortgaged property; he promises two things, first that he will repay to the mortgagee the mortgage money or amount of the debt, and, secondly that if he fails to pay, the mortgagee shall have the right to cause the mortgaged property to be sold and the proceeds of the sale to be applied to the payment of the debt, or if such proceeds are insufficient to satisfy the debt to be applied to its reduction. (S. 58 (b), T. P. Act.) In other words, the security which the mortgagee obtains before making an advance is that of the land itself; if the mortgagor makes default the mortgagee has the right to cause it to be sold. This does not mean he can sell it himself without the intervention of the Court; the right to bring the land to sale must be worked out in execution proceedings, under the supervision of the Court. Money may be borrowed upon a simple mortgage of immovable property and a hypothecation of crops or chattels. If this is done the security is extended to the crops or chattels hypothecated. But it is not a necessary incident of a simple mortgage that the security should be so extended. There may be, and generally is, a personal obligation not only to repay the loan but also to pay interest upon it, but in the absence of express provision to the contrary, the rents and profits from the land belong to the mortgagor and do not form part of the security for the repayment of the mortgage money or the interest on the loan. English mortgages are quite different. In an English mortgage there is a transfer of the ownership of the mortgaged property with a promise to repay the debt on a certain date. If the money is duly paid the mortgagor has a right to have the property re-transferred to him by the mortgagee: 25 Mad 220.[2] These two contracts are so different in their nature that it seems unfortunate that the word "mortgage" should be common to each of them. When we come to consider what are known in this country as mortgages by deposit of title deeds, care must be taken to avoid further confusion. Mortgages by deposit of title deeds in this country originated, no doubt, from the equitable rule in force in England that the mere fact of deposit of title deeds as security for a debt created a charge upon the property. Hence in England such mortgages were known as equitable mortgages.

Now in England the position of an equitable mortgagee gives him a right of foreclosure: (1873) 16 Eq 153.[3] A deposit of title deeds is regarded as a contract or a legal or English mortgage which gives to the mortgagee or person claiming through him all such rights as he would have had if the contract had been completed. This is briefly put by Jessel M. R. in the following observations in (1877) 4 Ch D 605:[4]

> When there is a deposit of title deeds, the Court treats that as an agreement to execute a legal mortgage, and therefore as carrying with it all the remedies incident to such a mortgage. None of this reasoning applies to a pledge of chattels; the pledgee never had the absolute ownership at law, and his equitable rights cannot exceed his legal title.

In 1889 the Bombay High Court held in 14 Bom 269[5] that a mortgagee by deposit of title deeds had the right to sue for foreclosure or sale, but in Calcutta it was held that the appropriate remedy was a decree for sale and not for foreclosure: 13 Cal 322,[6] (obiter dicta) and 24 Cal 348.[7] In the latter case Jenkins J. said:

> I was referred to the statement in a text book that the practice in mortgages of this class is regulated by the English practice and if that statement were correct then the remedy would be foreclosure. It seems however that the practice in this Court has for a long series of years been to decree a sale, and I accordingly will make a decree in that form.

At the present time we are governed by S. 96, T. P. Act, which was an amendment by Act 20 of 1929. It runs as follows:

> The provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be apply to a mortgage by deposit of title deeds.

This leads me to the conclusion that a mortgage by deposit of title deeds in this country has ceased to possess, if it ever did possess, those characteristics which were engrafted upon equitable mortgages by deposit of title deeds in England by the doctrine laid down in (1873) 16 Eq 153[3] and in (1877) 4 Ch D 605.[4] To call them both equitable mortgages and to assume that their incidents are alike in both countries is to prepare the way to error. In England a mortgage by deposit of title deeds carries

1. Papamma Rao v. Ramachandra Razu, (1896) 19 Mad 249=23 I A 32 = 6 M L J 53=7 Sar 10 (PC).
2. Narayana v. Venkataramana, (1902) 25 Mad 220.
3. James v. James, (1873) 16 Eq 153.
4. Carter v. Wake, (1877) 4 Ch D 605.
5. Manekji v. Rustomji, (1889) 14 Bom 269.
6. Oo Noung v. Moung Htoon Oo, (1886) 13 Cal 322.
7. Srinath Roy v. Godadhur Das, (1897) 24 Cal 348=1 C W N 225.

with it the remedies incident to an English mortgage, whereas in this country it carries with it the remedies to which a simple mortgagee may have recourse and those remedies alone. In the case of an English mortgage, and in certain other cases expressly laid down in S. 69, T. P. Act, the mortgagee is given a power of sale without the intervention of the Court; but the exercise of this power is not applicable in the case of a simple mortgage. Again in S. 69-A, where this power exists the mortgagee may under certain conditions appoint a receiver, but only where he has the right to exercise the power of sale without the Court's intervention under S. 69. It is conceded that no mortgagee has the power to appoint a receiver in the case of a simple mortgage only. The power of the Court to appoint a receiver is given by O. 40, R. 1, which begins with the following words :

> Where it appears to the Court to be just and convenient, the Court may by order (a) appoint a receiver of any property before or after decree.

That is the first step. It must appear to be "just and convenient" that the Court should do so. The order goes on to say that having appointed a receiver the Court may remove any person from the custody or possession of the property and commit the property to the possession, custody or management of the receiver, and may confer upon the receiver certain powers. It continues :

> (2) Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.

These words which constitute a Proviso must no doubt be considered when the Court is about to decide whether in any particular case the appointment of a receiver will be a measure of justice and convenience having regard to all the circumstances. In the case of a simple mortgage the right of the mortgagee is to a sale which he must work out in execution proceedings. If the property in a simple mortgage suit is in danger of being wasted, damaged, or alienated, he can no doubt obtain a temporary injunction by proceedings under O. 39, R. 1, pending the disposal of his suit or the further order of the Court. He does not therefore need to secure the appointment of a receiver to safeguard his rights in this behalf. As was held in 14 Rang 292[8] a simple mortgagee has no right to the rents and profits accruing from the mortgaged property during the subsistence of the mortgage. In 12 Rang 437[9] Page C. J. said :

> At one time the Court felt some diffidence in appointing a receiver at all in a mortgage suit, but both in England and in India the propriety of appointing a receiver in a suitable case cannot now be challenged : 14 Bom 431.[10]

This was a case of an English mortgage in which all the "estate, right, title, interest, property, claim and demand whatsoever of the mortgagor" was transferred to the mortgagees as security for the mortgage debt. The Bombay case was also a case of an English mortgage. But, with great respect, none of the cases which deal with English mortgages seem to me to lend any assistance to the Court. Another such case was 42 C W N 266.[11] We have to decide a different problem, namely in what circumstances it is permissible on grounds of justice and convenience to appoint a receiver in a simple mortgage suit where the mortgaged property is not transferred and the mortgagor remains in possession and is entitled to the rents and profits. Whether it is just and convenient to appoint a receiver in such a case does not depend, in my opinion, upon the application of rules laid down in England in connexion with equitable mortgages by deposit of title deeds in that country ; for such mortgages, as I have already observed give to the mortgagee all such rights as he would have had if a legal mortgage had been completed. The relief given to such mortgagees is therefore analogous to that given in respect of English legal mortgages and bears no comparison with the relief given to simple mortgagees here. From consideration of the position of a mortgagee in a simple mortgage suit it will be seen that there may be cases in which it will be just and convenient to appoint a receiver, as for instance where the contract between the parties expressly mentions that the crops, rents, or profits shall form part of the security for the repayment of the mortgage debt. In such a case the receiver, if he took possession of them, might be doing no more than the mortgagee would have a right to do. But after much hesitation and with

8. Ally Ramzan Yezdi v. Balthazar & Son, Ltd., (1936) 23 A I R Rang 290=163 I C 850 = 14 Rang 292.

9. Ma Joo Tean v. Collector of Rangoon, (1934) 21 A I R Rang 321=155 I C 776 = 12 Rang 437.

10. Jaikisondas Gangadas v. Zenabai, (1890) 14 Bom 431.

11. Kameshwar Singh v. Anath Nath Bose, (1938) 25 A I R Cal 93=175 I C 908=42 C W N 266.

great respect I have come to the conclusion that the case in 14 Rang 292[8] goes too far in saying that in a mortgage suit (meaning a simple mortgage suit) when interest is in arrear the Court will normally appoint a receiver at the instance of the mortgagee. I do not feel that the English cases there cited can be deemed to have reference to suits in which the mortgaged property remains in the possession and ownership of the mortgagor as it does in a simple mortgage suit; and it appears to me that by appointing a receiver merely because the interest is in arrear in such a case the Court is enlarging the security which the mortgagee has been content to accept before making his advance. No regard appears to have been paid to the provisions of O. 40, R. 1 (2), in arriving at this decision; and it is said that the reason is because the words "any person" this rule must be taken to mean "any person other than a party to the suit" and must be taken to refer to third parties only.

A consideration of that matter would make it necessary to decide whether, upon the interpretation of the words "any person" as connoting any person whatsoever, it would ever be competent for the Court to appoint a receiver. Upon that matter there has been a difference of judicial opinion and a wide field of investigation is revealed. The Rangoon decision to which I have referred was followed by the decision of a Full Bench in 14 Rang 308[12] to the same effect. The latter case overruled 14 Rang 16[13] in which it had been said that the question whether it was just and convenient to appoint a receiver generally turned on whether the security was reasonably sufficient to satisfy the decree which the plaintiff-applicant was likely to obtain in the suit. During the same month a Full Bench of the High Court in Allahabad was considering the same problem in 58 All 949.[14] Sulaiman C. J. pointed out that the sole question was whether the Indian statutory law permitted or prohibited the appointment of a receiver in a simple mortgage suit. In England there is no provision corresponding to sub-r. (2) of O. 40, R. 1. He also laid some stress upon the view that the appointment of a receiver in a simple mortgage suit would be a clog on the right of the mortgagor to free the property from the charge laid upon it. I think there is great force in this contention, but I desire to avoid the words "right of redemption" because in a simple mortgage the property is never transferred and is not redeemed in the sense in which redemption is understood in England. The learned Chief Justice observed (on p. 960):

> The Court should not constitute itself a gratuitous protector of the simple mortgagee and allow him to receive the income of the mortgaged property in direct violation of the terms of the contract.

With this view I wish to express my respectful concurrence. Then again he points out that when the receiver takes possession there must be a dispossession of some one, and that to confine the prohibition in sub-r. (2) to non-parties only would be to put a forced interpretation upon it. It seems unnecessary to me to examine the truth of the contention that if the sub-rule is to be taken to mean any person whatsoever there would never arise any case in which a receiver could be appointed by the Court under O. 40, R. 1. It is enough to say in answer to the questions propounded that the Court has jurisdiction to appoint a receiver of any property where it appears just and convenient to do so. The answer to the first question must therefore be in the affirmative. The answer to the second question must be that the appointment of a receiver by the Court must depend upon the individual facts of each particular case. The Court must see what is the object of the application; if it is plainly that the receiver should act in breach of sub-r. (2) it is neither just nor convenient to appoint him, since he cannot perform such a task, nor can the Court authorize him to do so. His appointment would in such a case be nugatory. But if it be shown that there is a reason for his appointment upon the ground of justice and convenience which will enable him to preserve the security of the mortgagee without infringing the sub-rule, the power of the Court to appoint him, which is unfettered, may be exercised upon these grounds. In other words, it can never be just and convenient to appoint a receiver for the sole purpose of taking possession of rents and profits unless they have been expressly made part of the security for the debt by the instrument creating the mortgage, even if, having done so, the Court could put the receiver into

12. Venkanna v. Mangammal, (1936) 23 A I R Rang 296=163 I C 856=14 Rang 308 (FB).
13. S. K. R. M. Chettyar v. V. E. A. Chettyar, (1935) 22 A I R Rang 525=160 I C 490=14 Rang 16.
14. Ram Swarup v. Anandi Lal, (1936) 23 A I R All 495=163 I C 481=1936 A L J 605=58 All 949 (FB).

possession. I am therefore of the opinion that (1934) 32 A L J 561[15] was rightly decided, and am unable to follow the decision in 56 Mad 915.[16] In (1938) 1 M L J 249[17] Horwill J. was bound by the former case. The case in 6 Rang 261[18] must be taken as overruled for, it applied the reasoning in 5 L B R 135[19] to a simple mortgage suit. And the latter case in which the mortgage was by deposit of title deeds cannot be regarded as an authority for the propositions laid down therein since the amending Act of 1929 indicated in the new S. 96, T. P. Act, that the provisions applying to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title deeds.

We have also been referred to 40 Bom L R 1266.[20] In the judgment, the case in 14 Bom 431[10] is again relied on although it was an English mortgage case. With great respect, the fallacy in the later decision seems to lie in the assumption that a receiver, if appointed when a licensee of the mortgagor's is in possession, can exercise rights adverse to the mortgagor. The suggestion here that sub-r. (2) of O. 40, R. 1, refers to third parties only and has been merely inserted ex abundanti cautela seems to me to be fraught with difficulty in its application. But I prefer to take the opening words of the rule and to say that the Court undoubtedly has jurisdiction to appoint a receiver in a simple mortgage suit but that whether it will do so must depend upon what is just and convenient in each particular case having regard to the reason for which he is appointed, to the precise nature of the security in the particular contract whereby a simple mortgage has been created and bearing in mind the limitations imposed by sub-r. (2) of the Rule itself. Since it may be thought necessary to be more explicit in answering the second question in the reference I would reply that the fact that interest on the mortgage debt is in arrear, or substantially in arrear, can only be a factor in deciding whether a receiver should be appointed: the fact that the security is likely for any reason to become insufficient may be another factor; but the governing words of the rule are whether it is just and convenient and in deciding this matter due weight must be given to all relevant considerations including those mentioned in sub-r. (2) of O. 40, R. 1. No order as to costs.

Mya Bu J. — I concur in the judgment of my Lord the Chief Justice.

Baguley J. — In view of the fact that O. 40, R. 1 says definitely that "where it appears to the Court to be just and convenient, the Court may by order appoint a receiver of any property" in perfectly general terms, I agree with my Lord the Chief Justice that a receiver can be appointed in a suit on a simple mortgage if it appears to the Court to be just and convenient. But these words "just and convenient" must, I think, be interpreted in a purely general sense and even if they do occur in a similar position in the Judicature Act of 1873 in England which was based on the practice of the old Court of Chancery: *vide* 40 Bom L R 1266[20] it does not follow that the rules for the appointment of receiver as followed in England in suits based on English mortgages must apply automatically to the cases in this country, the majority of which, like the present case, are based on simple mortgages. Whether it is just and convenient must depend to a very great extent on the terms of the contract entered into by the parties and when the terms of the contract vary then the events that will justify the appointment of a receiver must vary also. My lord has pointed out the radical difference between the nature of an English mortgage in England and a simple mortgage in this country and it is amazing to see in one reported ruling after another cases like 14 Bom 269[5] or 14 Bom 431,[10] quoted as establishing the general principle that in every suit on a mortgage a receiver can be appointed. In 14 Bom 269[5] the suit was one for foreclosure or sale and the judgment refers to Coote on Mortgage, Story's Equity Jurisprudence and (1838) 3 Y & C 55[21] at p. 61. Again, in 14 Bom 431[10] it appears from the argument at page 433 that it was a legal mortgage and

15. Ram Prasad v. Bishambar Nath, (1934) 21 A I R All 772=150 I C 1035 = (1934) A L J 561.
16. Paramasivam Pillai v. Ramasami Chettyar, (1933) 20 A I R Mad 570=145 I C 449=56 Mad 915=65 M L J 222 (FB).
17. Subramanyam Chettyar v. Ethirajulu Chettiar, (1938) 25 A I R Mad 325=182 I C 87=(1938) 1 M L J 249.
18. Khoo Joo Tin v. Ma Sein, (1928) 15 A I R Rang 176=110 I C 620=6 Rang 261.
19. Ahmed Cassim Baroocha v. M. L. R. M. A. Chetty, (1909) 5 L B R 135=4 I C 1031.
20. Damodar v. Radhabai, (1939) 26 A I R Bom 54=179 I C 821=I L R (1939) Bom 82 = 40 Bom L R 1266.
21. Keys v. Williams, (1838) 3 Y & C 55 = 7 L J Ex Eq 59=2 Jur 611=51 R R 339.

that the only contest was whether the plaintiff should take possession himself or should ask for the appointment of a receiver. This only shows to what fallacies one can be led if one follows the too common practice of thinking that because two transactions are called, more or less colloquially, by the same name they must have the same attributes. Before the passing of S. 96, T. P. Act, in its present form the Act did not say what incidents applied to a mortgage by deposit of title deeds. All it said was that in certain cases these mortgages were not invalid; so naturally in endeavouring to find out what legal consequences were attached to a mortgage by deposit of title deeds, Courts looked to England where this form of mortgage was first invented and assumed that the nature of this mortgage in India should be the same as in England; but now of course mortgages by deposit of title deeds have the same legal results as simple mortgages.

The most interesting point in the case to my mind is the question which is answered by Sulaiman C. J. in his judgment in 58 All 949.[14] In this case, probably for the first time, stress is laid on the wording of O. 40, R. 1 (2). No previous Court seems to have paid particular attention to this wording, but Sulaiman C. J. has gone into the matter at considerable length and the deduction which he makes is that this sub-rule makes it practically impossible for the Court to remove the mortgagor from the property in a case of an ordinary simple mortgage. The question, referred to the Full Bench in that case was:

> Under the provisions of the Civil Procedure Code, is it competent to appoint a receiver of the property mortgaged pending the decision of an appeal against a mortgage decree?

And the answer which the learned Chief Justice gave was:

> Although there is an objection to the mere appointment of a receiver of any property, the Court cannot remove from the possession or custody of the property any person, whether a party to the suit or not, whom any party to the suit has not a present right so to remove.

This judgment of Sulaiman C. J. was considered by Beaumont C. J. in 40 Bom L R 1266.[20] He said that he was not prepared to follow the Allahabad ruling and he had not the slightest doubt that the Court had jurisdiction to appoint a receiver in a case of a simple mortgage before or after a preliminary decree. The basis upon which he differs from the Allahabad case appears to be that the Allahabad Judges ignored the fact that the mortgagor is a party to the suit and can remove himself, and he goes on to say that if the Allahabad view is right, where the mortgagor is in possession by a licensee, the Court can appoint a receiver, since the mortgagor can remove his licensee, but if the mortgagor is in possession himself, the Court cannot appoint a receiver. It seems to me that this is not facing quite squarely up to the case. If the mortgagor is in possession by a license the receiver appointed by the Court can only remove the licensee and to that extent become a licensee himself. He also relied upon 14 Bom 431.[10] To my mind the difficulty about applying the Allahabad ruling literally would be that it would make the appointment of a receiver to all intents and purposes infructuous because he could practically never oust the mortgagor from his possession. For instance, in the case of a suit being filed on an English mortgage there has before now never been any question. I think that the Court can appoint a receiver to take possession, because the mortgagee is the legal owner, but if the defendant denied execution of the mortgage a literal application of the Allahabad ruling would prevent a receiver from taking possession because until the case was decided how could the plaintiff be said to have proved that he was the legal mortgagee? It would be difficult to say therefore that the plaintiff had a present right to remove the defendant. Nevertheless as a piece of dialectic reasoning I am unable to find any flaw in the argument of Sulaiman C. J. However I think it could be applied if we regard the Code as being what it is, a Code of Civil Procedure, which lays down the ways in which people who have enforceable rights can get them enforced, and if at the same time we recognize that the Code itself, and nothing done under the Code can affect the legal right which the plaintiff has against the defendant; and therefore by appointment of a receiver he cannot enlarge his security.

If we examine the Orders of the Civil Procedure Code we find that they follow an intelligible course; first of all they deal with the suit generally, pleadings, parties, the method of institution, and so on, and the way in which the suit is tried. In O. 21 we get execution dealt with. Next, special matters, payment into Court, security for costs, commissions to examine witnesses, suits by or against Government and so on. Proceeding further we get suits against trustees, minors, lunatics and paupers and

then special cases up to and including O. 37. Then we get a fresh group, Orders 38, 39 and 40, before the Code goes on to deal with appeals. This group of Orders deals with ways in which a plaintiff who is probably going to be successful will be protected from being cheated of the fruits of his success. O. 38 deals with cases in which the Court is satisfied that the defendant is going to prevent the plaintiff from getting the fruits of his decree and it deals with attachment or arrest before judgment. O. 39 deals with cases where the property in dispute is being damaged or wasted or removed outside the jurisdiction of the Court, and finally we have O. 40 which is of a similar nature. O. 38 does not require full proof after trial of the allegations before the Court takes action. The necessity of applying this order would always arise in a more or less urgent way and O. 38, R. 1 enables the Court to act "when the Court is satisfied by affidavits or otherwise." In O. 39 the same words occur :

> Where in any suit it is proved by affidavit or otherwise . . . . the Court may by order grant a temporary injunction.

A temporary injunction like an attachment order is not final but is merely an action which delays something being done which may cheat the plaintiff of his lawful rights. Under O. 40, R. 1 not even affidavits are referred to. R. 1 says "where it appears to the Court . . . ." and surely the way in which the Court is satisfied which is sufficient to make applicable Rule 1 (1) would also apply to R. 1 (2) and therefore if enough "appears to the Court" to justify it holding that it is just and convenient to appoint a receiver, surely the same degree of proof might be accepted of the fact that the plaintiff has a present right to remove the defendant. For example the plaint and affidavits might make it "appear to the Court" that the plaintiff has an English mortgage, then that would be sufficient proof of the "present right to remove the defendant" and, as a result, the plaintiff would have a right to possession and a receiver can be appointed by the Court to remove the defendant; but even if a simple mortgage is proved in this way, the plaintiff would not usually have shown a present right to remove the defendant, and no receiver can be appointed to take possession in the ordinary course of things. The result would be that in cases of a simple mortgage unless the annual crops or rents and profits were made part of the mortgage security the defendant can never be ousted by a receiver unless there was a question of wasting the security or something of that kind which is not before us. The rights which a simple mortgagee gets have been laid down by the Privy Council in 19 Mad 249[1] and it can never be "just" to give a mortgagee rights which he does not get under the mortgage bond. If he chooses to let interest accumulate until his security is not sufficient to cover it, that is his trouble. As I have said, under no circumstances can the Civil Procedure Code be utilized to enlarge the plaintiff's security, and the only class of cases I can envisage in which the holder of a simple mortgage would be entitled to cause a receiver to take possession of the mortgaged property from the mortgagor would be cases in which a receiver is appointed on purely equitable grounds such as a case in which the mortgagor was destroying the security or wasting it either actively or by negligence or allowing it to be sold for non-payment of taxes or something of that kind. An implied agreement would exist in the case of a simple mortgage that the mortgagor was to protect, so far as he could reasonably be expected to, the mortgaged property, for otherwise the mortgagee would not allow him to remain in possession. If he broke that implied covenant a Court of equity would I think always interfere to prevent a mortgagee from suffering damage at the hands of the mortgagor.

My answer to the second question referred would be that in no case can a receiver be appointed in a suit on a simple mortgage which does not include the rents and profits of the land as part of the security in which the appointment was only asked for in order to enlarge the area of the mortgagee's security. The plea that the mortgagor is battening on the profits and not paying his interest can to my mind, in the case of an ordinary simple mortgage, be met simply by the reply that the profits are no part of the mortgage security unless specially reserved. The question of appointing a receiver after the preliminary decree when there may be reasons for supposing that the mortgagor is merely playing for time can always be met outside the provisions of O. 40, by refusing to allow stay of sale unless the mortgagor consented to the Receiver being appointed.

Ba U J.—This reference was made as a result of the pronouncement made by a Full Bench of the Allahabad High Court

on the question of an appointment of a receiver in a simple mortgage suit in 58 All 949.[14] The Full Bench holds that in a simple mortgage suit a receiver cannot be appointed. The reason given is that as sub-r. (1) of O. 40, Civil P. C., is controlled by sub-r. (2) the Court has no power to appoint a receiver of any property so as to remove from the possession or custody of the property any person, whether a party to the suit or not, whom any party to the suit has not a present right so to remove; and inasmuch as the mortgagee, in the case of a simple mortgage, has no right to obtain possession of the mortgaged property or its rents and profits by dispossession of the mortgagor before the termination of the mortgagor's interest by actual sale of the property in execution of the final decree for sale, a receiver cannot be appointed in a simple mortgage suit to take possession of the mortgaged property or its rents and profits.

If this reasoning is followed to its logical conclusion no receiver can ever be appointed in a pending suit. The word "present" as used in sub-r. (2) means "now existing"; and so the person who has an existing right to remain in possession of any disputed property is the person who is found in possession thereof at the time of the institution of the suit. Possession, to use a well-known legal term, is nine points of the law. As in any suit relating to property the person generally found in possession is the defendant, he is the person to be allowed to remain in possession thereof until and unless the plaintiff can prove his superior title by legal evidence. In this sense the plaintiff can never be said to have a present right to remove the defendant from possession of the disputed property by appointment of a receiver. O. 40 should therefore be read in the way pointed out by my Lord the Chief Justice. The Court must first start with sub-r. (1) and see whether it is just and convenient to appoint a receiver. If it is just and convenient, the Court may then appoint a receiver, remove any person from the custody or possession of the property, commit the same to the possession or custody of the receiver and confer certain powers on him. Then comes sub-r. (2). Under the said rule the Court shall not, though it may have appointed a receiver, remove from the possession or custody of property any person whom any party to the suit has not a present right to remove. Put in common language, what O. 40 means is this. You may appoint a receiver but you cannot remove any person from the possession or custody of property, whom any party to the suit has not a present right to remove. Sub-rule (2) thus obviously refers to a third party and not to a party to the suit. This is also the view taken by the Calcutta, Madras and Lahore High Courts : *vide* 18 C W N 537,[22] A I R 1925 Lah 590[23] and 20 I C 767.[24]

Taking a simple mortgage suit, if the interpretation of the Allahabad High Court is correct, we may, as pointed out by Beaumont, C. J. in 40 Bom L R 1266,[20] get a strange result. In that case the learned Chief Justice said:

> If the Allahabad view is correct, where the mortgagor is in possession by a licensee the Court can appoint a receiver, since the mortgagor can remove the licensee, but if the mortgagor is in possession himself, the Court cannot appoint a receiver.

I am further fortified in my view that sub-r. (2) applies to a third person who claims a superior title by the form of a preliminary decree given in Appendix D, Sch. 1, Civil P. C. The decree is a decree to be drawn up in an administration suit. In an administration suit the only relief the plaintiff can ask for is partition and possession and the taking of accounts. He is not the person who has a present right to remove the defendant from possession and yet a provision is made in the preliminary decree for appointment of a receiver. The interpretation that sub-r. (2) applies to a third party will tend to the smooth working of the Court and have the effect of carrying out the real intention of the Legislature.

> It is an elementary rule that a thing which is within the letter of a statute will, generally, be construed as not within the statute unless it be also within the real intention of the Legislature and the words, if sufficiently flexible, must be construed in the sense which, if less correct grammatically, is more in harmony with that intention. Where alternative constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system: Maxwell on the Interpretation of Statutes, Edn. 8, pages 17 and 18.

The sole question that, therefore, arises is whether it is just and convenient to appoint a receiver in a simple mortgage suit. It has been argued that it will not be

22. Satya Narain v. Keshabati Kumari, (1915) 2 A I R Cal 35=25 I C 406=18 C W N 537.
23. Paras Ram v. Puran Mal Ditta Mal, (1925) 12 A I R Lah 590=85 I C 737.
24. Natesa Pandara Sannadhi v. Ramalingam Pillai, (1913) 24 M L J 658=20 I C 767.

just and convenient to do so inasmuch as all that the mortgagee in a simple mortgage suit bargains for in the event of his non-receipt of the mortgage money on the due date is to apply to the Court for sale of the mortgage property and that until the date of the sale the mortgagor is entitled under the terms of the contract to remain in possession. It has been further argued that by appointing a receiver the Court will be substituting a new contract for the one entered into by the parties or else will be enlarging the security. Now, the general ground on which the Court appoints a receiver is ultimately in every case the protection or preservation of property for the benefit of persons who have an interest in it : (1853) 4 H L C 997[25] at page 1032. A mortgagee has undoubtedly an interest in the mortgaged property. A simple mortgage consists of two parts : a covenant on the part of the mortgagor to pay the debt, and an agreement empowering the mortgagee to realize his money out of the property pledged to him : (The Law of Mortgage in India by Ghosh, Edn. 5, page 81, Vol. I). Therefore by appointing a receiver the Court neither substitutes a new contract for the one entered into by the parties nor enlarges the security. The Court simply keeps the security intact so that the parties may be able to carry out the terms of their contract. In order to keep the security intact, the receiver must be given certain powers, such as the collecting of rents and profits and payment of such charges as are due thereon to Government or local bodies. I have therefore no doubt in my mind that a receiver can be appointed in a simple mortgage suit even though the rents and profits are not part of the mortgage security. The question that presents more difficulty is the question whether a receiver should be appointed, as of course in a simple mortgage suit when the interest is in arrear or only when the security has become insufficient either by the accumulation of interest or by reason of depreciation of the value of the property itself. This question was first decided in 1909 in this country in 5 L B R 135[19] the headnotes of which are :

As the wording of O. 40, R. 1, Civil P. C., 1908, differed from that of S. 503 of the Code of 1882 and had been taken from English law, the practice of the English Courts should be followed. These Courts have observed the following principles :

(a) Receivers are usually appointed as a matter of course, if the interest on mortgages, whether legal or equitable, is in arrears.

(b) Further, in the case of equitable mortgages (in which expression puisne mortgages are included) receivers are appointed if there is reason to apprehend that the property is in peril or is insufficient to pay the charges or incumbrances thereon.

The correctness of this decision was not doubted till 1935 when a Bench of this Court held in 14 Rang 16[13] that

the mere fact that interest is in arrears does not necessarily entitle the plaintiff to have a receiver appointed in his mortgage suit. The criterion is whether the security is sufficient or not. If the security originally sufficient is likely to become insufficient, either by reason of considerable accumulation of interest or by reason of depreciation of the value of the property itself, the Court in its discretion would appoint a receiver.

At about the same time another Bench, of which I was a member, following the decision given in 5 L B R 135[19] and other cases said :

In a mortgage suit when interest is in arrear the Court will normally appoint a receiver at the instance of the mortgagee as of course, whether or not the property appears to be of sufficient value to cover the mortgage debt and interest, and whether or not the right of the mortgagee to obtain a personal decree against the mortgagor subsists or has been lost : 14 Rang 292.[8]

At the time we decided this case, we were not aware of the decision given in 14 Rang 16.[13] A few months later, a similar point arose for decision and a Special Bench in 14 Rang 308[12] reaffirmed the principle laid down in 5 L B R 135[19] and 14 Rang 292.[8] Therefore the principle that a receiver will normally be appointed as of course in a suit based on a simple mortgage or a suit based on a mortgage by deposit of title deeds when the interest is in arrear has become part of the law of this country for thirty years. On the principle of *stare decisis* this rule should not, in my opinion, be lightly abrogated unless it is shown to be based on false or wrong premises. It is submitted that in deciding the question whether a receiver should or should not be appointed in a suit based on a simple mortgage or a mortgage by deposit of title deeds, we are not to follow the practice of English Courts. The difference in the two systems is clearly pointed out in the judgment of my Lord the Chief Justice and so I need say no more about it. As the difference is so clear and marked, I am rather in doubt as to whether the Courts in India were quite right in following the English practice in appointing a receiver in a simple mortgage suit. It seems to my

25. Owen v. Homan, (1853) 4 H L C 997=17 Jur 861=94 R R 516.

mind that as the law relating to the appointment of receivers in pending suits is to be found in O. 40, Civil P. C., we must refer to that Order only for our guidance. The order clearly gives a discretionary power to the Court as to when and when not to appoint a receiver. This discretionary power should not, in my opinion, be fettered by any hard and fast rule. For these reasons, I would answer the first question in the affirmative and the second question in the sense indicated by my Lord the Chief Justice.

Braund J. — The question, to my mind, is not whether the Court "can" appoint a receiver of the mortgaged property in a suit on a simple mortgage at the instance of the mortgagee, in the sense of whether it has jurisdiction to do so; but rather whether, in any given case, it is "just and convenient" that the Court should do so. O. 40, R. 1 (1), Civil P. C., is explicit that the Court may, by order appoint a receiver of "any" property "where it appears to the Court to be just and convenient." That jurisdiction is limited by nothing except the justice and convenience of the particular case. The real question, therefore, involved in this reference is I think, no more than whether, in a suit on a simple mortgage, the Court, in the exercise of its discretion, ought to regard the circumstance that interest is in arrear or the circumstance that the mortgaged property is of less value than is sufficient to cover the mortgage debt and interest as generally conclusive of what is "just and convenient" in the matter of appointing a receiver. And in attempting to answer this reference, I desire for myself, to be careful to confine my answer to the case—which is the only case before us—of a suit on a simple mortgage and not to attempt to lay down principles of general application to the appointment of receivers in other cases which may or may not be governed by the same considerations as those which we have had an opportunity of discussing upon this reference.

Relief by way of the appointment of a receiver is an invention of English equity. It is an equitable device which has been adopted by the Civil Procedure Codes of India and Burma for the purpose of securing to a person the fruits of his legal rights. The appointment of a receiver is neither a measure of punishment nor does it operate to enlarge or to restrict existing beneficial rights of property. It follows, in my view, that when O. 40, R. 1 (1), Civil P. C., speaks of that which may be "just and convenient" it must follow that the "justice" in contemplation has to be measured by the legal rights of the parties under the particular contract, in this case, a simple mortgage contract—with reference to which the question of the appointment of a receiver has arisen. The sole question which as I think, arises in each question of this kind, having regard to the terms of Order 40, R. 1 (1), from which the jurisdiction to appoint a receiver is derived, is to define the word "just" having regard to the particular circumstances of the case and to the contract which the parties have made between themselves. And it is, in my view, of the utmost importance to appreciate at the outset the truth that the statute does not confer upon the Court an elastic "equitable" jurisdiction to alter the substantive rights of the parties to a contract, and still less to make a new contract for them, but that it is designed rather to secure justice to the parties, conformably with convenience according to their existing rights which are in suit in the proceedings in question. Upon this view of the matter, it can, ex-hypothesi, never be "just" in the legal sense in which that word is, in my opinion, used in O. 40, R. 1 (1), Civil P. C., in relation to the civil rights of a mortgagor and mortgagee under a simple mortgage to appoint a receiver except with due regard to the rights arising out of the legal relationship between simple mortgagor and simple mortgagee which they themselves have created. The first step, therefore is to consider what are the legal relations of a mortgagor and mortgagee under a simple mortgage in Burma. It is, I venture to think, from refusing to face the plain fact that a simple mortgage in Burma is founded upon a wholly different conception from that of an equitable mortgage in England that the difficulties which have necessitated this reference have arisen. Indeed, in the leading case in 14 Rang 292,[8] there seems to have been made what can only be described as a conscious attempt to assimilate the simple mortgage of Burma to the equitable mortgage of England upon grounds of English equity applicable to the English equitable mortgage for which, in my respectful opinion, there is no room in the law relating to the simple mortgage in Burma. The simple mortgage of India and Burma is the creature of S. 58 (b), T. P. Act :

Where without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

When a lender in Burma takes from his borrower a simple mortgage containing no express and unusual terms he takes it by reference to S. 58 (b), T. P. Act. And it appears to me to be plain, beyond doubt, that what is given to the mortgagee is the right to look to the proceeds of sale of the property which forms the security and no more. This, I think, conforms to the view of the character of a simple mortgage which has been expressed by the Judicial Committee of the Privy Council in 19 Mad 249.[1] There Lord Hobhouse says :

Though it is not here expressed that the mortgagee's remedy is to be by sale under decree, the mortgage falls within the class of 'simple mortgages' as classified in Sir A. Macpherson's work on Mortgages, page 12, and in the Transfer of Property Act, 1882. In such a mortgage there is no transfer of ownership, and the mortgagee must enforce his charge by judicial sale.

And again :

In default of payment, a simple mortgage gives to the mortgagee a right, not to possession but to sale, which he must work out in execution proceedings.

I cannot therefore escape from the view that under a simple mortgage the right of the mortgagee is no more than a right to have the corpus of the mortgaged property sold by the process of a judicial sale and to look to those proceeds for his own reimbursement of principal, interest and costs. It is not even the property itself which forms the security in a strict sense. The actual security is the right to conversion into money of the corpus of the property and the right to repayment out of the proceeds of that conversion. And the conversion contemplated by the Act is the sale of the property through the machinery of the Court. It appears to me to follow that until such a sale has been completed nothing emerges to which the mortgagee can look. When it is realized what a simple mortgage in Burma really is and that it is nothing more nor less than what the statute makes it, without regard to the characteristics of an English equitable mortgage, it follows, to my mind, that, neither when the security is created nor at any later stage, can resort be had to a purely English equity governing a security of a wholly different character to import into a mortgagee's rights under a simple mortgage a title to the rents and profits of the mortgaged property pending the completion of a sale. For the truth is that nothing but the proceeds of sale, realized in the statutory manner, ever constitute the security. With great respect to the learned Judge who decided 14 Rang 292,[8] it appears to me to be doing violence to the statutory character of a simple mortgage in Burma to clothe it, by reference to English equity, with the attributes of an English equitable charge in which the right to foreclosure and an interest on the part of the mortgagee in the corpus of the security before conversion has always been recognized.

Once this is realized, the whole reference is, in my opinion, answered. I do not, for myself, think that the Proviso contained in O. 40, R. 1 (2) is relevant to the question at all. Even if we were to assume that the receiver, if and when appointed, might be put into possession both of the corpus and of the rents and profits of the property in mortgage—which is the highest at which it can be put—that would not by itself be a circumstance which would make it any the more "just and convenient" that the receiver should be appointed, because the mere collection of the rents and profits by the receiver would in no way alter their ultimate beneficial destination. An idea appears to have obtained a footing in this Court that the appointment of a receiver to collect the rents and profits of the mortgaged property has by itself the effect of vesting a beneficial interest in them in the mortgagee. Indeed, the actual decision in 14 Rang 292[8] went as far as that. Nothing could, I think, be further from the truth. A receiver is an officer of the Court appointed to collect and hold the property of which he is the receiver pending its due administration by the Court in accordance with the several beneficial legal interests in such property, whatever those interests may be. The appointment of a receiver in no way creates new, nor diminishes old, rights. Therefore, whether a receiver can or cannot enter into possession under O. 40, R. 1 (2) is not a relevant consideration, because, even if he could be put into possession of the rents and profits of the mortgaged property, they would still remain the rents and profits of the mortgagor. And, in my view, the appointment of a receiver could never be justified as "just and con-

venient" if its only object is that he should take possession of something to which the mortgagee has no title. For myself, therefore, I think that it would be misleading to consider upon this reference the difficult question, which has caused a conflict of view in other Courts, as to whether or not the words "other than a party to the suit" should be read into sub-r. (2) of Order 40. Whether they should or not and whether a receiver of the rents and profits of a property in simple mortgage can be put into possession or not, the plain fact remains that he could not, conformably with justice and convenience, have been appointed a receiver with the sole object of taking possession of rents and profits in which the mortgagee has not, and can never attain, any beneficial interest.

In my view therefore the following principles can be deduced : (1) In the case of a simple mortgage the Court has jurisdiction to appoint a receiver whenever it is "just and convenient" so to do; (2) Whether in any particular case it is "just and convenient" in a simple mortgage suit to appoint a receiver depends entirely upon the circumstances of each case; (3) The collection of the rents and profits of the mortgaged property by the receiver is not, by itself alone and in the absence of a special contract between the mortgagor and mortgagee giving the latter a specific interest in such rents and profits, a ground upon which it is "just and convenient" that a receiver should be appointed; (4) By themselves and alone, neither the circumstance that interest is in arrear nor that the proceeds of the security is likely to prove deficient when sold to meet the mortgage debt, interest and costs, are grounds upon which it is "just and convenient" that a receiver should be appointed. I agree therefore that the reference should be answered in the words in which my Lord the Chief Justice has proposed. I have only to add that, if the effect of this view of the matter is to make the security obtained by an ordinary simple mortgagee less valuable in Burma than it has hitherto been or than it is desirable that it should be, the proper remedy for that is, in my opinion, by legislation, but not by a judicial straining of the clear terms of S. 58 (b), T. P. Act, 1882.

N.S./R.K. *Answers accordingly.*

*** * A. I. R. 1939 Rangoon 332**

FULL BENCH

ROBERTS C. J., DUNKLEY AND SPARGO JJ.

Maung Ba Maung — Appellant.

v.

Maung Ba Yin and another — Respondents.

Civil Ref. No. 8 of 1939, Decided on 3rd July 1939; reference made by Mosely J.

*** * Specific Relief Act (1877), Ss. 42 and 39—Creditor cannot sue under S. 42 for mere declaration that transfer of moveable property by his judgment-debtor is fraudulent—Nor can he sue under S. 39 for cancellation of deed of transfer:** *7 Rang 477=A I R 1930 Rang 27=120 I C 228, Overruled.*

It is essential to bear in mind the distinction between a substantive right and a right which is conferred by rules of procedure. The right of a judgment-creditor to attach the property of his judgment-debtor is a mere procedural right, conferred by the Code of Civil Procedure. It is not a substantive right as to the property, and therefore cannot give rise to a right of suit under Sec. 42. Hence a creditor cannot sue under S. 42 for a bare declaration that a transfer has been made by his judgment-debtor fraudulently with intent to defeat or delay his creditors : *7 Rang 477 = A I R 1930 Rang 27 = 120 I C 228,* **Overruled;** *4 L B R 252 and A I R 1916 L B 25, Held not good law; Case law discussed.* [P 332 C 2; P 334 C 1]

Nor can he sue for cancellation of the document of transfer, either as his sole remedy or as a relief further to a declaration, as he is not a person against whom a document transferring his debtor's moveable property is void or voidable: *A I R 1932 Rang 13, Expl.; A I R 1931 Rang 310, Disting.* [P 334 C 1]

A. N. Basu — *for Appellant.*

K. C. Sanyal — *for Respondents.*

OPINION

Roberts C. J.—The question for the determination of the Court is :

Can a creditor sue under S. 42, Specific Relief Act, for a bare declaration that a transfer has been made by his judgment-debtor fraudulently with intent to defeat or delay his creditors, or must he sue for cancellation of the deed of transfer either as his sole remedy or as a relief further to that declaration ?

Now this question refers, of course, to a transfer of moveable property, since a transfer of immovable property made fraudulently and with intent to defeat or delay creditors is dealt with by S. 53, T. P. Act. It is voidable at the option of any creditor so defeated or delayed. The normal method of execution by a creditor who becomes a decree-holder is to attach the property of the judgment-debtor. O. 21, R. 43, and the subsequent Rules to 57 inclusive, show how he can do it; both moveable and immovable property are dealt with by the rules and there are special provisions governing the

attachment of different kinds of property including decrees. If any claim is preferred to the property by a third party or an objection is made to the attachment under R. 58, the Court investigates the claim and may release the property from attachment. Supposing it does so, the creditor may still institute a suit in accordance with the provisions of R. 63 to establish the right which he claims to the property. The right of a decree-holder is to have his decree satisfied, and the method by which he enforces that right is by way of proceedings in execution. If there is a contest between him and a third party, there must be, first of all, attachment by the creditor, secondly, objection by the third party, and thirdly, if the objection is successful, a suit between them under the provisions of R. 63. In such a suit the creditor claims the right to property under his decree because he says that it belongs to the judgment-debtor and someone else is objecting either that it does not or that it is not liable to attachment for some other reason. The Legislature has here made provision for this very question and no other to be decided. In 4 Rang 22[1] it was held that a decree-holder having recourse to this method of obtaining the fruits of his decree open to him could not proceed by way of a bare suit for a declaration under S. 42, Specific Relief Act. After careful reading of the judgment of this Bench in that case, I must confess myself reluctant to make the smallest attempt to improve upon its language. I dealt fully with the authorities and it was followed in 5 Rang 699.[2] Neither of these decisions seem to have been referred to by the Court in 7 Rang 477[3] at all.

The judgment in this last mentioned case does not discuss the question of a creditor's right to bring a suit under S. 42, Specific Relief Act, in order merely to set up the title of his judgment-debtor to moveable property. The Court held that he was not barred from doing so by the proviso to the Section which says that no Court shall make a declaration in such a suit where the plaintiff is able to seek other relief and fails to do so. It was pointed out that where a creditor attached property and the attachment had been removed, a suit would lie under the provisions of O. 21, R. 63, but in 7 Rang 477[3] there had been no attachment nor removal of attachment. But a suit for a bare declaration will only lie if the plaintiff is "entitled to any legal character or to any right as to any property." These are the words of the statute itself: and where the only right claimed is a right to attach the property of another, the case in 4 Rang 22[1] is authority for saying that the suit is not maintainable. *See also* 39 Cal 704.[4] A perfectly independent remedy is given to the creditor by attachment and by a suit under O. 21, R. 63, if the attachment is objected to. I respectfully agree with the learned Judge who made the reference that the cases in 4 L B R 252[5] and 9 Bur L T 89[6] are not good law. In 26 All 606[7] the plaintiff claimed to be the owner of the property in respect of which he sought a declaration and the suit under S. 42 was thus clearly maintainable at his instance. So far as it relates to the maintainability of such a suit by a creditor in order to assert the title of his judgment-debtor and the liability of the property to attachment, I am of opinion that the case in 7 Rang 477[3] must be overruled, and my answer to the first question propounded must be in the negative.

We were referred in the course of the argument to 9 Rang 614.[8] All that case decided is that if there is an independent right to sue by reason of O. 21, R. 63, subsisting in the creditor, S. 53, T. P. Act, does not interfere with it. But to give the creditor his independent right he must proceed by attaching the property, and then if there is an objection by a third party and it is upheld, a suit will lie under O. 21, R. 63. He has his remedy, but this does not mean he can file a suit under the Specific Relief Act. In 9 Rang 367,[9] Carr J. expressed the view that a creditor who under Sec. 53, T. P. Act, was entitled to

1. K. R. M. A. Firm v. Maung Po Thein, (1926) 13 A I R Rang 124=95 I C 98=4 Rang 22.
2. U Po Thein v. O. A. O. K. R. M. Firm, (1928) 15 A I R Rang 34=106 I C 368=5 Rang 699.
3. Ma Sein v. P. L. S. K. Firm, (1930) 17 A I R Rang 27=120 I C 228=7 Rang 477.
4. Deokali Koer v. Kedar Nath, (1912) 39 Cal 704 =15 I C 427=16 C W N 838.
5. Societa Coloniale Italiana v. Mg. Shwe Le, (1907) 4 L B R 252=14 Bur L R 135.
6. Chan Tat Thai v. Ma Lat, (1916) 3 A I R L B 25=33 I C 124=9 Bur L T 89.
7. Ganga Ghulam v. Tapeshir Prasad, (1904) 26 All 606=1904 A W N 138.
8. Ah Foon v. Hoe Lai Pat, (1932) 19 A I R Rang 13=135 I C 641=9 Rang 614.
9. Maung Aung Myit v. Maung Tha Hmat, (1931) 18 A I R Rang 310=134 I C 746=9 Rang 367.

avoid a transfer should properly sue for the actual cancellation of the deed in question. But this case dealt with immovable property ; consequently, a suit would lie for a declaration that the mortgage on the property was fraudulent. In the present case I am of opinion that S. 39, Specific Relief Act, is not applicable. That Section says that any person against whom a written instrument is void or voidable in certain cricumstances may sue to have it adjudged to be so. A decree-holder is only entitled to have his decree satisfied and the modes by which he can execute his decree are the subject of careful provisions of the Legislature. He cannot demand to have any and every transfer of moveables by his judgment-debtor to a third party set aside under this Section. If he pursues his proper remedy by attachment and the attachment is removed, he can still institute his suit under R. 63 ; and whilst he has the liberty to take this course, the instrument of transfer from his judgment-debtor to the objecting transferee cannot give him apprehension of serious injury. My answer therefore to the second and third questions is in the negative. The costs of this reference to be costs in the appeal. Advocate's fee ten gold mohurs.

Dunkley J.—I am in entire agreement with my Lord the Chief Justice. It is essential to bear in mind the distinction between a substantive right and a right which is conferred by rules of procedure. The right of a judgment-creditor to attach the property of his judgment-debtor is a mere procedural right, conferred by the Civil Procedure Code. It is not a substantive right as to the property, and therefore cannot give rise to a right of suit under S. 42, Specific Relief Act. A creditor is not a person against whom a document transferring his debtor's moveable property is void or voidable, and therefore the creditor cannot sue for the cancellation of such a document under Sec. 39, Speeific Relief Act. Hence the answer to the question propounded must be that a judgment-creditor cannot sue for a bare declaration under S. 42, Specific Relief Act, nor can he sue for cancellation of the document of transfer, either as his sole remedy or as a relief further to a declaration.

Spargo J. — I have had the advantage of reading the judgments proposed by my Lord the Chief Justice and by my learned brother Dunkley and I respectfully agree that the three questions propounded to us must be answered in the negative.

N.S./R.K. *Answers in the negative.*

A. I. R. 1939 Rangoon 334

FULL BENCH

ROBERTS C. J., BAGULEY AND SHARPE JJ.

J. K. Shaha — Applicant.

v.

Dulah Meah — Respondent.

Civil Ref. No. 2 of 1939, Decided on 20th March 1939, made by Baguley J.

Promissory note—Consideration — Presumption — Suit on pro-note — Executant admitting signature but asserting that he did not sign note in the condition in which it is filed—Burden of proving that pro-note is not what it appeared to be is on executant: *5 Rang 527 = A I R 1927 Rang 319=105 I C 361, Overruled.*

Production of the promissory note itself, once the signature is proved or admitted, shifts the burden to the maker. Consideration is presumed in the case of negotiable instruments and need not be proved independently as in the case of an ordinary suit founded upon contract. Circumstances may of course exist which would weaken the ordinary presumption that a negotiable instrument has been executed for value received and when all the facts are before the Court, the presumption raised by S. 118, Negotiable Instruments Act, may be rebutted and the burden of proof shifted back to the plaintiff. It is however in plain contravention of the statute to ignore the presumption raised in the first instance. If therefore the plaintiff sues on a promissory note, and the defendant admits, or has had proved against him conclusively his signature or his thumb impression on the promissory note, but the defendant asserts that he did not sign the promissory note in the condition in which it is filed, the burden is on the defendant to prove that the promissory note is not what it appeared to be : *5 Rang 527=A I R 1927 Rang 319 = 105 I C 361,* **Overruled** *; A I R 1932 All 164; 20 Bom 367 and A I R 1935 Mad 769, Rel. on.* [P 334 C 2 ; P 335 C 1, 2]

F. S. Doctor — *for Applicant.*

A. N. Basu — *for Respondent.*

OPINION

Roberts C. J. — The question in this reference is :

If the plaintiff sues on a promissory note, and the defendant admits, or has had proved against him conclusively his signature and/or his thumb impression on the promissory note, but the defendant asserts that he did not sign the promissory note in the condition in which it is filed, is the burden of proof on the plaintiff or on the defendant ?

The answer is that in the circumstances set out, the burden of proof is upon the defendant. By S. 118, Negotiable Instruments Act, 1881, until the contrary is proved it shall be presumed that every negotiable instrument is made or drawn for consideration and by S. 20 of the same Act where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments

and either wholly blank or having written thereon an incomplete negotiable instrument he thereby gives prima facie authority to the holder thereof to make upon it, or to complete upon it, a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. It will be seen that the Section requires that the instrument should be stamped in accordance with the law and that it should be delivered. If the signer intends the document to become a negotiable instrument it is for him to take care that it is issued in accordance with his intentions, and for him to prove that the person into whose hands it has found its way had not in fact the authority to make or complete it. If he does not intend the document to be a negotiable instrument at all he will not be liable for the act of a bailee or thief who turned it into one: his signature does not operate as an estoppel against him. But adopting the words of the learned Judge who made the reference, he has to prove that the promissory note is not what it appears to be. The Order of Reference mentions the case in 5 Rang 527.[1] With respect I cannot agree with the decision in that case and the following passage in the judgment is, I think, gravely misleading:

All that the defendant admitted in this case was that his signature appeared on the document filed. Now it is quite clear that if the plaintiff had merely set forth in the plaint that the defendant's signature appeared on the document without any further allegation of fact, his plaint must have been rejected as disclosing no cause of action. It was a necessary averment to state that the defendant had promised to pay him the sum named with interest. The admission made by the defendant did not establish the plaintiff's case, and if there had been nothing on the pleadings besides the plaint and the defendant's denial, the suit must have failed. It is quite true that the fact that the defendant's signature appears on the note is of very great evidentiary value, and in many cases of this nature it might be sufficient corroboration of evidence given by the plaintiff himself to establish the plaintiff's case. That would depend on the circumstances of the particular case. But the defendant did not and never has admitted the material propositions of fact which would give the plaintiff a right to sue, and the burden of proving the loan in our opinion rested on the plaintiff.

Production of the promissory note itself, once the signature is proved or admitted, shifts the burden to the maker. Consideration is presumed in the case of negotiable instruments and need not be proved independently as in the case of an ordinary suit founded upon contract. The law on this matter is as stated in 54 All 375.[2] Circumstances may of course exist which would weaken the ordinary presumption that a negotiable instrument has been executed for value received, and when all the facts are before the Court, the presumption raised by S. 118 of the Act may be rebutted and the burden of proof shifted back to the plaintiff: *see* 20 Bom 367[3] and 58 Mad 841.[4] It is however in plain contravention of the statute to ignore the presumption raised in the first instance. 5 Rang 527[1] cannot be taken as good law and must be taken to be overruled. Advocate's fee five gold mohurs.

Baguley J. — I agree and have nothing further to add to what I said in my Order of Reference.

Sharpe J. — I agree.

N.S./R.K. *Answer accordingly.*

1. Hoe Moh v. Seedat, (1927) 14 A I R Rang 319 =105 I C 361=5 Rang 527.
2. Jagmohan Misir v. Mendhai Dube, (1932) 19 A I R All 164=135 I C 241=54 All 375.
3. Moti Gulabchand v. Mahomed Mehdi Tharia Topan, (1896) 20 Bom 367.
4. Narasamma v. Veerraju, (1935) 22 A I R Mad 769=160 I C 768=58 Mad 841.

A. I. R. 1939 Rangoon 335

ROBERTS C. J. AND BRAUND J.

Maung Paik — Appellant.

v.

Maung Tha Shun — Respondents.

L. P. A. No. 1 of 1939, D/- 1-5-1939.

(a) Buddhist Law (Burmese) — Succession—Claim of an out-of-time grandson.

The claim to inheritance of an out-of-time grandson does not arise through his acquisition of the interest of an orasa at all; it is an independent right of inheritance: *A I R 1933 Rang 50, Rel. on.* [P 336 C 1]

(b) Buddhist Law (Burmese) — Succession—Out-of-time grandson is entitled to equal share with uncle in estate of his grandparents if he is child of eldest child of grandparents — It is not necessary to show that his parent was orasa child — Eldest child dying in infancy being survived by two brothers—Elder of them is eldest for the purpose.

Under the Burmese Buddhist law an out-of-time grandchild or out-of-time grandchildren who are entitled to an equal share with an uncle or aunt in the division of the estate of the grandparents are the child or children of the eldest child of the grandparents. It is not essential to the success of their claim to such a share that their parent who predeceased either one or both of the grandparents was the orasa child, and all that is necessary to show is that their parent was the eldest child of the grandparents. Where the eldest child was a son and died in infancy, being survived by two brothers the elder of the two is eldest for the purpose and his son is entitled to equal share with his uncle in the estate of his grandmother: *A I R 1924 P C 238 and A I R 1929 Rang 365, Rel. on.* [P 336 C 1, 2]

U Chan Htoon — *for Appellant.*

U E Maung — *for Respondents.*

Roberts C. J. — This Letters Patent Appeal arises out of a suit brought by the appellant Maung Paik (by his next friend) for the administration of the estate of his paternal grandmother, Daw Nyo. The appellant's paternal grandfather was U Ba Oh; he died in 1927, and at the time of his death he had two sons, Maung Tha Win being the elder and Maung Tha Shun the younger. Daw Nyo was the widow of the deceased and she outlived Maung Tha Win, who died in 1931. She herself died in 1934. The question is whether the appellant is entitled to a share in Daw Nyo's estate; and, if so, to what share? The first born child of U Ba Oh and Daw Nyo was named Tha Lun: he died in infancy: he never attained, nor could have attained, the status of orasa. But Maung Tha Win, the father of the appellant, did attain the status of orasa; the learned Judge in second appeal observes that this fact has even been conceded. Now it is said that after the death of U Ba Oh, Maung Tha Win behaved unfilially towards his mother; and there is ample evidence to support this contention. The Subdivisional Judge, having held that Maung Tha Win was the orasa son, held that he became a *swanutta* or dogson; as such, then, he could not assert for himself the rights and privileges accorded to an orasa son; and up to the time of his death he remained under this disability. But the present appellant is an out-of-time grandson; his claim to inheritance does not arise through his acquisition of the interest of an orasa at all; it is an independent right of inheritance: 11 Rang 158.[1] The claim of the child of an orasa does not however, in view of a recent authority, fall to be considered. It was stated by Mya Bu J. in First Appeal No. 5 of 1939[2]:

> Under the Burmese Buddhist law an out-of-time grandchild or out-of-time grandchildren who are entitled to an equal share with an uncle or aunt in the division of the estate of the grandparents are the child or children of the eldest child of the grandparents. It is not essential to the success of their claim to such a share that their parent who predeceased either one or both of the grandparents was the orasa child, and all that is necessary to show is that their parent was the eldest child of the grandparents.

The judgment of the Bench of this case was not delivered till after the judgment of the learned Judge in second appeal in the present matter. The judgment of this Bench must, in our opinion, be held to conclude the matters raised in the present appeal independently of any other consideration. Is Tha Win to be regarded as the eldest child? In 2 Rang 693[3] at p. 746 Heald J. said:

> I think from my experience of cases under Burmese Buddhist law for more than 20 years, that there can be no doubt that children who do not grow up are always disregarded and that the eldest child who reaches an age at which he or she would be able to take the place of the father or mother in case of death would always be regarded as auratha.

This dictum received no adverse comment when the case was considered on appeal by their Lordships of the Privy Council. It was approved in 7 Rang 569.[4] If the eldest surviving son can be regarded as orasa I see no difficulty in considering him as the eldest son for the purpose of the present case. It does not appear to me consistent with the view of the law expressed by Heald J. to hold that Tha Win was not, at all material times, the eldest son of U Ba Oh, even though he had had an elder brother, who had died at the age of two or three years. Again, in 5 Bur L T 73,[5] where the eldest child was a son and died in infancy, being survived by two sisters, the son of the elder was awarded a share equal to that of his aunt. Twomey J. said that the texts cited in S. 163 of Kinwun Myingyi's Digest gave the issue of the eldest daughter a share equal to that of the youngest of his aunts and added that there seemed to be authority for holding that these texts applied exclusively to families consisting of daughters only. Consequently, in view of the recent Full Bench decision which I have cited, and in spite of some difficulties which we might have felt but for its existence, I am of opinion that this appeal must be allowed, with consequential costs, and the decree of the District Judge restored, except that the word "eldest" must be substituted for the word "orasa" in the eighth line thereof; advocate's fee 15 gold mohurs.

Braund J. — I agree and have nothing to add.

D.S./R.K. *Appeal allowed.*

1. U Sein v. Ma Bok, (1933) 20 A I R Rang 50=144 I C 306=11 Rang 158.
2. Ma Hnin Yi v. Maung Thin, First Appeal No. 5 of 1939.
3. Kirkwood v. Maung Sin, (1924) 11 A I R P C 238=84 I C 567 = 51 I A 434 = 2 Rang 693 (P C).
4. Ma Aye Yin v. Ma Mi Mi, (1929) 16 A I R Rang 365=121 I C 778=7 Rang 569.
5. Ma Ein Thu v. Maung Hla Dun, (1912) 5 Bur L T 73=15 I C 360.

*** * A. I. R. 1939 Rangoon 337**

SPECIAL BENCH

ROBERTS C. J., DUNKLEY AND SPARGO JJ.

Mrs. Sooniram Poddar — Applicant.

v.

Commissioner of Income-tax, Burma— Respondent.

Civil Ref. No. 6 of 1939, Decided on 26th June 1939: Reference made by Commissioner of Income-tax, Burma.

*** * Income-tax Act (1922), S. 2 (4)—Mere speculation not in nature of trade cannot be regarded as adventure in nature of trade—Assessee, outside his regular business, making speculative purchase of silver with a view to resell it at profit — Silver remaining in same state for three years and nothing done to enhance its price — Silver subsequently sold at higher price — Such speculative and isolated transaction held not in nature of trade—Profits therefore could not be taxed.**

Speculations and adventures must be "in the nature of trade" before the profits and gains resulting from them become taxable. Every speculation has in it the element of adventure, but it must be a speculation in the nature of trade if it is to be considered an adventure in the nature of trade. A mere speculation, not in the nature of trade, cannot be regarded as an adventure in the nature of trade. If the transaction is an isolated one then in order to constitute it an adventure in the nature of trade there must be some activity of a trading nature between the purchase and the sale undertaken in order to make the property marketable, i. e. to put it into a saleable state or to attract purchasers. If a man, outside his regular business, makes a speculative purchase of an article or commodity with a view to its profitable resale, he is not for that reason alone venturing on a trade. It is not necessarily "an adventure or concern in the nature of trade, commerce, or manufacture": *Case law reviewed.* [P 338 C 1, 2; P 342 C 1, 2]

An assessee who was a money-lender purchased a quantity of silver by means of money lying at deposit in her name in a bank with a view to resell it at profit. Nothing was done to the silver by silversmiths or other persons to enhance its value and it remained in possession of the assessee for three years in the same state. After that period the assessee sold the silver at a higher price and made a profit :

Held that the speculative and isolated transaction undertaken by the assessee was not an adventure in the nature of trade within the meaning of S. 2 (4) and hence the profits could not be assessed to income-tax. [P 337 C 1, 2; P 342 C 1]

Foucar — *for Applicant.*

U Theing Maung, Advocate-General — *for Respondent.*

Roberts C. J. — The question referred to us is as follows :

Whether there were materials from which the Income-tax Officer and the Assistant Commissioner of Income-tax could conclude that the receipts sought to be taxed arose from business within the meaning of S. 2 (4), Income-tax Act.

The term 'business' is defined by the Section referred to in the following way :

'Business' includes any trade, commerce, or manufacture, or any adventure or concern in the nature of trade, commerce or manufacture.

The assessee in this case, Mrs. Sooniram Poddar, is a Marwari Indian lady and is the wife of a partner in the firm of H. Soorajmal and Sons and Soorajmal Ganshamdas (one firm). She carried on an independent money-lending business on her own account, but her husband's firm conducted it on her behalf. In June 1932 the assessee had the sum of Rs. 25,000 lying on deposit with the National City Bank of New York in her own name and bearing interest at four per cent. per annum. She conceived the idea of purchasing silver with it, no doubt with a view to resale and profit, and on 17th June the sum was withdrawn and was entrusted to her husband's firm, who bought on her behalf 360 viss of silver on 8th July 1932, for the sum of Rs. 27,000. It is not suggested that any person other than the assessee found the balance of Rs. 2000 wherewith to complete the purchase price. It is said that one of the matters taken into consideration at the time of the withdrawal of the assessee's money from the Bank was that the Bank was alleged to be unstable. The Commissioner doubts whether this is the true explanation, but whatever the answer may be it cannot, I think, affect the result of this case.

The silver was actually delivered at the end of July 1932. Nothing was done by silversmiths or other persons to enhance its value, and it remained just as it was in the assessee's possession till July 1935, when it was sold on her behalf by her husband's firm for the sum of Rs. 40,519. In those circumstances, the profit made on the resale has been assessed to income-tax : we have to determine whether there were any materials on which the Commissioner could find that this isolated transaction by the assessee was an adventure in the nature of trade. If there was, she is liable to be assessed in respect of it; it does not fall to us to consider whether we should have found as a fact that this was an adventure in the way of trade or not, provided there is any evidence to support such a finding. But, on the other hand, if there was no evidence to support such a finding the Court will intervene. In (1930-

1931) 15 Tax Cas 333[1] the Commissioners found that the property was acquired with the sole object of turning it over again at a profit and without any intention of holding the property. Rowlatt J. said (and his remarks were in no way criticized in the Court of Appeal or by the House of Lords):

> That describes what a man does if he buys a picture that he sees going cheap at Christie's because he knows that in a month he will sell it again at Christie's. That is not carrying on a trade. Those words will not do for a finding of carrying on a trade or anything else.

Stopping there this means that if a man, outside his regular business, makes a speculative purchase of an article or commodity with a view to its profitable resale, he is not for that reason alone venturing on a trade. To use the words of our Act, it is not necessarily "an adventure or concern in the nature of trade, commerce, or manufacture." The learned Judge went on to say:

> What the Commissioners must do is to say, one way or the other, was this, I will not say carrying on a trade, but was it a speculation or an adventure in the way of trade. I do not indicate which way it ought to be, but I commend the Commissioners to consider what took place in the nature of organizing the speculation, maturing the property and disposing of the property, and when they have considered all that, to say whether they think it was an adventure in the way of trade or not.

That case related to the acquisition of an option over a rubber estate, and the resale to a company after an adjoining estate had been secured. The learned Judge sent the case back to the Commissioners. Now, I confess I should have thought this language was perfectly clear. What had been undertaken was admittedly a speculation, but the question was whether it was an adventure in the way of trade. And exactly the same question confronted the Commissioner here. But the learned Advocate-General asked us to say that, once the element of speculation appeared, then the adventure must be held to be an adventure in the way of trade. He said in effect, if I understand his argument aright, the test is whether the intention of the buyer of an article or commodity was to undertake a lock-up investment; in such a case, if he chanced to sell it later, he would not be liable to assessment; but if, on the other hand, he intended it as a speculation, meaning to resell at a profit when opportunity offered, there would be an adventure in the way of trade and he would be liable to assessment.

1. Leeming v. Jones, (1930-31) 15 Tax Cas 333.

What we are asked to do is to say that Rowlatt J. meant the terms "speculation" and "adventure in the nature of trade" as synonymous; and to read his judgment as though he had said "was it a speculation (or, to use a synonymous phrase an adventure in the way of trade) or not?" I am clearly of opinion that the context shows that this is quite a wrong interpretation to place upon this passage. He was contrasting an admitted speculation from an adventure in the nature of trade. In effect, he asked, was it a speculation merely, or was it something more, namely an adventure in the nature of trade. So insistent was the argument addressed to us on this point that I think it desirable to set out the position more fully. Speculations and adventures must be "in the nature of trade," before the profits and gains resulting from them become taxable. Every speculation has in it the element of adventure but it must be a speculation in the nature of trade if it is to be considered an adventure in the nature of trade. A mere speculation, not in the nature of trade, cannot, by any process of reasoning be regarded as an adventure in the nature of trade. And whether the purchase of silver with a view to reselling it at a profit is called a speculation, or whether it is called an adventure, is of no account; the dividing line between assessability and exemption depends on whether what is done is done in the nature of trade or not. I desire to add that, in my opinion, if the assessee had resold the silver at a profit in a week I do not think the principle involved would be any different. The Commissioner says, in para. 12 of his statement of the case:

> Had the price gone up almost immediately, I have no doubt she would have sold out promptly. Had she done so there could have been no question that the transaction was any other than a business venture.

I cannot accede to this view: the transaction would then have been shown more conclusively to be speculative but it would not have been shown to have had any greater connexion with trade. In the revision order of the Commissioner (Annexure D, para. 18) he says:

> If I am to regard the above transaction as purely a capital transaction resulting in an accretion of capital, I ought to be able to come to the conclusion that the purchase of silver provided what normally would be regarded as a suitable and safe investment.

This is, with all respect to his view, not the test to take. People buy shares (for example) with different intentions and even

from mixed motives, and what the Commissioner is saying is that appreciation of gilt-edged stock is immune from assessment, because he thinks it is suitable and safe, but increase in the value of speculative shares or of commodities the market price of which is wont to fluctuate is liable to it; and he makes himself the arbiter of what is a safe investment and what is not. But this is not the criterion. The Commissioner continues :

> If I am unable to come to such a conclusion then I must regard the transaction as a speculation or as an adventure in trade.

He ends (in para. 20) by finding that there was

> the primary intention to speculate in the silver market at a uniquely favourable juncture. That being so, the profits arising from the transaction to the applicant do not amount to an accretion of capital but amount to profits from the resale of stock in trade (that is the silver) purchased out of capital and as such are taxable.

It is quite plain that he has thought that if an investment is what he considers safe, and is a lock-up investment made without the intention of resale being in the forefront of the investor's mind, then, it may be regarded as an accretion of capital and non-assessable; but that the instant speculation comes in it is an adventure in the nature of trade. In my judgment this is an error the nature of which will be apparent from the authorities which I am about to cite. Lord Clyde in (1927) 11 Tax Cas 538[2] said :

> If the venture was one consisting simply in an isolated purchase of some article against an expected rise in price and a subsequent sale it might be impossible to say that the venture was 'in the nature of trade'; because the only trade in the nature of which it could participate would be the trade of a dealer in such articles and a single transaction falls as far short of constituting a dealer's trade, as the appearance of a single swallow does of making a summer.

In the case cited, the respondents, a ship repairer, a blacksmith and a fish salesman's employee, bought a cargo vessel and turned it into a drifter. In the course of doing so they engaged in trading activities. Lord Clyde said : "These operations seem to me to be the same as characterize the trade of converting and refitting second hand articles for sale." Lord Sands observed : "The subject of purchase and sale may be so treated in the interval as to bring the transaction within the category of carrying on a trade." Accordingly, the respondents were held to be assessable; but in the present case, as I have had occasion to remark, nothing was done to the silver purchased by Mrs. Poddar. It was resold just as it was. No trading activity took place. But it is contended that Lord Clyde explained what he had said here in the later case in (1929) 14 Tax Cas 490.[3] Mr. Rutledge was a money-lender and also a film director, and he went to Berlin on business connected with the film firm. He seized an opportunity there of buying a million rolls of toilet paper from a bankrupt firm of manufacturers, for £1000. By dint of business acumen he discovered a gentleman in the East End of London who offered him 3d. per roll, and he made a net profit of £10,985. Lord Clyde said that though this venture was an isolated one, the question whether it was in the nature of trade must depend on its character and circumstances. He said :

> . . . . if—as in the present case—the purchase is made for no purpose except that of re-sale at a profit, there seems little difficulty in arriving at the conclusion that the deal was 'in the nature of trade,' though it may be wholly insufficient to constitute by itself a trade. It is not difficult, on the other hand, to imagine circumstances in which the question might become very narrow; and in (1927) 11 Tax Cas 538,[2] I instanced such a case which it may be worth while to expound. Suppose the appellant on the occasion of his visit to Berlin had seen a picture for sale which he admired and which he thought likely to appreciate in value in the course of years; he might buy it — and might be conclusively influenced to buy it—because of an anticipated rise in its value. After using it to embellish his own house for a time, he might sell it if the anticipated appreciation in value ultimately realized itself. In such a case, I pointed out that it might be impossible to affirm that the purchase and sale constituted an 'adventure . . . in the nature of trade,' although again, the crisis of judgment might turn on the particular circumstances.

Now, here was a businessman travelling round and anxious to seize upon commercial opportunities. As Lord Sands observed :

> The nature and quality of the subject dealt with exclude the suggestion that it could have been disposed of otherwise than as a trade transaction. Neither the purchaser nor any purchaser from him was likely to require such a quantity for his private use.

Even then, Lord Clyde says if he had bought a picture which he admired and thought likely to appreciate in value "it might be impossible to affirm that the purchase and sale was an adventure in the

2. Commissioners of Inland Revenue v. Livingston, (1927) 11 Tax Cas 538=1927 S C 251 = 1927 Sc L T 112.

3. Rutledge v. Commissioners of Inland Revenue, (1929) 14 Tax Cas 490=1929 S C 379 = 1929 Sc L T 296.

nature of trade." In 1 I T C 238[4] at p. 243, Schwabe C. J. said :

To give a simple illustration, a Barrister might buy a picture and at a later date, when the works of the particular artist were in demand, sell that picture and realize a profit. No income-tax would be payable on this profit. If a picture dealer bought a picture and on the same events happening sold it at a profit, that profit would be a profit earned in his business and would be liable to income-tax. So, too, profits made on isolated speculations are not liable to income-tax, but those made in speculation of a similar kind as part of a business would be liable.

This last sentence points out very clearly what is the distinguishing line. The question is not whether it is a speculation with a view to profit, but rather whether it is a speculation as a part of a business, or, as the Act says, "in the nature of trade." Lord Clyde was careful in dealing with the construction to be placed on the hypothetical purchase of a picture by Mr. Rutledge; because if a businessman who lends money, indulges in film business, and buys toilet paper as a business transaction were also to buy a picture, it might be held that he was, what Shakespeare calls "a snapper-up of unconsidered trifles," all in the way of his business activities. As Lord Clyde said, much would depend on the circumstances of such a purchase before one could determine whether in the case of such a purchaser it was an adventure in the nature of trade or not. It is permissible to pursue the illustration of the purchase of a picture and to quote, at this stage, from the judgment of Scrutton L. J. in (1928) 13 Tax Cas 366.[5] At p. 390 he says :

In my view, the point at which sales of assets resulting in a profit are of such a number and nature as to constitute a trade or business or the point when a sale of an asset is so connected with a trade carried on that profits received from it are profits of a trade, is a question of degree and of fact. How many sales of pictures will make a man a picture dealer is a question of degree.

Now, the profit of an isolated transaction, if it constitutes an adventure in the nature of trade, is assessable to income-tax both here and in the United Kingdom. As Lord Clyde said in (1929) 14 Tax Cas 684[6]:

A single plunge may be enough provided it is shown to the satisfaction of the Court that the plunge is made into the waters of trade.

I am obliged to observe that the Commissioner in the present case seems to have thought that a single plunge might be enough provided it was made into the waters of speculation. Lord Clyde continues:

But the sale of a piece of property—if that is all that is involved in the plunge—may easily fall short of anything in the nature of trade. Transactions of sale are characteristic of trade, but they are not necessarily distinctive of it; much depends on the circumstances.

It is said that this lady bears the name of Mrs. Poddar and this is a designation given to a class of persons who are employed in banks and concerns whose business consists in transactions in money and in precious metals, but there is no evidence that she herself was in fact a dealer in silver; such evidence as there is is to the contrary. The leading cases to which we have been referred, and in which the profits or gains from the resale of an article or commodity have been held to be assessable, all possess features which show that a trading activity was added to the speculative venture. In (1917-19) 7 Tax Cas 125,[7] a firm of coal merchants and ship insurance brokers bought railway waggons as a speculation and sold them at a profit which was made in the operation of their business. It was held that they entered upon the ancillary business of waggon dealers for the purpose of this transaction. Each case, of course, must depend upon the facts for its decision. There was evidence there to show that the coal merchants had extended the sphere of their trading operations. (1927) 11 Tax Cas 297[8] at p. 309 is another case to which similar principles apply. Mr. Martin bought aircraft linen from the British Government and the purchase price was roughly three and a quarter million sterling. Rowlatt J. said :

If a person buys a thing, an object, a stock, a piece of land or anything, he says, 'it is going cheap'; he says, 'this is worth a great deal more than people are going to let it go for now; I will buy it, because some day or other I shall be able to sell it again,' and he buys it because he intends to sell it again, and one fine day in the view of the public, if it is a picture, or in the view of the neighbours, if it is land or what not, its value changes; he finds it of greater value, and he sells it. Now if he is always doing it, of course, he is a dealer, but if he only does it once it is an isolated transaction; but that is quite different in my judgment from where a man gets control of an enormous amount of material and sets to work as

4. Board of Revenue v. Arunachalam Chettiar, (1924) 1 I T C 238.
5. Rees Roturbo Development Syndicate, Ltd. v. Ducker, (1928) A C 132=97 L J K B 317=13 Tax Cas 366=44 T L R 307 = 138 L T 598= 72 S J 171.
6. Balgownie Land Trust, Ltd. v. Commissioners of Inland Revenue, (1929) 14 Tax Cas 684 = 1929 S C 790=1929 Sc L T 625.
7. Beynon & Co. Ltd. v. Ogg., (1917-19) 7 Tax Cas 125.
8. Martin v. Lowry, (1927) A C 312=11 Tax Cas 297=96 L J K B 379 = 136 L T 580=71 S J 18.

if he was the most pushing tradesman in the world, sets to work to find his customers, to stimulate them, and to get rid of it.

Then, (1927) 11 Tax Cas 538[2] and (1929) 14 Tax Cas 490[3] were in the same category. And the case of *Cape Brandi Syndicate* v. *Inland Revenue Commrs.*,[9] where something is altered and treated and dealt with in an expert way, is another. But in the present case I have been at a loss to find that there is the smallest evidence of a trading activity. As the Lord President of the Court of Session said in (1927) 11 Tax Cas 538[2]:

I think the test which must be used to determine whether a venture such as we are now considering is or is not 'in the nature of trade,' is whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made.

Now, says the Advocate-General, these operations were of the same kind as those which traders carried on when they were speculating on a rise in the price of silver. I do not doubt it. In para. 5 of Annexure D it is stated:

A number of Chinese firms about that time imported many lakhs worth of silver on a commission basis for various Indian firms including similar firms to that of the applicant's husband. The reason for this extensive traffic at that particular time was the low price, combined with reasonable prospects of a substantial increase in the price in the future.

Exactly the same argument might be used about picture dealers who were anxious to secure the works of a particular artist at the time when a person who was not a picture dealer but who had some knowledge of art and of possibilities in reselling works of art made a speculative purchase of the work of the same artist with a view to its resale. But the important words here are that the venuture should be not only of the same kind but carried on in the same way as the persons engaged in ordinary trading carried it on. There is no evidence here that it was carried on in the same way. Persons in Burma dealing in silver as business firms would be using their trading capital habitually employed for the purpose of earning income to purchase silver; but this assessee speculated with capital not normally used for the purpose of earning income but lying on deposit at the Bank. If it is said that she was not the only non-trading person who invested in silver with a view to a speedy resale and profit, I do not think this argument assists the Commissioner. Several private persons with expert knowledge of works of art might purchase the works of the same artist, with a view to profitable resale and within a few weeks of each other. None of their ventures could be said to be "in the nature of trade," merely because it could be shown that others seized upon a similar opportunity. Each one of them would only render himself liable to assessment if it could be shown that he did something which brought him into line with the picture dealers; and an isolated investment of capital, by itself, does not show a trading activity.

We are much obliged to the Advocate-General for drawing our attention to some observations in the Seventh Edition of the Income-Tax Manual issued by the authority of the Government of India. They occur at p. 188. It is said:

(1) *A* purchases a house with a view to reselling it at a profit. His profits from the transaction are liable to income-tax (even though it be an isolated transaction*).

There is an asterisk which refers to a footnote which in its turn gives the case in (1929) 14 Tax Cas 490,[3] the toilet paper case, as authority for this extremely misleading proposition. It is, of course, not authority for anything of the kind. Another so-called illustration is numbered 5. It says: "A man writes a book. His receipts from its sale are taxable." This is inaccurate and, if carried to its logical conclusion, would seem to suggest that an occasional contributor to a magazine, who is not a journalist, is liable to assessment when he receives payment for his contribution. The whole question in each case is whether the receipts arise from the profession, for example, of an author or journalist, or whether they do not so arise but are of a casual and non-recurring nature. It is much to be regretted that such wide and inaccurate generalizations have found their way into a manual published under Government authority.

In the present case the Commissioner has rightly observed that he is bound by what is on the record, namely that Mrs. Sooniram Poddar carried out the transaction in question from capital ostensibly her own property. The fact that she employed a business-man, whether he was her husband or not, to purchase the silver and later to sell it again falls far short of making her an adventurer in trade. The Commissioner says his predecessor was justified in hinting that there was a possibility that the trans-

9. (1921) 2 K B 403=90 L J K B 461=125 L T 108=37 T L R 402=65 S J 377.

action was really one of her husband's firm; but this is really confusing the issue because there is no evidence in support of this suspicion. The fact that the husband's firm had previously dealt in precious metals as part of its normal business operations is not evidence that the assessee put this money at their disposal; besides, they are not venturing to assess the firm, but are endeavouring to assess the lady herself. I entirely accept the Commissioner's finding that this lady used her capital, not habitually but on one occasion only to speculate in the silver market; that is all he has been able to find as a fact, and there was no evidence on which he could find anything more and certainly no evidence of an adventure in the nature of trade. Her business was that of a money-lender, and no one has suggested that it was anything else as well. This question must therefore, in my opinion, be answered in the negative and the Commissioner must pay the costs of the reference. No advocate's fee having been allowed on the mandamus proceedings we fix the advocate's fee now at thirty gold mohurs. The deposit of Rs. 100 must be returned to Mrs. Poddar.

Dunkley J. — The facts found by the income-tax authorities are that the assessee purchased a quantity of silver and retained it, in the state in which it was purchased, for three years and then sold it to a single purchaser. It was an isolated transaction. It is said that the purchase and sale of such a large quantity of silver must be a trading transaction, but how the value or quantity of the article purchased can have any relevancy to the matter before us I am at a loss to understand.

The fallacy of the argument advanced on behalf of the Commissioner of Income-tax lies in the assumption that every speculation is an adventure in the nature of trade. Every speculation is an adventure, but not necessarily an adventure in the nature of trade. An isolated purchase and sale is obviously not a trade, and the cases in (1927) 11 Tax Cas 438[2] and (1930-31) 15 Tax Cas 333[1] are ample authority for the proposition that a simple isolated purchase and sale is not an adventure in the nature of trade. It is a mere speculation. If the transaction is an isolated one then in order to constitute it an adventure in the nature of trade there must be some activity of a trading nature between the purchase and the sale, undertaken in order to make the property marketable. i. e., to put it into a saleable state or to attract purchasers. There is an entire absence of evidence of any such activity in this case. I therefore agree that the question propounded must be answered in the negative and that this assessment was wrong.

Spargo J. — I agree that there was no evidence that this transaction was an adventure in the nature of trade and I have nothing to add.

D.S./R.K. *Answer in negative.*

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DUNKLEY J.

Mohamed Ghazi

v.

U Tun Kywe and others.

Criminal Revn. No. 343-B of 1938, Decided on 2nd August 1938, from order of Third Addl. Special Power Magistrate, Yamethin, in Cr. Trial No. 15 of 1938.

Legal Practitioner—Witness — Party asserting that pleader for opposite party may be required as witness does not justify order restraining pleader from appearing in case — But pleader discovering that he is such witness should retire from case.

For the proper control of the legal profession, the Courts have authority to refuse to permit a particular pleader to appear on behalf of a particular person in a particular case. But a very strong case must be made out before an order restraining a pleader from acting in a particular case can be passed. The mere facts that the defence asserts that the pleader for the prosecution will be required as a witness for the defence, and that the Magistrate himself thinks that he will be a material witness for the defence, are not sufficient grounds. A pleader who is conducting a case is nevertheless a competent witness therein, and there is no harm in his giving evidence in a case in which he is appearing. But it is desirable that a pleader should not appear in a case if he knows or has reason to believe that he will be an important witness in the case. If he accepts the brief not knowing or having reason to believe that he will be a witness, but discovers subsequently that he is a witness on material question of fact, he should retire from the case : *40 Cal 898 ; A I R 1927 Pat 61 and A I R 1933 Pat 306, Rel. on.* [P 343 C 1]

Order. — The learned Magistrate has passed an order, dated 21st June 1938, restraining a pleader, named U Ba Maung, from conducting the prosecution in a criminal trial instituted on complaint which is pending before him. The grounds on which the order is based are that the defence advocate states that, if the accused are called upon to enter on their defence, he will desire to call U Ba Maung as a defence witness, and the learned Magistrate himself thinks that U Ba Maung will be a material witness for the defence. That

a Judge or Magistrate has authority to restrain a pleader from appearing for either party in a case, when it would be manifestly improper for the pleader to do so, cannot be gainsaid. In Burma, the discipline and control of pleaders is vested in the Courts by the Legal Practitioners Act, and for the proper control of the profession it is essential that the Courts should have authority to refuse to permit a particular pleader to appear on behalf of a particular person in a particular case when it would be gross misconduct on the part of the pleader so to appear. This power has always been recognized and acted on. But the Courts are always slow to interfere with the general right which a party has to be represented by the pleader of his choice, and a very strong case must be made out before an order restraining a pleader from acting in a particular case will be passed. For instance, if a pleader has accepted a retainer from one party, or has at an early stage been engaged by one party and has received confidential information from that party, he will not be permitted to appear for the other party. But the mere facts that the defence asserts that the pleader for the prosecution will be required as a witness for the defence, and that the Magistrate himself thinks that he will be a material witness for the defence, are not sufficient grounds for restraining the pleader from appearing in the case for the prosecution. A pleader who is conducting a case is nevertheless a competent witness therein, and there is no harm in his giving evidence in a case in which he is appearing: 40 Cal 898,[1] 5 Pat 777[2] and 12 Pat 359.[3] But it is desirable that a pleader should not appear in a case if he knows or has reason to believe that he will be an important witness in the case, and no self-respecting pleader should conduct a case under such circumstances; if he accepts the brief not knowing or having reason to believe that he will be such a witness, but discovers subsequently that he is a witness on a material question of fact, he should retire from the case: 5 Pat 777.[2]

Viewed as an order restraining U Ba Maung from appearing in the case for the prosecution, the order of the learned Magistrate, dated 21st June 1938, was wrong and must be set aside. But if it was merely intended to be advice given by the Magistrate to U Ba Maung and his client, it was very proper advice to give. U Ba Maung cannot be restrained from continuing to appear for the prosecution, but if he does so after this advice has been given to him, he does so at his own risk, and he may find at the end of the trial that he has laid himself open to a charge of misconduct.

N.S./R.K. *Order set aside.*

1. D. Weston v. Peary Mohan Dass, (1913) 40 Cal 898=23 I C 25=18 C W N 185.
2. Chandreshwar Prasad Narain Singh v. Bisheshwar Pratap Narain Singh, (1927) 14 A I R Pat 61 = 101 I C 289 = 5 Pat 777=8 P L T 510.
3. Sabitri Thakurain v. F. A. Savi, (1933) 20 A I R Pat 806=145 I C 1 = 12 Pat 359 = 14 P L T (Sup) 1.

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FULL BENCH

ROBERTS C. J., BAGULEY AND SHARPE JJ.

Gaw Kan Lye — Appellant.

v.

Saw Kyone Saing — Respondent.

First Appeal No. 79 of 1938, Decided on 20th March 1939, from judgment of High Court, in C. R. Suit No. 170 of 1937, D/- 17th June 1938.

(a) Trade Mark—Passing off—In Burma suit lies for passing off and not for infringement of trade mark.

In Burma there is no statutory provision for the registration of trade marks and no action can therefore be brought for infringement of a trade mark but the Courts entertain passing off suits. [P 344 C 1]

(b) Trade Mark — Difference between descriptive and distinctive trade mark.

Where a mark or phrase merely describes the quality or origin of an article such as "Custard Powder," "Malted Milk" or "Gripe Water" it is not capable of distinguishing the goods of one maker from those of others; but a mark is distinctive where it points to the goods of a particular person as for instance in the cases of "Lifebuoy" soap, "Wincarnis," or "Three Nuns" tobacco. [P 344 C 2 ; P 345 C 1]

(c) Trade Mark—Trader adopting distinctive trade mark is entitled to protection directly—In suit by him for passing off he needs only to prove likelihood of deception of purchasers by mark used by defendant—It is not necessary to prove actual deception.

If the mark or design be a distinctive one, the trader who adopts it is entitled to protection directly the article having assumed a vendible character is launched upon the market. As between two competitors who are each desirous of adopting a mark which is distinctive in character it is entirely a question of who gets there first : *(1864) 33 L J Ch 561, Rel. on.* [P 345 C 1]

In the case of distinctive marks all that is necessary for the plaintiff to prove is that the mark used by the defendant is likely to deceive purchasers of the class who buy the goods bearing the plaintiff's mark, and it is not necessary to prove actual deception : *A I R 1935 All 7, Rel. on.* [P 345 C 1]

C. H. Campagnac — *for Appellant.*

Dr. Ba Han — *for Respondent.*

Roberts C. J. — This is an appeal from the judgment and decree of Braund J. sitting on the Original Side of this Court. At the instance of the respondent he granted a perpetual injunction restraining the appellant and another from using a mark upon their rice bags which was in colourable imitation of the respondent's "Hlay Tazeik" or "Boat" mark, together with delivery up by them of all their bags so marked, and an account of their profits (if any) from the sale of rice in bags bearing this mark. The respondent milled rice at Syriam and he claimed that he was entitled to the "Boat" mark placed upon his bags of Shwe Wa Gyi or "Golden Fat" rice. He marketed this rice in Rangoon through the medium of a few shops only. The appellant was the lessee of a rice mill at Wakema and sold Meedon rice which is similar in character and which was put up in bags marked with a magenta colour. Both sets of bags bore the representation of a boat. The respondent's bags were mostly, though not invariably, marked in green colour and the boat design was somewhat crude, whilst that of the appellant was executed in more detail.

The learned Judge felt himself bound by the dictum of Page C. J. in 10 Rang 133[1] at page 136 in which he said:

> Now, this is a passing-off suit, and it is incumbent upon the plaintiffs in such a suit in the first instance to prove that the goods sold under their label and get-up were goods which had a reputation in the market as being goods manufactured or sold by them, of which the label and get-up were distinctive and well known in the particular market.

The learned trial Judge held that "reputation in the market" meant in the particular market in which the plaintiff-respondent dealt, however limited, and, having come to the conclusion that the plaintiff had established a limited but bona fide and sufficient local reputation in a distinctive mark, that he was entitled to the relief which he asked in the suit. In this country there is no statutory provision for the registration of trade marks and no action can therefore be brought for infringement of a trade mark, but the Courts entertain passing-off suits. In (1931) 48 R P C 227[2] at page 253 Lawrence, L. J. said:

> The cases to which I have referred (and there are others to the like effect) show that it was firmly established at the time when the Act of 1875 was passed that a trader acquired a right of property in a distinctive mark merely by using it upon or in connexion with his goods irrespective of the length of such user and of the extent of his trade and that such right of property would be protected by an injunction restraining any other person from using the mark.

Romer L. J. said (at page 260):

> The next contention on the part of the respondents is as to the meaning of the words 'in use as a trade mark'. They say that in order to constitute user of a trade mark two things must exist concurrently, namely (1) the intention of the proprietor of the mark to indicate by its use the origin of the goods upon or in connexion with which it is used; (2) recognition of the mark as indicating origin on the part of the section of the public with whom the proprietor deals. Now I do doubt that for the purpose of ascertaining the nature of the user of a mark one may legitimately take into consideration both the intention of the owner of the mark and the effect that the user has had upon the public, and the absence of both intention and public recognition would render it difficult, if not impossible, to treat the user as being user as a trade-mark. But I can see no reason whatever for regarding both intention and recognition by the public as essential conditions of such a user. If a trader uses a mark upon or in connexion with his goods with the intention of indicating their origin, surely he is using it as a trade mark from the moment of the first user, which will probably be many months before the public has come to recognise the mark as indicating origin. If public recognition be a requisite of user as a trade mark, the proprietor must necessarily remain in ignorance of whether he is or is not using a trade mark until by some means or another he has ascertained the views of the public upon the matter. How he is to do this has not been explained to me and I do not know. But it is quite clear that he can never ascertain when the public first regarded the mark as indicating origin, and must ever be unable to answer the question, 'when did you first use the mark as a trade mark?'. In my opinion a trader is at any rate using a mark as a trade mark when he first uses it upon or in connexion with his goods with the intention of indicating origin, assuming of course that it is a mark capable of so doing. In other words, intention without public recognition is enough.

These judgments were approved in the House of Lords in (1932) 49 RPC 88[3] and they followed the recognition by Sir John Romily in 32 L J Ch 548[4] of the difference between a mark which is distinctive and one which is merely descriptive. Where a mark or phrase merely describes the quality or origin of an article such as "Custard Powder," "Malted Milk" or "Gripe Water" it is not capable of distinguishing the goods of one maker from those of others; but a mark is distinctive where it points to the goods of a

1. Mohideen Bawa v. Rigaud Perfume Manufacturers, (1932) 19 A I R Rang 114 = 137 I C 391=10 Rang 133.
2. In re Nicholson & Sons' Application, (1931) 2 Ch 1 = 100 L J Ch 195 = 144 L T 673 = 48 R P C 227=75 S J 118=47 T L R 223.
3. Bass, Ratcliff & Gretton Ltd. v. Nicholson & Sons Ltd., (1932) A C 130 = 101 L J Ch 98= 146 L T 349=49 R P C 88=48 T L R 161 = 75 S J 568.
4. Hall v. Barrows, (1863) 32 L J Ch 548.

particular person as for instance in the cases of "Lifebuoy" soap, "Wincarnis," or "Three Nuns" tobacco. The case in (1931) 48 R P C 227,[2] though decided in 1932, had reference to the claim of the applicants to have used a distinctive mark for their bitter beer since a date prior to the Trade Marks Act of 1875 and has therefore direct reference to the law subsisting in this country at the present time. I feel sure that Page, C. J. in the case by which the learned trial Judge rightly felt he was bound, would have recognized the distinction made by the learned Lord Justices if the facts of the appeal which he was deciding had rendered it necessary. Messrs. Rigauds, who were the plaintiffs, had obtained an injunction against the defendants, who appealed and whose appeal was dismissed. The main defence was an alleged acquiescence by the plaintiff in the user of a distinctive design and get-up by the defendants which was a colourable imitation of their own, and there was a further defence of prior user; both of these defences failed. The question of reputation in the market of a distinctive rather than of a descriptive design or mark did not fall to be considered. Now, if the mark or design be a distinctive one it seems clear upon authority that the trader who adopts it is entitled to protection directly the article, having assumed a vendible character, is launched upon the market: (1864) 10 L T (N S) 442.[5] As between two competitors who are each desirous of adopting a mark which is distinctive in character it is, to use familiar language, entirely a question of who gets there first. In the case of distinctive marks and adopting the language of Iqbal Ahmad, J. in 57 All 510[6] at p. 548

all that is necessary for the plaintiff to prove is that the mark used by the defendant is likely to deceive purchasers of the class who buy the goods bearing the plaintiff's mark, and it is not necessary to prove actual deception.

Again, in (1882) 7 A C 219[7] at p. 231, Lord Blackburn said that he did not think that any hardship was inflicted on honest traders by holding that if they do not take pains when making a new mark to make it quite unlike an established one, they do so at the peril of making it evidence against themselves: see also (1887) 12 A C 453.[8] It has been pressed upon us that we should say that upon the facts the learned Judge came to a wrong conclusion but there was ample evidence on which he could find that there was a colourable imitation here. Witnesses called for the plaintiff whose testimony he accepted, said that they bought rice by the name or description of "Boat mark" rice, and the learned Judge considered that the bags of the appellant with their design were quite enough to create confusion in the mind of an ordinary purchaser in the rice market. Accepting this view, in my opinion he was right in granting the plaintiff the relief which he sought; and accordingly this appeal must be dismissed with costs, 20 gold mohurs.

Baguley J. — I agree.

Sharpe J. — I agree.

D.S./R.K. *Appeal dismissed.*

5. Mc Andrew v. Bassett, (1864) 4 D J & S 380=33 L J Ch 561=10 Jur(N S) 550=146 R R 356=10 L T (N S) 442=12 W R 777=4 N R 123.
6. Thomas Bear & Sons Ltd., India v. Prayag Narain, (1935) 22 A I R All 7=154 I C 788=57 All 510=1935 A L J 80.
7. Johnston & Co. v. Orr Ewing & Co., (1882) 7 A C 219.
8. Somerville v. Schembri and Camilleri, (1887) 12 A C 453=56 L J P C 61=56 L T 454.

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MYA BU AND MOSELY JJ.

P. L. S. P. Chettyar — Appellant.

v.

U Than Pe — Respondent.

Special First Appeal No. 108 of 1938, Decided on 20th March 1939, against order of Small Cause Court, Rangoon, D/- 11th August 1938.

(a) Civil P. C. (1908), O. 21, R. 11 (g) — Particulars of interest due can be furnished after issue of notice to judgment-debtor or before final order is passed.

Particulars of interest due are not required by O. 21, R. 11 (g) or by any other provision of the Code; that is to say, as it is not required that applications for execution shall contain these particulars they can be furnished by the decree-holder at any time after issue of notice to the judgment-debtor, when evidence is taken or before orders are passed for the purpose of ascertaining the amount due. [P 346 C 1]

(b) Limitation Act (1908), Art. 182 (5) — Step-in-aid—Application closed for inability to furnish particulars of interest due whether saves limitation for subsequent application *(Quære).*

Where an execution petition is closed by the decree-holder on request on the ground of his inability to furnish particulars of interest due, whether he can rely upon that application for the purpose of saving limitation in respect of subsequent application for execution: *A I R 1926 Cal 1077 and 17 All 106 (P C), Ref.* [P 346 C 1, 2]

(c) Limitation Act (1908), Art. 182 (5) — Proper Court — Decree-holder not knowing that judgment-debtor resides outside jurisdiction of Court — Application which on face of it is made to Court having jurisdiction is one to proper Court.

Where it has not been shown that the decree-holder knew that the judgment-debtor lived outside the jurisdiction and the application for his arrest is made on the face of it to the Court which had jurisdiction, it cannot be said that the application is not made to the proper Court : *A I R 1936 Rang 271, Rel. on.* [P 346 C 2]

J. C. Ray — *for Appellant.*

Kalyanwala — *for Respondent.*

Mosely J. — This is an appeal against an order of the Chief Judge of the Small Cause Court cancelling a prohibitory order in execution. The ground for this order was that the first application for execution made in 1933 was time-barred and that therefore subsequent applications and the present application were also time-barred. The decree in question was passed on 19th February 1930 and on 15th February 1933 an application for execution was presented, No. 1481. This was put down by the clerk for "admission," whatever that may mean, and on 6th March 1933 the decree-holder's advocate undertook "to file particulars of payment of interest" on 8th March. I do not know what "particulars of payment of interest" means. The decree was for Rs. 1081.6.0 and the costs were Rs. 116.8.0, a total of Rs. 1197.14.0. The application for execution recites that Rs. 1170 had been received out of Court. Interest due was said to be Rs. 82.7.6. Apparently what was required was the date of receipt of the payment of Rs. 1170 and particulars of interest due. This requirement may be convenient at this stage to the Court and I notice that these particulars were furnished with subsequent applications in execution, but they were not required by O. 21, R. 11 (g) or by any other provision of the Code, that is to say, as it is not required that applications for execution shall contain these particulars they can be furnished by the decree-holder at any time after issue of notice to the judgment-debtor, when evidence is taken, or before orders are passed, for the purpose of ascertaining the amount due. The next diary entry of the 8th March reads that the decree-holder's advocate was present, and by request the application was closed. The Judge on this said that it was manifest that the application was not even admitted. Admission is a technical term not usually applied to execution proceedings. Possibly, what the Judge was thinking of was the decision in 53 Cal 664[1] which is that where the decree-holder deliberately withdraws his application he cannot afterwards rely on that application for the purpose of saving limitation in respect of a subsequent application for execution. See however 17 All 106,[2] a decision of their Lordships of the Privy Council which was not referred to in 53 Cal 664.[1]

That point, however, has not been raised before us. What is said is that the application was in due form, and that cannot be gainsaid. Against this it is argued that the application was not to the proper Court. The words "proper Court" were inserted in Art. 182, sub-s. (5), by the Amending Act, of 1927. In an affidavit filed, the judgment-debtor said that he was in Mandalay at the time, that this application for execution was filed in 1933, but he did not attempt to assert that he was there to the knowledge of the decree-holder, or that the application was filed mala fide in a Court which had no jurisdiction to give the relief claimed, namely the arrest of the judgment-debtor, and that the application was filed merely to keep limitation alive. The plea of fraud and mala fides cannot be raised now here. The application was on the face of it to a Court which had jurisdiction, for it gave the judgment-debtor's address as Rangoon and asked for his arrest. In 14 Rang 550[3] at p. 555 it was said :

It cannot be said that an application for execution to the Court which passes a decree is not made in accordance with law merely because, instead of asking for a transfer of the decree to the Court within whose jurisdiction the property is situated, the application asks for the issue of a warrant of attachment.

Much more in the present case, it cannot be said where it has not been shown that the decree-holder knew that the judgment-debtor lived outside the jurisdiction, that the application for his arrest was not made on the face of it to the Court which had jurisdiction, that is to the proper Court. For these reasons the order of the trial Court will be set aside with costs, advocate's fee two gold mohurs, and the learned Chief Judge will be directed to proceed with the disposal of this application for execution as it is still contested whether the application of 1936 was within time.

Mya Bu J.—I agree.

N.S./R.K. *Order set aside.*

1. Pitambar Jana v. Damodar Gachait, (1926) 13 A I R Cal 1077=98 I C 166=53 Cal 664=30 C W N 918=45 C L J 86.

2. Thakur Prasad v. Fakir-ullah, (1895) 17 All 106=22 I A 44=6 Sar 526 (P C).

3. Arjundas v. U Ka Ya, (1936) 23 A I R Rang 271=163 I C 403=14 Rang 550.

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ROBERTS C. J. AND MOSELY J.

Ameena Bee Bee — Appellant.

v.

Mariam Bee Bee and others — Respondents.

First Appeal No. 27 of 1938, Decided on 1st December 1938, against order of High Court, D/- 25th January 1938.

Trust — Administration of — Testator after making ample provision for relatives setting apart large sum for works of merit and charitable purposes — After lapse of some years relatives making application for charitable benefactions from trustee—Interested persons appearing in Court for guiding trustee to administer trust properties — What is proper course for trustee to follow stated — Duty and powers of Court in deciding such matter explained.

Where a testator after making various benefactions to his family and others sets apart a considerable sum out of the residue for works of merit and charitable purposes, and the sum thus set apart is to be appropriated by his executors to such charity or charities as they might think fit and proper and there is nothing in the will that his descendants other than those provided for are to be provided for out of the funds set apart for works of merit or charitable purposes as against other persons who might have a reasonable claim, but after a lapse of some years, some of the relatives of the testator make application for charitable benefications from the trustees, the natural and proper course for the trustees, is that in considering applications so made to them they should have regard to what would presumably have been the desire of the testator that his own descendants should not fall into want. The trustees are left to administer a wakf and though some of those who make application to them are persons who have a claim just as good in law, but no better than that of any other member of the general public who is qualified to make a claim, yet from the point of view of good stewardship the trustees would naturally have a sympathetic ear to cases of that character and might well decide that they should fall within a class which would have their special attention in deciding how benefactions should be made. If in order to avoid disputes a number of interested parties come before the Court so that the trustees should obtain direction and guidance as to what in the circumstances is the best course for them to pursue, in giving that direction and guidance the Courts cannot in any way go behind the testator's will, nor direct that the trustees should follow any hard and fast rule in deciding within their discretion who should be the immediate objects and beneficiaries from time to time of the wakf created, but what the Court will do is to give general directions to ensure, so far as possible, that the trust fund is administered properly.

[P 347 C 2 ; P 348 C 1]

P. B. Sen — *for Appellant.*

Eunoose — *for Respondent 7.*

Roberts C. J. — This is an appeal against a final decree passed by Leach, J. on 8th June 1936, which settled a scheme for the guidance of the trustees of a certain wakf founded by Moolla Ebrahim. No step has been taken in appeal before since new trustees had to be appointed and were appointed by Braund, J. by his judgment of 25th January 1938, and it is therefore only now that the order of Leach, J. comes before us. The deceased Moolla Ebrahim left a will dated 1881 which, after various benefactions to his family and others, left a sum of Rs. 45,000 to be set apart out of the residue for works of merit and charitable purposes, and the sum thus set apart was to be appropriated by his executors to such charity or charities as they might think fit and proper. The deceased made, we are told, ample provision for his surviving relatives and there was nothing in the will that his descendants other than those provided for were to be provided for out of the funds set apart for works of merit or charitable purposes as against other Mahomedans who might have a reasonable claim. It is, however, agreed that at the time of making his will the testator did not think that it was likely that his descendants, or those of his brothers, would fall into indigence or poverty, nor did he envisage the distribution of any part of the money set apart for public benefactions to private persons who were descendants of members of his own household. As the years went by, it became apparent that there were those of his own family who were well qualified to make application for charitable benefactions from the trustees, and it is of course a natural and proper thing that the trustees in considering applications so made to them should have regard to what would presumably have been the desire of the testator that his own descendants should not fall into want. On the other hand the Court cannot possibly set aside the conclusion which must be drawn from the plain terms of the will that the testator was at the time making a public benefaction and not providing for such members of his family who should in later years suffer from poverty. The consequence of all this is that the trustees are left to administer a wakf and though some of those who make application to them are persons who have a claim just as good in law, but no better than that of any other member of the general public who is qualified to make a claim, yet from the point of view of good stewardship the trustees would naturally have a sympathetic ear to cases of that character and might well decide that they

should fall within a class which would have their special attention in deciding how benefaction should be made.

During the course of time a number of schemes have been settled by the Courts, and those schemes we think in strictness really come to this. In order to avoid disputes numbers of interested parties have come before the Courts so that the trustees should obtain direction and guidance as to what in the circumstances was the best course for them to pursue; and in giving that direction and guidance the Courts, of course, cannot in any way go behind the testator's will, nor direct that the trustees should follow any hard and fast rule in deciding within their discretion who should be the immediate objects and beneficiaries from time to time of the wakf created, but what the Court will do is to give general directions to ensure, so far as possible, that the trust fund is administered properly. This trust fund has a very unhappy history. We are careful to make no observations as to the conduct of persons not before us, but it is a deplorable thing that at the present time it should be an acknowledged fact that the trustees who took office as such from the Musjid were apparently unable to secure the due administration of the purpose for which the trust was created. We are told—and it has not been contradicted—that in two instances trustees were removed for negligence. We are also told that part of the house property is in a serious state of dilapidation. And whoever may be at fault for this state of affairs—and we do not suggest that every one concerned with the management of the trust has been at fault—there has, unfortunately, been created a situation which is deplorable and which ought to be remedied without further delay. That being so, we have listened to the submission of Mr. Sen with great interest when he says that the order which was drawn up by Leach, J., about two and a half years ago ought in some respects to be improved and varied, and we think in particular that we ought to stress the fact that this amended scheme is really a means whereby those interested, and in the present instance those who have chosen to appear before the Court, mutually agree that certain limits within which the trustees ought to act should be clearly defined and set down for the guidance of all concerned. If after obtaining these directions the trustees choose to ignore them, they will do so at their peril and serious consequences may result. If, however, they loyally abide by them, there can be no doubt that the property will in future be administered much more satisfactorily than has hitherto been the case. With those preliminary remarks I pass to consider the precise terms of the amendments of the scheme which have now been happily agreed upon between such parties as have been in Court during the hearing of this appeal.

In the amended scheme for the management of the Moolla Ebrahim Trust, the draft of which was settled by Leach, J., and which was subsequently confirmed with the addition of new trustees by Braund, J., in para. 1 headed "Interpretation" we have decided to delete sub-para. 1 (b). Sub-para. 1 (c) "Words in the plural shall include the singular and vice versa" thereupon becomes 1 (b). Before para. 2, which is headed "Appointment of Trustees" there shall be a paragrpah as to the description of the trust property. This we take from the scheme of 1917.

Constitution of Trust.

The Trust properties comprise the following namely :

(a) All that piece or parcel of freehold land known as portion of Holding No. 4 of 1914-15 situate in Kemmendine Circle, Rangoon Town District, comprising 6·98 acres or thereabouts together with the two semi-pucca and one pucca houses and all the out houses, etc. standing thereon known as houses Nos. 18, 19 and 19-A (new Nos. 202, 204 & 205), Boundary Road, Rangoon.

(b) All that piece or parcel of freehold land situate in the town and registration sub-district of Rangoon known as sourthern half of second class lot No. 11 in block F-2 measuring 50 by 60 feet or thereabouts known as No. 47 (new number 209/213), Lowis Street, Rangoon.

(c) Cash in the hands of the Official Receiver.

In para. 2 after the words "there shall be five trustees of this trust" shall be inserted the following: "Persons who are eligible to be appointed as trustees shall be in receipt of an income of not less than Rs. 50 per mensem independent of any public benefaction or charity." Para. 2 (b) should read "one member of the Board of Trustees of the Surati Jummat Masjid at Rangoon," and 2 (c) "two members of the Rander Sunni Vora Panchayat of Rangoon." Para. 2 following 2 (c) should read as follows: "Further, in the event of the Board of Trustees of the Surati Jumma Masjid failing to nominate one from their number . . . . of Rangoon," and the next paragraph should read "Lastly, in the event of there being no suitable candidates from the Rander Sunni Vora Panchayat to fill the

places on the board .... of Rangoon." Para. 4 should read: "Each trustee shall hold office for a period of five years, but on the expiry of such period, if he so desires, he shall be eligible for reappointment."

In para. 5 (b), relating to advertisements in newspapers, after the word "Gujarati" the words "and one Burmese" should be added. The next matter is after para. 5 (c) and relates to the fact that whereas trustees were originally appointed for life, they are now appointed for five years only. A new sub-para. 5 (d) shall be inserted as follows: "At least three months before the expiry of five years for which the trustees shall hold office, the trustees in office shall by advertisement in the manner aforesaid call for names to be suggested by the beneficiaries and persons interested in the wakf. Thereafter they shall select such persons as appear to them to be fit and proper and, after obtaining their consent, shall submit their names at least one and a half month before the expiry of the said five years in the manner as aforesaid, and the Court shall after hearing the parties concerned either confirm the selection made by the trustees or appoint such other persons as may appear to be fit and proper under the scheme as trustees of this wakf estate."

The next matter for consideration is para. 7 (v) under "the duties of trustees." We have decided to add the words, after "undesirable," "or who is at any time in arrear for three calendar months' rent." The next matter is para. 7 (xvi) which relates to the approval of the Court being given to the exercise of power to sell, exchange or mortgage immovable property. At the end of this sub-paragraph the following should be added: "Such approval shall be obtained by an application to the Court of which notice shall be given in an English, a Burmese and a Gujarati newspaper by means of three insertions during a period of one week in each of them and after hearing such persons as may appear in consequence of the notice." We now come to para. 8 which relates to the appropriation of the trust funds. And here, as I have already observed, it is impossible for this Court to give any direction to the trustees which might in any way conflict with the proper carrying out of their duties under the wakf. We are of opinion that we cannot properly say, taking the first instance, that 15 per cent. of the net income of the trust shall be reserved for a building fund, and we think that 8 (a) should run as follows: "8. Of the net income of the trust (a) sufficient appropriation shall first be reserved for a building fund." Para. 8 (c) becomes 8 (b) and runs as follows: "(b) Due regard shall be had to the spending of a suitable sum on Maulud Sharif at Rangoon." Para. 8 (b) becomes 8 (c) and shall run as follows: "(c) After making such provision, if any, as may be deemed necessary for the objects enumerated above the trustees shall expend in their discretion the balance of the net income of the trust upon such charitable and religious objects as they deem fit according to the Mahomedan law. Provided that if there are persons from among the descendants of Moolla Hashim, Moolla Ebrahim or Moolla Mohamed in indigent circumstances and in need of pecuniary help and support, the trustees may, but shall not be bound to, expend such sums and provide for such persons in such manner as they may deem fit."

Paragraph 8 (d) is deleted. But in deleting it we wish to remark that this must not be taken as a direction to the trustees not to reserve any sum such as may in their discretion be thought fit for the maintenance of the Moolla Ismail Masjid, 35th Street, Rangoon. It has been urged upon us with great force that the Masjid has a strong claim to their benefactions. We delete the clause only because we wish to leave them unfettered discretion in the matter. For para. 13 substitute the following: "The trustees may depute one of their number to represent the trust before any law Court, public body, registration office or any other public officer and generally to act on behalf of the trustees in matters relating to the wakf estate." Para. 15 will stand, but the following will be added to it: "All expenditure of the trust fund and all questions relating to repair, letting to tenants, evicting a tenant, recovery of outstanding sums due, investment of trust funds and other matters relating to management shall be referred to such meeting for sanction. Minutes shall be kept of every such meeting and shall be signed by the trustees present thereat and shall be referred to the next subsequent meeting for approval." In para. 16 the Burmese language is added, so that the paragraph runs: "The trustees shall keep or cause to be kept a full and true account in the Burmese, Guzarati or English language of the rents collected and of all other receipts and disbursements of the trust funds." There is a consequential amendment in para. 17: "All books of account and papers and other

documents connected with the trust shall be maintained and kept in the custody of the trustee deputed for that purpose for the time being," and later on where the words "managing trustee" occur, the words "such trustee" must be substituted.

Those, we think, are all the matters which have fallen for determination by us. We only desire to make the general observation that it is sincerely hoped that the new trustees will embark upon their duties at an early date, save the trust properties from waste, and, after due care and attention paid to the claims of those who feel that they are entitled to benefactions, distribute the surplus in a manner which meets with general approval. We have considered the question of costs anxiously, because it is desirable that costs for this elaborate work should not be stinted: on the other hand this is money dedicated to charity. We think that Mr. Sen must have done a great deal of work in connexion with this and he is entitled to twelve gold mohurs advocate's fee, and Mr. Eunoose six gold mohurs.

N.S./R.K. *Order accordingly.*

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BAGULEY J.

Ko Po Set — Appellant.

v.

Ma Saw Yin and others — Respondents.

Second Appeal No. 322 of 1938, Decided on 24th November 1938, against decree of Asst. Dist. Court, Bassein, D/- 11th June 1938.

(a) Civil P. C. (1908), S. 100—Suit for rent of agricultural land of value below Rs. 500 not coming under S. 13 (1), Burma Laws Act—Second appeal lies under S. 100 and not under S. 11, Burma Courts Act.

A suit for rent of agricultural land is not of a small cause nature and a second appeal from such a suit which does not come under S. 13(1), Burma Laws Act, and is not of a value more than Rs. 500 lies under S. 100, Civil P. C., and not under S. 11, Burma Courts Act: *A I R 1935 Rang 386, Rel. on.* [P 350 C 2]

(b) Appeal — Finding of fact — Ruling (of Rangoon High Court) that trial Court is in best position to judge credibility of witnesses and that finding of fact should not be lightly upset is not one of universal application.

The rule that the trial Court is in the best position to judge the credibility of the witnesses and that a finding of fact should not be lightly upset is not one of universal application. It must be remembered that the law allows an appeal on questions of fact and if the ruling is made of universal application it would practically debar all appeals on questions of fact. [P 351 C 1]

U Tun Tin — *for Appellant.*

Judgment.—This appeal was originally filed as an appeal under S. 100, Civil P. C., but in the office it was pointed out that the appeal should have been under S. 11, Burma Courts Act, so the learned advocate also agreed and made his appeal under S. 11 Burma Courts Act. As a matter of fact, the learned advocate was correct in the first instance. This appeal arises out of a suit for rent of agricultural land. A suit of this nature is not cognizable by a Court of Small Causes. As was pointed out in 13 Rang 633[1] a second appeal in a case of this nature lies under S. 100, Civil P. C. An appeal under S. 11, Burma Courts Act, can only be filed when the lower Appellate Court has varied the decree otherwise than as to costs and the suit is, if of a small cause nature, of a value of over Rs. 500, or, if not of a small cause nature, like the present case, when the value at stake is more than Rs. 500 or the suit is one which comes under S. 13 (1), Burma Laws Act. The present case is not one which comes under S. 13 (1), Burma Laws Act, and it is not of a value more than Rs. 500. Therefore, no second appeal under S. 11, Burma Courts Act, lies and this case must be treated as an appeal under S. 100, Civil P. C. The learned advocate is therefore confined to an argument on points of law only.

There were only two points in the suit before the Court: whether the original rent agreed upon was 300 baskets of paddy or 450 baskets of paddy and whether the plaintiff had accepted 200 baskets in full satisfaction. The lower Appellate Court has found as a fact that the plaintiff accepted 200 baskets in full satisfaction. This being the case, what the original rent agreed upon was is a matter of purely academic interest. The trial Court found in favour of the plaintiff. He states that many witnesses gave evidence to prove the defendant's contention but he brushed the whole of this evidence aside in one paragraph "such kind of evidence of defence witnesses is easy to adduce and difficult to rebut;" and the only witness whom he really criticized was Ko Shwe Thaung. On the other hand the lower Appellate Court points out that among the seven witnesses for the defendant one is a headman, and the trial Judge can say nothing against any of the witnesses except Maung-Shwe Thaung, and the learned Judge of the lower Appellate Court sees no other reason to discredit

1. Maung Po Kyun v. Ma Shwe, (1935) 22 A I R Rang 386=158 I C 804=13 Rang 633 (F B).

their evidence. It has, I know, been laid down that the trial Court is in the best position to judge the credibility of the witnesses and a finding of fact should not be lightly upset; but it must be remembered that the law allows an appeal on questions of fact and if this other ruling is made of universal application it would practically debar all appeals on questions of fact. The lower Appellate Court has given a very comprehensible reason for thinking that the trial Court is wrong in the way in which it chooses the defence evidence and I see no point of law in this case. This appeal is therefore dismissed summarily.

My attention has been drawn to the fact that there is a clerical error (which makes no difference to the decision of the present appeal) in the first four lines and the previous page, so I now correct it.

The portion between the two red lines, between costs and in line 1 and between '500 or' in the fourth line should run as follows: but it is provided that no appeal will lie unless the suit is, if a small cause, of the value of over 500, and if an unclassed suit like the present one, unless the value of the suit exceeds 500.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1939 Rangoon 351

MYA BU AND MACKNEY JJ.

Dr. A. Karim and another—Applicants.

v.

Pandit Laiq Ram and others — Respondents.

Civil Revn. No. 191 of 1938, Decided on 19th December 1938, from order of Dist. Court, Pegu, in C. M. No. 11 of 1937.

Civil P. C. (1908), O. 33, Rr. 2, 3 and 4 — Application not rejected under R. 3 but evidence recorded under R. 4—Court has jurisdiction to consider subsequently whether application can be rejected under R. 3 (b) or (c)—Order upon such questions if however based on material not appearing in plaint, is vitiated for material irregularity.

Where the Court does not reject under R. 3, an application filed under R. 2 but issues notices and hears evidence with reference to the question of pauperism under R. 4, it does not act without jurisdiction in subsequently considering whether the plaint discloses a cause of action or whether it is barred by limitation. If however the conclusion arrived at by the Court on these questions is based on evidence recorded in the inquiry under R. 4 or anything brought to its notice by the opposite side and not upon the materials within the four corners of the plaint, the order would be vitiated for material irregularity. [P 351 C 2; P 352 C 1]

Sahney — *for Applicants.*

Order.— This is an application for revision of an order dismissing the applicant's application for leave to sue in forma pauperis. The main grounds on which the order is based are that the proposed plaint did not disclose a cause of action and that the claim was barred by the law of limitation. The applicant having filed his petition in the manner required by O. 33, R. 2, the Court ordered issue of notice to the respondents and the Government Pleader and fixed a date for hearing of the petition. Hearing took place at which evidence was adduced with reference to the question of pauperism of the applicants. Upon the evidence the learned District Judge held that the applicants were paupers, but he found that the plaint did not disclose a cause of action and that the proposed suit was barred by limitation. The present application is prosecuted mainly on the ground that the Court not having rejected the application under R. 3, but having issued notice and having heard the case with reference to the question of pauperism under R. 4 acted without jurisdiction in considering the questions as to whether the plaint disclosed a cause of action or whether the suit was barred by limitation. R. 3 provides :

Subject to the jurisdiction of the Court to allow amendments to be made the Court shall reject the petition in any of the following cases :

(a) Where the plaint is not in the form prescribed; (b) where the plaint does not disclose a cause of action within the jurisdiction of the Court; (c) where the claim appears to be barred by any law; (d) where the applicant has within two months next before the presentation of the petition disposed of any property fraudulently or in order to be enabled to plead pauperism; (e) where the applicant has entered into any agreement with any person whereby such person has or will have an interest in the proceeds of the suit.

It has been contended before us that the matters that fell within clauses (a), (b) and (c) cannot properly be investigated by the Court after hearing the cause on the question of pauperism under R. 4. R. 4 as it stands deals with the inquiry into the question of pauperism and pauperism alone, i. e. whether the applicant is a person who is unable to pay the court-fee prescribed by law for the plaint in the suit, or whether he has fraudulently disposed of property or whether he has entered into any agreement as stated in clauses (d) and (e) of R. 3. But there is nothing to warrant the reading of these rules in such a way as to show that the Court not having rejected the petition on any of the grounds mentioned in R. 3, before the issue of notices and the holding

of the enquiry under R. 4, has no further jurisdiction to consider and determine whether it is liable to be rejected under clauses (a) or (b) or (c) of that Rule. There is nothing in R. 4 or in any other Rule in O. 33 which expressly prohibits the consideration and determination by the Court of these circumstances after issue of notice and hearing of the case under R. 4. Our attention has been drawn to the fact that in the old R. 7 (in the place of which the present R. 4 has been framed) sub-cl. (2) of that Rule expressly enjoined the Court to hear any argument which the parties might desire to offer on the question whether on the face of the application and of the evidence, if any, taken by the Court as therein provided, the applicant was or was not subject to any of the prohibitions specified in R. 5 (in the place of which the present R. 3 has been framed). We do not think that the fact that sub-r. (2) of the old R. 7 is not reproduced in the present R. 4 is sufficient to deprive the Court of the jurisdiction to consider questions under clauses (a), (b) and (c) of the present R. 3 after issue of notice and hearing of evidence under R. 4 because it is inconceivable that just because the Court omitted to pass a particular order at a particular moment it is to be deprived of the power of passing the order at a subsequent stage of the proceeding while it still has seisin of it. If in this case the Court had allowed itself to be influenced by any evidence which was taken at the enquiry under R. 4 or by anything which has been brought to its notice by the opposite party, which are not to be found either on the face of the proposed plaint or in an admission by the applicant, then the order would be vitiated for material irregularity; but in this case there is no such material irregularity because the conclusion come to upon the questions whether the plaint disclosed a cause of action and whether the suit was time-barred [R. 3 (b) and (c)] were based upon materials appearing within the four corners of the proposed plaint. In our opinion, this application fails and it is dismissed.

N.S./R.K. *Application dismissed.*

*** A. I. R. 1939 Rangoon 352**

SHARPE J.

Viola Duncan — Petitioner.

v.

George Duncan — Respondent.

Civil Regular No. 214 of 1938, Decided on 7th November 1938.

*** (a) Divorce Act (1869), S. 7—Petition for dissolution of marriage—Supplemental petition alleging further act of adultery committed by respondent subsequent to original petition — Under S. 7 Court can allow such act of adultery to be considered as basis for decree if essential requirements regarding supplemental petition are complied with — What these requirements are stated.**

Where after the presentation of a petition for dissolution of marriage on the ground of cruelty coupled with adultery the petitioner presents a supplemental petition alleging a further act of adultery committed by the respondent subsequent to the presentation of the original petition, then under S. 7 the Court is entitled, according to the practice in England, to allow such further act of adultery to be considered as providing a basis for a decree for dissolution of marriage, provided that the essential requirements with regard to the supplemental petition have been complied with. Those requirements are that no supplemental petition can be filed without leave, the application for which must be supported by an affidavit made by the petitioner. Such affidavit should set out the facts, testify to non-collusion and non-connivance and verify the paragraphs of the supplemental petition. A sealed copy of the supplemental petition must be served not only upon the respondent but also on all persons affected by it. [P 353 C 2; P 354 C 1]

*** (b) Divorce—Suit for—Revival of cause of action — Commission of matrimonial offence revives old cause of complaint previously forgiven—Subsequent offence need not be ejusdem generis as prior offence.**

Upon the commission of a subsequent matrimonial offence the forgiveness of the prior offence is cancelled and the old cause of complaint is revived; furthermore, the subsequent offence need not necessarily be ejusdem generis as the original offence: *A I R 1914 L B 171 and A I R 1929 Rang 216, Rel. on ; 4 Sw & Tr (P & D) 105, Foll.* [P 354 C 2]

*** (c) Divorce Act (1869), Ss. 41 to 43—Powers of Court—Order of Court for custody of minor child operates only so long as child is minor — Person to whom such custody is given can be directed not to remove child from jurisdiction of Court.**

The Court's power to make any order for the custody of minor child, the marriage of whose parents is the subject of a suit for obtaining a dissolution of that marriage, is limited to making an order in respect of such child, only so long as that child remains a minor child within the meaning of the Divorce Act. The person to whom is given the custody of a child of a marriage which has been dissolved can be directed not to remove such child outside the jurisdiction of the Court. [P 355 C 1]

Austin Moore — *for Petitioner.*

Order. — This undefended case came before me on the first day of the last sittings (26th August 1938). Although I wished to take time to write my judgment, I had no doubt that the petitioner was entitled to a decree nisi and I wanted the six months period to commence running in her favour before the long vacation. So I then merely

directed a decree nisi to be drawn up that day and intimated that I would give my full reasons after the long vacation. This I will now do. The petitioner is a Christian and, at the date of the presentation of her petition, which was one for obtaining a dissolution of her marriage to the respondent, both she and the respondent were domiciled in Burma. The matter therefore fell to be decided under the Divorce Act. Her case was based upon allegations of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et thoro*. The parties were married on 10th July 1933 and there is issue of the marriage, two children, a boy, Peter Mailland, born on 27th November 1934, and a girl, Ursula Celene, born on 1st December 1936. The cruelty alleged was of two kinds: first, that for the previous four years the respondent had on numerous occasions assaulted the petitioner and that, in consequence, her health had been seriously affected; second, that on five occasions since about October 1937 the respondent had attempted to have intercourse with the petitioner against the law of nature and that he had assaulted her when she resisted his attempts. I do not propose to go into the details of the evidence in regard to the charges of cruelty. I will merely say that, in regard to the first charge, I was doubtful whether the acts of the respondent amounted to cruelty, within the meaning of the Divorce Act. In regard to the second charge however I was abundantly satisfied that the respondent's acts amounted to such cruelty as without adultery would have entitled the petitioner to a divorce *a mensa et thoro*.

The adultery relied upon was, in the first place, an act of adultery committed by the respondent in September 1937 with a Burmese servant girl. The petitioner proved that act of adultery to my satisfaction, but she quite frankly admitted that she had condoned that matrimonial offence and had taken the respondent back, at his request, in order, as she said, "to avoid disgrace." That was the only act of adultery alleged against the respondent in the petition, but about four weeks after presenting her petition, namely on 17th August, the petitioner presented a supplemental petition alleging a further act of adultery by the respondent with a Burmese woman, whose name is unknown, on a date subsequent to the presentation of the original petition. The original petition had in the meantime, namely on 25th July, been served upon the respondent. I was abundantly satisfied upon the evidence, that that further act of adultery was committed by the respondent. But it fell to be considered whether such act of adultery, having occurred after the date of the presentation of the original petition, could be properly considered in the present proceedings as a ground for the dissolution of this marriage and whether it might not have been necessary for the present petition to be dismissed and for the petitioner to file a fresh petition so that the adultery relied upon would be prior in date to the institution of the proceedings. S. 7, Divorce Act, provides that, subject to the provisions of that Act, this Court (and also, for that matter, the District Courts) shall act and give relief on principles and rules which, in the opinion of the Court, are as nearly as may be conformable to the principles and rules on which the High Court in England for the time being acts and gives relief. As I understand it, the present practice in England is this: When it is desired, after a petition has been filed, to add further charges, if the acts or any of them have occurred after the date of the petition, and if the petition has already been served — and that is the position in the present case —the original petition cannot be amended and a supplemental petition must be filed. As a matter of fact supplemental petitions are not referred to in the English Divorce Rules, although they have been known to English practitioners for over fifty years; they are entirely governed by practice and by case law. But there can be no doubt that they are used in such cases as those which I have just indicated. The object of them is to enable the Court to pronounce a decree based, for example, on adultery committed by the respondent after the presentation of a petition for dissolution of marriage. In that respect therefore a suit for relief under the Divorce Act is an exception to the general rule governing civil suits, which I stated in 1938 R L R 6[1] at p. 18, namely that

> nothing arising after action brought can either create a new, or complete a then incomplete cause of action entitling the plaintiff to any relief in that same then existing suit.

In my opinion, the High Court in England would have allowed the adultery charged in the supplemental petition in the present case to afford a ground for dissolving the marriage and accordingly, by reason of S. 7,

1. Smith v. Heptonstall, (1938) 25 A I R Rang 134=177 I C 63=1938 R L R 6.

Divorce Act, this Court was similarly entitled to allow the adultery committed by the respondent on 13th August last to be considered as providing a basis for a decree in this case. But unfortunately certain essential steps had not been taken in regard to the supplemental petition. All that happened was this: The original petition was, as I have said, served upon the respondent on 25th July. When, on the day finally fixed for the filing of the written statement, namely 17th August, the advocates for both parties appeared before the learned Deputy Registrar, Mr. Austin Moore, for the petitioner, filed the supplemental petition to which I have referred, at the same time stating that he had already supplied the other side with a copy of it. Thereupon Mr. Jordan, for the respondent, said that he would not contest the suit. No written statement has been filed. Now the English practice requires that a sealed copy of a supplemental petition must be personally served in all cases except in cases where there was an order of substituted service of the original petition; and no supplemental petition can be filed without leave the application for which must be supported by an affidavit made by the petitioner. Such affidavit should set out the facts, testify to non-collusion and non-connivance, and verify the paragraphs of the supplemental petition. A sealed copy of the supplemental petition must be served not only on the respondent but also on all persons affected by it. Such are the main features of the English practice which, in my opinion, apply equally in Burma. In the present case, apart altogether from the fact that no formal application for leave to file this supplemental petition was made, as, in my judgment, it ought to have been, there was no affidavit by the petitioner, and the supplemental petition has never been personally served upon the respondent. In the result therefore the position in regard to the supplemental petition in the present case was this: the adultery therein charged could, when established by evidence, as in fact it was, and taken in conjunction with the cruelty which had been proved, have formed a basis for granting the petitioner a decree nisi; but, as the proceedings in connexion with this supplemental petition were irregular in the respects which I have indicated, I could not take such adultery into consideration.

How, then, did the matter stand, apart from such further adultery? The petitioner established to my satisfaction (a) the respondent's adultery in September 1937, which however she condoned, and (b) cruelty from and after October 1937. The condonation was before the cruelty in October. Upon the commission of a subsequent matrimonial offence, the forgiveness of the prior offence is cancelled and the old cause of complaint is revived; furthermore, the subsequent offence need not necessarily be ejusdem generis as the original offence. In 7 Bur L T 294,[2] following a number of English decisions on the point, adultery was held to have revived a prior act of assault, which had been condoned, while in 7 Rang 313,[3] a Full Bench of this Court held, following a Calcutta decision, which, in its turn, was based on English decisions that desertion revived previously condoned adultery. In 4 Sw & Tr (P & D) 105[4] a decision which is entirely in point in the present case, it was held that cruelty revives adultery. Consequently I hold in the present case that the respondent's cruelty from October 1937 onwards revived his adultery in the previous September, and, as I did not find either that the petitioner had been in any manner accessory to, or conniving at, the respondent's adultery in September 1937, or that the petition was presented or prosecuted in collusion with the respondent, I was able to pronounce a decree nisi for the dissolution of the marriage in this case without reference to the matters set out in the supplemental petition.

The question of the custody of the children remains. Mr. Austin Moore asked me to give the petitioner the custody of both the children for an indefinite period of time. He said that that was the usual practice of this Court. Be that as it may, I must consider whether the Court has power to make such an order. I will certainly follow that practice if I think it is allowed, but, if I come to the conclusion that it is not a practice which is legal, I cannot follow it. I would add that I do not know of any reported decision as to this practice: I think that the practice has merely grown up in the office and has never been the subject of consideration by a Judge of this Court. I wished to take time to consider the matter and therefore I made an interim

2. Hindle v. Hindle, (1914) 1 A I R L B 171=24 I C 710=7 Bur L T 294.
3. Blackmore v. Blackmore, (1929) 16 A I R Rang 216=119 I C 220=7 Rang 313 (F B).
4. Dent v. Dent, 4 Sw & Tr (P & D) 105.

order for the petitioner to have the custody of both her children until further order. I have now considered the matter carefully and my conclusions are these:

The power both of this Court and also of the District Courts to make orders, in a suit for obtaining a dissolution of marriage for the custody of any children, issue of that marriage, rests upon Ss. 41 to 43, Divorce Act. The only children concerning whom order with respect to custody, maintenance or education may be made are minor children, the marriage of whose parents is the subject of the suit. By S. 3 (5), Divorce Act, the words "minor children" are given a particular and carefully defined meaning, and, in my judgment, it follows that the Court's power to make any order for the custody of a minor child the marriage of whose parents is the subject of a suit for obtaining a dissolution of that marriage, is limited to making an order in respect of such child only so long as that child remains a minor child within the meaning of the Divorce Act. I think that I am right in saying that, according to the English divorce practice, an order for the custody of a child is, in England always expressly stated to be limited in point of time until the child shall attain an age specified in the order, which is usually sixteen (because of the practice which has there grown up at common law in respect of habeas corpus proceedings concerning minors over that age), and which never exceeds twenty-one (which is the age of majority in England). To my mind, the proper practice to be followed in Burma is to limit the order for custody to the age which is fixed by Sec. 3 (5), Divorce Act, as that at which any particular child ceases to be a "minor child" as defined in that Section. It is also the invariable practice in England to direct that the person to whom is given the custody of a child of a marriage which has been dissolved, shall not remove such child outside the jurisdiction of the Court.

The respondent in the present case was born in Rangoon and so the issue of the marriage are the children of what the Divorce Act calls a "native father": minor children of native fathers are, in the case of sons, boys under sixteen, and in the case of daughters, girls under thirteen. Therefore upon discharging, as I now do, the interim order for custody which I made on 26th August last, I direct that in lieu thereof the following shall be inserted in the decree: "And on the application of counsel for the petitioner it is ordered that Peter Maitland Duncan and Ursula Celene Duncan the children, issue of the marriage between the petitioner and the respondent, do remain in the custody of the petitioner until he and she attain the age of sixteen years and thirteen years respectively or until further order of the Court, but it is directed that, so long as this order for custody shall remain in force, neither of such children be removed out of the jurisdiction of the Court without its sanction." All questions of costs, alimony and maintenance have been settled between the parties and no order of the Court is asked for in regard thereto.

N.S./R.K. *Order accordingly.*

A. I. R. 1939 Rangoon 355

ROBERTS C. J. AND DUNKLEY J.

Maung Ba U — Appellant.

v.

Ma Shwe Hmi and others — Respondents.

Second Appeal No. 42 of 1939, Decided on 17th May 1939, against decree of Dist. Court, Shwebo, D/- 3rd November 1938.

(a) Buddhist Law (Burmese) — Marriage — Atetpa property—Change in character is question of fact—Atetpa property brought by wife to her marriage changing its original character being entirely rebuilt — Property becomes lettetpwa in which husband acquires interest.

So long as the corpus of payin or atetpa property is unchanged it will always remain payin or atetpa. The question as to whether there has been a change in the corpus of the property is one of fact. [P 356 C 2]

Where atetpa property originally brought by wife to her marriage changes its original character by reason of its having been entirely rebuilt during the coverture, the property becomes lettetpwa property of the marriage and the husband has half interest equally with the wife in such property: *A I R 1932 P C 152, Ref.; A I R 1936 Rang 417, Expl. and Disting.* [P 357 C 1]

P. B. Sen — *for Appellant.*

K. C. Sanyal — *for Respondents.*

Dunkley J. — The defendant-appellant is the judgment-creditor of respondent 2, Maung E Hu. Respondent 1, Ma Shwe Hmi, married Maung E Hu as her second husband, and the remaining respondents are Ma Shwe Hmi's children by her first marriage. In execution of his decree the appellant attached certain properties, one of which was a granary, as being the property of his judgment-debtor Maung E Hu. The remaining respondents then made an application for removal of the attachment on the granary on the ground that it was the

atetpa property brought by Ma Shwe Hmi to her second marriage, and that her husband Maung E Hu had no interest therein. The attachment was removed from half of the granary only, and a half interest in the granary remained under attachment. Thereupon respondents 1 and 3 to 7 brought this suit out of which the present appeal arises under O. 21, R. 63, Civil P. C., for a declaration that the half-share of the granary remaining under attachment was their sole property, and that Maung E Hu had no interest therein which could be attached in execution of the appellant Maung Ba U's decree. The suit was unsuccessful before the Township Court, the learned Township Judge holding that although this granary was originally atetpa property brought by Ma Shwe Hmi to the second marriage it had, by reason of its having been entirely rebuilt during her coverture with respondent 2 Maung E Hu, changed its character and become lettetpwa property of the second marriage. On appeal to the District Court this decision has been reversed and the suit of the respondents (excluding respondent 2) has been decreed, the learned District Judge holding that respondent 2, Maung E Hu, has no interest in this granary. As has now been pointed out to us in argument for the appellant, this decision is, in any case, contrary to the judgment of their Lordships of the Privy Council in 10 Rang 261[1] at page 268, where it is stated that under Burmese Buddhist law married persons hold during the subsistence of the marriage an interest in all property belonging to either or both, and consequently respondent 2 must have some interest in the atetpa property brought to the marriage by his wife. The learned District Judge, in allowing the appeal, based his decision on the case in 14 Rang 697,[2] and a statement in that case to the effect that "the more valuable part of a house and site is ordinarily the site," and the application of the maxim *quicquid plantatur solo, solo cedit.*

The learned District Judge has however extended this decision to apply to a state of facts which is entirely different to the facts before me in 14 Rang 697.[2] In that case I was dealing with valuable property in a town and the decision must be confined to the facts with which it dealt, and, moreover, I have stated that the site will ordinarily (but not invariably) be the more valuable part of a house and site. This decision, that a building erected upon land which is atetpa property must ordinarily be considered as atetpa property, has no application to the facts which were before the learned District Judge, those facts being that a house and two granaries have been erected in the same compound in a village. The land is village land, which is practically valueless, being not transferable, and the considerations to be applied are entirely different to those which have to be applied in the case of a valuable site in a town. It has, no doubt, been repeatedly pointed put that so long as the corpus of payin or atetpa property is unchanged it will always remain payin or atetpa, and the point for consideration, in any case in which this question as to a change in the nature of property has to be decided, must be a question of fact, as to whether there has been a change in the corpus of the property. In the present case, the question for decision is whether the granary now in existence is substantially a new building erected subsequent to the marriage of respondent 1 with respondent 2. On the evidence which was recorded by him, the learned Township Judge came to the conclusion that the granary which is now in existence is substantially a different building from the granary which was originally constructed. The evidence shows that the original granary was built by respondent 1's first husband some fourteen or fifteen years ago. Respondent 1 herself, in her evidence, had to admit that after her marriage with respondent 2 a new roof of corrugated iron sheets had to be placed on this granary. She alleges that she purchased the necessary materials and paid for the labour in connexion with this re-roofing with her funds which she had brought to the second marriage, but there is no evidence in support of this assertion, and the two witnesses whom she had called have also had to admit that the building was provided with a new roof, but beyond that their evidence is extremely vague, and does not state what other reconstruction, if any, was carried out.

The evidence called on behalf of the appellant, on the other hand, is the evidence of two headmen and a cultivator who appear to be well aware of the circumstances in which the present granary came into existence. They have stated that the original granary was built some fifteen years ago

1. U Pe v. U Maung Kha, (1932) 19 A I R P C 152=137 IC 1=59 IA 216=10 Rang 261 (PC).
2. S. P. L. S. Chettyar Firm v. Ma Pu, (1936) 23 A I R Rang 417=164 I C 1023=14 Rang 697.

by respondent 1's first husband, and that about five or six years ago this granary was substantially reconstructed by respondent 2, Maung E Hu. They have stated that the granary was considerably enlarged and a new roof of corrugated iron sheets was placed on it. Consequently, there is ample evidence to support the decision of the learned Township Judge that in fact the building has entirely changed its character and that there is now no part of the original building, constructed during the first coverture, in existence, and that substantially the granary which has been attached is a new building which was constructed during the coverture of respondents 1 and 2. That being the case, the finding of the learned Township Judge that this granary is lettetpwa property of the second marriage, is correct, and in this property respondent 2 has a half interest equally with respondent 1. This half interest is the part which now remains under attachment and is the part in regard to which respondent 1 and her children brought their suit for a declaration of their title. In my opinion, the suit was rightly dismissed by the learned Township Judge, and the judgment and decree of the District Court are based upon a wrong interpretation of the judgment in 14 Rang 697.[2] The appeal is therefore allowed, the judgment and decree of the District Court are set aside, and the judgment and decree of the Township Court restored, with costs throughout; advocate's fee in this Court five gold mohurs.

Roberts C. J.—After hearing the evidence in this suit the learned Township Judge found as a fact that the pre-existing granary near the house of respondents 1 and 2 had been completely reconstructed after their marriage. It is evident from the testimony of Maung Ba Myaing, headman of the village, and from that of Maung Po Nyo that there was ample evidence upon which he could arrive at that conclusion. There were new walls, there was a new roof and, in substance, the building could not be said to be the same building as it had been before. Applying this fact to the law he held that the property was lettetpwa property and that therefore the judgment-debtor had a half interest which was liable to attachment. Now, the suit was one for a declaration that Ma Shwe Hmi and her children were entitled to the one-half of the granary which was under attachment; but they have already obtained the removal of the attachment on the other half on the ground that that part belonged to them. They are only entitled to one part and the present suit really is to claim that the judgment-debtor has no interest at all in the property. I agree that the decision in 14 Rang 697,[2] though rightly arrived at, is no authority for saying that the site of a house is invariably the more valuable property. My learned brother expressed himself that it was ordinarily so, but circumstances alter cases and one must take care to see whether the facts in a particular instance justify the application of a decision to which reference has been made. I therefore agree that the appeal in this case must be allowed in the terms stated by my learned brother and I also agree with the proposed order in regard to the costs.

N.S./R.K. *Appeal allowed.*

*** A. I. R. 1939 Rangoon 357**

ROBERTS C. J. AND SPARGO J.

Reserve Bank of India — Appellant.

v.

K. A. Elias — Respondent.

First Appeal No. 60 of 1939, Decided on 21st July 1939, against decree of High Court, in C. R. S. No. 58 of 1938, D/- 23rd March 1939.

(a) Master and Servant — Government servant taken by Reserve Bank of India into their service — He cannot be dismissed at pleasure.

Whilst in Government service, a Government servant is liable to be dismissed at the pleasure of the Crown; but where the Reserve Bank of India take him into their service, the bank cannot dismiss him at pleasure : *A I R 1937 Rang 89, Ref.*

[P 358 C 2]

*** (b) Master and Servant —Reserve Bank of India employing servant in spite of his insolvency and without reserving any right to dismiss him for same insolvency — They cannot subsequently complain of his past insolvency.**

The Reserve Bank may employ whom they choose; if they knowingly employ an insolvent and desire nevertheless to be free at a later stage to dismiss him because of the same insolvency, then they must reserve that right expressly at the time of making the contract of employment; and their reservation of that right must be assented to by their prospective employee, in whatever terms it is made. Where the bank have not done so and have elected to ignore his insolvency and have accepted his services in spite of its existence, they cannot complain of his past actions.

[P 361 C 2]

*** (c) Master and Servant — Reserve Bank Rules, R. 22 (iii)—Enquiry must not be illusory — Mere framing of charges is not enquiry — Servant submitting explanation with regard to charges made against him — Bank cannot take any action against him till they are satisfied that charge is proved.**

When a servant who is entitled to an inquiry under R. 22 (iii) of the Reserve Bank Rules is afforded an inquiry it must not be wholly illusory. If he submits an explanation with regard to the charges made against him the bank cannot take any action till they are satisfied that a charge (or charges) is proved : it is not enough that it is merely made. The framing of charges is not an enquiry and if it is proved, they must be satisfied that the act or omission which forms the basis of the charge (or acts or omissions which form the basis of the charges) justify them in taking disciplinary action. And he must know exactly what is the nature of his offence and what is considered proved at the time when such action is taken. The fact that he does not desire to answer charges in person, but puts in a written statement, does not absolve the employer from paying regard to the elementary rules of justice and fair play.

[P 361 C 2]

(d) Master and Servant — Reserve Bank of India — Appeal against dismissal of employee —There must be satisfactory evidence on which Appellate Court can act.

Since a right of appeal is clearly given against dismissal of employee of Reserve Bank there must be satisfactory evidence upon which an appellate authority can act. [P 361 C 1]

Paget — *for Appellant.*

Dr. Rauf — *for Respondent.*

Roberts C. J. — This appeal is brought by the Reserve Bank of India against a judgment and decree on the Original Side of the High Court awarding to the respondent-plaintiff, K. A. Elias, the sum of Rs. 2700 as damages for wrongful dismissal, together with costs. Mr. Elias was employed in the currency department of the office of the Accountant-General prior to the Reserve Bank of India Act, 1934. By that Act, the appellant bank took over the functions of Government in respect of currency as from 1st April 1935, and on 19th October 1934, a memorandum was issued by the Deputy Controller of Currency at Rangoon addressed to the plaintiff and offering the continuance of his employment by the appellants. The offer declared that

> the conditions of service relating to pay, allowances, leave, pension, provident fund, control and appeal will as far as possible remain unaltered, that is they will be the same as under Government, or as nearly the same as circumstances permit. In other words the intention is that so long as their conduct and work are satisfactory the staff should not lose as a result of the transfer.

The respondent agreed to the proposed permanent transfer of his services to the appellant by letter dated 23rd November 1934 and the manager of the bank has admitted in evidence that the bank were bound by the memorandum and acceptance. Mr. Elias' duties included that of examining currency notes which passed through his hands to see whether they were genuine; it was a responsible task and no doubt it is desirable that a person who undertakes such responsibilities should be free from the temptations which might present themselves to the mind of one who was suffering from acute financial embarrassment. As a servant of the Government, Mr. Elias had been subject to the Government Servants' Conduct Rules issued or confirmed under S. 96.B, Government of India Act, and R. 16 applied to him. If he were adjudged insolvent or half his salary was constantly being attached or was continuously in attachment for more than two years, or was attached for a sum which ordinarily could not be repaid within two years he would be liable to dismissal. Sub-rule 5 says that the burden of proof would lie upon him, in such circumstances, to prove in effect that he could not help his insolvency and that it was not his fault. It is important to note that this presupposes that there will be a matter for inquiry and that dismissal will not take place until such inquiry is held. If this were not so, sub-rule 5 would have no meaning.

Whilst in Government service, Mr. Elias was also liable to be dismissed at the pleasure of the Crown, 1937 R L R 35;[1] but the Reserve Bank of India could not dismiss him at pleasure after they took him into their service. In that respect he was in a better position than he had been before; but in no respect could he be placed in a worse position. As it is expressed in a resolution of the Committee of the Central Board of the Bank passed on 9th December 1935, their staff regulations would apply to him and

> all staff permanently transferred to the Reserve Bank from the Government and the Imperial Bank of the extent that the regulations do not contravene any of their previous conditions of service.

This resolution is in evidence as Ex. 4. On 14th December Mr. Elias was required by the Currency Office to give a full list of the debts owed by him, and he did so. They amounted to a sum of Rs. 1016 certain, to which must be added a claim for Rs. 500 which was the subject of litigation in Travancore, contingent liabilities in respect of bills which he had backed on behalf of third parties to the extent of Rs. 589, an amount lying at his debit in the general provident fund account, and a further sum for which his pay was attached. With

1. Secretary of State v. J. C. Maurice, (1937) 24 AIR Rang 89=168 IC 272=1937 RLR 35 (SB).

the full concurrence, as is not now disputed, of the Currency Officer, Mr. Elias filed his petition and was adjudicated insolvent on 6th February 1935. The whole object of this was that his financial embarrassments should be ended. He was not dismissed from Government service.

The appellants having accepted the offer of his services do not appear to have raised any question about his insolvency. Instead of regarding the contract which they had entered into with the respondent as discharged they permitted him to enter the Bank and work on their behalf; the services of the Currency Officer were transferred to the Bank at the same time; there was not only constructive notice of the respondent's insolvency but as from 1st April 1935 the Bank possessed the actual knowledge of their servant, the Currency Officer. There is also in evidence a letter from the Manager of the Bank at Rangoon to the Chief Accountant at Calcutta, dated 7th April 1936, a year later, which is Ex. E. In it he says:

> "I would point out that the cases of these men" (having referred, amongest others to the respondent) were considered prior to the transfer of their services to the Bank. The then Deputy Controller of Currency after a full investigation of each case, recommended that the penalty of dismissal should not be imposed on them, and this recommendation was accepted by the Controller of the Currency.

It appears to me that the appellants had three courses open to them before they accepted the services of Mr. Elias. They could have entirely repudiated the contract of employment which was still executory and could have treated it as discharged by the insolvency; they could have repudiated it and have made an offer of a new contract on terms in which his insolvency was referred to and was made the subject of express stipulation; or they could have elected to ignore his insolvency in the circumstances of the case and have accepted his services in spite of its existence. They chose the last named course; and having done so they put it out of their power to complain of his past actions, and they accepted his services for their present worth. If he committed a future breach of discipline or through any future action rendered himself liable to dismissal he became amenable to the rules of the Bank so far as these regulations did not contravene any previous conditions of his service. But the application of these rules could not refer back to anything which he had done before he entered the service of the Bank at all, and of which the Bank had knowledge when it chose to employ him. The respondent entered the service of the bank on 1st April 1935. Nothing unusual occurred in the insolvency. The learned insolvency Judge in his order of 18th August 1936 said:

> I sympathize with the insolvent a great deal. Notwithstanding his stupidity in countersigning promissory notes without caring what he was doing, that is a common form of recklessness, but it is not otherwise a bad form of insolvency. At any rate, as things go in this country, it is a common example of what is happening every day in Rangoon. In that sense there is nothing out of the ordinary.

The learned Judge had not before him the fact that the appellants had chosen to employ Mr. Elias despite this insolvency, and therefore his remark that they were behaving reasonably in seeking to dismiss him upon the sole ground of this insolvency and matters arising directly out of it is of no account. It must have been present to the mind of the learned Judge not that they had chosen to employ a person who was insolvent and had subsequently regretted it, but that a person actually in their employment had become insolvent and that therefore they were contemplating his dismissal. That would be a very different thing. Persons in the employment of the appellants who were in debt had their cases reviewed from time to time, and on 24th August 1935 Mr. Elias received a notice from the appellants in these words:

> Mr. Elias is informed that he should clear his debts within a year from date, failing which serious action will be taken against him.

But as the Bank very well knew, and had known for some months, Mr. Elias' debts all fell within the insolvency jurisdiction of the High Court. Mr. Paget describes this intimation as a kind of forbearance on the Bank's part as though they were giving him a year to put right some new delinquency, but it referred solely to the existing insolvency. Some months after this a sum of Rupees 705 in his provident fund account was drawn by his wife on his behalf; it had been the subject of a prohibitory order, but the Official Assignee, for reasons best known to himself, withdrew that order; the Manager said in cross-examination that Mr. Elias' dismissal did not arise on this payment; the same thing happened in relation to a gratuity of Rupees 615, some Rs. 300 of which was applied for the benefit of creditors at a much later date and after his dismissal. On 28th April 1936, the learned insolvency Judge suspended the discharge of Mr. Elias for two

years and continued an appropriation order of Rs. 15 a month. In June 1936, Mr. Elias was asked whether he would be willing to have his gratuity of Rs. 615, then held at the disposal of the Official Assignee, applied for the benefit of his creditors. He said that he was willing to abide by the decision of the High Court, and added that

> the legal advice received by me is that it is not at all necessary to give my consent to pay the amount to the Official Assignee as the matter is being tackled by the Court.

Mr. Paget has urged that he was under a moral obligation to consent to these moneys being applied to payment of his debts, and has cited to us the standard of conduct expected of an officer in His Majesty's service. In my opinion the illustration does not afford a parallel. Such an officer's moral obligations may well be considered when the question of dispensing with his services at the pleasure of the Crown is under review. But Mr. Elias had his legal rights as an insolvent, and his insolvency was known to his employers even when they were prospective employers. His unwillingness to submit to any orders in respect of that insolvency, other than such as might be imposed by the Insolvency Court, afforded to his employers no new ground of dismissal, nor could they legitimately become the basis of any charge against him. In a letter (Ex. Q) from the appellants' manager in Rangoon to the Chief Accountant at Calcutta, dated 3rd July 1936, the history of respondent's insolvency is dealt with and it is stated:

> Since his insolvency is the result of circumstances which with the exercise of ordinary diligence he could have foreseen, and that he shows no inclination voluntarily to reduce his debts by the application of moneys that have become due to him, and that at the present rate of repayment he would ordinarily remain a debtor for fifteen years, I am of opinion that the retention of his services is undesirable and that steps should be taken to terminate them in accordance with Government rules.

This letter completely left out of account the fact that in the ordinary way Mr. Elias would obtain his discharge and be entirely free from debts in two years, and not in fifteen. In cross-examination the writer said that he was aware that the respondent would get his discharge in two years and in spite of this knowledge he chose not to take that fact into consideration. In those circumstances, Mr. Elias was suspended on 5th August 1936; what has been represented as the period of forbearance for one year had not completely expired; but the Bank were anxious to terminate his services as speedily as they could.

On 11th August he was served with a document in which what are called 'charges' were framed against him: it has been urged upon us that the learned Judge was wrong in taking the view that the Bank had already prejudged the case having regard to the fact that to the last charge the words are added " and that in the circumstances the Bank has no alternative other than to dispense with your services; " but I entirely share his view. Direct reference is made to the punishment which it was intended Mr. Elias should receive, but the time to consider the nature and extent of the penalty to be inflicted is only reached when charges have been proved. And their conduct in dealing with his explanation, to which I shall presently refer, strengthens me in arriving at this conclusion. It is then said it is admitted that the charges were not happily framed and that we ought not to regard the document as though it were drawn up by a lawyer. Bank officials have little experience in dealing with cases of this kind, and so on.

There are six charges. The first three relate directly to the insolvency itself. Charge 4 relates to the sum of Rs. 705 already referred to, and says he has not paid it to the Official Assignee. Charge 5 says he has not expressed his willingness to put the further sum of Rs. 615 at the Official Assignee's disposal towards reduction of his creditor's claim: and charge 6 says:

> The gravity of your present financial position is such as will inevitably tend seriously to impair your efficiency and your usefulness to the Bank.

As the learned trial Judge remarks, the insolvency is the very ground, and the only ground, on which the respondent has been dismissed. There is no new matter, not arising out of the insolvency, which was being dealt with by the Insolvency Court in these charges. But it is necessary to go further than this. The Bank's contention is that they held an "inquiry" by the mere act of formulating these charges and inviting from the respondent a written statement and a statement whether he desired to be heard in person. I agree with the learned trial Judge that this was no inquiry at all and amounted to a travesty of justice. The whole object of the rules framed for the protection of Government servants is that such a servant shall not be dismissed for misconduct without having

the charges made against him inquired into and properly proved. The framing of charges is not an inquiry but is only the prelude to an inquiry, and if the employee as here " submits an explanation " (to use his own words in his written reply, Ex. H), that explanation must receive proper investigation. It is true that Government servants may be dismissed at pleasure, but in the present case the mere advantage of knowing that an inquiry will be held under R. 55, Civil Services (Classification, Control and Appeal) Rules becomes a right that it shall be held. Under that Rule the authority may direct an oral inquiry. In this case an oral inquiry ought to have been directed. Indeed, under R. 22 (iii) of the Bank's Rules, this seems to be contemplated in every case, unless of course, there is an absconding delinquent or the employee makes no defence at all ; for, the sub-rule says :

> The inquiry under this Regulation and the procedure with the exception of the final order, may be delegated to an officer in Class A.

It is a plain injustice to a person accused of misconduct to assume that when he submits an explanation in reply to charges made against him no further investigation is necessary. Yet that is what the Bank did. The explanation was furnished on 25th August, and on the very next day the manager wrote to Calcutta (Ex. U) enquiring whether Mr. Elias was to be removed or dismissed from service, as under Government rules the latter action would disqualify him from future employment under Government. It was immediately assumed by the manager that the termination of the respondent's services as threatened in the sixth charge would now take place. On 9th September, Mr. Elias was informed "after careful consideration of his reply to the charge sheet" that he was dismissed. He was not even told what charges had been found proved, and thus he does not even now know what was the alleged ground of his dismissal. We are informed that he appealed and that his appeal was dismissed also. Since a right of appeal is clearly given in such cases there must be satisfactory evidence upon which an appellate authority can act, and in this instance there was none. The appeal, such as it was, must have been an empty formality. I was asked by Mr. Paget to indicate what the Bank did that was wrong so that they may be wiser in future. I do not think that this is a task which can properly be assigned to me, but I am tempted to make two observations with regard to that matter.

The first is that the Bank may employ whom they choose ; if they knowingly employ an insolvent and desire nevertheless to be free at a later stage to dismiss him because of the same insolvency, then they must reserve that right expressly at the time of making the contract of employment; and their reservation of that right must be assented to by their prospective employee in whatever terms it is made. The second is that when a servant who is entitled to an inquiry under R. 22, sub-r. (iii) of their own rules is afforded an inquiry, it must not be wholly illusory. If he submits an explanation with regard to the charges made against him the Bank cannot take any action till they are satisfied that a charge (or charges) is proved: it is not enough that it is merely made: and if it is proved, they must be satisfied that the act or omission which forms the basis of the charge (or acts or omissions which form the basis of the charges) justify them in taking disciplinary action. And he must know exactly what is the nature of his offence and what is considered proved at the time when such action is taken. Anything short of that deprives the employee of the protection to which he is entitled. If this were not so, he could be confronted with charges in the form of mere repetition of untrustworthy rumours reflecting on his character, and, no attention being paid to his denial, could be dismissed. The fact that he does not desire to answer charges in person, but puts in a written statement, does not absolve the employer from paying regard to the elementary rules of justice and fair play. With regard to the damages awarded, they are not the subject of any cross-appeal and I will say no more than that they seem to me by no means excessive. For all these reasons I am of opinion that this appeal should be dismissed. The appellants will pay the costs, advocate's fee thirty gold mohurs.

Spargo J.—I agree.

D.S./R.K. *Appeal dismissed.*

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ROBERTS C. J. AND DUNKLEY J.

Nga Thein Pe — Appellant

v.

The King.

Criminal Appeal No. 293 of 1939, Decided on 25th May 1939, from order of Addl. Sess. Judge, Maubin, D/. 29.3.1939.

(a) Evidence Act (1872), Ss. 133 and 114, Illus. (b) — Accomplice is competent witness apart from any question of pardon, but his evidence must be treated with greater caution than that of an established approver.

There is nothing improper in tendering an accomplice as a witness apart from any question of pardon. Such a person is a competent witness and there is no irregularity in not sending up for trial every person against whom any suspicion appears to exist. It may on occasions be desirable to include the evidence of an accomplice for what it is worth without tendering him a pardon. The question of the weight of such a person's evidence is of course important since he will naturally have a strong motive for minimizing his own part in any criminal transaction and hence his evidence must be treated with greater caution than that of an established approver. [P 362 C 2; P 363 C 1]

(b) Evidence Act (1872), S. 114—Person in possession of stolen property — Presumption depends upon nature of evidence adduced.

The Court is entitled to presume that a person found in possession of property which had been stolen is either the receiver or the actual thief. The nature of the presumption in each individual case depends entirely upon the nature of the evidence adduced. Where a long interval has elapsed before the stolen property has been recovered it is often unsafe to assume that the possessor is the actual thief. The highest presumption which can be drawn from possession of stolen property by itself, and in the absence of any other evidence, is presence at the scene of theft : *13 Mad 426, Disting. ; A I R 1930 Pat 513, Dissent.* [P 364 C 1; P 365 C 1]

(c) Penal Code (1860), Ss. 302, 392, 397—Murder with robbery — Common intention — Where several persons are involved in case of robbery accompanied with murder, mere possession of stolen property by one of them is not sufficient to attribute to him common intention respecting guilt of murder.

Where it is shown that only one person is present at the scene of theft and it is clear that the murder has been committed, the logical conclusion to be drawn from that is that the possessor of the stolen property is the person who committed the crime; but in a case in which there are several persons involved and question of common intention arises, great care must be taken not to assume that the person merely found in possession of the stolen property should have attributed to him for this reason alone, a common intention respecting the guilt of murder. [P 365 C 1, 2]

(d) Penal Code (1860), S. 392—Robbery — Accused held on facts guilty of robbery.

The accused along with his associates originally had merely a common intention between them to commit theft and there was never any suggestion that it was thought likely that the murder would be necessary. Nevertheless, two of the accused took deadly weapons with them and three went at night waiting till all was quiet, to the house of the deceased; and the nature of the theft was such that the deceased was being put in fear and in restraint by all of them :

Held that under the circumstances the accused was guilty of robbery. [P 364 C 2]

U Kyaw Din — *for Appellant.*

Myint Thein, Government Advocate — *for the Crown.*

Roberts C. J.—The appellant Nga Thein Pe was convicted by the learned Additional Sessions Judge of Maubin of the murder of one U Shwe Gan, an old gentleman of 62 years of age, who was a moneylender in a small way and who lived at Wedaung. The deceased lived alone, but his elder sister, one Daw Nyein E, occupied a house close by : she is 76 years of age. And she was awake during the night of 16th/17th September; hearing coughing, she called out, "what is wrong?" and heard a voice saying that nothing was wrong. But in the morning her brother was found to have been murdered. There were two wounds, one of a comparatively unimportant nature on the chest and one which must have been inflicted with great force and which pierced the lung, cutting it, and cutting the liver. It seems clear from the doctor's evidence that it was likely that the old man received the smaller wound first and, on flinching and turning away from it, put himself into a position in which the assailant was able to inflict the fatal injuries caused by the deeper wound. There was some delay before the examination of vital witnesses could be undertaken. The Sub-Inspector of Police, Saw Washington, who first undertook the investigation, fell ill after taking a statement from a man named Hla E on 1st October, and one Maung Maung Gyi then took over the investigation from him. Kyin Ma Shin, who has been convicted of the murder of the deceased, was arrested and he made a confession on 7th October to a Magistrate. Hla E was tendered as a witness for the prosecution at the trial. It is, in the main, upon their evidence that the appellant was convicted of murder. But it is necessary most carefully to analyze their account of how this murder came to have been committed.

Before proceeding to an examination of the evidence, it is desirable to say that there is nothing improper in tendering an accomplice as a witness, apart from any question of pardon. There is, as the learned Additional Sessions Judge has said, plenty of authority for saying that such a person is a competent witness and there is no irregularity in not sending up for trial every person against whom any suspicion appears to exist. It may, on occasions, be desirable to include the evidence of an accomplice for what it is worth without tendering him a pardon. The question of the weight of such a person's evidence is, of course, important; since the man who does not

know what may happen to him will naturally have a strong motive for minimizing his own part in any criminal transaction, and his evidence must be treated with even greater caution than that of an established approver. Hla E's story is that he was first approached by the appellant, Thein Pe, to go with him and another man, named San Dun, to commit theft at U Shwe Gan's house : San Dun failed them, and the appellant then brought Kyin Ma Shin. On the first occasion on which they attempted to carry out their plan they proceeded by boat and found that the inmates of the house had not gone to sleep. As soon as everything was silent, they approached U Shwe Gan's house, but were hailed by somebody and, fearing detection, they went home. Two or three days later, however, the project was renewed. Hla E says his wife woke him from sleep with the announcement that Thein Pe and Kyin Ma Shin had come to call him. The witness took his spear and dagger and Thein Pe had a saung-dah, a crowbar and a torch : Kyin Ma Shin brought a stick, pointed at both ends, and a dagger. On arriving at the scene, Hla E says that he remained in the boat and Kyin Ma Shin and the appellant went to open the door, and then one of them snapped his fingers to beckon the witness : Thein Pe asked him to bring a dagger which Kyin Ma Shin had left in the boat and he thereupon gave Kyin Ma Shin's dagger to the appellant, Thein Pe. The details of the version given by Hla E are important, especially when they come to be contrasted with the story of Kyin Ma Shin. Hla E denies that Kyin Ma Shin asked for the crowbar and took it from him and then later returned to the witness bringing the crowbar and asking for the witness's own dagger. They then both went into the house and Hla E says that he heard the sounds like "Woo, woo; done, done." After a time the appellant and Kyin Ma Shin came out of the house carrying a silver bowl and a spittoon and they got into the boat. Hla E then tells a story of Thein Pe giving a full account of the crime which the appellant said he had committed, implicating himself in some detail, before mentioning, on their arrival home, the extent of the booty which he had obtained.

Now, the confession of Kyin Ma Shin must be carefully compared with Hla E's statement. But it would first be noticed that they were for a long time in each other's company and that the desirability of keeping them apart, such as was referred to in the Full Bench case in 1938 RLR 190,[1] seems to have been entirely overlooked; the consequence is that the story which they tell naturally agrees in a great many details, but its weight is really not more than the weight to be attached to one story which is told by one whose evidence must be received with the greatest caution. Kyin Ma Shin agrees that Hla E remained behind in the boat. And he says that Thein Pe asked him to go and get the crowbar and he did so and handed it over to the appellant Thein Pe; he was then asked to go and give it back to Hla E and he brought what he describes as "the dagger" from Hla E. He says Thein Pe took and kept "my dagger." He heard a commotion in the room, but saw no light, and when he flashed a torch and looked he found that Thein Pe was placing the point of his dagger on the side of U Shwe Gan, who had not yet shouted. Thein Pe told him to place the point of his dagger on the chest and he did so and then U Shwe Gan coughed and the old woman cried out "what has happened ?" and was reassured. Now, it is quite clear that this story is at variance with the medical evidence. It sets out quite plainly that Kyin Ma Shin inflicted the slight wound on the chest but that the fatal wound caused by the dagger had already been inflicted by Thein Pe. Kyin Ma Shin says, at the outset of his narrative :

> When I flashed an electric torch and looked, I found U Shwe Gan lying on his side with blood on a mattress in the mosquito curtain.

This shows that he is anxious for the Court to believe that Thein Pe had already stabbed. It is quite plain that just after receiving this wound the deceased might call out: but it is not true to say that he had not yet called out, and coughed after receiving the slight wound on the chest, as Kyin Ma Shin pretends. It is, therefore, abundantly clear that Kyin Ma Shin's story of the part taken by Thein Pe cannot be relied upon. Moreover, it is clear that Kyin Ma Shin says that Thein Pe took Kyin Ma Shin's dagger when he was inside the room and took it from Kyin Ma Shin himself. Hla E's story is that he gave to Thein Pe Kyin Ma Shin's dagger outside the house. We regard these discrepancies as extremely important. If it be true (as we believe it to be proved) that Thein Pe was

1. The King v. Nga Myo, (1938) 25 AIR Rang 177 =175 IC 465 = 39 Cr L J 581 = 1938 R L R 190 (F B).

on the scene and Kyin Ma Shin's and Hla E's story is carefully tested, there is much ground for suspicion that between them they have resolved to put the blame upon Thein Pe for the murder, whereas, in our opinion, he may very well have been the man in the boat and have taken no part in the murder at all. It was, of course, necessary in these narratives to show that Thein Pe had a dagger and, therefore, it is pretended that he committed the murder with Kyin Ma Shin's dagger : but there is a discrepancy as to the point in the proceedings at which he actually received it. And it seems extraordinary that Kyin Ma Shin should borrow Hla E's dagger and permit his own to be carried by Thein Pe. It is quite evident, when Kyin Ma Shin's story is tested, that in the absence of any corroboration that Thein Pe was associated in this murder, the version told by these two persons cannot be accepted as conclusive against him. Thein Pe was taken to the police station as early as 27th September and his part in disposing of the jewelleries must, therefore, have been known to the police from the first. He frankly admitted that he had endeavoured to dispose of the rings and nagats to Chinnaya Pillai and, on finding that he would not purchase them, to Maung Shein, who is by occupation a goldsmith and to whom the articles were sold for the sum of Rs. 87 odd.

By reason of S. 114, Illus. (a), Evidence Act, the Court is entitled to presume that a person who is found in possession of property which has been stolen (and these articles have been clearly identified as being property coming from the deceased's house) is either the receiver or the actual thief. The nature of the presumption which the Court should draw in each individual case depends entirely upon the nature of the evidence adduced. Where a long interval has elapsed before the stolen property has been recovered, it is often unsafe to assume that the possessor was the actual thief. But in this case, in our opinion, the presumption may reasonably be entertained that Thein Pe was present at the theft, since it is most unlikely that the two other men, one or other or both of whom murdered the deceased, would have taken back the booty and disposed of it to someone, who was in no way concerned with their adventure, for disposal. What kind of theft was it which Thein Pe was associated in? It seems clear from the statement of Hla E himself that originally there was merely a common intention between these persons to commit theft and there is never any suggestion by any of them that it was thought likely that murder would be necessary. Nevertheless, it is clear that two at least of them took deadly weapons with them. The three went at night, waiting till all was quiet, to the house of this elderly gentleman in which he lived alone and the nature of the theft was such that he was being put in fear and in restraint by all of them : and it would be idle to pretend that Thein Pe was not, in those circumstances, guilty of robbery.

It is, we think, desirable to notice that, apart from the evidence of Hla E and Kyin Ma Shin, Hla E's wife gave evidence and said that Thein Pe was one of the two men who came for her husband on the night in question, that she tried to persuade her husband not to go, that she recognized Thein Pe by his voice, and that they all went together on this expedition. There is also, I think, another point in the evidence which shows that Thein Pe was actually present on the expedition. He borrowed an auger from a neighbour, Maung Tut, at about the material time. This auger was taken by Thein Pe's brother, Maung Hla, but he said in evidence that he never used the auger for the purpose for which he had requested the appellant to borrow it, as it was unsuitable: he says that he asked Thein Pe to return it to Maung Tut. There is therefore evidence that at the time in question Thein Pe had an instrument of the kind which he is said to have carried upon this expedition.

The learned Government advocate has also pointed out that certain studs which were found in the deceased's house were identical in character with those found in the house of the appellant and it is suggested that small articles like that would not be given by thieves to anyone to dispose of and that their presence in the appellant's house is a further small point for the prosecution and shows that he was present in the house of the deceased. By itself we think this would have little weight: but taken in conjunction with a number of small points, any one of which could individually be explained, we think it falls into its natural place and we can have no doubt that the appellant was present at the scene of the robbery. I desire however to refer to two cases which have been the subject of some comment in the judgment. One is

the case in 13 Mad 426,[2] in which a boy named Thevoo was kidnapped, robbed and murdered by three criminals. The crime was committed for the sake of some bangles which the boy wore. The appellant Sami made a confession in which he admitted his guilt so far as the kidnapping and robbery were concerned, but said he had taken away the bangles before the other two men proceeded to kill the boy and that he had no part in the murder. There was in this case independent evidence that he had been seen carrying the corpse and there were a number of circumstances which entirely justified the Court in coming to the conclusion that the evidence against the appellant pointed to his guilt, not only in the kidnapping and robbery but also in the murder charges. This case however seems to have been misunderstood and, it has been suggested, when stolen property is found in the possession of a person and it is shown that the stolen property belonged to someone who was murdered at the time of its theft, that the presumption can be drawn that the possessor of the stolen property was not only present at the scene of the crime but must be taken to have an equal share in the murder with other persons who were there taking part in the theft some one or other of whom proceeded to kill the person who was being robbed.

In 9 Pat 606[3] it is suggested that the presumption referred to in illus. (a) to S. 114, Evidence Act, is not confined to charges of theft, but extends to all charges, however penal, not excluding even murder. I desire, with respect, but with emphasis, to dissent from this expression of the law. The highest presumption which can be drawn from possession of stolen property, by itself, and in the absence of any other evidence, is presence at the scene of the theft. Where it is shown that only one person is present at the scene of the theft and it is clear that the crime has been committed, it may well be that the logical conclusion to be drawn from that is that the possessor of the stolen property is the person who committed the crime; but, in a case in which there are several persons involved and the question of common intention arises, great care must be taken not to assume that a person merely found in possession of stolen property should have attributed to him, for this reason alone, a common intention respecting the guilt of murder. For these reasons, we have set aside the death sentence and quashed the conviction under S. 302, read with S. 34, Penal Code: it follows as a corollary that the conviction under S. 397 must be set aside. But the conviction under S. 392 will stand and the sentence of seven years' rigorous imprisonment on the second charge is confirmed.

Dunkley J.—I agree.

S.G./R.K. *Appeal partly allowed.*

2. Queen-Empress v. Sami, (1890) 13 Mad 426=1 Weir 290.
3. Ramsarup Singh v. Emperor, (1930) 17 A I R Pat 513 = 1930 Cr C 109=128 I C 121 = 32 Cr L J 72=9 Pat 606=11 P L T 867.

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MYA BU AND MOSELY JJ.

Daw Ein and others—Appellants.

v.

Daw Chan Tha and others — Respondents.

First Appeals Nos. 111 and 126 of 1938, Decided on 21st March 1939, against decree of Dist. Court, Maubin, D/- 18th August 1938.

(a) Mahomedan Law—Wakf—When wakf is made owner is deity and not mutwalli.

When a wakf is made, the right of the wakif is extinguished and the ownership is transferred to the Almighty. The transferee is therefore the deity and not the mutwalli who is merely a manager : *AIR 1922 PC 123, Rel. on.* [P 367 C 2; P 368 C 1]

(b) Wakf—Creation — Wakf made by deed —Registration Act must be enforced.

A wakf can be created by oral declaration and dedication : *A I R 1925 Rang 71, Rel. on.* [P 367 C 2]

But where wakf is made by deed the provisions of S. 17 (1) (b) and S. 49, Registration Act, must be enforced : *A I R 1921 P C 105, Rel. on.* [P 367 C 2; P 368 C 1]

(c) Decree—Nature of—Suit for rents and profits of property held in trust which is alleged to have failed—Court asked to find out whether plaintiff entitled to claim—Suit is not one for administration—Nature of decree if wakf held invalid.

It is only where it is necessary that the estate should be administered by the Court that the Court may make payment of the liabilities of the estate and all persons who would be entitled to be paid may come in under the preliminary decree and make their claims against the estate. [P 368 C 1]

Where it is not alleged that there are any debts due to the estate nor is the Court asked to administer the estate but the suit is one for rents and profits of certain property held by defendant under trust which is alleged to have failed and all that the Court is asked to do is to decide, if the wakf is found to be invalid, whether plaintiff is entitled to what he claims, such a suit is not an administration suit; and the Court if it finds that the wakf is invalid should only grant the plaintiff's claim and pass a preliminary decree accordingly and for rents. [P 368 C 1]

(d) Limitation Act (1908), S. 10—Trust declared invalid—S. 10 does not apply to suit for rents and profits of property.

Once a trust has been declared invalid ab initio S. 10 can have no application at all to a suit for account of rents of property held under trust : *Case law relied on.* [P 369 C 1]

(e) Limitation Act (1908), Arts. 109 and 120 —Suit for rents and profits of land to which both plaintiff and defendant have claim is governed by Art. 120 and not Art. 109.

Where profits claimed in a suit are not mesne profits at all, that is, not profits wrongly received by the defendants but are the rents and profits of land to which both the plaintiff and defendant as co-heirs have a claim, the Article applicable is Art. 120 and not Art. 109 : *21 Cal 157 (PC); 23 Cal 799; 19 All 169 and A I R 1917 Mad 901, Rel. on.* [P 369 C 1]

U Ze Ya (in No. 111) and Beecheno (in No. 126)—*for Appellants.*

P. K. Basu and U E Maung (in No. 111) —*for Respondents 1 and 5 respectively.*

U Ze Ya (in No. 126)—*for Respondents.*

Mosely J. — The plaintiff Daw Chan Tha, the widow of U Pe a Zerbadi Mahomedan who died in 1926, sued for a declaration that a wakf which she and U Pe's two brothers, his other heirs, executed in 1926 had failed, and also for her share of the property comprised in that wakf, that is to say her share of part of her inheritance, and for the net rents and profits of the property from 1926 up to recovery of possession. The suit was filed in 1937. The other two parties to the deeds of wakf were U Pe's brothers, U Hpaw who died in 1929 and U Po Kyaw who died in 1931. The suit was greatly complicated because it was wrongly treated as an administration suit. There was an allegation that U Po Kyaw became a Buddhist in 1927 and questions regarding succession to his property were gone into which were quite foreign to this suit. The first set of defendants were U Hpaw's widow, Daw Ein and her children, and those of another, deceased wife of U Hpaw, U On Pe, Ma Thein Nyun, U Chit Pe, Ma Sein Yin and U Ba Kyin (defendants 1 to 6). These, except Ma Thein Nyun, are the appellants in Civil First Appeal No. 111 of 1938. Another set of defendants are the two daughters of Po Kyaw's widow, Ma On Khet, who died in 1937, namely Ma Aye Khin and Ma Aye Hla (defendants 7 and 8) who are the appellants in Civil First Appeal No. 126 of 1938. These two appeals are being decided in this judgment. The ninth defendant, Ma Than Kyi, was added on the request of defendants 7 and 8. She claims to be the child of a third wife of U Hpaw, Ma Ohn Kin (D. W. 12 here). An issue was framed and decided as to her status. It was necessary to decide that question as if she is the legitimate daughter of U Hpaw, she is interested in affirming or denying the validity of the wakf in suit.

The plaint set out the deeds relating to the wakf. These are Exs. A, B and C, all unregistered deeds. By Ex. A, one Haji Ko Dawood was appointed as arbitrator to partition the estate of U Pe leaving some two hundred acres of paddy land and jewellery worth some Rs. 14,000 for Lilla (charity). In pursuance of that agreement Exs. B and C were executed by the same parties some six weeks later. By Ex. B, the paddy lands mentioned in Ex. A were specified as 191·45 acres, and it was stipulated that U Hpaw was to collect the rents, maintain accounts, make necessary donations (it is not said to what) and to keep an account of the surplus funds. If he failed to give donations or to keep accounts it was agreed that the land and rents should be partitioned amongst the three executants in proportion to their shares. By Ex. C, it was agreed that the jewellery be sold (this has not been done), and with the proceeds mosques, school buildings and cemeteries should be built or repaired. These objects of the trust were copies from similar objects entered in Ex. A and then scored out.

The plaint set out the heirs and legal representatives of U Hpaw and again those of U Po Kyaw, merely of course for the purpose of adding them as defendants. Para. 8 of the plaint said that Po Kyaw's heirs and legal representatives were not only his children, defendants 7 and 8, but also the three male children of U Hpaw qua nephews of course and residuary heirs. In para. 11 the plaint averred that the intended religious trust had failed owing to the death of U Hpaw and U Po Kyaw before the agreement creating the trust was acted on in any way, and because of the uncertainty of the purpose and the contingent nature of the trust and non-fulfilment of its conditions and for other reasons. Para. 12 said that U Hpaw was in possession of the trust properties as manager till his death and since then U Po Kyaw's sons, U On Pe and U Ba Kyin were in possession of them. The plaintiff valued her suit at over Rs. 7000, a quarter of the value of the land Rs. 8000 odd, a quarter of the net rents and profits, and over Rs. 3000, a quarter of the market price of the jewellery, about Rs. 19,000 in all. Defendants 1, 2, 4, 5 and 6, that is

U Hpaw's widow and children except Ma Thein Nyun, in their written statement pleaded that the trust was not invalid and had not failed. U On Pe and U Ba Kyin admitted taking over the trust in management since their father's death. They pleaded that the claim to "mesne profits" beyond three years was time barred. Ma Aye Khin and Ma Aye Hla, U Po Kyaw's daughters, made common cause with the plaintiff, but they added that their father became a Buddhist in 1927 and made that a ground for assailing the wakf. (It is no ground of course.) In para. 4 of their written statement they pleaded that the suit was really a suit for administration of a portion of an unadministered estate and therefore it was essential that Ma Than Kyi should be made a party. (It may be said here that she was a necessary party for quite a different reason as she was interested in the validity of the wakf.) They said that U Hpaw's children were not U Po Kyaw's heirs but that they themselves were U Po Kyaw's sole heirs under Buddhist law, and finally they pleaded that they "are entitled to their legitimate shares in all the properties involved in this suit." Ma Than Kyi in her written statement also made common cause with the plaintiff, but she also pleaded that U Po Kyaw became a Buddhist. She set up her own claim as daughter and heir of U Hpaw.

The ten issues framed included two issues as to the creation and validity of the wakf; (3) as to mesne profits (4 and 5) as to the apostacy of U Po Kyaw and its effect on the wakf; (7) as to what rule of law governs the estate of U Po Kyaw and who were his legal representatives; (6) whether Ma Than Kyi was a necessary party and (8) whether Ma Aye Khin and Ma Aye Hla and Ma Than Kyi were entitled to a share in the trust properties. (Ma Aye Khin and Ma Aye Hla were, in any event, entitled to some share.) (9) and (10) need not be specified. On the evidence adduced on all these issues, it was found inter alia that over Rs. 1000 was said by defendants 1, 2 and 6 to have been spent on feeding the poor and on repairing a mosque and road, but that these were objects of the trust set out in Ex. C and not that set out in Ex. B, and therefore the fund of the wakf as set out in Ex. B had not been utilized. This I imagine is clearly wrong because Ex. B would allow expenditure on any objects of charity even if they were the objects more particularly designated in Ex. C. But this question seems to be immaterial. The main finding of the trial Court was that the wakf failed altogether and were invalid because the deeds of wakf were not registered. This objection had not been taken in the written statements or particularized in the issues but was raised in argument at the Bar. That, however, cannot affect the decision of the legal question, for, the case of both the plaintiff and defendants 1 to 6 throughout was that the wakf was created by these deeds.

A wakf of course can be created by an oral declaration and dedication. That is undisputed law. I need only refer to 2 Rang 495.[1] But where the wakf is made by deed, Ss. 17 (1) (b) and 49, Registration Act, come into operation. S. 17 (1) (b) demands the registration of non-testamentary instruments which purport to operate to create or extinguish any interest of the value of one hundred rupees and upwards in immovable property. S. 49 declares that no document required by S. 17 to be registered shall affect any immovable property comprised therein unless it has been registered, and exception is made in Sec. 49 to cases of part performance lying under S. 53-A, T. P. Act. But that Section can have no operation here as it deals with cases where the transferee has, in part performance of the contract, taken possession of the property.

In the case of a wakf the transferee is the deity, not the mutwalli who is merely a manager, *vide* 44 Mad 831[2] at p. 840, a decision of their Lordships of the Privy Council. In 42 All 609,[3] another decision of their Lordships of the Privy Council, it was assumed throughout that a wakfnama or deed of wakf must be registered. The learned author of Mulla's Commentary on the Registration Act (*see* Edn. 3, S. 17 (1) (b) at p. 58), has given the correct interpretation of this ruling. Unfortunately the headnote of the case in the Indian Law Reports and also in 47 I A 224[3] has given the opposite effect to that intended, and says that a wakfnama does not require registration. It was the trusteenama or deed of appointment of mutwallis which did not require registration, *see* pp. 615 and 618 *ibid.* As

1. Ma E Khin v. Maung Sein, (1925) 12 A I R Rang 71=88 I C 167=2 Rang 495.
2. Vidya Varuthi Thirtha v. Balusami Ayyar, (1922) 9 A I R P C 123=65 I C 161=48 I A 302=44 Mad 831 (P C).
3. Muhammad Rustam Ali Khan v. Mushtaq Husain, (1921) 8 A I R P C 105=57 I C 329=47 I A 224=42 All 609 (P C).

was said in 44 Mad 831[2] when a wakf is made the right of the wakif is extinguished and the ownership is transferred to the Almighty. I do not refer here to the effect of Ss. 123 and 129, T. P. Act, as a wakf is not a gift but a religious trust, and the law concerned is by virtue of S. 13, Burma Laws Act, the Mahomedan law. That law makes no mention of writings. It merely lays down that a wakf may be made by oral declaration and dedication. Therefore, although a wakf can be made orally, the law applicable to a wakf made in writing must be the statute law of India and the Registration Act must be enforced. The learned District Judge in the judgment went on to come to two other findings, that U Po Kyaw did not apostatize and that his nephews were entitled to a share in his estate along with his daughters. In that event the learned Judge should have gone on to fix the fractional share to which the nephews were entitled, for the purpose of the preliminary decree.

In my opinion, however, this question should not have been decided in this suit. This suit was not brought on as an administration suit and administration was not asked for by the plaintiff. It was not alleged that there were any debts due by the estate or that it was necessary for the Court to administer the estate, and in fact the Court took no steps to administer the estate. It is only where it is necessary that the estate should be administered by the Court that the Court may make payment of the liabilities of the estate and all persons who would be entitled to be paid may come in under the preliminary decree and make their claims against the estate: *vide* the provisions of O. 20, R. 13. All that the Court had to do in the present case was to decide if it found the wakf invalid, whether the plaintiff was entitled to what she claimed. The Court had to determine whether Po Kyaw's nephews, that is U Hpaw's sons, were heirs to U Po Kyaw's estate. As I have said they were already admittedly entitled to come on the record and dispute the plaintiff's claim as the legal representative of U Hpaw. On the District Court coming to a finding that the wakf was invalid it should only have granted the plaintiff's claim and passed a preliminary decree accordingly and for accounts of rents and profits. Further embarrassment in the present case is caused by the fact that U Po Kyaw left a separate estate and the decision on the validity of this wakf and on the share of U Po Kyaw and his heirs under the wakf estate would determine and be res judicata in any proceedings as between the heirs under U Po Kyaw's separate estate. The decision that U Hpaw's sons are heirs to U Po Kyaw's estate cannot be allowed to stand and I note that U Zeya, the advocate for U Hpaw's widow and children, the appellants in Civil First Appeal No. 111 of 1938, agrees to this finding. In any event it would have had to be set aside and this will be ordered accordingly.

As regards Ma Than Kye the case is different. As I have said she had to be admitted into the record for the purpose of admitting or denying the validity of the wakf and for that purpose her status had to be determined. The trial Court found that she had proved that she was the legitimate daughter of U Hpaw. Two reasons are given: the first is that the heirs of U Hpaw admitted that in accordance with Ex. A, Ma Than Kyi as a niece of U Pe received her share of his estate, some Rs. 5400. The other reason is that she had all along been living with U Po Kyaw and his family. The evidence as to Ma Than Kyi's legitimacy is not voluminous. But her status never seemed to have been closely questioned in the case. All that Ba Kyan, for example, said was that he did not know whether her mother had been married to U Hpaw or not. The case for Ma Than Kyi is that her mother Ma Ohn Khin (D. W. 12) married U Hpaw in 1918 in the mosque at Maubin by Mahomedan rites. This was a year before Ma Than Kyi was born. Ma Ohn Kin says that she lived with U Hpaw for about three years and then left him because he illtreated her. She now describes herself as a Buddhist and has remarried. She was hardly cross-examined. She said that a Moulvi performed the ceremony and that she got jewellery as her dower and that she was not given any Indian name. This Moulvi should have been a witness but she was not even cross-examined as to who he was or whether there were any witnesses at the ceremony. Ma Aye Khin, defendant 7 stated that Ma Ohn Kin was first married "according to Burmese custom" in her village and about two months later she was brought to Maubin where she was married by Mahomedan rites. Ma Aye Khin was not present at the ceremony but she was in a position to know of the marriage and of Ma Ohn Kin's repute as wife and being

treated as wife. After Ma Ohn Kin left, Ma Than Kyi was brought up not by her step-mother but by U Po Kyaw and his wife where indeed she may have been more happy. It appears to me that upon this evidence particularly, coupled with the fact that Ma Than Kyi was given her share on U Pe's death without dispute, sufficient proof was given of the legitimacy of her mother's marriage.

The learned Judge allowed the plaintiff a quarter share in the property as claimed and to "an equal" share, that is to say a quarter share in the rents and profits from the date of U Pe's death to the date of decree. The decree, I note, orders that the defendants would be given their respective shares under Mahomedan law, though it never went on to define their shares as should have been done, and ordered a commissioner to partition the plaintiff's share and to take an account of the rents and profits. Had the trust been a valid one, U Ohn Pe and U Ba Kyin would admittedly have been trustees de son tort, but it cannot be gainsaid that once the trust has been declared invalid ab initio, S. 10, Limitation Act, can have no application at all. This was laid down in 23 Bom 725[4] by their Lordships of the Privy Council. The earliest decision on the subject is 4 Cal 455[5] at p. 466 followed in 8 Cal 788,[6] and in addition I will only refer to 31 Bom 222[7] and 37 Bom 447.[8] The order therefore directing an account of profits for eleven years prior to the suit cannot be upheld. It is argued for the appellants in Civil First Appeal No. 111 of 1938 that Art. 109 applies, but this is clearly wrong. The profits in question are not mesne profits at all, that is to say not profits wrongly received by the defendants. They are the rents and profits of land to which both the plaintiff and defendants as co-heirs have a claim and the Article applicable is Art. 120: *vide* 21 Cal 157,[9] a decision of their Lordships of the Privy Council, 23 Cal 799,[10] 19 All 169[11] and 39 Mad 54.[12]

The preliminary decree of the trial Court therefore will be altered to one declaring that the plaintiff is entitled to a quarter share of the properties described in Sch. A, and to a quarter share of the rents and profits derived from them from six years prior to the date of suit, 29th October 1937, to the date of the decree of the trial Court, and a commissioner will be appointed to partition the plaintiff's share and to take accounts of what part of the property comes into the hands of the defendants, etc. and an account of rents and profits from that that will have come into the hands of any of the defendants from six years before the date of institution of the suit until decree. As to costs it was ordered that the plaintiff was entitled to proportionate costs payable out of the estate, and those costs in the trial Court will be maintained. As to the costs of appeal, the appellants in Civil First Appeal No. 111 of 1938 have been about a quarter successful and will therefore pay half the respondents' costs of this appeal. As regards the costs of Civil First Appeal No. 126 of 1938 the appellants have been successful but the trouble that befell them was largely due to themselves, and it will be ordered that the parties do bear their own costs of this appeal.

Mya Bu J. — I concur.

N.S./R.K. *Decree altered.*

4. Runchordas Vandravandas v. Paravatibai, (1890) 23 Bom 725 = 26 I A 71=1 Bom L R 607 = 7 Sar 543 (P C).
5. Kherodemoney Dossee v. Doorgamoney Dossee, (1879) 4 Cal 455 = 3 C L R 315.
6. Hemangini Dasi v. Nobin Chand Ghose, (1882) 8 Cal 788 = 11 C L R 370.
7. Mathuradas Domodardas v. Vandrawandas Sunderji, (1907) 31 Bom 222 = 8 Bom L R 828.
8. Mahomed Ibrahim v. Abdul Latiff, (1913) 37 Bom 447=17 I C 689=14 Bom L R 987.
9. Mohamed Riasat Ali v. Hasin Banu, (1894) 21 Cal 157=20 I A 155 = 6 Sar 374 (P C).
10. Robert Watson & Co. Ltd. v. Ram Chand Dutt, (1896) 23 Cal 799.
11. Umardaraz Ali Khan v. Wilayat Ali Khan, (1897) 19 All 169 = 1897 A W N 34.
12. Madar Sahib v. Kader Moideen Sahib, (1917) 4 A I R Mad 901=33 I C 705=39 Mad 54.

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ROBERTS C. J. AND DUNKLEY J.

Damjee — Appellant.

v.

Maung Hla Sein — Respondent.

Civil Misc. Appeal No. 19 of 1939, Decided on 8th May 1939, from order of Commissioner for Workmen's Compensation, Prome, D/- 16th February 1939.

Workmen's Compensation Act (1923), Ss. 3 and 2 (1) (d)—Object of awarding compensation—Question of dependency is one of fact—On evidence, fact of dependency held not proved—Husband held not entitled to claim compensation.

The purpose of the statute in awarding compensation is not to give solatium to a relative of a person who is an employee and has been fatally

injured, but something to replace the actual loss which he or she has suffered. The question of dependency is a question of fact which must be decided in relation to the particular circumstances of each given case. [P 370 C 2]

A person made an application for compensation for the death of his wife on the ground that she met her death in course of her employment. He did not set out in his application any grounds for showing that he was in fact dependent on his wife. In his statement before the commissioner he merely said that he and his wife used to pool their earnings which went into a common pot. But besides this there was nothing more to suggest that he had suffered at all pecuniarily by reason of his wife's death :

Held that the fact of dependency had not been proved and hence the husband was not entitled to claim any compensation: *(1911) A C 665, Ref.* [P 370 C 2; P 371 C 1]

Foucar — *for Appellant.*

Roberts C. J. — This is an appeal by Mr. Damjee, who was at all material times the proprietor of the Kothaung Mill in Prome, against an award of the Commissioner in workmen's compensation matters whereby the respondent Maung Hla Sein, who alleged that his wife Ma E Mi had met with an accident in the Kothaung Mill, being a "workman" within the meaning of the Act at that time, was entitled to compensation. Ma E Mi died on 23rd July 1938 and certainly met with some accident on 20th July of that year in the mill, the exact nature of it has been a matter of the widest possible controversy and every possible point of view has been taken into consideration by the Commissioner, including statements in evidence of expressions of opinion, all and sundry, connected or unconnected with the matters at issue. There is no doubt that the learned Commissioner has done his utmost to get to the bottom of the disputed matters, but we think that, having regard to the requirements of the Workmen's Compensation Act, the real question might have been solved with somewhat greater readiness than was shown. By Section 2 (1) (d) of the Act, it appears, according to sub-para. 1 of that Section, that the husband of a workman is not prima facie a dependent within the meaning of the Act, but according to sub-para. 2, that, if in part dependent on the earnings of the workman at the time of her death, the husband is a dependent. And before any question arose as to what happened inside this rice mill, it might, I think, have been more simple and helpful to observe what the nature of the application made by the husband was. He first of all wrote a letter, which is at page 3 of the record, in which nothing is said about dependency, and when he made his application on Form G, did not there say more than that "the applicant is the husband of the deceased workman." Later, in para. 7, he requested the Commissioner to determine whether the applicant was dependent on the deceased; that is to say he set out in his application no grounds whatever for showing that he was in fact dependent upon his wife. Then he came to make his first statement on 23rd November 1938, and in the course of that statement, he did not say at all that he was dependent upon his wife. When the matter came to be heard in the Workmen's Compensation Court at Prome, what he says is set out at the very bottom of page 10 where he says:

> My wife was paid six annas a day and wages were paid every ten or fifteen days. My wife had been working without a break in the mill for from four to seven days before her death. I work as a cooly: my wife and I used to pool our earnings and our earnings went into the common pot.

That was all the evidence given before the Commissioner on the question of dependency and, in our judgment it is by no means sufficient to establish a condition of dependency as a fact. It has always been said that the question of dependency is a question of fact which must be decided in relation to the particular circumstances of each given case. Every man is obliged to maintain his wife: but in this instance the applicant has never suggested that he had to have recourse to her earnings to do so, and still less has he suggested that without the contribution of the deceased he would be unable to live as well as he lived before. It has not been said that the wife, earning six annas a day, worked in such a way and with such regularity that she ever received Rs. 11-4-0 or anything like it during the course of any one calendar month ; in fact, it appears that her attendance at the mill (if she was working there at all) was sporadic and that she had not been there very long before she met with this unfortunate injury. From the evidence it is clear that the applicant was in no position to gain anything from her earnings which would put him in a better position and which he has lost by the event of her death. And it must be borne in mind that the purpose of the statute is not to give solatium to a relative of a person who is an employee and has been fatally injured, but something to replace the actual loss which he or she has suffered. There may be room for canvassing the opinion that in this respect the Act is

harsh, but we have to administer the Act as we find it : and there can be no doubt that in deciding the question of dependency the law is the same in this country as in England. We have been referred to the case in (1911) A C 665[1] in which Lord Loreburn pointed out that where the costs of the maintenance of a son was as such as the wages which he gave to his father, a County Court Judge was entitled to find, upon those facts, that there was no dependency at all. It has never been shown, either to the Commissioner or to us, that this man received more than was enough to keep his wife or that he has suffered at all pecuniarily by reason of her death : and we think therefore that the learned Commissioner was wrong in assuming that the fact of dependency had been proved before him.

In ordinary circumstances it would be unnecessary to make further comment, but I think it is desirable, in view of certain other matters which appear from the judgment, to make one or two additional remarks. First of all, if the fact of dependency had been proved, the task of the learned Commissioner would have been to calculate the wages by the method which is laid down in S. 5 (b), Workmen's Compensation Act. He would notice from the evidence that the continuous period of service immediately preceding the fatal accident was less than one month : and he would therefore have to compute the monthly wages of the deceased and he would have to find the average monthly amount which was being earned by another workman employed on the same work by the same employer or, alternatively, on similar work in the same locality. No attempt was made to satisfy any of the requirements of the Act, but the learned Commissioner, having discovered that the woman in question earned six annas a day, proceeded to translate that into Rs. 11-4-0 a month and then looked up the corresponding figure in Sch. 4 and made that the ground of his award. This was an inaccurate way of dealing with the requirements of the Act. In my opinion, it was really beside the point to examine at all the difficult question as to how these injuries came about. But it may be noted that, assuming that the Commissioner was satisfied on the question of dependency and was satisfied that the deceased woman was an employee at the mill and not a trespasser as alleged by the appellant, it would not very much matter whether she slipped and fell or whether she was injured, while washing, from the bursting or breaking of an exhaust pipe and consequent injury to her head and from the effect of steam. But the investigation appears to have proceeded rather on the footing that the employers were in some way negligent and that being so, care must be taken to investigate the exact source of the injury which the deceased workman sustained ; but, as I say, once proved she was an employee and that the accident arose in and out of the course of her employment, this prolonged investigation would have been unnecessary.

In the result, as we are satisfied that, whatever may be the true explanation about other matters, as the applicant was far from proving that he was dependent upon the deceased at the time of the accident which she received, this application should have been dismissed, and we must therefore order, in so far as the award to the applicant of Rs. 550 is concerned, that this order should be set aside : no order as to the costs here, and, so far as the costs in the lower Court are concerned, if they have been paid, the appellant is, in strictness, entitled to them.

Dunkley J.—I agree that the respondent failed to establish his right to bring the petition and that therefore on this ground the petition must be dismissed and that the appellant must be awarded costs before the Commissioner.

N.S./R.K. *Order of compensation set aside.*

1. Tamworth Colliery Co. Ltd. v. Hall, (1911) A C 665=81 L J K B 159 = 105 L T 449=55 S J 615=1912 W C Rep 79.

A. I. R. 1939 Rangoon 371

BAGULEY J.

Rasool Bhai — Appellant.

v.

The King.

Criminal Appeal No. 1019 of 1938, Decided on 23rd December 1938, from order of Second Addl. Magistrate, First Class, Rangoon, D/- 8th August 1938.

(a) Evidence Act (1872), S. 132 — S. 132 overrides provisions of Penal Code—Protection given by S. 132 must be claimed directly or indirectly in some way or other — Witnesses hesitating to answer for fear of legal consequences—Court telling them to answer — Protection of witnesses under S. 132 is complete.

The Evidence Act being a special Act with regard to special class of defamation arising out of depositions made in Court by witnesses would certainly override the provisions of the Penal Code. The Penal Code contains no exception in

favour of statements made in evidence in Court to give them absolute privilege, but there can be no doubt that S. 132, Evidence Act, if it applies, gives complete protection against criminal prosecution. The protection given by S. 132 must be claimed directly or indirectly in some way or another. If the witnesses object to answering any particular question on the ground that a true answer to it may render them liable to legal consequences and they are then told by the Court to answer, their protection under S. 132 is complete. There can be no further protection given outside S. 132 : *A I R 1926 Bom 141 (F B) ; A I R 1924 All 381 and A I R 1929 Mad 236, Rel. on; 36 Mad 216, Dissent.* [P 372 C 2 ; P 373 C 2 ; P 374 C 1]

(b) Penal Code (1860), S. 499, Exception 9 — Defamatory statements made by witness in answer to questions by Magistrate or Public Prosecutor — He is entitled to presumption of good faith.

Where defamatory statements are made by witness in answer to questions put to him by the Magistrate or by the Public Prosecutor he is entitled to the benefit of an initial presumption of good faith. There would be a presumption that what the witnesses said was said bona fide in the protection of their own interests and they would therefore be protected by the provisions of the Exception 9 to S. 499, Penal Code : *A I R 1925 Rang 360, Rel. on.* [P 374 C 1, 2]

(c) Defamation — Prosecutor or plaintiff should be ready to go into witness-box to submit to searching cross-examination.

In a case of defamation it is always necessary that the prosecutor or the plaintiff, according to whether the case is a criminal or a civil one, should be ready to go into the witness-box and submit to the most searching cross-examination. In a vast number of these cases the character of the complainant is the thing which requires to be most meticulously gone into. [P 375 C 1]

(d) Penal Code (1860), S. 499, Exception 9 —Burden of proving exception is on accused.

The burden of proving the exception lies upon the accused. Hence the burden is on accused of proving that the accused really, honestly and in good faith believed the truth of the accusation which he made. [P 375 C 2]

Foucar — *for Appellant.*

Auzam — *for Respondent.*

Judgment. — The appellant has been convicted under S. 500, Penal Code, and sentenced to pay a fine of Rs. 100 for defaming the complainant, Lall Khan. The defamation complained of was contained in statements which the accused made when examined as a witness in a certain criminal case (Criminal Regular Trial No. 419 of 1937, Fifth Additional Magistrate, Rangoon). In that case the accused was the complainant. A gang of men were sent up for trial on a charge of dacoity, the facts being that the present appellant had a hotel or restaurant and this gang of men with others came to the hotel and all of a sudden began smashing everything within reach, assaulted the servants and in the end carried off money out of the till. The present accused, after stating what he knew of the actual facts, was, it appears, asked if he could give any reason for the extraordinary conduct of the gang and he then came out with the statements for which he is now being prosecuted. These statements are, per se, undoubtedly defamatory of the present complainant, Lall Khan.

It is not easy to find out the exact position in which witnesses are with regard to the statements which they make when giving evidence in Court. There can be no doubt that if they object to answering any particular question on the ground that a true answer to it may render them liable to legal consequences and they are then told by the Court to answer, their protection under S. 132, Evidence Act, is complete. The Evidence Act is an Act dealing with a particular matter and it was passed in 1872, 12 years after the Penal Code was passed. The Penal Code deals with defamation in general and therefore a special Act with regard to the special class of defamation arising out of depositions made in Court by witnesses would certainly override its provisions. The Penal Code contains no exception in favour of statements made in evidence in Court to give them absolute privilege, but there can be no doubt that S. 132, Evidence Act, if it applies, gives complete protection against criminal prosecution. It seems however to be the view of all the High Courts that the protection given by S. 132 must be claimed directly or indirectly in some way or another. In 50 Bom 162[1] a Full Bench of the Bombay High Court held that :

> Relevant statements made by a witness on oath or solemn affirmation in a judicial proceeding cannot be held to be protected by the proviso to S. 132, Evidence Act, in cases where the witness has not objected to answering the question put to him.

In 46 All 254[2] a Bench of the Allahabad High Court held that :

> Whether or not a witness is "compelled" within the meaning of S. 132, Evidence Act, 1872, to answer any particular question put to him while in the witness-box is in each case a question of fact, although it may be said that in the case of an ordinary layman unacquainted with the technical terms of this Section, he is "compelled" to answer on oath questions put either by the Court or by counsel.

1. Bai Shanta v. Umrao Amir Malik, (1926) 13 A I R Bom 141=93 I C 151=50 Bom 162=27 Cr L J 423=28 Bom L R 1 (F B).
2. Emperor v. Banarsi, (1924) 11 A I R All 381= 77 I C 829 = 25 Cr L J 477 =46 All 254=22 A L J 144.

This Bench overruled an earlier decision of a single Judge of that Court to the effect that protection need not be claimed. In 52 Mad 432[3] a Bench of the Madras High Court held that:

A witness who answers a question or questions put to him by counsel without seeking the protection of S. 132, Evidence Act, is not entitled to that protection.

This Bench was prepared to take a view very much in favour of the witness and to extend the protection widely. They did not consider it necessary for the witness to refuse to answer and claim protection in so many words. On page 437 of the Report occurs the passage:

The proviso protects him from arrest or prosecution or proof of the statement in criminal proceedings against him except as to perjury. The compulsion contemplated in S. 132 is something more than being put into the box and being sworn to give evidence; the compulsion may be express or implied. It is not necessary that the compulsion must be in any set form of words or that the asking for protection should be in a particular form. If the witness is made to understand that he must answer all questions without exception, it would amount to compulsion. . . . . If he hesitates to answer and the Court tells him he must answer the question, I would hold that that hesitation and the direction of the Court to the witness to answer would bring the witness within the proviso.

I do not think it would be safe to extend the protection under S. 132 further than the Madras Bench was prepared to extend it. The view which that Bench took of the Section I should term, with respect, a reasonable one. In the present case there is no suggestion that there was any claim to protection made or hesitation on the part of the witness in answering the questions which would bring into effect the provisions of Section 132.

There is another point that must here be dealt with. There is a pronouncement of the Privy Council to be found in 17 W R 283[4] in which there is what appears to be a very definite principle laid down. That was a case in which a suit for damages for defamation was brought arising out of statements made in judicial proceedings. This would, of course, be governed by the law of torts which, in this country, is the same as the law in England, the law of torts not having been codified in any way. There is however a clear and unequivocal statement in the judgment, which is based upon grounds of public policy

that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of justice should not have before their eyes the fear to being harassed by suits for damages; but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury.

This statement would appear to override to a certain extent the Penal Code with regard to the law of defamation. It would give absolute privilege to witnesses who make statements on oath in Court and free them from liability to any judicial proceedings except a prosecution for perjury. This principle however has not been followed in its entirety in India. It was referred to by a Special Bench of the Calcutta High Court in 48 Cal 388.[5] The judgment was one by Mookerjee Ag. C. J. on pp. 409 and 410 and this pronouncement was, if I may say so, ignored. After setting out the passage I have already quoted, the judgment goes on to say:

This, in the absence of legislation on the subject of civil wrongs, is, if we may say so without impropriety, a perfectly legitimate process, but if we were to read into the provisions of the Penal Code an exception which finds no place therein . . . . the operation would in essence be legislation in the guise of judicial interpretation.

The case in 17 W R 283[4] was decided on 25th January 1872 and I am unable to trace the date of the facts which formed the basis of it. The same case had been before the Courts for a long time and there is a report of it in 5 W R 134[6] and that was an appeal from a decision of the principal Sudder Ameen, dated 24th June 1865, but there is no date in the judgment showing when the actual defamation complained of took place. Knowing how cases do drag on from year to year, it seems to me possible that the defamation may have been committed before the end of 1860 when the Indian Penal Code received the assent of the Governor-General in Council.

Be that as it may, there is no doubt that the facts which gave rise to that case took place before the Evidence Act came into force in 1872 and if on principles of public policy there was intended to be some protection given to witnesses outside and beyond the provisions of the Penal Code, now that that protection has been clearly defined in S. 132, Evidence Act,

3. Peddabba Reddi v. Varada Reddi, (1929) 16 A I R Mad 236=116 I C 337=30 Cr L J 613 =56 M L J 570=52 Mad 432.
4. Baboo Gunesh Dutt Singh v. Mugneeram Chowdry, (1872) 17 W R 283=11 Beng L R 321 (P C).
5. Satish Chandra v. Ram Doyal, (1921) 8 A I R Cal 1=59 I C 143=22 Cr L J 31=48 Cal 388 =32 C L J 94=24 C W N 982 (S B).
6. Mugnee Ram Chowdhry v. Gonesh Dutt Singh, (1866) 5 W R 134.

which is a complete Code dealing with the law of evidence, there can be no further protection given to witnesses outside S. 132. For this reason I would hold that in this case the appellant cannot claim any protection under the law relating to evidence. He must stand or fall by the law laid down in the Penal Code. With respect I am entirely unable to agree with the principle laid down in 36 Mad 216[7] that :

> Although the English doctrine of absolute privilege is not expressly recognized in the Section (S. 499 I. P. C.) it does not necessarily follow that it was the intention of the Legislature to exclude it from the law of this country.

In the present case when formally charged the accused pleaded that the imputations which he made were true. It is however quite clear that, in addition to truth, he was pleading that the imputations were made in good faith for the protection of his interests. This appears in the preliminary judgment, dated 4th February 1938, of the Magistrate who tried the case and also appears in the judgment which is the subject-matter of the present appeal. It is of interest to note that the prosecution in the former case was conducted not by an advocate briefed by Rasool Bhai but by the Public Prosecutor. I mention this because a distinction may be drawn between a witness answering questions put to him by an impartial person like a Magistrate or a Public Prosecutor, and a witness answering questions put to him by an advocate whom he had himself briefed and who may have been instructed with a view to leading him up to the defamatory statement which he wished to make. The Public Prosecutor has been examined as a witness in this case for the defence, and although his memory is, of course, not very distinct on the point he says that when he asked Rasool Bhai if he could account for the brawl, Rasool Bhai then began to make the statements complained of and he thinks that the Court put certain questions to him to elicit some portion of the answers recorded, although he could not say which particular statements were made in answer to himself or in answer to the Court or entirely voluntarily. I think it must be held for the purpose of this appeal, as the benefit of any doubt must be given to the accused, that these statements were made in answer to questions put to him by the Magistrate or by the Public Prosecutor. In these circumstances the Public Prosecutor being, as I have said, an impartial official, I think the accused was entitled to the benefit of an initial presumption of good faith as laid down in an unofficially reported case of this Court, 4 Bur L J 181.[8] In this case it was pointed out that generally speaking there would be a presumption that what the litigants said was said bona fide in the protection of their own interests and that they would therefore be protected by the provisions of Exception 9 to S. 499, I. P. C.

It is unfortunate that this case has really been tried in what I can only describe as rather a niggling manner. The parties seem to have been governed by words. This is a fault, I fear, which is not confined entirely to the Courts. Words, in themselves, are mere sounds which by convention represent facts and ideas. Rasool Bhai had had his restaurant smashed up and he knew, as well as the Magistrate who tried the case arising from that fracas, that the people who broke up his restaurant were not doing it on their own initiative and that there was some one behind them. The judgment of the Fifth Additional Magistrate in Criminal Regular Trial No. 419 makes this quite clear, although the Magistrate took rather a peculiar view in appearing to think that the hired gang who created the disturbance, being a hired gang were entitled to be let off easily. Rasool Bhai was asked if he knew what was behind this affair and the idea which he intended to convey was that Lall Khan was the man who incited these hooligans to smash up his restaurant, but, instead of saying that, he makes specific charges of Lall Khan and his brother frequenting the hotel and not paying for their meals. He then describes them as gondas and only after that he makes one very definite charge that Lall Khan sent his brother, Gul Khan to demand Rs. 100. To any ordinary person however the real gravamen of the charge was that Rasool Bhai said Lal Khan had had his (Rasool Bhai's) restaurant smashed up and in any ordinary form of pleading I should imagine that this would have been put in as an innuendo. The original question would have been given ; the various statements made afterwards would have been set out and then, judging by the form given in Archibald's Criminal Pleading, Edn. 30, p. 1270, there

7. In re Venkata Reddy, (1913) 36 Mad 216=14 I C 659=23 M L J 39=13 Cr L J 275.

8. Sayed Ally v. Emperor, (1925) 12 A I R Rang 360=94 I C 600=27 Cr L J 648=4 Bur L J 181.

would have been the explanation (meaning thereby that Lall Khan had incited these hooligans to break up his restaurant). Had the case been a civil one this would have been pleaded as the innuendo; instead of which the case goes on with regard to questions of whether Lall Khan or his durwan had a cup of tea and did not pay for it, etc. etc.

In argument before me great stress was laid on the word "gonda" but the extraordinary thing is that the complainant himself failed to give a satisfactory explanation of it. It means something bad and that seems to be as far as we can go. The Magistrate who tried the original case refers to the word as meaning a bully and Lall Khan seems to have adopted the same interpretation. His witness, Khan Bahadur Ali Bhai Mahomed, states it means a bad hat, which is not very explanatory. The next witness, N. A. Butt, said it meant a rogue, and witness Esoof Sulaiman Mayet said a "gonda" means "a homeless wanderer living on looting and sleeping on side pavements." This description obviously cannot apply and could not be made to apply to the prosecutor who said he pays corporation tax amounting to Rupees 2500 a year and over Rs. 1000 a year as ground rent to the Rangoon Development Trust. I think the best way to deal with this case is to regard all these statements together as conveying the innuendo that Lall Khan was the man who had instigated the band to break up the restaurant.

In a case of this kind it is always necessary that the prosecutor or the plaintiff, according to whether the case is a criminal or a civil one, should be ready to go into the witness-box and submit to the most searching cross-examination. In a vast number of these cases the character of the complainant is the thing which requires to be most meticulously gone into. In this case the complainant was very ill-advised in allowing his advocate to interrupt and object to questions, and the Magistrate was ill-advised in allowing these objections. The complainant certainly did not err on the side of over-frankness. He has had close connexion with Rasool Bhai for 12 or 14 years, having been one of his regular employers. When asked if he could account for Rasool Bhai's having turned against him he professed complete ignorance, saying "I cannot say accused made defamatory imputations against me." It is difficult to believe that he is really ignorant of the reason for his formerly trusted servant turning against him. (After discussing some evidence his Lordship proceeded further.) The accused in this case is pleading a defence by way of exception. The burden of proving the exception therefore lies upon him. The extent to which he has got to prove it is laid down in 14 Rang 666.[9] In view of the initial presumption which arises in the accused's favour, as laid down in 4 Bur L J 181,[8] the burden of proving that the accused really, honestly and in good faith believed the truth of the accusation which he made, viz. that the complainant instigated this attack on his restaurant, is not a heavy one and, having regard to the unsatisfactory nature of the evidence given by the complainant in the cross-examination, I think there is a definite doubt as to the guilt of the appellant. I therefore set aside the conviction and sentence and acquit him. The fine which has been paid will be refunded.

D.S./R.K. *Conviction set aside.*

9. Emperor v. U Damapala, (1937) 24 A I R Rang 83=168 I C 193=38 Cr L J 524=14 Rang 666 (F B).

A. I. R. 1939 Rangoon 375

DUNKLEY J.

Mariam Bibi and another—Appellants.

v.

Cassim Ebrahim Malin and another — Respondents.

First Appeal No. 144 of 1937, Decided on 9th December 1938.

(a) Court-fees Act (1870), S. 7, Sch. 1, Art. 1 — Art. 1 imposes liability and is not merely auxiliary to Section 7.

Article 1 of Sch. 1 is not merely auxiliary to S. 7 because the Schedules to the Act, when read with Ss. 4 and 6 of the Act, do impose a liability. S. 7 refers only to suits and in certain cases specifically mentioned, memoranda of appeal. The fees chargeable in respect of all other documents are those laid down in the Schedules to the Act, liability being imposed by the Schedules read with S. 4 or S. 6 as the case may be: *27 All 447 and 29 Mad 367, Ref.* [P 376 C 1]

(b) Court-fees Act (1870), Sch. 1, Art. 1 — Cross-objection is chargeable with court-fee calculated ad valorem on amount of subject-matter in dispute in cross-objection.

A cross-objection must be chargeable with a court-fee calculated ad valorem on the amount of the subject-matter in dispute. "The subject-matter in dispute" means the subject-matter in dispute in the cross-objection: *A I R 1925 Rang 145, Rel. on.* [P 376 C 2]

Rajagopal for Advocate-General — *for Appellants.*

Clark and P. B. Sen — *for Respondents.*

Judgment. — The question referred to me for decision, under the provisions of S. 5, Court-fees Act, arises out of a cross-objection which has been filed by the respondents in Civil First Appeal No. 144 of 1937. The suit out of which this appeal arises was a suit for the administration of the estate of a deceased person and accounts. By the preliminary decree the respondents (who were the defendants), have been ordered to pay to the appellants, (who were the plaintiffs) a sum of Rs. 2380 as special costs in any event, the ordinary costs being ordered to abide the passing of the final decree. The cross-objection contains seven grounds. The first four grounds relate to the findings in the suit. The remaining three grounds relate to the order that the respondents shall in any event pay this amount of special costs to the appellants. The taxing master has held that the cross-objection so far as it relates to these special costs is chargeable with court-fees ad valorem on the amount of the costs, viz. Rs. 2380, under Art. 1 of Sch. 1, Court-fees Act; but at the request of the respondents he has made a reference under Sec. 5 of the Act.

The argument which had been advanced on behalf of the respondents is that Sch. 1, Court-fees Act, does not impose any liability and that it must be read in relation to S. 7 by which the liability is imposed, that is that S. 7 is the charging Section and Art. 1 of Sch. 1 is merely auxiliary to that Section. I am unable to accede to this argument, because, in my opinion, it is clear that the Schedules to the Act, when read with Ss. 4 and 6 of the Act, do impose a liability. S. 7 refers only to suits and, in certain cases specifically mentioned, memoranda of appeal. The fees chargeable in respect of all other documents are those laid down in the Schedules to the Act, liability being imposed by the Schedules read with S. 4 or S. 6 as the case may be. See on this point 27 All 447[1] at p. 449 and 29 Mad 367[2] at p. 369. Now, the only place in the Court-fees Act where cross-objections are mentioned is Art. 1 of Sch. 1. Column 1 of this Article reads as follows :

1. Plaint : written statement pleading a set-off or counterclaim, or memorandum of appeal (not otherwise provided for in this Act) or of cross-objection presented to any Civil or Revenue Court except those mentioned in S. 3;

and Column 2 reads, "when the amount or value of the subject-matter in dispute . . . ." Consequently, it is clear that a cross-objection must be chargeable with a court-fee calculated ad valorem on the amount of "the subject-matter in dispute." With the greatest respect, I agree with the observations of Robinson C. J. in 2 Rang 637[3] at page 640 where he says :

> In my opinion it is wrong to assume that the words 'amount or value of the subject-matter in dispute' mean, in reference to a cross-objection, 'the amount or value of the subject-matter in dispute in the suit'.

In my view 'the subject-matter in dispute' means the subject-matter in dispute in the cross-objection. The subject-matter in dispute in this cross-objection is clearly whether the special costs awarded are to be payable by the respondents to the appellants in any event. The appellants expect to be paid these special costs irrespective of the final result of the suit. The respondents, on the other hand, hold that these special costs should abide by the final decree in the suit. Hence, so far as the grounds raised in the last three paragraphs of the cross-objection are concerned, a court-fee calculated ad valorem under Art. 1, Sch. 1, is payable by the respondents on the amount of the special costs, viz. Rs. 2380.

D.S./R.K. *Order accordingly.*

1. Nepal Rai v. Debi Prasad, (1905) 27 All 447=2 A L J 105=1905 A W N 40.
2. Reference under Court-fees Act 1870, (1906) 29 Mad 367=16 M L J 287.
3. Ma Shin v. Maung Shwe Hnit, (1925) 12 A I R Rang 145=85 I C 257=2 Rang 637.

A. I. R. 1939 Rangoon 376

DUNKLEY J.

Maung Khin Maung and another — Applicants.

v.

S. K. R. Karuppayya Pillai — Respondent.

Civil Revn. No. 365 of 1937, Decided on 9th March 1938, against order of Sub-Divisional Court, Mandalay, D/- 31-5-1937.

Civil P. C. (1908), O. 21, R. 16 and S. 115—Order under O. 21, R. 16 is decree and is appealable — Revision application is incompetent.

An order passed under the provisions of O. 21, R. 16 is an order determining a question between the judgment-debtor and the representative of the decree-holder because it determines the right of a representative of the decree-holder to execute the decree. This is a question falling within the provisions of S. 47 of the Code and is therefore a decree under the provisions of S. 2. An appeal therefore lies from the order and an application in revision is incompetent : *27 Cal 670 and A I R 1925 Pat 16, Rel. on.* [P 377 C 1]

K. C. Sanyal — *for Applicants.*

J. V. Kale — *for Respondent.*

Order. — A preliminary objection has been taken to this application in revision on the ground that an appeal lies against the order complained of and therefore S. 115, Civil P. C., has no application. The order was an order substituting the assignee of a decree as the new decree-holder. The facts are simple. It appears that one R. B. Mukerji, who was the receiver of an estate, obtained a preliminary mortgage decree against the two applicants and then subsequently he assigned this decree to another person, and after that there were two further assignments until an assignment by one Kamatchia Pillai, whose name had been substituted as the decree-holder under the provisions of O. 21, R. 16, Civil P. C., to the present respondent, S. K. R. Karuppaya Pillai. Karuppayya Pillai applied to the Court to have his name substituted as decree-holder and a final mortgage decree to be passed. This application, of course, lay under the provisions of O. 21, R. 16, and it was allowed by the learned Subdivisional Judge of Mandalay and Karuppayya Pillai has been duly substituted as decree-holder and a final decree in his favour has been drawn up.

Now the complaint in revision is that all these assignments, beginning with the assignment by R. B. Mukerji, are bad in law. It is clear that an order passed under the provisions of O. 21, R. 16, is an order determining a question between the judgment-debtor and the representative of the decree-holder because it determines the right of a representative of the decree-holder to execute the decree. This is a question falling within the provisions of S. 47 of the Code and is, therefore, a decree under the provisions of S. 2. If authority for this proposition is needed it is to be found in 27 Cal 670[1] and 3 Pat 344.[2] An appeal and, if necessary, a second appeal to this Court lay from the order of the Subdivisional Judge, and hence this application in revision is incompetent and is dismissed with costs, advocate's fee 3 gold mohurs.

D.S./R.K. *Application dismissed.*

1. Ganga Das Seal v. Yakub Ali, (1900) 27 Cal 670.
2. Run Bahadur Singh v. Bajrangi Prasad Singh, (1925) 12 AIR Pat 16=78 I C 495=3 Pat 344.

A. I. R. 1939 Rangoon 377

MACKNEY J.

Chan Elliam — Applicant.

v.

L. H. Wellington — Respondent.

Criminal Revn. No. 57-B of 1938, Decided on 7th March 1938, against order of District Magistrate, Rangoon, D/- 10th December 1937.

Criminal Trial — Procedure — Prosecution under S. 406, I. P. C. — Question of trust must be fully inquired into—Where only few of the prosecution witnesses have been examined, Magistrate's order declining to examine further witnesses and discharging accused on ground that case is of civil nature, is premature.

In a case under S. 406, I. P. C., the question of trust must be fully inquired into and for this purpose it is necessary that the whole of the prosecution evidence should be recorded. It is impossible to guess at an intermediate stage in the case, what would be the result of the inquiry. The Magistrate is not so much concerned as to whether the offence has been committed against the complainant but whether an offence has been committed which is punishable according to law. Therefore in a case under S. 406, when only a few of the prosecution witnesses have been examined it is too premature to decline to examine any more witnesses for the prosecution and discharge the accused on the ground that the case is of a civil nature.

[P 378 C 2]

U Sein Tun Aung — *for Applicant.*

M. M. Rafi — *for Respondent.*

Order. — The respondent, Mr. L. H. Wellington, was the president of a club known as the Dagon Club and the applicant, Chan Elliam, was the vice-president thereof. The club rented some premises from a firm of which Chan Elliam is said to be a partner. The premises were provided by the club with furniture of various kinds. After its formation the club got into trouble with the police for gambling. The members were prosecuted and ordered to pay fines. Mr. Wellington claims to have defrayed a good proportion of the fines to be paid by the members. He also claims that some at least of the members authorized him to take possession of the furniture of the club because he had taken a part in arranging for their defence and in the payment of their fines. Mr. Wellington apparently hypothecated the furniture to some person and then wished to sell it. His case is that he entrusted the property with Chan Elliam with instructions to find a prospective purchaser and bring him to him. Chan Elliam went beyond his instructions, sold the furniture and then appropriated Rs. 600 to rent of the club premises said to be due to his firm, also another sum of Rs. 120 said

to be due to some other person by the club and remitted the balance to Mr. Wellington. Mr. Wellington refused to accept it and required Chan Elliam to pay the whole amount which he had obtained from the sale of the property. Chan Elliam refused to do this. Mr. Wellington prosecuted him under S. 406, I. P. C.

The case has had various stages; at length it came up for inquiry before the Fourth Additional Magistrate of Rangoon. The latter after examination and cross-examination of Mr. Wellington, Mr. Lillywhite, who deposes to the loan paid to Mr. Wellington, Daw Khin Thet Tin, who deposes to Mr. Wellington telling Chan Elliam to bring a purchaser to him who would offer Rs. 1000, and Mrs. Wellington, the wife of Mr. Wellington, who deposes to the statement made by Chan Elliam regarding the refusal to return the whole amount of the purchase money, declined to examine any more witnesses for the prosecution on the ground that the case was of a civil nature. He appears to have thought that Chan Elliam had a right to appropriate Rs. 600 to the rent of the premises and Rs. 120 paid to U Phyu, and that there was no dishonesty in his so doing. He also thought that Chan Elliam was just as much entitled to deal with the properties as was Mr. Wellington. Accordingly he discharged the accused. The learned District Magistrate of Rangoon on revision held that it was too premature to say that the prosecution was infructuous; that the question of trust had not been fully inquired into and the respondent at least should have been confronted with the question whether he received the key of the club premises in which the furniture was kept from the applicant and, if so, on what terms he received the key; and that the case should be further inquired into. He set aside the order of discharge, and ordered that the case be further inquired into by the Western Sub-Divisional Magistrate of Rangoon. Chan Elliam has now applied to this Court in turn to revise the order of the District Magistrate.

It is again urged that the furniture belonged to the club; that Mr. Wellington authorized Chan Elliam to sell it and that there has been no dishonesty on the part of the applicant in appropriating a part of the proceeds towards rent, which was actually due and towards settlement of a debt which was actually due from the club, he himself having been the vice-president of the club. It appears to me that these arguments miss the point. It is impossible to guess at this stage what will be the result of the inquiry. The Magistrate is not so much concerned as to whether an offence has been committed against Mr. Wellington, as to whether an offence has been committed which is punishable by the law of the land. It may be, in the course of his inquiry it may appear that although a charge of criminal breach of trust could not be proved, there may be cause for believing that some other offence such as criminal misappropriation of property has been committed. So far the Magistrate has before him only the allegation of Mr. Wellington and certain admitted facts. The prosecution claimed to be in a position to prove that the property was in the rightful possession of Mr. Wellington and was handed over to the applicant, Chan Elliam, under certain explicit conditions which the applicant had completely disregarded to his own dishonest advantage. It is claimed that it can be shown that there was in fact no rent due. It is claimed that in any case it was not for the applicant to decide what payments should be made out of the proceeds of this property and certainly not to devote them to his own profit. It appears to me that the order of the District Magistrate was correct. The prosecution have not yet had a full opportunity to prove their case and this must be allowed to them. I decline to interfere with the order of the District Magistrate. This application is dismissed.

N.S./R.K. *Application dismissed.*

*** A. I. R. 1939 Rangoon 378**

BA U J.

Ma San Myint — Plaintiff.

v.

U Tun Sein — Defendant.

Civil Suit No. 184 of 1938, Decided on 2nd June 1939.

*** Civil P. C. (1908), O. 23, Rr. 1 and 2 — Scope of—Plaintiff withdrawing suit with permission to bring fresh suit on same cause of action — Court granting permission on condition of plaintiff paying costs of suit to defendant on or before certain date or before institution of fresh suit — Fresh suit instituted but payment of costs not made as per order — Second suit is void ab initio.**

Under R. 1 of O. 23, a plaintiff can withdraw a suit as a matter of right without the permission of the Court, but if he does it he is then precluded from filing a fresh suit on the same cause of action. If he wants to withdraw the suit and at the same time wants to file a fresh suit on the same cause of action, he must resort to R. 2. Under the said

Rule he must ask for permission to withdraw with liberty to file a fresh suit. The Court may grant the permission asked for on such terms as it thinks fit. The terms may be of any kind. They might be (1) that the plaintiff shall pay the costs before a certain date specified in the order, or (2) that the plaintiff shall pay the costs before the institution of the second suit, or (3) that the plaintiff shall pay the costs without specifying the time of the payment. If the terms imposed are as in Ill. (1) or Ill. (2), they then obviously refer not to the withdrawal of the suit but to the institution of a fresh suit. Once permission is granted to withdraw, the suit can no longer be regarded to be still existing. [P 380 C 2 ; P 381 C 1]

Where therefore leave to bring a fresh suit on the same cause of action is granted on payment of the costs on or before a specified date or before the institution of a fresh suit, such payment of costs is a condition precedent to the institution of a fresh suit. If no payment is made, the second suit is void ab initio : *Case law discussed.* [P 381 C 1]

U E Maung — *for Plaintiff.*

U Ze Ya — *for Defendant.*

Judgment.—This is a suit for a declaration that the plaintiff is the wife of the defendant and for partition and payment of her share out of the properties acquired by the defendant. The plaintiff asked for a similar declaration against the defendant in Civil Regular No. 192 of 1937 of this Court; but subsequently her advocate asked for permission to withdraw the suit with liberty to file a fresh suit. In granting her the permission to withdraw the suit Sharpe J. passed the following order :

I dismiss the suit with costs, as being withdrawn and give the plaintiff liberty to institute a fresh suit if he (she) is so advised. I fix the advocate's fee at seven gold mohurs; and I also make it a condition for the institution of a fresh suit that all the costs of the present suit must be paid to the defendant before the plaintiff is allowed to file a fresh suit.

U E Maung on behalf of the plaintiff admits that the costs were not paid before the institution of the fresh suit and in fact, according to U E Maung, the costs have not been paid up to date. Because of this one of the pleas now taken in defence is that the suit is void ab initio. There is a conflict of decisions on this point. The Calcutta, Lahore and Patna High Courts hold one view, while the Madras, Bombay and Allahabad High Courts take another view. In 31 Cal 965[1] Geidt and Mookerjee JJ. said :

We may take it that the payment of costs was meant by the order to be a condition precedent to the bringing of a fresh suit. But then the question arises, does that necessarily make the suit void ab initio, and will not the subsequent payment of the defendant's costs cure the undoubted irregularity. There is no express provision by the Indian Legislature as to the consequences of such a course of conduct. But we have referred to the rules of the Supreme Court, 1883. Order 26, R. 4 runs as follows : 'If any subsequent action shall be brought before payment of the costs of a discontinued action for the same, or substantially the same cause of action the Court or a Judge may, if they or he think fit, order a stay of such subsequent action, until such costs shall have been paid.' We think that the rule there laid down would be a fair rule for the Courts in this country to follow, in the absence of any statutory enactment in the matter and that though a Court would be warranted in refusing to proceed with a suit like this when the facts are brought to its notice that the plaintiff had not complied with the order requiring payment of costs, yet there is nothing in the law to show that a suit instituted under such circumstances is bad ab initio and must ipso facto be dismissed, if the payment ordered is made after its institution.

The decision in this case was supported by Sir Lawrence Jenkins C. J. in 19 C L J 529[2] but on different grounds. The learned Chief Justice said :

Though I agree with the result of the ruling in 31 Cal 965,[1] I would base my decision in this case on somewhat different though not antagonistic reasons. The withdrawal was under S. 373 of the Code of 1882 which provides that 'if at any time after the institution of the suit, the Court is satisfied on the application of the plaintiff that the suit must fail by reason of some formal defect or that there are sufficient grounds for permitting him to withdraw from the suit with liberty to bring a fresh suit for the subject-matter of the suit, the Court may grant such permission on such terms as to costs or otherwise as it thinks fit. If the plaintiff withdraws from the suit without such permission he shall be liable for such costs as the Court may award and shall be precluded from bringing a fresh suit for the same matter.' Here permission was given. Therefore the last paragraph that I have read has no application, for it cannot be said that the plaintiff withdrew without such permission. He withdrew with the permission and the permission is under the Section to withdraw from the suit with liberty to bring a fresh suit, that is to say a permission with a sequel attached to it. The condition of such permission in this case was the payment of costs. Until the costs were paid the permission was not operative, and so there was no withdrawal with liberty to bring a fresh suit. The result was that until there was such withdrawal the former suit was still pending. This appears to me to be the literal meaning of the words of S. 373 which is now reproduced in effect under Order 23, and is in accordance with the view of the English authorities on a cognate provision, for in (1832) 1 Dowl 152,[3] it was decided that where the plaintiff instead of paying costs went on with the original suit and obtained a verdict, the Court refused to set aside the verdict. When a plaintiff has obtained leave to withdraw upon payment of costs, it is his duty to pay the costs at once, for until they are paid there is no withdrawal with the permission of the Court. In that view when the case came before the Munsif he was not entitled to dismiss

1. Abdul Aziz Molla v. Ebrahim Molla, (1904) 31 Cal 965.

2. Shital Prosad v. Gaya Prosad, (1914) 1 A I R Cal 207=23 I C 210=19 C L J 529.

3. Edginton v. Proudman, (1832) 1 Dowl 152.

it. All he could do was to regard S. 10 as a bar to his proceeding with the trial of the suit.

This decision was followed by the Patna and Lahore High Courts in 5 Pat 306[4] and A I R 1927 Lah 159.[5] The point now under discussion came up for decision by the Madras High Court for the first time in 33 Mad 258.[6] At that time the only authority that was apparently available was the case in 31 Cal 965.[1] Though they did not dissent from that decision, White C. J. and Krishnaswami Ayyar J. observed that where leave was granted to the plaintiff to bring a fresh suit on payment of the defendant's costs on or before the specified date and he failed to do so, he was precluded from bringing a second suit and if such a suit was brought, it would be dismissed. In a subsequent case, 47 M L J 646,[7] Phillips J. reviewing the cases cited above said :

These cases all assume that the permission granted by the Court is not only permission to bring a fresh suit but also permission to withdraw the first suit, and that consequently until the condition is fulfilled the first suit is pending. This seems to me to overlook the provisions of O. 23, R. 1 (1) which gives a plaintiff power to withdraw his suit at any time without the permission of that Court. Consequently, I think that we must read the latter part of cl. 2 (b) as referring not to permission to withdraw a suit as well as permission to institute a fresh suit, but merely as allowing the Court to give permission to institute a fresh suit in place of the one which has been withdrawn. Inasmuch as the withdrawal of the suit does not require the permission of the Court, it must be taken that the first suit is withdrawn when the order is passed and that the permission granted refers only to the filing of the subsequent suit on certain conditions.

The view thus taken by the Madras High Court was followed by the Bombay and Allahabad High Courts in 55 Bom 206[8] and 118 I C 584.[9] In the first case Patkar J. said :

I am inclined to agree with the view of the Madras High Court and most respectfully dissent from the view of the Calcutta High Court. When once a suit has been withdrawn, it is no longer pending and the permission given by the Court relates to the bringing of the fresh suit . . . .

The conditions attached to the permission to bring a fresh suit after the withdrawal of the first suit may fall under different categories according to decided cases, (1) that the plaintiff shall pay the costs before a certain date specified in the order, (2) that the plaintiff shall pay the costs before the institution of the second suit, and (3) that the plaintiff shall pay the costs without specifying the time of the payment. The present case falls under the second category as the condition imposed by the permission allowing the bringing of the second suit after the withdrawal of the first was to pay the costs before the institution of the second suit.

In the same case Baker J. said :

Under O. 23, R. 1, cl. (1), the plaintiff has an absolute right to withdraw his suit if he likes, and the permission granted under O. 23, R. 1, cl. (2), relates not to the withdrawal but to the right to bring a fresh suit. With respect, I am unable to follow the reasoning in 19 C L J 529.[2] I do not see how where permission is given to withdraw from the suit with liberty to bring a fresh suit on condition of payment of costs, the former suit can be held to be pending until the costs are paid. In my opinion the permission relates not to the withdrawal but to the bringing of the fresh suit, and with respect I agree with the view of the Madras High Court in 47 M L J 646[7] that the latter part of O. 23, R. 1, cl. (2) (b) must be read as referring not to permission to withdraw a suit as well as permission to institute a fresh suit, but merely as allowing the Court to give permission to institute a fresh suit in place of the one which has been withdrawn. Inasmuch as the withdrawal of the suit does not require the permission of the Court, it must be taken that the first suit is withdrawn when the order is passed and that the permission granted refers only to the filing of the subsequent suit on certain conditions. In my opinion, it would be inconvenient to consider a suit which has been withdrawn as still pending, and with respect, the reasoning in the Madras cases commends itself to me rather than the reasoning in the Calcutta case.

In the second case Boys J. said :

Once a plaintiff who has applied for the withdrawal of his suit has accepted the terms imposed by the Court, the case is withdrawn and is no longer pending and the plaintiff cannot institute a fresh suit without strictly complying with those terms.

With respect I am of opinion that the view taken by the Madras, Bombay and Allahabad High Courts is the correct view of the law. As pointed out by Baker J. under R. 1, O. 23, a plaintiff can withdraw a suit as a matter of right without the permission of the Court; but if he does it, he is then precluded from filing a fresh suit on the same cause of action. If he wants to withdraw the suit and at the same time wants to file a fresh suit on the same cause of action, he must resort to R. 2. Under the said Rule he must ask for permission to withdraw with liberty to file a fresh suit. The Court may grant the permission asked for on "such terms as it thinks fit." The terms may be of any kind. They might be as pointed out by Patkar J.:

(1) That the plaintiff shall pay the costs before a a certain date specified in the order, or (2) that the

4. Muhammad Afzal v. Lachman Singh, (1926) 13 A I R Pat 409=96 I C 942 = 5 Pat 306= 7 P L T 491.
5. Nazir Hussain v. Nathu, (1927) 14 A I R Lah 159=99 I C 420.
6. Robert Fischer v. Nagappa Mudaly, (1910) 33 Mad 258=6 I C 288.
7. Seshayya v. Subbayya, (1924) 11 A I R Mad 877=82 I C 499=47 M L J 646.
8. Shidramappa Mutappa v. Mallappa Ramchandrappa, (1931) 18 A I R Bom 257=133 I C 256 =55 Bom 206=33 Bom L R 278.
9. Rachhpal Singh v. Sheo Ratan Singh, (1929) 16 A I R All 692=118 I C 584.

plaintiff shall pay the costs before the institution of the second suit, or (3) that the plaintiff shall pay the costs without specifying the time of the payment.

If the terms imposed are as in illustrations (1) or (2), they then obviously refer not to the withdrawal of the suit but to the institution of a fresh suit. Once permission is granted to withdraw, the suit can no longer be regarded to be still existing. If in spite of the permission to withdraw being granted the suit were to be regarded as still pending, the position would be intolerable. The plaintiff would be able to keep the case pending as long as he likes and use it to the annoyance and prejudice of the defendant, and the defendant would be simply helpless. This, I do not think, could have been the intention of the Legislature in enacting R. 2, O. 23. The terms imposed in illustrations (1) and (2) are somewhat analogous to what Cl. 10 of our Letters Patent and Cl. 12 of the Letters Patent of the Calcutta, Madras and Bombay High Courts say. Where a part of the cause of action arises within the local limits of the ordinary original jurisdiction of any of the said High Courts, leave to institute a suit must first be obtained. Where leave is not first obtained and a suit is instituted, the suit is void. Leave to sue is a condition precedent to jurisdiction: 3 M H C R 384.[10] Where therefore leave to bring a fresh suit on the same cause of action as in the first case is granted on payment of costs on or before a specified date or before the institution of a fresh suit, payment must be made before the specified date or before the institution of a fresh suit. If no payment is made, the second suit is void ab initio. The payment of costs is a condition precedent to the institution of a fresh suit. Where no time is fixed for payment of costs, then different considerations may arise. In the present case the order of Sharpe J. definitely stated that the costs of the plaintiff should be paid before the institution of the second suit and as no costs were paid before the institution, the present suit is, in my opinion, void. For these reasons I dismiss the suit.

N.S./R.K. *Suit dismissed.*

10. De Souza v. Coles, (1866) 3 M H C R 384.

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* A. I. R. 1939 Rangoon 381

BA U J.

U Kyaw Dun — Appellant.

v.

Maung Nge and another—Respondents.

Second Appeal No. 268 of 1938, Decided on 7th June 1939, against decree of Asst. Dist. Court, Mandalay, D/- 20th July 1938.

*** Trade-mark — Goods imported, sold by importer with his registered trade-mark — Goods acquiring great reputation owing to his care in selection, advertisement and pushing — Importer is entitled to protection as against manufacturer using similar trade-mark.**

Where goods imported have been sold by the importer with his own registered trade-mark and owing to his care and precaution in selecting goods, advertisement and pushing, the goods have acquired great reputation, the importer is entitled to protection of the Court and can maintain an action against the manufacturer of those goods using mark closely resembling that used by the importer: *35 Bom 425 ; (1876) 3 Ch D 584 and A I R 1924 P C 187, Rel. on.* [P 383 C 1]

Dr. Ba Han — *for Appellant.*

Clark and Surridge — *for Respondents.*

Judgment. — The plaintiff-appellant U Kyaw Dun is a resident of Prome while defendant-respondent 1 U Nge is a resident of Mandalay. Respondent 2 Daw Mi is the wife of respondent 1. In or about the year 1292 B. E. (1930) they commenced dealing with each other in the matter of manufacture and sale of Burmese cheroots. U Nge manufactured them in Mandalay and U Kyaw Dun imported them from Prome and sold them there. At that time the figure of a peacock was used by the respondent U Nge as his trade-mark; but some time later the trade-mark was changed. Instead of using the figure of a bird or an animal they used a combination of three names, Mandalay, Tin Tin Mya, Seinban, written in Burmese characters in the following manner:

The mark was registered in Mandalay by the plaintiff-appellant U Kyaw Dun as his trade-mark on 4th March 1931, *vide* Ex. B, and each cheroot imported by U Kyaw Dun bore this trade-mark. The cheroots thus became known as Tin Tin Mya cheroots or Tin Tin Mya "say-baw-lait." This went on

till about the end of 1937 when a difference of opinion took place between U Kyaw Dun and U Nge. U Kyaw Dun complained that the cheroots which he had been getting lately were not of the same quality as before; U Nge replied that as they were not made by machine he could not maintain their uniform quality. As a result of this difference of opinion U Kyaw Dun ceased dealing with U Nge and started placing orders for cheroots with a woman named Daw Mi of Sein Ban quarter, Mandalay. He sold these cheroots with his registered trade-mark, Tin Tin Mya, thereon. U Nge also used the same trade-mark with the addition of the words . . . . (golden spectacles) in very small type under the name "Tin Tin Mya." Unless one looks very carefully, one will not notice the words "golden spectacles" on the labels of the respondent U Nge. The two labels impressed with these trade-marks are thus in no way distinguishable from each other. In these circumstances the cheroots of one will and can easily pass off as the cheroots of the other.

For these reasons the respondent filed a suit, Civil Regular No. 25 of 1938, in the Court of the Subdivisional Judge, Mandalay, asking for the cancellation of the registration of the trade-mark registered in the name of the appellant U Kyaw Dun alleging that he allowed the Tin Tin Mya trade-mark to be registered in the name of the appellant U Kyaw Dun as the appellant agreed to act as his sole agent in Prome. In reply thereto the appellant U Kyaw Dun launched both civil and criminal proceedings. In the civil proceedings out of which the present appeal arises U Kyaw Dun makes the following allegations:

(1) That the plaintiff has for the last seven years or more sold in Prome District Burmese cheroots or "saybawlaits" manufactured by the defendants at Seinban Quarter, Mandalay, bearing a trade-mark or label round each cheroot or "saybawlait" and known as "Tin Tin Mya saybawlaits." This trade-mark was registered by the plaintiff at Mandalay on 4th March 1931. A sample of the trade-mark or label is attached to this petition, marked A. The plaintiff has extensively advertized and sold these "saybawlaits." In consequence thereof the "saybawlait" with the said label have become known in both Mandalay and Prome districts. . . . . .

(2) That the plaintiff's trade-mark or label bears the name "Tin Tin Mya," Maung Tin being the name of the only nephew of the plaintiff and Ma Mya being the name of the only grandchild of the plaintiff whom he has adopted as his keittima daughter, and thus "Tin Tin Mya" is a combination of these two names.

(3) That during the period the plaintiff has been using the said "Tin Tin Mya" trade-mark or label affixed on them, these cheroots or " saybawlaits " acquired a very high reputation in Prome District, and the sales have been large and profitable.

(4) That the defendants have been selling at Mandalay and Prome the cheroots or "saybawlaits" manufactured by them at Mandalay during the last two months using the " Tin Tin Mya " trade-mark or label round each cheroot or "saybawlait," which closely resembles the trade-mark or label used by the plaintiff in colour, size, general make-up and marking in order to pass off fraudulently the cheroots or " saybawlaits " as those bearing the trade-mark or label of the plaintiff.

In reply the respondent states inter alia as follows:

As regards para. 1 of the plaint these defendants admit that the plaintiff was the representative of the defendants at Prome to sell Burmese cheroots or saybawlaits manufactured by the defendants at Seinban Quarter, known as 'Mandalay Tin Tin Mya Seinban Quarter.' Defendant 1 was the owner of the said trade-mark and it was registered in the name of the plaintiff on condition that he the said plaintiff will act as the sole agent of defendant 1 at Prome for selling the abovementioned cheroots. Defendant 1 has already filed a suit in this Court for cancellation of the registration of the said trade-mark and for other reliefs being Civil Regular Suit No. 25 of 1938 of this Court.

On these pleadings suitable issues were framed and a good deal of evidence was produced by both sides. I have carefully examined the evidence and I am satisfied that the following points are satisfactorily proved : (1) That the plaintiff-appellant U Kyaw Dun was not the agent of the defendant-respondent U Nge, (2) that U Kyaw Dun was an importer and U Nge was a manufacturer of Burmese cheroots, (3) that U Kyaw Dun financed U Nge to a certain extent to carry on his business as a manufacturer, (4) that U Kyaw Dun himself selected leaves and sent them to Mandalay and with the leaves so sent U Nge made cheroots and sent them to U Kyaw Dun, (5) that U Kyaw Dun sold these cheroots with the Tin Tin Mya trade-mark thereon, and (6) that U Nge sent cheroots to other places bearing not Tin Tin Mya trade-mark, but some other trade-mark.

In holding that these points are proved, I rely on the letters written by the defendant-respondent U Nge to U Kyaw Dun, the evidence of U Nge's own witness, Beresford (D. W. 5), and the evidence of U Kyaw Dun and his grandchild, Ma Mya. Their evidence was also accepted by the trial Judge. On the facts thus found proved the question that arises is whether an importer can acquire a right of use to a trade-mark against a manufacturer. A good number of cases were cited at the Bar. As the facts of

some of those cases are entirely different from the facts of the present case, they are of no help; but the principle enunciated in all these cases is the same, and the principle is as enunciated by Sir Basil Scott C. J., in 35 Bom 425.[1] It is as follows :

The importer, who by advertising and pushing the sale of goods under a particular mark secures a wide popularity for the mark in relation to the goods sold by him, is entitled to the protection of the Court for that mark in the country of importation, even against the producer of the goods.

In (1876) 3 Ch D 584[2] Jessel, M. R., made observations to the same effect. The learned Master of the Rolls said :

I can understand a man saying, 'I am not the actual manufacturer of goods, but the selector of goods, and my reputation for cleverness and selection is so great that goods marked with a mark to shew that they had been selected and approved of by me will fetch a higher price in the market.' If Hirsch had put on the box 'Gloria de Inglaterra Havannah Cigars, selected by Hirsch' he might have had a case to prevent other people imitating that. It would shew that the cigars selected were approved of by him. If he got a great reputation in that way, I can understand he would have a right of protection for that which indicates to the public that the cigars were selected and approved of by him.

The Privy Council also laid down the same principle in A I R 1924 P C 187,[3] where their Lordships said:

It is possible for an importer to get a valuable reputation for himself and his wares by his care in selection or his precautions as to transit and storage, or because his local character is such that the article acquires a value by his testimony to its genuineness; and if therefore goods, though of the same make, are passed off by competitors as being imported by him, he will have a right of action.

The present case is much stronger than any of these cases inasmuch as, as I have pointed out above, it was the plaintiff-appellant who registered the trade-mark in his own name and had leaves selected for the cigars and sold them with his own trade-mark. Because of his care and precaution in selecting leaves and because of his advertisement and pushing, Tin Tin Mya cheroots have acquired a great reputation. In these circumstances I am clearly of opinion that the plaintiff-appellant U Kyaw Dun is entitled to the protection of the Court. For these reasons I allow the appeal, set aside the decree of the lower Appellate Court and restore that of the trial Court with costs throughout.

D.S./R.K. *Appeal allowed.*

1. West End Watch Co. v. Berna Watch Co., (1911) 35 Bom 425=13 Bom L R 212.
2. Hirsch v. Jonas, (1876) 3 Ch D 584=45 L J Ch 364=35 L T 228.
3. Imperial Tobacco Co. v. Albert Bonnan, (1924) 11 AIR PC 187=51 IA 269=51 Cal 892 (PC).

A. I. R. 1939 Rangoon 383

MACKNEY J.

Maung Tin Hlaing — Appellant.

v.

The King.

Criminal Appeal No. 272 of 1938, Decided on 10th March 1938.

(a) Burma Prevention of Crimes (Young Offenders) Act (3 of 1930), S. 16 (e) — Crime committed by juvenile an isolated one due to his losing self-control under special set of circumstances — Juvenile not subjected in his normal life to undesirable influences — It is not necessary that he should be detained in Borstal School.

The Borstal Schools in Burma are introduced for training and care of young persons who are by their circumstances likely to enter upon a life of crime. Where it appears that the crime which a juvenile has committed is an isolated one, due to his losing self-control in a set of special circumstances and where the juvenile is not shown to be subjected in his normal life to undesirable influences it is not necessary that he should be detained in a Borstal School. [P 384 C 1]

(b) Criminal P. C. (1898), S. 394 — Magistrate should not reject sentence of whipping merely on ground that accused is young and frail unless he has medical opinion in support of his own.

A Magistrate considering the question as to whether a sentence of whipping is appropriate in a particular case should not reject the punishment of whipping on the ground that the accused is too young and frail unless he has medical opinion in support of his own. [P 384 C 1]

Sir Oscar De Glanville — *for Appellant.*

Judgment.—The appellant, a schoolboy, has been convicted under S. 326, I. P. C., and the Magistrate, being of the opinion that he was too young and frail to receive any whipping of a sufficiently deterrent value, has ordered that he should be detained in the Borstal School for a period of four years. As to the correctness of the conviction there can be no doubt. It is proved beyond doubt that the appellant did stab the boy Saw Tun with something in the nature of a dagger. The wound was inflicted on the left side of the upper part of the abdomen; it penetrated the abdominal cavity and incised the liver. According to the complainant the appellant gave him a backward stroke with his knife as he passed by. For the defence it was urged that there had been grave and sudden provocation. A quarrel had arisen a little earlier in the evening between the two boys because the appellant had occupied a seat which the complainant usually occupied and which the latter regarded as specially reserved for him, and when the complainant sought to evict the appellant

there was very nearly a fight. Obviously such a matter could not be deemed to be grave and sudden provocation with respect to the assault with the knife. There is no realiable evidence that any provocation was given at the time the injury was actually received.

The appellant was born on 7th October 1921. He is a schoolboy at the Diocesan Boy's School. He comes of a respectable family and it does not appear that either he or his relatives are in any way associated with crime. It has not been shown that he is of a depraved character apt to resort to such violence as he has unfortunately used in the present case. Where it would appear that the crime which the juvenile has committed is an isolated one due to his losing self-control in a set of special circumstances, and where the juvenile is not shown to be subjected in his normal life to undesirable influences, it does not appear to me necessary that he should be detained in a Borstal School. The preamble to Act 3 of 1930, which deals with the establishment of Borstal Schools in Burma is so worded as to suggest that these schools are introduced for the training and care of young persons who are by their circumstances likely to enter upon a life of crime. In these circumstances it seems to me that the sentence of whipping was undoubtedly the appropriate sentence to be inflicted in the present case. The Magistrate appears to have considered this alternative, but to have rejected it because the appellant was too young and frail. The Magistrate should not have rejected this alternative punishment for such a reason unless he had medical opinion in support of his own. I have now taken the opinion of a Medical Officer and I find that the appellant is fit to receive whipping, but not the maximum number of strokes. The appellant is no longer a juvenile within the meaning of the Whipping Act. On the date of his sentence, 22nd February 1938, he was over 16. In the case of a person who is no longer a juvenile, the quality of strokes given is, no doubt, more severe. I take into account the fact that the appellant is barely over the age at which he could have been subjected to the lighter form of punishment. I set aside the order of the Magistrate directing his detention at the Borstal School and direct that the appellant do suffer sixteen lashes.

R.M./R.K. *Order accordingly.*

A. I. R. 1939 Rangoon 384

MYA BU AND DUNKLEY JJ.

U Nyun Tin — Appellant.

v.

Saw Eu Hoke — Respondent.

First Appeal No. 44 of 1939, Decided on 19th June 1939, against order of Dist. Court, Amherst, D/- 15th February 1939.

Res judicata—Order under O. 21, R. 48, Civil P. C., attaching judgment-debtor's salary — Order, not being appealed against, becoming final — Subsequent application contesting validity of order of attachment is barred by res judicata.

Where an order under O. 21, R. 48, Civil P. C., directing attachment of judgment-debtor's salary has been made and no appeal is filed assailing the validity of the order, the order becomes final as against the parties and subsequent application contesting the validity of the order of attachment is barred by the general principles of res judicata: *6 All 269; 8 Cal 51 and A I R 1936 All 21 (FB), Rel. on.* [P 385 C 1]

Saw Taik Leong — *for Appellant.*

A. A. Darwood — *for Respondent.*

Mya Bu J. — The appellant, a member of the House of Representatives, a moiety of whose salary as such has been under attachment in Civil Execution No. 15 of 1938 of the District Court of Moulmein, appeals against an order which is described as one rejecting his application for review. The application in question was filed on 6th February this year as an application for review under O. 47, R. 1, Civil P. C., but the application is in reality an application for the setting aside of the order which had been made under O. 21, R. 48, upon the application for attachment of his salary. The main ground on which the application of 6th February 1939 was based was that the appellant, not being an officer in the pay of the Crown, was not an officer within the purview of Sec. 60, Civil P. C., and that his salary was not liable to attachment. This ground, if substantiated, would have supported an objection to the adoption of the procedure under O. 21, R. 48; so, the question which the application of 6th February 1939 raised was whether the order of attachment under O. 21, R. 48 was lawful or not.

But it was no longer open to the appellant to take that objection. The application for execution was presented as early as 2nd April 1938. On 30th April a pleader appeared on behalf of the appellant and stated that only Rs. 75 out of his salary was liable to be attached. Accordingly, the learned District Judge issued a prohibitory order

attaching Rs. 75 monthly out of the appellant's salary. On 2nd May however the learned District Judge found that half of his salary was liable to attachment and therefore an order directing attachment of Rs. 120-13-0 out of his monthly salary was made. After 2nd May 1938, and before the appellant's application of 6th February 1939, there had been made payments into Court under the attachment of various sums of Rs. 120-13-0 each. In these circumstances, even apart from the question as to whether the liability of a moiety of the salary earned by him as a member of the House of Representatives can be attached under the procedure laid down in O. 21, R. 48, or not, the appellant's application was, at the time when it was made, barred on the ground that the order of 2nd May 1938 had become final against him. It is quite evident that the order of May 1938 was an appealable order and no appeal having been filed to assail its validity it became final as against the parties. Whether that order was valid or not in law was the question that was canvassed by the application of 6th February 1939, which, in those circumstances, was barred by the general principles of res judicata: *see* 6 All 269,[1] 8 Cal 51[2] and 58 All 313.[3] For these reasons there is no merit in this appeal which is dismissed with costs, advocate's fee five gold mohurs.

Dunkley J.—I agree.

D.S./R.K. *Appeal dismissed.*

1. Ram Kirpal v. Rup Kuari, (1884) 6 All 269 = 11 I A 37=1886 A W N 286 (P C).
2. Mungul Pershad Dichit v. Grija Kant Lahiri, (1882) 8 Cal 51=8 I A 123=11 C L R 113=4 Sar 248 (P C).
3. Genda Lal v. Hazari Lal, (1936) 23 AIR All 21 =160 I C 394=58 All 313=1935 A L J 1189 (F B).

A. I. R. 1939 Rangoon 385

ROBERTS C. J. AND DUNKLEY J.

U Thiseitta — Appellant.

v.

U Eindawuntha — Respondent.

Second Appeal No. 74 of 1939, Decided on 31st May 1939, against decree of Dist. Court, Hanthawaddy, D/- 24th December 1938.

(a) Buddhist Law (Burmese) — Ecclesiastical law — Owner of poggalika conferring rights of appointing his successor upon other persons — Person not exercising right—Ownership of poggalika vests in sangh who is then to elect presiding monk — Nature and mode of election — Sangh nominating senior members to elect monk —Election by such members is valid and proper.

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If the owner of a poggalika does not appoint his successor but confers the right of appointing successor upon certain persons then if those persons do not exercise that right, the ownership of the poggalika vests in the sangh at large. After the death of the owner the presiding monk is then to be elected by the sangh. The latter may elect such monk in any way they choose provided it is a real, valid and true election. The members of the sangh may nominate some of the senior members of them representing the whole body to elect the monk and the election of the monk by the members so nominated is a valid and proper election by the sangh as such: *A I R 1939 Rang 76, Rel. on.* [P 386 C 1; P 387 C 1]

(b) Buddhist Law (Burmese) — Ecclesiastical law—Poggalika—Election of presiding monk by sangh is not analogous to ceremonial.

Although there may be some ceremonial contemplated at the time of installing a presiding monk of a poggalika the election of such a presiding monk by the sangh is not analogous to a ceremonial but is a mere question of fact depending upon the consideration of the question whether the members of the sangh are substantially in favour of the appointment of the proposed monk. [P 387 C 1]

U Shu Maung — *for Appellant.*

A. Loo Nee for U Tun Maung — *for Respondent.*

Roberts C. J.—This is an appeal which comes before us from the learned Judge in second appeal to determine matters connected with Buddhist Ecclesiastical law. The facts are that U Yazeinda was the presiding monk of the Nyaungbinkwin kyaungdaik and at a time when he was approaching death he desired to make certain about the appointment of his successor. Accordingly, the poggalika property was remitted to the donors, U Po Thet and U Hein, and they were asked to appoint, upon the death of U Yazeinda, some one who should be a worthy successor to him. Within a week or two of this arrangement U Yazeinda died, and it is plain from the evidence before us that the donors disagreed as to who his successor should be and were themselves unable to carry out the task entrusted to them. U Po Thet is dead. But his widow, Daw Set, has told us in the plainest terms that there was a disagreement in respect of this matter between her husband and U Hein; and U Ngwe Hlaing, who is a physician residing at Kyonmaye, gives evidence to the same effect. U Hein himself says:

After the death of the said Sayadaw there was some difference between myself and U Po Thet regarding the appointment of a presiding monk and so we agreed to abide by the decision of 'Gana' Sayadaws consisting of 38 sanghas.

And it is quite clear that there was no decision communicated to U Hein or U Po Thet which could have caused them to become reconciled, because U Po Thet died

and shortly before his death he purported, acting by himself, to appoint the defendant, U Eindawuntha, the presiding monk of the poggalika kyaung-daik. He was acting quite beyond his powers in attempting to do anything of this kind and those Sayadaws who believed that U Eindawuntha had been properly appointed must have overlooked the fact that U Hein had an equal voice in the appointment of the presiding monk with U Po Thet and had by no means concurred in what was being done. That being so, the position at the death of U Yazeinda was this: he was the poggalika owner of the kyaung-daik, and, as was pointed out in 1938 R L R 678[1] the ownership of the kyaung-daik, upon the death of the original poggalika owner, vests in the sangha at large, if the original poggalika owner has not either himself appointed his successor, or conferred the right to appoint a successor on a third party. In this case, no doubt, the right to appoint a successor had been conferred jointly upon two persons, but they had failed to exercise that right and the position was that on the death of U Yazeinda the ownership of the kyaung-daik vested in the sangha at large. There has been some confusion with regard to the selection because some of the learned Sayadaws who have addressed their minds to the texts of the Vinayas in this connexion have reminded themselves that when a person or persons is or are delegated to perform certain acts they cannot delegate again to other persons, but must perform the duties delegated to them themselves. That is, no doubt, true in connexion with such proceedings as may have taken place if the sanghas had met to make a report which U Po Thet and U Hein could act upon. But, quite different considerations arise when we have to consider, not a report of this character, but an ordinary election which takes place of a presiding monk when the poggalika owner of the kyaung-daik has died and the ownership of the kyaung-daik vests in the Sangha. In circumstances of such a kind, the only question which it is necessary to ask is this: Has there been a real, valid and true election by the Sangha as such? They may elect, as it seems to us, in any way they choose, and the only matter about which we must be satisfied is whether the election was a real election by the whole of the Sangha.

1. U Thita v. U Areseinna, (1939) 26 A I R Rang 76=1938 R L R 678.

Now, in this particular instance, 38 monks met together, and, although it is not of particular importance in connexion with that meeting, it is, I think, interesting to observe that the senior of them was U Thanwara, who was known as the Kyinigyaung Sayadaw. This representative gathering of monks came to the conclusion that their numbers were great to permit of a settlement being arrived at and that it would be better to entrust the matter to five persons who should represent them, who were called Nayakas. Of these five persons, one, U Zayanta, died and took no part in the proceedings. There were left, U Thanwara, U Winmala, U Ardicca and Letkhana, and we have to decide whether those persons could validly and properly elect a presiding monk of the kyaung-daik. They at one time seem to have entertained the notion that they would leave the matter to the senior of their number, U Thanwara, but it is afterwards clear from the evidence that three of them met together and that U Letkhana was not present. U Letkhana was called for the defence. He is the Aungmyintha Sayadaw and he thought that as the four Nayakas had submitted the matter to U Thanwara for selection by himself it was out of his hands; in other words, he was a person who was not only willing to abide by the decision of U Thanwara but thought that his own services in connexion with the election were no longer required. Of the other three, U Thanwara, who gave evidence upon commission and is described as a witness for the defendant, after giving a long and careful account of all the circumstances, said at the conclusion of his evidence, "I knew before that if an appointment is made by a majority of the Nayaka Sayadaws it is valid." In my view his opinion is entitled to great weight in this matter and it was shared by the other two Nayakas who were present, U Wimala, the first witness for the plaintiff, who says that the appointment was valid because those who made the appointment formed the majority, and by U Ardicca, who says it was finally settled that U Thiseitta should be the presiding monk of the said kyaung-daik.

It is to be noted that at this meeting three other Sayadaws were present. They took sufficient interest in the matter to come to see what was going on. They made no protest, and at no time was it then suggested that because U Letkhana was unwilling to come and because U Zayanta was

dead there was wanting any element in the validity of the election of the presiding monk of the kyaung-daik. It is now urged upon us that the election of a presiding monk is of such an important nature that it is at least analogous to ceremonial. It is, of course, true that there are matters connected with ceremonial, the validity of which is affected unless the requisite number of monks is present. But, in my opinion it is clear in this particular instance that, although there may have been ceremonial contemplated at the time that the presiding monk was installed in his office, the question of his election by the Sangha is a plain question of fact and depends upon a consideration of the question whether the members of the Sangha were substantially in favour of his appointment. If we were to be driven to the contrary conclusion, it would be plain that there would be no answer to a case which might have arisen if the 38 members of the Sangha had appeared and one of them had dissented from the proposed appointment of a particular person ; in those circumstances it would indeed be difficult to secure the election of a presiding monk, since unanimity might not always easily be obtained : and I am satisfied that the action which the members of the Sangha took in leaving the matter to several of the more senior of their number was not only a wise one and calculated to attain a measure of unanimity when there was a possible risk of disagreement, but that such unanimity was substantially achieved. There is no evidence at all that U Zayanta before his death dissented from the appointment of the appellant, and it is quite plain that all those who survived were ready and willing that he should be appointed. In those circumstances, it seems to me that this appeal must succeed and the suit of the plaintiff-appellant is decreed. As the parties are Buddhist monks, we think it proper to make no order as to costs.

Dunkley J. — I agree. As my learned brother Braund pointed out in 1938 R L R 678[1] at p. 690, where a special power is granted for its valid exercise the terms of the power must be strictly complied with. In the present case a special power to appoint the successor of U Yazeinda as owner of a poggalika kyaung-daik upon his death was granted by U Yazeinda to U Po Thet and U Hein, and the power was to be exercised jointly. They could not agree as to the manner of its exercise and consequently, it was never exercised. They had no authority to delegate their power of appointment to any other person, and therefore the view which has been taken by the lower Courts that they delegated their power of appointment to the Sangha is an incorrect view. Clearly, when they were unable to exercise that power this poggalika kyaung-daik became, after the death of U Yazeinda, sanghika property and was at the disposal of the Sangha generally : *see* 14 Rang 566.[2] It was therefore the privilege and duty of the Sangha to elect the presiding monk of that sanghika kyaung-daik, and the only question which fell for decision in this suit was whether such an election had been made by the Sangha, that is, whether the election of the appellant by the three nayakas did truly represent the will of the Sangha. It has been suggested that, when the Sangha delegated to these five nayakas the power to elect the presiding monk, only the five nayakas acting together could make the election ; but no text of the Vinaya which says that under those circumstances the decision of the majority cannot prevail has been cited to us, and from the evidence of the learned sayadaws themselves it is clear that the texts to which they have referred are texts concerned with ceremonial matters which can only be carried out by a certain number of monks, and the Vinaya lays down that in such cases the requisite number of monks must be present. But, in the case of an election, as my Lord has pointed out, an impossible position would arise if the will of the majority should not prevail, for a single monk by merely absenting himself from the election would render it impossible for a new presiding monk of a sanghika kyaung-daik to be elected. In my opinion, the evidence in this case shows clearly that the election of the appellant was an election which was in accordance with the witness of the Sangha generally, and therefore the appellant was properly elected as the presiding monk of the kyaung-daik in suit.

N.S./R.K. *Appeal allowed.*

2. U Zawtika v. U Kalyana, (1937) 24 A I R Rang 76=168 I C 967=14 Rang 566.

*** A. I. R. 1939 Rangoon 388**

MYA BU J.

Maung Kan — Applicant.

v.

Maung Po Tok — Respondent.

Criminal Revns. Nos. 125-B and 126-B of 1939, Decided on 6th June 1939, for review of order of Sub-Divisional Special Power Magistrate, Paungde, D/- 17th January 1939.

*** (a) Criminal P. C. (1898), Ss. 145 and 146 — By execution of delivery warrant issued by Court decree-holder obtaining symbolical possession of land—Within two months of such warrant judgment-debtor attempting forcible entry on land—Decree-holder filing application under S. 145—Decree-holder must be deemed to be in possession of land at the date of order under S. 145 (1)—Magistrate's order referring parties back to Civil Court under S. 146 (1) is improper and contrary to principles of justice.**

If in execution of a decree against the judgment-debtor an order for delivery of possession of judgment-debtor's property to the decree-holder is made by the Court and effect is given to that order by an officer of Court executing the delivery warrant and since then the decree-holder is in possession both in fact and law of the land in question but the judgment-debtor within two months from the execution of such warrant attempts a forcible entry upon the land, whereupon the decree-holder files a petition in a Criminal Court under Sec. 145, the Magistrate cannot go behind the decision of the Civil Court and cannot ignore the decree. It is immaterial whether the possession is actual or merely symbolical and in the inquiry under S. 145 there is only one conclusion possible for the Magistrate to arrive at with reference to the land and it is that it was in possession of the decree-holder on the date of the order passed under sub-s. (1) of S. 145. Even assuming that the decree-holder had been forcibly dispossessed at any time after the execution of the delivery warrant, proviso 1 to sub-s. (4) of S. 145 will operate in favour of the decree-holder. If therefore in such circumstances the Magistrate passes an order under S. 146 (1) by which he refers the parties back to Civil Court for the determination of their rights, such an order is highly improper and opposed to all principles of justice : *A I R 1923 Cal 176 and A I R 1916 Cal 339, Rel. on.* [P 389 C 1, 2]

(b) Civil P. C. (1908), O. 21, R. 35 — Delivery of possession of land includes crops standing thereon—Judgment-debtor cannot re-enter for reaping those crops.

Where the decree-holder is put in possession of land such possession includes the standing crops. The judgment-debtor cannot re-enter in order to reap and dispose of the crops which he had cultivated upon the land : *3 L B R 129, Rel. on.* [P 389 C 2]

Order.—This is an application for revision of certain orders passed by the Subdivisional Magistrate of Paungde purporting to act under Ss. 145 and 146, Criminal P. C. The proceedings before the Subdivisional Magistrate were initiated by a petition filed by the applicant against the respondent and five others who are described as the respondent's men. The facts that led to the filing of the petition were as follows : In Civil Regular No. 7 of 1938 of the Subdivisional Court of Paungde, the applicant and his wife obtained a decree against the respondent and his wife for recovery of possession of a piece of paddy land, being holding No. 109 of Mogyobyit Kwin, Paungde Township, measuring 10.53 acres. That decree was passed on 19th September 1938. In execution of the decree the Subdivisional Court on 19th October 1938, passed an order for delivery of possession to the applicant and his wife. Effect was given to this order by the process-server of the Court executing the delivery warrant on 26th October 1938, by affixing a copy of the same on the land and by proclamation by beat of gong in the locality concerned. On 24th November however the respondent and his men attempted to effect forcible entry upon the land in question, with the result that two days later, the applicant filed his petition in the Court of the Subdivisional Magistrate for action under S. 145, Criminal P. C. The bases of the application were that since the execution of the delivery warrant issued by the Subdivisional Court the petitioner had been in possession both in fact and in law of the land in question, and that on 24th November the respondent and his men attempted to effect forcible entry for the purpose of reaping the crops standing on the land, in consequence of which there was a likelihood of a breach of the peace concerning the land in question. On the day of the filing of the petition, the Subdivisional Magistrate passed a preliminary order directing the issue of a prohibitory order to both parties and of notices to the respondent and his men to appear before him on 29th November and to put in written statements of their claims as respects the fact of actual possession of the land. The prohibitory order was ignored by the respondent and his men, who, in execution of their threat, went on reaping the standing crops on the land, and it appears that by 29th November all the crops had been reaped.

When the matter came before the Subdivisional Magistrate on 29th November arrangement was made to keep the produce in the hands of the headman and a villager of Leusu village on their signing a bond for the production of 550 baskets of paddy when required. The enquiry then proceeded,

in the course of which each party contested the claim of the other as to the factum of actual possession and also as to who is entitled to reap the crops. In the end however the learned Subdivisional Magistrate found it, in the circumstances of the case, impossible for him to come to any "rational decision as to which party were in actual possession of the crops and the land." He therefore decided to proceed to act under Sec. 146 and appointed the Bailiff of his Court " to take charge of the properties and to credit to the Court all the moneys or proceeds of the lands." Having passed that order, the learned Subdivisional Magistrate also instructed the bailiff "to deduct incidental expenses regarding cultivation, reaping, etc., from the sum realized." The Bailiff not only carried out this instruction, but in his report of his having taken custody of the paddy and of his having sold the same mentioned that he had paid to various persons to whom various sums were due for such incidental expenses. It is quite clear that the payments so made were unauthorized. It is also clear that the Magistrate's instruction to the Bailiff to deduct incidental expenses regarding cultivation, reaping, etc., from the sum realized is quite improper, because although it appears to be common ground that the crops on the land had been raised by the respondent, the question as to who is entitled to the crops or to the possession of the crops could not arise separately from or independently of the main bone of contention between the parties viz., who is entitled to the possession of the land. While the Subdivisional Magistrate admitted that he was not able to decide the question concerning the crops, he obviously had no right to determine which of the parties was liable to defray the expenses of cultivation.

In the face of the decree of the Civil Court in favour of the applicant and his wife, the order of the Subdivisional Magistrate referring the parties to the Civil Court for the determination of their rights under S. 146 (1) is highly improper. So far as the land is concerned it is absurd to think that the parties should again fight out in a Civil Court the question as to who is entitled to the possession of the land which the Civil Court had not only decreed in favour of the applicant and his wife but which the Civil Court had already enforced by the execution of its delivery of warrant. When a decree is inter partes it is immaterial whether the delivery of possession made under that decree is actual or merely symbolical: *see* 27 C W N 267,[1] in which it was laid down that in a proceeding between the parties to a civil decree under S. 145, Criminal P. C., the Magistrate could not go behind the decision of the Civil Court in the matter and could not ignore the decree even though the Court passing the decree had no jurisdiction over the land and it was immaterial that the delivery of possession was symbolical only. Therefore in the enquiry under S. 145, there was only one conclusion possible for the learned Subdivisional Magistrate to arrive at with reference to the land, that is, that it was in the possession of the applicant on the date of the order passed under sub-s. (1). Even assuming that the applicant had been forcibly dispossessed at any time after the execution of the delivery order of the Subdivisional Court the first proviso to sub-s. (4) will operate in favour of the applicant, as such dispossession must have taken place within two months next before the date of the order under sub-s. (1). I hold, therefore, that as regards the land the learned Subdivisional Magistrate's order is contrary to all principles of justice. My finding is the same as regards the crops or the produce also. Where the decree-holder is put in possession of land, such possession includes the standing crops. The judgment-debtor cannot re-enter in order to reap and dispose of the crops which he had cultivated upon the land: *see* 3 L B R 129.[2] I respectfully adopt the observation of Chitty and Walmsley, JJ. in 20 C W N 796:[3]

> It seems contrary to all principles of justice that a judgment-debtor should be allowed to retain possession against his decree-holder who has actually been given possession against him by a Civil Court and in a criminal proceeding, to assert that possession and by force of the order of the Magistrate, drive the decree-holder . . . back to the Civil Court for a further declaration of his rights.

The order of the Subdivisional Magistrate of Paungde dated 17th January 1939 is set aside and in its stead it is ordered that the learned Subdivisional Magistrate declare that the applicant was at the date of the order under Sec. 145 (1), Criminal P. C., in possession of the land, including the standing crops, and declaring the appli-

1. Akhoy Mondal v. Basu Rai, (1923) 10 A I R Cal 176=73 I C 53=37 C L J 256=24 Cr L J 517=27 C W N 267.
2. Aung Baw v. Tun Gaung, (1905-06) 3 L B R 129.
3. Atul Hazrah v. Uma Charan, (1916) 3 A I R Cal 339=33 I C 822=17 Cr L J 182=23 C L J 555=20 C W N 796.

cant to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding of all disturbance of such possession until such eviction. The Subdivisional Magistrate will take necessary steps to call into the custody of the Court the net sale proceeds of the paddy (i. e. sale proceeds less the Bailiff's commission) and to deliver the same to the applicant.

N.S./R.K. *Order accordingly.*

*** A. I. R. 1939 Rangoon 390**

DUNKLEY AND WRIGHT JJ.

Nga Sar Kee — Appellant

v.

The King.

Criminal Appeal No. 641 of 1939, Decided on 21st August 1939, from order of Sess. Judge, Thaton, D/- 25th July 1939.

*** (a) Criminal P. C. (1898), Ss. 537, 239 — Two persons charged with same offence of murder — Prosecution evidence against them being mutually exclusive — Their joint trial is an illegality which cannot be cured under Section 537.**

"The same offence" in S. 239 means an offence arising out of the same act or series of acts and can mean nothing else. [P 391 C 1]

When one accused is charged with having murdered a certain person at a certain place and another is charged with having murdered the same person at the same time and place and both are prosecuted because there is evidence against both but such evidence against them is mutually exclusive, it cannot be said that those persons are charged with the same offence committed in the course of the same transaction within the meaning of S. 239. There is no provision of the Code under which those persons can be tried together and such a joint trial is not a mere irregularity which can be cured under Sec. 537 but it is an illegality which goes to the very root of the trial : *7 L B R 68 and 25 Mad 61 (P C), Foll.* [P 391 C 1]

(b) Criminal Trial—Procedure—Prosecution — Public Prosecutor should place whole evidence before Court - It is for Judge and not for him to decide whether certain evidence should be believed or not.

It is the duty of the Public Prosecutor to conduct the case for the Crown fairly; his object should be not to obtain an unrighteous conviction but to see that justice is vindicated. He should therefore place before the Court all the evidence against the accused persons and should not withhold certain evidence by not calling the principal witness on the ground that he did not believe the witness's evidence. It is for the Judge and not for the Public Prosecutor to decide whether the evidence should be believed or not : *14 Rang 45, Rel. on.* [P 391 C 2; P 392 C 1]

C. A. Soorma — *for Appellant.*

U Tun Byu, Govt. Advocate — *for the Crown.*

Dunkley J.— We have with reluctance, come to the conclusion that we must order a re-trial of the appellant before another Sessions Judge, owing to the illegality of his original trial. The appellant was charged before the learned Sessions Judge of Thaton with having committed the offence of murder by causing the death of a person named Maung Kywe. Without any doubt, Maung Kywe met his death on the night of 31st January 1939, by reason of being cut and stabbed with some sharp-edged and sharp-pointed instrument. It was in evidence before the learned Sessions Judge that the first statements that were recorded in the investigation of the offence, which resulted in Maung Kywe's death led to the suspicion that this offence was committed by a man named Maung Yaung. Subsequently, further investigation elicited that there was evidence also that the appellant, Sar Kee, had committed this offence. The consequence was that the police sent up for trial, in one and the same trial, both Maung Yaung and Maung Sar Kee. Each of them was separately charged with the offence of murder, under Sec. 302, Penal Code, by causing the death of Maung Kywe on the night of 31st January 1939, and both of them were committed to stand their trial before the Sessions Court on this charge. The trial before the Sessions Court was a joint trial of the two appellants. The learned Sessions Judge, at the beginning of his judgment, has stated that the case presented difficulties from the outset as the two accused were not charged with having murdered the deceased jointly, but there were two sets of conflicting evidence one to prove that accused 1, Maung Yaung, was the assailant of the deceased, Maung Kywe, and the other to establish the guilt of Sar Kee, accused 2, "for the same offence." With due respect to the learned Sessions Judge, there was no evidence to establish that Sar Kee was guilty of the same offence as Maung Yaung. It was attempted to establish that he was guilty of the murder of Maung Kywe, but that does not make it the same offence as the offence of Maung Yaung, presupposing that Maung Yaung had committed this murder. The trial before the learned Sessions Judge was an illegal trial ab initio. The authority for this proposition—an authority which has never been doubted and has, in fact, been followed in several unreported decisions of this Court—is 7 L B R 768[1] and this case was binding upon the learned Sessions Judge

1. Azim-ud-din v. Emperor, (1913) 7 L B R 68= 21 I C 163=14 Cr L J 563.

and ought to have been followed by him. Had he referred to it, it would have been at once apparent to him that the two accused, Maung Yaung and Maung Sar Kee could not be tried together. The headnote of *Azim-ud-din's case*' reads as follows :

Two persons accused of an offence cannot be tried together if the prosecution cases against them are mutually exclusive. The words 'accused of the same offence' in Sec. 239, Criminal P. C., imply that the co-accused have acted in concert or association.

Referring to the provisions of the Criminal Procedure Code on which this decision is based, S. 233 of the Code specifically lays down that for every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in Ss. 234, 235, 236 and 239. Consequently, when there is one charge against one person and another charge against another person, those charges must be the subject of separate trials, unless the Criminal Procedure Code points that the two charges and therefore the two accused may be jointly tried. S. 239 lays down the only circumstances in which accused persons may be jointly tried. Cl. (a) of this Section says :

The following persons may be charged and tried together, namely persons accused of the same offence committed in the course of the same transaction.

When one accused is charged with having murdered a certain person at a certain place, and another accused is charged with having murdered the same person at the same time and place, and both these accused are being prosecuted because there is evidence against both, but the evidence is of such a character that both of them cannot be convicted, and if one set of evidence is believed one of the accused will have to be convicted, whereas if the other set of evidence is believed the other accused will have to be convicted, it cannot be said that those persons are charged with the same offence committed in the course of the same transaction. "The same offence" means an offence arising out of the same act or series of acts and can mean nothing else. This is clear from the words of the clause "committed in the course of the same transaction." When the prosecution evidence against two persons is mutually exclusive, there is no provision of the Code under which those persons can be tried together; and the joint trial of the two persons is not a mere irregularity which can be cured under S. 537, Criminal P. C., it is an illegality which goes to the very root of the trial. In 25 Mad 61,[2] their Lordships of the Privy Council held that the disregard of an express provision of the law as to the mode of trial was not a mere irregularity such as could be remedied by S. 537, Criminal P. C., and that such a phrase as "irregularity" is not appropriate to the illegality of trying an accused person for more different offences at the same time, and those offences being spread over a longer period than by law could have been joined together in one judgment. For myself, I can see no distinction between trying one person on a multiplicity of charges such as is not allowed by law, and trying two persons in one and the same trial where such joint trial is not allowed by law. I am therefore compelled to hold that the trial of this case before the learned Sessions Judge of Thaton was an illegal trial, and hence there must be a fresh trial of the appellant before some other Sessions Court.

It is unfortunately necessary, before we part with this case, to make some reference to the impropriety of the manner in which the learned Public Prosecutor for Thaton conducted the prosecution. There were for trial before the Sessions Court two persons, namely, Maung Yaung and the appellant. It is laid down in 14 Rang 45[3] that it is the duty of a Public Prosecutor to conduct the case for the Crown' fairly ; his object should be, not to obtain an unrighteous conviction, but, as representing the Crown, to see that justice is vindicated ; and in exercising his discretion as to the witnesses whom he should or should not call, he should bear that in mind. It therefore was in this case his bounden duty to place before the Court for the adjudication of the Court, all the evidence against both these accused persons. Yet he asked the permission of the Court not to call the principal witness against the accused, Maung Yaung, on the ground that he did not believe this witness's evidence. As the learned Sessions Judge has stated in the course of his judgment, this action on the part of the learned Public Prosecutor was constituting himself the judge of the case, that is, coming to a conclusion in regard to the guilt or innocence of one accused, and

2. Subrahmania Ayyar v. Emperor, (1902) 25 Mad 61=28 I A 257=11 M L J 233=8 Sar 160=2 Weir 271 (P C).

3. Nga Aung Gyi v. King-Emperor, (1935) 14 Rang 45.

therefore pressing unduly for a conviction of the other accused, namely the present appellant. If the learned Public Prosecutor had come to the conclusion, after the proceedings in the committing Court, that there was no creditable evidence against Maung Yaung his proper procedure was to have made an application to the learned Sessions Judge for permission to withdraw the case against Maung Yaung. In my view, if he had made such an application it would necessarily have been rejected, because the trial showed that there was considerable evidence against Maung Yaung and it was for the Judge, and not for the Public Prosecutor, to decide whether that evidence should be believed or not and it was therefore essential that the Public Prosecutor should place the whole of this evidence before the Court. The learned Sessions Judge, has in the course of his judgment, commented on the fact that neither of the accused persons called any defence evidence. The answer is that they were not able to do so because the defence evidence of each was the prosecution evidence against the other, and had therefore been called as prosecution evidence in the case. It is undesirable that we should express any opinion regarding the evidence against the present appellant or its credibility at this stage, because as I have already said, it is clearly essential that there should be a re-trial and therefore we accept this appeal, set aside the conviction and sentence of the appellant and order the re-trial of the appellant before the Sessions Court of Moulmein on the same charge.

Wright J.—I agree.

D.B./R.K. *Appeal accepted.*

A. I. R. 1939 Rangoon 392

MOSELY J.

The King

v.

Nga Ba Saing — Respondent.

Criminal Revn. No. 178-B of 1939, Decided on 2nd June 1939, for review of order of Head-quarters (S. P.) Magistrate, Sagaing, D/- 22nd February 1939.

(a) Criminal P. C. (1898), Secs. 370, 421—Recommendation for enhancement of sentence of accused made after his appeal against conviction has been dismissed—Accused is not again entitled to show cause against his conviction—He can only show cause against enhancement of sentence—The fact that his appeal was dismissed summarily makes no difference.

Where a recommendation for enhancement of sentence of an accused is made to High Court after the decision of the appeal filed by him against his conviction, the accused, when called upon to show cause against the enhancement of sentence, is not entitled to show cause against his conviction but may only show cause against the enhancement of his sentence. The order of the High Court in appeal is final and the accused cannot be heard again to show cause against his conviction. The fact that the accused's appeal from jail was dismissed summarily does not make any difference. Such appeals are dismissed summarily after consideration of the grounds of appeal, in addition to the judgment and if necessary, the evidence : *A I R 1926 Bom 555 ; A I R 1927 Lah 217 and A I R 1929 Lah 797, Rel. on.* [P 392 C 2 ; P 393 C 1]

(b) Criminal P. C. (1898), S. 439 (5), (6) — Sub-s. (6) only refers to sub-s. (5)—It is intended to operate as exception to what is otherwise laid down in the Section—Meaning of sub-s. (6) explained.

Sub-section (6) of S. 439 can refer only to sub-s. (5) of the Section, and means that, although a party, who has not appealed, could not be allowed to make an application in revision, yet, if proceedings are taken against him in revision and notice to show cause why his sentence should not be enhanced is issued to him, he shall, in showing cause be entitled also to show cause against his conviction. Sub-s. (6) is intended to operate as an exception to what is otherwise laid down in the Section itself. [P 393 C 1, 2]

(c) Criminal P. C. (1898), S. 369—Construction.

Section 369, Criminal P. C., must be read with S. 430 of the Code. [P 393 C 2]

Order.—The respondent, Nga Ba Saing, was convicted under the second part of Sec. 307, Penal Code, and sentenced to five years' rigorous imprisonment. The learned District Magistrate, Sagaing, has submitted the case in revision with the recommendation that the sentence be enhanced. The accused had preferred an appeal (No. 267 of 1939) before this, and that appeal was summarily dismissed about a month before receipt of the District Magistrate's recommendation. The respondent, when called upon to show cause against enhancement of sentence, has endeavoured, in addition, to show cause against his conviction, and the first question to be considered in this case is whether that can be done, having regard to the fact that the accused's appeal has already been dismissed.

When an appeal is preferred and it appears to the Judge that there is reason to believe that an enhancement of the sentence should be considered, it is the practice of this Court to issue notice in revision to the accused to show cause against enhancement, and the appeal and the revision are heard at one and the same time. I do not know of any previous case in this Court where a recommendation for enhancement of sentence has been made after the deci-

sion of the appeal, and there is certainly no reported case in the rulings of this Court on the subject. There is however considerable authority in the Indian High Courts for the view that in such a case the accused person cannot be allowed to show cause against his conviction, but may only show cause against enhancement of the sentence.

The High Court's power in revision are laid down in Section 439, Criminal P. C. Sub.-s. (1) enacts that the High Court may exercise any of the powers conferred on a Court of Appeal by certain Sections, of which the only one in point, S. 423 (1) (a), lays down that the Appellate Court in an appeal from an order of acquittal may, inter alia, find the accused guilty and pass sentence on him according to law, and Section 439, sub.-s. (1), goes on to provide that the Court may enhance the sentence. This power to enhance the sentence is subject to sub.-s. (2), namely notice to the accused person, and to sub-sec. (3) in regard to the maximum enhancement in certain cases. Sub.-sec. (4) prevents a finding of acquittal being converted into a conviction. Sub-section (5) says that where under this Code an appeal lies and no appeal is brought no proceedings by way of revision should be entertained at the instance of the party who could have appealed. This sub-section prevents a revision application being treated as an appeal when no appeal has been brought. Sub.-sec. (6), which is the one in question in this case, says :

> Notwithstanding anything contained in this Section, any convicted person to whom an opportunity has been given under sub-s. (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction.

This last sub-section was only added when the Code was revised in 1923. It is important to note that the initial words are "notwithstanding anything contained in this Section," and not "notwithstanding anything contained in this Code." It would seem clear therefore that sub.-sec. (6) can only refer to sub.-s. (5) of the Section, and means that, although a party who has not appealed cannot be allowed to make an application in revision, yet, if proceedings are taken against him in revision and notice to show cause why his sentence should not be enhanced is issued to him, he shall, in showing cause, be entitled also to show cause against his conviction. Had it been otherwise, it could have been contended in the case of an accused to whom notice had been issued and who had not appealed or in a non-appealable case had not applied for revision of his conviction, that he could not question the correctness of his conviction, and that was in fact decided under the old Code in 32 Bom 162.[1] It would seem therefore that sub.-s. (6) is intended to operate as an exception to what is otherwise laid down in the Section itself.

It is only by virtue of the provisions of this sub-section that the accused can show cause against his conviction, and, as I have said, under the words of the Section itself it would seem that the accused is not entitled to do so where his appeal has been previously dismissed. It is laid down elsewhere in the Code that judgments once passed cannot be altered or revised except as provided for by this Section. S. 369 of the Code says :

> Save as otherwise provided by this Code . . . . . no Court, when it has signed its judgment, shall alter or review the same, except to correct a clerical error.

This Section must be read with S. 430 of the Code, where it is said that "judgments and orders passed by an Appellate Court upon appeal shall be final, except in the cases provided for in S. 417" (appeals against an acquittal by the Government) "and Ch. 32" of which S. 439 is a part. It appears therefore to me that the order of this Court in appeal must be regarded as final, and that the accused person cannot now be heard to show cause against his conviction. Another view was taken incidentally in 49 Bom 450,[2] where it was remarked that it was the practice of the Bombay High Court to issue notice against enhancement in revision after the disposal of the appeal, and that the accused then still had the right to show cause against his conviction, though any attempt to set aside his conviction would not have much chance of success.

This view however was dissented from in 50 Bom 783,[3] a case on all fours with the present one, where it was said that such a case where the appeal had already been heard on the merits was not provided for in sub.-s. 6, and was outside the purview of that sub-section. It was also remarked that to allow cause to be shown against the conviction would be to rehear the appeal

1. Emperor v. Chinto, (1908) 32 Bom 162.= 7 Cr L J 119=10 Bom L R 93.
2. Emperor v. Mangal Naran, (1925) 12 AIR Bom 268=87 I C 424=26 Cr L J 968=49 Bom 450 =27 Bom L R 355.
3. Emperor v. Jorabhai Kisanbhai, (1926) 13 AIR Bom 555 = 97 I C 805 =27 Cr L J 1173=28 Bom L R 1051=50 Bom 783.

on the merits, and that that would be a proceeding which is against the ordinary principle of finality of judgments, such as has often been referred to by the Privy Council, for instance, in 48 Cal 499[4] at p. 508. This ruling was followed in 8 Lah 521.[5] In that case a petition by the accused for revision of his conviction and sentence was dismissed, whereupon the Crown presented an application in revision for enhancement of the sentence. It was held there that the accused was no longer entitled under S. 439, sub-s. (6), to reopen the question of his guilt in the face of the previous finding by the High Court. 10 Lah 241,[6] a similar case, also followed 50 Bom 783.[3] It was said there:

> Sub-s. (6) was meant to give an accused person to whom a notice of enhancement of sentence was issued and who has not appealed, or if no appeal lay, has not applied for revision of his conviction, an opportunity to question the correctness of his conviction if it was proposed to enhance his sentence.

Another case on all fours with the present one is 55 All 715[7] which also followed the decision in 50 Bom 783.[3] It does not appear to me to make any difference that the accused's appeal from jail was dismissed summarily. Such appeals are dismissed summarily after consideration of the grounds of appeal, in addition to the judgment and, if necessary the evidence. As to the merits of the case for enhancement, I am afraid that I cannot see any. This was a case of an assault with a dah by one ex-convict on an other ex-convict, apparently arising out of a sudden quarrel. It is true that the person assaulted was unarmed. He had six injuries, two of which were on the head. The other four were on the hand, arm and fingers, and might have been caused when the complainant was defending himself. The evidence given only referred to the first blow struck. Both the accused and the complainant appear to have been drunk at the time. The main ground of the learned District Magistrate's recommendation for enhancement was that the accused person had made a previous attempt to murder the same man, Maung Po An, but I find that the previous case in which this accused, Nga Ba Saing, was convicted (Criminal Regular Trial No. 98 of 1935 of the Subdivisional Magistrate, Myinmu) was a case of an assault against a totally different person, Maung San Htaik, who gave a different father's name. It does not appear to me to be necessary to take any steps to enhance the sentence, and that will be ordered accordingly.

R.M./R.K. *Order accordingly.*

4. Hook v. Administrator-General of Bengal, (1921) 8 AIR P C 11=60 I C 631=48 I A 187 =48 Cal 499 (P C).
5. Emperor v. Sher Singh, (1927) 14 AIR Lah 217 =100 I C 234=28 Cr L J 266 = 8 Lah 521= 28 P L R 559.
6. Emperor v. Dhanna Lal, (1929) 16 A I R Lah 797=1929 Cr C 429=117 I C 669=30 Cr L J 815=10 Lah 241=30 P L R 409.
7. Emperor v. Abdul Qayum, (1933) 20 A I R All 485=1933 Cr C 830=146 I C 157 =34 Cr L J 1205=55 All 715=1933 A L J 957.

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MOSELY J.

Maung Po Nwe — Accused.

v.

Ma Pwa Chone — Complainant.

Criminal Revn. No. 221-B of 1939, Decided on 16th June 1939, reference made by District Magistrate, Toungoo, D/- 7th June 1939.

Criminal Trial—Bar of — Previous judgment of Civil Court — Fact that matter in issue has been decided by Civil Court between same parties does not debar Criminal Court from taking cognizance of case and holding trial.

Though a civil suit and a criminal prosecution may be based on exactly the same cause of action, the parties are strictly speaking not the same. The burden of proof is differently placed and different considerations may come in. The result may therefore be a conflict in decision. The risk of such conflict is one that is inherent in the division of cause into criminal and civil. The judgment of neither Court is binding on the other and each must decide the cause on the evidence before it. If they arrive at different conclusions it is regrettable but unavoidable. [P 395 C 2 ; P 396 C 1]

The fact therefore that the matter in issue has already been decided in favour of the accused in a civil suit between the same parties does not debar the Criminal Court from taking cognizance of the case and holding a trial : *A I R 1916 Bom 163, Expl.; A I R 1932 Mad 254 and A I R 1932 Cal 293, Rel. on.* [P 394 C 2]

Order. — The learned District Magistrate has submitted the proceedings in Criminal Trial No. 50 of 1939 of the Township Magistrate of Kyaukkyi with the recommendation that they be quashed. The reason given was that the matter in issue had already been decided in favour of the accused in a civil suit between the same parties. The complainant there, Ma Pwa Chone, prosecuted Maung Po Nwe and another, Tun U, for criminal breach of trust or cheating. The case, after a preliminary inquiry by the police, proceeded against Po Nwe alone under S. 406, Penal Code. The complainant's case was that she had bought cattle for Po Nwe and hired them-

to him and that he had disposed of them by selling them to Tun U. This criminal case was only instituted after Ma Pwa Chone brought a civil suit in the Township Court of Kyaukkyi, (Small Cause Suit No. 3 of 1939) where she sued Po Nwe, who is her cousin, for recovery of the hire and the bullocks. The witnesses whom she produced there, Aung Ba and San Hla, however made the transaction of sale and exchange one with Po Nwe and not with Ma Pwa Chone at all and she also failed to prove payment of any hire. Her suit was accordingly dismissed. The present criminal case has proceeded on the same facts and the same evidence, though I note that Aung Ba has modified his statement in Ma Pwa Chone's favour here. His evidence however will not be worth considering in view of his previous statement in the civil suit. The complainant, after her preliminary examination did not tender herself as a witness. Maung Po Nwe seems to have made a verbal application to the Magistrate to allow him to file a copy of the judgment in the civil suit and his prayer for adjournment for that purpose was apparently refused. He then applied to the District Magistrate for transfer of the case, but the District Magistrate has recommended the quashing of the proceedings. The question usually presents itself in the reverse way. The judgment of a criminal Court is irrelevant in a civil suit as proof of the point decided by the Criminal Court. Similarly, here the decision in the civil suit was not res judicata. The judgment in that suit was not one which by law prevented the Criminal Court from taking cognizance of the case and holding a trial (S. 40, Evidence Act), nor was it a judgment in rem as defined in S. 41 of that Act, which could be conclusive proof of the matters dealt with in it, nor, again did that suit relate to matters of a public nature, (S. 42 of that Act). A judgment of a Civil Court other than one in rem cannot finally decide a matter subsequently dealt with in a criminal Court even though the facts in dispute in this civil suit govern the only question that can rise in these criminal proceedings, for if the property in question was bought by the accused he could not be convicted of any offence with respect to it on the complaint of the complainant.

The only other res judicata known to the criminal law is autrefois acquit and autrefois convict (S. 403, Civil P. C.). It has been held in one case by the High Court of Bombay in 41 Bom 1,[1] that a copy of the judgment in a civil suit should have been allowed to be filed in the subsequent criminal proceedings. It was said there that the judgment was relevant to know what the rights of the parties were with respect to the matter in dispute: Heaton, J. said (p. 5):

> It is a matter of the first importance, of the very highest relevancy to show to a Criminal Court that the matter which the Criminal Court is asked to adjudicate on has already been fully dealt with by a Civil Court . . . The judgment is relevant not for the purpose of proving or disproving facts in dispute in the case, but for the purpose of enabling the Magistrate to decide whether he should . . . . . exercise the discretion given him by Cl. 2, S. 253, Criminal P. C.

The Evidence Act, however, does not warrant this proposition of law. The judgment in the civil suit was not one of those mentioned in Ss. 40, 41 and 42, and was, therefore, irrelevant, not being a fact in issue nor relevant under some other provisions of the Evidence Act (S. 43 of the Act). Then, again, as admittedly the judgment should not be used to prove or disprove the charge, it is difficult to see how the Magistrate could have used it on which to ground his order of discharge. That would have been equivalent to treating it not merely as relevant but as conclusive. It is clear, I think, that the decision in 41 Bom 1[1] was on grounds of policy rather than of law, for it was said:

> We cannot have Criminal Courts trying over again matters which have been finally dealt with and finally decided by a Civil Court of competent jurisdiction.

41 Bom 1[1] was dissented from in 55 Mad 346[2] where it was rightly remarked that though the civil suit and the prosecution may be based on exactly the same cause of action, the parties are, strictly speaking, not the same. The burden of proof is differently placed and different considerations may come in. The result may, therefore, be a conflict in decision. Instances are given there, a trial for murder in which the confession is inadmissible in evidence and a suit for damages for the murder where the confessional statement is admissible: another instance is more familiar, a prosecution for defamation governed by the provisions of the Penal Code and a suit for damages governed by the English law of slander and libel. As is again said there

1. In re N. F. Markur, (1916) 3 A I R Bom 163=33 I C 633=17 Cr L J 153=41 Bom 1=18 Bom L R 185.
2. Ramanamma v. Appalanarasayya, (1932) 19 A I R Mad 254=1932 Cr C 184=136 I C 348=33 Cr L J 307=55 Mad 346=62 M L J 230.

in a passage quoted from another judgment, the risk of such conflict is one that is inherent in the division of causes into criminal and civil. The judgment of neither Court is binding on the other and each must decide the cause on the evidence before it. If they arrive at different conclusions it is regrettable but unavoidable. A similar recent decision is 59 Cal 136.[3] I am unable therefore to accept the learned District Magistrate's recommendation on the ground given by him. In the present case, however, I think that this recommendation can be supported on another somewhat analogous ground. The applicant is a poor man who could not afford to be represented in the criminal proceedings. It is obvious that if he had filed or were allowed to file a copy of the evidence of Maung Aung Ba, given in the civil suit in this trial, the trial could not possibly result in his conviction. It will, therefore, be directed that the proceedings be quashed and the accused Maung Po Nwe acquitted.

N.S./R.K. *Proceedings quashed.*

3. Trailokyanath Das v. Emperor, (1932) 19 A I R Cal 293=1932 Cr C 262=137 I C 163=33 Cr L J 441=59 Cal 136.

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ROBERTS C. J. AND DUNKLEY J.

Baker Ali and another—Appellants.

v.

Amir Ali Meah and others — Respondents.

First Appeal No. 127 of 1938, Decided on 7th June 1939, against decree of Asst. District Court, Akyab, D/- 18th August 1938.

(a) Deed—Construction—Terms of document must be construed according to law—Conclusion regarding rights and liabilities created by document cannot be based on irrelevant matters.

Construction of a document is a matter of law. When a Court is called upon to construe a document, it is the duty of the Judge to construe the terms of the document according to law and come to an independent conclusion of his own as regards the rights and liabilities created by document. He is not bound to base his conclusion upon matters which are irrelevant in a Court of law. [P 397 C 1]

(b) Deed — Construction — Description in document partly correct and partly incorrect—Correct description sufficient to identify subject-matter—Rule of construction—Land described in document by boundaries and also area—Land within boundaries passes by document.

When a description in a document is partly correct and partly incorrect and the former part is sufficient to identify the subject-matter intended while the latter does not apply to any subject, the erroneous part will be rejected in accordance with the maxim *falsa demonstratio non nocet cum de corpore constat*, and extrinsic evidence to show that the intention of the parties was not in accordance with the part of the description which is correct is inadmissible. So, where there is a description of land in a document setting forth the boundaries and then specifying the quantity as so many acres, etc., the description in regard to the acreage is considered to be mere false description if there is an error in the quantity, and the land within the boundaries passes by the document, whether it be less or more than the quantity specified : *41 Cal 493 (PC), Ref.* [P 398 C 1]

Dr. Ba Han and Zakharia — *for Appellants.*

Hay — *for Respondents.*

Dunkley J.—This appeal arises out of a suit in the Assistant District Court of Akyab, in which the plaintiffs-respondents sued the defendant-appellants for their ejectment from certain areas of agricultural land and for mesne profits of that land for a period of three years prior to the suit. The suit has been decreed by the learned Assistant District Judge of Akyab and it is against his judgment and decree that the present appeal has been filed. In their plaint the respondents alleged that the areas of land in suit lay within the area of a larger grant, which had been made to them by the Government of Burma under the Arakan Waste Land Grant Rules, and that on this ground they were entitled to eject the appellants. Para. 1 of the plaint is as follows:

1. That the plaintiffs are the registered grantees of Aungseikpyin Grant, situated in Maungdaw Township. The western boundary of the said grant is the course of Myothit chaung as it was in 1906.

Para. 4 of the plaint reads :

4. That the three plots marked on the exhibit map in red dotted lines as A, B and C fall within the boundary of the plaintiffs' grant.

These are the three areas of land from which the respondents seek to eject the appellants, and it is clear that their cause of action is based on the averment that the grant of land, which has been made to them by Government, includes the lands in suit. Yet, strange though it may seem, the deed of grant, which obviously should have been filed with the plaint, has not been produced at all. The respondents have relied upon two orders of the Financial Commissioner of Burma, dated 21st July 1936, and 26th July 1937, certified copies of which have been produced and are filed as Exs. B and C. In the plaint reference has been made to these orders, and it is set out that by his order of 26th July 1937, (Ex. C) the Financial Commissioner decided that the western boundary of the respondents' grant was the Myothit chaung as it

existed in 1906. The defence of the appellants, so far as it is now of any importance, is that the areas of land in suit lie outside the respondents' grant. Consequently, the first issue which was framed in the suit was, "Do the suit plots A, B and C fall within the boundary of Aungseikpyin Grant?" The learned Assistant District Judge, in considering this issue, came to the conclusion that he was bound by the orders of the Financial Commissioner, to which I have already referred, and therefore held that the lands in suit fall within the respondents' grant. This was not the correct way to view the matter. The Financial Commissioner was deciding a dispute between the revenue authorities of the Akyab District and the respondents regarding the western boundary of the respondents' grant, and as a Revenue Court, he was not bound by the strict rules of the law of evidence; but it was his duty to come to that decision which, in his view, would be equitable in consideration of all the materials which were placed before him. He based his decision on the ground that if the boundaries stated in the respondents' deed of grant were strictly adhered to, the area of the land which the respondents would obtain would be much less than the area stated in the grant. The construction of a document is a matter of law, and it was the duty of the learned Assistant District Judge to construe the terms of the respondents' grant in accordance with law, and on his independent construction of its terms, to come to his own conclusion as to whether the lands in suit were included within the grant or not. He was in no way bound by the opinion of the Financial Commissioner, which was based upon considerations which were irrelevant in a Court of law.

The learned Assistant District Judge having failed to construe the terms of this grant, it now falls on us to do so and we are placed in an initial difficulty in that the deed of grant itself is not before us. At one stage, it seemed likely that we should have to remand the case for this document to be produced. However the only part of the document which, for the present purpose, is of importance is the description of the boundaries contained therein, and that description is fortunately set out in full in the order of the Financial Commissioner, dated 21st July 1936, (Ex. B). It is necessary to set out in detail the history of this grant, as this has already been done by the learned Assistant District Judge in his judgment. It appears that the respondents and their predecessors-in-title have obtained a series of grants from the Government of Burma of this land which is known as the Aungseikpyin Grant. The grants have in each case been made for a period of 20 years and at the end of each such period a new grant has been issued. It appears that in each successive grant the rent payable by the respondents or their predecessors, has been revised, but we have not been told whether the other terms have continued to be the same in each grant. The last grant was made on 31st March 1936, the agreement apparently being signed some time in 1927. According to the Financial Commissioner's order (Ex. B), the boundaries of the grant land as stated in the deed of 1926 are as follows:

North : The right branch of the Padaga chaung to Mayu Hills.
South : The Gyit chaung from its mouth to its source in the Mayu Hills.
East : The Mayu Hills.
West : The Myothit chaung.

The order of the Financial Commissioner set out that all these boundaries are described in exactly the same words as were the boundaries in the deed of grant of 1906. But the evidence shows that between 1906 and 1926 the Myothit chaung changed its course towards the east, and when the 1936 agreement was signed its course was considerably to the east of the course which it had taken in 1906. It is common ground that the lands now in suit were on the east bank of the Myothit chaung in 1906, but were on the west bank of that chaung in 1926. The plain meaning of the description of the western boundary contained in the agreement of 1926 is the course of the Myothit chaung as it existed at the date of the agreement. Where the agreement says merely, "west: the Myothit chaung," plainly that means that the western boundary is the Myothit chaung as it was on the date of the agreement, and these words can have no other meaning. The Financial Commissioner, in his orders, discussed what was the intention of the parties at the time when this agreement was signed, and he came to the conclusion that the intention both of the Government and of the respondents was that the western boundary under the 1926 agreement should be exactly the same as the western boundary under the 1906 agreement. That is a construction which was permissible to him but which is not permissible to a Court of

law. When a description in a document is partly correct and partly incorrect and the former part is sufficient to identify the subject-matter intended while the latter does not apply to any subject, the erroneous part will be rejected in accordance with the maxim *falsa demonstratio non nocet cum de corpore constat*, and extrinsic evidence to show that the intention of the parties was not in accordance with the part of the description which is correct is inadmissible. So, where there is a description of land in a document setting forth the boundaries and then specifying the quantity as so many acres, etc. the description in regard to the acreage is considered to be mere false description if there is an error in the quantity, and the land within the boundaries passes by the document, whether it be less or more than the quantity specified. In 41 Cal 493[1] their Lordships of the Privy Council said :

> In their Lordships' opinion, the question as to what had been demised in 1894 turned upon the true construction of the kabuliyat, and that construction could not be varied by extraneous evidence as to the negotiations which led up to the contract which was, in fact, made, or by evidence showing that within the boundaries specified in the schedule to the kabuliyat there was not 400 bighas of land . . . .

Consequently, it is plain that under the deed of grant of 1926 the western boundary of the respondents' grant is the course of the Myothit chaung as it existed on that date. It has been urged on behalf of the respondents that the orders of the Financial Commissioner amount to a rectification of this grant in consequence of a mutual mistake of the parties thereto. If that were so then a new grant was necessary. Under direction 13 of the directions under the Lower Burma Land and Revenue Act, grants of land for cultivation must be made in a particular form and entered in a particular register. Nothing of the kind was done after the Financial Commissioner's orders were issued, and it is only necessary to read the second of these orders, Ex. C, to come to the conclusion that it is far too vague in its terms to be the basis of a new contract between the parties. There has obviously been no new grant or rectification of the old grant by reason of, or in consequence of, the orders of the Financial Commissioner ; but what the Financial Commissioner did was to construe, as between the Government and the respondents, the existing grant of 1926, and as I have already said, that construction is not a construction which can be accepted by a Court of law. It would seem that the Financial Commissioner recognized this, for in his order of 26th July 1937 (Ex. C) he said :

> In future therefore for that portion of the grant south of the defined common boundary between Aungeseikpyin and the Chaungbauk grant the centre line of the Myothit chaung as it stood in 1906 . . . will be adopted as the western boundary.

And it is common ground that by that the Financial Commissioner meant that when a new grant was issued the description of the western boundary should be in these terms. It is further urged on behalf of the respondents that if the orders of the Financial Commissioner cannot be held to be a rectification of the grant, at any rate they amount to an order that the respondents are to be permitted to occupy the land lying between the old and new beds of the Myothit chaung. This land is undoubtedly at the disposal of Government as waste land, and of course, under the rules for the occupation of waste lands, Government can permit any person to occupy it ; and without doubt, the Financial Commissioner had authority to direct that the respondents alone should be permitted to occupy this area. In fact, the appellants admit that this view of the Financial Commissioner's orders may be the correct view. But a case based upon a permission to occupy waste lands is not the case which has been set up by the respondents in their plaint. They have seen fit to base their case entirely upon their grant and the averment that the lands in suit fall within the grant, and upon this averment they must stand or fall. Learned counsel for the appellants has frankly admitted that the appellants are liable to eviction from the lands in suit at the hands of the revenue authorities by appropriate action, but he urges that if and when they are served by the Revenue Courts with notice of eviction they will then have an opportunity of presenting their case before those Courts, an opportunity which has so far been denied to them. The appellants claim that they cannot be evicted by a decree of a Civil Court passed in the present suit, and in my opinion, this argument is without doubt correct. The suit of the respondents based upon their grant was bound to fail and therefore this appeal is allowed and the suit of the plaintiffs-respondents is dismissed with costs in both Courts.

1. Durga Prasad Singh v. Rajendra Narayan Bagchi, (1913) 41 Cal 493=40 I A 223=21 I C 750=18 C W N 66=19 C L J 95 (P C).

Roberts C. J.—I agree and have nothing to add.

N.S./R.K. *Appeal allowed.*

A. I. R. 1939 Rangoon 399

MYA BU J.

Mo Maung U — Appellant.

v.

Ma Bla On — Respondent.

Special Second Appeal No. 80 of 1938, Decided on 13th January 1939, against decree of Dist. Court, Maubin, in C. A. No. 3 of 1937.

Specific Relief Act (1877), S. 41—Discretion under — Transferor stating that he is major — Circumstances showing that transaction would have been entered into whether statement was made or not — Transferor cannot be said to have misrepresented age nor induced transferee — Upon cancellation of deed of transfer, descretion under S. 41 held should not be used in transferee's favour by ordering transferor to refund consideration.

Where a minor by false respresentation as to his or her age induces another to enter into a transaction it is just that the latter should be refunded the money that was paid to the minor as consideration : *A I R 1924 All 156, Rel. on.* [P 401 C 1]

Where however at the time of entering into a transaction of transfer, the transferor, upon being questioned by the transferee as to his age declares that he is a major but the facts and circumstances of the transaction are such that the alleged declaration had no influence on the transaction and that the parties would have still entered into the transaction whether the statement was made or not, the alleged statement as to age cannot be regarded as inducement by the transferor to the transferee to enter into the transaction nor does it support the theory of the transferor having misrepresented his age on the occasion. It would not therefore be proper in such a case for a Court to exercise the discretion under S. 41 in favour of the transferee upon the cancellation of the instrument of transfer, by ordering the transferor to refund the money paid to him as consideration of transfer : *30 Cal 539 (P C), Rel. on; A I R 1928 Lah 609, Disting.* [P 400 C 1; P 401 C 1]

Dr. Ba Han — *for Appellant.*

U Zeya — *for Respondent.*

Judgment.—This appeal has arisen out of a suit instituted by the respondent under S. 39, Specific Relief Act, for cancellation of a deed of sale on the ground that it was void on account of her minority at the time of the transaction. The appellant who contested the suit on various grounds, such as that the respondent was not a minor at the time of the transaction, also claimed that in the cancellation of the deed the respondent should be ordered to make a refund of the purchase money which he (the appellant) had paid for the land that was transferred under the deed. This claim was made under S. 41, Specific Relief Act. Both the trial Court and the lower Appellate Court decided all the points in dispute in favour of the respondent, and held that as the respondent was a minor at the time of the transaction, the transaction was void, and consequently directed the cancellation of the deed of sale. With reference to the appellant's claim under Sec. 41, Specific Relief Act, the trial Court upon the evidence came to the conclusion that there was active misrepresentation on the part of the respondent as to her age, which was alleged to be 19 years, and that therefore the appellant was entitled to have the amount which he paid as purchase money refunded to him by the respondent upon the cancellation of the deed of sale. The lower Appellate Court, however, came to the conclusion upon the evidence in the case that no active misrepresentation on the part of the respondent as to her age was proved and that the appellant entered into the transaction with his eyes open to the fact that the respondent was a minor, and therefore held that the appellant was not entitled to have the amount paid by him as purchase money refunded to him. Before the filing of this suit the respondent had filed a suit to enforce an unregistered written agreement entered into at the time of the execution of the deed of sale under which the appellant promised to recover the property mentioned in the deed on the respondent paying him the purchase money with an additional sum. The appellant contested that suit which failed on the ground that the agreement relied upon by the respondent not being a registered one was invalid. Both parties to the suit led evidence upon various issues of fact which were framed in that proceeding. Therefore, in the present litigation the parties agreed in the trial Court that the evidence taken in the previous suit should be treated as evidence in the present case. In addition to such evidence the parties were given the liberty to adduce such further evidence that they desired to adduce in this case. Therefore the evidence relied on by the parties in this case has been mainly evidence which was not recorded by the learned Judge who tried this case.

In addition to the interested parties to this litigation, namely the appellant, the respondent and a cousin of the respondent named Maung Ba Maung, there are three witnesses who were examined with reference

to the allegation of active misrepresentation on the part of the respondent. The evidence in the affirmative comes forth from the witnesses Po Sa and Maung Kun called by the appellant, while the evidence of Maung Nyo called by the respondent supports the denial of the respondent that there was any misrepresentation on her part as to her age. There three witnesses were admittedly present at the time of the drawing up of the deed in question, Po Sa being the writer and Maung Kun, who is related both to the appellant and the respondent who are also related as cousins, and Maung Nyo being attesting witnesses to the deed. The evidence of Po Sa and Maung Kun supports the appellant's allegation to the effect that when Po Sa was about to write the deed Po Sa questioned the respondent as to her age and that the respondent's answer was that she was 19 years old. The evidence of Maung Nyo is to the effect that he never heard anybody questioning the respondent as to her age, nor did he hear any statement made by the respondent upon this point. It is undoubtedly a weak point in the case for the appellant that there was no circumstance which would show that there was any need for Po Sa to put the alleged question. But Po Sa says that he questioned the respondent as to her age because respondent was dwarfish, and it is perfectly clear that the question was not put by him on account of the realization on his part that a contract entered into by a minor was invalid in law. Thus the question that he put was not put in connexion with the transaction of which he was about to draw the deed, but merely to satisfy his personal curiosity. Be that as it may, it must be conceded that this weak point in the appellant's case is not sufficient, in my opinion, to justify interference by the lower Appellate Court with the finding of the trial Court though the trial Court did not in this case have the ordinary advantage over the Appellate Court of having the evidence of witnesses recorded before it.

But that is not the end of the matter, because in the circumstances of the case it appears to me that the parties would have entered into the transaction even if this alleged statement was not made, and I am unable to attribute the entry of the parties into the transaction to this statement at all. The writer of the deed, Po Sa, was a petition-writer, but he confesses that he did not know what the legal effect of the deed signed by a minor would be. Therefore so far as the question of minority was concerned, it was a matter of indifference to him. The transaction was brought about by Maung Ba Maung, respondent's cousin, in whose care the respondent was living at the time. He was a fishery lessee who needed money to pay the arrears of revenue due for the fishery, therefore he approached the appellant to let him have the money upon the respondent entering into this transaction. It was only after he had made all the arrangements that the respondent was taken to the place where the deed was to be drawn up to give the transaction its finality. The appellant was also related to the respondent as a cousin and they all lived in the same village until about eight years before the suit when the appellant left this village and took up his residence elsewhere which however does not appear to be so distant as to render improbable their meeting with each other on some occasions during the period. The arrangements had brought the matter to the stage when the final deed was to be drawn up, and up to that time it is reasonably clear that the appellant never had in his mind the question of minority or majority of the person who was going to execute the deed of sale in his favour. Therefore, upon the facts of the case in my opinion it is safe to hold that it was not the alleged declaration of her age to be 19 that had any influence on the transaction at all, and that this transaction would have been entered into whether that statement was made or not.

The question is whether in these circumstances the Court should exercise the discretionary power under Sec. 41; that is whether the Court will require the respondent to make any compensation to the appellant, and it resolves itself into whether justice requires the making of such an order. In 30 I A 114[1] it was held that a false representation made to a person who knows it to be false is not such fraud as to take away the privilege of infancy. In that case the Courts found that the agent of the mortgagee had not acted upon nor was misled by, the statement by the mortgagor as to his age but had been fully aware at the time the mortgage was executed of the minority of the mortgagor. In those circumstances their Lordships upheld the view of the Courts in India that under the circumstances of the case justice

1. Mohori Bibee v. Dharmodas Ghose, (1903) 30 Cal 539=30 I A 114 = 8 Sar 374 = 7 C W N 441 (P C).

did not require them to order the return by the respondent of money advanced to him with full knowledge of his infancy. In 9 Lah 701[2] a Full Bench of the Lahore High Court held, Harrison J. dissenting, that a minor who had entered into a contract by means of a false representation as to his age, though not liable under the contract, may, in equity, be required to return the benefit he had received by making a false representation as to his age. There the facts of the case showed that the minor had falsely represented himself to be a major and induced a person to enter into a contract with him. I do not think that the alleged statement made by the respondent to Maung Po Sa can be regarded as an inducement by the respondent to the appellant to enter into the transaction, because, as I have pointed out upon the facts and circumstances of the case the appellant would have taken the sale from the respondent even if she never made that statement to Po Sa. In 45 All 644[3] at page 649 Sir Grimwood Mears C. J. and Piggott J. of the Allahabad High Court pointed out that in each case the test must be the conduct of the parties, and observed in the course of the judgment :

> Purchasers or money-lenders who deal with persons who are hovering upon majority, and the ascertainment of whose age is impossible must not complain if their cupidity leads them at times into litigation and loss.

My view as to the principle laid down by this case is where a minor by false representation as to his or her age induces another to enter into a transaction it is just that the latter should be refunded the money that was paid to the minor as consideration. In my opinion it is not proper to exercise the discretion under S. 41, Specific Relief Act, in favour of a transferee from a minor upon the cancellation of the instrument of transfer on the ground of the transferor's minority at the time of the transaction, unless the transaction has been the consequence of the false representation by the minor as to age. Before I conclude I must mention that in 1932 when Maung Ba Maung was required by the Revenue Officer to furnish security for the fishery license fees the respondent, who was then only 13 years of age, offered herself as his surety by a petition in which she stated her age to be 16. It is surprising to find that the Revenue Officer concerned accepted her suretyship and the lease was issued to Maung Ba Maung. Judging by that conduct it seems that the respondent was a person who would be willing to make a misstatement of her age at the beck and call of Maung Ba Maung, but it cannot be said that she put herself forward as a major, and the circumstance does not by itself support the theory of her having actively misrepresented her age on the occasion of the transfer in question. In all the circumstances of the case I see no sufficient reason for interfering with the judgment of the lower Appellate Court on this point. The appeal fails and it is dismissed with costs.

N.S./R.K. *Appeal dismissed.*

2. Khan Gul v. Lakha Singh, (1928) 15 A I R Lan 609=111 I C 175=9 Lah 701=30 P L R 60 (F B).
3. Muhammad Said v. Bishambhar Nath, (1924) 11 A I R All 156=85 I C 79=45 All 644=21 A L J 596.

A. I. R. 1939 Rangoon 401

ROBERTS C. J. AND MACKNEY J.

E. M. Joseph — Appellant.

v.

Official Assignee — Respondent.

Civil Misc. Appeal No. 81 of 1938, Decided on 3rd May 1939, against order of High Court, D/- 18th August 1938.

Insolvency—One beneficiary of fund becoming insolvent — Trustee instead of paying to Official Assignee such money as would have been payable to insolvent in ordinary course forming his own notion as to proper allowance and continuing to pay it to insolvent for maintenance at the expense of other beneficiaries—Money so paid held should be refunded to Official Assignee.

One of the beneficiaries of a fund became insolvent. The trustee of this fund instead of paying to the Official Assignee such moneys as would have been payable to the insolvent from time to time in the ordinary course, formed his own notions as to what the proper allowance might be and continued to pay it to the insolvent for his maintenance at the expense of other beneficiaries. The Official Assignee applied for the refund of money so paid to the insolvent by the trustee:

Held that the trustee should be directed to refund the money to the Official Receiver : *(1907) 1 K B 865, Disting.* [P 402 C 1, 2]

N. M. Cowasjee — *for Appellant.*

E. C. V. Foucar — *for Respondent.*

Roberts C. J. — This is an appeal from an order of Shaw J., whereby the trustee of a fund, one E. M. Joseph, the beneficiaries of which were the several sons of J. I. Joseph (deceased), including one A. P. Joseph who has since become insolvent, was directed to pay to the Official Assignee the sum of Rs. 3097-6-9 or so much of it as might be payable by reason of the order of an Appellate Court which was presently

considering an appeal from an order by the learned Insolvency Judge, and whose judgment is contained in the Civil Miscellaneous Application No. 13 of 1938. It appears that the trustee of this fund, instead of handing over from time to time such moneys as would have been payable to the insolvent and other beneficiaries in the ordinary course in the case of the insolvent to the Official Assignee, in forming his own notions as to what the proper allowance might be and in making, at the expense of the beneficiaries (including, of course, himself) a series of payments of moneys which were in fact due and payable to the Official Assignee in insolvency, followed an entirely erroneous idea. The question whether the insolvent should have been permitted to receive the money for maintenance was before the High Court in two cases in July 1935 and in November of the same year, and both applications appear to have been rejected. Nevertheless, the trustee continued to make the payments (very small in amount, only Rs. 18 a week) for the maintenance of the insolvent, his wife and eight children, but nonetheless in clear contravention of the law. And having done so, the position now is that the Official Assignee has applied for this money to be refunded by the appellant and the learned Judge on the original side directed that that should be done but that the order to be drawn up should abide by the decision of the Appellate Court on the insolvency matter. So far as that decision is concerned, it is only necessary to say that the Bench dismissed the application for allowance and directed an allowance under S. 75, sub-cl. (2), Rangoon Insolvency Act, of Rs. 50 a month subject to various conditions. It appears from the effect of the judgment that the insolvent was allowed not only Rs. 18 a week but the use of premises which resulted in a loss of Rs. 50 a month, which would otherwise have to be paid as rent to the trust estate. The insolvent's share of this loss would be Rs. 12.8.0. This, we are told, has been calculated in the claim together with the Rs. 18 which has been formerly paid by the trustee to the insolvent instead of to the Official Assignee.

We have been referred by Mr. Cowasjee to the case in (1907) 1 K B 865[1] from which it is clear that an officer of the Court who stands by whilst, or who has constructive notice that, payments are being made which need not be made by way of premiums in insurance during the pendency of a bankruptcy, cannot afterwards turn round, despite the fact that there will be no answer in law or equity to his claim, and refuse the repayment of those sums by him. The learned Judges in that case all stressed the fact that the Court could not allow one of its officers to make a claim which was founded upon the fact that they were taking undue advantage of one who had acted in ignorance of his right and permitted him to go on doing so and afterwards turning round by means of what Vaughan Williams, L. J. described as a "shabby trick" to try to get some benefit to the creditors thereby.

This case is quite unlike that case. It is a case in which a trustee saw fit, out of motives of highmindedness, benevolence and great charity, to indulge in the whim of practising those virtues not at his own expense but at the expense of others. That being so, the Official Assignee is clearly right in saying: "If you would be high-minded, benevolent and charitable, you must do so out of your own pocket and not out of the trust estate moneys." That being so, there is no doubt that the order made by the learned Judge on the original side was right and it must be confirmed with costs, advocate's fee six gold mohurs.

Mackney J.—I agree.

D.S./R.K. *Order confirmed.*

1. In re Tyler, Ex parte the Official Receiver, (1907) 1 K B 865=76 L J K B 541 = 97 L T 30=14 Manson 73=51 S J 291=23 T L R 328.

A. I. R. 1939 Rangoon 402

MYA BU AND DUNKLEY JJ.

Ah Phut and others — Appellants

v.

The King.

Criminal Appeals Nos. 388, 389 and 390 of 1939, Decided on 20th June 1939, from order of Sess. Judge, Mergui, D/- 15th May 1939.

(a) Evidence Act (1872), S. 118—Child witness—Duty of Court.

Where a young child is called as a witness the first step for the Judge or Magistrate to take is to satisfy himself by questioning the child that it is a competent witness within the meaning of S. 118. [P 403 C 1]

(b) Oaths Act (1873), Ss. 5, 6 and 13—Oath or affirmation is compulsory for every witness—Child is not exception—Omission does not render evidence absolutely inadmissible.

Every person who is examined as a witness shall make an oath or affirmation and there is no

exception in the case of a child of tender years. Therefore if a child is adjudged to be competent witness an oath or affirmation must be administered to him before he is examined; but an omission whether deliberate or inadvertent to do so does not render his evidence absolutely inadmissible. But it is for the Court to decide what weight may be given to such unsworn testimony of the child whose evidence must always be received with great caution: *A I R 1918 L B 22, Not foll.; Case law referred.* [P 403 C 2; P 404 C 1]

(c) Evidence Act (1872), S. 30 — Confession of co-accused—Evidentiary value.

A confession of a co-accused cannot be the main evidence in a case but it is the weakest possible kind of evidence which cannot be acted upon. Hence such a bare statement in the confession of a co-accused is not alone sufficient to justify a finding of guilty of so grave an offence as that under S. 396 : *A I R 1938 Rang 92, Foll.* [P 404 C 1; P 405 C 2]

U Kyaw Zan — *for Appellants.*

U Tun Byu, Government Advocate — *for the Crown.*

Mya Bu J.—The three appellants have been convicted by the learned Sessions Judge of Mergui of an offence under S. 396, Penal Code, and the appellants Ah Phut and Lan Taung have been sentenced to death and the appellant Sa Khon has been sentenced to undergo seven years' rigorous imprisonment. At the beginning of the hearing of these appeals, learned counsel for the appellants urged that the evidence of Ma Shwe Tun May (P. W. 3), a child aged eight years, was not admissible because she had not been sworn or affirmed, and it is clear that the learned Sessions Judge deliberately refrained from administering an oath or affirmation to Ma Shwe Tun May on the ground of her tender years, and it is therefore necessary that we should make some observations for the guidance of the learned Sessions Judge regarding the manner in which a child of tender years, who has been called as a witness, should be treated by the Court. Under S. 118, Evidence Act :

All persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Consequently, when a young child is called as a witness the first step for the Judge or Magistrate to take is to satisfy himself, by questioning the child that the child is a competent witness within the meaning of S. 118, Evidence Act. Under Ss. 5 and 6, Oaths Act, 1873, every person who is examined as a witness shall make an oath or affirmation and there is no exception in the case of a child of tender years. Therefore if the child is adjudged to be a competent witness, an oath or affirmation must be administered to the child before he is examined. In the present case learned counsel for the appellants, in submitting that the evidence of Ma Shwe Tun May is inadmissible on the ground that she was advisedly neither sworn nor affirmed, relied upon the case in 9 L B R 88,[1] the headnote of which reads as follows :

Section 6, Oaths Act (10 of 1873). imperatively requires that no person shall testify as a witness except on oath or affirmation, and notwithstanding S. 13 of the same Act, the evidence of a child is inadmissible if it has advisedly been recorded without any oath or affirmation.

In coming to this decision the learned Judges professed to follow two decisions of the Allahabad High Court, namely 10 All 207[2] and 11 All 183.[3] With the greatest respect the second case is no authority for the proposition advanced for all that was decided in that case was that the evidence of a child could not be recorded without administering to him an oath or affirmation. The decision in 10 All 207[2] has been overruled in 38 All 49.[4] In our opinion, the provisions of S. 13, Oaths Act, are so plain as to admit of no misunderstanding. They are as follows :

No omission to take any oath or make any affirmation . . . . shall invalidate any proceeding or render inadmissible any evidence whatever.

The word "omission" is used in the Section without any qualification and, consequently, it must be held to include any omission whether that omission was deliberate or inadvertent. This is the view of the law which is now taken by all the High Courts : *see* 14 Beng L R 294,[5] 24 C W N 767,[6] 16 Bom 359,[7] 38 Mad 550,[8] 6 Pat L J

1. Deya v. Emperor, (1918) 5 A I R L B 22 = 43 I C 86=9 L B R 88=19 Cr L J 54.
2. Queen-Empress v. Maru, (1888) 10 All 207= 1888 A W N 86.
3. Queen-Empress v. Lal Sahai, (1889) 11 All 183 =1889 A W N 65.
4. Emperor v. Dhani Ram, (1915) 2 A I R All 437 =31 I C 1015=16 Cr L J 829=38 All 49=13 A L J 1072.
5. The Queen v. Sewa Bhogta, (1875) 14 Beng L R 294=23 W R 12 (F B).
6. Emperor v. Sashi Bhusan, (1920) 7 A I R Cal 414=58 I C 817=21 Cr L J 817 = 24 C W N 767=32 C L J 31.
7. Queen-Empress v. Shava, (1892) 16 Bom 359.
8. China Venkadu v. Emperor, (1914) 1 A I R Mad 293 = 22 I C 737 = 15 Cr L J 161 = 38 Mad 550.

147[9] and 31 P R 1889 Cr.[10] It is therefore clear that the word "omission," as used in Sec. 13, Oaths Act, includes any kind of omission and is not restricted to accidental or negligent omissions. Hence, although a child must be either sworn or affirmed before giving evidence, nevertheless if the child gives evidence without making an oath or affirmation his evidence is still admissible; but, as learned counsel for the appellants has pointed out, it is for the Court to decide what weight may be given to such unsworn testimony, and the evidence of a child must always be received with great caution. We do not propose to place any reliance on the evidence of Ma Shwe Tun May in this case. The appellant Sa Khon made a confession, and in the course of his judgment the learned Sessions Judge said :

> The main evidence for the prosecution is that contributed by the accused Sa Khon in his confession recorded by the Second Additional Magistrate, Mergui, on 12th December 1938.

How the confession of a co-accused can be the main evidence in a case we are unable to understand. It is the weakest possible kind of evidence, which can only be taken into consideration against the co-accused by reason of the provisions of S. 30, Evidence Act. It is not given upon oath and it is not tested by cross-examination. The correct view of the confession of a co-accused has been laid down by Mackney, J. in 1938 R L R 30,[11] the headnote of which is as follows :

> Section 30, Evidence Act, provides that the Court may take the confession of a co-accused person into consideration against the other co-accused, that is to say, that the Court can only treat a confession as lending assurance to other evidence against a co-accused.

Consequently, the confession of Sa Khon can, in this case, only be used for the purpose of corroborating the evidence given by the witnesses upon oath. For that purpose the confession of the appellant Sa Khon is, in our opinion, practically valueless. It is only necessary to read the confession to see that Sa Khon has made it in such a way as to exculpate himself as far as possible, and for this reason its truth is open to the gravest doubt. The robbery in connexion with which the appellants have been convicted occurred at Manoron village on the night of 21st November 1938. During that day three Siamese, who were unknown in the village, arrived at the house of Maung Shwe Myat and Ma E in the early afternoon and spent the rest of the day there. Before their arrival the appellant Sa Khon who belongs to that village, had visited Shwe Myat's house, and according to his confession, he had gone there as a spy of the robbers. On that day Ma Shwe Kyo Hla (P. W. 4) and her daughter Ma Shwe Tun May happened to be spending the day with Shwe Myat and Ma E. In the evening, after lamps had been lighted, the visitors suddenly attacked Maung Shwe Myat and Ma E. When they arrived they were carrying weapons, two of them a da each and one an axe, but in this wild country there was nothing unusual in that. However, after night had fallen one of them cut Maung Shwe Myat on the head with his da and when Ma E tried to take the da away she received a blow from the visitor who was carrying the axe. Immediately Ma Shwe Kyo Hla and Ma Shwe Tun May ran away into the jungle. Ma Shwe Kyo Hla says that she hid in the garden at some little distance from the house and she saw the three men going past her, taking Maung Shwe Myat and Me E with them. Ma Shwe Kyo Hla and her daughter hid in the jungle until daybreak and then the former returned to the house, and on her way she came upon the dead body of Ma E which was lying inside the garden. At some further distance away she also found the dead body of Maung Shwe Myat. In the first information report, which was given by Saw Ba Thein (P. W. 9), it is stated that the body of Shwe Myat was lying close to a hole which had been dug in the ground and at the mouth of hole there was a rusty da, but so superficial was the conduct of the prosecution that this important fact has not been brought out in evidence. It shows that, in all probability, Maung Shwe Myat had been compelled by the robbers to point out the place where he had buried his valuables and that the valuables had been dug up and taken by the robbers.

From the very first Ma Shwe Kyo Hla told the villagers, and subsequently she told the headman and the Police Officers, that she would be able to identify the three Siamese who came to Shwe Myat's house and who of course were obviously the robbers, and there is every reason why she should be able to identify them because she was in Shwe Myat's house at the same time as

9. Fatu Santal v. Emperor, (1921) 8 A I R Pat 109=61 I C 705=22 Cr L J 417 = 6 Pat L J 147=2 P L T 288.
10. Budha v. Empress, (1889) 31 P R 1889 Cr.
11. Nga Mya v. The King, (1938) 25 A I R Rang 92=174 I C 947=39 Cr L J 481=1938 R L R 30.

these three robbers for at least four hours and also for a considerable period while it was still daylight. For some reason of which there is no evidence, due to the extremely summary manner in which the Investigating Officer was examined, suspicion fell upon the appellant Sa Khon and he was arrested, and he then made a statement, in consequence of which he was taken to Siam and he pointed out the two appellants, who were arrested on his information on 1st December. On 12th December all the three appellants were sent before a Magistrate to have their confessions recorded but the appellants Ah Phut and Lan Taung declined to make confessions and only Sa Khon made a confession. As has already been pointed out, his confessional statement is a suspicious statement, but it does amount to an admission that he acted as guide for the robbers and received a sum of Rs. 10 as his share of the booty. This money was found by the police in his house when it was searched. It was handed over to the police by his wife Ma Ni (P. W. 6). She says that when she received this money from her husband it was tarnished as if it had been buried, and this is in accordance with Sa Khon's confession. So far as Sa Khon is concerned, his complicity in this robbery is clearly established by his confession, which is corroborated by the recovery of the money from his house and by the evidence of his own wife.

Against the appellants Ah Phut and Lan Taung there is also sufficient evidence to justify their convictions for participation in the robbery. Leaving aside the evidence of the child Ma Shwe Tun May, who was able to pick out the appellant Lan Taung only at an identification parade, there is the evidence of Ma Shwe Kyo Hla, who identified both Ah Phut and Lan Taung at this parade, which was held at Bokpyin police station on 8th December. As we have already pointed out, Ma Shwe Kyo Hla had ample opportunity of identifying the three Siamese who came to Shwe Myat's house. Naukachok (P. W. 5) supports her evidence because he says that when he was returning from school at about 4 P. M. on the day of the robbery he saw a Siamese sitting near Maung Shwe Myat at the entrance of Shwe Myat's house, and he identifies this Siamese as the appellant Lan Taung whom he picked out at the identification parade. Ma Ni (P. W. 6) says that three or four days before the robbery the appellants Ah Phut and Lan Taung came to her house and stayed one night, and they returned on the fifth day afterwards and took away her husband Sa Khon with them, and late on that same night her husband returned and gave her ten tarnished rupees. There is other evidence to show that Sa Khon was seen in the company of Siamese, who were not identified, by certain witnesses on the day of the robbery and also evidence to show that Ah Phut and Lan Taung and some other Siamese were brought to Manoron from Nandaung village in Siam in a boat about 15 days before the robbery, and that after the robbery Ah Phut and Lan Taung returned to Siam and then Lan Taung appeared to have plenty of money. Apart from this somewhat doubtful evidence, the identification of the two appellants by Ma Shwe Kyo Hla, supported by their identification by Naukachok and Ma Ni is sufficient to establish beyond any reasonable doubt that Ah Phut and Lan Taung must have taken part in this robbery.

The learned Sessions Judge has held that the offence committed was a dacoity in the course of which murder was committed by one of the dacoits, so as to bring the offence within Sec. 396, I. P. C., but beyond the bare statement of the appellant Sa Khon in his confession there is no evidence whatever on which it can be held that five or more persons took part in this robbery. We have already dealt with the value of the confession of a co-accused as evidence, and a statement in such a confession could not alone be held sufficient to justify a finding of guilty of so grave an offence as that under Sec. 396, which is punishable with death. Moreover, on this point Sa Khon's confession is obviously untrustworthy. He admits that only three of his confederates went to the house of Shwe Myat and Ma E, and he gives their names as Ah Phut, Lan Taung and Ah Chein. Then, further on, he says that some time afterwards he and one dacoit Bo and two other Siamese proceeded to Shwe Myat's house but remained outside. He does not say where he met this dacoit Bo and the other two Siamese, nor does he give their names. A vague statement of this kind could not be acted upon even if it was made in the course of a sworn deposition, and it is worthless when contained in the confession of a co-accused. Consequently, the evidence in the case establishes only that four persons took part in this robbery. Hence the appellants cannot be held responsible for the murder of Shwe

Myat and Ma E unless it is shown either that they actually committed the murders or one of them, or that they were parties to a common intention to commit them. On the first point there is no evidence at all. On the second point there is also no evidence, and, in fact, the only statement appearing in evidence, which bears upon this question of common intention, tends to show that the appellants Ah Phut and Lan Taung had no intention at the time of the robbery of injuring either Shwe Myat or Ma E seriously, for Ma Shwe Kyo Hla says in her evidence that when these two appellants were taking Shwe Myat and Ma E from their house she heard one of them enquire of Ma E whether she had been hurt much and she replied that she had only been hurt a little, and she heard Shwe Myat telling these two appellants to walk with care or they would fall off the bridge.

Consequently, the responsibility of the appellants Ah Phut and Lan Taung for these murders has not been brought home to them, and equally it is clear that Sa Khon did not commit an offence under Sec. 396. The Section of the Penal Code which is applicable is S. 394. We therefore alter the convictions of all the three appellants to convictions of an offence under this Section, and we reduce the sentence passed upon the appellants Ah Phut and Lan Taung to sentences of seven years' rigorous imprisonment each. The sentence of seven years' rigorous imprisonment passed by the learned Sessions Judge on Sa Khon will stand.

S.G./R.K. *Sentence reduced.*

A. I. R. 1939 Rangoon 406

BAGULEY J.

Boomiah — Applicant.

v.

R. M. N. R. M. Chettyar Firm — Respondent.

Civil Revn. No. 257 of 1938, Decided on 6th January 1939, from order of Third Small Cause Court Judge, Rangoon, in Civil Execution No. 12601 of 1937.

(a) Limitation Act (1908), Art. 182 (5) — Starting point is date of final order and not date of application as before amendment — Final order on execution application committing judgment-debtor to civil prison — Execution proceedings cannot be said to be pending till judgment-debtor is in jail.

Before the amendment in 1927 the starting point for limitation was the date of an application made to a Court for execution of a decree or order. But after the amendment in 1927 the period of limitation runs from the date of final order passed by a Court on an application for execution or to take some step-in-aid of execution of a decree or order. [P 407 C 1, 2]

An application for execution was made on 14th January 1933 and the final order on this application was passed on 16th February 1933 committing judgment-debtor to civil prison. The judgment-debtor was released from the civil jail on 1st July 1933 for non-payment of subsistence allowance :

Held the date from which limitation began to run was 16th February 1933 and execution proceedings could not be said to be pending till judgment-debtor was in jail : *A I R 1933 Mad 83 and A I R 1926 Cal 1077, Discussed; 25 Bom 639 and A I R 1929 Rang 152, Disting.* [P 408 C 1]

(b) Limitation Act (1908), Art. 182 (5) — Application to proper Court — Sending money-order *(Obiter).*

Sending a money-order from post-office for a subsistence allowance of a judgment-debtor is not an application to a proper Court within the meaning of Art. 182 (5) : *A I R 1933 Mad 83, Dissent.* [P 407 C 2]

Kalyanwalla — *for Applicant.*

Bharadvaj — *for Respondent.*

Order. — This application raises a very simple point of limitation about which however there is very considerable conflict of opinion and a marked lack of authority. The plaintiff obtained his decree on 19th January 1932. He filed an application for execution on 14th January 1933. The proceedings ended with a diary order dated 16th February 1933 :

Decree-holder in person and judgment-debtor in custody. There is no settlement. Judgment-debtor is committed.

The judgment-debtor went to the civil jail; his subsistence money was paid in month by month until he was released on 1st July 1933 for non-payment of subsistence. The next application for execution was filed on 18th May 1936 but was summarily rejected the next day as time-barred. A further application was filed ten days later, on 29th May 1936. Notice, which was issued, was never served and on 26th June the diary order says the case is closed by request.

He now comes with the present application for execution. This was filed on 12th December 1937. A point was raised that limitation had prevented further execution of the decree, more than three years having lapsed from 16th February 1933, the date of the final order passed by the Court on the first application for execution before any further application for execution was made to the Court. To decide the case it is first necessary to find exactly what the law says as, I fear, it must be acknowledged that some Courts have never ascertained

this. Limitation with regard to execution of the decree is given in Art. 182. In the ordinary books all these Articles appear one below the other with commentaries in between, the Articles themselves being in three columns and so voluminous are the commentaries that the headings of these columns were separated by enormous distances from the Articles themselves. In my edition of Rustomji the schedule containing the Articles starts on p. 533 and Art. 182 is more than a thousand pages later. In consequence it is quite common to omit to look up the beginning of the schedule and see what is at the top of any particular column. The heading of col. 3 is "time from which period begins to run" and the relevant portion of Art. 182 reads in col. 3 under this heading.

(Where the application next hereinafter mentioned has been made) the date of the final order passed on an application made in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree or order.

Apart from the brackets there is one comma in the whole of this article and to understand what that comma means one has to look back at the heading of the column and see that the whole sentence must refer to some landmark of time. Now, taking the first portion of the quotation,

the date of the final order passed on an application made in accordance with law to the proper Court for execution,

it is quite understandable and there is no trouble at all. The period of limitation runs from this particular time, namely the date of the final order. I am asked to hold that this comma and the word "or" are completely disjunctive and the alternative period is "to take some step-in-aid of execution of the decree or order" but "to take some step-in-aid" is no landmark of time, and any meaning attached to the second part of the sentence must show a point of time. Except for the fact that it has given difficulty I am unable to understand how any difficulty can arise. Applications are made to the Court for execution by attachment, arrest, the appointment of receiver and so on; again applications may be made to the Court to take some step-in-aid of execution by transferring a decree to another Court, by adding legal representatives, etc. and, in my opinion, this portion of Art. 182 must be read "(where the application next hereinafter mentioned has been made) the date of the final order passed on an application made in accordance with law to the proper Court for execution, or the date of the final order passed on an application made in accordance with law to the proper Court to take some step-in-aid of execution of the decree or order." Reading it in this way involves no strain on the English, it gives two landmarks of time from which the period of limitation can run, and is perfectly simple—and it runs smoothly and grammatically. I have been referred to 56 Mad 320[1] in which it is held that

a remittance by money-order to the Jail Superintendent of subsistence allowance necessary for the detention of a judgment-debtor in prison is an application to a Court within the meaning of Art. 182 (5), Limitation Act and is a step-in-aid of execution.

This ruling I can dismiss by saying that it has been passed under the former Limitation Act as the facts which gave rise to it occurred in 1923, the present Act dating from 1927. The reasoning however which is contained in the judgment as it stands, I am entirely unable to accept. How sending a money-order from a post office can be held to have constituted an application to a Court I am entirely unable to understand. The post office is not a proper Court to which a decree-holder can make an application for execution of a decree. To my mind it is so obvious that it is difficult to explain or to give reasons for it. I was referred to a still older case, 25 Bom 639,[2] but that is also, of course, not under the present Act, and under the old Acts the starting point for limitation was the date of an application made to a Court to take a step-in-aid of execution and the Courts frequently allowed various acts done to be constructively regarded as applications to Court. The dates on which applications are made to a Court now are of no interest. What we are concerned is the date of the final order passed on the application and that is usually quite easy to determine. I would refer in passing however to two other cases which were mentioned. 7 Rang 132,[3] which dealt with matters earlier than 1927 and is under the old Act, is therefore obsolete. I would also refer to a passage in 53 Cal 664[4] beginning at p. 677 :

1. Raja of Ramnad v. Kuppuswami Pillai, (1933) 20 A I R Mad 83=140 I C 498=56 Mad 320 = 63 M L J 792.
2. Malukchand Ratanchand v. Bechhar Natha, (1901) 25 Bom 639=3 Bom L R 275.
3. Somasundaram Chettyar v. Ma Shwe Thit, (1929) 16 A I R Rang 152 = 117 I C 578 = 7 Rang 132.
4. Pitambar Jana v. Damodar Gachait, (1926) 13 A I R Cal 1077=98 I C 166=53 Cal 664=45 C L J 86=30 C W N 918.

It is, of course, beyond controversy that where a decree-holder deliberately withdraws, or invites the Court to dismiss, his application he cannot afterwards rely upon that application for the purpose of saving limitation in respect of a subsequent application for execution.

With respect, I must say that I can find nothing in the Limitation Act which gives anything to support this proposition of the law said to be beyond controversy. As the Limitation Act says nothing about this I am unable to accept this purely ex cathedra statement. In the present case an application for execution was made on 14th January 1933. The final order passed on the application is to be found in the diary order dated 16th February 1933. Therefore in my opinion that is the date from which limitation began to run. I am asked to hold that because the judgment-debtor was in jail till the end of June 1933 the proceedings were still pending till then. I am unable to accept that view. If a man is sentenced to ten years, imprisonment in a criminal case the proceedings can in no way be said to be kept pending for ten years. Later orders might have been made in these proceedings. For example, the decree-holder might have certified to the Court in full satisfaction and asked for the release of the judgment-debtor in which case probably there would have been a further order passed; but no such order was passed and the final order passed must be the last order, namely "judgment-debtor is committed." Limitation therefore started on 16th February 1933 and on 17th February 1936 the decree had become time-barred. The application which was made in May 1936 could not revive the decree. This is an application against an order passed by the Judge refusing to cancel an order which he had made allowing execution to proceed. As I have pointed out, the decree is time-barred. The application is allowed and the order granting issue of warrant of arrest and detention of the applicant is set aside. Respondent to pay the applicant's costs, advocate's fee three gold mohurs.

N.K./R.K. *Application allowed.*

A. I. R. 1939 Rangoon 408

ROBERTS C. J. AND DUNKLEY J.

Government of Burma and another — *Defendants* — Appellants.

v.

Arunachallam and others — *Plaintiffs* — Respondents.

First Appeal No. 24 of 1939, Decided on 17th May 1939, from decree of Dist. Court, Amherst, D/- 24th January 1939.

Burma Municipal Act (3 of 1898), Sec. 8—Rules under Rule 68-A—Candidate filing petition against election of four others and alleging several irregularities in conduct of election — Judge finding objections valid and criticizms correct—Judge declaring candidates who were the next four elected — Government ordering preparation and publication of electoral rolls—Candidates declared elected suing for declaration that orders of Government and electoral authority were ultra vires and they were elected — Trial Court decreeing suit—There being no proper election candidates could not be elected and orders of Government were within their powers.

One of the candidates to a Municipal election brought a petition against four others who were thought successful, on several grounds of irregularities, with the result that it came to the notice of Government that the proceedings of the faulty election were a farce and a fiasco; and consequently they proceeded under R. 68 made under Sec. 8 for the preparation and publication of the electoral roll for holding a proper election. The Judge who decided the petition however held that the objections raised were valid and all criticizms were correct and that next four persons who were on the list of candidates ought to be elected. The candidates so declared elected sued for a declaration that the order of the Government and the electoral authority were ultra vires and that they were duly elected members of the Municipal Committee :

Held that once an election took place the Government could not declare it void and hold a new one. But the authorities must make a decision upon the facts as represented to them and must make their decision in good faith; and no proper election having been held the candidates could not be declared elected, and that the orders of the Government and the electoral authority were within their powers. [P 409 C 2 ; P 410 C 1]

U Thein Maung, Advocate-General — *for Appellants.*

U E Maung (1) — *for Respondents.*

Roberts C. J. — This appeal is brought by the Government of Burma and the Electoral Authority, Moulmein Municipal Election, from a decision of the learned District Judge of Amherst in which it was laid down that the order of the first defendants, the Government of Burma, dated 29th August 1938, and the declaration of defendant 2, the Electoral Authority, dated 3rd September 1938, were ultra vires and that the plaintiffs were elected members of

the Municipal Committee of Moulmein and were entitled as such to exercise their duties and responsibilities during the lifetime of the Committee.

A purported election took place on 4th November 1937, and shortly afterwards respondent 1 in this case brought a petition, which was Civil Miscellaneous No. 53 of 1937, against those who were thought to have been the successful candidates and to have been elected upon the Municipal Committee, and stated inter alia, that the poll was wrongly closed at various times, that the candidates and their agents were ordered to leave the enclosures by the supervisors, yet one of the agents, Chidambaram, was for a time allowed inside, thus giving him a preference over the representatives of the other candidates, and added that there was impersonation of a number of purely imaginary persons whose fictitious names appeared on the electoral rolls. The consequence of this petition was, of course, that the present respondents, more than any other persons, first brought to the notice of those in authority the fact that the proceedings which had taken place on 4th November 1937, at Moulmein, and which purported to have led to a faulty election, were a farce and a fiasco. The objection which was raised submitted that the election of the four respondents in the case, namely those four who were at the head of the poll, was void by reason of material irregularities in the election proceedings, and also by reason of bribery, impersonation and undue influence alleged to have been encouraged by them, and the Judge held, reviewing all the matters, that the objections raised in the petition were valid, and he pointed out that all the criticizms made in regard to the electoral roll were correct, and that there were a number of roads in which more houses were given on the roll than actually existed, and all kinds of other mistakes in the roll, which showed that the figures which had been reached or could be reached in any election purported to have taken place upon that roll would be unsatisfactory and unsustainable. Upon that it was thought that the next four persons who were on the list in having received votes during these proceedings ought to be elected. This, of course, was a mistake. The position was that a report should have been made to Government and that the Government should have taken action as it was properly entitled to do.

By Sec. 8, Burma Municipal Act, the Government shall, for every municipality of which the system of election is introduced, make rules regulating a number of matters, including the system of representation and election, for which it may seem expedient to provide, the time of election and mode of recording votes, the registration of electors and so on: and the members of the Committee shall under the Section, be elected in accordance with the rules. When the Government received the report that the election had been such a fiasco, it proceeded to act under its own rules made under this Section, and by R. 68 the Government may take any action which appears to it to be necessary for the proper preparation or publication of the roll, that is the electoral roll, or for the proper holding of the election. There can, upon the present respondents' own showing, be no doubt whatever that the election has not been properly held because they have complained of a lot of individual acts and wrong-doings on behalf of individual candidates, and of the closing of the poll during the hours in which it should have been open, and also of the entirely unsatisfactory nature of the roll which was the basis upon which the election was held.

Now, it is necessary, I think, to say that when one comes to look at these orders, although the order of defendant 1, the Government, by no means needs criticism, the same, unfortunately, cannot be said of the order of defendant 2. The slip made however is one of a trivial nature. What has been declared is that the election of Dr. Mazumdar, Mr. R. K. S. Pathy, Mr. K. Arunachalam and Kola Dharmarao is void and they therefore ceased to be members of the Moulmein Municipal Committee. That, of course, is not accurate, the fact being that they never have been members of the Moulmein Municipal Committee although they have acted as such and, no doubt, spoken and voted in good faith in the meetings of the Municipal Committee. The election having been void however it is not accurate to say that they ceased to be members of the body to which they have never in fact belonged.

Now, it is clear that once an election has taken place the Government cannot declare it to be void and hold a new one. A fear that one decision might go to the length of holding this was expressed by U E Maung, but there is really no ground for entertaining it. If the Government were

to take such a course, it would be at the peril of incurring liabilities of an unsuccessful litigant when such a course was challenged in the Courts: but they must exercise their discretion in any particular case as to whether an election has been held or not. Supposing, for example, a severe earthquake took place in the town after polling had begun and a number of polling boxes were saved and many destroyed: the argument presented to us by the respondents' advocates would lead to this, that, though everyone would know that the election had been a complete failure, the Government could not take any action under Rule 68, which appeared to be necessary, for holding a proper election. That would lead to a hopeless conclusion. The authorities must make a decision upon the facts as represented to them and must make their decision in good faith. When they are apprised of the existence of facts as the result of an inquiry, in which evidence as to those facts is relevant, they may be assisted by the examination of the tribunal's opinion and the record of the evidence before it. Although the only question before the District Judge related to the petition of the respondents, a number of other matters came to light. When it transpired that no satisfactory election was held, the Government immediately took prompt action, and hence this order. The respondents themselves, by the steps they took, challenged the validity of the whole election and the only conclusion to be arrived at from the finding is that no proper election was ever held. If they have come to the conclusion that the learned Judge's opinion was wrong and the evidence upon which they relied, and upon which the Government relied, was unreliable, they are, of course, entirely at liberty to file a suit for a declaration that they were duly elected as members of the Municipal Committee. That they have not done. They have chosen to challenge the orders issued by the Government and the Electoral Authority as being ultra vires, and for the appellants it has been conclusively proved that these orders were within the powers of each of the appellants. In my opinion, therefore, this appeal must be allowed, the judgment and decree of the learned District Judge set aside, and the suit of the respondents dismissed with costs in both Courts, advocate's fee twenty gold mohurs in this Court.

Dunkley J. — I am of the same opinion. It appears to me that, when Rule 68 says that the Government may take any action for "the proper holding of the election," that expression must mean and include the holding of a proper election when no election has, in fact, been held. Moreover, the power to grant a declaratory decree which is conferred by S. 42, Specific Relief Act, is a discretionary power. The relevant words of the Section are:

> Any person entitled to any legal character .... may institute a suit against any person denying ..... his title to such character ..... and the Court may, in its discretion, make therein a declaration that he is so entitled.

It cannot be said that the learned District Judge exercised his discretion judicially and in accordance with established principles in granting a decree to the respondents in this case. He has held in his judgment that, on a petition properly brought by another candidate or by a body of voters, the respondents would have been unseated, and, furthermore, that the same consideration is applicable to each and everyone of the candidates at the so-called election of 4th November 1937, namely that if any candidate had been declared under R. 67 by the Electoral Authority to be elected, that candidate could have been unseated by a petition properly brought. He has, in fact, held that the election of 4th November was entirely abortive and that in the ultimate event a fresh election would have had to be held. The order of the Government of Burma, directing that a fresh election shall be held, put an end to this anomalous position, and therefore it cannot be a proper exercise of judicial discretion to make a declaration the effect of which is to restore this anomaly. Consequently the learned District Judge ought not to have exercised his discretion in favour of the respondents.

S.G./R.K. *Appeal allowed.*

A. I. R. 1939 Rangoon 410

WRIGHT J.

Dr. R. L. Soni — Appellant.

v.

Phayagyi and another — Respondents.

Special Second Appeal No. 103 of 1939, Decided on 13th July 1939.

(a) Registration Act (1908) (Rangoon), S. 17 (1) (b) — It is document itself which must be looked at in deciding whether it requires registration—Immediate intention of document and not its ultimate result is important—Document held did not fall under S. 17 (1) (b).

It is the document itself which must be looked at in deciding whether it requires registration and

the immediate intention of the document and not its ultimate result is the important point. A very strict interpretation is to be placed on the words in Sec. 17 (1) (b), Registration Act, and if there is doubt the document should be admitted.

[P 412 C 2]

Certain person had mortgaged land standing in the name of his deceased father. The brother of the mortgagor executed a deed of agreement in favour of mortgagee. The deed provided as follows: "The said mortgage and sale deed were made by my elder brother in consultation with me and with my consent. The two documents, viz. a mortgage deed and a sale deed executed by my elder brother, have been read over to me and having understood (the same), I agree. I have no objection and I shall not interfere with the said documents and the said paddy land in future. I agree to all. In witness where of this deed is signed:"

Held that the document did not on the face of it purport to mortgage any interest in immovable property. Under it the executant did not purport to give up any of his rights in the property. The present tense in the last portion did not bring the document within the scope of S. 17 (1) (b), Registration Act. The document was therefore admissible in evidence : *Case law Rel. on.* [P 413 C 1]

(b) Practice — Case should not be decided regarding parties not on record.

The Court can only decide the case as between the parties on the record and should make no decisions as to shares of people who are not parties.

[P 413 C 2]

Cowasjee — *for Appellant.*
N. R. Burjorjee for Dr. Rauf — *for Respondent.*

Judgment.—The plaintiff-appellant, Dr. R. L. Soni, brought a suit against the defendant-respondent, Phayagyi (a) Fayez Mohamed, for declaration of his title to a piece of land, for possession of the land and mesne profits. In the Sub-divisional Court he failed, except in so far as he obtained a decree for Rupees 143.5.0 with regard to mesne profits. On first appeal his suit was dismissed altogether. He therefore comes to this Court in second appeal. Part of the plaintiff's claim was based upon a mortgage, evidenced by a registered deed (Ex. A), which was executed in his favour by one Po Lu, the brother of the defendant. It is the plaintiff's case that the defendant acquiesced in this mortgage and in a sale deed and that he is now estopped from denying that his interest passed under these deeds to the plaintiff. To support him, he relied upon a document (Ex. D). Both the lower Courts have held that this document is inadmissible in evidence because it has not been registered. The substantial point which arises before me in appeal is whether these decisions were correct or not. I set out a translation of the document :

DEED OF AGREEMENT

On 22nd March 1935, corresponding to 4th waning of Tabaung 1296 B. E., this deed of agreement is executed by me, Fez Mohamed, son of Maji Khan (alias) Majiru and younger brother of Fezal Mohamed Waziru (alias) Ko Po Lu, residing at Thayetchin village, Paungde, in favour of Dr. R. L. Sooni, residing on Rangoon Road, Paungde, as follows :

Whereas the paddy lands, situate in the Province of Burma, standing in the name of my deceased father and worked and managed by my elder brother Ko Po Lu, have been mortgaged with the creditor R. L. Sooni for Rs. 700 by my elder brother Ko Po Lu as per registered deed No. 2143, dated 16th November 1934 of the office of the Sub-Registrar, Paungde; and whereas other paddy lands belonging to us and standing in the name of (our) father, have been sold to R. L. Sooni for Rs. 1300 by my elder brother Ko Po Lu, as per registered deed No. 2142, dated 16th November 1934 of the same office, the same Township; and whereas the said mortgage and sale deed were made by my elder brother in consultation with me and with my consent; and whereas I was not able to come to Burma and effect the registration myself as I was away in India working my own paddy land; and whereas the registration has been effected already although I have come to Burma: So this deed of agreement is made and given. The two documents, viz. a mortgage deed being No. 2143, dated 16th November 1934 and a sale deed being No. 2142, executed by my elder brother, have been read over to me and having understood (the same), I agree. I have no objection and I shall not interfere with the said documents and the said paddy lands in future. I agree to all. In witness whereof this deed is signed.

The relevant portion of the Burma Registration Act which is said to apply is Section 17 (1) (b) :

Other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent of the value of Rs. 100 and upwards, to or in immovable property.

Such document must be registered. It is contended by Mr. Cowasjee on behalf of the appellant that it is the document itself which must be looked at to see whether it comes within the provisions of the Registration Act. He argues that the law and the document must be strictly construed and that if there is any doubt as to whether the document should or should not be registered, the benefit of that doubt should be given to the person who wishes the Court to accept the document. Mr. Cowasjee contends that this document does not fall within the purview of S. 17 (1) (b), Registration Act. He cites several authorities to support his argument. In a Full Bench—five Judges—case in 9 All 108[1] it was held that

1. Jiwan Ali Beg v. Basa Mal, (1886) 9 All 108= 1886 A W N 310 (F B).

for an instrument to come within S. 17 (b), Registration Act, it must in itself purport or operate to create, declare, assign, limit, or extinguish some right, title or interest of the value of Rs. 100 or upwards in immovable property, and to come within S. 17 (c), it must be on the face of it an acknowledgment of the receipt or payment of some consideration on account of the creation, declaration, assignment, limitation, or extinguishment of such a right, title, or interest. At p. 114 the learned Chief Justice said:

> Now what construction should be placed on these prohibitory and highly penal Sections, which impose such serious disqualifications for non-observance of registration? The only proper answer, to my mind, is that we must see that the strictest construction be placed on them, and that the document objected to comes within the four corners of these provisions.

The case I have just referred to was cited with approval in 23 Cal 450.[2] In 2 Lah 300,[3] the learned Chief Justice said referring to registration:

> If there is any doubt on the subject, the benefit of the doubt must be given to the person who wants the Court to receive the document in evidence.

In 5 Bom 232,[4] the question of registration was referred to. The document in question contained the following words:

> Our eldest brother M has built houses and is building new houses on property appertaining to his share. To the same we three persons and our heirs and representatives have no interest of any kind. If we or they should prefer any claim, then the same is to be null. This release paper we have duly passed in writing jointly and severally and in sound mind.

West, J. when considering this document said:

> It implies a declaration of will, not a mere statement of fact, and thus a deed of partition, which causes a change of legal relation to the property divided amongst all the parties to it, is a declaration in the intended sense; but a letter containing an admission, direct or inferential, that a partition once took place, does not 'declare' a right within the meaning of the Section.

This decision of his was approved of by their Lordships of the Privy Council in 11 Pat 272.[5] In 45 M L J 100[6] it was held that the word "declare" in Sec. 17 (1) (b), Registration Act, implies a declaration of will, not a mere statement of fact. There the deed of compromise did in one sense "declare" a right: that was, the existence of the right was directly or indirectly stated by the deed, but it was not held to be an expression or declaration of will by which the right was constituted. In 49 Cal 334[7] their Lordships of the Privy Council considered a document with a view to ascertaining whether it ought to have been registered. This document contained among other things the following passage:

> You are therefore liable for the profit or loss which accrued up till now and may accrue in future. We are not to take a share and pay the loss. You may make a management as you like.

It was held that this passage did not make the document one which required registration, and that it was receivable in evidence regardless of what the ultimate effect of these words might be. In 3 Lah 112[8] it was held that documents embodying an undertaking given by a certain person not to contest any alienation which his brother might make in future as to a half share of the land did not require registration. In 16 Pat 34[9] it was held that a document which merely acknowledged a pre-existing right did not require registration, and that it was only when there was an immediate intention to create, declare or assign title that a document need be registered. I think that these decisions lend strong support to the argument advanced by the learned counsel for the appellant, that it is the document itself which must be looked at in deciding whether it requires registration and that the immediate intention of the document and not its ultimate result is the important point. These cases do also shew that a very strict interpretation is to be placed on the words in S. 17 (1) (b), Registration Act. *Attra's case*[3] shews that if there is doubt the document should be admitted. Mr. Burjorjee on behalf of the respondent contends that these authorities are not directly in point and he lays great stress on the fact that in the latter part of Ex. D the present tense is used when the defendant stated:

> I agree, I have no objection and I shall not interfere with the said documents and the said paddy lands in future. I agree to all.

2. Gous Mohomed v. Khawas Ali Khan, (1896) 23 Cal 450.
3. Attra v. Mangal Singh, (1922) 9 A I R Lah 43 =65 I C 254=110 P L R 1921=2 Lah 300.
4. Sakharam Krishnaji v. Madan Krishnaji, (1880) 5 Bom 232.
5. Bageswari Charan Singh v. Jagarnath Kuari, (1932) 19 A I R P C 55=136 I C 798=59 I A 130=11 Pat 272 (P C).
6. Ranganayaki Ammal v. Virupakshee Rao Naidu, (1923) 10 A I R Mad 621 = 72 I C 456 = 45 M L J 100.
7. Pandurang Krishnaji v. Markandeya Tukaram, (1922) 9 A I R P C 20=65 I C 954=49 I A 16 =49 Cal 334=18 N L R 1 (P C).
8. Gulab v. Mehndi, (1922) 9 A I R Lah 95=67 I C 417=3 Lah 112.
9. Het Lal v. Upendra Nath, (1937) 24 A I R Pat 214=166 I C 22=16 Pat 34=17 P L T 835.

He further contends that equity should not be relied upon to enable anyone to avoid the operation of a statute. He points out that the ultimate effect of this document (Ex. D) is to deprive the defendant of his rights in this property, and that in effect it amounts either to a mortgage or a release, particularly when it is viewed in conjunction with the surrounding circumstances and the mortgage deed (Ex. A). I did not understand Mr. Cowasjee to be relying at all on equity when he advanced his argument to the effect that this document did not require registration. In the authorities cited no reference whatever is made to equity, and they proceed upon a strict construction of Sec. 17, Registration Act, itself. In such circumstances, I do not think that I need refer to the authorities which are cited by Mr. Burjorjee to support his contention that equity cannot be relied upon to avoid a statute. In view of the authorities which I have quoted, it does not seem that the ultimate effect of the document should be taken into consideration. It is the document itself which is important and I may quote at this stage a passage from the judgment of the Chief Justice in 9 All 108.[1]

It must be on the face of it an acknowledgment of the receipt or payment of some consideration on account of the creation, declaration, assignment, limitation or extinguishment of such an interest as is referred to.

It is true that the learned Chief Justice was referring to sub-cl. (c) of Sec. 17 (1), Registration Act, but it is conceded that for the purpose in hand there is no distinction to be drawn between these two sub-clauses. It is quite clear that this document (Ex. D) does not, on the face of it, purport to mortgage any interest in immovable property. It is also equally clear that under it the defendant does not purport to give up any of his rights in the property. To revert to Mr. Burjorjee's first point, it is true that in the latter part of Ex. D the present tense is used, but I think that if the document is read as a whole it will be seen that this amounts to a re-affirmation of what the defendant had done previously and is followed by a promise as to what he will refrain from doing in the future. It does not seem to me that the present tense in this one portion brings the document within the scope of S. 17 (1) (b), Registration Act. In view of the terms of Ex. D and the authorities to which I have referred above, I consider that Mr. Cowasjee's contention to the effect that this document is not one which must be registered should prevail and I am, therefore, of the opinion that it was wrongly excluded from consideration by the lower Courts. It is impossible to say what decision the Courts would have come to if they had taken this document into consideration, and moreover the fact that it must be admitted will also probably mean that a considerable amount of additional evidence will have to be adduced. In such circumstances, and with the approval of both sides, I propose to remand this suit as a whole under the provisions of O. 41, R. 23, Civil P. C.

I allow this appeal, set aside the judgments and decrees of the lower Courts and direct that the suit be re-admitted under its original number and determined on its merits, Ex. D being admitted in evidence. I notice that in the course of the trial Court's judgment reference has been made to the shares of some persons who were not parties to this suit. This was not correct. The Court can only decide the case as between the parties on the record and any decisions as to shares of people who are not parties must be deemed to have been set aside. It is stated before me by both sides that there will probably have to be an administration suit to decide such matters. Costs in this appeal, advocate's fee 10 gold mohurs, will be costs in the suit as ultimately decided. The usual certificate will issue for the refund of court-fees paid in this appeal.

D.S./R.K. *Case remanded.*

A. I. R. 1939 Rangoon 413

MACKNEY J.

Dwarika — Applicant.

v.

Bagawati — Respondent.

Civil Revn. No. 418 of 1938, Decided on 5th April 1939, from decree of Dist. Court, Thaton, D/- 26th August 1938.

(a) Revision — Lower Court misreading evidence and coming to wrong conclusion on facts —Decision is open to revision.

If the lower Court, misreads the evidence on record and failing to take notice of a vital fact appearing therein, comes to an erroneous conclusion, it would be deemed to have acted with material irregularity and its decision is open to revision by the High Court : *A I R 1929 Rang 145, Rel. on.* [P 414 C 2]

(b) Contract Act (1872), S. 62—Scope.

Section 62 presupposes that the original contract is still capable of performance : *15 Cal 319, Ref.* [P 415 C 1]

(c) Pledge — Redemption — Mortgage and pledge distinguished — Parties can by specia

agreement introduce clause in pledge that on failure to redeem within certain time property pledged would become property of pledgee.

The right to redeem is so inseparable an incident of mortgage that it cannot be taken away by express agreement of the parties that the mortgage shall not be redeemable, or that the right shall be confined to a particular time. A pledge confers a special interest in the property pledged, that is to say a right to sell the property if the loan be not repaid. If the pledgee sells, he does so by virtue and to the extent of the pledgor's ownership, and not with a new title of his own. He only holds possession for the purpose of securing to himself the advance which he has made. The pledgee has no right of foreclosure since he never had the absolute ownership at law. In a mortgage the right to the property is transferred to the creditor: in the case of a pledge the pledgee has no property in the pawn but merely a right to sell. The principle of avoiding clog on the equity of redemption does not apply to pledges and hence parties can by special agreement introduce a clause into the agreement that on failure to redeem within a certain time, the property pledged would become the property of the pledgee. [P 415 C 1, 2; P 416 C 1]

(d) Contract Act (1872), S. 74 — Pledge — Agreement that pledge would be irredeemable after certain time does not constitute stipulation by way of penalty unless value of thing pledged is much more than amount of loan.

An agreement that the pledge should become irredeemable if not redeemed after a certain period, although it may be an unfair agreement, would not in itself constitute an agreement by way of penalty unless the value of the thing pledged is so very much larger than the amount of the loan that it would become obvious that the clause is really inserted as a means of bringing pressure upon the pledgor to repay the loan within the contracted time. [P 416 C 2]

M. Rafi — *for Applicant.*

B. C. Guha — *for Respondent.*

Order. — In the suit out of which this application arises the plaintiff-respondent, Bagawati claimed that some time in 1934 he took a loan of Rs. 100 with interest at Rs. 2 per cent per mensem from the defendant-applicant, Dwarika, at the same time pledging two heifer buffaloes "with possession." The plaint further averred that it was agreed that if the plaintiff did not redeem the buffaloes within one year the defendant was to take possession of them outright. It was further alleged by the plaintiff that about nine months later a dispute arose between the parties because the defendant was using the milk got from the buffaloes. It is alleged that the dispute was referred to a panchayat, and the decision of the panchayat was that defendant should make use of the milk but should not charge interest, and that, if the principal sum of Rs. 100 was returned, defendant was to return the two buffaloes. The defendant alleged that the agreement of pledge contained a clause that if the loan were not repaid within three months, not one year, the buffaloes were to become his. He denied that there had been any reference of a dispute between them to arbitrators. The learned Judge of the original Court found that, although the original document of the agreement had been lost, there was sufficient evidence to show that the defendant's version of the agreement was correct. The learned Judge was not satisfied with the evidence as to the decision of the arbitrators, and accordingly he dismissed the plaintiff's suit which was one for redemption of the pledge. The plaintiff appealed to the District Court. The learned District Judge thought that the evidence as to the reference to arbitration was worthy of credence, and he accepted it as proving not only that the parties had agreed that no interest should be charged whilst defendant was making use of the milk from the buffaloes, but also that it had been agreed that the plaintiff should be able to redeem the buffaloes at any time. The learned Judge further thought that such an agreement as was relied on by the defendant, namely that if the pledgor should fail to redeem the buffaloes within the stipulated time, the buffaloes were to become the pledgee's property, was an unlawful stipulation as it amounted to "clogging the equity of redemption." Accordingly the learned Judge allowed the appeal and directed that the buffaloes (then increased in number to six) should be returned to the plaintiff on his paying the sum of Rs. 100, on or before 25th September 1938.

Against this order the defendant now applies to this Court in revision. It is argued that in applying to pledges a doctrine, namely that the equity of redemption cannot be restricted, which can only be applied to mortgages, the learned Judge acted irregularly in the exercise of his jurisdiction. To this it might be added that the learned Judge has so clearly misread the evidence on the record and the judgment of the learned Township Judge that he has come to an entirely erroneous conclusion of fact which is not justified by anything which was before him. In 7 Rang 339[1] it was pointed out that if the lower Court had failed to take into account some proposition of law or some material fact in evidence, it had acted illegally and its decision

1. Fut Chong v. Maung Po Cho, (1929) 16 A I R Rang 145=120 I C 899=7 Rang 339.

might be revised by the High Court. In the present case, as the learned Township Judge has pointed out, there is no evidence whatsoever that at the time of arbitration there was any alteration of the agreement, admitted by the plaintiff, that the buffaloes, if not redeemed within one year of the pledge, were to become the property of the defendant. Furthermore, if we accept the finding—as apparently the learned District Judge did accept it—that the original agreement fixed the time for redemption at three months, then at the time of this alleged reference to arbitration there was no contract in existence which could be the subject of novation—that is unless the proposition advanced by the learned District Judge that the clause restricting the right of redemption as illegal is a valid one. S. 62, Contract Act, clearly presupposes that the original contract is still capable of performance: *see* also 15 Cal 319.[2] It is true that now by statutory law restrictions on the right of redemption of mortgages are discouraged, but it was pointed out by their Lordships of the Privy Council in 1 Mad 1[3] that the essential characteristic of a mortgage by conditional sale was that on the breach of the condition of repayment the contract executed itself, and the transaction was closed and became one of absolute sale without any further act of the parties or accountability between them, but that because in India, in contravention of the law of India, the Courts applied to this class of security principles which were applied by the English Courts of Equity, their Lordships were clearly of opinion that the Courts had herein assumed the functions of the Legislature. In the event, however, as I have remarked, the principle was made the law of India. A pledge is a different matter from a mortgage, and if this rule, to which their Lordships referred and which they would only with the greatest reluctance apply to mortgages in India, has, by special enactment, become the law of the land, that is surely no reason for applying it to transactions which are of quite a different nature from mortgages.

In Halsbury's laws of England, Vol. 23, p. 223, it is observed in regard to mortgages that the right to redeem is so inseparable an incident of mortgage that it cannot be taken away by express agreement of the parties that the mortgage shall not be redeemable, or that the right shall be confined to a particular time. In (1916) 1 A C 145[4] it was pointed out that a pledge confers a special interest in the property pledged, that is to say a right to sell the property if the loan be not repaid. If the pledgee sells, he does so by virtue and to the extent of the pledgor's ownership, and not with a new title of his own. He only holds possession for the purpose of securing to himself the advance which he has made. The pledgee has no right of foreclosure since he never had the absolute ownership at law. In a mortgage the right to the property is transferred to the creditor: in the case of a pledge the pledgee has no property in the pawn, but merely a right to sell. It has been held in 19 Cal 322[5] that where a pledgee, having power to sell for default, takes over, as if upon a sale to himself, the property pledged, without the authority of the pledgor, but crediting its value in account with him, this act, though an unauthorized conversion, does not put an end to the contract of pledge, so as to entitle the pledgor to have the property back without payment. However from this it does not follow that the parties by special agreement, cannot introduce a clause into the agreement of pledge whereby, on failure to redeem within a certain time, the property pledged becomes the property of the pledgee. In 36 M L J 161[6] it was held that in the case of a mortgage of moveables the right of redemption subsisted notwithstanding a contract to the contrary. Their Lordships however in that case were dealing with a mortgage and not with a pledge. Their Lordships say:

> Again, the rule in England seems quite settled that in the case of a pledge of moveables the right of redemption would subsist notwithstanding any contract to the contrary.

I think however that the word "pledge" here appearing must be a misprint for the word "mortgage." Their Lordships add "This was forcibly illustrated in the case of the mortgage of policies in (1892) A C 1.[7]"

2. Manohur Koyal v. Thakur Das Naskar, (1888) 15 Cal 319.
3. Thumbusawmy v. Hossain Rowthen, (1876-78) 1 Mad 1=2 I A 241=3 Sar 531 (P C).
4. The Odessa, (1916) 1 A C 145=1 P Cas 554=114 L T 10=85 L J P C 49=32 T L R 103=13 Asp M C 215=60 S J 292.
5. Neckram Dobay v. Bank of Bengal, (1892) 19 Cal 322=19 I A 60=6 Sar 164 (P C).
6. Raghunathaiya v. Sobina Saldanha, (1919) 6 A I R Mad 946=49 I C 722=36 M L J 161.
7. Salt v. Marquess of Northampton, (1892) A C 1=61 L J Ch 49=65 L T 765=40 W R 529.

I have referred to this case, and it deals with a mortgage and not with pledge. Their Lordships further added :

In India, although there is no express law with reference to moveables the principles embodied in the Transfer of Property Act have generally been applied to them: *vide* 42 Cal 455.[8]

This case also dealt with a mortgage, and in this very case, at p. 478, it is remarked :

The case before us is clearly not that of a pledge of a moveable; such a pledgee, as pointed out in (1901) 2 Ch 314,[9] is in a very different position from an ordinary mortgagee, as he has only a special property in the thing pledged and may obtain a sale but not a foreclosure.

I have not been able to find any case of the Indian Courts or of this Court in which it is laid down that the principle of avoiding restrictions of the right of redemption can be applied to pledges where the parties have expressly agreed that the right of redemption shall cease after a certain period. Further, I have not been able to find any reference to such a principle in the English cases. However, in Story on Bailments, a book published in the United States of America, I find the following passage in para. 345 :

If a clause is inserted in the original contract, providing that, if the terms of the contract are not strictly fulfilled at the time and in the mode prescribed, the pledge shall be irredeemable, it will not be of any avail. For the common law deems such a stipulation unconscionable and void, upon the ground of public policy, as tending to the oppression of debtors. The Roman law treated a similar stipulation (called in that law lex commissoria) in the same manner, holding it to be a mere nullity.

However no English cases are quoted in support of this proposition, nor for the proposition occurring in para. 318 of this book that such an agreement (that upon the default of the pledgor a pledge shall be irredeemable) is repudiated by the common law and Roman law as unconscionable and against public policy. It can scarcely be contended that what we have before us now is a mortgage and not a pledge. Prima facie it is a pledge and there is nothing to show that it was in reality a mortgage. For two reasons therefore, first because the learned Judge has misread the evidence and failed to take notice of a vital fact appearing therein, and secondly because he has failed to take into account the difference between a mortgage and a pledge and the consequences that flow therefrom, he may be deemed to have acted irregularly or illegally in the exercise of his jurisdiction.

The learned counsel for the respondent has advanced the proposition that the agreement that the pledge should become irredeemable if not redeemed after three months was a stipulation by way of penalty, and S. 74, Contract Act, would apply. I am unable to see that the insertion of this agreement is by way of a penalty, nor was the learned counsel for the respondent able to explain in what way it was of the nature of a penalty. It is obviously a plain straightforward agreement that, on failure to repay the loan in three months time, the property pledged should become the property of the pledgee, and the transaction should be terminated. There is no evidence to show that this was an unfair agreement, and, even if it were an unfair agreement, that would not in itself constitute it an agreement by way of penalty unless perhaps it could be shown that the value of the buffaloes was so very much larger than the amount of the loan that it would become obvious that the clause was really inserted as a means of bringing pressure upon the pledgor to repay the loan within the contracted time. This however is not by any means apparent. The learned counsel for the respondent has suggested that the case should be remanded to the lower Court in order that evidence should be taken on this point. It appears to me that this is too late a stage to make such a request. The proposition which has been put forward is an entirely new one, and it would not be proper for this Court, acting as a revisional Court, to accede to such a request in such circumstances as the present. For these reasons this application is allowed, the decree of the District Court is set aside, and the decree of the Township Court dismissing the plaintiff-respondent's suit is restored with costs in all Courts : advocate's fee in this Court, two gold mohurs.

N.S./R.K. *Application allowed.*

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8. Mahamaya Debi v. Haridas Haldar, (1915) 2 A I R Cal 161=27 I C 400=20 C L J 183=42 Cal 455=19 C W N 208.
9. Harrold v. Plenty, (1901) 2 Ch 314=70 L J Ch 562=85 L T 45=49 W R 646=8 Manson 304 =17 T L R 545.

A. I. R. 1939 Rangoon 417

SHAW J.

In the matter of Burma Companies Act and Bengal-Burma Steam Navigation Co. Ltd. and Reduced.

Civil Misc. No. 174 of 1937, Decided on 16th June 1939.

Companies Act (1913), Ss. 55 and 56 — Court's power under S. 56 explained — What matters can be considered by Court and under what circumstances can reduction be confirmed stated — Matters falling within the internal management of company cannot be inquired into by Court under S. 56.

It is an elementary principle of law relating to joint stock company that Court will not interfere with the internal management of a company acting within its own rights and in fact has no jurisdiction to do so. [P 417 C 2]

In an application under S. 56 the Court is only concerned to confirm the proposed reduction and not the resolution passed by the company. The validity of the resolution cannot therefore be questioned in such application. The only questions to be considered by the Court are : (1) Ought the Court to refuse its sanction to the reduction out of regard to the interests of those members of the public who may be induced to take shares in the company ? (2) Is the reduction fair and equitable as between different classes of shareholders ? Where the reduction is shared by all and is designed to work justly and equitably and where it does not involve diminution of any liability in respect of the unpaid capital or payment to any shareholder of any paid-up capital and there is evidence regarding the loss of capital and non-representations of available assets, there is nothing to prevent the Court from confirming such reduction. [P 418 C 2; P 419 C 1, 2; P 420 C 1]

Where along with the resolution as to reduction of capital another resolution is passed for the increase of capital by issue of new shares and this fact is stated in the application under S. 55 with the prayer for the sanction of the new scheme of organization but the same is subsequently withdrawn objections on behalf of the objecting shareholders, that the new shareholders would be placed in a better position than the existing and expressing some fear about future do not fall to be considered by the Court under S. 56 as the function of the Court does not extend to the exercise of the paternal care of the shareholders of a company as such matter exclusively falls within the internal management of the company : *Case law relied on.* [P 418 C 2]

R. Clark and De — *for Petitioner.*

B. C. Paul —

for certain shareholder objectors.

Order.—This application of the Bengal-Burma Steam Navigation Co. Ltd., is for the confirmation by the Court of the reduction of its share capital from Rs. 25,00,000 to Rs. 2,00,000 a special resolution to that effect having been passed. In conjunction with that resolution there was also a resolution that after the said reduction was sanctioned by the Court the share capital of the company was to be increased to Rs. 50,00,000 by the issue of new shares. The prayer of the petition was also for sanction to be accorded to the scheme of re-organization embodied in the resolutions but as no sanction of the Court is necessary under the Companies Act for the increase of the company's share capital by the issue of new shares the learned advocate at the hearing confined himself only to what was required by S. 56 of the Act. The other matter was merely treated as the background for the action taken to reduce the share capital. This had the effect of cutting down the ground from under the feet of the objectors, for their main grievance was founded on what they imagined would be the benefit which would be derived by the new shareholders at the expense of the present shareholders.

Mr. B. C. Paul who argued the case for the objectors referred to (1902) 1 Ch 547[1] as authority for the proposition that the Court should go into the matter of the increase of capital. But it will be seen that there the reduction scheme in its entirety really involved an increase of capital and an issue of part thereof at 99 per cent. discount without any consideration to the company. It was not suggested that any part of the capital was lost or unrepresented by available assets or that any sum should be returned to the shareholders as being in excess of the wants of the company. Because the scheme was really for an increase of capital and for the extent of the increase of nominal capital the company would receive no consideration, the scheme was held to be illegal. Looking generally at the scheme which will follow the reduction in the present case it is, of course dependent upon the sanction of the reduction, but it is purely for the purpose of obtaining further capital for the company, and by the issue of new shares the company will obtain consideration to the extent of, it is hoped, Rs. 48,00,000. In (1902) A C 83[2] it was stated at (page 93) :

> It is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so.

It is admitted on behalf of the objectors by Mr. B. C. Paul that there is nothing

1. In re Development Company of Central and West Africa, (1902) 1 Ch 547=71 L J Ch 310 =18 T L R 337=86 L T 323=50 W R 456= 9 Manson 151.
2. Burland v. Earle, (1902) A C 83=71 L J P C 1=85 L T 553=50 W R 241=18 T L R 41= 9 Manson 17.

objectionable in the resolution per se to increase the share capital of the company by the method proposed. It is only because it happened to have been mentioned in the petition, followed by a prayer now withdrawn, that advantage was sought to be taken of it to go into the question whether the increase of capital would not result eventually in the present shareholders being placed in an unfair position as compared with the new shareholders. In considering the question whether the reduction now proposed was unfair, it had to be admitted that except by reference to the proposed new issue of shares there was no unfairness. There is now only one class of shareholders, although the Articles of Association speak of capitalist shareholders and ordinary shareholders. The capitalist shareholders are those holding 400 shares or more and the ordinary shareholders are those holding less than 400 shares but holding 40 or more shares, and the classification is made for the purpose of the appointment of directors, provision being made for a proportionate number of ordinary shareholders and capitalist shareholders to be directors.

Sir George Jessel, M. R., in (1877) 4 Ch D 827[3] regretted, as the law then stood, that he could not accede to the application for sanction to a reduction of capital. He stated that when a joint stock company has lost a portion of its capital nothing could be more beneficial to the company than to admit that loss—to write it off—and, if it chose to go on trading, to trade with the diminished capital which remained, the dividend being declared on the capital actually remaining. In (1894) A C 399[4] the House of Lords held that the reduction of capital was within the powers conferred by the Companies Act, 1867 and 1877, and that the arrangement being a fair and equitable one there was no reason why it should not be confirmed. Lord Macnaghten stated:

> The proposed arrangement has been approved by special resolution at general meetings, in which the American shareholders apparently took no part. The application to the Court was for an order confirming a reduction of capital to meet the arrangement. It is for the company, and the company alone, to judge of the prudence of the course proposed.

The Court had to be satisfied that the reduction was fair and equitable to all concerned, as between different classes of shareholders. The reduction here is shared equally by all the shareholders who are all of one class. Standing by itself no fault can be found with the reduction. The objectors have some fears for the future, but this Court's function does not extend to the exercise of a paternal care of the shareholders of a company so as to make it interfere in the internal management of a company acting within its powers. Art. 68 of the Articles of Association of the petitioner company empowers it to reduce its capital by cancelling capital which has been lost or is unrepresented by available assets, or reducing the liability on the shares, or otherwise as may seem expedient, etc. Art. 64 of the Articles of Association empowers the company to increase the capital by the creation of the new shares of such amount as may be deemed expedient, and Arts. 65, 66 and 67 contain provisions regarding the issue of new shares. S. 105 (c), Companies Act, should be read with Art. 67 of the Articles of Association. Art. 71 deals with the modification of rights as between different classes of shareholders. Mr. B. C. Paul relied on (1900) 2 Ch D 846[5] wherein it was held that the Court would not confirm a reduction of capital unless satisfied that it would not work unjustly and inequitably and the Court refused to confirm a reduction on the ground (inter alia) that the reduction would benefit the ordinary shareholders at the expense of the preference shareholders, also that in ascertaining the available assets of a company for the purpose of reduction of capital, the amounts of reserve and unappropriated profit and the value of goodwill were to be taken into account. In (1907) A C 229[6] Lord Macnaghten referred to (1900) 2 Ch D 846[5] saying

> where the scheme proposed was obviously unfair to the preference shareholders and the petition was very properly dismissed there are some expressions in the judgment of the learned Judge who decided the case which, taken apart from the context, may appear to support that contention,

in dealing with the argument that the Court had no jurisdiction to entertain a petition for the reduction of capital unless it be proved that the capital which the

3. In re Ebbw Vale Steel, Iron and Coal Co., (1877) 4 Ch D 827=46 L J Ch 241=36 L T 308.
4. British and American Trustee and Finance Corporation v. Couper, (1894) A C 399 = 63 L J Ch 425=6 R 146=70 L T 882 = 42 W R 652=1 Manson 256.
5. In re Barrow Haematite Steel Co. (No. 2), (1900) 2 Ch D 846=69 L J Ch 869 = 83 L T 397=16 T L R 569.
6. Poole v. National Bank of China, Ltd., (1907) A C 229=76 L J Ch 458=96 L T 889=51 S J 513=14 Manson 218=23 T L R 567.

company proposed to cancel was lost or unrepresented by available assets. Further on he stated:

The condition that gives jurisdiction is not proof of loss of capital or proof that capital is unrepresented by available assets, or that capital is in excess of the wants of the company. The jurisdiction arises whenever the company seeking reduction has duly passed a special resolution to that effect.

Again:

In the present case creditors are not concerned at all. The reduction does not involve the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital. The only questions therefore to be considered are these: 1. Ought the Court to refuse its sanction to the reduction out of regard to the interests of those members of the public who may be induced to take shares in the Company? and 2. Is the reduction fair and equitable as between the different classes of shareholders?

In the present case creditors are not concerned at all, and the reduction does not involve the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital. The second question does not arise for the reason that there is only one class of shareholders to be considered, and no differences are made among the one class of shareholders. The first question is the only one for consideration, and I have not heard any suggestion how any member of the public who may be induced to take shares in the company can be adversely affected. It may be that there should be some evidence of capital being lost or unrepresented by available assets, because of the wording of S. 55, sub-s. (1), cl. (b), and in view of the observations of Lord Parker in (1916) W N 70,[7] where he stated that his own practice had been to insist on prima facie evidence of the existence of the state of facts referred to in the resolution; if no such prima facie evidence were forthcoming, it may well be that the special resolution had been passed under the influence of some mistake or some misrepresentation as to the true facts, and it would be unfair to the minority if not also to the majority of share-holders to confirm a reduction voted under such circumstances; and after some further argument he concluded by saying that he still thought therefore that whether the reduction of capital was based on the ground that capital had been lost or was unrepresented by available assets, it was, though not necessary at any rate wise and prudent, to insist on some evidence of the fact. Such evidence is forthcoming in this case. With the petition was filed an affidavit of the Chairman of the Board of Directors in which he stated that the special resolution was passed and that at the time when the said special resolution was passed almost the whole of the paid-up capital had been lost or was not represented by available assets, and he produced a true copy of the balance sheet and profit and loss account of the company as at 31st August 1936, which showed the loss.

At the hearing that affidavit was supplemented by the evidence of the secretary of the company, who produced the minute book of the general meetings of the company and also the book containing all the profit and loss accounts and balance sheets since the formation of the company. The true position was fully set out in the circular to the share-holders of the company dated 29th April 1937, issued with a notice bearing the same date of an extraordinary general meeting of the company to pass the special resolution for reduction of the capital and other resolutions. It will be seen that by using the general reserve fund amounting to Rs. 46,703-11-6, the net loss would be Rs. 11,75,506-1-3. The paid-up capital (including 5251 shares forfeited with Rs. 54,875 paid-up thereon) amounted to Rs. 12,43,075. There would be left as capital Rupees 67,568-14-9. The managing agents were agreeable to give up Rupees 27,487-1-3 out of the commission amounting to Rs. 47,465-15-0 due to them. In that way the amount of capital left over after wiping off the loss and the reserve fund would be increased to Rupees 95,056. That is how the reduction to Rs. 2 of the Rs. 25 fully paid-up shares was arrived at, for, there were 47,528 shares issued and fully paid-up. The figures are all to be found in the profit and loss account for the year ending 31st August 1936, and the balance sheet as at 31st August 1936.

As I have said, the reason for the objections to the application was the fact that other resolutions dealing with matters beyond the reduction were also passed. But in an application such as this, under S. 56, Companies Act, the Court is only concerned to confirm the proposed reduction and not the resolutions passed by the company. This was laid down by Sterling J. in (1897) 75 L T 23,[8] who stated it was the duty of the Court to confirm the reduction if it

7. Caldwell v. Caldwell and Co. (Paper-makers) Ltd., (1916) W N 70=53 Sc L R 251.

8. In re the Hyderabad (Deccan) Co. Ltd., (1897) 75 L T 23=3 Manson 242.

was satisfied as to its fairness. That is all the Court is asked to do on this application. An attempt has been made to induce the Court to go into the question of the validity of the resolution. The share-holders who originally objected to the application and who were represented by Mr. J. R. Chowdhury have withdrawn their objections. They, along with others, had filed Civil Regular No. 217 of 1937 for a declaration that the special resolution passed at the special general meeting of the company of 4th July 1937, for reduction of share capital and of the value of paid-up shares was null and void and for an injunction not to give effect to the resolution. That suit was withdrawn in consequence of a compromise entered into between the plaintiffs and the defendants, after a notice by advertisement of the proposed settlement of the suit was given to all the share-holders of the company as the suit was a representative one. The objectors who came in and who were represented by Mr. B. C. Paul and Mr. M. I. Khan do not wish to continue the suit in place of the plaintiffs who desired to withdraw from the suit. Their only object was to be heard in this application. They had appeared late for the purpose but their appearance was not objected to by the company and their objections being to this application and not to the compromise were transferred to this application. There were some 86 share-holders represented by Mr. P. B. Sen, who had entered appearance and filed objections on this application. On the day the compromise petition was filed in the suit Mr. P. B. Sen withdrew his appearance for want of further instructions. When this application came on for hearing, Mr. B. C. Paul appeared for the five shareholders whose objections were filed in the suit. Mr. M. I. Khan failed to appear, but three of the six share-holders who instructed him were present in person. One of the 86 share-holders who had previously instructed M. P. B. Sen also was present in person.

I understand these unrepresented shareholders to say that they left the matter to the Court to see that justice was done because they knew nothing about the matter. On the second day of the hearing of the application Mr. B. C. Paul filed a power on behalf of the one share-holder out of the 86 above referred to. He is named Belayethaly. On his behalf Mr. B. C. Paul desired to take objection to the validity of the meeting at which the special resolution was passed and to contend that the resolution was invalid. I heard both him and Mr. Clark on the point, and I decided that I could not allow that objection to be now gone into. It was obviously a matter that could not be agitated in an application under S. 56, Companies Act, and was therefore made the subject-matter of a suit instituted a few days before this application was actually filed. After succeeding in holding up this application for a considerable time that suit was eventually dismissed upon withdrawal, after notice to all the shareholders, none of whom chose to continue the suit. Belayethaly was a party in this application which was to be heard with the suit, and he did not choose to carry on that suit. I am not sure if he was not present on the day that the compromise was mentioned.

The question of the validity of the resolution cannot be decided in this application. The opportunity to have that decision in the suit has been lost. As matters stand, the resolution was duly passed at an extraordinary general meeting—no one disputes that. The minutes produced by the Secretary are prima facie evidence of the matters stated in such minutes—*see* Art. 141 of the Articles of Association—and the minutes of the adjourned extraordinary general meeting held on 4th July 1937 are to be found from page 55 onwards of the Minute Book, Ex. A. That same day the adjourned ordinary general meeting had been held, as entered from page 52 of Ex. A, at which a resolution was passed that the audited balance sheet and the profit and loss account of the company together with Director's Report for the year ended 31st August 1936, a copy of which had been sent to each of the shareholders, be adopted. There was only one dissentient. At the extraordinary general meeting which followed, the Chairman made a speech in moving the resolution for reduction and the other resolutions. At the end of that speech the resolutions being duly seconded, were put to the vote and declared passed unanimously. The passing of the resolutions concerning the increase of capital by the issue of new shares was put through at the same time according to English practice, as will be found in Palmer's Company Precedents; (Edn. 13), Part I, p. 1168. It is a matter of procedure concerning the internal management of the company's affairs upon which I express no opinion. That capital was lost or was not represented by the available

assets has been proved by the evidence of the Chairman of the Board of Directors and by the profit and loss account and balance sheet as at 31st August 1936, in exhibit. These accounts were audited by the company's auditors and approved by a general meeting. Under Art. 184 of the Articles of Association of the company, the accounts are now conclusive of what they contain. Any attempt now to challenge them in any particular is not permissible. What should or should not be included in the accounts cannot now be considered. There is nothing in this case corresponding to what occurred in (1891) 2 Ch D 124[9] and so its application does not arise.

I may add that nothing was brought forward at the ordinary general meeting or at the extraordinary general meeting to justify the Court going into any matter as having arisen at those meetings either in relation to the accounts or in regard to the reduction. I have referred to (1937) 2 All E R 422[10] and I cannot find anything in that case to assist the objectors. Considering the reduction of the capital from the point of view as to whether it was necessary because of capital being lost or not represented by available assets, from the statement I have set out earlier it is clear that the reduction has been shown to be proper and not unfair to the whole body of the shareholders. The reduction of capital to be effected by the special resolution numbered 1, mentioned in para. 12 of the petition is confirmed, and the form of minute contained in paragraph 15 of the petition is approved. The addition of the words "and reduced" to the company's name is dispensed with altogether. Let a notice of the registration of the order and of the minute be published in one issue of the "Burma Gazette" and three issues of the "Bangala Gazette." As regards costs the matter has to be fully considered by the Court even if there had been no objection. Consequently, I award no costs against the objectors although they have not been successful. They are certainly not entitled to any costs to be paid to them out of the company's funds.

N.S./R.K. *Order accordingly.*

9. In re Abstainers and General Insurance Co., (1891) 2 Ch D 124=60 L J Ch 510 = 64 L T 256=39 W R 574.
10. Carruth v. Imperial Chemical Industries, Ltd., (1937) 2 All E R 422.

A. I. R. 1939 Rangoon 421

MOSELY J.

Tan Sit Shan — Defendant — Appellant.

v.

U Po Nyun and another — Plaintiffs — Respondents.

Second Appeal No. 305 of 1938, Decided on 25th May 1939, against decree of Dist. Court, Mergui, in C. A. No. 9 of 1938.

(a) Easement—Right of way —Ownership of two estates not co-extensive and equal in validity — Easement is only suspended but not extinguished by unity of possession of dominant and servient tenements.

Where the ownership of the two estates is not co-extensive and equal in validity—the dominant tenement being held for a term of years only and the servient tenement in full right of ownership—the acquisition of a right of way is not extinguished but is only suspended by unity of possession of the dominant and servient tenements: *A I R 1923 Cal 8, Rel. on.* [P 422 C 1, 2]

(b) Easements Act (1882), S. 1 — Applicability to Burma.

Although the Easements Act does not apply to Burma, the Court must have regard to that Act while deciding a question relating to an easement: *13 Rang 748, Rel. on.* [P 422 C 1, 2]

(c) Limitation Act (1908), S. 26 — Tenant of one land cannot acquire for himself or on behalf of landlord right of way, as of right, upon another land of his own.

Although possession of the tenant is the possession of the landlord, still a tenant of one land cannot acquire either for himself, or on behalf of his landlord, a right of way, as of right, upon another land of his own: *15 Beng L R 361 and A I R 1926 Mad 728 (F B), Rel. on.* [P 422 C 2]

Dr. Ba Han — *for Appellant.*

Maung Aung Gyaw — *for Respondents.*

Judgment. — The plaintiff-respondents, U Po Nyun and his wife, sued the defendant-appellant, Tan Sit Shan, for a declaration of a right of way and an injunction to restrain the defendant from obstructing it. They obtained a decree in the trial Court, which was upheld on appeal to the District Court. The facts of the case are that U Po Nyun and his father before him have owned the mill-site shown as B in the plan Ex. A for 60 or 70 years. This land was leased to one U Chein for 15 years. U Chein first erected a boat-building shed on it and 12 years later a mill, without obtaining a fresh lease. That mill was sold to Ba Swee Seng (Ban Shwe Sin) company, of which plaintiff 1 was one of the partners. That company was in possession of the mill for 26 or 27 years up to 1932, so the sale to them was in 1905 or 1906. U Chein came on the land 26 years before then, that is in 1879 or 1880, and built the mill in 1891 or 1892, and he and then after his death his wife Daw Lu Ngon owned the

mill for 14 years before she sold it to Ban Swee Seng Company in 1905 or 1906. The company went into liquidation in 1932, and another party in 1934 bought the mill buildings and they were dismantled and taken away. The defendant bought from Ban Swee Seng Company at the same auction in 1934 the land shown in the plan as A, over which the road in question, marked C D runs. Ban Swee Seng Company had bought this land from the original owners some three years after they had bought the mill buildings from Maung Chein, i. e. in 1908 or 1909. The defendant has built a substantial granary at the place marked by me as X in Ex. A, where the road CD debouches on the municipal road EF. Ex. B, plan of 1901-2, shows that the road existed in its present width and state in that year. The evidence showed that U Chein was exercising a right of way over this road since he built the mill in 1891 or 1892 for some 14 years up to 1905 or 1906, and that Ban Swee Seng Company exercised a right of way over it after that, from 1905 or 1906 until it bought the land on which the road stood in 1908 or 1909, after which it continued to use the same road over its own land. In all 17 years user or at the most 18 years user as of right over another's land was proved.

Before U Chein's time there was admittedly a footpath of unknown width on the same site as this road. The plaintiffs claim a right of way over the whole length of the road for a width of 18 feet. A right of way is not denied, but it is denied in this appeal that a right of way for carts over a width of 18 feet was acquired. The evidence, that of the plaintiff and his witness Za To (P. W. 2), goes to show that the road which led from the mill buildings to the municipal road was only used qua cart road after the mill was built. Both the plaintiff and U Za To say that the road was only made into a cart road and a bridge built over the creek when the mill was built. When there was a boatshed on the land there was a footpath on the same alignment, but Za To makes it clear that it was then only a footpath, and it would seem that carts could not have used it before there was a bridge. A right of way is acquired under S. 26, Limitation Act, by enjoyment by any person claiming title thereto as an easement and as of right without interruption and for 20 years. Although the Easements Act does not apply to Burma, no doubt the Court must have regard to that Act in considering the question now under consideration: 13 Rang 748[1] at page 752.

It is the law that the possession of the tenant is the possession of the landlord (1868) 4 Ch A 133,[2] but a tenant of one land cannot acquire, either for himself or on behalf of his landlord, a right of way as of right upon another land of his own; that is a principle of the English law repeated in Sec. 4, Easements Act, which defines "easement" as a right which the owner or occupier of certain land possesses in respect of certain other land not his own: *see* 15 Beng L R 361[3] at pp. 365, 366 and 49 Mad 820.[4] No doubt the acquisition of a right of way was not extinguished, but only suspended, by unity of possession of the dominant and servient tenements, for the ownership of the two estates was not co-extensive and equal in validity, the dominant tenement being held for a term of years only, the servient tenement in full right of ownership, 50 Cal 356.[5] But there is no evidence of user after the mill went into liquidation.

The learned District Judge said that although plaintiff 1 was a partner of the company he was always the owner of the land Ex. B, and used the road as such quite apart from the user of it by his tenant, the mill company; but it is clear from the evidence that the use of the road as a cart road was by the tenant mill company and its customers only. For these reasons it appears to me that 20 years uninterrupted user of the right of way claimed, i. e., of an 18 feet cart road, was not proved on behalf of the plaintiffs, but only 17 or at the most 18 years user was proved. This appeal must be successful and the plaintiff's suit dismissed with costs in this Court, advocate's fee four gold mohurs. As however the defendant adduced what was undoubtedly shown to be false evidence on a point never taken in the written statement, that the company paid rent to the previous owner of the land Ex. A before the company bought that land, the parties will pay their own costs in the two lower Courts.

R.M/R.K. *Appeal allowed.*

1. Daw Gyan v. U Maung Maung, (1936) 23 AIR Rang 58=160 I C 796=13 Rang 748.
2. Gaford v. Moffat, (1868) 4 Ch A 133.
3. Modhoosoodun Dey v. Bissonauth Dey, (1875) 15 Beng L R 361.
4. Subba Rao v. Lakshmana Rao, (1926) 13 A I R Mad 728=96 I C 968=49 Mad 820 (F B).
5. Tinkowri Pathak v. Ram Gopal Pathak, (1923) 10 A I R Cal 8 = 70 I C 663=50 Cal 356=36 C L J 161.

A. I. R. 1939 Rangoon 423

ROBERTS C. J. AND DUNKLEY J.

Akoojee Jadwet and Co. — Appellants.

v.

A. V. and Son — Respondents.

First Appeal No. 16 of 1939, Decided on 29th May 1939, against decree of Dist. Court, Amherst, D/- 30th January 1939.

Contract — Action on — Burden to prove that there was concluded contract is on plaintiff—Only certain terms of contract settled while others left open—There is no concluded contract—One party giving other party option for renewal of contract on terms to be mutually agreed upon—This does not imply that terms of prior contract should be incorporated in new one.

In an action brought on an alleged contract the burden of proof is, of course, upon the plaintiff to show that a firm contract had been entered into between the parties and that something more than mere negotiations had taken place. The negotiations and correspondence must be looked at as a whole to see whether the parties to them have concluded a binding contract or not. Where only certain terms of the contract were settled and the other terms of the agreement were left open there is no concluded contract: *(1878) 7 Ch D 29 and (1856) 6 H L C 238, Rel. on.* [P 423 C 2]

Moreover, when a party to the contract has given other party to the contract an option for renewal of the contract on terms which would be mutually agreed upon, this does not in any way imply that the terms of the prior contract, or any of them should be incorporated in the new one. In other words, the party does not bind himself in any way to renew the contract upon the old terms. [P 424 C 1]

Clark — *for Appellants.*

Hay and K. C. Sanyal — *for Respondents.*

Roberts C. J.—The appellants in this case, who were defendants in the Court below, are the agents and distributors of the Indo-Burma Petroleum Company for the sale of petrol in the district of Moulmein; and the respondents are general merchants carrying on business in petrol and commodities incidental to the motor trade. In 1930, the respondents were appointed sole distributors of the Indo-Burma Petroleum Company's petrol in Moulmein by the appellants, and on 15th June 1934 the contract was renewed as from 1st May 1934 for a period of three years, which expired on 30th April 1937. The terms of the contract contained provisions for the payment for petrol supplied, or what is known as "over-riding commission," and rent for the petrol godown, and various other stipulations. Paras. 6 and 7 of the contract are as follows:

6. You will remain the sole distributor of I. B. P. petrol in Moulmein and district for a period of three years from 1st May 1934, subject to our holding the I. B. P. Sub-Agency, with the option of renewal of this distributorship for a further period of two years on terms which shall be mutually agreed upon.

7. Should any dispute arise between us the subject-matter of such dispute shall be referred to the I. B. P. Co. Ltd., Rangoon, whose decision shall be final.

On 5th April 1937, shortly before the expiry of this contract, the appellants wrote a letter to the respondents, in which they state:

We shall be glad to know as to what arrangement you intend to make for renewal of it (the contract) for another two years for which you have been given option conditionally on certain terms to be mutually agreed upon.

We therefore beg to propose fresh terms by imposing our overriding commission at Rs. 25-15-0 per wagon load of 830 tins of petrol.

An early reply will be much appreciated.

Owing to the absence of the respondents' manager in India, an extension of time up to 31st May 1937 was mutually agreed upon between the parties and on that date the contract came to an end. The plaintiff's action was brought upon an alleged contract of 1st June 1937 whereby they were to be appointed for a further two years on the same terms and conditions as were contained in the old contract and it is said that it was further agreed that a formal agreement to that effect should be executed between the parties as early as possible. The plaintiffs say that without any reasonable cause or excuse the defendants refused to execute the written agreement and they brought an action for specific performance, or alternatively for damages. The burden of proof was, of course, upon the plaintiffs that a firm contract had been entered into between the parties and that something more than mere negotiations had taken place. The negotiations and correspondence must be looked at as a whole to see whether the parties to them have concluded a binding contract or not. As was said by Jessel M. R. in (1878) 7 Ch D 29[1] at page 30:

If in the case of a proposed sale or lease of an estate two persons agree to all the terms and say, 'we will have the terms put into form' then all the terms being put into writing and agreed to there is a contract.

If two persons agree in writing that up to a certain point the terms shall be the terms of the contract, but that the minor terms shall be submitted to a solicitor, and shall be such as are approved of by him, then there is no contract, because all the terms have not been settled.

1. Winn v. Bull, (1878) 7 Ch D 29=47 L J Ch 139=26 W R 230.

And again it was remarked in (1856) 6 H L C 238[2] that the act of sending a paper to a solicitor to have a matter reduced into form affords generally cogent reasons that the parties do not intend to bind themselves till it is reduced to form. And it is quite clear to my mind that the phrase "option for renewal of this distributorship on terms which shall be mutually agreed upon" does not in any way imply that the terms of the prior contract, or any of them, should be incorporated in the new one. The appellants could not, having made such an agreement, have entered into a new contract with third parties for the distributorship, but must first approach the respondents. But they did not bind themselves in any way to renew the distributorship to the respondents upon the old terms. It is quite plain that the respondents were eager to secure a renewal of the contract upon the old terms; and their case is that the moment Valliappa Chettyar, their manager, returned from India he proceeded at once to Moulmein and there interviewed the appellants and after some discussion, the contract was renewed for two years. In support of this it is urged that one waggon of petrol was received by the respondents on 8th June and another waggon of petrol on the 12th. I cannot myself find this conclusive of any more than that there was a mutual desire to achieve some continuity and that whilst negotiations were in progress petrol was supplied on an implied promise to be bound by reasonable terms: and it is clear that it was to everyone's interest that Moulmein should not be without supplies of petrol, and the gap during which negotiations took place was bridged by the offer and acceptance of these two consignments.

The appellants' case is that the respondents' manager, Valliappa Chettyar, arrived on 4th June at their office saying that he had been indisposed during the early days of the month: there was a question about the reduction of the over-riding commission, and matters were left open till 8th June and, as they were in abeyance on the 8th, the petrol to which I have referred was supplied, and, on 10th June, the terms of the contract which the appellants proposed to grant were handed to the respondents. These terms contained provisos that there should be no further option for extension at the end of the new term to be granted and that the godown and licence for storing petroleum should be taken and kept in the name of the appellants. The appellants say that Valliappa Chettyar explained that he was insufficiently familiar with English to accept the terms of this offer without further investigation and that he would come back in the evening — if it was all right — to sign the contract. He did not do so, but returned on the 15th with a refusal to accept the terms of it. On 17th June the appellants' legal adviser wrote to the respondents stating that up to then they had not come to any terms and that they had by their conduct ceased to be representatives of the appellants and must forthwith furnish accounts of empty tins, oils and cans and make over the godown and licence for the same to the appellants within three days. The respondents did not see fit to answer that letter direct. They were representing their case to the Indo-Burma Petroleum Co. and when they received this letter they forwarded it to that firm. Their letter to the Indo-Burma Petroleum Co. is also dated 17th June. It says that Mr. Jadwet, for the appellants, agreed to renew the agreement for a further term of two years on the same terms as previously, but sets out the documents which they were asked to sign on 10th June and which constitute what the appellants describe as their offer. The respondents, in that letter, asked the Indo-Burma Petroleum Co. to be so good as to try and effect a compromise. The respondents were able to send the Indo-Burma Petroleum Co. copies of Ex. B, which was the offer of 10th June, and of Ex. M, which was a memorandum in writing of the terms of the contract which they say they entered into on 1st June: Ex. M is dated 10th June.

To my mind, insufficient reasons have been given for the respondents being in possession of Ex. B at all, unless it is true that Valliappa Chettyar took it away with him on 10th June. His own story is that he never took it away, but saw it in the appellants' office and declined to agree to its terms. He also says that Ex. M was left with the appellants. In order to explain his ability to forward copies to the Indo-Burma Petroleum Co., he says that they were copied in the appellants' office by his own clerk, Xavier. Xavier is not a witness whose story can be accepted without caution as he has twice been in prison for criminal breach of trust. And the ac-

2. Ridgway v. Wharton, (1856) 6 H L C 238=27 L J Ch 46=4 Jur (N S) 173=5 W R 804=108 R R 88.

count which the respondents give of the interview on 10th June is, to my mind, inconsistent with their story of a firm contract having been arrived at on 1st June. It is quite plain from the evidence given on both sides that it was contemplated that a final agreement should be signed at an interview between the parties. If the respondents' story is true, there would be no need for a meeting between them on 10th June at all. No final agreement was ever signed; and I am obliged to hold that the negotiations which were being continued up to and beyond the interview of 10th June were broken off by the refusal of the respondents to accept the new terms under which they were offered the distributorship. When the plaintiff came to give evidence in the box and was cross-examined with regard to Ex. M, he described it as a draft and said that "Jadwet was at liberty to add anything to it except in the matter of the godown lease and the petrol license." On his own showing therefore, it appears to me, that even at that stage the respondents cannot suggest that a firm contract had been arrived at. The version of Mr. Highet, whose evidence was taken on commission, is to the following effect. About the 24th June after some discussion Valliappa Chettyar agreed to renew the agreement on the terms set out by the appellants in the draft dated 10th June. The witness told Valliappa Chettyar that the final decision as to renewal rested with Mr. Ebrahim, the manager of the appellants. At that time he says, in evidence, "the dispute had not been left to my company to decide."

The case for the respondents is supported not only by Mr. Xavier but also by Mr. Venkatesan, who was at one time their manager and alleges that he was present on 1st June when an oral agreement was come to. But I am satisfied, upon the evidence given on behalf of the respondents and from the letter in which fresh terms are mentioned and a reference is made to the fact that the option was to be exercised on terms to be mutually agreed upon, that all that happened at the oral interview, whether it took place on the 1st or 4th June, was that some further meeting would be necessary at which the final terms should be agreed upon. Mr. Hay says that the respondents are justified in raising objection to Ex. B, because it proposed something which had never been arranged before. This depends, to my mind, on the fallacy of going back to the old contract and assuming that, though it had been discharged by efflux of time, some, many, or most, of its terms must necessarily be the terms to be arrived at when a renewal of the distributorship was being arranged. So it is quite clear from the evidence that the negotiations broke down and I cannot accept the view that there was a firm contract on 1st June since it appears to me that the appellants' conduct has been consistent throughout and they explain their position fully in their letter of 17th June to the respondents. They were never anxious to grant a renewal upon precisely the old terms, but the respondents were always anxious to persuade them to do so: having failed, they then turned round and endeavoured to get the best terms they could and to force the appellants to re-open negotiations after their offer of 10th June had been refused.

Something has been said about arbitration in this connexion. In my view, the arbitration clause in Ex. A only refers to the submission of disputes between the parties to the contract whilst it lasted. It expired at midnight on 31st May. There is no submission to arbitration as to the terms of a new contract to be arranged, although in fact it was the appellants who in these proceedings suggested arbitration: and the respondents, in their written objections, said:

> Plaintiffs beg to submit that the Indo-Burma Petroleum Co. Ltd., being a company, cannot act as arbitrators. Even if it be held that its directors or share-holders should act as arbitrators it would never be feasible for such directors or share-holders to act as arbitrators.

They themselves brought this suit and in it they rely on the alleged contract of 1st June. The learned trial Judge has found, upon a consideration of the evidence, that an agreement was reached on the 1st June to renew the contract for a further term of two years. But he observes that the plaintiff in his own evidence said that Ex. M was meant to be very brief but that the defendant was at liberty to add to it. It is quite inconsistent with the respondents' case that there should be in existence, nine days after the alleged contract, a document embodying its terms which one of the parties was permitted to alter. For the reasons I have given, I am satisfied that we ought to hold that this was a case which never proceeded further than negotiations. The respondents' grievance has arisen from the fact that they have assumed that the so-called option for renewal given in the

earlier contract conferred upon them a right to extend the operation of that contract upon the same terms for the further period: nothing could be further from the truth. This appeal must therefore be allowed, and the suit of the plaintiffs-respondents dismissed with costs in both Courts.

Dunkley J. — I am in entire agreement with my Lord the Chief Justice and I have very little to add to his reasons for his decision. In my opinion, it is of importance to notice that the option given to the respondents by the letter of 15th June 1934, (Ex. A), was not an option to renew the agreement but an option of renewal of the distributorship. If para. (6) of this letter conferred any right at all on the respondents, it meant at most, as my Lord has said, that at the expiry of the agreed term of three years, before giving the business of distributor to any other person, the appellants must offer it to the respondents and give the respondents an opportunity of coming to terms with them. The appellants carried out their obligation by their letter of 5th April 1937, (Ex. C), in which they made a proposal to the respondents. This proposal was not accepted by the respondents' manager, who entered into negotiations with the appellants, with the result that the appellants modified their proposal as set out in the respondents' manager's letter of the 25th April (Ex. D).

Time was asked for on behalf of the respondents to consider this modified proposal, and time was granted until the 31st May, (Ex. E). The proposal was not accepted within the time given. It therefore lapsed. Also, at the same time, the agreement contained in the letter of 15th June 1934, ceased to have any force or effect by efflux of time, and every term of that agreement ceased to be binding on either party. Hence it is idle for the respondents to lay stress, as they have done, on para. (7) of this letter and to say that, in view of the letter of the 25th June from the Indo-Burma Petroleum Company to the appellants, the appellants were bound to accept the offer made by the respondents on the 26th June to continue the business of the distributorship on the terms proposed by the appellants on the 10th June and contained in the document Ex. B. The respondents had been given ample time to accept these terms, and the correspondence shows that they had definitely rejected them, at any rate on the 17th June if not earlier. Consequently, it was not open to the respondents to accept them on 26th June. Moreover, this case, which has been strenuously urged before us, is not the case which is set up in the plaint, which is based on a binding agreement between the parties concluded on the 1st June. I agree with my Lord that the supplies of petrol made on the 8th and the 12th June cannot be held to have been made in pursuance of any such agreement, or that they raise any inference as to the existence of any new agreement, and that the true inference is that they were made by the appellants in their own interests for the preservation of the business while negotiations were going on.

To my mind, it is a matter of indifference whether, as the respondents state, negotiations were begun on the 1st June, or whether, as the appellants state, they were begun on the 4th June. Negotiations were opened at the beginning of June, and they were entirely fresh negotiations for an entirely new agreement. It may be, as is now urged on behalf of the respondents, that the appellants did not think of the terms which subsequently became the bone of contention between the parties until after these negotiations had opened; but of what importance is that? The appellants were not bound by anything that had been done previously, and it was open to them to suggest new terms. It is plain that at the first interview only the rate of commission was settled and the other terms of the agreement were left open ; that is, no concluded contract was made. This is clear from the respondents' letters of the 17th June and the 27th June to the Indo-Burma Petroleum Company (Exs. 3 and 6), and their pleader's letter to the appellant's pleader of the 2nd July (Ex. 8) and the evidence of the respondent's managing partner. Referring to the note of the terms acceptable to him (Ex. M), which he alleges that he left with the appellants on 10th June, he said in cross-examination : " Jadwet was at liberty to add anything to it, except in the matter of the godown lease and the petrol licence." This disposes of his claim based on a concluded contract of the 1st June, and therefore his suit was bound to fail.

D.S./R.K. *Appeal allowed.*

A. I. R. 1939 Rangoon 427

MOSELY J.

Kumarappan and another

v.

The King.

Criminal Revn. No. 156.B of 1939, Decided on 19th June 1939.

(a) Criminal P. C. (1898), Ss. 106 and 514—Bond under S. 106—Magistrate should record evidence to prove fresh breach of peace and forfeiture of bond — Respondent appearing to show cause why bond should not be forfeited — He must be given opportunity of cross-examining witnesses — Witnesses, on whose evidence forfeiture is established, previously examined in absence of accused — They need not be again examined in his presence — *(Obiter).*

In case of bond under S. 106, Criminal P. C., it is necessary for the Magistrate to record evidence to prove the commission of a fresh breach of the peace and the forfeiture of the bond. Such evidence need not, according to the terms of Sec. 514, be taken in the presence of the respondent, but when the respondent appears and shows cause he must be given an opportunity of cross-examining the witnesses upon whose evidence the Magistrate had directed him to show cause why the bond should not be forfeited. The Section does not require that before a final order is made the witnesses on whose evidence the forfeiture is held to be established, if they have been previously examined in the absence of the accused, must again be examined in his presence: *4 Cal 865 (F B), Rel. on ; 25 Cal 440, Dissent. ; 10 C L R 571, Expl.*

[P 428 C 1]

(b) Criminal P. C. (1898), S. 514—Bond for appearance of accused—Forfeiture—It is often unnecessary for Magistrate to record evidence —Burden is on surety to give explanation why accused was unable to attend Court.

Where a bond has been executed for appearance merely, it is often unnecessary for the Magistrate to record any evidence at all. The Magistrate knows by his own observation that the accused failed to appear in his Court. The burden of proving the negative, that is to say, that the accused absented themselves without reasonable cause for their non-appearance is not upon the prosecution and it is for the surety to give an explanation why the accused person was unable to attend Court.

[P 428 C 1]

(c) Criminal P. C. (1898), S. 514—Bond for appearance of accused — Forfeiture — Order directing forfeiture without giving accused or surety opportunity of proving their allegation is bad.

An order directing forfeiture of bond executed for the appearance of accused and directing the surety to pay penalty without giving the accused and the surety an opportunity of showing cause, by adducing evidence, as to why the accused failed to appear is bad and should be set aside.

[P 428 C 2]

Order.—The applicants in revision went bail to the amount of Rs. 100 each for certain persons accused of trespass, an offence under S. 447, Penal Code. On a date at a later stage of the case to which the case was adjourned only two out of the six accused were present. The advocate for the remaining accused filed a petition stating that they had started by boat from their village, and that they had probably been detained by a storm. The Magistrate recorded his grounds for belief that this was not so, and called upon the sureties under S. 514, Criminal P. C., to show cause why their bonds should not be forfeited to the amount of Rs. 100 each. The sureties showed cause in writing to the same effect as that mentioned. The Magistrate did not believe this explanation as he said that two of the accused had been able to come, and, in any event, the other accused should have appeared as soon as possible after the date fixed, and should have explained their non-appearance. It was ordered that the sureties pay a penalty of Rs. 100 each. In appeal the penalties were reduced to Rs. 50 each on each surety. It is now contended in revision that the Magistrate's order was bad because it had not been proved to the satisfaction of the Court that the bond had been forfeited, that a formal inquiry should have been held by the Magistrate, and that in any case it should have been found that there was sufficient reason for the non-appearance of the absent accused on the date fixed: 4 Cal 865[1] is cited as authority in this connexion. S. 514, Criminal P. C., of 1898, which is substantially the same as the Code, current in 1879, says:

> Whenever it is proved to the satisfaction of the Court by which a bond under this Code has been taken, or when the bond is for appearance before a Court, to the satisfaction of such Court, that such bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid.

The only authority that I can find on the subject is the above cited case and two other cases, also from the Calcutta High Court in 10 C L R 571[2] and 25 Cal 440.[3] These are all cases of breach of a bond executed either by the surety or by the accused under Sec. 106, Criminal P. C., and not bonds for the appearance of accused persons. In two of these cases there was no relevant evidence against the accused on record and the Magistrate had wrongly relied on evidence implicating him in cases

1. The Empress v. Nobin Chunder Dutt, (1879) 4 Cal 865=4 C L R 243 (F B).
2. In re Mohesh Chundra Roy, (1882) 10 C L R 571.
3. Queen-Empress v. Har Chandra Chowdhury, (1898) 25 Cal 440.

against other persons without recording further evidence himself. In the third case, which was against the surety, the Magistrate had relied on the case in which the accused was convicted, and that evidence was not relevant against the surety: *vide* S. 43, Evidence Act: (but see now sub-s. (7) of S. 514).

In such cases it is obviously necessary for the Magistrate to record evidence to prove the commission of a fresh breach of the peace and the forfeiture of the bond. Such evidence need not, according to the terms of S. 514, be taken in the presence of the respondent, but clearly, as was said in 4 Cal 865,[1] when the respondent appears and shows cause he must be given an opportunity of cross-examining the witnesses upon whose evidence the Magistrate had directed him to show cause why the bond should not be forfeited. I do not agree with what was said in 25 Cal 440[3] that the Section requires that before a final order is made the witnesses on whose evidence the forfeiture is held to be established, if they have been previously examined in the absence of the accused, must again be examined in his presence. 10 C L R 571[2] is cited as authority for that proposition, but it is clearly no authority, for all that is said there is that evidence should be recorded by the Magistrate before calling upon the person bound by the bond to pay the penalty thereof. Where a bond has been executed for appearance merely, I am of the opinion that it is often unnecessary for the Magistrate to record any evidence at all. The Magistrate knows by his own observation that the accused failed to appear in his Court. The burden of proving the negative, that is to say that the accused absented themselves without reasonable cause for their non-appearance, is not upon the prosecution and it is for the surety to give an explanation why the accused person was unable to attend Court.

In the present case however in view of the petition put in and as two accused persons did appear, it was clearly the duty of the Magistrate to examine them as to the reason put forward for the non-appearance of the other accused. One of the two accused who did appear came from the same village as the four defaulters and the other accused from evidently a neighbouring village, who presumably would come by the same route. It does not necessarily follow, of course, that either of the two accused who did appear came from their villages on the day in question, they might have come from elsewhere. The other reason given by the Magistrate, I think, is no reason if the accused persons were really unable to appear because of the storm. They were not bound to come all the way to Court to explain how they had been detained. In my opinion however the Magistrate's proceedings were bad for another reason — the simple reason that the accused persons should have been given an opportunity of proving their allegation, if they so desired, by adducing evidence. It is quite possible that the storm was so bad that they really were detained by it, and so were unable to attend Court.

There is another matter which should be remarked on in the present case. This prosecution for trespass was apparently a petty case. It started on 30th June 1938. All the accused were present on 5th August, the date fixed for the case, when it appears that the Magistrate himself was absent. On 5th September, four out of the six accused were present and two were sick. On 30th September the same thing happened. On 20th October all six accused were present and some only of the prosecution witnesses were examined. On 31st October all six accused were present, but nothing was done on the excuse that a cross case had not been finished. The next hearing (the sixth hearing) was on 11th November the date in question, when four accused were absent. There were no less than six subsequent adjournments before orders were passed on 21st February, when the accused were fined Rs. 10 each. It is no wonder, in view of the lamentable delay in trying this trivial case, if some of the accused made only a half-hearted attempt to appear on the sixth occasion. As the Magistrate did not give the respondents a proper opportunity of showing cause, the order directing the forfeiture of the bonds will be set aside, and the amounts paid refunded to the applicants.

D.S./R.K. *Order set aside.*

A. I. R. 1939 Rangoon 428

ROBERTS C. J. AND DUNKLEY J.

Lee Shi — Appellant.

v.

Consolidated Tin Mines of Burma Ltd. — Respondents.

Civil Misc. Appeal No. 5 of 1939, Decided on 29th May 1939, against order of Commissioner for Workmen's Compensation, Tavoy, D/- 3rd November 1938.

(a) Workmen's Compensation Act (1923), S. 12 — Liability of principal to compensate workmen employed by his contractor when arises stated.

Section 12 shows that the principal who employs a contractor shall be liable to compensation to workmen whom he did not immediately employ but who are employed by the contractor. But before the principal can be made so liable it must be shown that the contractor was entitled to expect such workmen to do his work at his orders and that he was entitled to dismiss such workmen. It must in short be proved that there was a contract of service between the workmen and the contractor. Where there is only an agreement by which certain selected persons could come when they chose and do work on their own account which would get for them remuneration from the contractor, the principal is not liable to compensate such workmen. [P 429 C 2 ; P 430 C 1]

(b) Workmen's Compensation Act (1923), S. 3—Wilful disobedience of workman—Liability of employer to compensation—Test—Workman meeting his death while doing work which he was employed to do but having no right to go to place where he died—Employer is liable to compensation.

Under S. 3 although there may be wilful disobedience on the part of the workman concerned, the employer may be liable in respect of injury which results in death of the workman, provided the accident arose out of and in course of his employment. In considering this question the ambit and scope of the man's employment must be looked at in relation to the contract which he made with the employer. The test applicable in such cases is whether it was or was not a part of the injured person's employment to hazard or suffer or do that which caused his death. If yes, the accident will be deemed to have arisen out of and in course of the employment. [P 430 C 1, 2; P 431 C 1]

Where the workman when met with his death was doing the very thing which he was employed to do, the mere fact that he had no right to be working in the place where he was when he met his death, does not mean that the accident did not arise out of and in course of the employment and the employer would in such case be liable to compensation under S. 3 : *English Case law Rel. on.* [P 430 C 1 ; P 431 C 1]

U Chan Htoon — *for Appellant.*

De — *for Respondents.*

Roberts C. J. — This is an appeal from the order of the learned Commissioner for Workmen's Compensation at Tavoy arising out of the death of one Chan Chi Lyan, a Chinaman, who was killed on 24th August 1937 whilst working in or about the mines of the respondent company. The cause of his death was the fall of a tree which collapsed into a drainage or ditch in which he was working, and this action is brought by his widow by her agent Ah Chan against the respondent company. The learned Commissioner framed four issues, the first being whether on the date in question the deceased was a workman employed by the respondent company, and that issue he answered in the affirmative for reasons which we find it difficult to understand. He states that his finding has been arrived at in view of the evidence of one Akbar and that at the time of his death the deceased was what is known as a tributor? We are not told in the order of the learned Commissioner what a tributor is: We are not told with whom he had a contract of service: we are not told of the nature of his work, or the place at which he was expected to work, or the wages which he earned; but we are left with the bare finding of fact that he was in the opinion of the Commissioner a workman within the statute. Akbar in his evidence says that the deceased was a tributor who during the four days before his death (which was the only period for which he had been a tributor) did not supply any ore to the company and that his name was not entered in any ledger. In cross-examination he said that contractors do not employ tributors but tributors get and sell ore to contractors and get cash from them. And his evidence was therefore to the effect, so far as I can see, that the deceased was not employed by anybody but was a free agent to come and go as and when he liked for the purpose of collecting ore or doing some other ancillary work which would result in his private gain when he sold the produce to a contractor. Another witness, Mr. Rajan, who was the Assistant Officiating Manager of the respondent company, said that the contractor engaged his own labour and made his own arrangements for paying them, and the contractor was paid by the company an agreed price per viss won. This makes it doubtful as to whether the contractors would pay merely for the ore which was given to them by the tributors or whether they were dealing with the deceased upon the footing of a servant or some one who was having a series of contracts with them.

Section 12, Workmen's Compensation Act, plainly shows that the principal who employs a contractor (that is to say the respondent company here) shall be liable to compensation to workmen whom he did not immediately employ but who are employed by the contractor. But there is, so far as I can observe, nothing in the evidence in this case which shows that the deceased ever had a contract of service with the contractor at all. Loosely speaking, of course, it might be permissible to say that the coolies who collect ore and are paid by a contractor for what they collect are

employed by him, but the tests of employment must be looked to. Were the contractors entitled to expect such coolies and the deceased among them, to do their work under their orders? Were they entitled to dismiss such persons? Was there in short a contract of service between them or was there merely an arrangement by which certain selected persons when they chose could come and do work on their own account which would get for them remuneration from the contractors? We have not been favoured with the result of an examination into these matters, and this case must accordingly go back to the Commissioner so that he may take evidence and record the evidence that he has taken and that we may say whether upon that evidence there is any material upon which he can find that the deceased in this case was a workman within the meaning of the statute. If he was such a workman, the next question is whether the accident which killed him arose out of or in the course of his employment, having regard to the provisions of S. 3 of the Act. And it is clear from those provisions, looking at sub-s. (1) (b) (ii), that the employer shall not be liable in respect of any injury not resulting in death caused by an accident which is directly attributable to the wilful disobedience of the workman to an order expressly given. That means to say that the first question to be faced is whether the accident arose out of and in the course of a workmen's employment. If it does, the employer is prima facie liable unless there is a wilful disobedience by the workman to an order expressly given. But even though such wilful disobedience has existed, the liability occurs when the injury is found to have resulted in the workman's death. Accordingly, the Commissioner had to address himself, having found that the deceased was a workman, to the question whether this accident arose out of and in the course of his employment. This matter he has dealt with in a somewhat summary way. He said that it was clear that the deceased had no right to be working in the place where he was when he met his death, and that therefore the accident did not arise out of and in the course of his employment. But the Statute says in plain terms that in spite of there being wilful disobedience an employer may be liable in respect of injury which results in death provided the accident arose out of and in the course of a person's employment.

Now in considering this question the ambit or scope of a man's employment must be looked at in relation to the contract which he has made with his employer. The first thing to be noticed is that it is quite clear that there are a number of things which a person may do whilst he is being employed which do not arise out of and in the course of his employment. Two cases assist us in this connexion. In the first case, (1924) 2 K B 651,[1] a workman in contravention of express orders went to hang up his coat in a place to which he had been forbidden access, and it was held that the act of hanging up his coat, though done at or close to the place of his employment, was done for his own purpose and done in a place outside the scope of his employment, and was merely an act incidental to his employment, and therefore was not an act covered by the statute. A further illustration of the same principle arose in a case to which I referred in argument, where a travelling ticket collector in the employment of the Great Western Ry. Co., was obliged during the course of his duties to remain on different occasions for a night at Swansea. Being qualified as a guard and therefore being liable to be called upon in any emergency to act as such, he was obliged to leave the address of his lodgings in Swansea with the Railway Company; but apart from that he was free to go to and fro wherever he chose in Swansea whilst not on duty. One morning whilst going from his lodgings to the station to join the train he fell in the street and claimed compensation. It was held, while in the street proceeding from his lodgings to the station, he was not performing any duty under his contract of service, and therefore the accident did not arise in the course of his employment. And the whole question in this case is whether the accident which took place was one which took place owing to the nature of the person's employment and from a risk which was incident to the carrying out of his duties in that employment alone. In the case I have just cited, (1937) A C 454,[2] although the appellant would never have been at Swansea but for the nature of his employment, he was whilst at Swansea acting as an ordinary

1. Davies v. Gwauncaegurwen Colliery, (1924) 2 K B 651=68 S J 882=40 T L R 859.

2. Alderman v. G. W. Ry. Co., (1937) A C 454=106 L J K B 335=30 B W C C 64=156 L T 441=81 S J 337=53 T L R 594=(1937) 2 A E R 408.

member of the public. In this case however it seems to me that the accident which arose was one which arose—assuming the deceased to have been a workman—by reason of the fact that he was doing the very thing which he may well have been employed to do, namely to find ore, and in the course of finding ore and while doing those things which directly concerned his work he was injured by a falling tree.

In (1927) 96 L J K B 572[3] the authorities in relation to the act of a person who does something which he is forbidden to do whilst engaged in his work received careful consideration at the hands of Scrutton L. J. In that case Clarke, who was a workman in the employ of the Southern Railway, went by a shorter route along the permanent way to his work. This was a common practice although forbidden by the company's rules. When the servant had walked some distance along the line an engine was found to be going in the same direction and he tried to mount it so as to get a lift, with the result that he was seriouly injured. It was held on appeal that workmen were not any longer in their employment when they went into a definitely prohibited area and had gone outside their sphere of employment. Scrutton L. J. said :

> Approaching this case therefore from that point of view and appreciating that it is not enough to say: 'You were forbidden to go on the line, therefore the accident cannot have arisen in the course of your employment,' what test are we to apply?

and he applied the test laid down by Lord Sumner in the case which Mr. De has just cited to us (1917) A C 352.[4] Lord Sumner said :

> There is in my opinion one test which is always applicable, and it is this : Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury ? If yea, the accident arose out of his employment. If nay, it did not, because what it was not part of the employment to hazard, to suffer, or to do cannot well be the cause of an accident arising out of the employment.

In this case the deceased Chan Chi Lyan was doing something which, so far as can be seen, arose from the nature of the contract of service which he had undertaken. It has been suggested that there was an added peril by reason of the fact that notwithstanding the prohibition he went to a place which was near a dangerous tree which fell upon him; but that point has been dealt with by Lord Buckmaster in the case of 20 Butterworths' Workmen's Compensation Cases 436.[5] Lord Buckmaster says (at p. 446) :

> In one sense, every method of performing an operation in the course of a man's employment that is not the safest is an added peril, but the Act contains no provisions that exclude from its benefits an accident that has arisen through a method of work which was not the safest in the circumstances. Conduct can of course be so reckless and so unnecessary as to take it outside the meaning of the statute.

Now, does the mere fact of an act of being a disobedient act take it outside the meaning of the statute because it must necessarily, by reason of being disobedient, be so reckless and so unnecessary that the dependent should not receive compensation? The answer is that the statute expressly deals with the matter in saying that where there is wilful disobedience the employer shall not be liable unless—and this is the most important matter — the injury results in death. Where the injury results in death the employer has no defence in merely saying that it was sustained as the result of the wilful disobedience of the workman to an order expressly given; and that is all that he has been able to say here. I therefore think that the Commissioner has not rightly directed himself upon this matter. But all that we have to do at the present juncture is to send the case back to him to see whether there was any evidence upon which he could hold as a fact that the deceased was a workman within the meaning of the Act. We shall have to consider when he has taken fresh evidence and reported to us his conclusion on that matter, what are the proper steps to be taken in the circumstances. Having examined the other matters the learned Commissioner must make an effort to deal with the question of wages in case it shall transpire that the appellant is entitled to compensation. The method of calculating wages is laid down by S. 5 of the Act and must be computed in accordance with its provisions.

Dunkley J. — I agree, and desire to add only one word. The Act provides that in the case of an injury resulting in death it shall be no answer on the part of an employer to a claim for compensation that the deceased workman acted in wilful disobedience of an order expressly given, and it appears to me that the answer of the learned

3. Clarke v. Southern Railway, (1927) W C I Rep 282=96 L J K B 572=137 L T 200.
4. Lancashire and Yorkshire Railway v. Highley, (1917) A C 352=86 L J K B 715 = 1917 W C I Rep 179 = 116 L T 767 = 61 S J 397 = 33 T L R 286.
5. Thomas v. Ocean Coal Co. Ltd., 20 Butterworths' Workmen's Compensation Cases 436.

Commissioner to his third issue must have the effect of rendering this provision nugatory.

N.S./R.K. *Case sent back.*

A. I. R. 1939 Rangoon 432

BAGULEY J.

Municipal Corporation of Rangoon — Applicant.

v.

Ram Behari and another — Respondents.

Civil Revn. No. 222 of 1938, Decided on 5th January 1939, from order of Court of Small Causes, Rangoon, in C. M. No. 235 of 1938.

(a) Civil P. C. (1908), S. 60 — Exemptions are cumulative.

Exemptions from attachment running from sub-heads (a) to (p) are cumulative and any man is entitled to all the benefits if he is qualified to do so. [P 432 C 2]

(b) Civil P. C. (1908), S. 60, Explanation 2 as amended by Act 9 of 1937—Emoluments as pay are "salary."

The emoluments of a judgment-debtor known as his pay must be regarded as "salary" for the purposes of this Section as defined by the Explanation. [P 432 C 2]

(c) Civil P. C. (1908), O. 21, R. 46 and S. 60 (k)—Subscription to provident fund cannot be attached by garnishee order.

There is no intervening period between which a subscription by a judgment-debtor to a provident fund can be attached by a garnishee-order to a corporation in which judgment-debtor is an employee, because before the time of payment the money does not belong to judgment-debtor and at the time of payment it becomes a compulsory deposit and therefore is exempted from attachment under S. 60 (k). [P 433 C 1]

(d) Civil P. C. (1908), S. 35 — Costs in test cases.

In test cases there should be no order for costs. [P 433 C 1]

Rafi — *for Applicant.*

Dangali — *for Respondent 1.*

Order.—This is an application to revise an order passed by the Chief Judge of the Court of Small Causes in an application for a garnishee order. The judgment-debtor is an employee of the Rangoon Corporation. His salary is Rs. 120 a month. Out of this there is a compulsory deduction of Rs. 10 a month towards his provident fund. The question to be determined is how much of his salary can be attached in execution of the decree. Under S. 60, Civil P. C., certain property is exempt from attachment. After first saying what is attachable in sub-s. (1) the proviso reads: "the following particulars shall not be liable to such attachment or sale, namely" and we then get sub-heads running alphabetically from (a) to (p). The first question for consideration is whether these exemptions are cumulative or whether the judgment-debtor is confined to one only as was strongly urged. All are apparently on the same footing: (a) refers to the necessary wearing apparel, cooking vessels, beds and bedding of the judgment-debtor, etc.; (b) refers to tools of artizan, and where the judgment-debtor is an agriculturist, his implements of husbandry, cattle, seed-grain, etc.; and (c) refers to houses and other building belonging to an agriculturist and so on. I can see no reason whatever why an agriculturist who is exempted under this proviso should not claim exemption for his house, cattle, seed-grain, implements of husbandry, wearing-apparel, cooking vessels and so on; so, as all the sub-heads are on the same footing, I can see no reason for supposing that these exemptions are not cumulative and any man is entitled to all the benefits if he is qualified to do so.

The Section has been amended by Act 9 of 1937 and now sub-s. (i) of the proviso exempts

> the salary of any public officer or of any servant of a railway company or local authority to the extent of the first hundred rupees and one-half the remainder of such salary,

and an Explanation has been added: "'salary' means the total monthly emoluments," excluding certain matters which are not germane to the present question. The emoluments of the judgment-debtor in the present case appear to me to be Rs. 120 a month; that is what is known as his pay and I think it must be regarded as 'salary' for the purposes of this Section as defined by the explanation. This being the case, under sub-s. (i) Rs. 110 of his salary is exempt from attachment. Proceeding further down the proviso we find sub-s. (k) which exempts

> all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act for the time being applies, in so far as they are declared by the said Act not to be liable to attachment.

The Provident Funds Act now in force is dated 1925 and in this Act compulsory deposit is defined :

> "Compulsory deposit" means a subscription to or deposit in, a provident fund which under the rules of the fund, is not, until the happening of some specified contingency, repayable on demand otherwise than . . .

It is claimed that under this Section the judgment-debtor is entitled to have exempt-

ed from attachment a further Rs. 10. For the decree-holder it is urged that until this money has been actually deposited in the fund, it is not a compulsory deposit so as to be free from attachment. A reference to the Provident Fund Rules at p. 130 of the Rangoon Municipal Manual shows that Provident Fund Rule 7 says :

The Corporation shall, at the time of payment, deduct from the pay of every subscriber the amount of the subscription due from such subscriber to the provident fund and shall pay such amount into the provident fund to the credit of such subscriber.

Once this Rs. 10 has been paid into the provident fund it is beyond the reach of the creditor and exempt from attachment. The question is whether it can be intercepted en route, so to say, between the disbursing officer and the fund. In my opinion, it cannot and for this I rely on the actual wording of the definition in S. 2 of the Act. It will be noticed that what are exempted from attachment under sub-s. (k) are "compulsory deposits" and there being a reference to the Provident Funds Act I think the definition of "compulsory deposit" in that Act must apply, and compulsory deposit means "a subscription to, or deposit in." This Rs. 10 never gets into the hands of the judgment-debtor. The corporation or the disbursing officer deducts it. He deducts the amount of the subscription from the judgment-debtor's pay bill at the time of payment. Before the time of payment the money is not the judgment-debtor's. At the time of payment the Rs. 10 becomes a subscription to the fund and a subscription to the fund is a compulsory deposit and therefore exempted. There seems to me no intervening moment when it is susceptible of attachment. In consequence I hold that under sub-s. (k) the judgment-debtor is entitled to claim exemption for another Rs. 10 making his total exemption Rs. 120; that is equal to his total salary and there is no balance left available for attachment. I therefore set aside the order passed by the Chief Judge of the Court of Small Causes directing the Corporation to pay into Court Rs. 10 a month from the judgment-debtor's salary. I am given to understand that this is a test case. I think therefore that there should be no order for costs.

N.K./R.K. *Order set aside.*

A. I. R. 1939 Rangoon 433

BAGULEY J.

U Maung Maung — Appellant.

v.

S. H. Shahul Hamid — Respondent.

Civil Revn. No. 284 of 1938, Decided on 27th January 1939, from order of Dist. Court, Yamethin in Civil Misc. Appeal No. 36 of 1938.

(a) Execution—Trial Court can proceed with execution while copy of decree has been sent to another Court for execution.

A Court which passed decree can proceed with the execution itself while a copy of the decree had been sent to another Court for execution elsewhere: *AIR 1927 Rang 258, Rel. on.* [P 434 C 1]

(b) Execution—Notice can be issued to judgment-debtor outside jurisdiction if application is made for attachment of his property lying within jurisdiction.

A Court can issue a notice to a judgment-debtor living outside its own jurisdiction if an application had been made for attachment of his property inside the jurisdiction of that Court. [P 434 C 1]

(c) Limitation Act (1908), Art. 182 (5)—Application for execution by issuing notice operates to save limitation even if made merely for purpose of saving limitation.

Applications for execution by issuing notice, made merely for the purpose of saving limitation are legal and do operate to extend the time for limitation even if there is no genuine intention to proceed at the time and take further steps, and whether the proceedings end in a voluntary withdrawal or in any other way : *A I R 1934 P C 14, Rel. on.* [P 434 C 2]

(d) Civil P. C. (1908), S. 115—Material irregularity—Failure to notice reported ruling of High Court to which attention was drawn is material irregularity justifying interference.

The fact that the lower Appellate Court entirely failed to notice a reported ruling of High Court to which its attention was drawn by the fact that it was mentioned in the judgment of the trial Court, may be regarded as a material irregularity which will justify interference in revision. [P 434 C 2]

P. K. Basu — *for Appellant.*

Guha — *for Respondent.*

Order. — The facts of this case are quite simple. The applicant got a decree against the respondent on 12th February 1932. The decree was transferred to Lewe on 17th July 1934. An application for execution was made at Lewe and it was closed by an order of the Court dated 6th August 1934. No further application was made there and the copy of the decree was not sent back to Yamethin. However, on 6th August 1937 an application was made to the Township Court of Yamethin, which passed the decree for issue of notice to the judgment-debtor. This application was dismissed on 19th August 1937 and the application, out of which the present appeal arises, was filed on 23rd February 1938. Objections to the execution of the decree

were raised on the ground that the decree was time barred, the application of 1937, it is contended, being bad. The Township Judge rejected this contention and directed execution to proceed. The foundation of the order is the case in 5 Rang 397[1] in which it was held that the Court which passed the decree originally retained control of the execution proceedings and there was nothing in the Civil Procedure Code to prohibit the sending of a decree for execution to two Courts at the same time and if the Court that passed a decree can send copies of the decree for execution to two other Courts simultaneously, still more could it proceed with the execution itself while a copy of the decree had been sent to another Court for execution elsewhere. On appeal to the Assistant District Court this order was upset but on what grounds it is difficult to see. The learned Judge did not refer to 5 Rang 397[1] at all. So far as I can see the basis for allowing the appeal was that the application of 1937 to the Township Judge, Yamethin, was "a farce." He says :

> The application in C. E. No. 124 of 1937 was not made to a proper Court. It was an application filed before the Township Judge, Yamethin, for execution by issuing notice on a judgment-debtor whose address was given as "Trader Ela, Lewe Township".

Now, so far as I can see, there is nothing to prevent a Court issuing a notice to a judgment-debtor outside its own jurisdiction. An application for the arrest of a judgment-debtor outside the jurisdiction will, of course, be bad. An application for arrest of such a judgment-debtor would be an application made to a Court not having jurisdiction, but if an application had been made for attachment of property inside the jurisdiction of the Yamethin Court a notice would be sent to the owner of the property even if he were living in another Township. My attention was also drawn to the case in 61 I A 62.[2] In this case it was held that

> an application to execute a decree or to take a step in execution, made in accordance with the Code of Civil Procedure, to the proper Court, and within the time prescribed, operates under the Limitation Act, 1908, Sch. I, Art. 182 (5)—if made before 1st January 1928, when Act 9 of 1927 came into force—to extend the time for executing the decree, whether or not the application was made with the genuine intention to proceed to execution, a decision which shows that applications for execution by issuing notice, made merely for the purpose of saving limitation are legal, and do operate to extend the time for limitation even if there is no genuine intention to proceed at the time and take further steps, and whether the proceedings end in a voluntary withdrawal or in any other way.

For these reasons I consider that the lower Appellate Court erred in reversing the decision of the trial Court. This is an application for revision, not a second appeal, but I think that the fact that the lower Appellate Court entirely failed to notice the case in 5 Rang 397,[1] a reported ruling of this High Court to which its attention was drawn by the fact that it was mentioned in the judgment of the trial Court, may be regarded as a material irregularity which will justify interference in revision. I therefore set aside the order of the lower Appellate Court and restore that of the trial Court dismissing the judgment-debtor's objection to execution proceeding. Respondent to bear the applicant's costs throughout.

D.S./R.K. *Order set aside.*

1. K. K. Deb v. N. L Chowdhury, (1927) 14 AIR Rang 258=104 I C 133=5 Rang 397.
2. Khalil-ur-Rahman Khan v. Collector of Etah, (1934) 21 A I R P C 14=147 I C 323=61 I A 62=55 All 993 (P C).

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* A. I. R. 1939 Rangoon 434
SPECIAL BENCH

ROBERTS C. J., MYA BU AND MOSELY JJ.

S. T. R. M. Chettyar Firm—Appellant.

v.

Andathal and others — Respondents.

First Appeal No. 55 of 1938, Decided on 2nd February 1939, from order of Asst. Dist. Court, Hanthawaddy, in Civil Execution No. 7 of 1936.

*** Civil P. C. (1908), O. 21, R. 54—Personal service of prohibitory order on judgment-debtor is not necessary.**

Personal service of the prohibitory order on the judgment-debtor is not necessary. The omission to require service of a notice on the judgment-debtor in person in R. 54 was intentional. No notice other than the publication of the prohibitory order is necessary. Except in the cases covered by O. 21, R. 22 and except where the Court issues of grace of its own motion notice to the judgment-debtor to show cause against attachment, the judgment-debtor has no notice actual or constructive of attachment before a prohibitory order is issued under O. 21, R. 54, as that is the first stage in the execution by attachment of immovable property : *A I R 1936 Rang 403; A I R 1926 Oudh 45 and A I R 1919 Mad 594, Ref.; A I R 1929 Rang 311, Expl. and Disting.* [P 435 C 2; P 436 C 1]

P. B. Sen — *for Appellant.*

Aiyar and Wan — *for Respondents 1 and 4.*

Mosely J. — This is an appeal by the S. T. R. M. Chettyar Firm of Pyawbwe,

Hanthawaddy District, whose property was sold in execution by its partner Somasundaram Chettyar against the decree-holder-respondent 1 and respondents 2, 3 and 4, the auction-purchasers. In Civil Regular No. 30 of 1933 of the Assistant District Court of Hanthawaddy the plaintiff sued the firm in question carrying on business by its partner Somasundaram Chettiyar, and also sued the four partners in their personal capacity, namely the above Somasundaram Chettyar whose address is given as Mogul Street, Rangoon, Thenappa Chettyar deceased, by his legal representative Subbiah Chettyar of Ramnad, Madras, Visvanathan Chettyar, and Meenatchi Achi of Madras. The suit was decreed against the firm and partners. In the execution case in question, No. 7 of 1936, the judgment-debtors were: (1) the firm; (2) Somasundaram Chettyar; (3) Subbiah Chettyar as legal representative; (4) Nachiappa Chettyar, minor son of Visvanathan by his guardian ad litem, the bailiff, Hanthawaddy; and (5) Meenatchi Achi. It appears that the last two judgment-debtors had been adjudged insolvent in Madras. One of the grounds of objection in the present case is that notice to the Official Receiver as their legal representative was not issued under O. 21, R. 22. I note that the trial Court went astray in quoting 7 Rang 425[1] as authority for the proposition that notice was unnecessary to the Official Receiver. That case was a case where the Official Receiver was impleaded in his capacity as an ordinary receiver in administration and not as Official Receiver. However, in the present case these notices under O. 21, R. 22 are altogether immaterial, as execution was applied for against the property of the partnership firm and not against the personal property of the partners: *vide* O. 21, R. 50 (a). The next objection is that the prohibitory order (O. 21, R. 54) was not served on Somasundaram Chettyar, the managing partner. It is objected by Mr. Aiyar for respondent 1 that such notice is unnecessary. That has been laid down in First Appeal No. 22 of 1936[2] which I note has been reported in an unauthorized report. We have been invited by Mr. P. B. Sen for the appellant to have this ruling reconsidered. It has been given effect to in Burma Courts Manual, Circular No. 30, Item 18, and it is therefore desirable to reconsider it if there are grounds for doing so, though that may not be essential for the decision of this case. O. 21, R. 54, sub-rr. (1) and (2), read as follows:

(1) Where the property is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate.

Sub-r. (3) need not be considered. It was added by this Court to deal with the date from which the order is effective. First Appeal No. 22 of 1936[2] quotes four decisions: 42 Mad 844,[3] 42 Mad 565,[4] 46 All 741[5] and 7 All 702[6] and says that these are no authority for the contention that personal service of the prohibitory order on the judgment-debtor is necessary. These cases are directed to the point, it is said, that an attachment is effective not from the date of ordering it but from the date of publishing it. No doubt, it is said, there are, in these cases, dicta to the effect that the judgment-debtor must receive notice of the attachment, but he does receive such notice, either actual or constructive, because before the order for attachment is made he is called up to show cause against it, and therefore he must either be present before the Court at the time when the order is made, or he must have had an opportunity of being present. The form of the notice is addressed to the judgment-debtor personally as well as to the public. I agree that the Section of the Code does not require personal service of the notice on the judgment-debtor. A perusal of the rules of O. 21 which deal with the attachment of other descriptions of property, Rr. 43, 44, 46, 47, 48 and 51 to 53, of which R. 46 (2) and R. 47 are the only ones which parti-

1. Maung Ohn Tin v. P. R. M. P. S. R. M. Chettyar Firm, (1929) 16 A I R Rang 311=120 I C 142=7 Rang 425.
2. Nayasha Kursoon Bee Bee v. S. P. S. T. R. M. Chettyar Firm, (1936) 23 A I R Rang 403 = 164 I C 1044.
3. Sinnappan v. Arunachalam Pillai, (1920) 7 A I R Mad 804=53 I C 207=37 M L J 281= 42 Mad 844 (F B).
4. Ramanayakudu v. Pedda Basappa, (1919) 6 A I R Mad 594=50 I C 261=42 Mad 565=36 M L J 284.
5. Abdul Ghafur Khan v. Akram Hasan, (1924) 11 A I R All 747=83 I C 878=46 All 741=22 A L J 703.
6. Ganga Din v. Khushali, (1885) 7 All 702 = 1885 A W N 179.

cularize notice to the judgment-debtor as the requisite method of informing him of the attachment, is sufficient to show that the omission to require service of a notice on the judgment-debtor in person in R. 54 was intentional. As was said in a case quoted to us, A I R 1926 Oudh 45,[7] which is only available in an unauthorized report, no notice other than the publication of the prohibitory order (wrongly styled there "sale notice") is necessary. 42 Mad 565[4] says, at p. 566, that O. 21, R. 54, sub-r. (2) contemplates that the person prohibited must have the opportunity afforded by the application (affixing?) mentioned in sub-r. (2) of R. 54 of knowing that he is so prohibited.

Except in the cases covered by O. 21, R. 22, and except where the Court issues of grace of its own motion notice to the judgment-debtor to show cause against attachment, the judgment-debtor has no notice actual or constructive of attachment before a prohibitory order is issued under O. 21, R. 54, as that is the first stage in execution by attachment of immovable property. It may be in some cases that notice to the judgment-debtor, though not obligatory under R. 54, is desirable. A case of this kind might be where the property is attached in the non-cultivating season, and lies so far from any village that the judgment-debtor may not know of the attachment. In any case the evidence and the materials on record show that notice in this execution case was served on Vyravan who was living in the firm's house at Pyawbwe and was working and collecting rents on behalf of the firm. In my opinion until the contrary is proved he must be held to have an ostensible authority to accept notice on behalf of the managing partner (Order 5, R. 12). It is unnecessary to consider the evidence, that of Chidambaram, and the affidavit of service of the prohibitory order itself that a prohibitory order was issued to Somasundaram Chettyar in another execution case, No. 15 of 1936, of the same Court, by another decree-holder attaching the same land in question, which was sold in execution at the same sale, that decree-holder being allowed rateable distribution, for that attachment would not fix this debt on the property.

Another objection is that notice to verify the sale proclamation issued under O. 21, R. 66 by substituted service was obtained under false pretences; but there is nothing on the record to satisfy me that this was so. It is true that the address of the judgment-debtor had once been given as Mogul Street; but there is evidence that he was also residing at Pyawbwe from time to time, and he appears to have kept himself out of the way, and Vyravan refused to accept service of any summons or notice to him. It would have been more satisfactory perhaps if the process-server had been called by the decree-holder, but his affidavit was evidence and it was always open to the present appellant to call him. The last objection is one under O. 21, R. 90, that there is a material irregularity in publishing or conducting the sale in that the property was misdescribed in the proclamation. We have heard Mr. P. B. Sen at length on the point and it appears to me that the schedule gave all the particulars of the property sold that could be reasonably required. It was not necessary to give the amount for which the houses in question were rented, nor was it necessary to describe one plot of land as suitable for a mill site when there is no evidence that it was peculiarly suitable therefor and all that is said is that a proposal for its use as such had once been abandoned.

The evidence on the record that the granary was sold for a wholly insufficient price is, in my opinion, quite unreliable. There is evidence that judgment-debtor, throughout knew of the sale, and it was not shown that he suffered any substantial injury by reason of any irregularity. What is more, the grounds put forward by him could have been put forward before the sale was conducted (Order 21, R. 90, sub-r. (a) as amended by Schedule Notification No. 44 of 27th January 1937). No irregularities were disclosed which went to the root of the proceedings, or affected the auction purchasers. I would therefore dismiss this appeal with separate costs against the decree-holder and the auction-purchasers, advocate's fee in each case five gold mohurs.

Mya Bu J. — I concur.

Roberts C. J. — I agree.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Rangoon 436

MYA BU AND MOSELY JJ.

K. K. N. K. A. R. Chettyar Firm — Appellant.

v.

Aga M. Sheerazee — Respondent.

Civil Misc. Appeal No. 46 of 1938, Decided on 9th February 1939.

7. Sher Khan v. Misri Lal, (1926) 13 A I R Oudh 45 = 89 I C 107.

(a) Civil P. C. (1908), O. 9, R. 13 — Words "prevented by any sufficient cause from appearing"—Meaning.

The words "prevented by any sufficient cause from appearing" in O. 9, R. 13 clearly mean causes other than lack of knowledge of the proceedings. [P 440 C 1]

(b) Civil P. C. (1908), O. 5, R. 20 (2)—Word "effectual"—Meaning explained.

The word "effectual" in O. 5, R. 20, sub-r. (2) does not mean due service. The order for substituted service is made ex parte, and obviously it should be open to the defendant when he appears to show that the method employed was not calculated to effect the purpose which the Court had in view, namely informing the defendant of the institution of the suit. The rule that substituted service is to be taken as effectual as personal service only means that the Court hearing the case may proceed with the suit as if the summons had been personally served on the defendant. The basis of the order on which the Court orders substituted service to issue is either that the defendant is either deliberately keeping out of the way to avoid process or that it cannot be served in the ordinary way, perhaps through no fault of his own. In the latter case, the defendant may always show that the proceedings could not have come to his knowledge. In the former case the order of the Court is only relevant to the question whether the defendant was in a position to have knowledge of the proceedings, for obviously if a defendant keeps out of the way to avoid service of process on him either on account of the suit in question or of other suits that have been or may be filed against him he cannot afterwards be heard to argue that he had no knowledge of the proceedings, as he has deliberately put himself in a position where he can have no such knowledge: *A I R 1931 All 727 and A I R 1931 Mad 813, Rel. on.* [P 440 C 1, 2]

(c) Limitation Act (1908), Art. 164—"Due service of summons" in Art. 164, Limitation Act, and O. 9, R. 13, Civil P. C.—Meaning explained.

In Art. 164, Limitation Act, and O. 9, R. 13, Civil P. C., the expression "due service of summons" means not only that the summons was served in proper form according to the directions laid down in the Code but also that that summons was served under circumstances which enabled the Court to be satisfied that the defendant had knowledge of the decree against him, except of course in the case where the defendant had purposely put it out of his power to have such knowledge. [P 440 C 2]

Kalyanwalla — *for Appellant.*

Aiyangar — *for Respondent.*

Mosely J.—The appellant K. K. N. K. A. R. Chettyar Firm of Hlawga by its agent Kanappa Chettyar applied under O. 9, R. 13, Civil P. C., for setting aside an ex parte decree passed against it in Civil Regular Suit No. 29 of 1931 of the District Court of Insein. The learned District Judge dismissed the application holding that the applicants had been duly served once by a summons which was refused by their clerk and posted on their place of business and secondly by substituted service. In appeal it is now contended that these findings were wrong, and that the appellants were never properly served, and it is also argued that in any case they were unaware of the summonses and the proceedings in the suit. Their case in the trial Court was that the summonses and subsequent notices in the case were kept from their knowledge by fraud or, if not, by irregularities or carelessness in the service of them. The suit in question was one instituted by the present respondent Aga M. Sheerazee for an equitable mortgage decree. The property in that suit was very large and the property now in question is some 130 acres. There were nine defendants in that suit. The facts there were briefly that the lands in question originally belonged to one Ko Po Mya and his wife who mortgaged them in 1921 to the appellants, the K. K. N. K. A. R. Firm. In 1922 Po Mya sold the lands to C. A. P. C. T. Shanmugam Chettyar. In 1923 Shanmugam Chettyar mortgaged them by an equitable mortgage to Sheerazee. In 1924 the K. K. N. K. A. R. Firm obtained a mortgage decree against Po Mya and Shanmugam Chettyar and the Firm bought the lands in execution. Then in 1931 Sheerazee brought this mortgage suit against Shanmugam Chettyar and eight other defendants, one of whom was the appellant firm and another was the so-called K. K. N. K. A. P. Veerappa Chettyar. Veerappa Chettyar died in 1935 and the suit was continued against his son of the same name Veerappa alias Somasundaram Chettyar.

A decree was passed against all nine defendants, ex parte against Veerappa Chettyar and the appellant firm. There is evidence in the present case which has not been rebutted or even denied that there never was such a firm as the K. K. N. K. A. P. and Veerappa appears to have been impleaded by mistake merely because he was a previous agent of the appellant K. K. N. K. A. R. Firm. The appellant firm was sued in that suit as subsequent transferees of the property. It is said now, and it is not denied, that they never were such subsequent transferees of the property but merely prior encumbrancers. On referring to the case I find that there was no issue on the point whether they were subsequent transferees. That perhaps is natural as the case was decided ex parte against them; but there was no evidence on the subject and no reference to it, much less any finding on the point in the judgment. All that there is in the case is a pleading in the plaint that they were subsequent trans-

ferees and the decree was one against them as well as the other defendants. No attempt was evidently made to execute it as against them. It is perhaps doubtful whether anything is res judicata against the present appellants. Even had they been proved to have been subsequent transferees there would have been no merger of their interest in the property as prior mortgagees: S. 101, T. P. Act, as altered in 1929. But they have chosen to file the present suit if only by way of greater caution, and the matter must now be decided.

The appellants also filed another application under O. 21, R. 90 to have the sale of certain land set aside on the ground that they had no notice of the terms of the proclamation and that the proclamation itself did not disclose the previous encumbrance, which was a registered mortgage, of which Sheerazee must have had constructive notice. But this application which was rejected by the trial Court in another part of its order which is also appealed against need not now be considered in view of the orders which I propose to pass on the application to set aside the ex parte decree in that suit. The defendant-respondent sought to prove certain notices issued to the appellants in execution to rebut the allegation that they did not know of the sale; but these notices, it is now argued, are relevant here to show the appellants' knowledge of the proceedings. The trial Court in the shorter portion of its judgment which relates to the question of setting aside the ex parte decree merely found that two summonses were served : one, as has been said, refused by a clerk and posted and the other by substituted service. The first of these two summonses was not accepted as duly served by the learned Judge who was trying the suit in question. The present Judge merely remarked that the summons fulfilled all the details required by O. 5, R. 17. He did not say that he believed the oral evidence given to prove proper service. This was a summons of 23rd May 1933, the endorsement on which was signed by the process-server Mya Myun on 25th May. It reads as follows :

> I not knowing the defendant personally was accompanied by Maung Htike (plaintiff's clerk) to Hlawga village. He pointed out (the house). Karuppan Chetty was not found. His agent Koorandon Chetty also was not found. The summons was tendered but the said clerk did not take it. So the summons was posted on the house.

It should be explained here that throughout the original suit the appellant firm was sued by its agent Karuppan Chettyar. It is in the evidence for the defendants and it has not been denied that Karuppan was the agent from 1926 to 1929. After that the principal took charge. Then in 1931 Kanappa became the agent. The summonses, however, in the suit and the subsequent notices after the decree were issued throughout to the appellant firm by its agent Koorandan Chettyar. It is said by the appellants, and not denied, that there never was such an agent of the firm as Koorandan Chettyar. So in the original suit in question we have one non-existent firm of K. K. N. K. A. P. sued and another the K. K. N. K. A. R. firm sued by its agent who had left long ago and then summonses issued throughout on a non-existent Koorandan Chettyar. These circumstances, which have been ignored by the trial Court, are, in my opinion, extremely important to decide the question whether the appellant firm was ever properly served or ever had any knowledge of the proceedings. It may be added also that a decree was passed against the appellant firm as subsequent transferees of the property when there is no doubt that they were merely prior encumbrancers who had bought in the property prior to the suit. So we have a decree against the summonses issued to non-existent persons on pleas unfounded on any facts. Maung Mya Nyun (D. W. 2) was examined in May 1938 and could only speak to what happened from his report of 1933, five years before. There is a curious air of unreality in the proceedings, for the house or place of business of the Chettyar or its locality and surroundings are never described by either side. I do not know how many Chettyars there are in Hlawga, but the evidence discloses that Veerappa's place of business is next door but one to the K. K. N. K. A. R. firm. So there were at least two Chettyars in Hlawga. There is no indication who the clerk in question was in the endorsement. He may not have been the appellants' clerk at all, and it is significant that the report says that Koorandan was not found. It would be thought that any enquiry would have revealed that there was no such person. Maung Htike (D. W. 1) in his evidence does not add anything to Mya Nyun's evidence on the point. I have no doubt that the previous Judge was justified in saying that the summons was not properly served.

The Judge also discussed the summons by way of substituted service and held

that service was effected on the appellants. Application for issue of substituted service was made on an affidavit filed by Maung Htike, page 101 of suit No. 29. (I note that the references to this and some other summonses in the judgment of the lower Court were wrong.) This affidavit does not say the K.K. N. K. A. R. firm were avoiding service of summons, but merely that three summonses had been issued on the appellant firm and on the K. K. N. K. A. P. firm that the clerks had refused the summonses which were posted and that summonses could not be served in the ordinary way. So substituted service was allowed to be issued not merely on the K. K. N. K. A. R. firm but also on the K. K. N. K. A. P. non-existent firm. The summons to the K. K. N. K. A. P. Veerappa Chettyar, page 79 of part 1 of the process file to which Mya Nyun refers in his evidence bears an endorsement of 2nd May to the effect that "Karuppan" Chettyar was not found. The summons to Veerappa Chettyar which was reported to have been refused by his clerk is the one referred to by Mya Nyun on page 90 of the process file, part 1. As to the summons by substituted service, this is to be found on page 102 (h) in the main proceeding of suit No. 29. The process-server here was Maung Pyant (D. W. 4). The report says :

On 28th June 1933 at about 3 P. M. I went to Hlawga. I do not know personally. The plaintiff did not accompany (me) to point out. I made enquiry and looked for and posted the summons by way of substituted service on the house where Koorandan Chettyar had lived before.

There was a pencil endorsement in the corner of the headman's name. This merely appears to mean that the headman vouched for the process server having come to the village. It will be noticed that the house on which the summons was posted was one where the non-existent Chettyar Koorandan had lived before. Maung Pyant says in his evidence that he went to the headman's house and the headman's "people," (not the headman himself as is said in the judgment of the lower Court) told him to go and enquire at the place itself. The Judge thought this meant that he must have been informed where he was. I think the contrary,—that he could not get any information. All these summonses were issued in the name or initials of the K. K. N. K. A. R. firm, but it is admitted at the Bar that Burmans commonly know of Chettyars by the agent's name only. This process-server professed first to remember from five years before that he did not see some servants on the premises, then he denied it and then he repeated it. He said that he asked where the agent had gone to and was told that he had gone to India. This looks as if he did not ask in the house itself and received some vague information about the former agent Karuppan having gone to India. The process server did not make any effort to go back to see if he could serve the summons again. He says he was told that the clerk had gone to the jungle. The headman is not a witness.

The present application to set aside the ex parte decree was made on 21st January 1938, and the appellant says that he had notice of the proceedings against him only on 8th January 1938, when he found that his tenants were being asked by the respondent Sheerazee to pay the rent to him. Under Art. 164, Limitation Act, the limitation for an application by the defendant for an order to set aside a decree passed ex parte is 30 days from the date of the decree or, where the summons was not duly served, when the applicant has knowledge of the decree. The meaning of this Article was discussed in 54 All 154[1] by a Full Bench and in 55 Mad 223[2] by a Bench of Judges. The question before those Courts was whether summons by substituted service effected in proper form was necessarily due service for the purpose of Art. 164, Limitation Act. O. 5, R. 20, sub-rr. (1) and (2), read as follows :

(1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

(2) Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

Order 9, R. 13 says :

In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside ; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing

1. Ram Bharose v. Ganga Singh, (1931) 18 A I R All 727=136 I C 609=54 All 154=1931 A L J 1049 (F B).
2. Gyanammal v. Abdul Hussein Sahib, (1931) 18 A I R Mad 813=134 I C 1202=55 Mad 223 =61 M L J 920.

when the suit was called on for hearing, the Court shall make an order setting aside the decree. . . .

The words "prevented by any sufficient cause from appearing" here clearly mean causes other than lack of knowledge of the proceedings, so that this rule is in the same terms as Art. 164. I would respectfully agree with the conclusions arrived at in those two rulings. The object of issuing a summons is to inform the party against whom a suit is being instituted of the fact that there is a suit against him and if he so chooses he may contest it. The order for substituted service is made ex parte, and obviously it should be open to the defendant when he appears to show that the method employed was not calculated to effect the purpose which the Court had in view, namely informing the defendant of the institution of the suit. The rule that substituted service is to be taken as effectual as personal service only means that the Court hearing the case may proceed with the suit as if the summons had been personally served on the defendant. Where the summons has issued against the defendant personally and it has been reported that personal service has been effected, the defendant may always come forward to show that that has not been the case. Summons by way of substituted service is obviously the least satisfactory of all methods of service only to be used by the Court as a last resort when other means are unavailable, and the defendant should be given an opportunity of contesting that the summons has been served in a way which did not in effect bring the proceedings to his notice. The basis of the order on which the Court ordered substituted service to issue is either that the defendant is either deliberately keeping out of the way to avoid process or that it cannot be served in the ordinary way, perhaps through no fault of his own. In the latter case the defendant may always show that the proceedings could not have come to his knowledge. In the former case the order of the Court is only relevant to the question whether the defendant was in a position to have knowledge of the proceedings, for obviously if a defendant keeps out of the way to avoid service of process on him either on account of the suit in question or of other suits that have been or may be filed against him he cannot afterwards be heard to argue that he had no knowledge of the proceedings as he has deliberately put himself in a position where he can have no such knowledge. In 55 Mad 223[2] at p. 231 Reilly J. draws attention to the judgment of Srinivasa Ayyangar J. in 54 M L J 448.[3] In the words of Reilly J.:

There Srinivasa Ayyangar J. suggested with great force, I think, that the provision that, when the summons is not duly served, the period runs from the date when the applicant had knowledge of the decree implies that due service within the meaning of that Article is service which brings the claim to the knowledge of the defendant.

What Srinivasa Ayyangar J. said was this:

I do not for my part believe that the Legislature really intended in enacting col. 3 of Art. 164 to confine the scope of the Section only to cases where the actual service directed by the Court is shown not to have been effected at all in that manner. We may also have regard to what is obviously the object of the Legislature in providing that in cases where the summons is not duly served the time begins to run from the date on which the applicant has knowledge of the decree. The implication seems to be clear that in cases where the summons is duly served the presumption may well be that he has knowledge of the decree, or at any rate if he does not get knowledge of the decree, it was ascribable only to some fault on his part or on the part of those near about him who ought to have known better.

I would respectfully agree that the word "effectual" in O. 5 R. 20, sub-r. (2) does not mean due service, and that it has the meaning given to it by the learned Judges in these rulings. I would also agree that in Art. 164, Limitation Act, and O. 9, R. 13 "due service of summons" means not only that the summons was served in proper form according to the directions laid down in the Code but also that the summons was served under circumstances which enabled the Court to be satisfied that the defendant had knowledge of the decree against him, except of course in the case where the defendant had purposely put it out of his power to have such knowledge. On the evidence in this case however I do not think it could possibly be held that either of these summonses were served in due form, that is to say, that one was refused by the appellant firm's clerk and then posted, or that the other was posted on the appellant firm's house.

It remains to consider whether it can be satisfactorily inferred from the other summonses and notices proved in this application that the defendant had knowledge of the decree, and that therefore the present application is time-barred. Mr. Aiyangar for the respondent has invited the Court to refer also to still other summonses and notices filed in the proceedings. Not only

3. Venkatachalam v. Subbayya, (1928) 15 A I R Mad 655=108 I C 889=54 M L J 448.

are there no translations of these on the record but the originals even have not been put in evidence and I consider that for the purposes of this case that they could not be put in evidence by the oral testimony of the process-servers who made the reports and affidavits who could be subjected to cross-examination by the other side. A notice to contest an application for a final decree (p. 5 of the Process File, Part II) was issued to K. K. N. K. A. R. Chettyar on 11th April 1935. The report on this was made by Maung Pein (D. W. 3) and reads as follows: "On 27th April 1935 at 11. A. M. the withinnamed Chetty's agent Mutu signed and took (the notice)." This bears at the bottom the English initials "K. K. N. K. A. R." followed by the Tamil equivalents of these initials. That is not an ordinary method of signature. The plaintiff had testified that his firm never had an agent or clerk called Mutu and this evidence is unrebutted. The notice so far from proving the respondent's case goes to throw extreme doubt on whether this notice was ever served at all.

The next notice is p. 116 of the Process File, Part II. It is also proved by Maung Pein. This is a notice to both K. K. N. K. A. P. Veerappa Chettyar and K. K. N. K. A. R. Karuppan Chettyar by his agent Koorandan *re* amendment of the preliminary decree. The endorsement does not state that any effort was made to tender service or that service was refused, but merely that copies were posted on the house of the defendants—and of course it must be admitted that the K. K. N. K. A. P. firm had no house and did not exist. The next notice is p. 151 of Part II of the Process File. This is a notice *re* sale of the mortgaged properties to the appellant firm, dated 3rd December 1936. The endorsement of 12th December says:

> On 6th December 1936 at about 7 o'clock I without knowing the defendant personally and without being accompanied by the plaintiff to point out, went to tender (the notice)—the headman pointing out (the place). The within-named Chetty was not found. His clerk was found, I tendered the notice. He refused to sign. So the notice was posted. . . . . .

This again is a summons to the appellants by their agent Koorandan and the headman has merely signed in the corner and has not given any evidence. The process-server Maung Sein said in cross-examination that there was no one at the address before he recollected himself and added that there was a clerk. Then he said that this clerk said that the Chettyar and his agent had gone to India; but there was nothing about that in the report. I do not think it can be held on this that the process-services went to the right place or effected service. Then there is another notice in duplicate to K. K. N. K. A. P. and K. K. N. K. A. R. Chettyars, p. 179, Part II of the Process File, dated 13th March 1937, notice against sale of the mortgaged properties. The endorsement says:

> I not knowing the defendants personally was accompanied by the plaintiff's clerk Po Htike who pointed out the defendant. Veerappa died about a year ago. The notice was posted on the house where he had lived before. The remaining defendant Karuppan Chetty's clerk was found. The notice was tendered, refused and posted.

The attesting witness to this, Po Kyaw, has not been called. Thus, Maung Pein says about Veerappa's successors, and Karuppan of course had gone to India long before while this notice was again issued to the agent Koorandan. For the applicant Kanappa Chettyar, two of his clerks, Elan Kannu (P. W. 2) and Katappan (P. W. 3) said that no notices or summonses had been received by them. Kanappa said that since 1931 he stayed sometimes at Hlawga and sometimes at Rangoon but afterwards left a clerk authorized to receive summonses. The clerks on the other hand said that the agent Kanappa never spent the night out of Hlawga. In the original suit it would seem that another address of the appellant firm was given as Mogul Street, but it is proved in this application that they had no such address or place of business. I do not think it was proved that any of these notices or summonses was tendered to or refused by the appellant firm or posted on their house or place of business. There is something suspicious about the serving of the summonses or notices. What is perhaps the most important feature in the case is this, that the appellant firm had no possible reason whatever to avoid service of summonses on them. They had a perfectly good answer to the suit and had merely to say that they were not subsequent transferees but prior mortgagees who had bought the property in execution of their mortgage decree. They had only to produce their mortgage or the record of the previous proceedings. I am bound to comment on one unsatisfactory feature in the present appeal and that is the failure to translate one or two of the documents relied on in the application and put them on the Bench

copy and also what is more important, the failure to put any copies of the defence evidence at all on the Bench copy which has caused the Court considerable inconvenience. I consider that the appellant should be deprived of part of his costs for this. For the reasons that I have given the decree of the trial Court will be reversed with costs throughout, the appellants to obtain two-thirds of what would otherwise have been awarded them as their advocate's fee in this Court (for their failure to translate two documents and failure to put any copies of the defence evidence on the Bench copy; which caused the Court considerable inconvenience), advocate's fee six gold mohurs, and it will be directed that the ex parte decree against the appellants in Civil Regular Suit No. 29 of 1931 of the District Court of Insein be set aside.

Mya Bu J. — I agree.

D.S./R.K. *Decree reversed.*

A. I. R. 1939 Rangoon 442

DUNKLEY AND WRIGHT JJ.

Maung Ba To — Appellant.

v.

Maung Nyun and others — Respondents.

First Appeal No. 71 of 1939, Decided on 15th August 1939, from order of Dist. Court, Hanthawaddy, D/- 4th April 1939.

Buddhist Law (Burmese) — Marriage—Essentials, stated.

A marriage between Burmese Buddhists is created by co-habitation coupled with intent to become husband and wife. There must also be publicity of the relationship : *A I R 1936 Rang 212, Rel. on.* [P 442 C 1]

Hay — *for Appellant.*

A. H. Paul — *for Respondent 1.*

Dunkley J.—This appeal arises out of rival applications for letters of administration to the estate of Ma Chit May, deceased. The appellant based his application on the ground that he was the husband of the deceased, and his claim to marriage was contested by the blood relatives. The learned District Judge has held that the appellant failed to prove the marriage. In 14 Rang 215[1] at p. 223 a Full Bench of this Court said that a marriage between Burmese Buddhists is created by cohabitation coupled with intent to become husband and wife. With the greatest respect, I would add to that definition that there must also be publicity of the relationship. Now, Ma Chit May, for more than 20 years prior to her death, lived as husband and wife with an Indian named Jabbar. It has been established that Jabbar died on 29th September 1937, and the case of the appellant is that he became married to Ma Chit May almost immediately after Jabbar's death. When particulars of his plaint were asked for and he was required to state the date upon which his marriage was consummated, he gave that date as 23rd September 1937; and this is a somewhat significant mistake in view of the weakness of the rest of the evidence to prove that there was cohabitation with the necessary intent.

Ma Chit May herself died on 6th March 1938 that is, a little over five months after the death of Jabbar, and there is no dispute that in the course of these five months she lived in a number of different places, and there is further no dispute as to the places in which she lived, although there is a dispute between the appellant and the respondents as to the periods spent at these respective houses. She lived with Jabbar in 39th Street, Rangoon, and soon after Jabbar's death she moved to a zayat in Bahan, which was occupied by a nun named Ma Wuntha, who is witness 7 for the appellant. From Bahan she went to the house of Ma Khatiza in Rangoon, and from there she moved to the village of Wabalaukthauk where she stayed for some little time. From Wabalaukthauk she returned to Ma Khatiza's house and then went to the house of Ma Pan Sein, and finally moved to a house in 7th Street, which belongs to Maung Ba Gyi (witness 9 for the appellant), and she died in that house within a short time of occupying it. Ma Khatiza and Ma Pan Sein are witnesses for the respondents. The appellant's case is that even during Jabbar's lifetime he from time to time had clandestine intercourse with Ma Chit May. He, in fact, says that before Ma Chit May lived with Jabbar, when she and he were both young people they were in love with one another and co-habited for some little time. He says that their love continued and that during Jabbar's lifetime he used to visit her occasionally, and that when Jabbar died Ma Chit May sent for him and he actually had sexual intercourse with her within a day or two of Jabbar's death. He says that he moved with her from Jabbar's house to the zayat in Bahan and lived with her there, and that he also lived with her at Wabalaukthauk and at the house in 7th Street.

In order to prove that he had co-habited with her and that that cohabitation was

1. Maung Tun Aung v. Ma E Kyi, (1936) 23 AIR Rang 212=162 I C 560=14 Rang 215 (F B).

after Jabbar's death and was cohabitation with intent to become husband and wife, the appellant called a considerable number of witnesses. One witness is Ma E, who is an aunt of the deceased. She says that after Jabbar's death when the appellant arrived at the house Ma Chit May told her that she intended to take the appellant. That is put forward as an admission by the deceased that she intended marriage, but it falls far short of that, and, in view of the appellant's assertion that he had been in the habit of having intercourse with Ma Chit May during Jabbar's life-time, it amounts to no more than a statement by Ma Chit May that she intended to continue that relationship. Ma E also describes how Ma Chit May's furniture was sent to the appellant's house in Pyahmut village and stored there. No inference arises from this fact, because as Ma Chit May had decided to move to another place she clearly required some place in which to store her furniture, and there is evidence for the respondents to show that a number of relatives of Ma Chit May were asked to store this furniture but were unable to do so owing to the smallness of their houses, whereas the appellant was in a position to store the furniture because he already had one wife and seven children and therefore had a large house. The fact that he had a previous wife still alive and a large number of children also makes it unlikely that Ma Chit May in her late middle age would agree to become associated with him as his second wife.

So far as the visit to the zayat in Bahan is concerned Ma Wuntha has given evidence that the appellant lived for some days with Ma Chit May in this zayat, and the learned District Judge has accepted her evidence and has held that there was cohabitation between the appellant and the deceased in this zayat. We do not disagree with this finding of fact, but at the most it amounts to nothing more than proof that the previous relations between the appellant and the deceased were continued in this zayat and is no evidence of a concluded marriage.

In regard to the residence at Wabalaukthauk, several witnesses have been called who state that they saw the appellant in this house at Wabalaukthauk while the deceased was residing there, and that the appellant was the person who carried out the negotiations for the renting of the house. Their evidence is no evidence of cohabitation, and there is considerable evidence on behalf of the respondents to show that at the time when the deceased was living in the house at Wabalaukthauk she was ill and was looked after by two of the respondent's witnesses and that the appellant merely called at the house from time to time to enquire after her health, as no doubt he would do in the ordinary course of things as he is a near relation by marriage of the deceased. The explanation of the respondents in regard to the appellant's visits to the house at Wabalaukthauk receives strong support from the evidence of the doctor who attended the deceased during her last illness. He is Dr. Dharam, witness 7 for the respondents. He is an independent person, and he was able to give his evidence by referring to his own records kept in the course of his medical practice. He stated that he visited the deceased first on 23rd February 1938, at Ma Pan Sein's house, and that she was then suffering from dropsy and was bed-ridden. He gave it as his opinion that she must have been ill for at least a year prior to this date. Consequently, as I have said, his evidence strongly supports the respondents' case that the deceased was ill during the time that she was residing at Wabalaukthauk village, and also the inference which arises therefrom is that in that state of her health she would not only not be contemplating another marriage but was probably not in a physical condition for sexual intercourse.

As regards the residence in the house in 7th Street, Maung Ba Gyi, the landlord, states that this house was rented from him by the appellant and the deceased. He says that the deceased first visited him and asked about renting a room from him and that he told her that he would not rent the room to a single woman and asked her if she had a husband and she said that she had, and then on a subsequent day produced the appellant and introduced him as her husband, and they made a deposit for the rent of the room and he gave the appellant a receipt for the amount deposited, and thereafter the appellant and the deceased lived together in this room until the deceased died. This deposit receipt has been produced. It is a receipt for a deposit of a sum of Rs. 22.8.0. It is made out in favour of U Ba To and is dated 17th February 1938. Ba Gyi's evidence is supported also by U Net who says that he was present when this room was rented by the deceased and the appellant and the deposit was paid.

The only conclusion at which one can arrive from the evidence of Dr. G. Dharam is that Ba Gyi and U Net have given false evidence in connection with this case, for Dr. Dharam says that he visited the deceased while she was living in Ma Pan Sein's house. It is admitted by the appellant that the deceased did live in Ma Pan Sein's house before she removed to the house in 7th Street. Dr. Dharam, referring to his note-book, gives the dates of his visits. He says that he visited the deceased at Ma Pan Sein's house on the 23rd, 24th and 25th February, and that his next visit was on the 27th February and that was at the house in 7th Street. Consequently, as, in my opinion, his evidence cannot be discredited, it is clear that Maung Ba Gyi's room was not rented by the deceased and Ba To on 17th February, as the appellant would desire it to be believed from the receipt for the deposit. Furthermore, Dr. Dharam says that on 23rd February the deceased was bedridden and she continued to be bedridden during the time that he visited her, that is, up to 27th February, and we know that she died on 6th March. Therefore in view of his evidence, it is impossible that Ma Chit May could have gone to Mg Ba Gyi and negotiated for the renting of his room, as Ba Gyi has stated that she did.

Consequently, although there may have been cohabitation in Ma Wuntha's zayat as Ma Wuntha has alleged, there is no proof that there was cohabitation between the appellant and the deceased at any other time after the death of Jabbar, and therefore there never has been cohabitation with intent to become husband and wife, and furthermore, there never has been any publicity of this relationship. I agree with the learned District Judge that the appellant failed to establish that he was ever the husband of the deceased, and therefore, his application for letters of administration to her estate was rightly dismissed. This appeal fails and is dismissed with costs, advocate's fee six gold mohurs.

Wright J.—I agree.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Rangoon 444

WRIGHT J.

Singaram — Appellant.

v.

S. P. R. Somasundaram — Respondent.

Second Appeal No. 125 of 1939, Decided on 18th July 1939.

Civil P. C. (1908), O. 32, R. 3—Powers and duration of guardianship—Appeal—Guardian ad litem appointed — Third person cannot appeal on behalf of minor.

Execution proceedings are only a continuation of the regular suit and a guardian ad litem appointed in the civil suit continues to be guardian ad litem in execution proceedings and for the purposes of appeal : *A I R 1938 All 601 and A I R 1937 Cal 259, Rel. on.* [P 445 C 2]

After a decree passed against minor and the case had been transferred to another Court for execution the guardian ad litem did not wish to continue and so another guardian ad litem was appointed. The proceedings in execution were however conducted by a third person and during such proceedings he appealed on behalf of the minor :

Held that where there was a properly constituted guardian ad litem no one else could represent the minor and hence the appeal must be dismissed. [P 445 C 1]

Held further that such dismissal of appeal on the ground that the minor was not properly represented could not affect the minor's interest as he was not bound by it : *24 Cal 25 and 24 All 383 (FB), Rel. on; A I R 1933 Cal 794, Disting.* [P 445 C 1]

Kalyanwalla — *for Appellant.*

Hay — *for Respondent.*

Judgment.—An appeal was filed in the District Court of Bassein which purported to be by Singaram, a minor represented by his next friend Palaniappa Chettyar. The learned District Judge, without going into the merits, dismissed the appeal on the ground that Palaniappa Chettyar had no locus standi to appear on behalf of the minor at all as he had never been appointed his guardian-ad-litem. An appeal against this order has been filed by Palaniappa Chettyar purporting to be acting on behalf of the minor Singaram. I think the proceedings show beyond all doubt that Palaniappa Chettyar was never appointed the guardian-ad-litem of the minor Singaram. A decree was passed against Singaram and others in the Chief Court of Pudukkottai in Civil Regular No. 916 of 1934. That decree was transferred to the Subdivisional Court of Kyonpyaw for execution. At that time Singaram was represented by defendant 1 judgment-debtor Ramanathan Chettyar, who had been appointed his guardian-ad-litem. It was eventually held that the decree could only be executed against Singaram, and Ramanathan then stated that he refused to continue to act as the guardian-ad-litem of Singaram. An application was then made to the Chief Court of Pudukkottai to have a guardian-ad-litem appointed for Singaram, and subsequently a letter was received from the Registrar of the Chief Court of Pudukkottai stating, among other

things, that T. M. Raghunatha Rao, a clerk to that Court, had been appointed guardian-ad-litem of the minor Singaram. In the meanwhile the person who is prosecuting this appeal, Palaniappa, had made an application to the executing Court asking to be appointed the guardian-ad-litem of the minor, but no specific orders were passed on this application. The Subdivisional Court, however, appears to have taken no notice of the letter from the Registrar of the Chief Court of Pudukkottai stating that T. M. Raghunatha Rao had been appointed guardian-ad-litem, and continued with the proceedings as though Palaniappa was the guardian-ad-litem of Singaram. On these facts the learned District Judge came to the conclusion that Palaniappa had no right to prosecute the appeal on behalf of Singaram. It seems to me that this decision was obviously correct, and Mr. Kalyanwalla on behalf of the appellant has no good ground for contending that this decision was wrong.

The main point taken on behalf of the appellant is that the learned District Judge should not have dismissed the appeal, but should have taken steps to have the minor properly represented before him. It is suggested that the dismissal of the appeal will adversely affect the interests of the minor and that it is the duty of Courts to protect minors. I do not think that this contention is sustainable. It has been held by the learned District Judge that the minor was not properly represented before him, and it was on this ground, and this ground alone, that the appeal has been dismissed. I am quite unable to see how such an order can affect the minor's interests, because he is not bound by it, *vide* the cases in 24 Cal 25[1] and 24 All 383.[2] Moreover, under the Civil Procedure Code, O. 32, R. 5 (1) every application to a Court which I presume includes an appeal, on behalf of a minor shall be made by his next friend or his guardian-ad-litem. Here where there was a properly constituted guardian-ad-litem, T. M. Raghunatha Rao, no one else could come forward on behalf of the minor and purport to represent him as his next friend.

Mr. Kalyanwalla relies upon the case in 37 C W N 921.[3] In that case notice of an appeal was served on a guardian-ad litem for a minor respondent, but he did not appear, and therefore he was removed and a new guardian-ad-litem was appointed. It is suggested that this procedure ought to have been followed by the learned District Judge. I do not think that there is any difficulty in distinguishing that case from the facts of the case before me. In that case notice had been served on the guardian-ad-litem and he did not appear. In the case before me no notice has been served on the real guardian-ad-litem Raghunatha Rao. Moreover in the case before me the District Court was only concerned with matters which arose out of execution proceedings, which were taken out in pursuance of the decree passed by the Chief Court of Pudukkottai. The Chief Court of Pudukkottai is not under the superintendence of this Court, still less under the superintendence of the District Court of Bassein, and it would not appear that either of these Courts would be able to interfere with any order which had been passed by the Chief Court of Pudukkottai with regard to the appointment of a guardian-ad-litem in respect of one of the defendants in the case before that Court. There is ample authority for holding that execution proceedings are only a continuation of the regular suit and that the guardian-ad-litem appointed in the civil suit continues to be the guardian-ad-litem in execution proceedings and for the purpose of appeal. In this connexion reference may be made to the cases in I L R (1938) All 829[4] and I L R (1937) 2 Cal 127.[5] In such circumstances it seems to me that the learned District Judge was fully justified in holding that Palaniappa was not entitled to appear and prosecute the appeal on behalf of Singaram, and I cannot see that he was wrong in dismissing the appeal on this ground. Mr. Kalyanwalla takes serious objection to the fact that execution proceedings are going on against the minor's property and that no notice has been issued to the minor's guardian-ad-litem. This matter is not really before me, but I may remark that the executing Court would be well advised to see that due notice is given to the guardian-ad-litem of Singaram, namely Raghunatha Rao, before action is taken in execution

1. Dakeshur Pershad Narain Singh v. Rewat Mehton, (1897) 24 Cal 25.
2. Bhura Mal v. Har Kishan Das, (1902) 24 All 383=1902 A W N 76 (F B).
3. Upendra Nath Das v. Daksha Yani Debya, (1933) 20 A I R Cal 794=146 I C 824=37 C W N 921.
4. Hemraj v. Khem Chand, (1938) 25 AIR All 601 =178 I C 449=I L R (1938) All 829=1938 A L J 919.
5. Brojendra Kishore Ray v. Sham Sher Ali, (1937) 24 A I R Cal 259=171 I C 435=I L R (1937) 2 Cal 127=41 C W N 531.

against the minor's property and I would draw attention to the provisions of the Civil Procedure Code, O. 32, R. 5 (2). This appeal is dismissed with costs, advocate's fee three gold mohurs.

D.B./R.K. *Appeal dismissed.*

A. I. R. 1939 Rangoon 446

BAGULEY J.

Ah Li — Appellant.

v.

U San Baw — Respondent.

Special Second Appeal No. 208 of 1938, Decided on 27th January 1939, from judgment of Asst. Dist. Court, Sandoway, in Civil Appeal No. 1 of 1938.

(a) Easement — Right of water—Right to surplus water flowing from another person's land through artificial channel must be proved by prescription.

For a person to prove that he is entitled to the surplus water flowing from another person's land to his own land through an artificial channel he would have to prove that he was entitled to this water by some right of prescription. [P 446 C 2]

(b) Easement—Riparian rights — Owner of upper holding can use as much water for irrigation as convenient provided supply to owner of lower holding is not materially diminished—Owner of lower holding cannot restrain owner of upper holding from use of water without proof of damage actual or feared.

The proprietor of an upper tenement who claims the right to dam up a natural stream has right to take for the purpose of irrigation so much water only as can be abstracted without materially diminishing what should be allowed to descend. If the amount which is allowed to descend is sufficient to supply the owner of a lower holding with as much water as he needs for his own purpose, it cannot be said that the amount that goes down is materially diminished. Diminished it may be, but not materially diminished if the owner of the lower holding has enough for his needs. The owner of the lower holding is not entitled to restrain the owner of the upper holding without any proof of damage, actual or to be feared, for the future: *24 Cal 865 (P C), Expl.; Dictum in A I R 1916 L B 30, Dissent.* [P 447 C 1]

R. M. Sen — *for Appellant.*

Tun Aung — *for Respondent.*

Judgment. — This appeal arises out of a suit in which the plaintiff asks that the defendant be directed to remove a bund which he has placed across the bed of a stream. This is the main cause of contention. The plaint also refers to some other bund which the defendant is said to have made. There is, however, no mention of this second bund in the prayer and really I do not quite understand the position with regard to it. In view, however, of the fact that there is no mention of this second bund in the prayer it is difficult to see what order could be passed with regard to it. Fortunately a proper survey of the plaintiff's land has been made by a patta surveyor in which the various points of interest are noted, and it is, I think, not difficult to see exactly what has happened. The stream runs roughly from north-east to south-west and the plaintiff's and defendant's holdings are on the south-east side of the stream. The stream passes the defendant's holding before it reaches the plaintiff's holding. At a point about half way down the defendant's holding the bund complained of has been erected. The stream, I gather, is a permanent stream coming down from the hills but there is little or no appreciable water in it during the dry weather. The surveyor was called as a witness by the plaintiff. His evidence shows that the bund has been put across the river so as to block the water course entirely. Just above the bund, however, he has cut what I would describe as a by-pass; so, when the water banked up by the bund rises to a certain level, the surplus water flows down that bypass and rejoins the bed of the main stream just below the highest point of the plaintiff's holding.

The second obstruction complained of by the plaintiff is somewhere about the middle of the boundary between the holdings of the two parties; but the map shows no regular stream there and the suggestion seems to be that spare water from the defendant's holding was at some time allowed to flow from there into the plaintiff's holding, but it is clearly not by any natural stream. For the water to get from point F—the point where the obstruction is said to have been—to the plaintiff's paddy land, it would have to be conducted across a portion of the plaintiff's holding which is called a garden land. (It is the customary practice to classify all land that is too high or too uneven to be used for paddy cultivation as garden land.) It seems to me therefore that if there is a channel then it must be an artificial one and for the plaintiff to prove that he is entitled to the surplus water flowing from the defendant's land to his own land, he would have to prove that he was entitled to this water by some right of prescription and this he has not attempted to do. It looks to me as though perhaps at some time the defendant used to allow his surplus water to discharge into the plaintiff's land and that now he prefers to let it go in a different direction into the holding of Ma The The. This he would be entitled to do unless the plaintiff

had become entitled to the use of this water by prescription. I return now to consideration of the bund which the plaintiff asks may be removed. The lower Appellate Court has quoted a dictum in 8 L B R 556[1] in which it is said :

> In order to support an action by one riparian owner to restrain another from diverting the water beyond his riparian tenement it is not necessary that the plaintiff should prove that he has suffered any damage.

This statement is made on the authority of a Privy Council case, 24 Cal 865.[2] I have referred to this ruling and nowhere in it can I find any passage which supports this statement. Referring to the proprietor of an upper tenement who claimed the right to dam up a stream and to impound so much of its water as he might find convenient for irrigation, leaving only the surplus, if any, for the use of the proprietors below, it is said that his common law right is to take for the purpose of irrigation so much water only as can be abstracted without materially diminishing what should be allowed to descend. It seems to me that if the amount which is allowed to descend is sufficient to supply the owner of a lower holding with as much water as he needs for his own purpose it cannot be said that the amount that goes down is materially diminished. Diminished it may be, but not materially diminished, if the owner of the lower holding has enough for his needs. The dictum that the owner of the lower holding is entitled to restrain the owner of the upper holding without any proof of damage, actual or to be feared for the future, cannot anywhere be found in the Privy Council ruling referred to. A decree may be passed on actual damage incurred or when the remedy sought is by way of an injunction, when damage can reasonably be feared in the future, but manifestly it is impossible for a man to prevent another one from irrigating his land merely in order that he may have the pleasure of seeing a large volume of water passing his holding. This being the case, it is, I think, necessary to see whether there it is true that the plaintiff has suffered, or is likely to suffer from the effect of this dam, taking into consideration the fact that in addition to the dam the defendant has dug a water-course to enable all the surplus water to rejoin the main channel of the river at a spot where it is available for the plaintiff. It must be remembered that when a permanent stream is dammed it is impossible to block it up completely. As the water continues to come down it will rise to the top of the bund and then go off in one direction or another. Even in big schemes for water-works, where water is drawn off in pipes for the use of a city, there must be some escape channel in case more water comes down than is necessary for the use of the city. Once the artificial lake or pond is filled water will continue to pour in at one end, and unless it goes over the top of the bund it must escape either into the defendant's holding (in which only a limited quantity of water can be used), or down the escape channel, and what goes down the escape channel is available for the use of the plaintiff and the owners of holdings below his.

Now, taking the patta surveyor, who may be regarded as an unbiased witness, and who was called by the plaintiff he says that when he visited the plaintiff's paddy land, there was water in it and the plaintiff had already transplanted his paddy. His visit was some time about August. Ko Aye, the headman, also called by the plaintiff, says that Po Kin who holds the land next below the plaintiff was able to get water from the river. And he could only get the water which came through the escape channel, passed the plaintiff's land and reached his land. The other witnesses called by the plaintiff speak of there having been no water in the river after the bund was made. But it seems to me that they are speaking of the land immediately below the bund and above the point where the escape channel rejoins the old river bed. In this portion there can be no water unless the water overflows the defendant's bunds because the plaintiff has put a bund in the old river bed also, at the point marked E, immediately above where the escape channel rejoins the river bed, and in the place between these two bunds the plaintiff is now growing tobacco. The necessity for the bund at the lower point can only be the fact that were it not for this bund water coming through the escape channel might flow backwards of a distance up the old bed of the stream and this would interfere with the tobacco plantation. Po Kin, the cultivator of the land below the plaintiff's, is called as a witness for the defendant and he says that he gets water on his land not only from the river but also the

1. Kaw La v. Maung Ke, (1916) 3 A I R L B 30 =35 I C 356=8 L B R 556.
2. Debi Pershad Singh v. Joynath Singh, (1897) 24 Cal 865=24 I A 60=1 C W N 401 (P C).

overflow from the upper paddy land and there is evidence that in the middle of October when the case was tried there was water in the plaintiff's fields. I cannot see that the plaintiff has made out a case that the supply of water to his paddy land is materially diminished. I think therefore that the trial Court was right in dismissing the suit. I allow the appeal, set aside the order of the lower Appellate Court directing that the bund be opened and restore that of the trial Court dismissing the suit. The respondent will bear the appellant's costs throughout.

D.S./R.K. *Appeal allowed.*

A. I. R. 1939 Rangoon 448

MYA BU AND MOSELY JJ.

Ram Oudh — Applicant

v.

Government of Burma

Civil Revn. No. 327 of 1938, Decided on 31st January 1939, from order of Asst. Dist. Court, Meiktila, in C. R. No. 5 of 1938.

(a) Civil P. C. (1908), S. 115 — Application for revision does not lie on ground that evidence is being, or will be, rejected by trial Court.

An interlocutory order may decide a case and may be subject to revision if it does irreparable damage to a party, but that cannot be said in the case of rejection of evidence. High Court does not entertain an application for revision on the ground that evidence is being, or will be, rejected by the trial Court : *A I R 1927 Bom 664, Rel. on.*

[P 448 C 2]

(b) Civil P. C. (1908), S. 115—Mere error of law is no ground for revision.

A mere error of law on a question which the Court has jurisdiction to decide will not in itself be a ground for interference in revision.

[P 448 C 2]

K. C. Bose — *for Applicant.*

U Thin Maung, Advocate General — *for the Crown.*

Mosely J. — This is an application under S. 115, Civil P. C., for revision of a decision of the learned Additional District Judge of Meiktila on a preliminary issue in a suit. The issue was in substance as follows :

Whether the terms of tenancy as embodied in the deed of lease can in law be subject to a condition precedent that in reality the lease will be for ten years at a time and not for a period of five years as inserted in the deed of lease ?

The learned Additional District Judge said that no question of a condition precedent arose but that the oral agreement sought to be proved was not a matter on which the document was silent or inconsistent with its terms and could not be included under proviso (2). A preliminary objection by the learned Advocate-General is that this application for revision will not lie. I do not think that this Court or any other High Court has ever entertained an application for revision on the ground that evidence is being or will be rejected by the trial Court. A decision is quoted by the learned Advocate-General which is in exact point, 29 Bom L R 304.[1] No doubt an interlocutory order may decide a case and may be subject to revision if it does irreparable damage to a party, but that cannot be said in the case of rejection of evidence. It is open to the party to question the decision in appeal which is the proper time at which the error, if any, should be remedied. It cannot be said here either that the trial Court has not applied itself to the matter. A mere error of law on a question which the Court has jurisdiction to decide will not in itself be a ground for interference in revision. It is said for the petitioner that the plaintiff's case was really based on fraud and that if an issue were framed on fraud this evidence will be admissible. That may or may not be so, but it is not a matter before this Court and it is not a matter decided by the trial Court. This application in revision must therefore be dismissed with costs—advocate's fee, three gold mohurs.

Mya Bu J. — I agree.

D.S./R.K. *Application dismissed.*

1. Isa Adam v. Bai Mariam, (1927) 14 A I R Bom 664=101 I C 385=29 Bom L R 304.

END

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1939

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54	1939	"	8	149	"	"	86	249	"	"	159	313	"	"	190	391	"	"	238
60	"	"	1	160	"	"	114	258	"	"	152	324	"	"	213	401	"	"	244
73	"	"	20																

I. L. R. 1939 Karachi (F. C.) = All India Reporter

ILR	AIR			ILR	AIR			ILR	AIR			ILR	AIR		
1	1938	FC	1	96	1939	FC	42	132	1939	FC	43	190	1940	FC	5
6	1939	"	1	98	"	"	58	165	"	"	74	191	"	"	4

I. L. R. 1939 Karachi = All India Reporter

ILR	AIR			ILR	AIR			ILR	AIR			ILR	AIR			ILR	AIR		
1	1938	S	88	152	1939	S	66	307	1939	S	110	439	1939	S	225	652	1939	S	148
12	"	"	141	156	1938	"	239	314	1938	"	233	449	"	"	185	656	"	"	164
13	"	"	86	160	"	"	237	325	1939	"	13	460	"	"	196	659	"	"	179
18	"	"	132	165	"	"	193	330	"	"	137	469	"	"	279	662	"	"	167
38	"	"	150	179	1940	"	24	342	"	"	360	475	"	"	263	669	1940	"	30
41	"	"	108	187	1938	"	190	344	"	"	288	499	"	"	96	674	1939	"	180
50	"	"	124	189	"	"	224	348	"	"	9	502	"	"	93	676	"	"	207
55	"	"	106	191	"	"	218	359	"	"	52	509	"	"	234	677	"	"	203
60	"	"	122	196	"	"	223	370	"	"	71	518	"	"	150	684	"	"	157
64	"	"	164	199	1939	"	182	378	"	"	76	523	"	"	299	693	"	"	113
75	"	"	202	204	1938	"	171	383	"	"	80	527	"	"	221	725	"	"	343
82	"	"	149	217	"	"	228	385	"	"	75	530	"	"	200	741	"	"	184
85	"	"	113	228	1939	"	38	388	"	"	65	539	"	"	177	744	"	"	190
95	"	"	127	230	1938	"	209	391	"	"	85	544	"	"	86	749	"	"	260
99	"	"	182	238	"	"	217	393	"	"	46	563	"	"	128	751	"	"	230
104	"	"	157	241	"	"	213	398	"	"	142	566	"	"	276	760	"	"	152
111	"	"	198	248	1939	"	1	401	"	"	270	573	"	"	145	765	"	"	206
119	"	"	191	269	"	"	97	405	"	"	144	580	"	"	251	769	"	"	357
121	"	"	153	275	"	"	172	409	"	"	68	589	"	"	161	775	1940	"	51
131	1939	"	165	277	"	"	208	417	"	"	62	597	"	"	315	779	1939	"	293
134	"	"	35	280	"	"	170	422	"	"	125	602	"	"	173	787	"	"	297
136	1938	"	215	283	"	"	27	427	"	"	127	611	"	"	254	793	1940	"	49
140	"	"	206	300	"	"	258	428	"	"	303	632	"	"	281	800	"	"	53
147	1939	"	33	304	"	"	160	432	"	"	107	648	"	"	78				

CASES OVERRULED

IN

A. I. R. 1939 SIND

Emnabai Hassan v. Fakir Muhammad, (1922) 15 S L R 165=A I R 1922 Sind 1=65 I C 50	Overruled in A I R 1939 Sind 241 (F B).
Tirathbai, Mt. v. Mt. Sugnibai, (1929) 23 S L R 43 = 29 Cr L J 1097 = 11 A I Cr R 366=A I R 1929 Sind 61= 112 I C 681	Overruled in A I R 1939 Sind 193 (F B).

THE

ALL INDIA REPORTER

1939

Sind J. C.'s Court

A. I. R. 1939 Sind 1

DAVIS J. C.

Muhammad Ashfaq Imam Illahi — *Complainant* — Applicant.

v.

Motiram Manghanmal Advani — *Accused* — Opponent.

Criminal Revn. Appln. No. 3 of 1938, Decided on 30th May 1938, from order of Addl. City Magistrate, 21st December 1937.

(a) Penal Code (1860), S. 405 — Trust — Trust receipt — Property whether passes to purchaser — Decisive test in cases of breach of trust—Requisite criminal intent how ascertained — Buyer under trust receipt when guilty of criminal breach of trust stated—Terms of trust receipt not intended to be strictly complied but taken as securing payment on due date—Buyer committing default in payment held could not be said to have criminal intent under S. 405.

The question whether the property in the goods has or has not passed to the purchaser under a trust receipt is relevant to the decision of cases under S. 406 or S. 409, but it is not necessarily decisive. The decisive test is whether there was an entrustment within the meaning of S. 405, and the necessary criminal intent. The property in the goods may have passed to the purchaser; he is therefore the legal owner but he may nevertheless constitute himself a trustee of these goods for another, including the seller, who thereby becomes the beneficial owner. The proposition however that a man cannot commit criminal breach of trust of his own property requires some qualification. It is true, provided the person is the legal and beneficial owner, and the whole aggregate of rights of ownership are vested in him. It is not of course true if the legal ownership only is vested in him. Therefore if the property in the goods does and is intended to pass under these documents called trust receipts, it is still possible that the purchaser may constitute himself a trustee of goods that are now his, for the seller. But it cannot well be said that a person has the requisite criminal intent, when it is doubtful whether the property has or has not passed, whether he is entrusted with the goods under the terms of a trust agency, or whether there is an out and out sale, whether by cash or credit, with the property in the goods passing. But if it is clear that the trust receipt is, what it is really intended to be, a trust agency, whereby the buyer binds himself to sell the goods on behalf of the seller and is entrusted with the goods under certain clear terms and conditions, there is an entrustment within the meaning of S. 405, and if there be a violation of the terms and conditions of the entrustment with the necessary intent, there can be a conviction for criminal breach of trust.

[P 2 C 1, 2; P 8 C 2]

Where the seller had never seriously directed his mind to the words of the trust receipt at all, that he never contemplated that its terms would be complied with and all he thought that it secured was due payment of the purchase price at due date and the buyer took delivery of goods but did not pay the purchase price either on the date mentioned in the trust receipt or afterwards :

Held it could not be said that the buyer had the criminal intent which S. 405 requires, because whatever be the legal relation established by this trust receipt, the buyer had good reason to believe that he was the purchaser of the goods in the ordinary sense of the term, that the property or the goods had passed to him on delivery, and that all he had to do was to pay the draft on the due date: *Case law discussed.* [P 5 C 1]

(b) Trust—Trust receipt—Nature *(Obiter).*

Trust receipts are not intended to pass the property in the goods purchased, but to give the purchaser a limited right of disposal pending the payment of full purchase price. [P 5 C 2]

M. N. Kotwal — *for Applicant.*

P. S. Shahani — *for Opponent.*

D. N. O'Sullivan, Public Prosecutor — *for the Crown.*

Judgment.—In this case, one Muhammad Ashfaq, who describes himself as a partner in a firm called the Cosmopolitan Trading House, made a complaint against one Motiram Manghanmal Advani, who is described as the proprietor of the Head & Footwear House, of offences under Ss. 409 and 417, I. P. C. The complaint arose out of a business dealing between the parties.

The accused placed an order with the complainant's principals, Messrs. Stanley Oaks & Co., Calcutta, for certain parcels of boots and shoes to be delivered after payment of the purchase price £42-13-1. This payment was to be made by a draft drawn on the purchasers at 60 days d. p. (documents against payment), the 60 days expiring on 24th February 1936. Before this date however the goods arrived in Karachi and the purchaser wanted the goods before payment, and the complainant, the sellers' agent, agreed to let the purchaser have the goods before payment on his accepting the draft and signing a document called a trust receipt which he did on 2nd January 1936. The purchaser took delivery of the goods but did not pay the purchase price either on due date, 24th February, or before or after, and the complainant had himself finally on 29th September 1936 to pay the amount of the draft £42-13-1, and on 22nd October he filed this complaint against the accused who was subsequently adjudicated an insolvent. Now the Magistrate discharged the accused holding that under the trust receipt, the property passed to the accused, and he could not therefore be guilty of criminal breach of trust of his own property. He referred to a single Judge judgment of a Judge of this Court in which it was held that a trust receipt created no trust in law, and there has been arguments before me, as there were arguments before the learned Magistrate, as to whether under the terms of the trust receipt the property in the goods passed to the purchaser. Now, no doubt, the question whether the property in the goods has or has not passed to the purchaser, is relevant to the decision of cases under S. 406 or S. 409, I. P. C., but it is not necessarily decisive. A man, for instance, may commit theft of his own property. Illus. (j) and (k) in S. 378, I. P. C., are two cases in point :

(j) if *A* owes money to *Z* for repairing the watch, and if *Z* retains the watch lawfully as a security for the debt, and *A* takes the watch out of *Z's* possession, with the intention of depriving *Z* of the property as a security for his debt, he commits theft, inasmuch as he takes it dishonestly.

(k) Again, if *A*, having pawned his watch to *Z*, takes it out of *Z's* possession without *Z's* consent, not having paid what he borrowed on the watch, he commits theft, though the watch is his own property, inasmuch as he takes it dishonestly;

and likewise a man may commit criminal breach of trust of his own property. If, for instance, instead of *A's* taking the watch out of *Z's* possession, without his consent, *Z* entrusted the watch to *A* at *A's* request for a night, on the express condition that *A* should return it the next morning, and *A* in deliberate violation of that express condition did not return the watch but sold it, *A* might be convicted of criminal breach of trust. Moreover, a person may constitute himself trustee of his own property for another. So the learned Public Prosecutor who appeared in response to notice was of the view that the Magistrate's order was wrong because the test of whether property has or has not passed is not decisive. The decisive test is whether there was an entrustment within the meaning of S. 405, I. P. C., and the necessary criminal intent. The property in the goods may have passed to the purchaser; he is therefore the legal owner but he may nevertheless constitute himself a trustee of these goods for another, including the seller, who thereby becomes the beneficial owner.

The phrase, however, 'that a man cannot commit criminal breach of trust of his own property', requires some qualification. It is true, provided the person is the legal and beneficial owner, and the whole aggregate of rights of ownership are vested in him. It is not of course true if the legal ownership only is vested in him. Therefore if, as the Magistrate holds, the property in the goods does and is intended to pass under these documents called trust receipts, and for reasons I shall give, I do not think the property does or is intended to pass under these documents, it is still possible that the purchaser may constitute himself a trustee of goods that are now his, for the seller. I do not myself think that this is the purpose or effect of these trust receipts nor do I think a single Judge judgment of mine reported in the April number of the (1938) All India Reporter, (A I R 1938 Sind 73[1]), to which reference has been made, is or was intended to be authority for such a proposition. That case related to a simple case of the hypothecation of shop goods against an advance, quite a different case from the one before me, and follows the opinion of one of the Judges in a reported case of this Court, 7 S L R 61,[2] to which no reference is made in a single Judge judgment of this Court reported in the March number of the

1. Gobindram C. Motwani v. Emperor, (1938) 25 A I R Sind 73=174 I C 560 = 39 Cr L J 509.
2. David Sassoon & Co. v. National Bank of India Ltd., Karachi, (1913) 7 S L R 61 = 21 I C 520.

All India Reporter, A I R 1938 Sind 57.[3] The facts of that case are quite different from the facts of this case, and illustrate the wisdom of dealing with each case on its own facts. The only comment I think necessary to make on that judgment is that the reference in that case to the unreported case of *Pahlajrai* v. *Crown* (decided by Raymond A. J. C. in 1923) on which the learned Judge relies is not complete, for that judgment went in appeal and the Judges in appeal appeared to doubt the correctness of the lower Court's decision on the point of law but dismissed the appeal on the ground that the necessary criminal intent was not proved. References then to unreported cases are liable to mislead.

And in this case it appears to me that this revision application must fail because it is quite impossible to hold in this case that the criminal intent required by S. 405, I. P. C., was present. The evidence of the complainant himself shows that it was never the intention of the parties that the terms of the trust receipt should be binding or complied with, and this case in this respect resembles the case in 60 Cal 262.[4] In that case, the question of the legal relationship created by these so-called trust receipts was again discussed, as it was discussed in the previous judgments of that Court in 56 Cal 1074[5] and 59 Cal 818[6] and the conclusion was that no trust was created by mere trust receipts, that the property in the goods did not and was not intended to pass from the seller to the purchaser, and that these documents were created merely as a device to evade the provisions of Sec. 52 (2) (c), Presidency Towns Insolvency Act. With all due respect to the learned Judges who decided those cases these documents may have a less dubious and unworthy origin, whatever the ultimate purpose to which they have been turned. In (1922) 2 Ch 211,[7] letters of trust were regarded as entirely reputable documents evidencing a trust agency created by the Bank as pledgee in the Company who imported the goods for resale for the purpose of realizing the Bank's security.

In the Calcutta case in 60 Cal 262[4] the importers obtained from the plaintiff-bank bills of lading and other documents of title which the plaintiff-bank handed over to the importers in breach of their agreement with the shippers before they obtained payment for the goods in return for trust receipts whereby the importers purported to become trustees for the plaintiff-bank of the goods and their sale proceeds until payment. The importers having obtained delivery of the goods pledged them with the defendant-bank who received the goods in good faith without any knowledge of the trust receipts, and allowed overdrafts on the security of the pledged goods and in an action brought by the plaintiff-bank against the defendant-bank, the plaintiff-bank was unsuccessful because, inter alia, whatever be the legal relations created by the trust receipts between the importers and the plaintiff-bank, the defendant-bank were as pledgees without knowledge of the trust receipts and had given in good faith good consideration for the goods pledged, but the case is of interest in showing how these trust receipts were regarded by men of business and what was their effect. The firm concerned were Kerr Tarruck & Co., a firm of long standing and high repute, and used to carry on business in Calcutta as importers and dealers. In the words of the judgment:

> Their shippers used to draw bills of exchange on them for the price of the goods shipped. The plaintiffs used to finance the shippers by discounting these bills, or by issuing other bills in exchange, and took as security, the bills of lading and other documents relating to the goods, and the shippers from time to time executed letters of request and hypothecation in favour of the plaintiffs. These bills of exchange were called advance bills as distinguished from other bills of exchange which were handed to the plaintiffs by the shippers for collection only. By the terms of the letters of request and hypothecation, it was agreed inter alia that the plaintiffs should accept the shippers' bills of exchange drawn upon their indentors (in this case Messrs. Kerr Tarruck & Co.) accompanied by bills of lading, invoices and marine insurance policies purporting to represent the relative merchandise shipped. The documentary bills were to be forwarded by the plaintiffs to their agents (in this case their Calcutta Branch) and the shippers undertook that their respective drawees (in this case Kerr Tarruck & Co.) would accept the bills on presentation and pay them at maturity. It was a term of the contract that the documents attached were not to be delivered until payment of the relative bills. In consideration of the plaintiffs accepting their bills, the shippers undertook to pay the amount required, to meet the acceptances in

3. Karamali Manji v. Emperor, (1938) 25 A I R Sind 57=174 I C 145=39 Cr L J 399.
4. Chartered Bank of India, Australia and China v. Imperial Bank of India, (1933) 20 A I R Cal 366=1933 Cr C 502=149 I C 903=60 Cal 262.
5. In re Nripendra Kumar Bose, (1930) 17 A I R Cal 171=121 I C 745=56 Cal 1074.
6. In re Sumermull Surana, (1932) 19 A I R Cal 680=140 I C 594=59 Cal 818.
7. In re David Allester, Limited, (1922) 2 Ch 211 =91 L J Ch 797=127 L T 434=66 S J 486= 38 T L R 611.

case the plaintiffs did not receive, cover before maturity, or should the amounts received be insufficient, and to pay interest in case of default. Further in case of default by either the shippers or their indentors, the plaintiffs were authorized to sell the goods. Kerr Tarruck & Co. had knowledge of these terms and of the terms of the contracts of sale, and in particular of the fact that the bills were D/P, that is to say, payment must be made on or before delivery of the shipping documents. The plaintiffs used to send the bills of exchange, with the bills of lading and other documents, to their branch in Calcutta and Kerr Tarruck & Co. accepted the bills. Thereupon, and before obtaining payment, the Calcutta branch used habitually to hand over the bills of lading and other documents to Kerr Tarruck & Co., and take in exchange certain documents called trust receipts. This practice had been followed for 20 years prior to the year 1927, though obviously it was done in breach of the contract between the plaintiffs and the shippers contained in the letters of request and hypothecation, because it enabled Kerr Tarruck & Co., to obtain delivery of the documents and the goods before payment.

By the terms of the trust receipt it was provided that, in consideration of the plaintiffs having handed over the shipping documents in respect of goods hypothecated to them as collateral security for the due payment of the relative draft drawn upon and accepted by Kerr Tarruck & Co., the latter firm undertook to land, store and hold the goods until sale as trustees for the plaintiffs, and in the event of sale by Kerr Tarruck & Co., to receive the gross proceeds as trustees for the plaintiffs, and forthwith to pay them in full to the plaintiffs. Further, Kerr Tarruck & Co. agreed, in case the goods were sold by them on credit, to obtain from the purchaser a promissory note for the price payable on demand, and endorse it in favour of the plaintiffs forthwith, if called upon to do so, and to receive any sums paid in discharge of the notes, on behalf of the plaintiffs to whom such sums should belong, and to hold them as trustees for the plaintiffs and to pay them to the plaintiffs as and when received.

It is clear from the evidence that neither the plaintiffs nor Kerr Tarruck & Co., ever intended that these terms, which were printed, should be adhered to either strictly or in full. This was admitted by Mr. Pollock, Mr. Warren and Mr. Warwick, sub-agents of the plaintiffs. For example Kerr Tarruck & Co., were not expected to pay the gross proceeds of sale to the plaintiffs forthwith or at all. One of the witnesses of the plaintiffs described this term as "silly". They were to meet the relative bills of exchange at maturity and this they did invariably, over a long period of years, and until they became insolvent. Further, goods, such as corrugated iron sheets and sugar, were not stored, nor ever intended by either party to be stored in the godown but were sold *ex jetty*. Moreover, when goods were sold on credit Kerr Tarruck & Co., did not obtain promissory notes from the purchasers, but took bazar chits instead, nor did they pay the sums received in discharge thereof to the plaintiffs, when or as received, and when the plaintiffs became aware of these departures from the terms of the contract they acquiesced rather than risk the loss of good customers of high commercial repute and good standing, such as Kerr Tarruck & Co. were recognized to be. This is confirmed by the correspondence. In fact, Mr. Warwick had to admit that the terms of the trust receipts contained in the first two, which are the main clauses of the agreement, had never been adhered to in practice;

and in conclusion the learned Judge was of the opinion that the facts showed that

Kerr Tarruck & Co. honestly believed, so far as they ever directed their minds to the question, if at all, that they were entitled to deal with the goods as they thought fit, subject to their obligation to meet the bills when they fell due, and that the property in the goods had passed to them on delivery, just as the plaintiffs honestly believed that they were justified in issuing the shipping documents in return for trust receipts.

Now, in this case, it is clear from the evidence of the complainant and from the facts of the case and from the words of the trust receipt itself that the complainant had never seriously directed his mind to the words of the trust receipt at all, that he never contemplated that its terms would be complied with and all he thought that it secured was due payment of the purchase price at due date. The trust receipt is printed, and it was not altered to adapt it to the facts of this particular case. It is as follows:

Karachi, 2nd January 1936.

To

The Cosmopolitan Trading House, Bunder Road, Karachi.

Dear Sirs,

In consideration of your handing over to us the shipping documents for the undermentioned goods held by you on trust re: the undermentioned drafts accepted by us with Mercantile Bank of India or the undermentioned invoices payable to you, we undertake to hold the said documents and goods and all proceeds of sales thereof in trust for you to be dealt with according to your directions and we engage: (1) to hold, store and sell the said goods and pay you the proceeds of sales immediately on receipt thereof advising you the account in respect of which each payment is made; (2) to effect sales of the said goods for cash which will be held and collected by us in trust for you and paid to you on demand; (3) if the goods covered by this trust receipt shall not be sold for cash or money not realized in sufficient time to provide payment for the said drafts/invoices at the due date thereof, we undertake to pay the amount of the said drafts/invoices with interest at 5 per cent. per annum to the approximate date of the arrival of the remittance in London, such payment to be made in sterling or rupee currency according as the amount is payable in sterling or rupee; (4) to keep the said goods insured against fire, marine risk and riot and civil commotion in trust for you to the full value and to hand over to you on receipt all moneys received in like manner from the insurers; (5) to return and deliver to you or to your nominee at any time on demand the said documents and the goods remaining unsold; (6) to allow you or any other authorized by you in writing to enter our godowns and premises at any time

and take possession of any of the goods remaining unsold ; (7) that in the case of our being a firm of more than one individual our obligations hereunder shall bind the members for the time being of such firm or such individuals jointly and severally and continue notwithstanding any changes ; (8) that we acknowledge and declare that the goods or moneys thereof represent a separate transaction distinct from all other goods or outstandings and shall not be deemed or taken to constitute a general credit from you.

Yours faithfully
For Head and Footwear House
Sd/ M. M. Advani,
Proprietor.

No.	Drawn by	Invoice No.	Amount due.	Description.
	M/s Oakes & Son. London.	13225	£42/13/1	10 parcels from Lotus Ltd. contg. shoes.
	Do	13260	£13/17/7	3 parcels from M/S Lincol Bennet & Co., Ltd.
	We have received these goods.			

In this case there were no shipping documents at all. The goods came by parcel post and the complainant gave to the accused the necessary authority to the post office to deliver the goods to him, but it is clear that it purported to bind the purchaser to pay over the receipts for goods sold as soon as they were sold, yet with respect to this the complainant says :

In my previous deposition before Mr. Mangharam I stated that when I got the trust receipt executed by the accused besides giving him delivery orders on the post office, I gave him no other document. It is correct I have stated in my previous deposition before Mr. Mangharam that it was open to Mr. Motiram to sell the goods mentioned in the trust receipt as he liked and when he liked and for whatever price he liked without any reference to me. This is correct. I have also stated in the same deposition whether he sold the goods at a profit or at a loss was entirely his concern and not mine. It was open to him to sell the goods for cash or on credit without reference to me. If the goods got stolen or burnt it was his own misfortune. He was bound to pay full amount shown in the trust receipt on 24th February 1936. He was not bound to pay me anything before 24th February 1936. This is correct.

This being the case, it appears to me quite impossible to say, whatever be the legal relation established by this trust receipt, that the accused had not good reason to believe that he was the purchaser of the goods in the ordinary sense of the term, that the property or the goods had passed to him on delivery, and that all he had to do was to pay the draft on due date. Therefore, it appears to me, it cannot be said the accused had the criminal intent which Sec. 405, I. P. C., requires and that this revision application must fail.

As however this one question of these trust receipts was argued at length before me, and my remarks in view of my dismissal of the revision application on other grounds must be obiter, it is perhaps only fair to the learned advocate concerned, that I should state my view. My view is that these trust receipts are not intended to pass the property in the goods purchased, and I am dealing here with the simple case of seller and buyer. The real purpose is not to pass the property but to give the purchaser a limited right of disposal pending the payment of the full purchase price. In 56 Cal 1074,[5] the nature and purpose of trust receipts were discussed. In that case, one Bose, the purchaser, used to obtain goods by sending an indent to the petitioners addressed to them and on a form supplied by them requesting them to order on his account certain goods therein mentioned, packed as directed at the price stated, c. i. f. c. i. Calcutta, 60 days D/A in sterling and otherwise on terms and conditions stated on the reverse of the form :

These terms inter alia provided, that all risks of voyage, &c., were to be borne by Bose. That he would accept their invoice as correct and accept on presentation and pay at maturity the draft (or on demand the pronote) drawn for the invoice value. That in the event of the goods arriving before the bill fell due, he would retain the same or, if no draft were drawn, he would pay the invoice amount on arrival of the steamer. That he would raise no objection to quality, &c., unless the draft (or pronote) had been first accepted (or signed) and paid by him. In case the indent mentioned D/A terms, that is to say, delivery against acceptance, the petitioners had the option to allow these terms or not, and Bose agreed to pay the draft on arrival of the steamer. In default of Bose accepting or paying the draft at maturity or pronote on demand, he agreed to pay the value of the goods according to the invoice as for goods bargained, and sold and authorized the petitioners to resell the goods on his account, and agreed to pay any deficit

and waive all claims to any surplus which might arise on resale. In answer to the indent order, the petitioners used to send what they called a report stating that the order had been placed. In practice, the goods ordered were made over to Bose, either against cash or upon his executing a pronote for their value. This note contained particulars of the invoice, the goods and the ship and a promise to pay the sum stated therein to the petitioners on demand against the goods and in addition, at the foot thereof, a statement which, so far as it is material, is as follows :

I engage myself to hold these goods in trust for and on their behalf and keep the goods insured against fire and confirm that these goods until sold by me and the proceeds thereof when sold, shall remain their property and that the said proceeds shall be kept by me separate, the intention being that they may take possession of the goods and/or the said proceeds whenever they wish to do so and that production of this notice shall make null and void any claims that may be made on the goods and/or the said proceeds by my creditors whether or not they had notice of this trust. The trust created shall cease to exist after I have paid in the above amount.

This document is called by the petitioners a trust receipt, and is a variant of the trust receipts sometimes taken by bankers in exchange for goods delivered to the buyers in advance of payment.

Certain goods in accordance with the above arrangement had been delivered to Bose by the petitioners and not paid for when Bose became insolvent and the petitioners claimed the goods against the Official Assignee as goods being held in trust for Bose on their account and the Official Assignee met their claim by the plea of reputed ownership, and S. 52 (1) (a), Presidency Towns Insolvency Act. The Court held that the plea that Bose held the goods in trust and was a trustee would not help the petitioners because the legal ownership vests in a trustee so that there would be in Bose not only reputed ownership but legal ownership as well. According to the terms of the contracts, however, the Judge held that the property in the goods was not to pass, saying :

But if Bose was a trustee, then he was the real owner, and the property in the goods was in him. Whereas the trust receipt printed upon the pronote states explicitly that the property in the goods and/or the proceeds thereof is to remain in the petitioners until payment. If, therefore, the property in the goods never passed to Bose, in my opinion it is clear upon the facts that the goods were in his reputed ownership within the meaning of S. 52 (2) (c). On sale of goods, the property in the goods passes, when the parties intend that it shall pass, as shown by the terms of the contract and the circumstances of the case.

Where the delivery of the goods or of a document giving control of the goods is to be in exchange for payment of, or security for the price of the goods, the seller, unless a contrary intention appears, reserves the right of disposal of the property in the goods, until payment, or security, be made or given accordingly. In the absence, therefore, of the trust receipt, the property in these goods would have passed to Bose on signing the pronote and not before. But the effect of the trust receipt was to postpone the transfer of property until payment. Apart however from these considerations, the arrangement made by the petitioners, was only an ingenious attempt to defeat the provisions of the Insolvency Act. While putting it in the power of Bose to obtain credit on the strength of the goods with which they supplied him, they tried nevertheless to secure a preference for themselves over all other creditors. Even if they had succeeded in drafting a document, which would have been sufficient to create a trust, in my opinion, such a trust would not have been legal or valid. A trust must be created in good faith. This application therefore is dismissed with costs.

In 59 Cal 818[6] Ameer Ali J. dealt with the question of a trust receipt from the point of view of its effect on the doctrine of reputed ownership. In that case the trust receipt was in the following terms:

The delivery contemplated by this contract shall always at the option of the sellers be against a delivery order which shall be construed as trust receipt and shall always be deemed to include the following stipulations :

(a) That in consideration of the sellers having handed over to the buyers the shipping documents for the goods or in consideration of the sellers having delivered the goods to the buyers as the case may be, the buyers shall undertake to land, store and/or hold until sale of the said goods as trustees for and on behalf of the sellers, and in the event of the said goods or any portion thereof being sold by the buyers to receive the gross sale-proceeds thereof as trustees for sellers and forthwith after receipt thereof to pay the same in full to the sellers and at the same time to advise the sellers of the account in respect of which such payment is made, and (b) they, the buyers, shall further undertake not to sell the said goods on credit except with the permission in writing of the sellers and whenever any goods covered by this contract or any part thereof shall be sold by the buyers on credit with the permission in writing of the sellers as aforesaid to obtain from the purchaser or purchasers thereof a promissory note or notes for the price of the said goods made in their own favour or order and payable on demand and to endorse the same in favour of the sellers forthwith, if called upon to do so, and further that all sums paid to the buyers in discharge or part discharge of the promissory notes or any of them shall be received by the buyers for and on behalf of the sellers and shall be the property of the sellers and that they the buyers shall hold all such payments while in their hands as trustees for the sellers and will pay the same to the sellers when and as received by them and that they the buyers shall advise the sellers of the account in respect of which such payment or payments is or are made, and (c) the buyers shall undertake that they shall keep the goods fully insured against loss or damage by fire and to hold the policy or policies of insurance as trustees for the sellers and to hand over to the sellers forthwith the full amount recovered by them in respect of such insurance, and (d) that the buyers shall get such delivery

order duly stamped, and (e) it being further expressly agreed that in the event of the breach of any item or conditions of the stipulations aforesaid or any part thereof the sellers may at their option either prosecute the buyers under S. 405, I. P. C., or may proceed civilly against the buyers or may adopt both such proceedings.

On page 821 the learned Judge says:

The exigencies of trade apparently require that buyers should be given possession and control of goods for the purpose of sale before payment. This has led to the adoption by sellers of various devices designed to maintain some connexion with or control over the goods; some invisible machinery by which the sellers can prevent goods being dealt with or passing from their buyer to the sellers' detriment. Two kinds of situations arise, one as between sellers and buyers simply, and the other as between sellers, bank and buyer. In the latter case, commonly, when the goods have been imported from abroad, the bank, having discounted foreign bills for the price of the goods, is, until payment, a pledgee of the goods vis-a-vis the buyer or the seller according to whether property has or has not passed under the contract of sale. The bank, in many cases, notwithstanding the pledge, delivers the goods to the buyer, so that the latter can deal with them against documents called "trust receipts."

The situation to be considered here is between buyer and seller simply, but, in my opinion, the same principles apply to the situation as between bank and buyer.

And on page 823 he says:

There remains the question of trust. As already indicated I propose to assume that the clause here, Cl. (34), is equivalent to a trust receipt. Now, it is clear that trust receipts may be considered something more than mere contract: *see* (1922) 2 Ch 211.[7]

Sellers resorted to the device of trust for the reason that, as a general rule, trust property does not vest in the Official Assignee and is excluded from the scope of reputed ownership. That general rule is based upon the theory of law that the trustee is the owner. Therefore, there is no other owner who can give his consent to reputed ownership by the buyer: (1804) 1 Sch & Lef 328.[8]

In India the rule is stated in S. 52 (a) and 52 (2) (c), Presidency Towns Insolvency Act. These two sub-sections read as if trust property could in no event be affected by the doctrine of reputed ownership. But, in my opinion, the rule is subject to certain qualifications. It may be put alternatively as follows: either some trusts may fall within the reputed ownership clause or such trusts when investigated will not be regarded by the Court as trusts in the full legal sense.

And the learned Judge sums up his conclusions on page 826 as follows:

First, that which appears on the document to be a trust may fall within reputed ownership, either because reputed ownership does apply in cases where a trust is of a secret or fictitious nature or because the Court refuses to recognize such transactions as trusts at any rate as against outsiders. I add the qualification because it may be that the incidents of the trust would be enforced as between the two immediate parties.

Secondly, trust receipts taken by a trader seller from a trader buyer so far as they purport to create an agency for sale do not preserve the property from reputed ownership, unless the relationship of the parties is known to the public. The common sense of the matter is this, that no special words or legal formula can preserve a control where actual control has been abandoned nor maintain a connexion with the goods when the connection has been in fact severed or, save for the seller, property which a seller hands over to a buyer with capacity to deal with it either as against transferees for value or against the Official Assignee. If the exigencies of trade require that the goods must be handed over for sale the seller takes the risk, he cannot put that risk upon the public which deals with his buyer ostensibly in possession of those goods as owner.

Lastly, reference may be made to the case in (1922) 2 Ch 211.[7] In that case, a limited company pledged bills of lading with a bank to secure an overdraft. When it was time to sell the goods, the company in accordance with the well-established mercantile practice obtained the bills of lading from the bank for realization on the terms stated in the usual letter of trust given by the company to the bank, to wit, that the company received the bills of lading in trust on the bank's account and undertook to hold the goods when received, and the proceeds when sold as the bank's trustee and to remit the entire net proceeds as realized, and it was held that as the letter of trust merely recorded the terms on which the company was authorized to realize the goods on the bank's behalf, and did not really create any charge at all, it did not require registration (as was contended) under S. 93, sub-s. 1 (c), (e), Companies (Consolidation) Act, 1908, either as a bill of sale within Cl. (c) or a charge on book debts within Cl. (e). The trust receipt in this case reads as follows:

1st February 1921.

To Barclays Bank, Limited.

Gentlemen,

I/We have to acknowledge receipt of invoice, bill of lading, and copy of insurance policy representing 100 bags alsike and white clover, loan 271, 11th January 1921.

I/We receive the above in trust on your account, and I/we undertake to hold the goods when received and their proceeds when sold as your trustees. I/We further undertake to keep this transaction separate from any other and to remit you direct the entire net proceeds as realized, but not less than £1200, within 28 days from this date.

I/We undertake to cover the goods by insurance against fire and to hold the policy or policies on your behalf.

Yours faithfully,
For and on behalf of David Allester, Ltd.
Henry F. Mills, Secretary.

8. Joy v. Campbell, (1804) 1 Sch & Lef 328=9 R R 39.

Astbury J. in giving judgment said :

In my judgment these letters of trust do not fall within the bills of sale definition at all. The pledge rights of the bank were complete on the deposit of the bills of lading and other documents of title. These letters of trusts are mere records of trust authorities given by the bank and accepted by the company stating the terms on which the pledgors were authorized to realize the goods on the pledgees' behalf. The bank's pledge and its rights as pledgee do not arise under these documents at all, but under the original pledge : *see* (1886) 17 Q B D 690[9] at p. 697. The bank as pledgee had a right to realize the goods in question from time to time, and it was more convenient to them, as is common practice throughout the country to allow the realization to be made by experts, in this case by the pledgors. They were clearly entitled to do this by handing over the bills of lading and other documents of title for realization on their behalf without in any way affecting their pledge rights : *see* (1895) A C 56.[10]

And finally the learned Judge said :

Here, if I may repeat myself again, the bank as pledgee created a trust agency in the company for the purpose of the realization of the bank's security. That trust agency was acknowledged and recorded in the letters of trust. That is the whole of the transaction. The letters of trust are neither bills of sale within S. 93, sub-s. 1 (c), nor are they in any sense mortgages or charges on book debts within Cl. (e) or any other clause of the Section.

Though in a very recent judgment, the Court of Appeal in an English case in (1938) 2 All E R 63[11] found in certain circumstances that the pledgor and pledgee were joint owners of the bills of lading which had been pledged. And I do not think the nature of the transaction is so very different where in place of the bank as pledgee there is the seller or the seller's agent as owner. I think the true nature and purpose of these trust receipts is expressed in the phrase "trust agency." It was not the purpose and intention of these trust receipts that property in the goods should pass as it need not pass under S. 25, Sale of Goods Act until they had been paid for. It may well be in India that the terms of the trust receipts have been so added to by sellers in the endeavour to secure themselves, that there is a conflict between and uncertainty in the terms themselves. The sellers wish to have all the advantages of a sale, and yet retain the property in the goods. They want the goods and the money. They want to eat their cake and have it, and it is clear that where the terms of the trust receipt are themselves inconsistent or in conflict, a prosecution for a criminal breach of trust must ordinarily fail. It cannot well be said that a person has the requisite criminal intent when it is doubtful whether the property has or has not passed, whether he is entrusted with the goods under the terms of a trust agency, or whether there is an out and out sale, whether by cash or credit, with the property in the goods passing. But, if it is clear that the trust receipt is, what it is really intended to be, a trust agency, whereby the buyer binds himself to sell the goods on behalf of the seller and is entrusted with the goods under certain clear terms and conditions, there is an entrustment within the meaning of S. 405, I. P. C., and if there be a violation of the terms and conditions of the entrustment with the necessary intent, there can be a conviction for criminal breach of trust. But, in the case now before me, though the terms of the document are compatible with an entrustment by the seller to the buyer, and Cl. (3) may be read to mean that the entrustment comes to an end when payment is made or is due, as in 56 Cal 1074,[5] yet it is clear from the evidence of the complainant that he did not understand its terms and that he thought that in some way the document was security for the payment of the price of the goods on due date. But, the document cannot be read as transferring legal ownership to the buyer who thereupon constitutes himself a trustee for the goods or mortgages them to the seller. This, I think, is not the purpose of these documents. The fact that this document is stamped as an agreement is in itself of some significance. It supports the conclusion that what this document and other documents like it are intended to evidence is a trust agency agreement, not a mortgage of goods or chattels. The case where the owner of goods hypothecates his goods as security for a loan or advance is a different class of case and will be dealt with when it arises. I am quite satisfied that the complainant did not understand the terms of this document and did not even expect them to be fulfilled. To say that the accused should be prosecuted for not fulfilling them is unreasonable. For these reasons I dismiss this revision application. Order accordingly.

N.S./R.K. *Application dismissed.*

9. Ex parte Hubbard, (1886) 17 Q B D 690 = 55 L J Q B 490=59 L T 172*n* = 35 W R 2 = 3 Morrell 246.
10. North Western Bank v. Poynter, (1895) A C 56=64 L J P C 27=11 R 125=72 L T 93.
11. Lloyds Bank Limited v. Bank of America, National Trust and Savings Association, (1938) 2 All E R 63.

A. I. R. 1939 Sind 9

DAVIS J. C. AND TYABJI J.

Mt. Sardar Khatun — Appellant.

v.

Secretary of State and others — Respondents.

First Appeal No. 31 of 1935, Decided on 30th August 1938, against judgment and decree of First Class Sub-Judge, Shikarpur, D/- 16th February 1935.

(a) Mahomedan Law—Hiba-bil-iwaz presupposes valid hiba.

Whenever a transaction is relied upon as being a hiba-bil-iwaz it necessarily includes the allegation that it is a hiba valid according to Mahomedan law: *A I R 1927 Cal 808 and 28 All 439, Rel. on.* [P 11 C 2]

(b) Deed — Recitals — Binding effect — Gift — Recitals as to possession of gifted property are binding on donor's heirs.

Where the deed of gift itself recites that the donor has given up possession of all his properties to the donee such a recital is binding on the heirs of the donor : *11 All 460 (P C), Rel. on.* [P 12 C 1]

(c) Benami—Transaction to be benami must be proved to have been carried out for benefit of true owner.

Before any transaction can be held to be benami, it must be clearly shown that it was not carried out for the benefit of the alleged benamidar but for the benefit or for the protection of the interests of the alleged true owner. [P 13 C 1]

Dipchand Chandumal — *for Appellant.*

Partabrai D. Punwani, Advocate-General — *for Respondents.*

Tyabji J.—This is an appeal against the judgment and decree dated 16th February 1935 of the First Class Sub-Judge of Shikarpur disallowing certain claims made in a suit filed by the appellant Mt. Sardar Khatun for partition of her share in moveable and immovable properties left by her brother Haji Muhammad who died on 2nd December 1929, at Shikarpur, and for a declaration that a gift alleged to have been made by the deceased Haji Muhammad of certain properties in favour of Mt. Ghulam Aisha in 1915 was void. It was claimed that Haji Muhammad left very considerable agricultural lands shown in Sch. A, houses shown in Sch. B, and moveable property shown in Sch. C, and that the plaintiff being a sister and defendant 2 a brother of the deceased were the only heirs of the deceased and as such entitled under Mahomedan law to a one-third and two-thirds share in the properties respectively. It was contended that defendant 1, Mt. Ghulam Aisha, was a mistress of the deceased Haji Muhammad who falsely claimed to be the wife of the deceased, and to be entitled to some of the properties under a deed of gift made by the deceased which was void. Defendant 2 supported the plaintiff's claim. It may be explained that defendant 1, Mt. Ghulam Aisha, was originally a Hindu woman, named Lachibai, the wife of one Godhoo, who died in February 1918. While her husband was still alive, she became a convert to Islam and married deceased Haji Muhammad according to Muslim rites in 1877. She lived with him for some time, after which on account of the wishes of the parents of Haji Muhammad, she was divorced and sent away and Haji Muhammad then married one of his own relations. A couple of years later, on the death of his wife, Haji Muhammad again took Mt. Ghulam Aisha back, and again married her on 10th September 1886. Thereafter Mt. Ghulam Aisha continued to live with Haji Muhammad until his death in 1929. In September 1915, Haji Muhammad executed a deed (of which Ex. 126 is a copy), titled a "hiba-bil-iwaz" under the terms of which he made a gift of all the properties owned by him at the time both moveable and immovable, to Mt. Ghulam Aisha, whom he described as his duly wedded wife. The properties gifted under this deed include all the properties in Sch. A and also the houses Items 1 to 7 in Sch. B. After setting out in detail a history of his relations with Mt. Ghulam Aisha up to the time, he states in para. 5 of the document :

Mt. Ghulam Aisha has been doing my service very well and has been quite obedient and dutiful to me and she has obeyed all my orders and discharged the duties which under the law are to be rightly performed as between a wife and husband, and I am quite happy and pleased with her beauty, service and allegiance.

And later in paragraph 7 :

My brother Mian Habibullah, my mother and sisters had filed a suit against me, viz. No. 1607 of 1897, in the Subordinate Civil Court, Shikarpur, which was disposed of in pursuance of the compromise filed by the parties.

And

My brother Mian Haji Habibullah as well as his sons are the enemies of my person and property and we have filed several suits against each other. We are not on visiting terms with each other on occasions of marriage and sorrow.

And in paragraph 9 :

I make a gift of all my moveable and immovable property belonging to me, viz. moveable property which is shown above and immovable property of the following description with all the rights and interests appertaining thereto admitted or rejected,

those which are existing and which are to accrue hereafter in the lump sum of Rupees 10,000 in words ten thousand rupees in current coins towards the aforesaid "haq mohar" (dower) to Mt. Ghulam Aisha alias Mt. Lachi, Mussalman Shaikh, my duly wedded wife by way of "hiba-bil-iwaz" and have given their possession to her. She is enjoying their possession and I have given up my possession and proprietary rights, etc. of all kinds therein. Mt. Ghulam Aisha has agreed to receive the aforesaid moveable and immovable properties as a gift towards the above ten thousand rupees of the "haq mohar" and I the executant have agreed to give the same in this amount.

This deed was duly registered and mutation was effected in respect of all the properties mentioned therein in the Record of Rights. Defendant 1 in her written statement denied that the properties mentioned in Schs. A, B and C were left by the deceased Haji Muhammad. She claimed that all the lands mentioned in Sch. A and the houses Items 1 to 7 in Sch. B had been gifted to her and had been in her possession since September 1915, that the remaining houses in Sch. B had been purchased by her and were in her possession, and denied that the moveable property shown in Sch. D was Haji Muhammad's. She pleaded that she had been married again after her first marriage and divorce, to Haji Muhammad, according to Muslim rites, when her dower had been fixed at Rs. 10,000 and that in 1915, Haji Muhammad made the gift to her in lieu of her dower. She also contended that the suit was time-barred by her adverse possession of these properties since 1915. While this suit was still pending before the lower Court, Mt. Ghulam Aisha died on 15th December 1931. As she died intestate and without leaving any heirs, all her property escheated to the Crown, and the Secretary of State was accordingly joined as a party on 23rd May 1932 and is respondent 1 before us.

The learned Judge who tried this suit held that as Mt. Ghulam Aisha's husband Godhoo was alive till 1918 and her marriages with him subsisted in law until his death, her marriages with Haji Muhammad in 1877 and 1886 were void and therefore the consideration, (it would have been more accurate to say the "Iwaz" or the return) for the gift of 1915, which was the dower due on her marriage, failed. The transaction of 1915 could not therefore be upheld as a 'hiba-bil-iwaz'. He however held it proved that the deceased Haji Muhammad had the bona fide intention to complete the gift and did in fact part with the possession of the properties gifted to Mt. Ghulam Aisha, and so upheld the gift as a simple hiba. He also held that the suit was time-barred by adverse possession so far as the claims to the immovable properties mentioned in Ex. 126 were concerned. The houses after Item 7 in Sch. B were purchased after the deed of 1915 and some of these were purchased and stood in the name of Mt. Ghulam Aisha in the Record of Rights while others were purchased and stood in the name of Haji Muhammad. The learned Judge allowed the plaintiff's claim in respect of those houses which stood in the name of the deceased Haji Muhammad at the time of his death. With regard to the moveable property mentioned in Sch. C, the main part of which consisted of the proceeds of hundis which stood in the name of Mt. Ghulam Aisha and were found from her house, the learned Judge held that it was the property of Mt. Ghulam Aisha herself and not a part of the property of the deceased Haji Muhammad. The result was that the plaintiff and defendant 2 got a decree for the partition of their shares in Items 9 to 12 and Item 14 of Sch. B. The remaining properties were held to be exclusively the property of Mt. Ghulam Aisha and as such to have escheated to the Crown. This appeal has been filed in respect of the claims disallowed.

The learned advocate who appeared before us in this appeal referred to several points but eventually confined his arguments in the main to three contentions, first, that the lower Court erred in entertaining the plea that the transaction of 1915 which according to him had failed as a "hiba-bil-iwaz" could be upheld as a pure "hiba". He claimed that this was an entirely new case set up against the plaintiff which had not been sufficiently pleaded; secondly, that the properties alleged to have been gifted to Mt. Ghulam Aisha under the gift deed and also those alleged to have been purchased in the name of Mt. Ghulam Aisha subsequently were in reality the properties of the deceased Haji Muhammad himself of which possession had never been transferred or given to Mt. Ghulam Aisha; and thirdly, that the property shown in Sch. C and particularly the hundis were part of the property left by the deceased Haji Muhammad as Mt. Ghulam Aisha was merely a "benamidar" in respect of this property. We cannot see how it is possible

to find any substance in the argument that the learned Judge in upholding the gift in 1915, made out a new case for the plaintiff which had not been set out in the pleadings. Mr. Dipchand argued that the deed of 1915 was relied upon by Mt. Ghulam Aisha to prove a sale transaction. He relies on a passage in the evidence of Mt. Ghulam Aisha taken on commission in which she says :

A Kabin (dower) of Rs. 10,000 (ten thousand) was fixed at the time of the marriage at Ranipur before Pir Ghulam Mahiuldin. After the marriage I came and lived in this building where I am now living. I used to live with my husband, as long as he was alive, in this building. In lieu of the Kabin (dower) he had given this building by getting my name registered.

Q. Did he effect a sale of the property in your favour or he gave it to you as a gift ?

A. He sold it to me.

And Mr. Dipchand relies on the case in A I R 1930 P C 57[1] where their Lordships of the Privy Council approved of the action of the lower Appellate Court in not permitting a new plea to be raised in appeal which had never been put forward before the original Court; and on A I R 1931 Sind 17[2] in which it was held that the plaintiff, who had relied on a sale deed and pleaded a particular transaction as a sale, could not be permitted to give a complete go-by to the case on which he had proceeded in the trial Court and set up a new case before the Appellate Court that the transaction was a valid gift under the Mahomedan law. These cases have no application to the facts before us. The plaintiff herself in para. 7 of her plaint stated that defendant 1 claimed the properties under a gift. Paragraph 7 is as follows :

It is being falsely alleged by defendant 1 that Haji Muhammad deceased remarried her after the death of his first wife by fixing her kabin at Rupees 10,000 and made a gift of some of his property in her favour in lieu of the above dower debt.

Defendant 1 in her written statement stated in paragraph 1 :

The suit is time-barred. Defendant 1 has been living in possession of the property ever since the date of the gift since September 1915.

And again in paragraph 4 :

All the property shown in Sch. A and all the houses from 1 to 7 shown in Sch. B have been gifted away to defendant 1 by Haji Muhammad deceased by registered gift deed dated 25th September 1915.

And Issue 4 reads :

Did Haji Muhammad make any gift of his property shown in Schedule A and part of Sch. B to defendant 1 ? If so, whether that gift is valid and according to law and binding on the heirs of Haji Muhammad ?

It is therefore perfectly clear that from the very beginning the transaction of 1915 was relied upon by defendant 1 as a valid gift and not as a sale, and the issue framed was whether there had been a valid gift. There is, of course, a very great difference between a transaction which is a sale and governed under the ordinary law of Contracts, and a gift valid under the Mahomedan law. As pointed out in 54 Cal 754[3] cited by Mr. Dipchand himself :

A gift may be a heba simple or a heba-bil-iwaz (gift for an exchange or a return gift), or a heba-ba-shurt-ul-ewaz, (a gift with a stipulation for an exchange or a return gift), but in each and every variation of gift the transaction is a heba, and must contain the essential elements that constitute a heba according to the Mahomedan law.

Therefore, whenever a transaction is relied upon as being a 'hiba-bil-iwaz' it necessarily includes the allegation that it is a 'hiba' valid according to Mahomedan law. In 28 All 439[4] even where a transaction described as a 'hiba-bil-iwaz' was relied upon as being in reality a conveyance for value and the case so set up was found to have failed by reason of the fact that no valuable consideration had ever passed, their Lordships of the Privy Council still considered it important to consider whether the possession of the property comprised in the deed had or had not been delivered to the defendant as had been alleged, for, it was held that the transaction would, under the circumstances, have been a valid gift under the Mahomedan law, if possession had actually been delivered to the defendant. In the case we are dealing with the transaction was throughout claimed to be a valid gift, the question of the delivery of possession was definitely raised, and in fact the greatest part of the evidence consisted of evidence given on behalf of the plaintiff that the properties continued to remain in the exclusive possession of Haji Muhammad up to his death, and the evidence given on behalf of defendant 1 that the possession was hers.

1. Siddik Mahomed Shah v. Mt. Saran, (1930) 17 A I R P C 57=121 I C 204=24 S L R 138 (P C).
2. Mt. Hakim Bibi v. Mir Ahmed, (1931) 18 A I R Sind 17=129 I C 900=25 S L R 72.
3. Sarifuddin Mahammad v. Mohiuddin Mahomed, (1927) 14 A I R Cal 808=105 I C 67=54 Cal 754=31 C W N 1068.
4. Chaudhuri Mehdi Hasan v. Muhammad Hasan, (1906) 28 All 439=9 O C 196=33 I A 68=3 A L J 405 (P C).

The second contention of the learned advocate for the appellant urged before us was that the immovable properties in question, those which were the subject-matter of the gift of 1915 as well as those subsequently purchased in the name of Mt. Ghulam Aisha, were never in the possession of Mt. Ghulam Aisha at all, but remained in the possession of Haji Muhammad until his death. This was by far the most important question in the case, for, not only did the validity of the gift of 1915 depend upon it, but as the learned advocate for the appellant admitted and is clearly obvious, unless the plaintiff succeeded on this question, the plaintiff's claim was clearly barred by adverse possession in respect of the properties covered by Ex. 126, and further the plaintiff could not in this suit, which was for a partition of her share in the properties left by the deceased Haji Muhammad, succeed in respect of any claim regarding properties in Mt. Ghulam Aisha's possession and not in the possession of the deceased Haji Muhammad at the time of his death. But here the appellant is clearly faced with an extremely uphill task. The deed itself (Ex. 126) recites that the donor Haji Muhammad had given up possession of all his properties to Mt. Ghulam Aisha and such a recital is binding on his heirs : *cf.* 16 I A 205.[5] Immediately after executing the deed Haji Muhammad proceeded to have mutations effected in the Record of Rights, entries from which have been exhibited, Exs. 209 and 210. This, by itself, raises a presumption in favour of a transfer. The entire conduct of Haji Muhammad subsequent to this, as disclosed in numerous documents, shows a definite intention carefully to divest himself of all rights of ownership in the properties. Haji Muhammad and Mt. Ghulam Aisha were at the time occupying one of the houses gifted and on 22nd September 1915, Haji Muhammad executed and registered an agreement (Ex. 124) in which he stated that he had gifted the house by the deed executed by him on 9th August 1915 and he would live as a tenant in that house with his wife Mt. Ghulam Aisha :

> The rent has been fixed at Rs. 10 per annum. The above building has been hired on rent for a period of five years from the said Mt. Bibi Ghulam Aisha. After the expiry of the period of five years the said proprietress is at liberty to eject me or to let me continue in the occupation of the building. Hence I have executed this rent deed so that the same may be utilized whenever necessary.

A large number of similar documents have been produced, agreements of tenancy as well as leases of agricultural lands (Exs. 182 to 194 and 196 to 198) executed between the date of gift and 1929, in all of which Mt. Ghulam Aisha is shown to be the owner, and in most of which Haji Muhammad is specially mentioned as her 'mukhtiar' or attorney. Even Abdul Majid, a nephew of Haji Muhammad and son of defendant 2, on occupying one of the houses gifted, was required to execute a document (Ex. 125) dated 17th September 1928 in which he stated :

> This building belongs to Mt. Ghulam Aisha, wife of Haji Muhammad, caste Sheikhin, resident of Shikarpur. I have hired this building on rent at the rate of Rs. 6, (rupees six per mensem), from the said proprietress for a period of eight months with effect from 1st October 1928, and have become liable for a sum of Rs. 48 on account of the rent for the above period. It rests with the proprietress whether or not to let me remain in occupation after the expiry of the period.

It would be difficult to say what further Haji Muhammad could have done in order to carry out his intention of completely divesting himself of the ownership and possession of these properties. As against all this documentary evidence, the learned advocate for the appellant, has read out to us the evidence of Pir Baksh (Ex. 112), Fazul Ahmed (Ex. 113), Taki Khan (Ex. 115), Moulabuksh (Ex. 117) and a couple of lines from the evidence of Tikiomal (Ex. 116). The witnesses make statements to the effect that deceased Haji Muhammad used to do zamindari work and used to manage the lands. Several of them were questioned with regard to the name under which kabuliats and other documents regarding the lands were written, but the witnesses show entire ignorance of such affairs. They knew of no gift made by Haji Muhammad. None of these witnesses refers to any particular survey number and in view of the fact that Haji Muhammad had his own separate lands at least for some part of this period and was acting as the attorney or mukhtiar of Mt. Ghulam Ashia in respect of her lands, this evidence cannot be regarded as at all pertinent and is entirely without any value. The learned Judge was right in describing it as very vague. We therefore see no reason whatever to differ from the learned Judge who held that deceased Haji Muhammad did

5. Muhammad Mumtaz Ahmed v. Zubaida Jan, (1889) 11 All 460=16 I A 205=5 Sar 433 (P C).

have a bona fide intention to confer ownership upon Mt. Ghulam Aisha and did part with the possession of the properties in her favour.

Coming next to the contention of the learned advocate that the moveable property shown in Sch. C and particularly the hundis of the value of Rs. 21,600 standing in the name of Mt. Ghulam Aisha and found from her house was actually the property of deceased Haji Muhammad in the hands of Mt. Ghulam Aisha as a benamidar, the learned advocate for the appellant has not been able to point out to us any facts or circumstances from which any such conclusion could be rightly drawn. The learned advocate laid much stress on the statement of some of the plaintiff's witnesses that Mt. Ghulam Aisha was a very poor woman, but this statement appears to us to be clearly false. We can see no reason to disbelieve the evidence of Mt. Ghulam Aisha herself that she had Rs. 10,000 to Rs. 15,000 of her own at the time of her second marriage to Haji Muhammad in 1886 and she must have greatly increased her personal property after 1915. The evidence of witness Hassomal (Ex. 216) supported by the statement produced by him (Ex. 217) proves that Mt. Ghulam Aisha had extensive dealings in hundis, all done by herself in her own name. It is also well settled law that before any transaction can be held to be benami it must be clearly shown that it was not carried out for the benefit of the alleged benamidar but for the benefit or for the protection of the interest of the alleged true owner, and in this case all the circumstances point definitely to the contrary. The result is that we do not see any reason to interfere in any manner with the decree passed. This appeal is accordingly dismissed with costs.

N.S./R.K. *Appeal dismissed.*

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* A. I. R. 1939 Sind 13

LOBO AND WESTON JJ.

Vishram Manji — Appellant.

v.

Gangaram Ladha and others — Respondents.

First Appeal No. 58 of 1935, Decided on 23rd August 1938.

*** (a) Civil P. C. (1908), S. 92—Allotting property for benefit of poor members of particular community is purpose of religious and charitable nature—When suit relates to such property, sanction under Sec. 92 is necessary although property forms only part of entire trust property in respect of which suit is brought.**

Allotting property for the benefit of poor members of a particular community is a purpose of public or charitable nature within the meaning of S. 92. Where a suit relates to such property, sanction of the Advocate-General under S. 92 prior to the institution of the suit is essential, although such property forms a small part and is divisible from the rest of the trust property in respect of which the suit is brought. Sanction under Sec. 92 is all the more necessary when the suit is not divisible and it is not possible for the plaintiff to omit the relief which he claims relating to charitable part of the trust and in such a case the whole suit is governed by S. 92: *34 All 468, Rel. on.* [P 14 C 2; P 15 C 1]

(b) Civil P. C. (1908), S. 92—Court must consider prayer in suit at time of institution to determine whether sanction under S. 92 is necessary—It should not pay regard to subsequent amendment or abandonment.

It is incumbent upon the Court to see what were the prayers in the plaint at the date the suit was instituted in order to satisfy itself whether S. 92 has been complied with and for this purpose the Court must pay no regard to what may happen by way of amendment or abandonment at some later stage in the suit : *A I R 1931 Bom 33, Rel. on.* [P 15 C 1]

Sobhanmal — *for Appellant.*

Sunderdas — *for Respondents.*

Weston J. — It is desirable to state briefly certain facts giving rise to this litigation. In the year 1906, there was some dispute between one Nensi Gopal on the one hand, his brother Ladha Gopal and two sons of Ladha, one of whom then a minor is present defendant 1, on the other hand relating to family property. To settle this dispute an arbitrator was appointed and he made an award. The immovable property of the family with which the award deals, consisted of five properties. In respect of four of these properties, the arbitrator made certain dispositions as to income to be paid not only to the disputing parties but also to other members of the family. In respect of the fifth property the arbitrator directed that its income should be devoted entirely to charitable purposes, the precise purposes being the payment of Rs. 25 per month to poor Kachi Lohana boys and girls for school books and school fees and the payment of Rs. 60 per month for the maintenance of 15 poor widows and members of the Kachi Lohana community, any balance of income from this fifth property being devoted to paying marriage expenses in the case of poor members of the community. The arbitrator by his award purported to create one trust in respect of this property and of the four properties, benefits of which were to accrue

to members of the family. He made directions forbidding alienation and he directed that Nensi Gopal should be trustee so long as he lived and after his death seven persons including one of the sons of Ladha were to be trustees. This award was filed in Court and although present defendant 1, one of the sons of Ladha was a minor, the award was made a rule of the Court. Subsequently Nensi Gopal died and of the seven trustees appointed it appears that only two, namely the present defendants 2 and 3, are now alive. According to defendants 2 and 3, about the year 1922 they resigned their trusteeship and handed over all the properties to defendant 1, who is the younger and only surviving son of Ladha Gopal, deceased.

Plaintiff in the present suit is the youngest and only surviving son of Manji, a younger brother of Gopal. He claims that under the award of 1906 he was entitled to receive certain allowances, but the suit which he has filed is not to recover such sums as he is entitled to but to obtain the following reliefs : firstly, that defendants 2 and 3, surviving trustees should be removed and that new trustees should be appointed; secondly, that trust properties should be removed from the control of defendants 1 to 3 and be handed over to the new trustees appointed who should be given suitable directions for the purposes of fulfilling the objects of the trust; and thirdly, that the defendants should be required to render full accounts of the income and profits of the properties.

The suit was opposed on a number of grounds, among which were, that the suit is bad as the sanction of the Advocate-General under S. 92, Civil P. C., has not been obtained. It was also claimed that the trust was inoperative as it offended against the rule of perpetuities. The learned Judge who tried the suit held that as the portion of the property applied to charitable purposes was only a minor part of the total trust property, S. 92, Civil P. C., had no application. He divided the trust however into two parts, one relating to charitable purposes and the other relating to the trust for benefit of the members of the family. The second trust he held to be void, as it was against the rule relating to perpetuities; but the first he held to be operative and in accordance with the prayers in he plaint, passed a decree appointing trustees, directing the property to vest in these trustees and directing defendant 1 to render accounts and hand over the property to the trustees. The plaintiff has appealed. His appeal naturally relates to that part of the decree whereby the learned Judge declined to pass any orders in respect of the trust property existing for the benefit of the family. But the learned advocate for the appellant has not attempted, and indeed confesses his inability, to dispute the finding of the learned Judge that this part of the trust is inoperative. We do not think it necessary therefore to consider the appeal further and it must be dismissed.

Cross-objections have also been filed by defendant 1. These cross-objections contain several other grounds but those urged before us are that as part of the suit at least related to public charitable trust the whole suit was bad for want of sanction required under Sec. 92, Civil P. C., and secondly, that even if, as the learned trial Judge held, the trust is divisible into two trusts, yet as the decree passed relates solely to that part of the trust which is for public charitable purposes, that decree cannot be upheld as the required sanction under S. 92, Civil P. C., was not obtained. In our opinion, these cross-objections must be upheld. It does not seem to have been disputed in the suit and it has not been disputed before us that the purposes for which the fifth property was earmarked by the arbitrator were purposes of a public and charitable nature. As has been stated earlier in this judgment this property was in fact allotted for the benefit of poor members of the Kachi Lohanas Community. In our opinion this was a purpose of a public and charitable nature. Reference perhaps may be made to the case in 34 All 468[1] in which it was held that a trust for the benefit of fakirs of a particular denomination is a trust for public and charitable purposes. This being so, it is clear that even if the trust is divisible, the sanction of the Advocate-General under S. 92, Civil P. C., is essential for a suit of the nature of that actually brought relating to the trust for charitable purposes.

We are also inclined to accept the argument of the learned advocate for defendant 1 that the suit is not divisible, that it would not be open to plaintiff after filing the plaint to omit the reliefs which he claimed relating to the charitable part of

1. Puran Atal v. Darshan Das, (1912) 34 All 468 =14 I C 698=9 A L J 709.

the trust, and that as reliefs in respect of a trust of a public charitable nature were claimed in the plaint the whole suit was governed by Sec. 92, Civil P. C. Sec. 92 (2) states that save as provided by the Religious Endowments Act, no suit claiming any of the reliefs specified in the first part of the Section shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section. As remarked in 32 Bom L R 1435,[2] at p. 1446 it is incumbent upon the Court to see what were the prayers in the plaint at the date the suit was instituted in order to satisfy itself whether S. 92 has been complied with and for this purpose the Court must pay no regard to what may happen by way of amendment or abandonment at some later stage in the suit.

The learned trial Judge has quoted no authority for his proposition that S. 92, Civil P. C., has no application when the public and charitable part of a trust is small as compared with what may be called, the other parts of the trust. Nor do we think that this proposition can be sustained. We must remark that while holding the public and charitable part of the trust to be small the decree passed by the learned Judge appointing trustees and making directions, deals solely with this minor part of the trust. We hold therefore that the suit was wholly incompetent for want of the sanction required by S. 92, Civil P. C., and the only order which could be passed is that the whole suit should be dismissed. We allow the cross-objections and make an order accordingly. As to costs we consider that plaintiff must bear the costs of defendants one set, both in the trial Court and in this Court.

R.M./R.K. *Order accordingly.*

2. Narsidas v. Ravi Shankar, (1931) 18 A I R Bom 33=128 I C 891=32 Bom L R 1435.

A. I. R 1939 Sind 15

LOBO J.

Kashibai w/o Saba Babu — Applicant.

v.

Parsram Wadhumal —

Judgment-creditor.

Misc. No. 218 of 1936, Exn. Appln. No. 416 and Misc. No. 237 of 1937, Decided on 29th April 1938.

Civil P. C. (1908), S. 60 — Decree against employee, member of Mutual Relief Fund — Wife appointed nominee of policy — Employee dying during service—Ownership of fund and interest of deceased held vested in nominee — Amount of policy held not liable to attachment in execution.

A railway employee who was a member of the Mutual Relief Fund had appointed his wife as nominee of the policy. The certificate of membership provided for the payment of pecuniary relief in the case of death or retirement from service to the member or "his nominee or the legal heirs of the nominee". The employee died during service and his creditors who had obtained a decree against him in his lifetime proceeded to execute the decree by attachment of the amount of the policy of the deceased in the hands of the fund :

Held that the deceased had no interest in the Relief Fund which passed on his death to his legal representatives, as the ownership of the Relief Fund and therefore the interest of the deceased therein had been transferred to the trustees of the fund and there was a vested trust in favour of the nominee; and although the trust in favour of the nominee was a contingent trust, the contingency having occurred before the judgment-creditor effected any attachment, the trust in favour of the nominee ceased to be contingent and hence the amount payable by the Mutual Relief Fund became payable to the nominee and was not liable to attachment by the creditors of the deceased : *A I R 1931 Bom 300, Rel. on.; Case law referred:* [P 17 C 1]

Order.—This is an application under O. 21, R. 58 and S. 151, Civil P. C., made by one Kashibai, widow of Saba Babu, in the following circumstances: One Parsram Wadhumal obtained a decree for a sum of Rs. 900 against Saba, son of Babu, in Judicial Misc. No. 218 of 1936. The judgment-debtor died after the decree and in March 1937 the judgment-creditor applied for execution of his decree against the heirs and legal representatives of the deceased Saba "by attachment of the amount due on the ripe policy of the deceased in the hands of garnishee, the Keamari N. W. Ry. Traffic Mutual Relief Fund, Karachi." An order of attachment was issued on this application and the Relief Fund referred to has paid into Court the sum of Rs. 239-10-0 as being "the balance relief due to the widow of Saba Babu". The applicant Kashibai, as the widow of the deceased Saba, has filed this application praying that the attachment on the sum of Rs. 239-10-0 now lying in Court be raised on the ground that in his lifetime the said Saba, son of Babu, on 9th October 1928, assigned his right, title and interest in the said Relief Fund to his wife Kashibai, the applicant.

The applicant contends that by reason of that assignment the amount became the absolute property of the applicant, that it was no part of the estate of the deceased and that it is not therefore liable to attachment in execution of a decree against the deceased. It appears that on 9th October

1928 the deceased Saba, an employee in the N. W. Ry. at Karachi, became a member of the relief fund called the "Keamari N. W. Ry. Traffic Mutual Relief Fund". Ex. 3 is the certificate of membership. After reciting that Mr. Saba Babu has become a member of the fund and has undertaken to abide by the rules of the fund and to pay the calls provided for by the rules the certificate provides:

> In consideration and on condition of his continuance as a member the fund engages to afford after proof of death or retirement from service, either after completion of prescribed service under railway rules or owing to being permanently disabled for railway service, of the said Mr. Saba a pecuniary relief, payable at Keamari at the fund office, in accordance with the provisions of the then existing rules to himself, or the undermentioned or substituted nominees, or their legal heirs; provided that this certificate shall not have become void, and the said member shall not have discontinued to be a member of the fund, under the operation of the rules of the fund.

Below this is a tabulated form in which is to be entered particulars of the nominee and in Ex. 3 Kashibai, aged 15 years, daughter of Sonoo, wife of Saba, s/o Babu, is shown as the nominee. On the reverse of Ex. 3, certain rules of the Keamari N. W. Ry. Traffic Mutual Relief Fund are reproduced. R. 26, which is one of these rules, provides inter alia:

> The fund will, on no account, recognize any transfer or any alienation of relief by the member or his nominees.

Now the whole question before me is whether the interest of the deceased Saba Babu in the Relief Fund in question is an interest which could be attached by his creditors. It would be so liable to attachment if at the time of the attachment there was such an interest which on the death of Saba had passed to his legal representatives, and such would be the case if at the time of his death Saba had a disposing power over his interest in the Relief Fund. Several cases have been referred to in the course of arguments in support of the proposition that the interest of the deceased Saba Babu in this Relief Fund is attachable. Reference has been made to the case in 37 Bom 471;[1] to the case in A I R 1934 Bom 296;[2] to the case in 114 I C 658[3] and to the case in A I R 1938 Sind 20.[4] I have gone through these cases carefully but am of opinion that they do not bear on the question involved in this matter. These were all cases relating to policies of insurance and to the provisions of S. 6, Married Women's Property Act. The case however in 33 Bom L R 720[5] which has been cited by the learned advocate for the applicant appears to me to bear directly on the point involved. In that case moreover the learned Chief Justice of the Bombay High Court has pointed out the difference between a case relating to a policy of insurance and one relating to a death benefit fund such as we have in the present case. In the course of the judgment in that case the learned Chief Justice states:

> Now the whole question is whether the interest of the deceased Hormasji Bhabba in the Times of India Employees Death Benefit Fund is an interest which can be attached by his creditors. In order to answer that question one has to look at the rules governing that fund . . . . .

The learned Chief Justice then examined various rules relating to the fund and concluded as follows:

> The position under the rules therefore is that you have a fund vested in trustees and payable to the two children of the deceased and that the deceased himself never had in the events which have happened any interest in the fund or any disposing power over it. If that is the position, then I think there is a valid trust under S. 5, Trusts Act of 1882 . . . . I think here the ownership of the whole fund and therefore of the interest of the deceased which is sought to be attached, had been transferred to the trustees of the fund and that therefore there was valid trust under that Section.

In the course of arguments it had been urged before the learned Chief Justice that Cls. 17, 18 and 19 of the Rules gave the deceased member a power of disposal of his interest in the fund. The learned Chief Justice has however met this argument in his judgment thus:

> It seems to me that all these provisions in Cls. 17, 18 and 19 only confer upon the employee a right to receive a portion of the fund in certain contingencies, none of which has happened, and, I think therefore that these clauses can be disregarded.

1. Shankar Vishvanath v. Umabai Sadashiv, (1913) 37 Bom 471=19 I C 736=15 Bom L R 320.
2. Dinbai Hormasji v. Bamansha Jamasji, (1934) 21 A I R Bom 296=152 I C 168=58 Bom 513 =36 Bom L R 608.
3. Krishna Lal Sadhu v. Promila Bala Dassi, (1928) 15 A I R Cal 518=114 I C 658=55 Cal 1315=47 C L J 587=32 C W N 634.
4. Parmeshwaribai v. Nihalchand Lalchand, (1938) 25 A I R Sind 20 = 173 I C 457 = 32 S L R 138.
5. Nadirshaw J. Vachha v. Times of India Employees Death Benefit Fund, (1931) 18 A I R Bom 300=134 I C 558=33 Bom L R 720.

Now in the case before me which is a case relating to a mutual relief fund similar to that in *Nadirshaw's case*[5] the certificate of membership provides for the payment of pecuniary relief in the case of death or retirement from service to the member or "his undermentioned nominee or the legal heirs of the nominee." It is not the case here that the deceased retired from service and died thereafter so that pecuniary relief under the certificate became payable to him and he acquired disposing power over it. It is common ground that he died during service, and it appears to me that in these circumstances the deceased had no interest in the Relief Fund which passed on his death to his legal representatives so as to be attachable.

As in *Nadirshaw's case*,[5] so in the present case, the ownership of the Relief Fund and therefore of the interest of the deceased therein which is sought to be attached had been transferred to the trustees of the fund and there was a vested trust in favour of the applicant, the nominee. It may be that in October 1928 this trust in favour of the applicant was a contingent trust, but the contingency having occurred before the judgment-creditor effected any attachment, the trust in favour of the applicant nominee ceased to be contingent and the amount payable by the Mutual Relief Fund became payable to the applicant and was not liable to attachment by the creditors of the deceased. It has been held with reference to Sec. 6, Married Women's Property Act, that even a contingent trust is covered by the Section. Reference may be made to the case in I L R (1937) Mad 990.[6] Had Saba Babu retired from service alive he would have had a power of disposal over the amount which in the circumstances became payable to him by the fund, but this contingency never arose and this provision in the certificate may therefore be disregarded. In my opinion the case before me is covered by the decision of the Bombay High Court in 33 Bom L R 720.[5] I accordingly grant the application under O. 21, R. 58 with costs. The attachment levied on the money now lying in Court will accordingly be raised.

N.S./R.K. *Application granted.*

6. Bengal Insurance and Real Property Co. Ltd. Calcutta v. Velayammal, (1937) 24 A I R Mad 571=170 I C 279=I L R (1937) Mad 990.

A. I. R. 1939 Sind 17

LOBO J.

Messrs. Brijlal Jagan Nath — Plaintiffs.

v.

J. R. Sukhia and others — Defendants.

Suit No. 292 of 1938, Decided on 19th September 1938.

Civil P. C. (1908), O. 39, R. 2—Considerations guiding grant of temporary injunction stated.

In a suit for a perpetual injunction a temporary injunction is to be granted or refused on a consideration of the following points: (1) Has the plaintiff made out a good prima facie case? (2) On which side lies the balance of convenience?: *A I R 1934 Cal 694 and A I R 1935 Sind 128, Rel. on.* [P 19 C 2]

A person's title to a plot was based on a deed of conveyance. That deed of conveyance gave him a right of passage to certain road. The nature and dimensions of that passage were not mentioned in the deed of conveyance. Prima facie therefore he was entitled to the passage as it existed on the date of conveyance; on the date of the conveyance that passage was a passage which connected his property with the road and ran between two compound walls. That passage was 20 feet wide. The defendant started building operations by which he was encroaching upon this passage to the extent of 5 feet:

Held that the owner of the plot had every right to say that having made out a prima facie case he was entitled to a temporary injunction. [P 20 C 2]

Thanwerdas Isardar — *for Plaintiffs.*

Dingomal Narainsing, Khanchand Gopaldas and Kimatrai Bhojraj — *for Defendants 1, 2 and 3 respectively.*

Order.—This is a suit filed by the plaintiffs for a declaration and an injunction against defendant 1 to restrain him from encroaching in any manner upon a certain passage by building thereon so as to enclose any space out of the said passage into his own land or otherwise interfere with the rights of the plaintiffs.

Defendants 2 and 3, like the plaintiffs, are interested in this passage. Along with the plaint the plaintiffs presented an application for a temporary and interim injunction under O. 39, Rule. 2, Civil P. C., and on 25th July I granted the plaintiffs an interim injunction and issued notice of the application. It is this notice which is now before me for disposal.

The facts connected with this matter are somewhat involved and need to be set out in some detail in order to make the position clear. In the Frere Town Quarter of the City of Karachi there is a plot of land which formerly bore Survey No. 5 survey sheet J-1; it was the property of Tyebali

Moosaji and Brothers. On three parts of this plot of land Tyebali Moosaji & Brothers had erected three buildings. The fourth portion of the plot was left unbuilt on but demarcated by a compound wall and otherwise. The entire plot of land abuts on the McNeil Road on the south: on the north it is bounded by the railway line, on the west its boundary consists of a property belonging to Edulji Dinshaw & Co., and on the east it is bounded by a property belonging to another stranger. The division of the plot into four parts resulted in two of the parts having no access to the McNeil Road. On both these parts Tyebali Moosaji and Brothers had erected buildings. In order to afford such access the owners provided a passage starting on the McNeil Road and leading up between the two portions of the plot abutting on McNeil Road to the two portions of the plot behind.

Tyebali Moosaji & Brothers in course of time became involved in financial difficulties and in order to meet these and to clear off mortgages which they had been obliged to effect, they began to dispose of the various portions of plot No. 5. On 16th May 1924, Tyebali Moosaji & Brothers sold to the predecessor-in-title of defendant 2 the back portion of the plot on the north-west side with buildings thereon admeasuring 1506 square yards for a sum of Rupees 29,000. The deed of conveyance is Ex. 4. Now, this was one of the plots having access to the McNeil Road only by the passage referred to above and in the deed of conveyance Ex. 4 provision is made for this in the following words:

Further the vendors do hereby covenant with the vendees that they, the vendors, shall either continue to maintain and in good order the 15 feet wide road that at present exists leading from the McNeil Road through the unsold portion of the plot Survey No. 5 survey sheet J-1, Frere Town Quarter, or make another road of the same width to the south-west of the plot referred to above.

To the deed of conveyance is appended a schedule and in the schedule again there is reference to this passage. The schedule reads:

Undivided 1506 square yards of land out of 3533 square yards being a portion of the plot bearing Survey No. 5 survey sheet J-1, situate in the Frere Town Quarter of the City of Karachi in the Registration District and sub-District of Karachi, and bounded on north by railway lines, on the south by portion of plot No. 5 and road on the east by plot No. 5-A and on the west by bungalow of Mr. Edulji Dinshaw, along with the bungalow and outhouses standing thereon together with all the rights, easements and appurtenances thereto including the right of way by a 15 feet wide road leading from the McNeil Road to the said bungalow as per sketch herewith attached or make another road of the same width to the south-west of the plot referred to above.

By a deed of conveyance registered on the following day, i. e. 17th May 1924, Tyebali Moosaji & Brothers conveyed to the plaintiffs in the present suit the north-eastern back portion of plot No. 5 with buildings thereon admeasuring 1496 square yards for a sum of Rs. 30,000. The deed of conveyance is Ex. 3. Now, this property was also one of the two portions of plot No. 5 having no access to McNeil Road except by the passage which had been reserved for this purpose by Tyebali Moosaji and Brothers, when they originally divided the plot into four portions and built on three portions thereof. In Ex. 3 this passage is provided for the plaintiffs in the following words:

They, the said vendors do, by these presents, grant, sell, convey, assign and transfer unto the said vendees, parties of the second part, all that piece or parcel of land with buildings thereon being Survey No. 5-A survey sheet J-1, measuring 1496 square yards or thereabouts according to sanad and known as bungalow and outhouses and compound walls standing thereon with a passage common to this bungalow and two others also belonging to the vendors, viz. Survey Nos. 5/A-1 and 5 and situated in the Frere Town Quarter of the City of Karachi in the Registration District, Sub-District and taluka and town of Karachi.

A schedule is attached to this deed of conveyance and the western boundary of the property conveyed to the plaintiffs is thus described:

On the west passage common to survey Nos. 5, 5-A and 5A/1.

On 16th November 1927 Tyebali Moosaji & Brothers sold the south-western portion of plot No. 5 which had been left unbuilt on to Hassanali Sheikh Alibhoy admeasuring 1506 square yards for a sum of Rs. 8950. The deed of conveyance is Ex. 5. The description and boundaries of the plot as appearing in Ex. 5 are thus set out:

All their right, title and interest in an undivided southern half portion being a plot of land with compound walls and kutcha buildings thereon the whole plot bearing old Survey No. 5, old survey sheet J-1, new Survey No. 7 in the map marked sheet 2 situated in Frere Town Quarter, Karachi, Registration District, Sub-District, taluka and town of Karachi the plot conveyed measuring 1506 square yards from whole area of 3196 square yards and bounded on the north by another portion of plot old Survey No. 5 with bungalow, east by common passage and old Survey No. 5A/1, south by McNeil Road and west by plot of Edulji Dinshaw. Together with all buildings, ways, water-courses, drains, passages and easements and advantages and appurtenances whatsoever.

The remaining portion of the original plot No. 5 with buildings thereon belonging to Tyebali Moosaji & Brothers, the south-eastern portion, appears to have been conveyed to defendant 3 in the suit for he is the present owner thereof. At present however, there is no material on the record showing when and how defendant 3 acquired this portion of the plot. The plot which was originally plot No. 5 at present consists of four portions which have been renumbered as follows : The plaintiffs' plot with buildings thereon bears Survey No. 8, defendant 3's plot with buildings thereon bears Survey No. 9, defendant 2's plot with buildings thereon bears Survey No. 7/1, and the portion sold to Hassanali bears Survey 7/2. On 23rd December 1937, defendant 1 and his wife purchased from Hassanali Sheikh Alibhoy plot No. 7/2 for a sum of Rs. 11,295 and the area sold was 1506 square yards. The deed of conveyance is Ex. 8. The schedule attached to Ex. 8 reads thus :

> A plot of land bearing new Survey No. 7/2 survey sheet FT-2 admeasuring 1506 square yards and situated in the Frere Town Quarter of the City of Karachi in the Registration District and Sub-District of Karachi together with compound walls and a wooden shop thereon and bounded on the north by new Survey No. 7/1, sheet FT-2, on the east by common passage 14 feet and 10 inches wide, on the south by McNeil Road and on the west by plot of land with buildings thereon belonging to Messrs. Edulji Dinshaw & Co.

It must be mentioned that between January 1931 and December 1936 Hassanali with the co-operation of defendant 2 or his predecessor-in-title had with considerable difficulty and after much loss of time been able to obtain leave from Government for a sub-division of the western half of what was originally plot No. 5 into two portions 7/1 and 7/2, and that the demarcation and limitation of the passage as one of 14 feet and 10 inches as shown in Ex. 8 was part of the arrangement as a result of which Government through the City Deputy Collector agreed finally to the sub-divisions 7/1 and 7/2. Exs. 9, 10, 11 and 12 make this position clear. The plaintiffs had no voice in these proceedings.

Defendant 1 had purchased plot No. 7/2 for the purpose of erecting a building thereon. In or about July 1938 he started operations. He pulled down the compound wall, the boundary on the eastern side, and started preparations for the construction of a building on the extreme eastern limit of his plot which he demarcated after pulling down the compound wall about 5 feet further east and beyond the compound wall. Thereupon there was a protest by the plaintiffs and defendants 2 and 3. The plaintiffs contended that defendant 1 was deliberately encroaching upon the passage to the extent of about 5 feet and that he had no right to do so. The plaintiffs were supported in their contentions by defendants 2 and 3. Acrimonious correspondence and unseemly interviews between the plaintiffs, defendants 2 and 3 and defendant 1 ensued and ultimately on 23rd July 1938 the plaintiffs filed the present suit and applied for and obtained an interim injunction against defendant 1.

Now, it has been clearly laid down that in a suit for a perpetual injunction, such as I have before me, a temporary injunction is to be granted or refused on a consideration of the following points : (1) Has the plaintiff made out a good prima facie case? (2) On which side lies the balance of convenience? In 61 Cal 814[1] Buckland Offg. C. J. states the position thus :

> The plaintiff must make out a prima facie case. This is essential before either injunction or attachment can be granted. Moreover, the Court must be satisfied that the interference is necessary to prevent injury which is irreparable and that the mischief or inconvenience, which is likely to arise in consequence of withholding relief, will be greater than that from granting it.

The learned Judge in support of his judgment has relied inter alia on the case in 127 I C 690,[2] a case of our own Court. In A I R 1935 Sind 128[3] it is laid down by a Bench of our own Court that where no prima facie case is proved a temporary injunction should not issue.

Now, in order to ascertain whether the plaintiffs in the present case have made out a good prima facie case it is necessary to refer in the first place to the deed of conveyance upon which alone they can base their right to the passage or to a right of way to the McNeil Road. This deed of conveyance undoubtedly gives them a right of way to the McNeil Road by a passage common to their bungalow and two others, and in the schedule attached to Ex. 3 the western boundary of the plaintiffs' property

1. Drugadas Das v. Nalinchandra Nandan, (1934) 21 A I R Cal 694=155 I C 354=61 Cal 814=38 C W N 771.
2. Daily Gazette Press Ltd. v. Karachi Municipality, (1930) 17 A I R Sind 287=127 I C 690=25 S L R 142.
3. Bagomal Hotchand v. Dharambai Jethmal, (1935) 22 A I R Sind 128=156 I C 698.

is described as "passage common to Survey Nos. 5, 5A and 5A/1". No dimensions are mentioned in regard to this passage and in the absence of the mention of any dimensions the plaintiffs have every reason to say that the passage given to them for the use of their bungalow was the passage as it existed on the date of the conveyance to them in May 1924. It is therefore necessary to ascertain what was the nature and dimensions of that passage.

As to its nature, there is sufficient evidence on the record to establish that it lay between the compound wall of present plot No. 9 and the compound wall which was the eastern boundary of plot No. 7/2. Not only is this clear from Ex. 5, Hassanali's deed of conveyance, but I have on this point the affidavits of R. B. Kimatrai Ishwardas Mallick, of Rochiram Thakurdas and of the plaintiff himself, that till the disputes arose the passage from McNeil Road to the bungalows on plots Nos. 7/2 and 8 ran between two walls, the compound wall of plot No. 9 to the east and the compound wall of plot No. 7/2 to the west.

As to the dimensions of the passage, the evidence on record to my mind is clear. Ex. 6 is the relevant portion of the field-sheet prepared in the year 1922 when the City of Karachi was being re-surveyed. Ex. 6 is drawn to scale 80 feet to an inch. The passage shown therein is clearly 20 feet. Ex. 7 is the relevant survey map prepared from the field sheet Ex. 6. It shows the passage to be 20 feet and to be bounded on both east and west by a compound wall. Both Exs. 6 and 7 show that at the south-western end of this passage where it touches McNeil Road there is a cistern or a tank, and the compound wall which forms the western boundary of the passage starts from the eastern extremity of this cistern or tank. Ex. 14 is a photograph of the passage taken after defendant 1 had initiated building operations by demolishing the compound wall on the east of his plot. It is clear from this photograph that the compound wall extended northwards from the eastern extremity of the cistern or tank.

To my mind this is sufficient to establish that the plaintiffs have a strong prima facie case. Their title is based on their deed of conveyance, Ex. 3; that deed of conveyance gives them a right of passage to the McNeil Road; the nature and dimensions of that passage are not mentioned in the deed of conveyance. Prima facie, therefore, they were entitled to the passage as it existed on the date of their conveyance; on the date of their conveyance that passage was a passage which connected their property with the McNeil Road and ran between two compound walls, the compound wall of plot No. 9 and the compound wall of plot No. 7/2. That passage was 20 feet wide. Prima facie therefore the plaintiffs are entitled to a right of way to the McNeil Road by a passage 20 feet wide. Defendant 1 has admittedly started building operations by which he is encroaching upon this passage to the extent of 5 feet or so and the plaintiffs have every right to say that having made out a prima facie case they are entitled to a temporary injunction.

It has been argued that Ex. 3 mentions no dimensions in regard to the passage, but it refers to plots Nos. 5, 5A and 5A/1 and that to ascertain the extent of the plaintiffs' right of way recourse must be had to Ex. 4, the deed of conveyance, in respect of plot No. 5A in favour of defendant 2. That a reference thereto shows that defendant 2 was given an "existing passage" of 15 feet only and even this was liable to be diverted to the south-western extremity of the plot alongside the property of Edulji Dinshaw. This, it is argued, is the limit of the extent of the plaintiffs' right to a passage to McNeil Road. He is entitled only to a passage 15 feet wide. The argument is unsound and there are several effective answers to it. In the first place there was no 'existing' passage 15 feet wide; it is clear on the evidence the passage to McNeil Road in 1924 was 20 feet wide. The sketch annexed to the deed of conveyance (Ex. 4) is drawn to scale 20 feet to an inch, and the passage indicated in the sketch is clearly 20 feet wide. In Ex. 4 itself therefore there is a conflict on this point between the recitals in the body of the document and the sketch. Again there is no justification whatever for importing into Ex. 3 the contents of other deeds of conveyance in favour of other persons for the purpose of ascertaining the plaintiffs' rights under his deed of conveyance, Ex. 3. Such a course could be justified only if by mutual agreement Tyebali Moosaji & Brothers had simultaneously effected conveyance to the vendees of plots Nos. 5, 5A and 5A/1 now plots Nos. 9, 8 and 7/1 and made a mutual arrangement regarding the right of passage.

There is yet another point which appears considerably to favour the case of the plaintiffs. It is asserted by the plaintiffs that the pipe-lines conveying water to their building have been laid through the passage and that the drainage and pipe-lines of defendant 2 also pass through this passage and that defendant 1 in starting building operations has had perforce to interfere with these pipe-lines and the drainage arrangements. It is argued for the plaintiffs that the lay out of the pipe-lines and the drainage is clear indication that the common passage extends to the west beyond the pipe-lines and drainage pipes and up to the compound wall now demolished. In my opinion this argument is sound. It is not reasonable to suppose that in laying pipe-lines and drainage for the bungalows on plots No. 7/1, 8 and 9 the original owners of the original plot No. 5 would have chosen to lay them in the unsold portion of the plot. It is far more reasonable to suppose that they would run the pipe-lines and the drainage through the common passage. I am of the view therefore that the plaintiffs have made out a strong prima facie case entitling them to a temporary injunction. If the question of convenience is considered, the balance of convenience is undoubtedly in favour of granting a temporary injunction. Defendant 1 has not chosen to place on the record any material indicating that he will be inconvenienced or damnified to any considerable extent by having his building operations held up. He has filed more than one affidavit and the only reference to this point is in para. 42 of his affidavit dated 1st August 1938. It reads :

> That I have made all arrangements for constructing my plot and as a result of the attitude of the plaintiff and defendant 2 in having the injunction served upon me, my work has been stopped. I say that the continuation of the injunction will seriously prejudice me as it will hold my building work indefinitely.

Onthe other hand, there can be no doubt that if defendant 1 is allowed to carry on his building operations the plaintiffs will find it very difficult to induce the Court, in the event of their being successful, to order defendant 1 to demolish a completed building. It is true that the learned advocate for defendant 1 has stated that his client will be willing to demolish the building if the suit is decided against him, but the acceptance of such undertakings has always been discouraged by the High Courts. I have done my best in this matter to bring the parties to a reasonable settlement by suggesting to each of the contesting parties a little give and take. But the parties are in no mood to come to any amicable arrangement and I have therefore to deliver this order. In these circumstances I make no order as to any early date of hearing. If an application in that regard is made hereafter it will be considered on its merits. The plaintiffs will have the costs of this application.

D.S./R.K. *Order accordingly.*

A. I. R. 1939 Sind 21

DAVIS J. C.

Muhammad Jamadar Jhangir — Complainant — Applicant.

v.

Ghulam Rasool Mirza — Accused — Opponent.

Criminal Revn. Appln. No. 25 of 1938, Decided on 27th July 1938, from order of Sub-Divisional Magistrate, Karachi, D/- 7th April 1938.

Penal Code (1860), Ss. 403, 420—Partner can be convicted of criminal breach of trust in respect of partnership property—But if chief matter in dispute between complainant and accused is dispute between partners and allegations under Ss. 403 and 420 are made merely to squeeze out money from accused, dismissal being of civil nature, criminal complaint does not lie.

A partner can be convicted of a criminal breach of trust in respect of the partnership property. The partnership may be for one purpose, and one partner may for his own different purpose, dishonestly and fraudulently, abstract money from the partnership assets and criminally misappropriate it. Such an action would make him liable to criminal prosecution and it would not then be a matter merely of dispute between the partners. [P 22 C 1]

Where, however the chief matter in dispute between the complainant and the accused is a dispute between the partners, and the allegations of criminal offences under Ss. 403 and 420 are made in the complaint, merely for the purpose of squeezing money out of the accused, the dispute being merely one of civil nature, the complaint is liable to be dismissed : *A I R 1934 Sind 22, Rel. on ; A I R 1933 Cal 582, Not foll.* [P 22 C 2]

B. P. Samtani — *for Applicant.*

Kundanmal Dayaram, Special Assist. Public Prosecutor — *for the Crown.*

Order.—This is an application in revision against the order of the Sub-Divisional Magistrate, Karachi, dismissing the complaint of the applicant under Ss. 403 and 420, I. P. C., against the accused on the ground that the dispute is clearly one for

the Civil Court to decide. It is clear the Magistrate has not dealt with this case in a perfunctory manner though his order dismissing the complaint is, I think, unduly brief, and he might have given shortly his reasons for his conclusions to assist the higher Court. But he sent this case first to an Honorary Magistrate for a preliminary inquiry who recommended process to be issued. But the report of the Honorary Magistrate is open to the same objection of undue brevity in that there is nothing in his report which assists the higher Court to determine why process should issue. But looking at the complaint, I think the Magistrate is right, and that this complaint is merely brought by the complainant to squeeze money from the accused who is his neighbour because the partnership between them has been unsatisfactory.

I do not myself agree with the argument advanced by the learned advocate for the accused that in no case can a partner be convicted of criminal breach of trust in respect of the partnership property. The partnership may be for one purpose, and one partner may for his own quite different purpose dishonestly and fraudulently abstract money from the partnership till and criminally misappropriate it, and I do not see how it can then be said that there is no room for the criminal law at all. It is not then a matter merely of dispute between partners, and the judgment on which the learned advocate for the accused relies (A I R 1933 Cal 582[1]) has been differed from, and with all respect, I think, rightly, by this Court in 28 S L R 84.[2] But so far as the charge of cheating is concerned, I should say it is extremely improbable that the complainant could in any way prove the necessary guilty intention on the part of the accused, and as regards the charge of criminal misappropriation, in view of the fact that this applicant has been asking for accounts of the partnership and of the time which has elapsed between the formation of partnership and the filing of the complaint, it is improbable that the complainant could prove that there was anything in this case but a partnership dispute of a civil nature. Mr. Samtani, I think, unwittingly disclosed the reason of this complaint, when he said that when the complainant came to try and get some compensation from the accused he found that he was too late. The accused's house had already been attached. The fact, of course, that a man's house has been attached does not free him from the liability of a criminal prosecution if he has committed a criminal offence. But it does, I think, appear in this particular case that the chief matter in dispute between the complainant and the accused was a dispute between the partners, and that these allegations of criminal offences are made in the complaint, as the complaint itself shows, for the purpose of squeezing money out of the accused. That is all. The complainant thinking he will get nothing by attachment of the accused's property, or by action in the Civil Court wishes to use the Criminal Court as his debt-collector.

I do not think therefore there is any reason whatever to interfere with the order of the Magistrate. I therefore dismiss this revision application.

R.M./R.K. *Application dismissed.*

1. Bhupendra Nath v. Girdharilal Nagar, (1933) 20 A I R Cal 582=1933 Cr C 953=145 I C 416=60 Cal 1316=37 C W N 982.

2. Bhikchand Gangaram v. Emperor, (1934) 21 A I R Sind 22=1934 Cr C 220=155 I C 439=28 S L R 84.

A. I. R. 1939 Sind 22

TYABJI J.

Hemraj Radhowji — Respondent 1.

v.

Shahbhan Mohib — Respondent 2.

Misc. No. 42 of 1932 and Execution Appln. No. 1351 of 1937, Decided on 5th October 1938.

(a) Civil P. C. (1908), S. 47, O. 21, R. 64 — Property in possession of judgment-debtor sought to be sold—Question whether it is wakf property is question arising between parties to suit and can be determined in execution proceedings.

The question as to whether the property held by a judgment-debtor, which is sought to be sold in execution of a decree is wakf property, in which the judgment-debtor has no beneficial interest, is a question arising between parties to the suit in which the decree was passed and can be determined in execution proceedings : *A I R 1924 Cal 744; 17 Cal 711 (F B) and 19 Cal 683, Rel. on.* [P 23 C 2]

(b) Mahomedan Law—Wakf—Shiah Law — Enjoyment of entire usufruct of wakf property exclusively reserved to owners, who are Shiahs, during their lifetime — Right of relations to commence after death of respective owners — Wakifs and after them their descendants and heirs to have right of residence in the wakf property—Wakf is wholly void.

Under Mahomedan law, a Shiah cannot validly create a wakf under which he reserves any benefit for himself. [P 23 C 2]

Where under the terms of a deed of wakf, the enjoyment of the entire usufruct of the wakf properties is exclusively reserved to the owners of the properties i. e. the wakifs, who are Shiahs, during their life-time, and the rights of the relations of the owners are to commence only after the death of the respective owners and the main benefit contemplated by the authors of the wakf, for themselves and after themselves for their descendants and heirs is the right of residence in the properties, such a deed of wakf is wholly void and does not create any wakf. [P 23 C 2; P 24 C 1]

Hakumatrai M. Eidnani —
for Judgment-creditor (Assignee).

Kundanmal Dayaram —
for Judgment-debtors.

Order. — This is an application under O. 21, R. 64 by the judgment-creditor for an order of sale by public auction of the right, title and interest of the judgment-debtor in the two properties mentioned in the application. The judgment-debtor has filed his objections and alleges that the two properties do not belong to him and that they are wakf properties, by virtue of the deed of 1st March 1930 duly executed and registered by the owners of the properties, of which Ex. 6 is a copy. The judgment-creditor on the other hand contends that this wakf deed executed by parties who are admittedly Shiahs is void on the very face of it. The question for decision is therefore whether a valid wakf was created under the deed of 1st March 1930 by which the judgment-debtor entirely ceased to have any beneficial interest in the properties. Before I deal with this question, I must refer to two preliminary objections raised on behalf of the judgment-debtor. Mr. Kundanmal has referred me to the case in 14 Cal 617[1] and argued that this is a question in which very intricate questions of law have arisen with regard to the validity of a trust, and to A I R 1924 Cal 744,[2] where it was stated that ultimate questions of trust were not intended to be thrashed out in execution proceedings. But this is by no means a question where very intricate questions of law have arisen, and in the case in A I R 1924 Cal 744[2] it was clearly held that where a judgment-debtor was in possession as an agent or trustee for another, his title may be the subject of an inquiry in a claim case. The rulings further cited by Mr. Hakumatrai in 17 Cal 711[3] and 19 Cal 683[4] and above all the terms of S. 47, Civil P. C., appear to me to make it quite clear that this is a question arising between the parties to the suit in which the decree was passed which has to be determined in these proceedings.

The other objection raised was that I ought not to inquire into this question because these properties were held to be wakf properties in two decrees, one passed in Suit No. 134 of 1936 and another in Misc. No. 66 of 1934. A copy of the plaint in Suit No. 134 of 1936, Ex. 9, and the award made and filed in the suit Ex. 11 have been produced, as also the award in Misc. No. 66 of 1934. It is quite clear that in neither of these proceedings to which the judgment-debtor and his relations were parties, was any question raised with regard to the validity of the wakf, and it is clear that it was to the interest of all these parties to treat the alleged wakf as a valid wakf, and they no doubt took into consideration the benefits that the wakf deed conferred on the persons named therein. In any case the judgment-creditor was not a party to any of those proceedings, and the manner in which the judgment-debtor and his relations dealt with the questions with which they were concerned, does not in any manner affect the necessity and propriety of the question being decided in these proceedings. Turning next to the main question at issue, namely whether the execution of the deed Ex. 6 created a valid wakf, it is admitted that the parties who executed the deed were Ismaili Shiahs, to whom the Shiah law applies. It is also admitted that under Mahomedan law a Shiah cannot validly create a wakf under which he reserves any benefit for himself. A Shiah may of course make a valid wakf for the benefit of his family or relations. Under the terms of this deed however the enjoyment of the entire usufruct of the two properties is exclusively reserved to the owners of the properties, who were the wakifs, creators of the wakf, during the lifetime of the owners. This is clear from conditions (1) and (4) and 9. The rights of the relations of the owners commence only after the death of the respective owner through whom these relations

1. Hamid Bakhut Mozumdar v. Buktear Chand Mahto, (1887) 14 Cal 617.
2. Najimunnissa Bibi v. Nacharaddin Sardar, (1924) 11 A I R Cal 744=83 I C 233=51 Cal 548=39 C L J 418.
3. Punchanun Bundopadhya v. Ralia Bibi, (1890) 17 Cal 711 (F B).
4. Prosanno Kumar Sanyal v. Kali Das Sanyal, (1892) 19 Cal 683 = 19 I A 166 = 6 Sar 209 (P C).

were to become entitled to the benefits under the wakf. The main benefit contemplated by the authors of the wakf, for themselves and after themselves for their descendants and heirs, was the right of residence in these properties. At one time an attempt was made by Mr. Kundanmal to argue that the right of residence was not a benefit of the type which under the Mahomedan law, a Shiah could not reserve for himself under a wakf. But he was not able to cite any authority for this proposition, which on the very face of it, is wholly untenable.

I therefore hold that the wakf deed is wholly void, and does not create any wakf. Admittedly the judgment-debtor is an owner and has a share in these properties, and I grant this application for sale of the right, title and interest of the judgment-debtor in these properties. I may mention here that Mr. Kundanmal has contended that his client, the judgment-debtor, appeared to oppose this application here not only in his capacity as a judgment-debtor, but as the mutawalli of the two properties, which he claimed were wakf properties and he asked me to note that he has appeared before me as an applicant under O. 21, R. 58 and he relied upon a passage in a ruling cited by him, viz. in A I R 1928 All 516[5] for his contention that he could do so without making a separate application under O. 21, R. 58.

R.M./R.K. *Order accordingly.*

5. Musharrat Begam v. Sikandar Jahan Begam, (1928) 15 A I R All 516=111 I C 583=51 All 40=26 A L J 1180.

A. I. R. 1939 Sind 24

LOBO J.

Kishinchand Santram —
Respondent 1.

v.

Messrs Rochaldas Gidumal —
Respondents 2.

Misc. No. 65 of 1938, Decided on 16th August 1938.

(a) Arbitration Act (1899), Sec. 9—Contract of sale between *K* and *M* on terms and conditions of importing office — Contract providing separate arbitration clause under Section 9—Appointment of arbitrators in terms of contract with importing office—Arbitrators held had no jurisdiction to draw award.

K and *M* entered into a contract of sale of certain goods on terms and conditions of the importing office of the goods. The contract between the parties contained an arbitration clause which provided that all disputes of whatsoever nature, unless amicably settled, should be referred to two arbitrators, one to be nominated by each under the provisions of the Arbitration Act. Upon a dispute having arisen *K*, nominated one arbitrator on his behalf and called upon *M* to nominate one for him within three days. On failure of *M* to do so *K* himself appointed an arbitrator on behalf of *M*. This was in accordance with the arbitration clause contained in the contract between *K* and the importing office. The two arbitrators thus nominated by *K* drew up an award :

Held that the arbitrators acted without jurisdiction because whatever terms and conditions of the importing office were to be incorporated in the contract between *K* and *M*, the arbitration clause in the contract of the office could not be incorporated by implication because the contract between *K* and *M* actually contained a separate arbitration clause and hence the appointment of another arbitrator by *K* on behalf of *M* was in contravention of the provisions of Sec. 9, Arbitration Act, and hence illegal : *A I R 1921 Cal 767 ; (1912) A C 1 and (1889) 5 T L R 677, Rel. on ; A I R 1931 P C 289; A I R 1931 Bom 81 and A I R 1933 Sind 75, Disting.* [P 26 C 1, 2]

(b) Arbitration Act (1899), S. 9 — Appointment of arbitrator before expiry of seven days from notice.

The appointment of an arbitrator within seven days from the service of notice on the other party is illegal and the mere embodying of the appointment in a reference on a later date does not affect the invalidity of the appointment. [P 27 C 1]

Kodumal Lekhraj —
for Respondent 1.

Srikishindas H. Lulla —
for Respondents 2.

Order. — These are objections to an award under the Arbitration Act which arise in the following circumstances: Respondents 1 and 2 are both merchants doing business in Amritsar. Respondent 1 entered into a contract for sale to respondents 2 of ten bales of piecegoods, July and August 1937 delivery. The contract between the parties is Ex. 6. Disputes arose between the parties relating to both shipments and by their letter (Ex. 7) dated 5th November 1937 respondent 1 appointed Mr. R. H. Martin of Messrs Forbes Forbes Campbell & Co. as their arbitrator and called upon respondents 2 to nominate their arbitrator within seven days. Respondents 2 replied on 11th November 1937 by Ex. 8 asking for a copy of the contract between Messrs Ralli Bros. Ltd., the importing firm and respondent 1. On 13th November 1937 respondent 1 in their letter (Ex. 9) referring to Ex. 8, the letter of respondents 2, said that it was "sheer nonsense". They then appointed Mr. Martin of Messrs Forbes Forbes Campbell & Co. as their arbitrator in respect of both shipments of July and August and again called upon respondents 2

to nominate their arbitrator within seven days. The words that follow are important: "If you fail to nominate your arbitrator we shall instruct our arbitrator to proceed ex parte." On 11th December 1937, respondent 1 by their letter (Ex. 10) appointed Mr. Godbert of Messrs Fleming Shaw & Co. on behalf of respondents 2, taking a position inconsistent with that which they had adopted in their letter (Ex. 9). It appears that Mr. Martin, the arbitrator appointed by respondent 1, left for Europe and on 23rd December 1937 respondent 1 wrote to respondents 2 a letter (Ex. 11) in which they state :

With reference to our previous correspondence, we beg to notify that as Mr. R. H. Martin of Messrs Forbes Forbes Campbell & Co. is leaving for England and is unable to proceed with the arbitration, so we hereby nominate Mr. J. W. Anderson of Messrs Grahams Trading Co. (India) Ltd., Karachi, to act on our behalf. We again call upon you to nominate within three days after receipt hereof your arbitrator, failing which Mr. Godbert of Messrs Fleming Shaw & Co., Karachi, will act on your behalf as we have already advised you.

No further correspondence of any importance ensued and Messrs Anderson and Godbert proceeded on a reference made to them and signed by respondent 1 alone. Respondents 2 did not appear before the arbitrators. They sent to them a document which is Ex. 12 dated 21st January 1938 wherein they disputed the jurisdiction of the arbitrators and under protest set out their case. The arbitrators made their award on 27th January 1938 and filed it in Court on 15th February 1938. On being served with notice, respondents 2 have filed objections to the award and pray that the award be removed from the file. Several objections have been filed on behalf of respondents 2 but the learned advocate who appears for them has stated that so far as these proceedings are concerned he presses only two of the objections which he formulates thus :

(1) The reference to two arbitrators by respondent 1 was illegal as it was not in accordance with the submission clause contained in the contract between the parties (Ex. 6). The arbitrators therefore acted without jurisdiction.

(2) That in any event respondent 1 having appointed an arbitrator on behalf of respondents 2 after notice of three days the nomination of an arbitrator by respondent 1 on behalf of respondents 2 offended against the provisions of Sec. 9, Arbitration Act, and was accordingly illegal. The arbitrators therefore proceeded without jurisdiction.

After carefully considering the matter and after hearing the learned advocates appearing for respondents 1 and 2, I am of opinion that these objections must prevail. Ex. 6 is the contract between the parties containing an arbitration clause which reads thus :

Further all disputes of whatsoever nature unless amicably settled shall be referred to the arbitration of two European merchants of Karachi, one to be nominated by each under the provisions of the Arbitration Act 9 of 1899.

It is contended by the learned advocate for respondents 2 that here there is a complete and self-contained submission clause. Respondents 2 having failed according to the contentions of respondent 1 to appoint an arbitrator, the provisions of S. 9, Arbitration Act, immediately came into operation. Clause (b) of Section 9, Arbitration Act, provides :

If on such reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party having appointed his arbitrator, has served the party making default with a written notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent.

The learned advocate for respondents 2 points out that in these circumstances and in view of the terms of the submission clause contained in Ex. 6 the appointment of a second arbitrator by respondent 1 on behalf of respondents 2 was illegal, and the arbitrators who have made the award have acted without jurisdiction. The answer of the learned advocate for respondent 1 to this position taken up by the learned advocate for respondents 2 is this: Respondent 1 had purchased the goods in question from Messrs. Ralli Bros. Ltd. who were the importing office. The contract between respondent 1 and Messrs. Ralli Bros. Ltd. is Ex. 13. The contract (Ex. 6) between the parties provides :

We the undersigned have contracted to purchase from Messrs. Kishan Chand Sant Ram Amritsar this day through. . . .(broker) the following goods 'Karachi Godown Delivery' on the terms and conditions of the importing office of these goods.

Thus, argues the learned advocate for respondent 1, the terms and conditions of Ex. 13 must be deemed to be imported into the contract (Ex. 6) including the submission clause which is cl. 21 in Ex. 13. Put in a nut-shell, the argument of the learned advocate for respondent 1 on this point comes to this : There is a submission clause in the contract between the parties. To appreciate what are the terms of that submission clause reference must first be made

to Ex. 6. But the submission clause in Ex. 6 is not exhaustive for, it makes reference to the provisions of the Arbitration Act. When the Arbitration Act is referred to all the provisions of Cls. (a) and (b) of Sec. 9 thereof are excluded by the words "unless a different intention is expressed therein," occurring in the first part of S. 9. The different intention is to be found in Ex. 13 and in the submission cl. 21 contained therein. Thus argues the learned advocate. Ex. 6 contemplates the appointment of two European merchants of Karachi one to be nominated by each party. Respondents 2 having failed to nominate an arbitrator under Ex. 6 reference must be made to the Arbitration Act. But the provisions of Cls. (a) and (b) of S. 9 of that Act are excluded because in this case the terms and conditions of Ralli Bros. contract (Ex. 13) are embodied in the contract between the parties and cl. 21 of Ex. 13 provides that if one of the parties fails to nominate an arbitrator the other party shall nominate one on his behalf. This is an argument with which I am not prepared to agree.

The first objection to it is to be found in the very wording of Ex. 6. The word 'further' appearing in Ex. 6 is most significant. Ex. 6 says that the contract is on the terms and conditions of the importing office of these goods. Then follow the words "Further all disputes of whatever nature, &c." It seems to me obvious from the wording of Ex. 6 that whatever terms and conditions of the importing office were to be deemed as incorporated in Ex. 6 the arbitration clause was certainly not to be deemed to be embodied because a separate and independent arbitration clause is embodied in Ex. 6 itself. The next objection to which the argument of the learned advocate is open is that there is no legal authority in support of the general proposition that in a contract between *A* and *B* an arbitration clause contained in a contrct between *B* and *C* can be incorporated by implication. In support of this, reference may be made to the case in 47 Cal 799.[1] In that case *B* entered into a contract with *C* for sale of 30 bales of dhoties with a condition stating :

> We sold the goods as were bought by us of L. J. batta, chafage, all other terms according to Bakar (importing) firms.

The contract between *B* and *LJ* had a clause for arbitration embodied in it. Held in a suit filed by *B* in respect of some of the bales that S. 9, Arbitration Act, had no application because the arbitration clause between *B* and *LJ* was not incorporated into the contract between *B* and *C*. The judgment of the High Court in this case is based very largely on the judgment of the House of Lords in (1912) A C 1[2] in which the decision of the Court of Appeal in (1889) 5 T L R 677[3] was approved. The learned advocate for respondent 1 has drawn my attention to several decisions which according to him establish the proposition that an arbitration clause in a contract between two parties can by implication be embodied in a contract between one of those parties and a third party. The learned advocate relied upon the decision of their Lordships of the Privy Council in A I R 1931 P C 289.[4] That case however has no application for, there the two contracts were between the same parties. There was one principal contract between the parties and four subsidiary contracts between them in which a reference was made to the main contract. The learned advocate draws my attention to the case in 32 Bom L R 1451,[5] a single Judge decision of the Bombay High Court. The facts of that case are entirely different. Two parties entered into an agreement to abide by the bye-laws of the East India Cotton Association in respect of contracts made between them. The bye-laws make a reference to arbitration compulsory in case of disputes as regards transactions in cotton. In these circumstances, it was held that there was a submission clause in the contract between the parties. The learned advocate has again relied on the case in 27 S L R 169,[6] a judgment of a single Judge of this Court. The decision in this case does not assist respondent 1. In that case a submission clause between two parties to a contract was held to bind the assignee of one of the parties.

1. Chatturbhuj Chandanmull v. Basdeodas Daga, (1921) 8 A I R Cal 767 = 60 I C 909=47 Cal 799=33 C L J 145.

2. T. W. Thomas & Co. Ltd. v. Portsea Steamship Co. Ltd., (1912) A C 1.

3. Hamilton & Co. Ltd. v. Mackie & Sons, (1889) 5 T L R 677.

4. Louis Dreyfus & Co. v. B. A. Arunachala Ayyar, (1931) 18 A I R P C 289=134 I C 1080 =55 Mad 93=58 I A 381 (P C).

5. Rambaksh Lachmandas v. Bombay Cotton Co., (1931) 18 A I R Bom 81=128 I C 881= 32 Bom L R 1451.

6. McKenzies Ltd. v. Sulleman & Co., (1933) 20 A I R Sind 75=140 I C 626=27 S L R 169.

I therefore hold that the first objection raised by the learned advocate for respondents 2 must prevail and that the appointment of an arbitrator by respondent 1 on behalf of respondents 2 was illegal and that the arbitrators acted without jurisdiction. But respondents 2 are entitled in my opinion to succeed even on the second objection. There can be no doubt that though correspondence passed between the parties relating to arbitration prior to Ex. 11 dated 23rd December 1937 the whole matter of reference of disputes to arbitration was reopened and restated by respondent 1 in their letter Ex. 11. In this letter respondent 1 gave respondents 2 three days to appoint an arbitrator and stated as follows:

Failing which Mr. Godbert of Messrs Fleming Shaw & Co., Karachi, will act on your behalf as we have already advised you.

Now S. 9, Arbitration Act, provides a statutory period of seven days time for the appointment of an arbitrator and respondents 2 had the statutory right of appointing an arbitrator within seven days after having been served with a notice to do so. Respondent 1 clearly appointed Mr. Godbert as arbitrator on behalf of respondents 2 before the expiry of seven days and the appointment was accordingly illegal and the arbitrators who acted upon the reference acted without jurisdiction. It is argued by the learned advocate for respondent 1 that as a matter of fact the reference to arbitration was made on 5th January 1938, much later than seven days after the notice, Ex. 11. This makes no difference, for Ex. 11 distinctly states that on failure to nominate within three days, "Mr. Godbert of Messrs Fleming Shaw & Co., Karachi, will act as your arbitrator." The mere embodying of the appointment in a reference on a later date does not affect the invalidity of the appointment made in contravention of the provisions of S. 9, Arbitration Act. Respondents 2 are entitled to succeed therefore even upon the second objection. I accordingly allow the objections raised on behalf of respondents 2 and order the award to be removed from the file. Respondents 2 are entitled to costs of these proceedings.

N.S./R.K. *Objections allowed.*

A. I. R. 1939 Sind 27

DAVIS J. C.

Dorabji F. Minwala, partner of Messrs. Yusifali Muhammadali M. Lookmanji & Co., Karachi—Complainant — Applicant.

v.

Sobhraj Chellaram — Accused — Opponent.

Criminal Revn. Appln. No. 1 of 1938, Decided on 25th July 1938, from order of City Magistrate, Karachi, D/- 3rd December 1937.

Penal Code (1860), S. 405 — Trust receipt defined — Buyer obtaining from seller documents of title of goods on certain terms and conditions — If buyer deals dishonestly with goods in violation of conditions with guilty intent, he comes under S. 405 — Term in trust receipt that buyer should pay interest on purchase price—Buyer committing default — Trust receipt held not valid declaration of trust — Question between parties being one of civil nature case held did not fall under S. 405.

Trust receipts can be looked at in two ways: Either they are documents containing a declaration of trust, whereby the buyer constitutes himself trustee for the seller when the property must have passed, for a person cannot constitute himself trustee of goods unless he is the legal owner, or they are documents evidencing a previous pledge when they are merely evidence of the terms and conditions on which the seller permits the buyer to deal with the goods on his behalf. If a buyer or an importer who obtains from a seller or a bank documents of title which enable him to deal with the goods covered by the documents of title on certain terms and conditions, deals dishonestly with those goods in violation of those terms and conditions, it may be said that the buyer or importer is entrusted with dominion over the documents of title and of the goods within the meaning of Sec. 405, and the plea that the documents are only pledged will not avail him, for though as a pledger he may be the legal owner, the pledgee has clearly a beneficial interest. It is true when a buyer or importer under such circumstances obtains possession of the documents, he obtains merely the custody; the juridical possession remains with the pledgee but so much the more is he entrusted with dominion over them within the meaning of S. 405, Penal Code, and there is no reason why a buyer or importer cannot under such circumstances be guilty of criminal breach of trust provided he has the necessary guilty intent and violates the terms and conditions of his contract: *(1937) 4 All E R 651 and (1938) 2 All E R 63, Expl.; Case law referred.* [P 28 C 1; P 29 C 2; P 30 C 1; P 31 C 2; P 32 C 1]

One of the terms of a trust receipt was that the buyer should pay interest on the purchase price of the goods until payment was made and the buyer committed a default:

Held that the trust receipt could not be deemed a valid declaration of trust because in spite of the use of the word 'trustee' the term in the trust receipt was inconsistent with the position of a seller's agent or the existence of a trust agency or

the creation of a trust and that the case was only of a Civil dispute and not a criminal offence.

[P 28 C 1; P 29 C 2; P 32 C 2]

Revachand V. Thadhani — *for Applicant.*

Suganlal Hassanand — *for Opponent.*

Parsram Tolaram — *for the Crown.*

Order. — This is an application in revision against an order of the City Magistrate dismissing the applicant's complaint of an offence under S. 406, Penal Code, on the ground that the complaint and the preliminary enquiry showed merely a civil dispute and no criminal offence. The case is one arising out of a trust receipt now on the record, and the City Magistrate came to the conclusion that on the terms of that trust receipt, particularly the term that the accused, the buyer, should pay interest on the price of the goods until payment was made, showed that the complainant did not and did not intend to retain the ownership in the property, and that the question between them was merely one of enforcing payment of goods sold by the complainant to the accused.

These trust receipts, I think, can be looked at in two ways. Either they are documents containing a declaration of trust, whereby the buyer constitutes himself trustee for the seller when the property must have passed, for a person cannot constitute himself trustee of goods unless he is the legal owner, or they are documents evidencing a previous pledge when they are merely evidence of the terms and conditions on which the seller permits the buyer to deal with the goods on his behalf, and as it happens, both these classes of cases are dealt with in two recent English rulings reported in (1937) 4 All E R 651[1] and (1938) 2 All E R 63.[2] So far as the first class of cases is concerned, the case where the owner constitutes himself the trustee of the goods by a proper declaration of trust, it is dealt with by Porter J. in two cases arising out of the affairs of Messrs. Strauss & Co. Ltd., and the relevant provisions of the Trusts Act are considered by Porter J. in relation to goods stored in Karachi. Porter J. says :

The point is a short one, and depends upon the true interpretation and application of the Indian Trusts Act, 1882. It was at one time contended by Mr. Willink for the defendant bank that the Act had not been shown to extend to Karachi, where some of the produce claimed was stored, but I think that there is no doubt that it does so extend: *see* Note 3 to S. 1 of the Act. In any case, it admittedly applies in the case of some of the godowns where the produce was stored. A trust is defined by S. 3 of the Act. One dispute between the parties was as to whether or not the documents under discussion created a trust within the meaning of the Act. I return to this question later. Sec. 5 enacts : 'No trust in relation to immovable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee. No trust in relation to moveable property is valid unless declared as aforesaid, or unless the ownership of the property is transferred to the trustee'.

In construing this Section, the defendant bank argued that in the case of a trust in relation to immovable property, the trust must be both declared and registered, but that in the case of a trust in relation to moveable property, it need be declared only, and not registered. This would make para. 1 read as follows : 'No trust, etc. is valid unless (i) declared, (ii) registered.' I do not think that this is right. The trust is not registered: the instrument is. I think the true meaning is : 'No trust, etc. is valid unless declared by an instrument in writing, which instrument is signed, etc. and registered;' in my view, the trust is not duly declared unless that declaration is contained in a written registered instrument. 'Declared as aforesaid' in para. 2 therefore means declared by a written registered instrument, and an unregistered declaration in writing is not enough. This is the view put forward by the plaintiffs, and supported by Messrs Strauss & Co., and is, I think right. S. 6 sets out how and when a trust is created. The main argument on behalf of the defendant bank was that these documents did not create a trust, or, at any rate, not a trust within the meaning of the Trusts Act. The plaintiffs and Messrs Strauss Co. based an argument on the allegation that it was difficult, if not impossible, to tell when the trust, as they maintained it was, came into force, since its existence depended upon the acquisition by Strauss & Co., of property subject to the trust, and the borrowing of money to purchase that property. Any such difficulty appears to me to be one of fact, and not of law, and to be immaterial to the point I have now to decide. They also contended however that the documents constituted trusts of moveable property, and that to be valid, they must be registered. In support of this view, they pointed out that the documents were headed "Trust receipts" and provided for the holding of the goods by Strauss & Co. in trust for the defendant bank.

The defendant bank contended that the provisions of the Trusts Act were confined to express trusts and that the documents did not declare express trusts. Moreover, they maintained that, if the Act were considered as a whole many of its provisions were inapplicable to the kind of right the bank obtained under the terms of these documents. The documents, they said, must be looked at as a whole. So considered, they were business documents, charging property as and when it came into the hands of Strauss & Co. and creating an equitable or floating charge on goods of which Strauss & Co. were, or should become owners, and

1. Mercantile Bank of India Ltd. v. Chartered Bank of India, Australia and China, etc., (1937) 4 All E R 651.
2. Loyds Bank Ltd. v. Bank of America National Trust and Savings Association, (1938) 2 All E R 63.

the defendant bank pledgees. In their contention, Strauss & Co. were at most agents, and not trustees. Had the property been physically transferred to the defendant bank, either by storage in their godowns, or by storage in a portion of Messrs Strauss's godowns, and the key handed over, there would, in my view, have been created a legal charge which would have remained none the less legal though the property had later been re-transferred to Messrs Strauss for realization on the defendant bank's behalf : In (1922) 2 Ch 211,[3] (1921) 2 K B 807[4] and (1892) 2 Ch 352,[5] where it is said by Stirling J. at p. 360 : 'If possession is actually taken of the property when it comes into existence then a legal interest is acquired'.

But where, as here, the property never was physically transferred, either actually or symbolically, I think the better view is that there is either a trust or an equitable charge, and not a legal charge: (1914) A C 823,[6] (1924) 1 K B 431[7] and (1935) A C 53.[8] Holding this view as I do, it has yet to be determined whether the several documents create a trust or an equitable charge, and, if the latter, whether the existence of an equitable charge makes the giver of it a trustee and the giving the creation of a trust. These questions, as I think, must be answered on a broad construction of the documents and their legal effect. That an equitable charge is not necessarily a declaration of trust seems to have been conceded in argument in (1872) 15 Eq 69,[9] and to be implicit in the judgment. It is true that that case like all the cases I have cited turned upon the provisions of the Bills of Sale Act then in force, and one ground for the decision was that the document then under discussion was a business document; but Sir James Bacon C. J. put his decision on a wider basis, namely that the class of document with which he was dealing was not the class of document intended to be dealt with by those Acts, i. e. was not (amongst other things) a declaration of trust. In this view, it does not matter that equitable charges are now included in the definition of bills of sale, or that in (1873) 16 Eq 414[10] the document there under discussion, being an equitable assignment was held to be within the wording of the Bills of Sale Act, 1854, that wording being "other assurances of personal chattels," and therefore registrable as a bill of sale. Indeed, in (1873) 8 Ch 643[11] at p. 649, Mellish L. J. states that the document there in question, although an equitable assignment, was not 'a declaration of trust without transfer'.

In these circumstances, I think that I have to determine broadly whether the documents are declarations of trust or equitable charges. The question is not free from doubt, since the expressions 'as agent for you' and 'under lien to you' are to be found contrasted with the words 'in trust for you.' Despite the use of the word 'trust', I hold that the general effect of the documents is to give to the bank an equitable charge, and not to create a trust, and therefore they are not void for want of registration under the Indian Trusts Act. I think it is plain however from what I have said, that in this case the security is given by the documents, and not by some extraneous act outside the documents. So that the defendant bank's rights depended upon the documents, and therefore, if in my view the documents had created a trust, they must be registered : (1921) 2 K B 807[4] at page 814.

It is to be noted that Porter J. distinguishes between a case such as this, where the security is given only by documents, and a case where security is given by means of some previous extraneous act, for instance, the pledging of the shipping documents, class of case discussed in the judgment of this Court in Cr. Rev. Appln. No. 3 of 1938,[12] and referred to in the English case in (1922) 2 Ch 211,[3] and in the latest case of the English Court of Appeal on this point with which I shall presently deal. It seems to me clear then that the trust receipt in this case cannot be deemed a valid declaration of trust, so that the accused in this case cannot be deemed a defaulting trustee and liable under S. 406, I. P. C., and I agree with the learned advocate that cases on facts similar to the case in A I R 1938 Sind 73[13] will require re-consideration in view of the judgment of Porter J. and that certain statements in that judgment may require modification. In any case, that judgment does not bind this Court or Courts subordinate. The second class of cases, the case where the trust receipt evidences a previous transaction such as a pledge, and where the buyer or importer obtains from the seller or the

3. In re David Allester, Ltd., (1922) 2 Ch 211=91 L J Ch 797=127 L T 434=66 S J 486=38 T L R 611.
4. Wrightson v. McArthur & Hutchinsons, (1921) 2 K B 807=90 L J K B 842=(1921) B & C R 136=125 L T 383=65 S J 553=37 T L R 575.
5. Morris v. Delobbel-Flipo, (1892) 2 Ch 352=61 L J Ch 518=66 L T 320=40 W R 492.
6. Dublin City Distillery, Ltd.v. Doherty, (1914) A C 823=83 L J P C 265=111 L T 81=58 S J 413.
7. National Provincial & Union Bank of England v. Charnley, (1924) 1 K B 431=93 L J K B 241=(1924) B & C R 37=130 L T 465=68 S J 480.
8. Madras Official Assignee v. Mercantile Bank of India, Ltd., (1934) 21 A I R P C 246=152 I C 730=61 I A 416=58 Mad 181=(1935) A C 53=104 L J P C 1=152 L T 170=40 Com Cas 143.
9. Re Slee; Ex parte North Western Bank, (1872) 15 Eq 69 = 42 L J Bk 6=27 L T 461=21 W R 69.
10. In re Steele; Ex parte Conning, (1873) 16 Eq 414=42 L J Bk 74=21 W R 784.
11. In re Jeavons; Ex parte Mackay, (1873) 8 Ch 643=42 L J Bk 68=28 L T 828=21 W R 664.
12. Muhammad Ashfaq Imam Illahi v. Motiram Manghanmal Advani, *Reported in* (1939) 26 A I R Sind 1.
13. Gobindram C. Motwani v. Emperor, (1938) 25 A I R Sind 73=174 I C 560=39 Cr L J 509.

bank documents of title enabling him to deal with the goods and where the buyer or importer acts as the seller's or bank's agent, has been dealt with by the English Court of Appeal in (1938) 2 All E R 63,[2] also a case arising out of the affairs of Messrs. Strauss & Co. It is true that in that case the learned Judges were considering the trust receipts in relation to the Factors Act, but much of what they said applies generally to this question of trust receipts. Sir Wilfrid Greene M. R. said :

There is another form before us which is exactly the same as the one which I have read, but it has a particular reference to trust receipts in these terms : 'If required we will sign a trust receipt when any documents are released to us.' That was contemplating the procedure which I have already described, under which, when the accommodation granted exceeded £50,000, shipping documents would be released against trust receipts. It was the practice to release those documents, and it is important to notice the purpose for which they were released. The transaction is one so familiar, and has been referred to in so many cases, and its objects are so notorious, that it is almost with apology that I refer to any allegations or evidence on the matter, but the plaintiffs, in their statement of claim, say this :

The bills of lading, invoices and relative merchandise referred to in para. 10 hereof were handed by the plaintiffs (Lloyds Bank) to the company (Strauss & Co. Ltd.) in order to enable the company to sell the merchandise as trustees for the plaintiffs in pursuance of the terms of the letters of 2nd January and 14th January 1935.

Those are the trust receipts. A passage in the evidence which also deals with that matter was referred to Mr. William Hedley Robinson, an accountant in the Eastern Department of Lloyds Bank, and concerned with the carrying on of this particular business, was asked :

'You had from time to time released to them the documents as against each trust receipts for the purpose of their selling the goods ?—Quite so.

The object of their selling the goods was to realize moneys to pay to your bank, in order to meet the bills ?—That is so.'

Then later he was asked :

'So far as the release of the bills of lading was concerned in these particular cases, was it your intention that Strauss & Co. should be able to give a good title to the purchasers of the goods ? — Yes.'

The goods therefore were released, and, when they were released, Lloyds Bank took from Strauss & Co. Ltd. the trust receipt. The trust receipt schedules a large number of bills of lading relating to a quantity of goods and also relating to bills which had been drawn under this procedure. The document is dated 2nd January 1935, and is the only one to which I will refer. It is in this form :

'We hereby acknowledge the receipt of the undermentioned documents under lien to you and undertake to and declare that we act as your trustees for the lading, storage and sale of the relative merchandise. We also undertake that the said merchandise will be stored in approved warehouses separate from any other goods whether belonging to ourselves or other persons. We also undertake that the proceeds of the sale of the said merchandise or any portion thereof will be received by us as your trustees and kept separate from other moneys, and will be remitted to you as and when received by us. We also undertake to keep the said merchandise fully insured, the relative policy or policies of insurance being held and the proceeds thereof or of any other insurance of the said merchandise being received by us as your trustees and remitted to you as and when received. We further undertake to return to you on demand the balance of the said merchandise in respect of which you may not have received proceeds.'

Upon the terms of that document, the bills of lading and the invoices with which we are concerned in this case were handed to Strauss & Co. Ltd. and they had no right to deal with the documents in any way inconsistent with the terms of that receipt. About that there can be no possible doubt. It is to be observed that, at the date when this document was given and the shipping documents released, the particular bills to which those documents were related had not yet matured for payment. The bills in question, which are referred to in the schedule to this trust receipt, were three months' bill accepted on 31st December 1934, which made the due date, allowing for the days of grace, 3rd April 1935. On behalf of the appellants, a strong point was made of the circumstance that, at the date when the trust receipt was signed and handed over, and the shipping documents handed over, and at the date when Strauss & Co. Ltd. deposited the shipping documents with the defendants, the bills had not yet become due for payment. It was said that, on the footing of that fact the dispositions made by Strauss & Co. Ltd. of the shipping documents must be regarded as having been made by them in their capacity as having the general ownership of the goods. There is no necessity to refer to the details with regard to what Strauss & Co. Ltd. did towards the defendant bank. They deposited these documents very shortly after they had got them.

On that state of facts, the first question which arises is quite shortly this. Were Strauss & Co. Ltd. mercantile agents in possession of those shipping documents with the consent of the owner ? I will put on one side for the moment the question as to whether they were mercantile agents, because that is a question on which we have not heard a very great deal of argument. I will proceed at once to the question upon which the greater part of the argument has turned. It is said: When one looks at the relevant date, which is the date when Strauss & Co. Ltd. came into possession of those documents, is it true to say that they were in possession of these documents with the consent of the owner ? The argument, if I understood it correctly, was of this nature, that, where goods have been pledged, the only person whom one can with correct use of language describe as the owner is the pledgor. As justification for that, it is said that the pledgor is the person who has the general property in the goods, and that the interest of the pledgee is merely a limited and particular interest. As an abstract proposition, that, no doubt, is one which is, in substance, correct. The question in this case however is : Who is the owner for the purpose of this Section ? I myself find it only confusing to go

into abstract questions of what the word "owner" may mean in other contexts and for other purposes.

After considering the meaning of the term "owner" in S. 2 (1), Factors Act, with which we are not now concerned, the learned Master of the Rolls goes on to say:

I have dealt so far with the question of whether or not the documents of title came into the hands of Strauss & Co. Ltd. with the consent of the owner. In my opinion, they were in the possession of Strauss & Co. Ltd. by the consent of Lloyds Bank, together with Strauss & Co. Ltd. themselves, in so far as any consent by them was necessary. It is said—and said, I think, with great force—by Sir Stafford Cripps that, quite apart from the general proposition which I have been endeavouring to state (which applies, if it be correct, generally to all cases where the incidents of ownership have come into more than one hand), upon the particular documents of this case, the bank, and the bank alone, was the owner for the purposes of the Section. He refers to the provisions of the covering letter of hypothecation, which I have read, which empowers the Bank to sell as though they were the absolute owners. It seems to me that, by virtue of that contract, the relationship of the bank to these particular goods and the documents of title representing them was the relationship of owner, in that they were given power by that document to exercise all the rights of ownership over the goods. On that rather narrower ground, quite apart from the ground which I stated earlier, it seems to me that Strauss & Co. Ltd. were in possession of the goods with the consent of the owner, who, on that hypothesis, would be the bank.

It is said that the trust receipt is not a document under which Strauss & Co., Ltd. were constituted mercantile agents. It is said that it is not an agency document at all, but merely a permission by the pledgees to the pledgors to exercise their own power of disposition. I have had some little difficulty in following that argument, but doing it the best justice that I can, it appears to be to this effect. Strauss & Co., Ltd. had the general property in the goods. Upon the power of disposition which that general property would generally carry there was a clog, namely the right of the bank as pledgee, and by virtue of the transaction when the shipping documents were released and the trust receipt taken, the bank removed that clog, leaving the general property of Strauss & Co., Ltd. free from the clog. The position then was that Strauss & Co., Ltd. were in possession of the shipping documents as owners, without any right at all in the bank, and it was as owners that they dealt with the shipping documents. With all respect to that argument, it appears to me to be completely misconceived. It fails to recognize the true relationship of Strauss & Co., Ltd. to the documents which they received. It was by virtue of the trust receipt, and by the virtue of the trust receipt only, that Strauss & Co., Ltd. obtained what they never could have obtained otherwise as against the bank, namely possession of those documents, and the terms laid down in the trust receipt on which they obtained possession constitute them trustees for the lading, storage and sale of the relative merchandise. It contains an undertaking that the proceeds of sale will be received as trustees for the bank, and it provides that any unsold balance of the merchandise will be returned to the bank. It appears to me, as the result of that document, which alone embodies the terms upon which they obtained back the shipping documents to follow that by virtue of the authority from the bank to Strauss & Co., Ltd. they were entitled to sell the goods comprised in the shipping documents and to sell them (to use the words of Astbury J. in dealing with a document of this character) as trust agents for the bank. Except in that capacity and by virtue of this document, they would have had no title whatsoever to do the things which this document contemplates that they shall do, without obtaining the documents from the bank (and they only obtained them by signing this document), they never could have made an effective sale of the merchandise, delivery of the merchandise to a purchaser and receipt of the purchase money from a purchaser, because the right of the bank under its pledge would have stood in the way. It is therefore only by virtue of this authority that they become empowered to sell the goods.

And MacKinnon L. J. said :

I do not know when, as a matter of history, this practice of bank releasing documents under a trust receipt began, but 16 years ago, in a case before Astbury J. I observe that it was described as a well-established mercantile practice in these transactions, and I have an idea that it is of very long standing. There was some suggestion that if the decision in this case was to the effect that a person who was in possession of documents released to him pursuant to such a trust receipt would be in the position of a mercantile agent under the Factors Act, it might have a serious effect upon the continued use of that practice in the future. I do not apprehend any such danger or difficulty. The truth is that almost every aspect of commercial dealing is not proof against the possible result of very rare frauds that a lawyer, thinking of the possibilities of such things, might suppose to be so easy. In this case Strauss & Co., Ltd. in breach of good faith and in breach of their contract pledged these goods, and thereby improperly obtained money upon the value of them; but if they had sold the goods and misappropriated the purchase price, they would only have been acting in a rather different way in breach of their duty and in breach of their contract, and in that case the plaintiffs would have had no shadow of a claim against anybody except Strauss & Co., Ltd. I have no doubt that this very convenient practice will be able to continue and that it will be able to continue because the whole basis of business rests upon honesty and good faith, and it is very rarely that such an exception is defeated.

It appears to me then that if a buyer or an importer who obtains from a seller or a bank documents of title which enable him to deal with the goods covered by the documents of title on certain terms and conditions, deals dishonestly with those goods in violation of those terms and conditions, it may be said that the buyer or importer is entrusted with dominion over the documents of title and of the goods within the meaning of S. 405, I. P. C. : *see* A I R 1934 P C 246.[8] It is of course true that no

question of criminal liability arose in either of the English cases to which I have referred or indeed in the Madras case, A I R 1934 P C 246,[8] but once the relationship of a trust agency between seller and buyer or importer and Bank is established, it appears to me that there is established between them such a relationship that any dishonest dealing on the part of the buyer or importer, the seller or Bank's agent, with the documents or the goods may bring the buyer or importer within the provision of Sec. 405, I. P. C., and the plea that the documents are only pledged will not avail him, for though as a pledgor he may be the legal owner, the pledgee has clearly a beneficial interest. It is true when a buyer or importer under such circumstances obtains possession of the documents, he obtains merely the custody; the juridical possession remains with the pledgee (*see* A I R 1934 P C 246[8]), but so much the more is he entrusted with dominion over them within the meaning of S. 405, I. P. C., and I can see no reason why a buyer or importer cannot under such circumstances be guilty of criminal breach of trust provided he has the necessary guilty intent and violates the terms and conditions of his contract. I can see no reason why a person cannot under certain circumstances be guilty of criminal breach of trust of his own property when he has pledged that property and gets it back from his pledgee under certain terms and conditions which he violates, as he may under certain circumstances be guilty of theft of his own property : 22 Mad 151[15] and A I R 1923 Mad 597.[16]

I do not think therefore that the decision of this case rests, as the learned advocate for the opponent has so very ably argued, on the narrow ground that a charge or lien transfers no estate legal or equitable in property. He has argued on the authority in A I R 1934 P C 246,[8] that the pledge of railway receipts which are documents of title gives only an equitable charge or lien; it does not convey any legal estate or even any equitable estate; it gives the pledgee the right only to sell the goods, a right not in the goods but against the goods. But nevertheless, it gives him a clear beneficial interest; and the Privy Council was not considering a case under S. 405, I. P. C.; they were not considering the meaning of the words :

> Whoever being in any manner entrusted with any dominion over property dishonestly misappropriates or converts to his own use that property or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged or any legal contract, etc.

Even were the bills of lading merely pledged, it appears to me that the buyer or importer may be interested by the seller or the bank with dominion over property within the meaning of Sec. 405, I. P. C., when the bills of lading were returned to him upon conditions, and a buyer or importer might be guilty of criminal breach of trust in respect of documents or goods covered by those documents even if he were the legal owner, for the pledgee would be the beneficial owner : *see also* (1884) 15 Cox C C 466.[17] But each case must be looked at upon its own facts, and in this case, it appears to me clear that there are terms in this trust receipt which are inconsistent with the position of a seller's agent or the existence of a trust agency or the creation of a trust, for despite the use of the word "trustee", I think the Magistrate is right when he says that the provision in the trust receipt itself that interest shall be paid upon the price of the goods shows that it was intended that all the property in the goods should pass to the buyer, for the payment of interest upon the purchase price was the equivalent for the time being of the payment of the purchase price, subject only to a charge or lien on the goods as in the case in (1937) 4 All E R 651.[1] It must be remembered a man cannot have a lien upon his own property : *see* (1938) 2 All E R 285.[18] This is not here then a case of a trust agency or a valid trust created by the trust receipt. In any case the doubt which must attend the liabilities created by this document makes it clear that no criminal intent can be proved. I can see therefore no useful purpose in sending the case back for further enquiry, and I dismiss this revision application accordingly.

N.S./R.K. *Application dismissed.*

15. Queen-Empress v. Abayya, (1899) 22 Mad 151 =8 M L J 259=1 Weir 424.
16. In re Venkatagurunatha Sastri, (1923) 10 AIR Mad 597=72 I C 612=24 Cr L J 452=45 M L J 133.
17. Reg v. Townshend, (1884) 15 Cox C C 466.
18. Nippon Yusen Kaisha v. Ramjiban Serowgee, (1938) 25 A I R P C 152=174 I C 564=65 I A 263=I L R (1938) 2 Cal 381=32 S L R 502=(1938) 2 All E R 285.

A. I. R. 1939 Sind 33

DAVIS J. C. AND DADIBA C. MEHTA J.

Atumal Ramoomal — Applicant.

v.

Dipchand Kessumal — Opponent.

Civil Revn. Applns. Nos. 45, 46 and 79 of 1935, Decided on 24th May 1938, against Judgment and decree of Judge Small Cause Court, Karachi.

(a) Contract Act (1872), S. 23—Composition between debtor and creditor — Secret agreement to prefer some creditors — Agreement held void—Essence of S. 23 explained.

In cases of a composition, where all creditors have joined in on equal terms and a secret preference is given to certain creditors to induce their agreement to the composition, then the contract whereby such a preference is given is void under Sec. 23 as being a contract based on fraud. The essence of the offence against S. 23 is that there is a secret agreement by some creditors that they are to be preferred, so that there is a fraud upon the other creditors, who, ignorant of this secret agreement, have signed the deed of composition in the belief that all are to lose equally and none is to be preferred : *20 Mad 84 and 16 M L J 418, Ref.; (1851) 16 Q B D 689, Rel. on.* [P 33 C 2 ; P 34 C 1, 2]

(b) Contract Act (1872), S. 23 — Contract challenged on ground of public policy in trial Court—On same facts held it could be attacked as fraudulent in revision.

Where a case put forward in the trial Court was that the agreement in question was void as being opposed to public policy on the fact stated:

Held that in revision the contention that the agreement was void as being fraudulent on the same facts could be raised as the other party was not misled. The facts were the same though the names by which they were described may be different. [P 34 C 2]

Santdas Idanmal — *for Applicants.*

W. B. L. Vellani — *for Opponents.*

Davis J. C.—This is an application in revision against the order of the Judge, Karachi Small Cause Court, in which he decreed the plaintiffs' suit purporting to be based upon a receipt in their favour passed by the applicant, holding that he could not accept the defence that this receipt really represented a transaction that was against public policy, in that in reality it merely evidenced an arrangement whereby in a composition by the applicant with his creditors this plaintiff was to be preferred and the learned Judge remarked that in this suit he came to a different conclusion from his conclusion in another suit where he had held that such a transaction was against public policy.

Now, as the learned Judge says, the facts in this case are admitted or proved and the plaintiffs did not go into the witness-box to meet the contention of the defendants that the contract upon which the suit is based was against public policy. It appears that the defendants and their father traded in Karachi in the name of defendant 1 until June 1931 when they were in financial difficulties, and having no means to pay their creditors in full they approached them for settlement. The plaintiffs in this case and one Jeramdas Khanchand and one other creditor refused to listen to the applicant's plea for a settlement and while the rest of the creditors agreed to receive six annas in the rupee in full settlement of their claims and the composition deed was drawn up in those terms which the creditors executed, the plaintiffs and these two other creditors did not execute the composition deed with these other creditors until they had secured for themselves a document whereby they were to get ten annas instead of six annas, and only when they got this special document would they sign with the other creditors ; and the receipt for Rs. 450 on which the plaintiffs sued does represent this composition, this composition of ten annas in the rupee.

Now the learned Judge found that on these facts there was no undue influence, nor could he find the contract was void under Section 23, Contract Act, as against public policy ; because he held that in 20 Mad 84[1] there were proceedings in bankruptcy, an insolvent was concerned and there was a fraud upon the Court; and so far as the case in 16 M L J 418[2] is concerned, upon which the applicant's advocate has relied in his arguments before us, the learned Judge remarked that this case proceeded upon the lines of the case reported in 20 Mad 84;[1] the difference between the two cases was not observed and no reasons were given at length. But we do not think it is decisive in cases of this nature whether the fraud was upon the Court in the case of an insolvent or whether the fraud was by one creditor upon others in the case of a private composition, as is the case here ; because we think, that there is authority to show that in cases of a composition where all creditors have joined in on equal terms and a secret preference is given to certain creditors to induce their agreement to the composition,

1. Krishnappa Chetti v. Adimula Mudali, (1897) 20 Mad 84.

2. K. Jamal Mahamad Pulavar v. N. Parameshwara Pattar, (1906) 16 M L J 418.

then the contract whereby such a preference is given is void under S. 23, Contract Act, as being a contract based on fraud. We may refer to the case in (1851) 16 Q B 689[3] wherein Erle and Coleridge, JJ. were of the opinion that when one creditor is secretly preferred to another in an arrangement for composition, then the agreement whereby such preference is made is void. Erle J. said :

The plaintiff, by entering into the composition deed with the other creditors, contracted a duty towards them to release the defendants from his debt. Each creditor consents to lose part of his debt in consideration that the others do the same ; and each creditor may be considered to stipulate with the others for a release from them to the defendants in consideration of the release by him. Where any creditor, in fraud of the agreement to accept the composition, stipulates, for a preference to himself his stipulation is altogether void ; not only can he take no advantage from it, but he is also to lose the benefit of the composition. The requirement of good faith among the creditors, and preventing of gain by agreement for preference, has been uniformly maintained, by a series of cases from (1803) 4 East 372[4] to (1840) 52 R R 579[5] and (1841) 9 M & W 29.[6]

Then the learned Judge went on to refer to a second fraud in the case and it would appear that it was on this question of second fraud that Wightman J. found himself in disagreement with Erle, and Coleridge JJ. In Halsbury's Laws of England, p. 152, Vol. 7, Edn. 2 the following passage occurs :

A contract made with the purpose of committing a fraud on a third person or on the public cannot be enforced. Where a debtor enters into a deed of composition with his creditors, a secret agreement, whether by the debtor or a third person, to give one of the creditors an additional benefit is a fraud upon the other creditors, because each creditor consents to lose part of his debt in consideration of the others doing the same, and equality among the creditors is an implied condition of the arrangement. In such a case not only is the creditor who has entered into the secret agreement with the debtor unable to enforce the stipulation for his benefit, but the deed remains operative against him so that he loses both the right to the composition and his original debt which has been released. It is immaterial that the creditor receiving preferential treatment guarantees payment of a specified composition to the other creditors if they do not consent to the arrangement.

So that, it appears that the essence of the offence against the Section is that there is a secret agreement by some creditors that they are to be preferred, so that there is a fraud upon the other creditors, who ignorant of this secret agreement have signed the deed of composition in the belief that all are to lose equally and none is to be preferred. But, it is argued in this case that the opponents have been misled because the case which has been put against them is a case based upon public policy and that they have not been asked to meet and they have not met, as they would otherwise have met, the case that the contract is void under S. 23 because it is fraudulent ; but the case set out against them is set out on the facts, and we think the fact that it comes more properly under the head of fraud under S. 23, Contract Act, rather than under the head of public policy is immaterial and has in no way misled them. The facts were there for them to meet and they are the same whether it be said that in consequence the agreement is unlawful because it is fraudulent or because it is opposed to public policy. The facts are the same, though the name by which they are described may be different.

We see that in this case the plaintiff was not prepared even to go into the witness-box ; all the facts and evidence on record point irresistibly to the fact that the creditors, save these favoured few, were deceived and there was thus a secret preference which is the essence of the fraud. Indeed, it is clear that the case as put in the plaint is an entirely false case, based upon a receipt acknowledging a cash payment and designed to conceal the true nature of the transaction. We think therefore that this is a case where the revision application must be allowed and that the plaintiff's suit should be dismissed. The decree of the lower Court should be set aside and the suit dismissed. We have two other revision applications No. 46 of 1935 and No. 79 of 1935 in which the facts are similar and the Judge has dealt with them in the one judgment with which we have just dealt. As in that case we had to allow the application and set aside the order of the Judge and dismiss the suit, so in these cases, for like reasons, we must set aside the orders of the Judge and dismiss the suits. There is however so little to choose between the applicants and the respondents that we think there should be no order as to costs.

B.D./R.K. *Petitions allowed.*

3. Mallalieu v. Joseph Hodgson and James Hodgson, (1851) 16 Q B 689=20 L J Q B 339=15 Jur 817=83 R R 679.
4. Leicester v. Rose, (1803) 4 East 372=1 Smith 41=102 E R 874.
5. Howden v. Haigh, (1840) 11 A & E 1033=3 P & D 661=9 L J (N S) Q B 198=52 R R 579.
6. Bradshaw v. Bradshaw, (1841) 9 M & W 29=152 E R 13.

*** A. I. R. 1939 Sind 35**

DAVIS J. C. AND DADIBA C. MEHTA J.

Larkana Municipality — Appellant.

v.

Gokaldas Mewaldas and another — Respondents.

Second Appeal No. 13 of 1935, Decided on 23rd May 1938, against decree of District Judge, Larkana, D/- 22nd December 1934.

(a) Provincial Small Cause Courts Act (1887), Preamble—Difference between old and present Act explained.

While the old Act gave to the Small Cause Court jurisdiction only in certain specified matters, the present Act proceeds upon another basis, excluding from the jurisdiction of the Courts of Small Causes certain matters and leaving to these Courts a residuary jurisdiction. [P 35 C 2]

(b) Civil P. C. (1908), S. 102—Nature of suit determines right of appeal—Suit for recovery of terminal tax on moveable property valued at less than Rs. 500—No second appeal lies.

It is the nature of the suit and not the Court in which it is tried that determines the right of appeal within the provisions of S. 102. Where a suit is for recovery of taxes upon moveable property and the subject-matter of the suit is also less than Rs. 500 no second appeal lies. [P 35 C 2]

*** (c) Provincial Small Cause Courts Act (1887), Sch. 2—Municipalities' right to recover taxes is not excluded.**

There is nothing in Sch. 2 which excludes from the jurisdiction of the Court of Small Causes a suit by the municipality to recover municipal taxes due to them: *9 Mad 110, Ref.* [P 35 C 2]

Jamiatrai Lalchand — *for Appellant.*

Sunderdas Jethanand — *for Respondents.*

Davis J. C.—This case comes before us as a second appeal against the judgment of the District Judge of Larkana who decided that the Larkana Municipality were not entitled to Rs. 85-13-0 being 2 per cent. of the value of the two lorries liable, they said, to pay this sum as terminal tax. The judgment of the District Judge confirmed a judgment of the Subordinate Judge of Larkana, who came to the conclusion that if the Municipality were entitled to levy tax upon these two lorries they were entitled to a tax under quite a different head from that of either octroi or terminal tax.

But, we are not concerned with this aspect of the matter because objection has been taken that under S. 102, Civil P. C., no second appeal will lie because the suit is a suit of a nature cognizable by the Court of Small Causes and the amount or value of the subject-matter does not exceed Rs. 500, and the learned advocate for the appellant admits that unless we are prepared to follow an old ruling of 1885 in 9 Mad 110[1] he is out of Court. We think he is out of Court because the Madras ruling followed the old Act which gave to the Small Cause Court jurisdiction only in certain specified matters, while the present Act proceeds upon another basis, excluding from the jurisdiction of the Courts of Small Causes certain matters and leaving to these Courts a residuary jurisdiction, and it is clear to us that there is nothing in Sch. 2 to the Small Cause Court Act which excludes from the jurisdiction of the Court of Small Causes a suit by the Municipality to recover municipal taxes due to them as in this case.

In A I R 1932 Pat 220[2] it was pointed out that the Municipality has no such interest in immovable property as excludes the suit brought to recover taxes upon such property from the jurisdiction of the Small Cause Court. Art. 13, Sch. 2, Provincial Small Cause Courts Act (1887), was the Article there under discussion, and among other things it was decided that the expression "dues" as used in Art. 13 must be read ejusdem generis with the words that precede it, namely "malikana and hak or of cesses," and that municipal taxes were not such malikana, hak or cesses or anything like them. In the Bombay case in A I R 1935 Bom 254[3] the learned Judge referred to certain other rulings, 9 Bom 259,[4] 32 Bom 356[5] and 40 Cal 537,[6] in support of the argument that it is the nature of the suit and not the Court in which it is tried that determines the right of appeal within the provisions of S. 102, Civil P. C., and the fact that the Court which tries the suit is not a Small Cause Court is not a decisive matter.

We think, therefore, that this suit which is a suit for recovery of taxes upon moveable property a suit to recover terminal tax upon two lorries, is a suit falling within the provisions of S. 102, Civil P. C., the subject-matter of the suit being also less than Rs. 500, and that no second appeal lies. This

1. Logan v. Kunji, (1886) 9 Mad 110.
2. Municipal Commissioners, Ranchi v. Mt. Mungia, (1932) 19 A I R Pat 220=139 I C 104 =13 P L T 277.
3. Shankar Vishvanath v. Shrinivas Bhalchandra, (1935) 22 A I R Bom 254=156 I C 607=37 Bom L R 355.
4. Kalian Dayal v. Kalian Narer, (1885) 9 Bom 259.
5. Lakshmandas v. Anna, (1908) 32 Bom 356.
6. Indra Chandra v. Srish Chandra, (1913) 40 Cal 537=21 I C 120.

appeal therefore must be dismissed with costs.

B.D./R.K. *Appeal dismissed.*

A. I. R. 1939 Sind 36

DAVIS J. C. AND WESTON J.

Ghanshamdas Lokumal Shivdasani — Appellant.

v.

Manager, Sind Encumbered Estates and others — Respondents.

First Appeal No. 52 of 1936, Decided on 26th August 1938, against Judgment and decree of First Class Sub-Judge, Hyderabad, D/- 24th August 1936.

(a) Sind Encumbered Estates Act (20 of 1896), S. 9 (2) — Suit to compel manager to recognize transferee or assignee of admitted claim falls within prohibition under S. 9 (2).

The claims against the estate are debts, and the manager is concerned only with such debts and represents the debtor. A debt is not the less a debt because its amount is determined by the Manager. The Act does not prevent the Manager from paying to a third party the amount of a debt at the request of the creditor nor does it say that the Manager should not recognize the lawful transferee or assignee of the claim. But a suit to compel the Manager to recognize such transferee or assignee of the claim being in reality one in respect of the debt or liability falls within the prohibition contained in S. 9 (2). [P 38 C 1]

(b) Sind Encumbered Estates Act (20 of 1896)—Scheme of the Act.

The scheme of the Sind Encumbered Estates Act does not contemplate that the Court should oust the jurisdiction of the Manager on matters which the Legislature has declared to be within his sole competence : *A I R 1927 Sind 123 and A I R 1927 Sind 225, Rel. on.* [P 37 C 2]

(c) Specific Relief Act (1877), S. 42—Relief under S. 42 cannot be granted against colluding defendant added only to ground suit against other defendant, when suit dismissed as to latter.

Where one of the defendants is in collusion with the plaintiff and the suit against him is brought merely for the purpose of assisting to ground the suit against another defendant and the suit against such other defendant is dismissed, an equitable relief by way of declaration will not be granted to the plaintiff against the colluding defendant. [P 38 C 2]

Dipchand Chandumal — *for Appellant.*

Hakumatrai M. Eidnani and Khanchand Gopaldas — *for Respondents 2 and 3.*

Davis J. C. — This is an appeal against an order of the First Class Subordinate Judge, Hyderabad, dismissing the plaintiffs' suit for a declaration that they were the transferees of a claim against the estate of one Mir Abdullah Khan then under the protection of the Manager of the Encumbered Estates, defendant 1, which they purchased from one Khubchand, defendant 2, on 20th March 1922. It appears that the claim of one Khubchand was admitted by the Manager against the estate of Mir Abdullah Khan under his protection for Rs. 11,500 and that this Khubchand sold, or so the plaintiffs allege, this claim to them for Rs. 6500, and when they applied to the Manager to recognize the transfer he refused to do so. Matters have been further complicated by the fact that one Parchomal brought a suit against Khubchand, the plaintiffs' transferor, and got a decree for Rs. 986-3-9 on 23rd April 1923, and in execution of this decree Khubchand's claim against the estate of the Mir, which the plaintiffs claim was transferred to them, was sold in execution to one Assumal, joined as defendant 3 in the suit, and one Vensimal, whose legal representatives in the opinion of the Subordinate Judge should have been joined as co-defendants, but they were not. Other claimants to two-thirds share in the claim were the two minor brothers of Khubchand, also not parties to the suit. The Manager of the Encumbered Estates denied the power of the Court to compel him to recognize the claim of any particular claimant against estates in his charge and denied he had ever recognized the plaintiff's claim. Defendant 2 supported the plaintiff, while defendant 3 alleged that defendant 2 was in collusion with the plaintiffs because he was in their power, plaintiff 1 being the brother of an accountant in the Manager's office, and plaintiff 2 being the son of a pleader's clerk employed in litigation over this claim, a most undesirable combination. Defendant 3 also contended that plaintiffs' claim was time-barred. The Subordinate Judge held that the Court had jurisdiction to decide the suit to which the Manager was a party; he found however that the suit was time-barred and must fail on that account; he found it must also fail because there was no consideration for the alleged transfer to the plaintiffs.

In appeal the learned advocate for the plaintiffs first contended that as defendant 2 had admitted the plaintiffs' claim, it was not for the Subordinate Judge to dismiss the suit on the objection of a third party, and that so far as he found the suit was time-barred because the claim was attached and no suit was brought to set aside the attachment within one year, the Judge was

wrong when he found the debt had been attached because though it is true the plaintiffs made an application under O. 21, R. 58, Civil P. C., on 14th October 1924 to raise the attachment, this application was made under a mistake of fact, because on 8th December 1923 the attachment had been raised by the Court in the suit of Parchomal v. Khubomal. Reference to Ex. 204 on p. 109 of the paper-book shows this to be the case. So on this point the learned Subordinate Judge was wrong. Moreover, it appears difficult to see how a Court can refuse to decree a plaintiff's suit based upon an alleged transfer or assignment of a claim when the assignee or transferor admits the claim unless it is shown that the Court has no jurisdiction or has discretion in granting or refusing the relief claimed, being, as in this case an equitable relief, or that the assignor or transferor had no power in law to assign or transfer. The Court rejected the defence of defendant 1, the Manager, that the Court had no jurisdiction in this matter and did not find that defendant 2 had no power to assign or transfer the debt and did not refuse relief as being an equitable relief under S. 42, Specific Relief Act. The Court dismissed the plaintiffs' claim inter alia on the ground that the transfer was without consideration.

Now, on the question as to whether this Court had jurisdiction or not, or, to put the issue more appropriately, whether the suit would lie against defendant 1, the Manager of the Encumbered Estates, we think reference should be made to the plaint. It is argued on behalf of the appellants that the Manager is a mere formal party; he is brought in only as the party in whose hands the money was as the stake holder, but reference to the plaint will show that the suit is directed principally against him; according to para. 13, the cause of action arose when the Manager finally refused at Hyderabad on 23rd April 1926, to recognize the plaintiffs as transferees of the claim against the minors' estate. In paras. 7, 8, 9, 10, 11 and 12 his conduct is attacked, and it is clear that he is the principal and not a mere formal party, and the suit is to compel him to recognize one claimant against the estate in preference to another. But, even if he were a formal party, he would be as much bound by the decree as if he were the sole defendant. And we do not think the scheme of the Sind Encumbered Estates Act contemplates that the Court should oust his jurisdiction on matters which the Legislature has declared to be within his sole competence: *see* A I R 1927 Sind 123[1] and A I R 1927 Sind 225.[2] The Subordinate Judge deals with this issue as Issue 1 but briefly. The dispute, he says, is not about a debt due from the estate; it is about the sale of a claim by a claimant to a third party, and to such a dispute the provisions of the Act do not apply. If this is so, it would appear that the suit should be limited to the dispute between the claimant and the third party, and if it does not come within the scope of the Act, it appears difficult to see how the Manager, who administers the Act, is a necessary party to the suit. If the suit were brought by the creditor himself, the transferor or assignor, against the Manager, it could scarcely be contended that the suit would lie. There is no reason to suppose that the transferee or assignee in this matter gets any greater rights than his transferor or assignor possessed. The learned Judge has not referred to any decided cases on this question of jurisdiction. He has not referred in any detail to Sec. 15 of the Act. The Section is as follows:

> The Manager shall inquire into the history and merits of every claim received under Ss. 12 and 14 and shall, in accordance with the rules to be made under this Act, determine the amount of the debts and liabilities (if any) justly due to the several claimants.

Now a debt is not the less a debt because its amount is determined by the Manager; it may not become payable at once; it may, be included in a scheme under Sec. 17. It cannot be, we think, that the creditor can sue the Manager in respect of such a debt, otherwise the scheme would be unworkable. Such a debt, we think, comes within the prohibition in Sec. 9, and as the creditor could not sue the Manager, so cannot the creditor's transferee or assignee. He can have no greater rights than his transferor or assignor. Now it is clear that so far as the Manager is concerned, he is to enquire into every claim received under Ss. 12 and 14, and determine the amounts of the debts and liabilities due to the several claimants. Reference to Sec. 12 will show that the

1. Ghanshamdas Khatumal v. Manager, Encumbered Estates, (1927) 14 A I R Sind 123=99 I C 930=28 Cr L J 194=22 S L R 24.
2. Shewakram Gurdinomal v. Ghulam Shah, (1927) 14 A I R Sind 225=103 I C 440 = 22 S L R 82.

claims are debts against the estate, and it is only with such debts or claims that the Manager is concerned. Moreover, reference to Sec. 20 (2) will show that it is only the person proving a claim of a debt within the meaning of Sec. 12 who is entitled to payment under the Act. The Act does not, we think, intend to make the Manager answerable to the claims of strangers to the estate such as the transferees or assignees of the claimants. There is nothing indeed in the Act to prevent the Manager, if he wishes, paying a third party, at the request of the creditor, the amount determined under Sec. 15. Provision may have been made for such cases in rules made under the Act which have not been put before us. He would, of course, obey any lawful order of a Court, though it might be that thereafter a Court of Appeal might find the Court's order wrong. Presumably the manager has access in such matters to competent legal advice. Nor do we say he should not recognize the lawful transferee or assignee of a debt, but, we think, a suit against him as manager to compel him to do so must fall within the prohibition contained in Section 9 (2).

It is urged that the claim against the manager may be transferred or assigned as any other claim, but while the subject of this transfer is described loosely as an award or a manager's decree, the thing assigned is really a debt. The manager is or represents the debtor; the suit is in reality brought against him as the debtor or the debtor's representative, and as such, we think, it must necessarily fall within the prohibition contained in S. 9 (2). The material words in the sub-section are "in respect to", and so far as the manager is concerned, we think the suit can only lie with respect to Khubchand's claim against the estate as the estate's debt to Khubchand. The fact that the debt has been assigned and others are joined as parties does not, we think, alter this aspect of the case. Once the sum found due to Khubchand has been paid, it is of course no longer a debt. The manager will not even be a "stake-holder". The suit will lie, as it should in any case lie, against the transferors. Therefore it appears to us that the suit against the manager must fail because if there be a cause of action against the manager as manager it must be a suit "with respect to" a debt or liability within the meaning of Ss. 8, 9 or 12, when no suit will lie. Against him then the suit must be dismissed. And if it fails against the manager, it should fail against defendant 2, and defendant 3, for a relief by way of a declaration is an equitable relief, and we will not grant an equitable relief against defendant 2. The beneficial provisions of S. 42, Specific Relief Act, will be entirely inappropriate either to the case of plaintiffs 1 and 2 or defendant 2. So far as defendant 2 is concerned, we are satisfied from the frame of the suit that he is in collusion with the plaintiffs and the suit against him is brought merely for the purpose of assisting to ground the suit against the manager; and so far as the suit against defendant 3 is concerned, he, it is admitted, is one only of the auction-purchasers, and the legal representatives of Valiram, the other auction-purchaser, are necessary parties. Defendant 3 Assumal was joined, and we think wrongly, under the orders of of the Court. We do not think S. 42, Specific Relief Act, is properly to be applied for the benefit of plaintiffs 1 and 2 against defendant 3. We therefore for other reasons agree with the order of the Subordinate Judge, dismissing the suit, and dismiss this appeal with costs.

N.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Sind 38

DAVIS J. C. AND DADIBA C. MEHTA J.

Chellomal and others

v.

Kewalmal Jeramdas.

Criminal Ref. No. 77 of 1938, Decided on 4th May 1938, made by Sess. Judge, Sukkur.

Criminal Trial—Complaint—Complaint dismissed and accused discharged—Second complaint on same facts cannot be entertained by another Magistrate — Remedy of aggrieved complainant is to move superior Court for further enquiry.

It is not open to a Magistrate to entertain a complaint when a similar complaint has been dismissed by another Magistrate of co-ordinate jurisdiction and the dismissal has not been set aside by higher authority. If the complainant is aggrieved by the dismissal of his complaint and the discharge of the accused under S. 259, Criminal P. C., it is open to him to move the superior Court to order further inquiry under S. 436 because that Section is now amended and relates not only to a dismissal of complaint under S. 203 or under sub-s. (3) of S. 204 but to any case where persons accused of an offence have been discharged: *A I R 1929 Sind 61, Rel. on; A I R 1914 Sind 44, Ref.* [P 39 C 1, 2]

Partabrai D. Punwani, Advocate-General — *for the Crown.*

Davis J. C.—This is a reference by the Sessions Judge of Sukkur in which he recommends that proceedings instituted before the City Magistrate upon a complaint similar to a complaint based upon the same facts previously made in the Court of the Mukhtiarkar and Second Class Magistrate of Sukkur in which the three accused had been discharged, should be quashed, on the ground that it is not open to a second Magistrate to entertain a second complaint when another Magistrate on the same facts has either dismissed the first complaint or discharged the accused. Now the learned Judge in his interesting reference refers to two views taken by High Courts as to the effect of a dismissal of a complaint or discharge of the accused upon the right of the complainant to start fresh proceedings and the learned Judge has drawn our attention to what appear to be conflicting decisions between Judges of this Court itself. The judgment of a Division Bench of this Court in 23 S L R 43[1] lays down that it is not open to a Magistrate to entertain a complaint when a similar complaint has been dismissed by another Magistrate of co-ordinate jurisdiction and the dismissal has not been set aside by higher authority and the case in 8 S L R 196[2] is to the effect that

a prior order of discharge does not bar the jurisdiction of the Magistrate to entertain a second complaint on the same facts,

and

the mere fact that the first complaint was dismissed under S. 259, Criminal P. C., is not, by itself, a sufficient ground for dismissing the second complaint under S. 203 of the Code.

But what escaped the notice of the learned Judge is that the case in 8 S L R 196[2] is a case tried by a Judicial Commissioner of this Court sitting in Sessions Court jurisdiction and therefore that decision is not in effective conflict with the decision of a Bench of this Court in 23 S L R 43,[1] which until overruled by a Full Bench must be deemed to guide the Courts of this province. We do not think that the particular circumstances of this case justify us in referring this question to a Full Bench. If the complainant in this case is aggrieved by the dismissal of his complaint and the discharge of the accused under S. 259, Criminal P. C., it is open to him to move the Sessions Court to order further inquiry under S. 436 because that Section is now amended and relates not only to a dismissal of complaint under S. 203 or under sub-s. (3) of S. 204 but to any case where persons accused of an offence have been discharged. We therefore accept the reference of the Sessions Judge and quash the proceedings based upon the second complaint in the Court of the Head Munshi and Third Class Magistrate, Sukkur. Order accordingly.

B.D./R.K. *Reference accepted.*

1. Mt. Tirathbai v. Mt. Sugnibai, (1929) 16 AIR Sind 61=112 I C 681=29 Cr L J 1097=23 S L R 43.
2. Bulchand Tahilram v. Chandoomal Ramrakhiamal, (1914) 1 A I R Sind 44=27 I C 558 =16 Cr L J 174=8 S L R 196.

A. I. R. 1939 Sind 39

LOBO J.

Haji Abdulla Haroon — Plaintiff.

v.

Municipal Corporation, Karachi — Defendants.

Suit No. 202 of 1935, Decided on 23rd September 1938.

(a) Easement—Light and air—Right of owner of dominant heritage — He has no absolute right to access of light and air—He cannot claim compensation by way of injunction or otherwise in absence of substantial damage — Substantial damage must be diminution of value of dominant heritage, of its utility and material interference with physical comfort of persons using it.

The owner of a dominant heritage has no absolute right to the access of light and air to windows and apertures, and is not entitled to compensation by way of injunction or otherwise for the disturbance of an easement, unless he has sustained substantial damage; that substantial damage must be a diminution of the value of the dominant heritage, or of the utility thereof, material interference with the physical comfort of persons using the dominant heritage, a material interference with the use of the dominant heritage in as beneficial a manner as it had been used before such interference. An owner of ancient lights is entitled to sufficient light according to the ordinary notions of mankind for the comfortable use and enjoyment of his house as a dwelling house, if it is a dwelling house, or for the beneficial use and occupation of the house if it is a warehouse, a shop or other place of business. So also, to constitute an infringement of an easement of light and air, there must be a substantial privation of light and air enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind and (in the case of business premises) to prevent the plaintiff from carrying on his business as beneficially as before: *(1904) A C 179 and 7 Bom L R 73, Rel. on.* [P 43 C 1, 2]

(b) Easement—Light and air — Reference to reported case is of little value — Whether disturbance of easement amounts to nuisance depends on facts of each case — Reference to English statutes and decisions is of little practical use.

In the case of a suit relating to an easement of light and air, reference to reported cases is necessarily of little value, because, whether or not the disturbance of an easement of light and air amounts to a nuisance, depends entirely on the facts and circumstances of each particular case. So also, as the law relating to easements in British India is governed very largely, if not entirely, by the Easements Act in those provinces to which it has been made applicable; it is of little practical use to refer to the provisions of the English statute and decisions in English cases, in a matter relating to easements. [P 44 C 2]

(c) Easement—Light and air—Plaintiff seeking injunction restraining defendant from interfering with his right—Court can in proper case direct enquiry as to damages although refusing injunction.

Where in a suit relating to an easement of light and air, the plaintiff seeks an injunction restraining the defendant from interfering with his right, the Court is entitled, in a proper case, to order an enquiry as to damages, even though it holds that the plaintiff is not entitled to injunction. No such enquiry can however be ordered when the plaintiff has not proved any damage. [P 44 C 1]

(d) Easement—Rights of lessee — Lessee of site constructing house on it — Easements of light and air and support acquired by him enure to his benefit alone—Acquisition of right of way or right to flow water enures to benefit of owner of site.

In the case of a lessee of a site, who is also the owner of the house which he has built thereon, so far as the use of light or air or support for his building is concerned, he is an owner of the building and may, under the first two paragraphs of Sec. 15, Easements Act, acquire such easements, and he would not acquire them for any one except himself under S. 12, Easements Act. But when the question arises of a right of way or a right to flow water he comes under Paragraph 3 of Sec. 15 and anything which he would acquire, would be as the person in possession of the land which is his site, and he would acquire on behalf and for the benefit of the owner of the site : *A I R 1938 All 293, Foll.; A I R 1936 Sind 61, Disting.* [P 44 C 2]

Dingomal Narainsingh—*for Plaintiff.*

Sunderdas Jethanand — *for Defendants.*

Judgment. — Abutting on the South Napier Road on its western side is a plot of land with buildings thereon bearing Survey No. 1, Survey Sheet S. R. 5, Serai Quarter. A sanad in respect of this plot of land was issued by the Karachi Municipality for a term of 99 years on 4th November 1895 in favour of one Devji Parpia. The sanad required the grantee to erect a building on the said plot of land of the value of over Rs. 8000 within three years from the date thereof. Devji Parpia appears to have transferred the plot of land, probably built on, to Basrio Fudoo on or about 4th December 1900. The property appears next to have passed to the Punjab Cotton Press Co. Ltd. in or about March 1905. On 27th April 1907 it was transferred to Adamji Mulla Lukmanji. All these transfers appear on the sanad Ex. 6. In 1917 this property was transferred by Adamji Mulla Lukmanji to Yusifally Mahomedali Lukmanji. From the evidence of Yusifally Adamji, the son of Adamji Lukmanji, it appears that in 1917 or 1918 Adamji Lukmanji closed his business and in a partition effected at about this time he transferred the property in suit to Yusifally Mahomedali Lukmanji. The plaintiff purchased this property by a deed of conveyance (Ex. 8) on 9th November 1925 for a sum of Rs. 3,31,680.

Except that in 1927 the plaintiff added some godowns he has not since his purchase in 1925 otherwise altered or added to the buildings on the property in suit and these buildings are therefore very much in the condition in which they were when the plaintiff made his purchase in 1925. Along the entire frontage of the property on Napier Road runs a two floored building to the depth of about 40 to 45 feet. The ground floor is occupied by business concerns, presses and the like; on the upper floor there are residential flats. Two large archways in this structure give access each to an open quadrangle in the rear of the main building. The three remaining sides of each of these quadrangles consist of rows of godowns. Godowns thus form the boundary of the plaintiff's property on south, west and north. On the south the godown opens on to Grant Road, on the west there is a "nulla" and on the north there was originally a broad kutcha nullah which about the year 1928 or 1929 was converted by the Karachi Municipality, into a narrower pucca cemented storm water drain. As a result of this improvement effected by the Karachi Municipality a piece of land became available to them, the space between the northern boundary of the plaintiff's property and the cemented storm water drain, admeasuring 738.86 square yards with a frontage on South Napier Road of 40.2 feet. In the northern boundary wall of the plaintiff's property in suit overlooking this plot of municipal land and the storm water drain beyond it are 26 windows. Nine of these are in the main building which abuts on the Napier Road and forms the frontage of the property in suit; and one of these nine windows is a kitchen window. The remaining 17 windows are in the northern row of godowns behind the main building. After the Karachi

Municipality had constructed the storm water drain referred to and had for disposal the piece of land to which reference has been made above lying between the storm water drain and the plaintiff's property in suit, they attempted to sell this piece of land. They found however that the existence of the 26 windows in the northern boundary wall of the plaintiff's property presented a serious difficulty. The plot the Municipality offered for sale was a long narrow strip and if the plaintiff had acquired rights of easement in respect of the 26 windows referred to, any purchaser of the adjoining plot from the Karachi Municipality would find it difficult to turn the plot to any useful purpose without disturbing the plaintiff's rights of easement. It appears also from the evidence that the plaintiff was approached by the Karachi Municipality to buy this plot of land as an annexe to his existing property but no satisfactory arrangement was arrived at.

Ultimately in or about March 1934, the defendants, the Municipal Corporation of Karachi, determined to have the matters of the rights of easement in respect of these windows determined by a Court of law. They accordingly proceeded to block the windows by erecting a cement wall flush against the northern boundary of the plaintiff's property in suit. The plaintiff interfered and again certain negotiations took place between him and the defendants but nothing was effected and the defendants completed the cement wall thus closing 17 out of the 26 windows, the 17 windows in the northern godowns. On 12th December 1935, the plaintiff filed the present suit. The plaintiff avers in his plaint that these 26 windows are ancient lights and have existed for a very long time over the statutory period, and that the plaintiff and his predecessors in title have always enjoyed light and air through them without interruption. In para. 6 of the plaint the plaintiff avers:

> That the blocking of these windows has materially interfered with light, use and comfort of the plaintiff's tenants and has rendered the rooms dark, insanitary and unhealthy and has materially diminished the value of the plaintiff's building.

The plaintiff's prayer in the plaint is for a declaration that he has acquired a right of easement in respect of 26 windows in the northern boundary wall of his property and for a perpetual injunction restraining the defendants from interfering with his rights of easement. The defendants, the Municipal Corporation of Karachi, contended that the plaintiff as a lessee of the property in suit from the Karachi Municipality cannot acquire rights of easement against his lessors; they further contend that in respect of the 17 windows in the godowns, even if the plaintiff has acquired an easement of light and air he has by his own act extinguished the easement by closing the windows with brick masonry; they further contend that the remaining windows are not ancient lights and that the plaintiff has no claim in respect of these. Lastly, the defendants contend that in any event the plaintiff has no actionable claim in respect of the 26 windows in suit. The following issues were framed by the Hon'ble Rupchand A. J. C. on 22nd May 1936:

1. How many windows exist in the plaintiff's building over-looking the defendant's plot?
2. Have any of the windows been closed more than two years before suit? If so, how many windows have been closed and what is the consequence?
3. Is the suit of the plaintiff within time? If so, in respect of what windows?
4. Have the plaintiffs enjoyed light and air through the windows for over the statutory period?
5. Have the enjoyment of light and air been as of right or permissive?
6. Has the plaintiff acquired any right of easement of light and air? If so, in respect of which windows?
7. Is the plaintiff entitled to injunction?
8. General.

Some time later, the defendants applied for amendment of their written statement to enable them to raise the first of the pleas to which reference has been made above. The amendment application was allowed and the following further issue, styled a preliminary issue, was framed by the Hon'ble Mr. Rupchand:

> Is the plaintiff a lessee of the defendants and if so, has he any right of easement against them?

It will be convenient to deal in the first instance with matters covered by Issues 4, 6 and 7, and I will therefore proceed to deal with these matters together. The 26 windows in suit fall into two groups. The 17 windows in the northern godowns are admittedly of greater age than the nine windows in the main building on the plaintiff's property. It is the plaintiff's case that the stretch of building forming the frontage of the property in suit was erected in or about 1912 or 1913 before the Great War, and that the entire building was completed within the space of a year. The nine windows in the northern wall of the building date from 1912 or 1913 so that in

December 1935 when the plaintiff filed the suit, these were ancient lights. The defendants dispute this position and assert that the building in question was erected in the year 1917 or 1918, that when the plaintiff filed the suit in December 1935 therefore the windows had been in existence for 17 to 18 years only and the plaintiff therefore had acquired no right of easement whatever in regard to these windows. The burden of proving the acquisition of a right of easement in respect of these nine windows is undoubtedly on the plaintiff. Considering that he had purchased the property only in 1925, the plaintiff was in a difficult position in having to discharge this burden, he himself having no personal knowledge of the matter. All that he has been able to say on the point is: "The office premises were built as far as I recollect before the War." (His Lordship then discussed the evidence and proceeded.) I have no hesitation on the evidence before me in coming to the conclusion that the building forming the entire frontage of the plot in suit was erected in 1917 or thereafter and that the nine windows in these buildings have not therefore been in existence for 20 years prior to the date of the suit and that the plaintiff has no legal rights in respect of these windows.

The position however with regard to the 17 windows in the northern boundary wall of the plot in suit is entirely different. With regard to these windows, the defendants do not contend that they have not been in existence for the statutory period or that the plaintiff has not acquired in respect thereof a right of easement. What the defendants contend is in the first place that the plaintiff by his own act has extinguished the easement within the meaning of S. 38, Easements Act, and in the next place, that even if the easement has not been extinguished, and the plaintiff therefore has a claim to an easement of light and air in respect of these windows, he has no actionable claim against the defendants as the closing of the windows has not resulted in such a substantial privation of light and air as to render the godowns uncomfortable or less useful as godowns for the purposes of business.

As to extinction of the easement or abandonment thereof by the plaintiff, the defendants rely in the first place on Ex. 21, the photo of the northern boundary wall of the plaintiff's property in suit. It shows all the 26 windows with which we are concerned. It also shows that the 17 windows in the godowns are bricked up from the outer side. The defendants contend that this was the state of things in March 1934. The burden of proof is on the plaintiff to show that he was in the enjoyment of light and air through these windows for a period of 20 years ending within two years of the date of the suit, December 1935. That the bricking up of the window in the manner shown in Ex. 21 is clear indication of an intention to abandon the the right to access of light and air through the windows; that the windows are all iron barred; that the windows have fixed wooden shutters opening inwards and capable of closing the said windows; that there was thus no necessity whatever to brick up the windows unless the intention was to definitely abandon the claim to access of light and air thereto; that there is every reason to believe that the windows had been permanently closed up long before March 1934 and that in these circumstances the plaintiff must be held to have failed to prove a right of easement in respect of these 17 windows and must be held to have definitely extinguished the easement by abandonment. The defendants have relied upon oral evidence on the point. (His Lordship then discussed the evidence and proceeded.) As I am definitely of opinion that there has been no extinction or abandonment of the right of easement in respect of these 17 windows, it is unnecessary for me to refer to a series of rulings which have been cited by the learned advocates in support of and against the contention of extinction and abandonment. The most important question however with regard to these windows is, whether or not the plaintiff has an actionable claim against defendants who have admittedly disturbed his right of easement. The law relating to easements in India is governed largely, if not wholly, by the Easements Act 5 of 1882 in those Provinces to which the Act has been made applicable. There is no dispute that the Easements Act is applicable to Sind. S. 32, Easements Act, provides :

> The owner or occupier of the dominant heritage is entitled to enjoy the easement without disturbance by any other person.

Section 33 reads thus :

> The owner of any interest in the dominant heritage, or the occupier of such heritage, may institute a suit for compensation for the disturbance of the easement or of any right accessory thereto,

provided that the disturbance has actually caused substantial damage to the plaintiff.

To this Section there are three explanations attached which are of great importance. They read thus :

(1) The doing of any act likely to injure the plaintiff by affecting the evidence of the easement, or by materially diminishing the value of the dominant heritage, is substantial damage within the meaning of this Section and Sec. 34.

(2) Where the easement disturbed is a right to the free passage of light passing to the openings in a house, no damage is substantial within the meaning of this Section, unless it falls within the first explanation, or interferes materially with the physical comfort of the plaintiff, or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit.

(3) Where the easement disturbed is a right to the free passage of air to the openings in a house, damage is substantial within the meaning of this Section if it interferes materially with the physical comfort of the plaintiff, though it is not injurious to his health.

It is clear therefore that the plaintiff, even if he has acquired a right of easement of light and air in respect of the 17 windows in the godowns, has no right to compensation from the defendants, has in fact no right of action against them, unless the closing of these windows amounts to a nuisance, unless the closing of the windows and the shutting out of light therefrom has diminished the value of the dominant heritage, has materially interfered with the use of the godowns as beneficially as they had been previously used, or has materially interfered with the physical comfort of persons who have occasion to use these godowns. That the owner of the dominant heritage has no absolute right to the access of light and air through windows and apertures has been laid down in the leading English case in (1904) A C 179.[1] A large number of authorities, both English and Indian, have been quoted by the learned advocates for the plaintiff and the defendants on the question whether or not an injunction should be granted to the plaintiff, but all the cases referred to do nothing more than reiterate the principles set out in the explanations to S. 33, Easements Act. In the case of a suit relating to an easement of light and air reference to reported cases is necessarily of little value because whether or not the disturbance of an easement of light and air amounts to a nuisance gives rise to an actionable claim, depends entirely on the facts and circumstances of the particular case. The principles are clear. The owner of the dominant heritage is not entitled to compensation by way of injunction or otherwise for the disturbance of an easement unless he has sustained substantial damage; that substantial damage must be a diminution of the value of the dominant heritage, or of the utility thereof, material interference with the physical comfort of persons using the dominant heritage, a material interference with the use of the dominant heritage in as beneficial a manner as it had been used before such interference. In (1904) A C 179,[1] referred to above, the House of Lords laid it down that :

An owner of ancient lights is entitled to sufficient light according to the ordinary notions of mankind for the comfortable use and enjoyment of his house as a dwelling house, if it is a dwelling house, or for the beneficial use and occupation of the house if it is a ware-house, a shop, or other place of business.

In 7 Bom L R 73[2] it was held that to constitute an infringement of an easement of light and air there must be a substantial privation of light and air enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind and (in the case of business premises) to prevent the plaintiff from carrying on his business as beneficially as before. I will now proceed to apply these legal principles involved in Sec. 33, Easements Act and in the leading authorities to which I have referred to above to the case before me. Does the evidence in the case establish that the closing of the 17 windows in the godowns of the plaintiff's property constitute a nuisance or has it caused substantial loss to the plaintiff ? (His Lordship then discussed the evidence and proceeded.) I am therefore of opinion that the closing of these windows in the northern godowns of the plaintiff's property in suit does not afford the plaintiff an actionable claim; that it does not amount to a nuisance; that it does not materially interfere with the use of the godowns as godowns; that it will not materially interfere with the physical comfort of persons who may have occasion to work in these godowns; and if this is so, the plaintiff's suit for an injunction in regard to these windows must necessarily fail.

It has been argued by the learned advocate for the plaintiff that in any case

1. Colls v. Home & Colonial Stores Ltd., (1904) A C 179=73 L J Ch 484=90 L T 687=53 W R 30=20 T L R 475.

2. Framji Shapurji v. Framji Edulji, (1905) 7 Bom L R 73.

the plaintiff is entitled to damages and that if the Court is of the opinion that this is not a case in which an injunction should be granted, the question of damages should be considered by the Court and an inquiry should be held as to what damages the plaintiff has sustained. The learned advocate has referred me to several authorities on the point. I have no doubt whatever that the proposition set out in these authorities is correct and that in a proper case the Court would order an inquiry as to damages while refusing an injunction; but to my mind this is not a case of that description. No damage whatever has been caused to the plaintiff by the closing of the 17 windows. The plaintiff has not led any evidence to show that the rental of these godowns has been reduced by a single rupee even by reason of the closing of these windows which took place as far back as March or April 1934. These are the most important points in the case and having disposed of them I am now in a position to record my findings on the issues in the suit.

As to Issue 1, there is no dispute. There are 26 windows overlooking the defendants' plot. As to Issue 2, having found that there has been no extinction of the easement in respect of the 17 windows in the godowns and that the plaintiff has not abandoned his right of easement to light and air in respect of these windows, my answer to Issue 2 is in the negative. As to Issue 3, no question of limitation arises in view of my finding on Issue 2. As to Issue 4, my finding is that the plaintiff has enjoyed light and air through the 17 windows in the godowns on the northern side of the plaintiff's property for over the statutory period but not in respect of the nine windows in the building forming the frontage of the plaintiff's property. On Issue 5, my finding is that the enjoyment of light and air in respect of the 17 windows in the godowns has not been permissive. The mere fact that the plaintiff must have erected buildings on the property with the permission of the defendants does not in my opinion make the enjoyment of light and air through the windows of that building permissive. As to Issue 6, my finding is that the plaintiff has acquired an easement of light and air in respect of the 17 windows in the northern godowns of his property. On Issue 7, my finding is that the plaintiff is not entitled to an injunction.

There remains for consideration the preliminary issue as to whether the plaintiff as lessee of the defendants can acquire against the defendants a right of easement in respect of the windows in his property. In view of my findings on the other issues, and in view of my finding that the plaintiff is not entitled to any relief against the defendants, it is scarcely necessary to deal with this point at all though it has been argued at great length and with much learning before me by the learned advocates for the plaintiff and the defendants. I think it will suffice for me to say that in my opinion the answer to the preliminary issue must be in the affirmative. As I have stated in a previous part of this judgment the law relating to easements in British India is governed very largely, if not entirely, by the Easements Act in those provinces to which it has been made applicable. It is therefore of little practical use to refer to the provisions of the English statute and decisions in English cases in a matter relating to easements. In support of my finding on this issue I need only refer to the provisions of S. 15, Easements Act, and the distinction between the wording of Paras. 1 and 2 thereof and that of Para. 3. This subject has been discussed at great length in a Full Bench ruling of the Allahabad High Court: I L R (1938) All 538.[3] The opinion of the Full Bench in that case may be summarized by the following quotation from the judgment :

> In the case of the lessee of a site, who is also the owner of the house which he has built thereon, so far as the use of light or air or support for his building is concerned, he is an owner of the building and may under the first two paragraphs of S. 15, Easements Act, acquire such easements, and he would not acquire them for anyone except himself under S. 12. But when the question arises of a right of way or a right to flow water he comes under Para. 3 of S. 15 and anything which he would acquire would be as the person in possession of the land which is his site and he would acquire on behalf and for the benefit of the owner of the site.

It is true that in the case before the Full Bench the question was the acquisition of a right of easement of passage and flow of water over the servient heritage, but the entire question of the acquisition of easements by a tenant against his landlord is ably discussed in the judgment of Bennet J. and this case is the only authority I have been able to find bearing directly on the point. Reference has been made to the case in

3. Abdul Rashid v. Braham Saran, (1938) 25 A I R All 293=175 I C 227=I L R (1938) All 538=1938 A L J 436 (F B).

30 S L R 32,[4] but all that that case decides is that a right of way cannot be acquired as an easement by user by a tenant-at-will or for a number of years over another parcel of land either in the possession of his landlord or in the possession of another tenant of the same landlord. There is no reference in that case to an easement of light and air attached to any building on the land in the occupation of a tenant. The result of my findings on the issue is that the plaintiff's suit must be dismissed and I order accordingly.

As regards costs, I think this is a case in which the proper order will be that each party should bear his own costs. If the plaintiff has failed with regard to the nine windows in the building forming the frontage of his property no blame attaches to him. In the circumstances of the case he had reasonable grounds for believing that the windows had been in existence for over the statutory period. In regard to the 17 windows in the godowns he has established his right of easement and is in no way to blame if the Court takes the view that he has no actionable claim against the defendants. I accordingly order that each party should bear his own costs.

R.M./R.K. *Suit dismissed.*

4. Mowloo Nanji v. Rochiram, (1936) 23 A I R Sind 61=163 I C 137=30 S L R 32.

A. I. R. 1939 Sind 45

RUPCHAND BILARAM J. C. AND LOBO J.

Gulabsing Ramsing — Appellant.

v.

Hukmatrai Thakurdas and another — Respondents.

Misc. Appeal No. 28 of 1935, Decided on 16th September 1937, against order of Dist. Judge, Sukkur, D/- 28th June 1935.

Provincial Insolvency Act (1920), S. 75 (2) and (3)—*B* having *G* and *K* as partners in certain contract — *G* and *K* in separate suits for settlement of partnership accounts obtaining decrees—Pending suits, *B* becoming insolvent—Application by unsecured creditor for determination whether money recovered under contract should be paid to *K* solely — *G* made party — Trial Court deciding in favour of *G* — Appeal against — *G* not made party — Appeal by *G* against order not making him party — Appeal held premature and incompetent as leave of District Judge was not obtained.

One *B* had *G* and *K* as partners in certain contract. *G* and *K* filed separate suits at different places for settlement of partnership accounts against *B* and obtained decrees. Pending these suits *B* was adjudicated insolvent and an unsecured creditor applied to the Insolvency Court under S. 4 for determination whether the money which had been recovered from the contract should be paid solely to *K* or not. To this petition *G* was made a party. The trial Court held in favour of *G*. Against this order an appeal was filed in the District Court but in that appeal *G* was not made a party. *G's* application that he should be made a party was dismissed and against this order *G* appealed under S. 75 :

Held that even if Cl. (2) to Sec. 75, applied, the appeal was premature as it was possible that District Court might dismiss the appeal, i. e. decide the dispute in favour of *G* and if it did not, then alone *G* would become an aggrieved party. With regard to Cl. (3) even if it was applicable no leave of the District Court had been applied for. The appeal was therefore incompetent. [P 46 C 1]

Srikishindas H. Lulla — *for Appellant.*

Assudomal Rewachand — *for Respdts.*

Rupchand Bilaram J. C.—This appeal arises out of an order passed by the learned District Judge Sukkur refusing to join the appellant as a party to the appeal pending before him under Sec. 75, Provincial Insolvency Act. The facts giving rise to the present appeal are as follows : One Girdharidas who is an adjudicated insolvent had taken up certain contracts at Much. It is alleged that in those contracts he had two partners, Gulabsing and Parumal, and that subsequently he admitted one Kevalram as his sub-partner. There were disputes between the parties, and Kewalram filed a suit in the Sukkur Court for settlement of partnership accounts against Girdharidas, and obtained a decree. Gulabsing on the other hand filed a suit in the Shikarpur Court for settlement of partnership accounts, and obtained a decree in his favour. In the suit of Kevalram, Gulabsing and Parumal are not parties, and in the suit by Gulabsing, Kevalram who was made a party at one time was given up and is not a party in the decree. Pending these suits Girdharidas was adjudicated an insolvent and his property has vested in the receiver appointed by the Insolvency Court. One Choithram purporting to act as an attorney of one Sugnomal, who is an unsecured creditor, applied to the Insolvency Court under the provisions of Sec. 4 of that Act for determination of the question whether the money which had been recovered and the money which was likely to be recovered from the Much contracts should be paid solely to Kevalram or not. To this petition Gulabsing was made a party. The learned Judge of the trial Court held in favour of Gulabsing. Against his order an

appeal has been filed in the District Court, but in that appeal Gulabsing was not made a party and the only respondent is the Receiver. Gulabsing made an application to the District Court that he be joined as a party as he is a person vitally interested in the result of the decision by the District Court. The learned Judge passed an order dismissing that application and it is against that order that Gulabsing has come to us in appeal.

A preliminary objection has been raised that this appeal is incompetent as it does not fall under any clause of S. 75, Provincial Insolvency Act, and that the proviso to Cl. (1) which confers upon this Court revisional jurisdiction cannot be invoked at this stage as the appeal has not been finally disposed of. On the other hand, it is contended by the appellant that an appeal is competent both under Cls. (2) and (3), Sec. 75. With regard to Cl. (2), it would appear that even if that clause applied, the appeal is premature. It is possible that the District Court might dismiss the appeal, that is to say, decide the dispute in favour of Gulabsing, and if it does not, then alone Gulabsing would become an aggrieved party. With regard to Clause (3) again, it would appear, that even if that clause is applicable, no leave of the District Court or of this Court has been applied for.

We however think that this is a case in which we should, while dismissing the appeal as incompetent, safeguard the interests of Gulabsing by ordering that in the event of the appeal being allowed by the District Court the receiver should not part with the money until the lapse of sufficient time to enable Gulabsing to move this Court to act under Proviso 1 to Sec. 75 of the Act, and if so advised, under any other provision of law, and obtain an order of stay from this Court. We have as a matter of fact passed an order in Miscellaneous Appeal No. 94 of 1936 also requiring the Receiver not to part with the money. We accordingly dismiss this appeal subject to what we have said above with regard to the directions to be issued to the Receiver, but make no order as to costs. Anything said above should not be considered by the learned District Judge as dealing with the merits of the appeal before him which we have no doubt he will decide according to law.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Sind 46

DAVIS J. C. AND TYABJI J.

Secretary of State — Appellant.

v.

Peoples Bank of Northern India, Ltd. and others — Respondents.

First Appeal No. 62 of 1935, Decided on 31st August 1938, against Judgment and decree of Rupchand Bilaram A. J. C., *Reported in A I R 1935 Sind 232.*

Bombay Land Revenue Code (5 of 1879), Ss. 137, 187, 150 (2) —Liquor license granted to firm forfeited and sold as result of its inability to pay instalments—Stocks of liquor in bonded ware-house belonging to firm are moveables in respect of which Government has no prior charge in preference to secured creditors.

Where the liquor license granted to a firm for sale of liquor in its premises, is forfeited and sold as a result of its inability to pay the instalments due and subsequent instalments, the stocks of liquor in the bonded ware-house belonging to the firm come within the scope of S. 150 (c), Bombay Land Revenue Code, and they are moveables in respect of which the Government has no prior charge, and the claims of the Government do not have preference over secured creditors in whose favour the stocks of liquor have been mortgaged : *15 Bom 67 and A I R 1932 Sind 121, Ref.; AIR 1935 Bom 25, Disting.* [P 48 C 1]

Partabrai D. Punwani, Advocate-General — *for Appellant.*

Dingomal Naraising — *for Respdt. 1.*

Davis J. C. — This is an appeal from the judgment of Rupchand A. J. C., in which he gave judgment for the respondents, the plaintiffs in the suit, for Rupees 5275 and interest and costs, and it concerns the interpretation of S. 34, Abkari Act, and Ss. 137 and 187 of the Land Revenue Code. The plaintiffs in the suit were the Peoples Bank of Northern India Ltd., and they advanced Rs. 10,000 to a firm of Shahani Brothers upon a Stock of liquor belonging to the firm and lying in the bonded warehouse. This firm had taken an "on" license for three years from Government for the sale of liquor in premises known as the "Victoria Bar". They had agreed to pay the sum of Rs. 26,100 by three-monthly instalments of Rs. 2175, commencing from 1st July 1927 and ending 3rd March 1930, and they defaulted in payment of the instalment due on 1st January 1929, and on 1st March 1929, the managing partner of the firm, Bhagwan T. Shahani, informed the Collector of Karachi that he was unable to pay the instalments due or subsequent instalments, informing him also that he had mortgaged the stocks of liquor lying in the bonded warehouse in favour of the

plaintiffs, the Peoples Bank of Northern India Ltd., and in favour of the Punjab National Bank Ltd., and asking the Collector to auction the unexpired period of the license. The Collector of Karachi on 2nd March 1929, asked the Collector of Customs Karachi to detain the goods lying in the bonded warehouse under S. 34, Abkari Act, and S. 154 of the Land Revenue Code. This was done, and by consent in a suit brought by the Peoples Bank, an order for Receivers was made and the stocks of liquor were sold by the Receivers and realized Rs. 9869-11-10; and in an order dated 17th February 1930, passed on an application under O. 40, R. 1, Civil P. C., Wild A. J. C. held that Government had a first charge upon the sale proceeds for the balance of the license fee due to them, namely Rupees 5275, and it is to recover this Rs. 5275 that the present suit, out of which this appeal arises, is brought.

Now, in their written statement the defendants claimed a first charge upon the goods in question, namely the stocks of liquor in the bonded warehouse under the Statute law as well as under the Common law, and with their claim under the Common law the learned Judge has dealt at length in his judgment and the case under Common law was not argued before us. But the Advocate-General for the appellant contended that the case under Statute law had not been properly dealt with by the learned trial Judge. Far from "faintly suggesting," as the learned Judge remarks that the provisions of S. 137 of the Land Revenue Code applied, the Advocate-General contends that he relies and did rely strongly on S. 137 of the Land Revenue Code and the Bombay case in 36 Bom L R 1103,[1] which the learned Judge says, it was not necessary for him to consider.

The learned trial Judge seems to have rested his decision, so far as the Statute law is concerned, mainly upon S. 150 (c) and S. 154, Land Revenue Code, the stocks of liquor being moveable property within the meaning of S. 150 (c). Speaking generally, the learned trial Judge would appear to be right when he says that the claims of Government do not have preference over the claim of secured creditors on immovable property other than the land in respect of which the land revenue is due or on moveable property. And it is, I think, clear that when the Government filed their written statement, they had not in mind the limited claim which the Advocate-General, as the result of argument in Court, was prepared to support, namely that Government had a prior right over these stocks of liquor as being covered or as intended to be covered by the license in respect of which the license fee was in arrears; but, as in the case reported in 26 S L R 390,[2] Government claimed to have a prior claim over any of the immovable property of the defaulter with respect to the balance of unpaid liquor license fees, so it appears, they claimed in this suit a prior right over any of the moveable property of the licensee. When the extravagance of this claim was pointed out to the learned Advocate-General, he limited his contention to a prior claim upon liquor in possession of the licensee, and when it was then pointed out that this might include wines kept by the licensee in his own private cellar for his own private use, and which had no concern whatever with the license in respect of which the fees were due, the Advocate-General finally limited his contention to liquor covered or intended to be covered by the license such as was liquor in this case. Now, by virtue of S. 34, Abkari Act, fees leviable under the Bombay Abkari Act are recoverable as arrears of land revenue, and this Section with S. 187, Land Revenue Code applies, so far as may be the provisions of the Land Revenue Code relating to the recoveries of land revenue and other similar charges, to the recovery of the unpaid balance of this license fee on the "on retail license" of the Victoria Bar. Clearly some modification is required before rules, which have relation to land, can be applied to liquor licenses, but a clear distinction has long been drawn with respect to land in respect of which the arrears are recoverable and other land of the defaulter. Land, in respect of which, arrears are recoverable, it matters not whether it is arrears of land revenue or charges due for boundary marks, may be recovered by forfeiture and sale of the land itself, and S. 137, Land Revenue Code, applies; and all other charges upon the land are postponed to Government's charge. Other land of the defaulter cannot be forfeited and sold but it can be sold under S. 150 (d), Land

1. Balmukund v. Collector of Ahmednagar, (1935) 22 A I R Bom 25=154 I C 519=59 Bom 154 =36 Bom L R 1103.

2. Ahmed Haji Esmail v. Parmanand Meghraj (1932) 19 A I R Sind 121=139 I C 47=26 S L R 390.

Revenue Code, but prior charges are not in that case postponed. This is very clearly set out in the Bombay case in 15 Bom 67[3] and it would only be possible by analogy to apply the provisions of Ss. 137 and 150 (b) to the liquor licenses in respect of which the license fee is recoverable; so it might be said that this can be forfeited and sold under S. 150 (b) read with S. 187. The liquor license has in fact been forfeited and sold and the proceeds of Rs. 5600 credited to Government, but it has not been suggested to us that this has been done under the provisions of S. 34, Abkari Act, read with Ss. 137 and 187, Land Revenue Code, and not under the terms of the license itself. But, we are not concerned with this aspect of the case. We are concerned only with the question of a prior charge upon the stocks of liquor in the bonded warehouse, and we are satisfied that these come within the scope of S. 150 (c), Land Revenue Code, and that they are moveables in respect of which Government has no prior charge.

The Advocate-General has not argued that Government has a prior claim upon the stocks of liquor intended to be covered by the license on the ground that such stocks are by analogy crops upon the land under the provisions of S. 138, which apply however only to demands for the current year; but while it might be possible to argue that stocks of liquor actually in the retail premises were to the license as crops were to the land, even this argument, which even the Advocate-General did not advance, could not under any circumstances apply to liquor in a bonded warehouse under the Customs authorities which might never come upon the licensed premises. We can find nothing in the judgment in 36 Bom L R 1103[1] on which the learned Advocate-General relies, to assist us. Moreover, we think that judgment must be read with the judgment of the Privy Council reported in 50 Cal 1[4] in which the difference in the meaning of the phrases "as if they were" and "are deemed to be" is pointed out. We think therefore that the judgment of the lower Court was right in its ultimate conclusions, and we dismiss this appeal with costs accordingly.

R.M./R.K. *Appeal dismissed.*

3. Venkatesh Ramkrishna v. Mabal Pa, (1891) 15 Bom 67.
4. E. D. Sassoon and Co. v. Ramdutt Ramkissen Das, (1922) 9 A I R P C 374=70 I C 777=50 Cal 1=49 I A 366 (P C).

*** A. I. R. 1939 Sind 48**

DAVIS J. C.

Tarumal Ghandumal — Applicant.

v.

Ismail Haji Saleh — Opponent.

Criminal Revn. Appln. No. 10 of 1938, Decided on 25th July 1938, from order of City Magistrate, Karachi, D/- 3rd February 1938.

*** Penal Code (1860), Ss. 403, 406 and 417 — Potato-grower mortgaging his crop to commission agent to secure to latter sale of crop and his commission—Sale by grower to another agent in breach of this contract does not amount to offence under S. 403 or S. 406 or S. 417.**

A commission agent advanced a sum to a grower of potatoes upon the mortgage of his crop. The mortgage was not security for repayment of money advanced but to secure to the commission agent the sale of crop and his commission. The grower in breach of this agreement sent the potatoes for sale to another agent :

Held that the grower could not be said to have committed criminal misappropriation, criminal breach of trust or cheating. [P 48 C 2]

Kundanmal Dayaram — *for Applicant.*

Hatim B. Tayebji — *for the Crown.*

Order. — This is an application in revision against an order of the City Magistrate dismissing the applicant's complaint of offences under Ss. 403 and 406 and other Sections of the Penal Code. It appears that the applicant advanced Rs. 200 to the opponent upon mortgage of his potato crop but the mortgage was not security for repayment of the money advanced but was to secure to the mortgagee the sale of the crop and his commission. There is indeed authority for the argument of the learned advocate for the applicant that goods present and future may in India be subject to a simple mortgage, 7 S L R 61,[1] and that the mortgagee has a lien or charge upon such goods; but no authority has been cited to me to support the argument that a grower of potatoes who commits a breach of a contract of this kind commits a criminal offence. Assuming the grower sent his potatoes for sale to another agent in breach of his agreement, it does not appear to me that he has committed criminal misappropriation, criminal breach of trust or cheating. I, therefore, dismiss this revision application.

D.S./R.K. *Application dismissed.*

1. David Sassoon & Co. v. National Bank of India Ltd., Karachi, (1913) 7 S L R 61 = 21 I C 520.

*** A. I. R. 1939 Sind 49**

DAVIS J. C. AND WESTON J.

Lekhraj Sirumal and others — Appellants.

v.

Khubchand and another—Respondents.

Second Appeal No. 50 of 1935, Decided on 29th July 1938, against Judgment of Assistant Judge, Nawabshah, D/- 28th September 1935.

*** Limitation Act (1908), Article 182 (7) — Instalment decree containing default clause that upon non-payment of instalments on due dates whole balance would be payable—Decree-holder failing to enforce default clause—He cannot be called upon to prove condonation of default clause—His right to instalments due to him within three years of application for execution is not barred.**

Where an instalment decree contains a default clause that if any instalment is not paid on due date the whole of the remaining amount would be payable at once, the default clause is for the benefit of the decree-holder and it is at his option to take or not to take the advantage of it. He cannot be compelled to take advantage of the default clause on pain of losing further instalments due to him. There is no reason why the judgment-debtor seeking to take advantage of his own default should be allowed to require the decree-holder to prove condonation of the default. If the decree-holder says that he did condone the default, then, in the absence of evidence or conduct by the decree-holder proving the contrary, his statement should be accepted. Hence where the decree-holder has failed to take advantage of the default clause, his right to recover instalments due to him within three years of the application for execution is not barred: *A I R 1932 P C 207, Applied; A I R 1936 Bom 17 and A I R 1928 All 629, Rel. on; Case law referred.* [P 51 C 1, 2; P 52 C 1]

Manghanmal Bhojraj — *for Appellants.*

Pahlajsingh B. Advani — *for Respondents.*

Davis J. C. — This is an appeal against the judgment of the Assistant Judge, Nawabshah, who set aside an order of the Subordinate Judge of Naushahro Feroze, in which he ordered execution to proceed upon a decree wherein it was provided that Rs. 600 should be payable in instalments of Rs. 75 on 1st July and 1st January of each year, and the decree contained a default clause, the proper interpretation of which has been the subject of argument in this appeal. It was provided in the decree that if any two instalments were not paid on the due date, the defendants were to pay the remaining amount unpaid at once.

Now, both the lower Courts dealt with this case from the point of view whether there was waiver or not, it being the view of the Courts that if upon the facts the judgment-creditor had waived his right to enforce payment of the balance due on default of the payment of the two instalments, then the execution application was in time, because time then ran not from the date of the last default which made the decree enforceable at once, but from the date of payment of the last instalment due, and if that was so, the execution application would be in time. The Subordinate Judge was of the opinion that as the decree-holder had accepted overdue instalments he had waived his right to enforce payment of the lump sum. He had held his hand and not sought execution to obtain payment of the balance, and therefore impliedly he had waived his right to do so, and the Judge relied upon the case cited in 14 S L R 128.[1] But the Judge in the lower Appellate Court took a different view; he came to the conclusion that the case in 14 S L R 128[1] did not apply, and the case in 11 S L R 120[2] did. He was of the opinion that before a decree-holder could claim that he had waived his right to enforce the payment of the sum due under the decree in default of payment of instalments, he must prove it clearly, for, it was to be a ground for reviving limitation; the burden of proof therefore lay upon him who so alleged. He must in his application specify how time is extended and prove it. Mere acceptance of overdue instalments is not in itself proof of waiver, and the learned Judge referred to two cases of this Court, 11 S L R 120[2] and A I R 1933 Sind 365,[3] and a Bombay case, 27 Bom 1.[4] He distinguished the case in 14 S L R 128,[1] and was of the opinion that the case in 11 S L R 120[2] was the case in point.

Speaking for myself, apart from the authority, I should find it difficult to see how the right of a judgment-creditor to obtain payments of instalments of the debt due to him within three years of the date of his application in execution is dependent upon his proving that he has waived the right to enforce a condition in the decree which was in his favour, and that if

1. Bahadur Dino v. Galomal, (1920) 7 A I R Sind 25=59 I C 607=14 S L R 128.
2. Bhawandas Feroomal v. Menghraj Tharumal, (1918) 5 A I R Sind 68 = 45 I C 324 = 11 S L R 120.
3. Kalliandas Balchand v. Mahomedkhan, (1933) 20 A I R Sind 365=147 I C 30.
4. Kashiram v. Pandu, (1903) 27 Bom 1=4 Bom L R 688.

he did not prove, by evidence other than the acceptance of overdue instalments or his failure to enforce the condition in his favour, his intention to waive his right to recover the balance due, he would lose, as a result of his forbearance, money due to him under the decree and not otherwise barred by limitation. But undoubtedly, there is authority, both of this Court and in the Bombay High Court, to this effect. Reference may be made to the cases, 8 S L R 63,[5] 14 S L R 128[1] and A I R 1933 Sind 365,[3] while the Bombay cases on the point are referred to in the judgment of Broomfield J., in 38 Bom L R 492.[6] These judgments appear to be based upon the argument that when under an instalment decree with a default clause instalments have not been paid and the default clause can be brought into operation, the decree ceases to be an instalment decree; it becomes a decree from the date of default for the payment of a lump sum and time runs from that default; and in order that the decree may retain for the benefit of the decree-holder the nature of an instalment decree, the decree-holder must show unequivocally that he so intended, in other words that he had waived his right to enforce payment of the balance due under the decree on default. But as a result of the judgment of the Privy Council in 59 I A 376=A I R 1932 P C 207,[7] discussed in 29 S L R 361,[8] these instalment decrees are now regarded in another light, for as in 59 I A 376[7] their Lordships of the Privy Council held that as the default clause in the mortgage deed was a clause in favour of the mortgagee which he might or might not enforce, so he was not bound to enforce it; and time ran not from the date the default clause might have been brought into operation, but from the date when the mortgage expired and the principal sum became due; and this principle was applied by the Bombay High Court in the case to which I have above referred, and in 60 Bom 62,[9] to default clauses in decrees where the decretal sum is payable in instalments. Beaumont C. J. said (page 66):

> The question as to the effect of a default clause has recently been discussed at length by their Lordships of the Privy Council in 59 I A 376.[7] That was a case of moneys payable by instalments under a mortgage bond containing a default clause and it was held that the mortgage bond did not 'become due' within the meaning of Article 132, Limitation Act, until both the mortgagor's right to redeem and the mortgagee's right to enforce his security had accrued Their Lordships pointed out that the default clause was inserted for the benefit of the mortgagee, that he might or might not take advantage of it, and that it did not lie in the mouth of the mortgagor to insist that the mortgagee must take advantage of the mortgagor's default. The Privy Council overruled various cases in which a contrary view had prevailed.
>
> In the present case, I think the Article of the Limitation Act applicable to the case is Article 182(7) which provides that time runs for the execution of a decree or order of any Civil Court 'where the application is to enforce any payment which the decree or order directs to be made at a certain date', from such date. In the present case, the decree makes the money payable on the three dates specified for payment of the instalments, and those dates are certain. But, as pointed out in 51 All 237[10] it cannot be said that in a decree of this sort, there is any certain date for payment of the whole amount in default of payment of any instalment. There is no certainty that there will be default. In terms therefore the relevant Article of the Limitation Act is not a bar to the last two instalments, and moreover, I think the reasoning of the Privy Council, in the case to which I have just referred, applies with equal force to a default clause in a money decree, such clause being inserted for the benefit of the creditor, and the creditor being free to take advantage of the privilege or not as he thinks best.

In the case now before us, the decree-holder gave up all those instalments which had not been paid and which were due more than three years prior to the date of his execution application. He claimed the amount of four instalments from 1st July 1930 to 1st January 1932. To this it was contended that admittedly the default clause came into operation before the first of these dates and more than three years before the date of the execution application and as the judgment-creditor had not proved that he had waived his right to enforce the balance due, his right to enforce payment by instalments had gone, as had his right to enforce payment for the balance due in a lump sum. But, speaking for my

5. Kimatrai v. Wadero Sher Mahomed, (1914) 1 A I R Sind 60=25 I C 938=8 S L R 63.
6. Bomatu Bhadu v. Govardhandas Nanabhai, (1936) 23 A I R Bom 268=163 I C 937 = 38 Bom L R 492.
7. Lasa Din v. Mt. Gulab Kunwar, (1932) 19 A I R P C 207=138 I C 779=7 Luck 442 = 59 I A 376=34 Bom L R 1600 (P C).
8. Nenumal Jiamal v. Chandumal Assanmal, (1936) 23 A I R Sind 14 = 161 I C 518 = 29 S L R 361.
9. Veherbhai Vallabhai v. Javer Soma, (1936) 23 A I R Bom 17=160 I C 527=60 Bom 62=37 Bom L R 942.
10. Joti Prasad v. Sri Chand, (1928) 15 A I R All 629 = 112 I C 73 = 51 All 237 = 26 A L J 966 (F B).

self, I think it clear that the reasoning of the Privy Council in the case of a default clause in the mortgage deed applies with equal force to the case of the default clause in an instalment decree. The default clause was introduced into the decree not for the advantage of the judgment-debtor but for the advantage of the judgment-creditor. I do not see how he can be compelled to take advantage of this clause which is in his favour on pain of losing further instalments due to him, this payment of instalments being not for his benefit at all but for the benefit of the judgment-debtor. It does not lie in the mouth of the judgment-debtor to complain if his creditor is not harsh. It might be said that the view I take is in conflict with the view taken by this Court in previous cases. But the Court in these cases had not before it the decision of the Privy Council in A I R 1932 P C 207[7] to which I have referred; this aspect of the matter was not considered. There is, of course, this difference in the two cases, that the default clause in the mortgage decree became enforceable on failure to pay interest and the default clause in the instalment decree becomes payable on failure to pay instalments as agreed, but the same reasoning appears to me applies equally to a default clause of this kind in an instalment decree as to a default clause in a mortgage decree. It may be, as Broomfield J., points out, that the terms of the decree itself may make it clear that the decree-holder must enforce the default clause as soon as default occurs when time may run against him from that date, but that was not the form of the decrees in the cases before him; it is not the form of the decree in this case, and it is not the usual form.

I think therefore the learned appellate Judge was wrong, that the appeal should be allowed and the order of the Subordinate Judge, though for different reasons, be restored with costs throughout. Order accordingly.

Weston J. — I concur. The cases such as 11 S L R 120[2] in which it appears to have been held that the decree-holder of a money instalment decree with a default clause who wishes to recover instalments due under the decree more than three years (or six years in the case of a registered decree) after a default must prove affirmatively that he waived his option to recover the full amount of the decree upon default, are clearly based upon Article 75, Limitation Act. This Article refers only to instalment promissory notes or bonds with default clauses, but its language seems to have been taken as being of universal application. Suits on mortgages, where the principal is payable by instalments with a default clause or where there is a default clause operating on failure to pay interest, are governed by Art. 132, Limitation Act, but it was similarly held by the Allahabad High Court in 37 All 400[11] and 45 All 27[12] and also by certain other High Courts that on default the principal became due and limitation therefore ran against the mortgagee from the date of default by the mortgagor. This view has been negatived by the Privy Council in 34 Bom L R 1600[7] in which it was held that the provision as to default being exclusively for the benefit of the mortgagee, the mortgage money does not "become due" within the meaning of Art. 132 until both the mortgagor's right to redeem and the mortgagee's right to enforce the security have accrued.

Possibly, some points of distinction may exist between a suit on an instalment mortgage bond and execution of the ordinary instalment money decree with a default clause. But the Privy Council ruling in 34 Bom L R 1600[7] at least must be taken to have overruled the view that the language of Art. 75 is to be read into other Articles of the Limitation Act governing cases in which there are instalments and default clauses. In instalment money decrees, such as the present, limitation is governed by Art. 182 (7) which lays down that for execution of a decree the period of limitation is to be computed, when the application is to enforce any payment which the decree directs to be made at a certain date, from such date. As pointed out in 51 All 237[10] at p. 252 in an instalment decree with the ordinary default clause such a decree cannot be said to fix any 'certain dates' other than those of the instalments, for default may or may not be made. I would add that if, as in the present case, the default clause merely provides that the whole amount of the decree is "payable" on default then an option exists to the decree-holder in respect of the penalty on default. He may

11. Gaya Din v. Jhuman Lal, (1915) 2 A I R All 189=28 I C 910=37 All 400=13 A L J 510 (F B).
12. Shib Dayal v. Meharban, (1923) 10 A I R All 1=69 I C 981=45 All 27=20 A L J 819 (F B).

enforce it or he may not and the "certain date" becomes still more uncertain. Once the construction of Art. 75 is not taken as controlling Article 182 (7), there remains in my opinion no reason why the judgment-debtor seeking to take advantage of his own default should be allowed to require a decree-holder to prove condonation of the default. If the decree-holder says that he did condone the default then in the absence of any evidence or conduct by the decree-holder proving the contrary his statement should be accepted. In other words, it should be for the judgment-debtor to establish that by reason of his default limitation has begun to run in his favour. In the present case there is no such evidence or conduct and I would hold that the "certain dates" are the dates when the instalments claimed in the present execution application were due under the terms of the decree and that therefore the execution application is not barred under Article 182 (7). For these reasons I concur in the order passed by the learned Judicial Commissioner.

D.S./R.K. *Appeal allowed.*

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* A. I. R. 1939 Sind 52

TYABJI J.

In re Mrs. Daisy Kemp — Applicant.

Misc. Appln. No. 24 of 1938, Decided on 15th September 1938.

*** Provident Funds Act (1925), S. 5 (2) — Amount of Provident Fund standing in name of depositor remains his property till his death — It does not vest in nominee at time of nomination — Nominee takes by succession and is not entitled to get succession certificate without payment of court-fee payable under Art. 12, Court-fees Act.**

The amount of the Provident Fund standing to the credit of a subscriber or depositor under the Provident Funds Act remains his property till his death and does not vest and become the property of the nominee at the time of nomination. The nominee takes by succession after the death of the depositor and consequently is not entitled to get a succession certificate in respect of the amount without payment of the court-fee payable under Article 12, Court-fees Act : *A I R 1930 Oudh 145 and A I R 1933 Sind 101, Foll.; A I R 1936 Mad 477, Dissent.; A I R 1925 Nag 108, Expl.; A I R 1926 Nag 306 and A I R 1930 Cal 252, Disting.; Case law discussed.* [P 56 C 1, 2; P 57 C 1]

H. T. Raymond — *for Applicant.*

Parsram Tolaram, Govt. Pleader — *for Secretary of State.*

Order. — The applicant Mrs. Kemp a sister of the deceased Joseph Henry Jones has applied under Sec. 373, Succession Act, and Sec. 5 (2), Provident Funds Act, 1925, for a succession certificate to entitle her to receive a sum of Rs. 30,104-2-0 standing to the credit of the deceased in the North Western Railway Provident Fund. The applicant is a nominee, duly nominated by the deceased to receive this amount on his death. On filing the application, the applicant was required to pay a court-fee of Rs. 786. She has deposited this amount under protest, and claims that the fee is not payable by her, and the question I have to decide is whether her contention is right. The position contended for by her counsel before me is, that she is required to produce such a certificate before the amount can be paid to her by the railway under S. 4 (1), C (i), Provident Funds Act, and that she is entitled to such a certificate, but that she is not liable to pay any court-fee under Article 12, Court-fees Act, which, it is contended, has no application here, because, the applicant, from the moment of her nomination, acquired an absolute title to the amount in question, which was therefore no part of the estate of the deceased at the time of his death, and the debts and securities referred to in Art. 12, are debts and securities which are part of the property of the deceased at the time of his death.

Now obviously probate, letters of administration, and succession certificates relate and can only relate to the estate of a deceased person left at the time of his death, and can only be granted to a person claiming on succession to be entitled to the effects of the deceased person or to some part thereof. It would be an utter absurdity to claim a certificate, and call it a succession certificate, in respect of a debt or security which was not a part of the estate of the deceased, and the implication, in the argument of the learned counsel stated above, which I am asked to consider seriously, that the Provident Funds Act itself requires the production by a nominee of such a "succession certificate" in respect of property, which under the Act itself had ceased to be the property of the deceased, having passed over to the nominee at the time of the nomination, in respect of which therefore no succession occurred at the time of the death of the deceased, is, it is contended, based on decisions of Courts of high authority. If one turns to the Provident Funds Act, 1925 itself, the terms used in the Act clearly make it impossible to regard

deposits in the Provident Fund as anything else but the property of the depositor up to the time of his death. Under S. 2 (2) :

'Provident Fund' means a fund in which subscriptions or deposits of any class or classes of employees are received and held on their individual accounts, and includes any contributions credited in respect of such subscriptions or deposits and any interest or increment accruing on such subscriptions, deposits, or contributions under the rules of the fund,

and in Ss. 3, 4 and 5, the deposit is referred to as the sum standing to the credit of the subscriber or depositor, which would include the interest and increments accruing on such subscriptions under the rules of the fund. How these sums held on their individual accounts and standing to the credit of the subscribers or depositors, are to be dealt with on the death of the subscribers or depositors, is laid down in S. 4, which has to be read with Ss. 3 and 5.

Subject to the rights of assignees on assignments made before the commencement of the Act, which may affect the rights of nominees other than widows and children, the Act lays down that where the nominees are dependants within the meaning of the definition in Sec. 2 (e), the dependants become entitled to receive the amounts, no matter how large or small, immediately upon the death of the depositor or subscriber, without having to obtain probate or letters of administration or succession certificates. Under S. 3 (2) such sums vest in such dependants. Even where the nominee is not a dependant within the meaning of S. 2 (e), S. 5 confers on him an absolute right to receive the amount on the death of the subscriber or depositor, subject to the grant of probate or letters of administration or a succession certificate where the amount exceeds Rs. 5000. In the absence of a valid nomination under the rules, the officer, whose duty it is to make the payment, is authorized to pay the amount to any person appearing to him to be entitled to receive it, if the amount does not exceed Rs. 5000, otherwise the amount is payable to a claimant on production of probate, letters of administration or a succession certificate.

It is clear from the above that in every case the sum standing to the credit of the subscriber or depositor in his individual account remains the property of the deceased until his death. In no case where a nomination has been validly made can the sum be paid to anybody but the nominee. The Act lays down in what cases the nominees or other claimants are entitled to payment without a grant from the Court, and in what cases such a grant is necessary. Whether there be a nominee or not, and whether a grant is required or not, a succession occurs in respect of the sum standing to the credit of the deceased at the time of his death. There is thus no justification whatever for ascribing to the Act the absurdity of requiring the grant of a succession certificate or letters of administration or probate, in respect of property which under the provisions of the Act itself had been transferred to the claimant during the life of the deceased, and in respect of which the claimant's title had already before the death of the deceased vested in the claimant. The type of certificate, to which, according to the learned counsel for the applicant the applicant is entitled, is in effect not a succession certificate at all, but a decree of this Court declaring the title of the applicant to the Provident Fund and also entitling the applicant to get possession of the property, on which, it is further contended, no court-fee is payable, by reason of the very fact that what the Provident Funds Act describes as a succession certificate, is not one in reality. The whole argument shows what a *reductio ad absurdum* one would necessarily be led into by accepting the proposition, that the nominee acquires a vested title to the Provident Fund on nomination, as correct, and an argument of this character could not have been entertained for one moment but for the fact that some ground for it has been furnished by a decision of the Madras High Court in 59 Mad 855[1] to which I shall refer later.

Further, if a succession certificate is applied for at all, whether the applicant is required to obtain such a certificate under the Provident Funds Act or not, it is clear that under Article 12, Court-fees Act, a fee at the prescribed rate is payable on the amount of the debt or security to be specified in the certificate, unless the applicant can show that she is exempted from such fee by some provision of law. S. 19, Court-fees Act, which enumerates the exemptions, does not mention succession certificates granted under the Succession Act, which shows that such certificates are never exempt from the payment of the court-fee

1. Mon Singh v. Mothi Bai, (1936) 23 A I R Mad 477=162 I C 956 = 59 Mad 855 = 71 M L J 790.

under Article 12. An attempt was made to show that exemptions not mentioned in Sec. 19 had in some cases been allowed by reason of the provisions of the Provident Funds Act, and I was referred to A I R 1925 Nag 108,[2] A I R 1926 Nag 306[3] and A I R 1930 Cal 252.[4] Very great reliance was placed on the last mentioned of these cases, a decision of the Calcutta High Court (Ghose and Panton JJ.) in which the Provident Funds Act, 1925, was considered but I am unable to see how this case can be said to support the argument advanced. The widow of a deceased employee of the Eastern Bengal Railway had applied for letters of administration of the estate of her husband. There was a sum standing to the credit of her husband in the Railway Provident Fund, which under a nomination made by the deceased was payable to the widow, who was a dependant within the meaning of S. 2 (e). An allegation had been made that the railway were not paying the amount to the widow without her taking out letters of administration. The learned Judges in their judgment observed that it would be wrong on the part of the railway not to pay the amount to her, which was clearly payable to her under Sec. 4 without any letters of administration, and having so stated in the judgment, granted the widow letters of administration in respect of the deceased's property excluding the Railway Provident Fund, in respect of which no letters were needed under the Provident Funds Act. This was not therefore a case of exemption of court-fee at all, but a case where no grant was required or made in respect of the Provident Fund; the learned Judges pointed out that the widow had not applied for letters of administration in relation to the Provident Fund and observed:

> It cannot therefore be said that this Provident Fund money was included in the petition as assets left by the deceased so as to fall within Article 11, Court-fees Act, and be liable to probate duty.

The Provident Fund was an asset of the deceased which was excluded from the petition because it did not need to be included in it by reason of S. 4, Provident Funds Act. The words quoted above clearly are not meant to imply that the Provident Fund did not form any part of the assets of the deceased at all, but that it did not form part of those assets, in respect of which letters of administration were required, and which therefore needed to be included in the petition as assets falling within the purview of Art. 11 and as such liable to probate duty. The judgment read as a whole makes this very clear. The other two cases are both decisions of Hallifax A. J. C., Nagpur, prior to the passing of the Provident Funds Act of 1925, and are based upon a Bengal Revenue Circular, as a result of which, it was held, Provident Funds were exempted from court duty. In both cases the applicants for letters of administration were held to be entitled to obtain the amounts of the Provident Fund without letters of administration, as nominees in whom the amounts had vested under the Provident Funds Act of 1895, but, in view of the representations made, that the authorities administering the fund refused to make the payments without grants from the Court, the learned Judge while holding that the amounts did not form part of the estates to be administered permitted the inclusion of the items in the letters, but exempted the items from court-fees under the Revenue Circular mentioned. These cases therefore have no application whatever to the case before me, and this contention of the applicant is also entirely untenable.

I have next to consider the case law on the main point urged before me, that in this case the Provident Fund was not a part of the assets of the deceased at his death; but the property of the applicant herself which had vested in her at the time of the nomination. There have been a very large number of cases decided under the Provident Funds Acts of 1897 and 1925, and although the rights given to nominees under the Act of 1925 have so altered the law as to make cases decided under the old Act inapplicable on many very important points, the rights of nominees under both Acts accrue from the date of the death of the subscriber, and except in the Madras case to be referred to later, no attempt has ever been made, so far as I am able to see, to suggest that the act of nomination itself operated as an immediate transfer resulting in a title vesting in the nominee. Most of these cases regard nomination as the exercise of a testamentary power, and a notorious conflict has arisen

2. Agnes Mary De Santos v. James William De Santos, (1925) 12 A I R Nag 108=82 I C 128.
3. In re Digambar, (1926) 13 A I R Nag 306=92 I C 525.
4. Secretary of State v. Mary Murray, (1930) 17 A I R Cal 252=123 I C 646=33 C W N 1148.

between the various Courts with regard to the effect of the Act on nominations made by Muslims or Buddhists, whose testamentary powers under their personal law are subject to very important limitations. While the Sind, 18 S L R 311[5] and A I R 1935 Sind 73,[6] and Lahore, A I R 1928 Lah 773,[7] Courts have taken the view that in the case of Muslims, dependants as well as other nominees receive the Provident Fund on the death of the subscriber without prejudice to the rights of other heirs under Mahomedan law, an opposite view has been taken by the Rangoon, 6 Rang 682,[8] Bombay, A I R 1935 Bom 234,[9] and Oudh, A I R 1936 Oudh 32,[10] Courts. Such a controversy would obviously have been impossible but for the fact that all these Courts have regarded the sums to the credit of deceased person in the Provident Fund to be the property of the deceased until his death, and the right of the nominee to be the right of a person entitled to such property under a testamentary disposition, and not the right of a transferee taking a vested interest during the life of the deceased. There are also direct cases on the point.

The liability of a nominee who was not a dependant (within the meaning of the Act) to pay the court-fee on the amount to which she became entitled on the death of the subscriber was the subject of a Full Bench decision of the Oudh Chief Court in 5 Luck 712.[11] The question raised in that case was whether the widowed sister of an employee in the East Indian Railway, who was not only the sole legatee and beneficiary of all the property of her deceased brother under a will, for a probate of which she had applied, but also the nominee of the sum in the Railway Provident Fund to the credit of the deceased (exceeding Rs. 5000), was liable to pay probate duty on the amount of the Provident Fund. The counsel who represented the applicant in that case, doubtless because he had carefully acquainted himself with the provisions of the Provident Funds Act, was not enterprising enough to claim that the provident fund had passed over to the applicant by nomination during the life-time of the deceased. The argument addressed to the Court on her behalf was that under the provisions of the Provident Funds Act, the rights of the deceased to deal with the deposits in the Provident Fund standing to his credit had been so restricted, that the sum in the hands of the railway had in effect ceased to be his "property" within the meaning of Article 11, Court-fees Act. The unanimous decision of the learned Judges in that case was that inspite of the limitations imposed by the Act, the sum nonetheless remained the property of the deceased and the applicant was therefore liable to pay probate duty in respect of the sum. In 26 S L R 429,[12] Wild J. C. approved of the above Oudh decision, in which, as he said, "it was held that court-fee was payable on the deceased's Provident Fund as being his property."

It is true that the applicant in that case was not a person duly nominated and the question raised concerned the general nature of a Provident Fund and whether the deposits in such funds were chargeable as property of the deceased. The only case which supports the applicant's contention is a Bench decision of the Madras High Court, 59 Mad 855[1] (*per* Sir Owen Beasley C. J. and Stodart J.). The facts in that case briefly were that, one Lakshman Singh, an employee of the Madras and S. M. Railway had died in 1931 with a sum standing to his credit in the Railway Provident Fund. He had long before nominated one Bhavani Singh to receive the amount on his death but Bhavani Singh had predeceased him in 1921. No later nomination had been made. On the death of Lakshman Singh two rival claims to obtain a succession certificate in respect of the sum were set up : one by appellant Mon Singh, the heir of Lakshman Singh, and the other by Mothi Bai, the widow of Bhavani Singh as the heir of the pre-deceased nominee. The learned Judges confirming the grant made by the lower Court in favour of Mothi Bai, held that the nomination of Bhavani Singh had given him a

5. Aimai v. Awabai Dhanji Shaw, (1924) 11 A I R Sind 57=76 I C 739=18 S L R 311.
6. Hayatuddin v. Mt. Rahiman, (1935) 22 A I R Sind 73=159 I C 427.
7. Hardial v. Secretary, Dev Samaj, (1928) 15 A I R Lah 773=108 I C 894.
8. Ma Kyway v. Mi Lay, (1929) 16 A I R Rang 54=115 I C 909=6 Rang 682.
9. Ahmad Abdul Razaak v. Jamala Bint Mehdi, (1935) 22 A I R Bom 234=156 I C 630=59 Bom 475=37 Bom L R 370.
10. Mahomed Naim v. Mt. Munimunnissa, (1936) 23 A I R Oudh 32=159 I C 596=11 Luck 611 =1935 O W N 1296 (F B).
11. N. M. Robinson v. H. H. Robinson, (1930) 17 A I R Oudh 145=122 I C 322=5 Luck 712 =7 O W N 824 (F B).
12. In re Coses Fernandez, (1933) 20 A I R Sind 101=142 I C 359=26 S L R 429.

vested title to the sum which upon the death of Bhavani Singh in 1921 had passed to his widow Mothi Bai, and that Mothi Bai was therefore entitled to the sum on the death of Lakshman Singh in preference to the heirs of Lakshman Singh. The learned Judges in the case addressed themselves to the question, whether the absolute right to receive (under Sec. 5) meant a vested right in the money which passed to the heir of the nominee at his death, and answered the question in the affirmative. This decision purports to be based on the provisions of the Provident Funds Act, 1925, but with the utmost respect I find it impossible to appreciate the reasoning on which the decision is based which appears to me to be clearly in contravention of the plain terms of the Act.

In the first place, it is clear that inspite of any nominations made by a subscriber the amount to the credit of the subscriber at a certain stage may become payable to the subscriber himself who may withdraw the same when entitled to do so under the rules. As a matter of fact this frequently happens. In such cases the nominee may get nothing. The Act also permits the subscriber at his will to cancel or vary or make a new nomination at any time provided this is done in the manner prescribed under the rules. In view of these facts, it is impossible to regard the right of a nominee during the life of the subscriber as anything more than a purely contingent right and to hold that under such circumstances a title to receive the sum absolutely vests in the nominee at the time of the nomination is with all respect clearly to act contrary to a well-established legal principle, and to use the word "vests" in a sense distinctly contrary to its accepted meaning. The learned Judges did not consider this. Nor did they notice that under Secs. 3 and 5 no right of any kind whatever vested in or accrued to any dependant or nominee before the death of the subscriber. They did not note that the sum throughout spoken of as standing to the credit of the subscriber in his individual account could not be regarded as anything else but the property of the deceased. They did not consider what an absurdity it would be as pointed out above for the Act to require and for the Courts to grant the succession certificates mentioned in Sec. 4 if what the learned Judges decided were to be acted upon as the true result of the Act. Also when the appellant's counsel pointed out to the learned Judges the very marked and obviously deliberate difference in the terms used in the Act, in Sec. 3 under which a duly nominated dependant acquired a vested title to the sum on the death of the subscriber, and in Sec. 5 under which a nominee only acquired an "absolute right to receive" the learned Judges satisfied themselves with the remark :

> The fact that the word "vests" occurs in Sec. 3 does not mean that an absolute right cannot be conferred by the provisions of a Section in which the word is not used,

which can hardly be regarded as a convincing reason for disregarding the difference. In construing the words, "right to receive the whole or any part of each sum on the death of the subscriber or depositor, (in Section 5), as equivalent to a vested, absolute title in the sum, not on the death of the subscriber but at the time of the nomination the learned Judges purport to rely inter alia on two passages from decisions of the English Courts under the English Friendly Societies Act, 1875. But, even the English Act (which did not have to take into consideration the personal law of parties such, as Mahomedan law, which might prevent or limit their power to make valid testamentary dispositions by way of such nominations) does not confer an absolute title on the nominee even on the subscriber's death. Two passages from Halsbury's Laws of England may be cited in this connexion. In Vol. XV, Para. 629, page 350 it is stated :

> Though the Society and trustees are discharged if the payment is made in accordance with the provisions of the Act of 1896, the statute does not confer an absolute right on the nominee;

and in Para. 639, page 353 of the same volume :

> There is a prima facie presumption that the nominee is intended to take beneficially but it is a question depending upon evidence and the personal representative of the member may in a proper case demand repayment from the nominee, subject to sums expended by the latter for doctor's fees and funeral expenses.

In view of what has been stated above I have no doubt that the view expressed in 5 Luck 712[11] and approved of in 26 S L R 429[12] and implicit in most of the cases under the Provident Funds Act, that the sums to the credit of a subscriber or depositor remain his property till his death and that the nominee takes by succession under the Provident Funds Act is correct and not that in 59 Mad 855.[1] The result is that in my opinion the applicant

has not succeeded in showing that she can get the succession certificate without payment of the court-fee under Art. 12. She must therefore apply the sum deposited by her to the payment of the proper court-fee.

R.M./R.K. *Order accordingly.*

A. I. R. 1939 Sind 57

DAVIS J. C. AND LOBO J.

Haji Khudu and another — Appellants.

v.

Emperor.

Criminal Appeal No. 280 of 1936, Decided on 23rd April 1937, against conviction and sentences passed by Addl. Sess. Judge, Hyderabad (Sind), D/- 20th October 1936.

(a) Penal Code (1860), Ss. 299, 300 — In deciding whether offence is culpable homicide amounting to or not amounting to murder Court should turn to the words of Sections themselves, rather than to judicial pronouncements—Distinction between the two pointed out—Good working rule to the judiciary in the Province provided.

(Per *Davis J. C.*)—Generally speaking, the proposition that murder is killing with the intention of killing or inflicting a fatal injury will cover broadly Cls. 1, 2 and 3 of S. 300, I. P. C. Cases under Cl. 4 of S. 300 are so rare that Judges can in each case well refer to the words of that clause and Illus. (d) as a sufficient guide. Sessions Judges, while deciding whether a particular offence is culpable homicide amounting to murder or not amounting to murder, should not allow themselves to be confused by overmuch analysis but should turn to the words of the law themselves. They should look at S. 300. If the killing comes within any one of the four clauses, it is, exceptions apart, murder. If, on referring to Sec. 300, the Judge is of the opinion that the killing comes within one of the four clauses, he can then refer to S. 299. If the killing comes within part. 2 of S. 299, I. P. C., that which relates to the intention of causing a bodily injury likely to cause death, it comes under S. 304, Part 1, and if there is no intention but only knowledge, that is to say, if there is no intention to cause death or a bodily injury likely to cause death but only knowledge that death is likely to be caused, the offence is under Sec. 304, Part 2, I. P. C. Cases under exceptions to S. 300 will fall under S. 304, Part 1. [P 60 C 1, 2]

In murder cases, as in other cases, a man's intentions are to be judged by his acts in relation to the surrounding circumstances, but the provisions of the law of culpable homicide in India are merciful. The burden of proof in these cases, as in other cases, lies on the prosecution and the distinction between knowledge and intention made in S. 299 and again in S. 304 in Part 1 and in Part 2, allows the Judge when he thinks that the prosecution have not proved intention but only knowledge to convict of the lesser offence. Killing may be murder although it is not premeditated and in order to determine the intention of the accused it is not sufficient to judge of the intention when the accused left their houses but it is necessary to judge the intention of the accused when they struck the fatal blow. [P 61 C 1]

(Per *Lobo J.*) — If Judges would lay more emphasis on the wording of the Sections themselves and less on judicial pronouncements which are almost invariably covered by the facts of the particular case, there would be no room for confusion. If death is caused by an act done with the intention of causing death or done with the intention of causing a fatal injury, the offence is murder and is covered by Cl. 1 or Cl. 3 of S. 300. Cl. 2 of S. 300 is clearly intended to cover what may conveniently be classified as "spleen cases" such as are referred to in Ill. (b) to Section 300. A case under Cl. 4 of Sec. 300 is very unusual and Ill. (d) is a sufficient indication to what class of cases it is intended to apply. Ordinarily, therefore the exceptions to S. 300 apart, the test to be applied in any particular case of culpable homicide is whether the intention specified in Cl. 1 or Cl. 3 of S. 300 is established on the evidence and circumstances. If it is, the offence is murder; if it is not, the offence is culpable homicide. If the offence is culpable homicide and the offender's intention was to cause such bodily injury as is likely to cause death (*secondly* of definition in S. 299), the offence is punishable under Part 1 of S. 304. If the offender had not such intention but had knowledge that his act was likely to cause death (*thirdly* of definition in S. 299), the offence is punishable under Part 2 of Section 304. [P 61 C 2]

Where an old woman had been killed in her own house by the accused armed with axes when she attempted to prevent them from kidnapping her grand-daughter and the medical evidence showed that she had eight incised wounds, each of three of which was sufficient in the ordinary course of nature to cause death and there was no question of any general or special exception:

Held that the offence was clearly one of culpable homicide amounting to murder and fell under Sec. 300 "*Thirdly*": *1 Bom 342 and A I R 1934 Sind 145, Commented upon.* [P 61 C 1]

(b) Criminal Trial—Revision — High Court cannot convert acquittal into conviction.

A High Court cannot even in revision convert an acquittal, even what has been called a partial acquittal, into a conviction: *A I R 1928 P C 254, Foll.* [P 59 C 1]

D. N. O'Sullivan — *for Appellants.*

Partabrai D. Punwani — *for the Crown.*

Davis J. C.—The two accused in this case, Haji and Faizu, have been convicted of an offence under S. 304 (1), I. P. C., by the Additional Sessions Judge, Hyderabad, and sentenced to seven years rigorous imprisonment each. One Mahmood who was tried with them was acquitted. The appellants were also charged with kidnapping and both were acquitted on these charges.

The case for the prosecution is that Faizu was in love with one Siani, the grand-daughter of one Tillu whose wife Mt. Dhano was killed and some twenty days before the offence Siani had run away with Faizu, but she was brought back and

betrothed to a cousin. She was in fact sitting in 'vanah' preparatory to the marriage when, on 13th April 1936, about noon, Faizu, accompanied by Haji and Mahmood, came to the house. Mahmood remained waiting outside the hedge while Faizu and Haji went inside to fetch the girl. But Mt. Dhano, the girl's grandmother, resisted and she was cut down by Faizu and Haji with axes: the girl Siani was accidentally injured in the struggle but seeing the harm they had done, the appellants fled. But Tillu, who had gone that day to fetch a goat, returning about that time saw the appellants, and Sumri, Siani's sister, a little girl of nine, who was playing near, saw Mahmood outside the hedge and heard the cries and went and fetched her father Sodho who with his wives was working in the fields. Tillu went with Mirkhan, the Nekmard of the village, to Samrao, five miles away and made complaint, and at 5 P. M. the Sub-Inspector came to the village. The three accused were arrested by Mirkhan and produced before the police at 11-30 P. M. that night. The case for the defence is that Siani in her attempt to go to her lover killed her old grandmother, and was struck on the head by Sodho, her father, when on his coming to the house he found what she had done. Now there is no doubt that Mt. Dhano was killed on the morning of 13th April 1936. The medical evidence shows in all eight injuries three of which were sufficient in the ordinary course of nature to cause death. The case for the defence that Siani herself killed her own grandmother is based merely upon hearsay statements made to the police which are not substantive evidence at all and the Judge has quite rightly pointed out that if he is to accept this case witnesses must go into the witness-box to testify to it. In my opinion, the case that Siani killed her grandmother is merely the result of the mischief of Mirkhan who has tried to save the accused. To Mirkhan's mischief is, in my opinion, also due the fact that others besides Tillu and Siani and Sumri have not gone into the witness-box to bring the criminals in this case to justice. The question then to be considered is whether Mt. Dhano was killed by the two appellants.

Now, the advocate for the defence argues that the evidence of Tillu and Sumri cannot be relied on because as the Judge has rejected their evidence so far as Mahmood is concerned, he should have rejected their evidence so far as the appellants are concerned. Further, he argues, Tillu and Sumri were not present at the scene of the offence but came after, and he stresses the fact that the house of Tillu is close to the shop of Loung ; villagers must have come when cries were raised, as they must have been raised, and Siani herself in her statement under S. 164, Criminal P. C., made to the Magistrate, shortly after the offence said :

> On my cries Gulu, Shah Muhammad Shah Syed, Bhambho, Mir Muhammad Shah and several other persons of the village came. Thereafter my grandfather and after him my father came.

This statement is not of course substantive evidence, but the learned advocate argues that if the evidence of Tillu and Sumri is excluded, there remains the evidence of Siani, and on the evidence of Siani no Court could convict. Now, I myself see no reason why the appellants should not be convicted on the evidence of Siani corroborated as it is by certain circumstances. The first report was made without undue delay. In that report Tillu mentions the name of the three accused; Faizu had a powerful motive to get the girl away. He had taken her once and had lost her. She was now about to be given in marriage to another. This time he would take no chances. The girl was watched, therefore he would go with companions. There are no reasons whatever why either Haji or Mahmood should be falsely implicated. Tillu states in his first information that he was returning about noon when from the distance of a survey number he saw the two appellants with axes and Mahmood on watch outside. He made this statement in the presence of Mirkhan. I do not think he would have dared to have made this statement if it was untrue, and I accept as substantially true the evidence of Tillu as corroborated by his first information.

There is also no reason to disbelieve Siani. She was there, and though she may have wanted to go with Faizu, there is no reason to suppose she wanted her grandmother's death, and there appears to me no reason why, and no probability, that she would implicate Faizu and his relations falsely. Much was made in argument of the fact that Tillu in his first information said nothing of the injury upon Siani but this one point is explained by the fact that he had seen his wife, as he said, red with blood, and the injury upon Siani's head was a small matter compared with that: he did not believe Siani was injured by her

own father. I would not rely upon the evidence of Sumri. Her evidence may be true but she was confused in Court as in the circumstances is not surprising and even in her examination-in-chief she says she did not see Faizu and Haji. I think however the evidence of Tillu and Siani, corroborated as it is by all the circumstances of this case, is quite sufficient to justify the conviction of Faizu and Haji. I do not think the fact that Mahmood has been acquitted makes any difference. He is, in my opinion, lucky to get off.

The question then to be considered is whether the appellants have been convicted under the right Section. The learned advocate argues that the right Section is S. 304, Part 2, I. P. C. My opinion however is that the right Section is S. 302, I. P. C., but Government have not appealed against the acquittal of the accused of the offence under Sec. 302, I. P. C., and there is now the authority of the Privy Council that a High Court cannot even in revision convert an acquittal, even what has been called a "partial acquittal" into a conviction : *see* 50 All 722,[1] which overrules the case of this Court reported in 20 S L R 352,[2] which is now no longer good law. It is perhaps as well that I should deal now with a question which appears to be a cause of great confusion to certain Judges, judging from judgments recently before me, the question of the difference between culpable homicide amounting and not amounting to murder. That confusion appears to me to arise largely from a misunderstanding of the well known judgment of Melvill J., in 1 Bom 342[3] at pp. 344-346, followed by this Court as recently as the case in 28 S L R 353.[4] Speaking for myself, though I share the respect with which the judgment of Melvill J. is held by Judges of this Court, I do not find it particularly easy to understand. Indeed, I find the analysis of the law as set out in that judgment in tables, numerals, and letters somewhat confusing, and I gather what Sessions Judges want is not so much any further analysis of the law, as a working rule for their guidance so that they will not, as in this case, find accused guilty of culpable homicide not amounting to murder when in reality they are guilty of culpable homicide amounting to murder. For instance, in this case, an old woman has been killed in her own house by the two appellants armed with axes when she attempted to prevent them from kidnapping her grand-daughter. The medical evidence shows she had eight incised wounds. Of these eight wounds, each of three was sufficient in the ordinary course of nature to cause death. There is no question here of any general or special exception. This being so, it appears difficult in the extreme to understand how the learned Judge did not find that an offence of culpable homicide amounting to murder was committed, but he does not so find and in these words :

> Accused Haji and Faizu had not gone with the intention of killing Mt. Dhano or of causing such injuries to her as were sufficient in the ordinary course of nature to cause death. It is true that three of the injuries caused to Mt. Dhano were actually found by the doctor to be each sufficient in the ordinary course of nature to cause death. But in order that a case should fall under S. 300, I. P. C., it is not only necessary that injuries should have been sufficient in the ordinary course of nature to cause death but also that they should have been intended by the assailants to be sufficient in the ordinary course of nature to cause death This is clear from the judgment of Melvill J. in 1 Bom 342.[3] I therefore hold that accused Haji and Faizu intended to cause such injuries as were likely to cause death and are therefore guilty under Ss. 304 (1)/34, I. P. C.

He therefore sentenced each of the accused to seven years' rigorous imprisonment. On this passage, my first comment is that killing may be murder although it is not premeditated, and in order to determine the intention of the accused it is not sufficient to judge of the intention when the accused left their houses, but it is necessary to determine the intention of the accused when they struck the fatal blows. Moreover, while the learned Judge has referred to the judgment of Melvill J. it appears doubtful whether he had in his mind, when he wrote his judgment, a certain material passage in that judgment. For instance, Melvill J. says :

> Practically I think it will generally resolve itself into a consideration of the nature of the weapon used. A blow from the fist or a stick on a vital part may be likely to cause death: a wound from a sword on a vital part is sufficient in the ordinary course of nature to cause death.

In this case an old and defenceless woman was struck savagely with axes upon the head and neck. The vertebrae at the root

1. Kishansingh v. Emperor, (1928) 15 A I R P C 254=111 I C 332=29 Cr L J 828=50 All 722 =55 I A 390 (P C).
2. Emperor v. Shahu, (1927) 14 A I R Sind 16= 97 I C 641=20 S L R 352=27 Cr L J 1121.
3. Reg. v. Govinda, (1875-77) 1 Bom 342.
4. Mahomed Hassan v. Emperor, (1934) 21 A I R Sind 145=1934 Cr C 1137 = 152 I C 271=36 Cr L J 22=28 S L R 353.

and on the left side of the neck were fractured, there was a wound five inches long, deep to the bone on the left side of the head. Applying then the test of the judgment of Melvill J. this old woman was not only killed but she was murdered. We invite the attention of the learned Judge to Illus. (c) to Sec. 300, I. P. C. But in the judgment of Melvill J. in 1 Bom 342[3] appears a passage cited with approval by this Court recently in 28 S L R 353[4] which, with the greatest respect, appears to me liable in the extreme to mislead, and which cannot, in my opinion, be supported by the words of S. 300, I. P. C., itself, which are of greater binding force on Judges than any judgment. The passage is the passage where the learned Judge says: "If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder." The word 'probable' or rather one of its variations, occurs only in Cl. 4 of S. 300, I. P. C., which is illustrated by Illus. (d) to S. 300 as follows :

A without any excuse, fires a loaded cannon into a crowd of persons and kills one of them. *A* is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

I imagine, instances of murder under '*fourthly*' in S. 300, I. P. C., are so rare that a general proposition based on this clause is of little assistance in decisions in murder cases which usually come before the Courts in India. Speaking for myself, I think a jury would probably find the exposition of the law set out in 1 Bom 342[3] somewhat difficult to follow, and again speaking for myself, when charging a jury in a murder case, I have always said that "murder is killing with the intention of killing or causing a fatal injury." It may, of course, be said that this is merely saying the same thing twice over because unless the injury is fatal it does not cause death. Any one who intends to kill intends to cause a fatal injury, and though it appears only reasonable to say that any one who intends to cause a fatal injury intends to kill, yet Illus. (c) to S. 300, I. P. C., makes a distinction. But generally speaking, the proposition that murder is killing with the intention of killing or inflicting a fatal injury will cover broadly Cls. 1, 2 and 3 of S. 300, I. P. C. Cases under Cl. 4 of S. 300, I. P. C., are so rare that Judges can in each case well refer to the words of that clause and Illus. (d) as a sufficient guide. I therefore advise Sessions Judges not to allow themselves to be confused by overmuch analysis, but to turn to the words of the law themselves. They should look at Sec. 300, I. P. C. If the killing comes within any one of the four clauses, it is, exceptions apart, murder. They will bear in mind that while Cl. 3 to S. 300, I. P. C. refers to a bodily injury sufficient in the ordinary course of nature to cause death, Sec. 299, I. P. C., refers to bodily injury likely to cause death, and it is, I think, the use of the word "sufficient" in Clause 3 of Sec. 300, I. P. C., and the word "likely" where it occurs for the first time in S. 299, I. P. C., that much of the difficulty in the interpretation of these Sections arises. But if Judges will read carefully S. 300, I. P. C., and give to the words there used their ordinary grammatical meaning, no difficulty should arise. If on referring to S. 300, I. P. C., the Judge is of the opinion that the killing does not come within one of the four clauses he can then refer to Sec. 299, I. P. C. If the killing comes within the second part of S. 299, I. P. C., that which relates to the intention of causing a bodily injury likely to cause death, it comes under Sec. 304, Part 1, and if there is no intention but only knowledge, that is to say, if there is no intention to cause death or a bodily injury likely to cause death, but only knowledge that death is likely to be caused, the offence is under S. 304, Part 2, I. P. C. If Judges will refer to Sec. 304, I. P. C., they will see how in Part 1, there is "intention", and how in Part 2 "intention" is expressly excluded, and the latter part of Sec. 304, I. P. C., deals only with "knowledge". Cases under the exceptions to S. 300, I. P. C., will fall under S. 304, Part 1, I. P. C. Speaking for myself, it is my opinion, that the general proposition set out in the judgment in 28 S L R 353[4] at page 365, namely

speaking generally, if the act must in all probability cause death the offence is within S. 300, and if the act is only likely to cause (death) the offence falls within S. 299,

is only likely to confuse. It is only necessary to point out that the words "in all probability" only occur in Cl. 4 of S. 300, I. P. C., the least used of all clauses of Sec. 300, I. P. C., to show how confusing and misleading such a general statement may be. The words of S. 300, I. P. C., are plain and are there for all to read. If Judges read them carefully and intelligently, they will find it unnecessary to rely on general propositions.

There can then, looking to the facts of this case, be no doubt that this old woman was murdered because the bodily injuries intended to be inflicted were sufficient in the ordinary course of nature to cause death. The offence would appear properly to fall under S. 300 "*thirdly*", I. P. C. In murder cases, as in other cases, a man's intentions are to be judged by his acts in relation to the surrounding circumstances, but the provisions of the law of culpable homicide in India are merciful. The burden of proof in these cases, as in other cases, lies on the prosecution, and the distinction between "knowledge" and "intention" made in S. 299, I. P. C., and again in S. 304, I. P. C., in Parts 1 and 2, allows the Judge, when he thinks the prosecution have proved not intention but only knowledge to convict of the lesser offence. I have however not yet come across a case where a Judge has found that a defenceless old woman who has been savagely cut on the head with axes and killed, has not been murdered. The learned Judge in this case appears to have fallen into an error when he judged the intention of the appellants not at the time of striking the blow, which is the material time, but at the time they left the house, which is not the material time. I would therefore confirm the convictions and dismiss the appeal, and as I think the sentences imposed are grossly inadequate, I order notice to issue upon the appellants to show cause why the sentences passed on them should not be enhanced.

Lobo J. — I concur with the learned Judicial Commissioner that this appeal should be dismissed and that the conviction of and the sentences imposed on the appellants should be confirmed. I also agree to the issue of the notice upon the appellants proposed by the learned Judicial Commissioner. I would merely add a few words to that part of the judgment of the learned Judicial Commissioner which deals with Secs. 299 and 300, I. P. C., and the differences between culpable homicide amounting and not amounting to murder.

To my mind, if Judges would lay more emphasis on the wording of the Sections themselves and less on judicial pronouncements, which are almost invariably coloured by the facts of the particular case, there would be no room for confusion. Sec. 299, Penal Code defines "culpable homicide" and provides that culpable homicide defined, is in itself an offence. The to "culpable homicide" in the opening sentence of S. 300, I. P. C., is to the definition only. If death is caused by an act done with the intention of causing death or done with the intention of causing a fatal injury the offence is murder and is covered by Cl. 1 or Cl. 3 of Sec. 300, I. P. C. Cl. 2 of Section 300, I. P. C., is clearly intended to cover what may conveniently be classified as "spleen cases" such as are referred to in Illus. (b) to S. 300, I. P. C. A case under Cl. 4 of Sec. 300, I. P. C., is very unusual and Illus. (d) is a sufficient indication to what class of cases it is intended to apply. Ordinarily therefore, the exceptions to S. 300, I, P. C., apart, the test to be applied in any particular case of culpable homicide is whether the intention specified in Cl. 1 or Cl. 3 of Sec. 300, I. P. C., is established on the evidence and circumstances. If it is, the offence is murder; if it is not, the offence is culpable homicide. The punishment for culpable homicide is provided for in S. 304, I. P. C., and the Section makes a sharp and clear distinction between "intention" and "knowledge". If the offence is culpable homicide and the "offender's intention was to cause such bodily injury as is likely to cause death (secondly of definition in Sec. 299, I. P. C.) the offence is punishable under Part 1 of S. 304, I. P. C. If the offender had not such intention but had knowledge that his act was likely to cause death, (*thirdly* of definition in S. 299, I. P. C.) the offence is punishable under Part 2 of S. 304, I. P. C. What both the learned Judicial Commissioner and I aim at in this judgment is to provide a good working rule to the judiciary in this Province when dealing with cases in which the application of these Sections is in question. Such a rule appears necessary judging from the number of judgments which come before the High Court betraying the existence of considerable confusion on these points in the minds of Sessions, Additional and Assistant Sessions Judges.

R.M./R.K. *Order accordingly*

A. I. R. 1939 Sind

RUPCHAND BILARAI, *Commr. of Income-tax, Bombay*— Applicant.

Commissioner

v.

Abdul Hussein Moosaji — Opponent.

Reference No. 72 of 1934, Decided on 8th February 1937.

Income-tax Act (1922), Ss. 10, 22 (2) — Assessee carrying on money-lending business and owning immovable property advancing Rs. 30,000 on mortgage of property — Property subsequently purchased by assessee and dealt with as an owner—Assessee selling off property after some years for Rs. 24,500 and showing it for first time in subsequent year's account as an item of his money-lending business, and claiming credit for loss sustained by him on the deal — Held that Income-tax Officer was justified in inferring that assessee had purchased the property outright — That it was not open to him to treat the purchase as part of his money-lending business.

The assessee, who was a money-lender and also owned immovable property, advanced a sum of Rs. 30,000 on a mortgage of certain property. He subsequently purchased the property in satisfaction of the loan and thus became the ostensible owner thereof from the date of the purchase. It stood in his name in the Government and Municipal records and he dealt with it as an owner. In the returns of the income submitted by him under S. 22 (2) for assessment of income-tax he showed the property as his property. After some years he sold the property for Rs. 24,500 and then for the first time in the subsequent year's account, he treated it to be an item of his money-lending business and claimed credit for Rs. 5648 as the loss sustained by him on that deal :

Held that, on the facts, the Income-tax Officer was justified in inferring that the assessee had purchased outright and that having treated it as his own property along with his other immovable property, it was not open to him to treat the purchase as a part of his money-lending business transaction and claim credit for the loss he sustained by the resale of the property many years after its purchase. [P 62 C 1]

Partabrai D. Punwani —*for Applicant.*

Suganlal Hassanand — *for Opponent.*

Rupchand Bilaram J. — The question referred to us under S. 66, Cl. (2), Income-tax Act, is this :

Whether in the circumstances of this case, the Income-tax Officer was correct in not allowing any deduction from the income liable to tax on account of the loss of Rs. 5648 on the sale of a property belonging to the assessee.

Now, there is no dispute about the facts on which this question is based. The assessee is a money-lender and also owns immovable property. On 29th July 1920 he had advanced a sum of Rs. 30,000 to Messrs. P. Allahna & Bros., on the mortgage of their property in Somerset Street. In May 1929 he purchased that property in satisfaction of the loan and the loan transaction thus finally ended. From the date of his purchase, the assessee became the ostensible owner of the property. It stood in his name in the Government and Municipal records and he dealt with it as owner. In the returns of income submitted by him under S. 22 (2) of the Act for purposes of assessment of income-tax for the years 1931-32 and onwards, he showed this property along with his other property as his own and returned the rent of his properties including this property in Sch. A at the back of the returns and was taxed accordingly. Three and a half years after his purchase, he sold this property for Rs. 24,500 and then for the first time in the subsequent year's account he treated it to be an item of his money-lending business, and claimed credit for Rs. 5648 as the loss sustained by him on this deal.

On these facts, the Income-tax Officer drew the inference that the assessee had purchased the property outright and having treated it as his own property in the same way as his other immovable properties, it was not open to him to treat the purchase as a part of his money-lending business transaction and claim credit for the loss he sustained by the resale of the property three and a half years after its purchase. There was nothing before the Income-tax Officer to convince him that in 1929 when the assessee purchased the property its value was less than Rs. 30,000 or that he intended to treat the purchase as not an out and out purchase of property which was to be treated as his own property but as an item in his money-lending business on which he intended to claim the loss in the event of the property realizing less than the mortgage amount. If it was the intention of the assessee to treat the transaction as not an out and out sale to him but only to treat it as an item of the money-lending business, he should have said so in the returns which he filed immediately after his purchase. We are not prepared to hold that the inference drawn by the Income-tax authorities is not a proper inference to draw upon the facts of this case or is one with which we can interfere. We accordingly answer the question referred to us in the affirmative.

R.M./R.K. *Answered in affirmative.*

*** A. I. R. 1939 Sind 62**

DAVIS J. C. AND TYABJI J.

Uttamchand Hassaram — Appellant.

v.

Devdittaram Bhawanidas and another — Respondents.

Second Appeal No. 44 of 1936, Decided on 23rd September 1938, against Judgment of Asst. Judge, Sukkur, D/- 5-8-1936.

(a) Civil P. C. (1908), O. 21, R. 92 — Order under O. 21, R. 92—Second appeal does not lie.

Where an order passed under O. 21, Rule 92 setting aside sale is set aside in appeal, a second appeal will not lie against the order in appeal made by a Judge under O. 43, R. 1 (j): *A I R 1920 Bom 60, Rel. on.* [P 63 C 2]

*** (b) Civil P. C. (1908), O. 21, R. 92—Order under O. 21, R. 92 setting aside sale — Auction-purchaser can appeal.**

While the auction-purchaser is not a person affected within the meaning of R. 90 and cannot therefore move the Court under Rule 90, when it comes to a question of setting aside the sale, auction-purchaser is a person affected within the meaning of the Proviso to sub-rule 2 of Rule 92. Under the Proviso to sub-r. (2) of Rule 92 he is entitled to notice, and if he is entitled to notice, then he is a party to the proceedings and can as such appeal from an order passed in such proceedings : *2 All 352 and 15 C W N 685, Rel. on ; 37 Bom 387 and A I R 1936 Bom 311, Expl.* [P 64 C 1]

Dipchand Chandumal — *for Appellant.*
Srikrishindas H. Lulla — *for Respondents.*

Davis J. C. — This is a second appeal against an order of the Assistant Judge of Sukkur confirming an auction sale and reversing the judgment of the Joint Subordinate Judge of Shikarpur who set the sale aside. A preliminary objection was taken that a second appeal will not lie for the order of the Subordinate Judge was an order under O. 21, R. 92, Civil P. C. There has been one appeal already under O. 43, Rule 1 (j). Mr. Dipchand for the appellant the judgment-debtor, conceded that the order of the Subordinate Judge setting aside the sale was made under O. 21, Rule 92, Civil P. C., and that no second appeal will in consequence lie, but he contends that the Assistant Judge had no jurisdiction to entertain the appeal at all because it was made by the auction-purchaser who has no right to appeal, not being a party to the proceedings, and he asks us therefore to treat this appeal as a revision application, and set aside the order of the Assistant Judge under Sec. 115, Civil P. C., as being without jurisdiction. So far as the question of second appeal is concerned, it appears clear that by the operation of O. 43, R. 1, read with Sec. 104, Civil P. C., one appeal will lie against an order passed under O. 43 and not two appeals. Order 43 itself refers to S. 104, and S. 104 (2) provides that "no appeal shall lie from an order passed in appeal under this Section".

In a Bombay case, 44 Bom 472,[1] the Court decided that no second appeal could lie against an order on an application made under O. 21, Rule 89, Civil P. C. The fact that the application was made under Rule 89 of O. 21, Civil P. C., in that case instead of under R. 90, as is the case here, does not matter. It is clear then that no appeal lies against the order in appeal made by the Assistant Judge under O. 43, Rule 1 (j) Civil P. C., and that this appeal as such must fail. But we have then to consider this appeal as a revision application. Clearly under S. 115, Civil P. C., we have power to do this, and as the order of the Assistant Judge is attacked on the question of jurisdiction, not that he has rightly or wrongly decided a question of fact or law in his jurisdiction, but that he has no jurisdiction to decide, the case in 43 All 334,[2] on which the respondent relies will not apply. And the question whether the Assistant Judge acted without jurisdiction depends upon whether an auction-purchaser can appeal against an order setting aside a sale passed under O. 21, R. 92, Civil P. C. Now the rights of an auction-purchaser to intervene in an auction-sale can be looked at from two points of view. It can be looked at from the point of view of his right to move the executing Court under O. 21, R. 90, Civil P. C., to set aside the sale and his right to appeal against an order of the Court setting aside the sale under Order 21, Rule 92 (2), Civil P. C. Mr. Dipchand for the judgment-debtor contends that as the auction-purchaser is not a party to the proceedings for the purpose of O. 21, R. 90, Civil P. C., and he cites rulings to this effect, so he cannot be a party to the proceedings under Rule 92. Rr. 90 and 92 must be read together, and therefore he cannot appeal against an order made under Rule 92.

Mr. Lulla, on the other hand, for the auction-purchaser contends that as by the sale he becomes a party to all proceedings under R. 92, notice must be given to him as a person affected under the provisions of sub-r. (2) of Rule 92, and Mr. Lulla relies principally upon the case in [illegible] 450.[4] 685,[3] referred to with approval by the Privy Council [illegible]

1. Kachu Ravji v. Trimbak Khemchand, (1920) [illegible] A I R Bom 60=56 I C 597 = 44 Bom [illegible] 22 Bom L R 383.

2. Chandulal [illegible] Mahomed Habibuddin, (1911) [illegible] 226=[illegible] 685=10 I C 148=13 C L J 535.

3. Bihelal v. Umrao Singh, (1931) 18 A I R (1921) 8 A I R All 334=19 A L J 110. P C 38=130 I C 686=58 I A 50 = 27 N L R 95=33 Bom L R 450 (P C).

Now, so far as the right of the auction-purchaser to move the Court under R. 90 is concerned, as a person whose interests are affected by the sale, there is a difference of opinion in the High Courts. The Allahabad and Patna High Courts, 47 All 479[5] and 12 Pat 665,[6] have held that an auction-purchaser is a person affected within the meaning of the rule. The Rangoon High Court in 6 Rang 621,[7] the Lahore High Court in 14 Lah 1,[8] and a single Judge judgment of this Court in 25 S L R 405,[9] and of the Bombay High Court in 60 Bom 750,[10] have held that the auction-purchaser is not a person whose interests are affected within the meaning of this rule, because the rule contemplates that the interests affected must be interests existing before the sale and not interests created by the sale itself.

Now, it is quite possible to hold that while the auction-purchaser is not a person affected within the meaning of R. 90 and cannot therefore move the Court under R. 90, when it comes to a question of setting aside the sale, the auction-purchaser is a person affected within the meaning of the Proviso to sub-r. 2 of R. 92. It appears to us to do violence to the plain meaning of plain words to say that the auction-purchaser is not affected by an order of the Court affecting adversely the purchase by him of immovable property, and we think it would be difficult to hold that under the Proviso to sub-r. (2) of R. 92 he is not entitled to notice, and if he is entitled to notice, then he is a party to the proceedings and can as such appeal from an order passed in such proceedings against him. It is not now necessary for us to decide whether an auction-purchaser is a person affected within the meaning of R. 90 so as to be able to apply to set aside the sale on account of fraud or material irregularity, though we would point out that a distinction would appear to be drawn in Rr. 89 and 90, between a person holding an interest by virtue of a title acquired before such sale and a person otherwise interested, because R. 89 (1) reads as follows:

> Where immoveable property has been sold in execution of a decree any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in Court . . . .;

and R. 90 is in different words. R. 90 (1) reads as follows:

> Where any immoveable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it . . . .

So far as the right of the auction-purchaser to appeal is concerned, there is a judgment of the Allahabad High Court directly on the point. Although decided under the old Code, this does not make any difference to the decision of the point before us that auction-purchaser can appeal: 2 All 352.[11] In the Bombay case in 37 Bom 387,[12] the difference between the persons affected by Rr. 89 and 90 is pointed out; and in the Bombay case in 60 Bom 750[10] a single Judge held that an auction-purchaser could not move the Court under R. 90. But the Judge in the last-mentioned case was not considering the wording of Rule 92 (2), and the fact that the Proviso is made to apply particularly to sub-r. (2). On this question, then, of the right of the auction-purchaser to appeal, we agree with respect with the opinion of Mookerjee J. in 15 C W N 685[3] above referred to, and as the Assistant Judge in the Appellate Court below had jurisdiction and no appeal lies from his order in appeal, we are of the opinion that this second appeal treated either as a revision application or an appeal must fail and we dismiss it with costs accordingly.

D.S./R.K. *Appeal dismissed.*

5. Ravinandan Prasad v. Jagarnath Sahu (1925) 12 A I R All 459=87 I C 278 = 47 All 479= 23 A L J 233.
6. Mahadev Ram v. Mohan Vikram, (1933) 20 A I R Pat 435=145 I C 421=12 Pat 665 = 14 P L T 388 (S B).
7. K. V. A. L. Chettayar Firm v. M. P. Maricar, (1929) 16 A I R Rang 33 = 114 I C 538 = 6 Rang 621.
8. Nihal Chand Gopal Das v. Pritam Singh, (1932) 19 A I R Lah 468 = 138 I C 817 = 14 Lah 1=33 P L R 788.
9. Kalumal Tolaram v. Ahmed Nur Mahomed, (1931) 18 A I R Sind 107=134 I C 373 = 25 S L R 405.
10. Balkrishna Waman v. Sakharam Babaji, (1936) 23 A I R Bom 311=164 I C 644 = 60 Bom 750=38 Bom L R 589.
11. Gopal Singh v. Dular Kuar, (1879) 2 All 352.
12. Ganesh Bab Naik v. Vithal Vaman, (1913) 37 Bom 387=19 I C 475=15 Bom L R 244.

A. I. R. 1939 Sind 65

DAVIS J. C. AND TYABJI J.

Mt. Raji w/o Khuda Baksh, and others — Applicants.

v.

Allaudin M. Samo, Mukhtiarkar — Opponent.

Criminal Revn. Appln. No. 128 of 1938, Decided on 31st August 1938, from order of Sess. Judge, Sukkur, D/- 18th March 1938.

(a) Criminal P. C. (1898), Sec. 195 (1) (b)—Mere fact that Magistrate gives "B" summary does not bring offence in relation to which it is given within S. 195 (1) (b).

The mere fact that a Magistrate gives a 'B' summary does not bring the offence in relation to which that summary is given within the provisions of Sec. 195 (1) (b), for the giving of 'B' summary is merely an administrative and not a judicial act : *A I R 1938 Sind 213, Foll.* [P 65 C 2]

(b) Criminal P. C. (1898), Sec. 195 (1) (b)—Offence under S. 211, I. P. C. not committed in or in relation to any Court—Private person, who is aggrieved, is entitled to complain of offence.

It is not the intention of the Legislature that an offence under Sec. 211, I. P. C., can be made subject of a complaint only by Courts or public officers. When an offence under S. 211 is not committed in or in relation to any Court, a complaint of such an offence can be made by a private individual, and it is not necessary that the complaint must be made by a Court or by a public officer : *A I R 1932 Mad 363, Ref.* [P 65 C 2]

H. T. Raymond — *for Applicants.*

Dharamdas Mulchand — *for Opponent.*

Partabrai D. Punwani, Advocate-General — *for the Crown.*

Davis J. C. — This is an application in revision against an order of the Sessions Judge of Sukkur who set aside an order of the Subordinate Judge and First Class Magistrate, Rohri, who in a very long judgment has found that a complaint of an offence under S. 211, I. P. C., must be made by a Court under the provisions of S. 195, Criminal P. C., if a Magistrate has given a "B" summary in the offence to which the false complaint relates. The Magistrate also appears to be of the opinion that a complaint of an offence under S. 211, I. P. C., cannot be made by a private individual.

We think the learned Sessions Judge is perfectly right in setting aside the order of the Magistrate which is a very long and detailed order and obviously a work of much care and thought, but we think that the learned Magistrate has confused himself by overmuch analysis. We have already pointed out in a judgment which will be reported in due course, Cri. Appeal No. 34 of 1938,[1] that the mere fact that a Magistrate gives a "B" summary does not bring the offence in relation to which that summary is given within the provisions of Sec. 195 (1) (b), for the giving of a "B" summary is merely an administrative and not a judicial act. Really there is nothing more in this case than this. But the learned advocate who has appeared for the applicants in revision, supporting the judgment of the Magistrate that complaint of the Court is necessary, has argued that though an offence under S. 211, I. P. C., may not be an offence committed in or in relation to a Court, nevertheless if the complaint is to be made, it must be made by a public servant referred to in S. 195 (1) (a), Criminal P. C., because the whole scheme of S. 195, Criminal P. C., is to exclude complaints by private individuals in relation to the offences therein named. Sec. 195 (1) (a), Criminal P. C., refers to public officers; Sec. 195 (1) (b), Criminal P. C., refers to Courts. Therefore, he argues when the offence is an offence, as in this case, under S. 211, I. P. C., it can only be that a complaint of such offence can be made by a Court or by a public officer. But we think, this argument has nothing to recommend it except its ingenuity. If it had been the intention of the Legislature to say what the learned advocate says it had the intention to say, it could have said so. For instance, if it had been the intention that an offence under Sec. 211, I. P. C., could be made the subject of complaint only by Courts or public officers, appropriate words could have been found without difficulty by the official draftsmen. But, when we look at S. 195 (b), Criminal P. C., we see that there is no reference to offences under Sec. 211, I. P. C., generally; but, there is a reference only to S. 211, I. P. C., in particular circumstances, to offences under Sec. 211, I. P. C., committed in or in relation to any Court, and when an offence under S. 211, I. P. C., is not committed in or in relation to any Court, a complaint of such an offence can be made by a private individual. There is nothing more in this case than this.

The Sessions Judge has in an order which is a short order, nevertheless dealt adequately with the questions which are material. He has pointed out that Cl. (b) of sub-s. (1) of S. 195, Criminal P. C., is a

1. Dharamdas v. Emperor, *Reported in* (1938) 25 A I R Sind 213=178 I C 218.

bar to complaints of offences under S. 211, I. P. C., only in certain circumstances to which we have referred. He has referred to a Full Bench judgment of the Madras High Court in A I R 1932 Mad 363,[2] in which however the complaint was made by a police officer. This, we think, makes no difference. The Sessions Judge distinguishes this case from other cases upon which the First Class Magistrate has, in our opinion, wrongly relied. We think, therefore, it is clear that the complaint in respect of which an offence under S. 211, I. P. C., is alleged related to an offence which was not committed in or in relation to any proceeding in any Court; therefore, it was competent to a private person who was aggrieved to complain of this offence. This is what in this case the complainant has done. Therefore, we think the order of the learned Sessions Judge was right, and this is not a case in which we should in any way interfere in revision. The application therefore is dismissed.

R.M./R.K. *Application dismissed.*

2. Registrar, High Court v. Kodangi, (1932) 19 A I R Mad 363=1932 Cr C 329=137 I C 312 =33 Cr L J 479=55 Mad 611=62 M L J 425 (F B).

A. I. R. 1939 Sind 66

DAVIS J. C. AND DADIBA C. MEHTA J.

Fateh Mahomed Idan and another — Appellants.

v.

Thariomal Jethomal and another — Respondents.

Second Appeal No. 11 of 1935, Decided on 25th May 1938.

(a) Land Acquisition Act (1894), S. 31 (2), Proviso 3 — Upon acquisition of certain land, daughters of owner claiming share in compensation — Collector's apportionment not being accepted, Collector making reference to Court —Daughters and their assignees appearing and assignment by consent recognized by Court — Claim of assignees for share in compensation adjudicated upon and rejected — Order not appealed against — Assignees held could not bring separate suit for share in compensation.

The principle which applies in each case, i. e. under Secs. 18 and 30, is that parties to these proceedings are parties to proceedings under a Special Act ; special Tribunals have been constituted under the Act to deal with the matters for which the Act legislates, and it is in the proceedings before these Tribunals and not by civil suits that the claims of and disputes between the parties are to be settled. Adjudications by the appropriate Tribunal under Land Acquisition Act are as much subject to the principles of res judicata as adjudication by Courts under the Civil Procedure Code : *A I R 1922 P C 80, Rel. on.* [P 67 C 1 ; P 68 C 1]

Upon the acquisition of some land owned by a person his daughters claimed a share in the compensation awarded. They did not accept the Collector's order as to apportionment and hence the Collector made a reference to the Court. They and their assignees who were present in the Court put forward their claims and the assignment by consent of the daughters to the assignees was recognized by the Court. The claim of the assignees to a share in the compensation was adjudicated upon and rejected. They did not appeal from that order :

Held that the assignees of the daughters could not be said to be strangers to the proceedings under the Land Acquisition Act and hence they did not come under Proviso 3 to Sec. 31 (2). The assignees not having appealed against the order of adjudication of their claims the order stood and the assignees had no right to bring a separate civil suit : *25 All 133, Rel. on.* [P 68 C 1]

(b) Land Acquisition Act (1894), Sec. 54 — Order relating to distribution of compensation money — Appeal lies under Civil Procedure Code.

There is nothing to exclude an appeal from an order relating to the distribution of compensation money under the Civil Procedure Code : *A I R 1933 Bom 187, Rel. on.* [P 67 C 2]

Kundanmal Dayaram — *for Appellant.*

Manghanmal Bhojraj — *for Respondents.*

Davis J. C. — This is an appeal against a judgment and decree of the Assistant Judge of Sukkur, who by that judgment confirmed a judgment of the Subordinate Judge of Rohri, who dismissed the plaintiff's suit for a declaration that they were entitled to a sum of Rs. 1134 being a part of the compensation paid by Government for the acquisition for the purpose of the Barrage of a certain Survey No. 309, owned by one Faiz Muhammad. The plaintiffs claim to derive their title as the assignees of the three daughters of this Faiz Muhammad.

Now, the judgments of the lower Courts proceeded, generally speaking, on the basis that as the assignees of the daughters were made parties to the land acquisition proceedings and their claim to a share of the compensation was adjudicated upon in these proceedings, they had no right to bring a separate civil suit; their remedy lay in an appeal against the order of the Court rejecting their claim to part of the compensation. But against this view it is urged in appeal that these three daughters were not in effect parties to the proceedings. It is true they appeared and that by consent the assignment to the assignees was recognized, but so far as they were concerned nothing more was done; there was no adjudication upon their claim: therefore a remedy lay open to the assignees

outside the Act by reason of Proviso 3 to Sec. 31, Land Acquisition Act, and they could bring this suit and were entitled to an adjudication by a Civil Court. It would appear that in these proceedings some doubt arose as to whether the Collector had referred the case to the District Court under Sec. 18 or under Sec. 30, Land Acquisition Act.

The learned appellate Judge appears to have been of the opinion that if the reference was under Section 30 of the Act, then the suit would not lie, but if the reference was under S. 18, the suit would lie. But we do not think that the question whether the reference is made under S. 18 or S. 30 is in this case decisive; for, while it may be said that under S. 18, it must be clear that the party objecting was before the Court because a reference is made to the Court by the Collector at the instance of that party and the reference under S. 30 is made by the Collector at his own instance, yet the same principle applies in each case, this principle being that parties to these proceedings are parties to proceedings under a special Act; special tribunals have been constituted under the Act to deal with the matters for which the Act legislates, and it is in proceedings before these tribunals and not by civil suits that the claims of and disputes between the parties are to be settled. For instance, in this case, though it may be said that there was a question of doubt as to whether when the order of reference was made by the Collector it was made under S. 18 or S. 30 of the Act, yet if it was made under S. 18, it is clear the daughters of Faiz Mahomed were claiming a share in the compensation; their claim was mentioned in the order of reference; they did not accept the Collector's order as to apportionment, so that when they and their assignees were present and put forward their claims before the Court and the assignment by consent was recognized by the Court and orders were passed upon their claims, the provisions of S. 31 would apply to all present and parties to the proceedings and the fact that it is a matter of some doubt whether the order was made under Sec. 18 or Sec. 30 appears to us to be a matter of minor importance. In fact it would appear that the order of reference was to fall as to part under S. 18 and as to part under S. 30. And under S. 53 of the Act, the provisions of the Code of Civil Procedure, so far as they are not inconsistent with the Act, apply to proceedings under the Act before the Court.

Therefore it appears to us, it was competent to the Court when the compensation money was sent by the Collector to the Court for the Court to consider the claims of parties, who appeared before it and made their claims and whose claims were mentioned in the order of reference by the Collector and who had not accepted the Collector's award. The case in 25 All 133[1] is an authority for the procedure adopted by the learned Judge in this case. In that case a person claiming to be entitled to part of the compensation by reason of his title by adverse possession was joined as a party by the Court on a reference by the Collector under S. 30, though that person had not hitherto intervened in the proceedings and we can see in principle no difference if the order of reference was made under S. 18 or S. 30. But it is urged by the appellants that when the assignees of the three daughters did apply to the Court for the payment to them of the share of the daughters and their claim was rejected, they could not have appealed because, under the authority of the Privy Council in the case in 45 Mad 320,[2] an appeal would lie under S. 54, Land Acquisition Act, only against an award and not against an order dealing with the distribution of money between the different claimants. But this aspect of the case has been dealt with in a judgment of the Bombay High Court in 35 Bom L R 276,[3] in which it was held that there is nothing in the judgment of the Privy Council which would exclude an appeal from an order relating to the distribution of compensation money under the Civil Procedure Code. Baker J. said :

The provisions of Sec. 54, Land Acquisition Act, are subject to the provisions of the Code of Civil Procedure, 1908, and although the order determining the rights of the parties is not, in view of the Privy Council judgment, an award, it is certainly a decree or of the nature of a decree and an appeal would lie against it. That is the interpretation which has been put on the Privy Council judg-

1. Kishan Chand v. Jagannath Prasad, (1902) 25 All 133=1902 A W N 215.
2. T. B. Ramchandra Rao v. A. N. S. Ramchandra Rao, (1922) 9 A I R P C 80=67 I C 408=45 Mad 320=49 I A 129 (P C).
3. Raghunathdas Harjivandas v. District Superintendent of Police, Nasik, (1933) 20 A I R Bom 187=57 Bom 314=35 Bom L R 276.
4. Venkatareddi v. Adinarayana Rao, (1929) 16 A I R Mad 351=119 I C 42=52 Mad 142=56 M L J 357.

ment in 52 Mad 142.[4] It would be extraordinary if, without special words to that effect, the Legislature had deprived the parties, who dispute the apportionment of the compensation, of the appeal which they had under Section 39 of the old Act.

Therefore when the assignees who became parties to these proceedings as assignees of the daughters and who had appeared before the Court when the order of 28th November 1929 was passed, applied on 26th March 1931 for their share of the compensation money and their claim was rejected, then it was clearly open to them to appeal against the order as a decree. This they did not do, and therefore it must be said that that order rejecting their claims stands. That being so, we do not see how it can be said that they can come in under Proviso 3 to S. 31 (2) of the Act. It appears to us to be intended to apply to persons who are not parties to proceedings under the Act and whose claims were not the subject of an adjudication under the Act. It cannot be said that the plaintiffs who are the assignees of the daughters are strangers to the proceedings under the Land Acquisition Act and can come in under Proviso 3 to sub-s. (2) of S. 31 of the Act. Their claim has been adjudicated upon by the Court within the meaning of the ruling of the Privy Council in 45 Mad 320,[2] which makes it clear that adjudications by the appropriate Tribunal under this Act are as much subject to the principle of res judicata as adjudication by Courts under the Civil Procedure Code. We think therefore the lower Courts were right when they dismissed the plaintiffs' suit and we think this appeal must be dismissed with costs. Order accordingly.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Sind 68

DAVIS J. C. AND TYABJI J.

Mt. Wazir Begum w/o Ghulam Nabi, and others — Appellants.

v.

Mt. Dadan w/o Ghulam Hussain, and others — Respondents.

Second Appeal No. 31 of 1936, Decided on 23rd September 1938.

(a) Dekkhan Agriculturists Relief Act (17 of 1879), S. 22—General words in surety bond that if amount of bond was not satisfied surety's property would be liable, held could not be construed to create mortgage or charge.

The marginal note to Sec. 22 refers to property specifically pledged. The marginal note however is not part of the Act but so long as the word 'specifically' is emphasized, it makes little or no difference whether immovable property is specifically mortgaged or charged. The deeds have to be properly stamped and registered and a Court is not likely to construe a surety bond with an eight anna stamp as constituting a specific mortgage or charge upon immovable property. [P 69 C 1; P 70 C 1]

A surety bond provided, "if the amount of the bond according to its terms is not satisfied from the surety, I, my property, and my heirs are and shall remain liable." This was followed by a statement that the surety had a large well-known building which was without incumbrance:

Held that this general statement occurring in a bond of this nature could not fairly be construed as intended to create a mortgage or charge. It created only a personal liability. The statement meant nothing more than evidence of the surety's solvency: *34 Mad 47, Disting.*; *A I R 1933 Bom 298, Ref.* [P 70 C 1]

(b) Dekkhan Agriculturists Relief Act (17 of 1879), Sec. 22—Judgment-debtor non-agriculturist — Decree sought to be executed against his legal representative who is agriculturist — Latter can take advantage of S. 22.

Under S. 22, as it stands, it matters not what is the status of a defendant when the decree was passed against him. Once it is shown that the property to be attached or sold is the immovable property of an agriculturist not specifically pledged, the Section applies and the property is protected. S. 22 should be read as it stands, to mean what it says, and to protect agriculturists, whether judgment-debtors or the legal representatives of judgment-debtors in the possession of their lands. Hence even if the judgment-debtor is non-agriculturist, his legal representative who is an agriculturist can take advantage of S. 22 when the decree is sought to be executed against him by attachment of property in his possession: *A I R 1930 Sind 16; A I R 1929 Sind 209 and A I R 1925 Sind 49 (F B), Rel. on; A I R 1921 Sind 29, Expl.* [P 70 C 1, 2; P 71 C 1]

(c) Dekkhan Agriculturists Relief Act (17 of 1879), Sec. 22 — Appellate Court should not give direction to Collector in absence of such application before lower Court.

Section 22 does not contemplate that the Appellate Court should give directions to the Collector when no such application under that Section was before the lower Court. [P 71 C 1, 2]

Kimatrai Bhojraj — *for Appellants.*

Fatehchand Assudomal — *for Respondents.*

Davis J. C. — This is a second appeal against the order of the Assistant Judge at Sukkur dismissing summarily an appeal against an order of the Joint Subordinate Judge at Shikarpur dismissing the execution application of the appellant against the respondents who are the heirs of one Ghulam Hussain, who stood surety for the judgment-debtor in a partition suit to which the respondents were parties. Before the Subordinate Judge the liability of this Ghulam Hussain as a surety was disputed. It was argued that he merely attested the bond, but this argument the Subordinate

Judge rejected holding that Ghulam Hussain was a surety with the principal surety, one Bodaram, who has become insolvent and against whom the appellants have recovered only some Rs. 900 in satisfaction of their decree. The surety bond was for Rs. 3000. We have not however in this appeal to consider the question as to whether Ghulam Hussain was a surety under the bond. This is decided, but the Subordinate Judge dismissed the execution application against his legal representatives on the ground that it was proved that they were agriculturists, no immovable property had been specifically mortgaged; Ghulam Hussain was only liable personally under the bond. In appeal before us it has been argued that the immovable property was specifically mortgaged or charged under the bond, and that if it was not, then the property of Ghulam Hussain, who admittedly was not an agriculturist, was not the immovable property of an agriculturist within the provisions of Sec. 22, Dekkhan Agriculturists Relief Act, in the hands of his legal representatives who are admittedly agriculturists.

This question of whether by the surety bond Ghulam Hussain specifically mortgaged his immovable property was not discussed in the judgment of the Subordinate Judge, and we have no doubt the reason is that it was not considered at the time that this argument could be accepted by a Judge familiar with the practice of the Subordinate Courts. It is now hoped that we, perhaps less familiar with the practice of Subordinate Courts, will read into the surety bond the intention to mortgage the surety's immovable property which intention we have no doubt was not at the time present to the minds either of the judgment-creditor or the surety himself. It is true that in the bond occur the words

> if the amount of the bond according to its terms is not satisfied from the surety, I, my property and my heirs are and shall remain liable,

but this general statement occurring in a bond of this nature cannot fairly be construed as intended to create a mortgage or charge. The statement of fact which follows that the surety has a large well-known building in Shikarpur which is without incumbrance, appears clearly to us to mean nothing more than that this is evidence of the surety's solvency. To any one familiar with the practice in subordinate Courts to suggest that a bond of this nature is intended to create any but a personal liability is to suggest what is known to be untrue. There is also no registered and stamped deed which to residents in the mofussil indicate the serious nature of the transaction into which it is proposed to enter. The learned advocate for the appellant has relied on the case in 34 Mad 47,[1] where it is pointed out that a distinction must be drawn between wideness and indefiniteness of language and that where it appears that the proper construction of a document is not that the property generally of the party but some specific property is made liable, a charge is created. But the facts of that case are clearly different. That was no case of a surety bond but of a deed drawn up between the two parties to a partition deed and property specified in the schedule was to be made liable for the payment of money under the partition deed. It is true that later in the judgment the learned Chief Justice appears to doubt the ruling in 3 Mad 35[2] where it was held that a promise to pay out of the debtor's property indefinitely did not create a charge, but if, as the learned advocate for the appellants argues, surety bonds as well as pleadings being documents are not to be construed too strictly, according to the well-known ruling of the Privy Council, but the real meaning, purpose and intention of the parties is to be ascertained, then the construction of this surety bond must certainly be that it is a mere personal undertaking and not a mortgage or charge of immovable property.

The learned advocate also relied on the case in 35 Bom L R 588[3] to prove that in this case, by these general words, a mortgage within the meaning of Sec. 22, Dekkhan Agriculturists Relief Act, 17 of 1879, was created. The material part of S. 22 is as follows :

> Immovable property belonging to an agriculturist shall not be attached or sold in execution of any decree or order passed whether before or after this Act comes into force, unless it has been specifically mortgaged for the repayment of the debt to which such decree or order relates, and the security still subsists. For the purposes of any such attachment or sale as aforesaid standing crops shall be deemed to be moveable property.

The words used seem in themselves precise enough, but as Broomfield J. pointed out the marginal note refers to property

1. Manickam v. Audinarayana, (1910) 34 Mad 47=5 IC 917=20 M L J 407=(1910) M W N 568.
2. Bheri Dorayya v. Ramayya, (1881) 3 Mad 35.
3. Manekchand Ramchand v. Ganeshlal Govardhan, (1933) 20 A I R Bom 298=145 I C 582=35 Bom L R 588.

specifically pledged. Broomfield J. said :

As to the construction of S. 22, the first question is whether the Dekkhan Agriculturists Relief Act intended to draw a distinction between a mortgage in the strict technical sense and a charge. In S. 70 no doubt both words are used. But in S. 56 the word 'charge' is apparently used in a sense where it would include a mortgage and it may be mentioned that the side-note to S. 22 itself uses the word 'pledged' as equivalent to mortgaged. Before the Transfer of Property Act was passed no clear distinction was drawn between mortgages and charges, as was pointed out in 14 Cal 730.[4] On the argument addressed to us I am of opinion that the lower Court was right in holding that the words 'specifically mortgaged' in S. 22 need not be construed in a technical sense and would apply to a specific charge such as we have in this case.

The marginal note however is not part of the Act but so long as the word "specifically" is emphasized, it appears to us to make little or no difference whether immovable property is specifically mortgaged or charged. We imagine, it will be found in most cases in practice to be a distinction without a difference. The deed will have to be properly stamped and registered and a Court is not likely to construe a surety bond with an eight anna stamp as constituting a specific mortgage or charge upon immovable property. As however we find that there was no intention specifically to charge the immovable property mentioned in the surety bond as evidence of solvency, and that no such charge was created, this point of difference is of no importance.

The next point taken is that as Ghulam Hussain was not an agriculturist and the decree was passed against the legal representatives who are admittedly agriculturists, they cannot take advantage of the Section, and reliance has been placed upon a judgment of a Bench of this Court in 15 S L R 47.[5] Now the long and learned arguments we have heard on the interpretation of this S. 22 have more than ever convinced us that it was not the intention of the Legislature that there should be read into the simple words of this Section, and, indeed, other Sections of the Act, those subtleties and niceties of legal argument which so delight the lawyer. The language of this enactment, Broomfield J. remarks, is notoriously difficult to construe, but, we think, that difficulty might be lessened if it is remembered that the Act was intended to be a simple Act for simple men to achieve a simple but to them a vital purpose, the preservation to an agriculturist of his land. It is true that the definition of "agriculturist" is so wide as to let in men who are not agriculturists in the ordinary sense of the word. They are not tillers of the soil or farmers as the word is understood in some other countries, and S. 22 refers to immovable property generally, not simply to agricultural lands, but these are faults remediable by the Legislature if it so wishes, and it may be that it was thought better to err on the safe side to make the words of the Act so wide and general in their meaning as to make certain that the Act would not fail in its purpose by reason of any restrictions or qualifications on the words or general purport used. Reading S. 22 as it stands, there would seem little difficulty in deciding that it matters not what is the status of a defendant when the decree was passed against him. S. 22 says:

"Immovable property belonging to an agriculturist shall not be attached or sold in execution of any decree", and once it is shown that the property to be attached or sold is the immovable property of an agriculturist not specifically pledged, one would think that there was little difficulty in deciding that the Section applied and the property is protected. This appears the simple and straightforward interpretation put upon the Section by Sir Norman MacLeod in 28 Bom L R 656[6] at p. 658, when he says :

It seems obvious, then, that under S. 22 the important question is whether the property sought to be attached belongs to an agriculturist at the time of the attachment, and, then, it would be open to the person against whom execution is sought to plead that as he was an agriculturist, the property could not be attached, although at the time the decree was passed, nothing was said as regards his status as an agriculturist.

In A I R 1926 Bom 140[7] Sir Norman MacLeod decided that the legal representatives of a deceased agriculturist could prove that they were agriculturists so as to free the immovable property of the judgment-debtor in their hands from attachment, though he added a proviso that the applicant would have to prove that he also was an agriculturist at the time of the decree. But this Court in A I R 1930 Sind 16[8] decided that the legal representative of the

4. Girwarsingh v. Narain Singh, (1887) 14 Cal 730 (F B).
5. Choitram Kaliandas v. Lalbux, (1921) 8 A I R Sind 29=63 I C 310=15 S L R 47.
6. Balkrishna Tulsidas v. Sarupchand Purshottamdas, (1926) 13 A I R Bom 389=95 I C 1017=28 Bom L R 656.
7. Shidraj v. Renaki (1926) 13 A I R Bom 140 =92 I C 554=27 Bom L R 1490.
8. Showkomal v. Jagatmal, (1930) 17 A I R Sind 16=118 I C 221.

judgment-debtor is entitled to plead and lead evidence to prove that he is an agriculturist even though the judgment-debtor had already raised the plea, and it was decided that he was not an agriculturist. In 18 S L R 19[9] a Full Bench of this Court decided that a debtor could in execution proceedings raise the plea that he was an agriculturist, and it was not necessary for him to show that he was an agriculturist at the date of the suit or the decree. The advocate for the appellant argues that an agriculturist may raise the plea and prove that he was an agriculturist and yet not be entitled to the privileges of an agriculturist under the Act. We can see no force in this argument. It is unreasonable to suggest that the Legislature intended that a person could prove himself an agriculturist under an Act and yet be denied the appropriate protection the Act was intended to give.

The case in A I R 1930 Sind 16,[8] above referred to, the case in A I R 1929 Sind 209,[10] therein referred to, and the Full Bench case in 18 S L R 19[9] make it clear that this Court has taken the view that S. 22 should be read as it stands, to mean what it says, and to protect agriculturists, whether judgment-debtors or the legal representatives of judgment-debtors in the possession of their lands. But reliance is placed for the applicant upon 15 S L R 47,[5] but all that that case decided was that the land of the judgment-debtor, an agriculturist, in the possession of his legal representative also an agriculturist is within the second clause of S. 22. It is true that this judgment is differed from by the Bombay High Court for good reasons given in 32 Bom L R 320,[11] and it may be necessary to refer the decision of this Court in 15 S L R 47[5] to a Full Bench at some future date, but we do not think we can in this appeal pass any order under the second part of S. 22. No application for a direction to the Collector was before the lower Court at all, no order was passed by the Court on such an application, and we do not think that S. 22 contemplates that the Appellate Court should give directions to the Collector when no such application under that Section was before the lower Court. We think therefore the appeal must be dismissed with costs accordingly.

D.S./R.K. *Appeal dismissed.*

9. Hariomal v. Hazarising, (1925) 12 A I R Sind 49=78 I C 583=18 S L R 19 (F B).
10. Godumal Jethanand v. Bulchand Gurmukhdas, (1929) 16 A I R Sind 209=119 I C 543.
11. Mathuradas Tuljaram v. Mahadu Maruti, (1930) 17 A I R Bom 238=127 I C 207=32 Bom L R 320.

A. I. R. 1939 Sind 71

DAVIS J. C. AND WESTON J.

Azizuddin R. Faruqui

v.

Emperor

Criminal Revn. Appln. No. 117 of 1938 Decided on 5th July 1938, against order of First Addl. Sess. Judge, Hyderabad D/- 9th March 1938.

Criminal Trial—Revision—Jurisdiction should be used sparingly—Careful and proper order of trying Magistrate should not be interfered with merely on conflict of views upon evidence.

Jurisdiction exercised in revision is an extraordinary jurisdiction and is to be used only in exceptional cases and sparingly and reading S. 436 with S. 435, Criminal P. C. [P 72 C 1, 2]

A Sessions Judge should not usurp the jurisdiction conferred by law upon a Magistrate and should not interfere with a careful and fairly proper order of a Magistrate merely because the Sessions Judge takes a different view upon the evidence from that of the trying Magistrate, when the view taken by the Magistrate is reasonable in all circumstances of the case : *15 Cal 608 (FB) ; 9 All 52 ; 32 Mad 220 and A I R 1916 Sind 16, Disting.; A I R 1935 Bom 137, Rel. on.* [P 72 C 2]

D. N. O'Sullivan — *for Applicant.*

Partabrai D. Punwani, Advocate-General — *for the Crown.*

Davis J. C.—This is an application in revision against an order of the First Additional Sessions Judge of Hyderabad, who ordered under S. 436, Criminal P. C., a further inquiry into a complaint of an offence under S. 409, I. P. C., made by the opponent, one Haji Shah Nawaz Pirzada, against the applicant one Azizuddin Rahimuddin Faruqui, who was a Deputy Educational Inspector for Mahomedan Education, Hyderabad. The subject of the offence alleged was a carpet and it was the case of the complainant that the present applicant who was then the accused had committed criminal breach of trust of the carpet in that he had substituted for the good carpet a bad carpet, which was the in the office. As this appeared a dispute a somewhat unusual nature for a Criminal Court, the City Magistrate at Hyderabad ordered a preliminary inquiry and he himself examined 10 witnesses with whose evidence he has very carefully dealt, and he came to the conclusion that it was not possible upon the evidence as it was recorded before him that the accused could

be convicted of the offence alleged; for, finally, after considering all the evidence he came to the conclusion that the substitution of this bad carpet for the good carpet as alleged by the complainant rested upon the evidence of the peon named Soman, so far as it implicated the accused, and that his peon Soman had given evidence in a departmental inquiry which was inconsistent with the evidence which he gave before him and upon which the learned Magistrate was asked to rely. He thereupon dismissed the complaint under S. 203, Criminal P. C., and the matter then went in revision before the Additional Sessions Judge, who took a different view of the evidence, coming to the conclusion that there was sufficient, indeed overwhelming, evidence upon which the accused could be convicted and he directed a further inquiry not by the same Magistrate but by the District Magistrate himself, or some competent Magistrate subordinate to him other than the City Magistrate.

The learned Additional Sessions Judge in his order referred to a case wherein he found authority for ordering further inquiry into a case upon the same facts. He also referred in his order to a case which was authority for the statement that the mere fact that an accused person had been exonerated in a previous departmental inquiry was not sufficient ground for dismissal of a complaint and with these two authorities and the statements based upon them we find it quite unnecessary to disagree; but, we do not think that the learned Additional Sessions Judge sufficiently appreciated the fact that when he was acting under S. 436, Criminal P. C., he was exercising a jurisdiction that must be used sparingly and that was a jurisdiction in revision. It is true that the words of S. 436, Criminal P. C., are so wide that it might be said that the Sessions Judge has, without any limitation, power to order a further inquiry into a complaint that has been dismissed or into the case of a person accused of an offence who has been discharged. But S. 436 must be read with S. 435, Criminal P. C., and the limitations within which jurisdiction in revision is to be exercised, are indicated by the words of sub-s. (1) itself. It is true these words are wide but they again are limited in their application by the fact that jurisdiction exercised in revision is an extraordinary jurisdiction and that that jurisdiction is to be exercised only in exceptional cases and sparingly. S. 435, sub-s. (1) is as follows:

435. (1) The High Court or any Sessions Judge or District Magistrate or any Subdivisional Magistrate empowered by the Local Government in this behalf, may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Now the words with which we are chiefly concerned in that sub-section are "as to the correctness, legality or propriety of any finding, sentence or order," and it is obvious that a Court should interfere only when it finds that the order is incorrect, illegal or improper. It is not intended by that sub-section that a Sessions Judge should, for instance, usurp the jurisdiction conferred by law upon Magistrates and that he should interfere with an order of a Magistrate which may fairly be deemed a proper order, merely because the Sessions Judge does take a different view upon the evidence from that of the trying Magistrate. In short, it is not sufficient in itself for there to be conflicting views between the Sessions Judge and the Magistrate as to the truth of what the witnesses say to justify interference by the Sessions Judge with the order of the Magistrate; and, although there is authority for the statement that a Sessions Judge may send a case back for further inquiry upon the same evidence that does not, we think, mean that the Sessions Judge should send the case back for further inquiry upon the evidence merely because the Sessions Judge differs from the view of the trying Magistrate, the view of the trying Magistrate being a reasonable view in all the circumstances of the case. Reference may be made to the case in 15 Cal 608,[1] the case in 9 All 52,[2] the case in 32 Mad 220[3] and the case in 10 S L R 68[4] in support of the statement that a Sessions Judge or District

1. Hari Dass Sanyal v. Saritulla, (1888) 15 Cal 608 (F B).
2. Queen-Empress v. Chotu, (1887) 9 All 52=1886 A W N 281 (F B).
3. Narayanaswamy Naidu v. Emperor, (1909) 32 Mad 220=1 I C 228=19 M L J 157.
4. Begraj Basharam v. Emperor, (1916) 3 A I R Sind 63=35 I C 525=17 Cr L J 349=10 S L R 68.

Magistrate has jurisdiction to direct a further inquiry or rehearing upon the same materials which were before the Subordinate Magistrate, though there is no further evidence forthcoming. But we do not think one of those cases is authority for the statement that any such further inquiry or rehearing is justified when the order of the Magistrate upon the evidence appears a reasonable order. In a recent case in the Bombay High Court, 59 Bom 125,[5] where the Court considered the powers exercisable under S. 437, Criminal P. C., Rangnekar J. in his judgment refers to the powers exercisable under Ss. 436 and 437, Criminal P. C., in the following words:

Now there is some distinction between these two Sections and it is this. S. 436 provides that the Sessions Judge can set aside an order of discharge and order further inquiry when he is acting in the exercise of his revisional jurisdiction whereas S. 437 provides that he can make an order of commitment when the accused was improperly discharged. The question then arises whether there is any real distinction between the revisional jurisdiction of the Sessions Judge when he acts under S. 436 and when he acts under S. 437. One thing is clear and that is the action to be taken under both the Sections by the Sessions Judge when he considers that interference is necessary is only in the exercise of his revisional jurisdiction. It is not easy to understand why the Legislature has used the words "improperly discharged" in S. 437. The learned Government Pleader argues that in spite of the use of this expression there is substantially no difference between Ss. 436 and 437 as to the jurisdiction of the Sessions Judge in revision as to orders of discharge made by the Court holding an inquiry under Ch. 18, and I am inclined to agree with this contention I think what is meant by this particular expression is nothing more than what Mr. Justice Crowe said in 27 Bom 84[6] to which I have referred, in these words at page 88:

'The next point which arises is whether the order of discharge was illegal or incorrect or otherwise improper, i. e. was it wrong on the merits?'

Confining myself to the order of discharge falling under S. 437, the position seems to me that in a case triable exclusively by the Court of Session the Sessions Judge can set aside the order and commit the accused for trial (1) when he considers that the charge was not groundless, and (2) when he considers that there are sufficient grounds for commitment, both on facts and on legal grounds, or even when the proceedings before the inferior Court were not regular, and that is the meaning of the expression "improperly discharged." This then being the extent and scope of the revisional jurisdiction of the Sessions Judge, it is difficult to see how it can be said that an order of discharge made by a Magistrate after hearing all the evidence for the prosecution ought not to be set aside unless "the order is perverse or manifestly unreasonable and inconsistent with an honest appreciation of the evidence by the Court." Nor is there, with sincere respect for Broomfield J., any warrant for the proposition the learned Judge laid down in 57 Bom 430[7] in these words (page 440):

'The question whether it ought to be set aside in revision depends on whether it is a reasonable order the criterion being, not whether the revising Court agrees with it, but whether it is rational in the sense that it cannot be fairly described as perverse or manifestly contrary to the evidence.'

Having said this there are some points to which I might usefully refer. The first is that this Court has always held that the power in revision has to be used not freely but sparingly, not as if the revising Court is sitting in appeal from a judgment of the lower Court. That rule is good enough for the guidance of the High Court, and a fortiori I think that rule is binding on all subordinate Courts.

Now we are not concerned here in a case under S. 437, Criminal P. C., where the Magistrate has merely to consider whether there is sufficient evidence to commit or not, because we are not concerned here with a case where the accused is to be committed to the Court of Session, but we are concerned with a case under S. 436, Criminal P. C., and though it may be said that it is wrong to say that a revising Court will not interfere with such an order unless it can be fairly described as perverse or manifestly contrary to the evidence, it is, we think, clear that the Court will not interfere with a reasonable order made by a Magistrate in the exercise of his jurisdiction and that it will not interfere unless it is satisfied that the order is an unreasonable order, though it may not be necessary or proper to describe that order as perverse or manifestly contrary to the evidence. S. 435, Criminal P. C., as we have pointed out, refers to the correctness, legality or propriety of the order and if we use the word "an improper order" instead of "an unreasonable order" it makes little difference because it means much the same thing within the meaning of the Section.

Now looking at the order of this Magistrate in this light remembering that we are exercising jurisdiction in revision as was the Additional Sessions Judge exercising jurisdiction in revision and which revisional jurisdiction is to be sparingly exercised, we find that the learned City Magistrate has very carefully considered all the evidence that was led before him

5. Ramchandra Babaji v. Emperor, (1935) 22 A I R Bom 137=1935 Cr C 288=155 I C 101 =36 Cr L J 643=59 Bom 125=37 Bom L R 16 (F B).
6. Emperor v. Varjivandas, (1903) 27 Bom 84= 4 Bom L R 779.
7. Parasharam Bhika v Emperor, (1933) 2 A I R Bom 158=1933 Cr C 470=143 I C 28 = 34 Cr L J 564=57 Bom 430=35 Bom L R 245.

He examined all the eight witnesses first cited by the complainant, and two more whose evidence he considered necessary in the interests of justice. The Magistrate examined even two witnesses whom the complainant had named but whom he did not wish finally to be examined, as he thought their evidence might be of some use to the Court. The Magistrate then goes on to refer to the departmental enquiry, not making it in any way a basis for the dismissal of the complaint, but because previous statements were made by witnesses in that departmental inquiry which statements the Magistrate had to compare with their later statements made before him. He considered the evidence of those witnesses who said that a carpet then in the office of the Deputy Educational Inspector was not the good carpet they had seen. Two of these witnesses were assistants to the Deputy Educational Inspector and two were managers of a Mulla School. They were, as the learned Magistrate pointed out, not members of the office but visitors. Then the learned Magistrate refers to the evidence of the Head Clerk. That witness apparently said that the carpet had been changed. Then the peon Soman gave evidence and his evidence really most seriously implicated Mr. Faruqui because it was he who said that the good carpet was taken away to a certain bungalow by him and another carpet was left in the office by another peon. Then the Magistrate points out that the head clerk and Soman had made different and conflicting statements and in the departmental inquiry both these witnesses gave explanations as to their previous statements which the Magistrate could not accept.

Then he dealt with the evidence of the clerk of the Deputy Educational Inspector who stated that the carpet had not been substituted. This clerk apparently contradicted the peon Soman. Next he dealt with the evidence of the Deputy Educational Inspector. His evidence in no way supported the case for the complainant. Then he dealt with the evidence of Mr. Memon who was in charge of the inquiry and occupied a high position in the Educational Department which again was against the case of the complainant. Then he dealt with the evidence of the peon Saleh and that too was against the case of the complainant. Then finally he considers as a whole the evidence of the two sets of witnesses; those who say, the carpet is substituted and those who say, the carpet is not substituted and he prefers to rely upon those witnesses who belonged to the office of the Deputy Educational Inspector and would be more familiar with the carpet and its circumstances than to rely upon the evidence of those who were visitors from time to time. Finally he points out that the case would ultimately rest upon the evidence of the peon Soman, because it is not sufficient to find that one carpet was substituted for another; to convict the accused he will have to find that the substitution was made by the accused. Considering then the evidence as a whole he came to the conclusion that the accused could not be convicted upon this evidence and he dismissed the complaint.

But when the matter came before the learned Additional Sessions Judge in revision he took a different view and the difference merely amounted to this: that while the Magistrate had relied upon the statements of those witnesses who belonged to the office and who would be most familiar with this carpet and its circumstances the learned Judge preferred to rely upon the evidence of the two Assistant Deputy Educational Inspectors and two Managers of Mulla Schools. So far as the evidence of the clerk Choithram is concerned, he does not appear to have set out the relevant passage of his evidence entirely correctly in his judgment; so far as the evidence of the peon Soman is concerned, who is the most important witness, the learned Judge said that his first statement must be deemed to have been made under pressure and that his second statement should be relied on; and he sent the case back for further inquiry with an implied order that the accused should be convicted; for if the Judge's appreciation of the evidence was correct and would bind a Magistrate as presumably it would, it is difficult to see even if a charge were framed and witnesses for the defence were called, how a Magistrate could under such circumstances in view of the Judge's order, acquit the accused.

But it is clear from these two orders that there is nothing more here than a mere difference of opinion between the Additional Sessions Judge and the Magistrate as to the credibility of the witnesses. It appears that it can in no way be said that the Judge's appreciation of the evidence is more correct than the appreciation of the evidence by the City Magistrate; we need go no further than that. But having

gone so far, we think, it is clear that the learned Additional Sessions Judge when he interfered merely upon conflicting views of the evidence upon a difference of opinion, with an order that was a careful and reasonable order, did not exercise jurisdiction in revision sparingly and did not exercise it in the manner that it was intended to be exercised. It should be exercised, reading S. 436, Criminal P. C., with S. 435, Criminal P. C., and as judgments of High Courts agree, sparingly. It is an extraordinary jurisdiction; it is not a jurisdiction in appeal. That being so, we do not think it will be right for us to allow the order of the Additional Sessions Judge to stand because it would amount in practice to this: that the case would go back to a Magistrate practically with the direction to convict; the Magistrate would convict and the case would come in appeal and in appeal a Court would be bound, almost inevitably, to set aside the conviction and give the accused the benefit of the doubt, if no more. We cannot then see how justice or public interests can be served in any way by allowing this procedure to be followed. We must therefore set aside the order of the Additional Sessions Judge and restore the order of the City Magistrate. The revision application will be allowed accordingly.

N.S./R.K. *Application allowed.*

A. I. R. 1939 Sind 75

DAVIS J. C. AND TYABJI J.

Mt. Soni w/o Sher Muhammad

v.

Kishnomal Manghandas and others.

Criminal Ref. No. 186 of 1938, Decided on 31st August 1938.

Criminal P. C. (1898), Secs. 247 and 439 — Judicial Commissioner's Court can set aside acquittal not based on merits of case.

Judicial Commissioner's Court, upon an application in revision by the complainant, can set aside an acquittal not based on the merits of the case (being one under S. 247) and order the case to proceed according to law : *A I R 1922 Sind 22 and A I R 1928 Sind 176, Expl. and Disting.*

[P 75 C 2 ; P 76 C 1]

Partabrai D. Punwani, Advocate-General — *for the Crown.*

Davis J. C. — This is a reference to us by the learned Sessions Judge of Sukkur who asks us to set aside an order of acquittal of three accused persons passed by the Second Class Magistrate, Sukkur, on the ground that the diary of the case shows that the order was a most improper order, that the case had been adjourned time after time when the complainant, a woman, was present with her witnesses, and that on the one day when she was absent and when the Magistrate without proper notice to her had changed his camp, the Magistrate took advantage of her absence and acquitted the accused under S. 247, Criminal P. C. These briefly are the material facts of this case, and it is clear that if this Court has the power in the exercise of its revisional jurisdiction to set aside this acquittal, which was not an acquittal on the merits at all, but which is an acquittal passed, in our opinion, most unfairly by the learned Magistrate, this Court should do so.

But the question has been raised as to whether the only remedy open to the complainant is to move Government to appeal under S. 417, Criminal P. C. But we think it is clear that this Court has in its revisional jurisdiction power to set aside an order of acquittal but not to change it into one of conviction. The power of a Court to change a finding of acquittal into one of conviction appears to us to rest in its appellate jurisdiction under S. 423 (1) (a), Criminal P. C., upon an appeal properly made under Sec. 417, Criminal P. C., to which reference is made in S. 423 (1), Criminal P. C., itself. But to hold that this Court can never, for instance, in a case such as this, set aside an order of acquittal, such an order of acquittal not being based upon merits of the case at all, would be to render Section 439, Criminal P. C., in part infructuous, for we think that sub-s. (4) of S. 439 itself contemplates that a Court in the exercise of its revisional jurisdiction can set aside an order of acquittal as a Court in appeal could set aside an order of acquittal, for the Court in its revisional jurisdiction exercises with certain limitations the power exercised by a Court of Appeal; one of these limitations is that a Court in revision shall not convert a finding of acquittal into one of conviction. But this is not what we intend in this case to do, nor is it what the learned Sessions Judge has asked us to do. He has asked us merely to set aside the order of acquittal and order further inquiry, so that this complainant, a woman, who has so patiently and so often attended the Magistrate's Camp shall be given due opportunity to prove her case.

Now sub-s. (5) of S. 439, Criminal P. C., must be read with sub-sec. (4), and it must

be considered in relation to the argument that where the Code provides a remedy by way of appeal, then no remedy by revision lies, for sub-s. (5) of S. 439, Criminal P. C., reads as follows:

Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.

Now, we emphasize in that sub-section the words "at the instance of the party" because it was upon these words that the Division Bench of this Court in 15 S L R 171[1] refused to interfere on a reference by a District Magistrate in exercise of its revisional jurisdiction with an order of acquittal because the Court pointed out that Government has a right of appeal and that for this purpose no distinction can be drawn between the District Magistrate and Government. But we are not concerned here with an application in revision by Government at all. The applicant here is the complainant, a woman, and it is clear that she could not appeal under S. 417, Criminal P. C. There is a case of a Bench of this Court, A I R 1928 Sind 176,[2] which in effect says that this Court will not interfere in revision against an order of acquittal when an appeal will lie under S. 417, Criminal P. C. That case does not bind us and the case then before the Judge was a case that had been heard and tried on its merits, and though we do not decide, as it is not necessary to decide, that S. 417, Criminal P. C., is equally applicable to a case which has not been decided on its merits as to a case which has been decided on its merits, for that point is not now before us, there is no binding authority of this Court which prevents our setting aside in revision an acquittal not based upon the merits of the case and ordering the case to proceed according to law.

We think therefore that it is clear that we have, in exercise of our powers under S. 439, Criminal P. C., power to set aside this order of acquittal and to order the case to proceed from the stage which it had reached when this improper order of acquittal was passed. We therefore set aside the order of acquittal and order a further enquiry into the case to proceed and its disposal according to law. We think the case should be sent to the District Magistrate, Sukkur, with a request to send it to any competent Magistrate other than this Second Class Magistrate who has passed this order. Order accordingly.

D.S./R.K. *Order of acquittal set aside.*

1. Emperor v. Janu Fakir, (1922) 9 A I R Sind 22 =66 I C 999=23 Cr L J 343=15 S L R 171.
2. Emperor v. Dito, (1928) 15 A I R Sind 176= 114 I C 110=30 Cr L J 251.

A. I. R. 1939 Sind 76

DAVIS J. C.

Baijnathsing Attarsing

v.

Emperor

Criminal Appeal No. 106 of 1938, Decided on 23rd August 1938, against judgment of City Magistrate, Karachi, D/- 31-5-1938.

Criminal P. C. (1898), S. 35 — Offences of housebreaking with intent to commit theft and theft following it can be punished with separate and consecutive sentences.

As S. 71, Penal Code, now stands and as S. 35, Criminal P. C., now stands amended, they do not restrict the passing of separate sentences for house-breaking with intent to commit theft and the commission of theft which follows it. There can be no doubt that these two separate offences, though they form part of one transaction, can be punished with separate and consecutive sentences. [P 77 C 2]

Jethanand Tahilramani—*for Appellant.*

Parsram Tolaram, Ag. Public Prosecutor — *for the Crown.*

Judgment. — This is an appeal against the judgment of the City Magistrate of Karachi, who has convicted the appellant of offences under Ss. 457 and 380, I. P. C., house-breaking with intent to commit theft and theft, and sentenced him under each Section to six months rigorous imprisonment, the sentences to run not concurrently but consecutively. I admitted this appeal to hear arguments on the question as to whether S. 35, Criminal P. C., read with S. 71, I. P. C., prohibited the passing of separate punishments for these two offences, and after having heard the learned advocate for the appellant and the learned Public Prosecutor, I have come to the conclusion that there is nothing at all in law which forbids the imposition of separate sentences for house-breaking with intent to commit theft and for the commission of the theft which follows it.

I am not concerned here with the question of rioting and the use of force or violence which is an essential part of the offence of rioting. I am concerned only with the question of house-breaking and theft and the case in point which the learned advocate refers me to, 5 Pat 464,[1]

1. Makhru Dusadh v. Emperor, (1926) 13 A I R Pat 367=96 I C 528=27 Cr L J 976=5 Pat 464=7 P L T 794.

does not discuss the matter at any length and refers merely to previous rulings in the Weekly Reporter, but as pointed out in Ratanlal's Law of Crimes at p. 129, the Patna High Court has followed the earlier decisions of the Calcutta High Court before Sec. 35, Criminal P. C., was amended and has not followed the later decision (A I R 1925 Cal 1015[2]) of that High Court of which the substance is given in Ratanlal's Law of Crimes, Edn. 13, at pp. 128 and 129. Now this judgment does show that previous to the amendment of S. 35, Criminal P. C., it was conceded that house-breaking with intent to commit theft and the commission of theft which followed, were not distinct offences within the meaning of S. 35, and that conclusion was supported by the illustration, now no longer in the Section by reason of the amendment which is as follows :

> *A* breaks into a house with intent to commit theft and steals property therein. *A* has not committed distinct offences.

But that illustration is no longer in S. 35, nor is the word "distinct," so that we are concerned now not with distinct offences but offences within the meaning of Sec. 71, I. P. C. In S. 35, Criminal P. C., occurs neither the words "separate" nor "distinct," but the words "subject to the provisions of S. 71, I. P. C.," which were inserted in S. 35 by amendment when this illustration was omitted, bring this Section into relation with S. 71 and those offences with which that Section is designed to deal. What we have now to consider is whether these two offences are of the nature of any of those described in S. 71, I. P. C., so that the punishment for more than one of these two offences is forbidden by that Section. Now S. 71, I. P. C., is in the following terms :

> Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided:
>
> where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or
>
> where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence,
>
> the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences.

2. Kanchan Molla v. Emperor, (1925) 12 A I R Cal 1015=88 I C 997=26 Cr L J 1253=41 C L J 563.

It cannot be said that either the offence of house-breaking by night with intent to commit an offence or the offence of theft from a dwelling house is an offence made up of parts. The offence of house-breaking with intent to commit theft is complete as soon as the house-breaking with the necessary intent is committed. If an offender be frightened before he has committed the offence of theft after he has broken into the house with the necessary intent and runs away, yet he could be convicted of the offence under Sec. 457, I. P. C., but not of an offence under S. 380, I. P. C. Moreover, a person can be convicted of theft from a dwelling house without having broken into that dwelling house. In fact the two offences are not part of one offence, as for instance theft and hurt are parts of the offence of robbery. Therefore, clearly paragraph 1 of S. 71, I. P. C., does not forbid a separate punishment for the offence of house-breaking with intent to commit theft and a separate punishment for the offence of theft to be passed.

Then, it cannot be said, that house-breaking with intent to commit theft and theft fall under para. 2 of S. 71, where the same unlawful act is described by different names and the unlawful act is only one. Neither can it be said that the offences of house-breaking with intent to commit theft and theft combine to constitute a different offence, for there is no such offence combining house-breaking with intent to commit theft and the commission of theft in the definitions of offences in the Penal Code. Therefore the last two paragraphs of Sec. 71, I. P. C., also do not apply. Therefore, there appears nothing now in Sec. 71, I P. C., which restricts the power of the Court under S. 35, Criminal P. C., to pass separate and consecutive sentences for the two offences of which the accused has been convicted at the one trial. To me as S. 71, I. P. C., now stands and as S. 35, Criminal P. C., now stands amended, they do not restrict the passing of separate sentences for house-breaking with intent to commit theft and theft. There can be no doubt that these two separate offences, though they form part of one transaction, can be punished with separate and consecutive sentences.

In this case the sentences imposed are sentences of six months' rigorous imprisonment under each Section and are less than could have been imposed under any one of

the two Sections. It is said that the accused in this case confessed his crime and that apart from any question of the interpretation of Sec. 35, Criminal P. C., or Sec. 71, I. P. C., I should direct the two sentences to be concurrent because the theft is a small one of Re. 0-8-6. Though the theft is a small one, the learned Magistrate has pointed out that little more than a month before, the accused was convicted of theft and he was released on probation of good conduct but he did not avail himself of the leniency shown except to commit this further offence soon after. The learned Magistrate thinks that it is the only chance of the accused that he should be given a year's rigorous imprisonment, so that he may feel what prison really means. I can see no reason to differ from the learned Magistrate's order or to interfere with the conviction and sentence. The appeal is therefore dismissed.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Sind 78

DAVIS J. C.

Radhakrishin G. Keswani

v.

Emperor

Criminal Appeal No. 122 of 1938, Decided on 29th September 1938, against order of Addl. City Magistrate, Karachi, D/- 29th May 1938.

(a) Penal Code (1860), S. 211 — Magistrate intending to make charge against complainant of offence under S. 211 — Complaint which he holds to be false must be first verified and dealt with under S. 200, Criminal P. C.

If a Magistrate is going to make a charge against a person of an offence under S. 211, Penal Code, the complaint which the Magistrate holds to be false must have been verified and dealt with by the Court according to law, i. e. when the complaint is made to the Magistrate he is bound to take cognizance of it under S. 200, Criminal P. C., and to verify the complaint in the ordinary way. The Criminal Procedure Code does not contemplate that when the Magistrate has received a formal complaint he need not follow the procedure set out in S. 200, Criminal P. C., but can straightway send it to the police under S. 156 (3), Criminal P. C., and then upon issue of B summary make a complaint of a false charge. The word "may" under S. 190, Criminal P. C., does not mean that Magistrate may refuse to take cognizance of an offence upon a complaint duly made to him : *12 Bom 161; A I R 1924 Bom 321 and A I R 1926 Bom 284, Rel. on.* [P 78 C 2; P 79 C 1]

(b) Criminal P. C. (1898), S. 476-B—Charge framed against complainant under S. 211, Penal Code, without giving him opportunity to show cause why complaint should not be made against him — Delay in filing appeal to High Court against order of Magistrate held should be condoned.

A charge was made against a complainant under S. 211, Penal Code. The complainant was however not given any opportunity of showing cause why the complaint should not be made against him. He knew nothing about the matter until he received summons from the Court to appear and answer a charge upon a complaint made by the Magistrate. As soon as he did this he applied for a copy of the order of the Magistrate and by that time his appeal to the High Court was out of time because more than 30 days had elapsed :

Held that the delay must be condoned : *A I R 1928 Bom 64, Rel. on.* [P 79 C 2]

K. H. Nagrani — *for Appellant.*

Kazi Khudabuksh, Asst. Public Prosecutor — *for the Crown.*

Judgment. — This is an appeal under S. 476-B, Criminal P. C., against a complaint made by the Additional City Magistrate, and asking me to order withdrawal of the complaint. The complaint is of an offence under S. 211, I. P. C., the appellant having made a false complaint of an offence under S. 406, I. P. C., against one Hakim Jamiatrai to the Court of the learned Magistrate. It appears, the learned Magistrate did not examine the complainant on oath though he had a formal complaint in writing before him, and sent the case direct to the police for investigation under Sec. 156 (3), Criminal P. C., and it was returned by the Sub-Inspector with a recommendation for a B summary which the Additional City Magistrate granted and without giving any notice to the appellant of the complaint to be made against him.

Now there are rulings of the Bombay High Court to the effect, that if a Magistrate is going to make a charge against a person of an offence under S. 211, I. P. C., the complaint which the Magistrate holds to be false must have been verified and dealt with by the Court according to law. For instance, in this case when the complaint was made to the Magistrate he was bound to take cognizance of it under S. 200 Criminal P. C., and he was bound to verify the complaint in the ordinary way. If he was of the opinion that it was not a case in which he should issue process at once he should have postponed the issue of process under the provisions of S. 202 and have sent it to the police for inquiry and report, and he could then have dealt with it under S. 203, Criminal P. C. But I do not think the Criminal Procedure Code contemplates that when the Magistrate has received a formal complaint he need not follow the procedure set out in S. 200, Criminal P. C., but can straightway send it to the police under S. 156 (3), Criminal P. C., and then

upon issue of B summary make a complaint of a false charge. It is true that S. 200, Criminal P. C., does not say in so many words that the Magistrate is bound to take cognizance of a complaint made to him but that is the general interpretation of the Section by High Courts. The word "may" under S. 190, Criminal P. C., does not mean that Magistrate may refuse to take cognizance of an offence upon a complaint duly made to him. As a Magistrate he is bound to examine the complaint and then either issue summons to the accused or make an inquiry under S. 202, Criminal P. C., or dismiss the complaint. Reference may be made to the case in 12 Bom 161.[1] S. 156, Criminal P. C., merely gives a Magistrate power when he is empowered under S. 190 to order such an investigation as the police might make under that Section when he has not before him materials on which he should take action under S. 190. It cannot, I think, mean that the Magistrate when he has received a complaint under S. 200 can refer the matter to the police under S. 156 (3), Criminal P. C. In the case in 26 Bom L R 183[2] the Magistrate dismissed the complaint without examining the complainant as he was bound to do under S. 203, Criminal P. C., and then he called upon the complainant to show cause why he should not be prosecuted for an offence under S. 211 or S. 182, I. P. C. Sir Norman Macleod C. J. held that as the complaint was not dismissed according to law the complainant could not be convicted of bringing a false charge. In 28 Bom L R 490[3] at page 493 Martin J. said :

> But it was not legitimate for the prosecution to institute proceedings under S. 211 for making a false charge before the proceedings in which that charge was actually made had been finally and properly determined according to law. Accordingly, it was not open to the District Magistrate to direct an inquiry in the way which he did, and to disregard the provisions of the Criminal Procedure Code, namely not to examine the applicant on oath, nor to take down his statement in writing, nor to give the Magistrate's reasons for the inquiry by the District Superintendent of Police,

and

> As regards the decisions of this Court it has been held in 15 Bom L R 574,[4] that if a case comes clearly under S. 211, the procedure to be followed should be under that Section and not under S. 182. Thus, as regards the lodging of a complaint for making a false charge before the original proceedings have been properly determined, there is a recent decision of the Chief Justice and Shah J. reported in 26 Bom L R 183.[2] There, a Magistrate without examining a complainant as he was bound to do under S. 200, Criminal P. C., dismissed a complaint and then called upon the complainant to show cause why he should not be prosecuted under S. 211 or S. 182. The Court held that this could not be done as the original complaint had never been properly dismissed according to law. And if one considers the underlying principles, then surely Ss. 200 and 203, Criminal P. C., are perfectly intelligible. They merely lay down the elementary principle that before you decide against a litigant you shall first hear him. If, on the other hand, the Magistrate merely reads a complaint, and then proceeds to dismiss it without hearing what the complainant may have to say, then that may be said to be in general a denial of elementary justice.

In this case it appears the appellant was not given any opportunity of showing cause why the complaint should not be made against him. He knew nothing about the matter until he received a summons from the Court to appear and answer a charge upon a complaint made by the Additional City Magistrate. As soon as he did this he applied for a copy of the order of the Magistrate and by that time his appeal was out of time because more than thirty days had elapsed. I have power to condone the delay and clearly this is a case where the delay should be condoned because in the ordinary way the accused person would have received some notice if such a complaint was to be made against him to appear before the Magistrate and show cause why the complaint should not be made against him. If then he did not file his appeal within thirty days his appeal would have been dismissed as time-barred; but here in this case the appellant knew nothing whatever about the complaint made by the Magistrate. He was not given an opportunity to show cause why it should not be made and the first he knew about it was when he received the summons to answer and then without delay he got the necessary copies and appealed to this Court : *see* 52 Bom 164[5] at page 167. I think it is clear that the delay must be condoned and the appeal must be allowed and the complaint withdrawn. I order accordingly.

D.S./R.K. *Appeal allowed.*

1. In re Jankidas Guru, (1888) 12 Bom 161.
2. In re Ningappa Rayappa, (1924) 11 A I R Bom 321=81 I C 608=25 Cr L J 960=48 Bom 360 =26 Bom L R 183.
3. In re Pampappa Balla Rao Desai, (1926) 13 A I R Bom 284=95 I C 68=27 Cr L J 740 = 28 Bom L R 490.
4. Emperor v. Apaya Tatoba Munde, (1913) 15 Bom L R 574=20 I C 747=14 Cr L J 491.
5. Emperor v. Daga Devji Patil, (1928) 15 A I R Bom 64=108 I C 26=29 Cr L J 315=52 Bom 164=30 Bom L R 76.

A. I. R. 1939 Sind 80

DAVIS J. C. AND TYABJI J.

Mt. Nooran w/o Rasool Baksh

v.

Rasool Baksh Haji.

Criminal Ref. No. 173 of 1938, Decided on 31st August 1938, made by Sess. Judge, Sukkur, D/- 13th June 1938.

Criminal P. C. (1898), S. 488 — Scope — Order under S. 488 must be one made after careful inquiry—Application by wife—Husband offering to maintain her — Application cannot be dismissed without taking evidence or giving finding—What is finding stated.

Section 488 contemplates a careful order made after a careful inquiry and not an order made in a hasty and summary fashion though such order may appear on the face of it to satisfy law. It is wrong to dismiss an application by the wife under S. 488 on the mere offer of the husband to maintain her without any evidence or giving any finding as to neglect or refusal to maintain the wife or as to the sufficiency or otherwise of the wife's reasons for refusing to live with her husband. "Finding" means a finding after an inquiry which is of a judicial nature. [P 80 C 2]

Partabrai D. Punwani, Advocate-General — *for the Crown.*

Fakir Muhammad Jaffri— *for* Rasool Baksh.

Davis J. C.—This is a reference by the learned Sessions Judge of Sukkur in which he asks us to set aside an order of the City Magistrate Shikarpur dismissing an application by a wife for maintenance under S. 488, Criminal P. C., on the ground that the learned Magistrate has not held a judicial inquiry into this application at all, that he has dealt with the application in a summary and cursory fashion and has taken the side of the husband in a manner which he thinks is not quite fair. The learned Judge points out that it is not sufficient for a husband, when proceedings have been taken against him under S. 488, Criminal P. C., on the application of the wife, to come forward and state merely that he is willing to maintain his wife. It is a common experience in these Courts that when proceedings are taken under S. 488, Criminal P. C., a husband often endeavours to avoid their effect and any order of maintenance by coming forward and making a statement that he is willing to keep the wife with him. But Magistrates, must in cases of this sort, bear in mind that this may be a mere device or trick on behalf of a husband to avoid payment of maintenance to a wife whom he has neglected or driven away by ill-treatment, and that when the sub-s. (4) says that maintenance should be refused if the wife refuses to live with her husband without sufficient reason, it means there must be some inquiry as to whether the wife has refused without sufficient reason to live with her husband. The advocate for the husband has relied on the Proviso to sub-s. (3), but when that Proviso says that a Magistrate may consider the grounds of the wife's refusal to live with her husband, if the husband offers to maintain her, that Proviso is intended to protect the wife and under the circumstances to which sub-s. (3) has reference.

In this case however sub-s. (3) of S. 488, Criminal P. C., had not yet come into operation, and the Magistrate held no such proper inquiry as sub-s. (4) of the Section contemplates. We observe from the record that the statement of the wife is recorded in a few lines; the statement of the husband is recorded in a few lines. The Magistrate has given the wife no opportunity to call her witnesses, and we see the Magistrate has noted that the names of witnesses have been given.

Therefore, so far as the Magistrate's order is concerned, although on the face of it, it may appear to satisfy the law, we have no doubt that it is not an order that is based upon a proper inquiry at all. It is an order made, in our opinion, in a hasty and a summary fashion and is not such an order as is contemplated by S. 488, Criminal P. C. That Section contemplates a careful order made after a careful inquiry. The Magistrate should bear in mind in cases of this nature that it is wrong to dismiss an application by the wife under this Section on the mere offer of the husband to maintain her without taking any evidence or giving any finding as to neglect or refusal to maintain the wife or as to the sufficiency or otherwise of the wife's reasons for refusing to live with her husband; and "finding" means a finding after an inquiry which is of a judicial nature. We therefore accept the reference of the learned Sessions Judge, set aside the order of the City Magistrate of Shikarpur with the direction that the Magistrate should inquire carefully into this woman's application, give both sides a proper opportunity to adduce evidence and dispose of the matter according to law.

N.S./R.K. *Reference accepted.*

*** A. I. R. 1939 Sind 81**

LOBO J.

Ramji Purshotam — Applicant.

v.

Hari Shamla — Opponent.

Judl. Misc. No. 116 of 1938, Decided on 30th August 1938.

*** Arbitration Act (1899), Sec. 8 (1) (b)— Parties jointly appointing two arbitrators — One of them dying — Court under S. 8 (1) (b) has no power to supply vacancy.**

It is an ordinary canon of construction that a Section of a statute should be so construed as to render every part thereof consistent with every other part. [P 83 C 1]

Section 8 must be read as a whole and Cl. (b) of sub-s. (1) must be read as qualified by sub-s. (2). It is consistent with the language of entire Section to construe Clause (b) as covering the case of a vacancy where the submission provides for reference to a single arbitrator and any other construction would render clause (b) of sub-s. (1) inconsistent with the words of sub-s. (2). Hence where the parties have jointly appointed two arbitrators and one of the arbitrators dies or a vacancy otherwise occurs, the Court has no power under S. 8 (1) (b) to supply the vacancy and appoint an arbitrator : *A I R 1929 Cal 177, Dissent.; A I R 1919 Bom 24 and A I R 1929 Sind 55, Rel. on.* [P 81 C 2 ; P 85 C 2]

Order. — This is an application under Ss. 8 and/or 9, Arbitration Act 9 of 1899 which has been occasioned in this way : The applicant and the opponent did business in partnership in the name and style of Hari Shamla. Some years ago, the partnership was dissolved but the accounts remained unsettled. There was ultimately a reference to five arbitrators who orally awarded to the applicant as against the opponent a sum of Rs. 975. The applicant and the opponent adjusted this matter to the extent of Rs. 528; there remained to be paid by the opponent Rs. 331 and for the non-payment of this amount the applicant sued the opponent in the Court of Small Causes, Karachi. On 26th January 1937 the parties executed a reference under the Arbitration Act, in favour of Messrs. Fatehchand Dharamdas and Chunilal Kalidas Yagnik, advocates. These gentlemen were the advocates of the parties to the suit. On the same day the suit was withdrawn. It is not disputed that the arbitrators were appointed jointly and that each party did not nominate his arbitrator. The arbitrators from time to time extended the period for making an award, the last such extension endorsed on the reference being dated 18th December 1937. Unfortunately Mr. Fatehchand Dharamdas died suddenly on or about 22nd December 1937. Thereafter the applicant intimated to the surviving arbitrator that he appointed Mr. Locumal Naraindas as arbitrator in the vacancy caused by the death of Mr. Fatehchand. But the opponent and Mr. Chunilal, the surviving arbitrator, took up the position that legally the applicant had no power to do what he had done and Mr. Chunilal declined to act in the matter of the reference with Mr. Locumal, the applicant's nominee. The applicant has in these circumstances preferred the present application.

It is conceded from the Bar that S. 9, Arbitration Act, does not apply and the words "one to be appointed by each party" in Para. 1 of S. 9 makes this obvious. The controversy however is as to the applicability of S. 8 (1) (b). While it is contended for the applicant that this case is covered by S. 8 (1) (b), Arbitration Act, and that the vacancy which has occurred by reason of one of the appointed arbitrators having died can be filled by the Court under the provisions of S. 8 (1) (b), it is contended by the learned advocate for the opponent that S. 8 (1) (b), Arbitration Act, has no application as it is applicable only to a case of a single arbitrator and a vacancy occurring by his neglect or refusal to act or by his death or removal. The question for decision therefore is: "Whether in a case where the parties have jointly appointed two arbitrators and one of the arbitrators dies or a vacancy otherwise occurs, the Court has power under Sec. 8 (1) (b) to supply the vacancy and appoint an arbitrator." The answer to this question should primarily in my opinion be sought from the Section itself and the language and structure thereof. Now, no doubt if the language of S. 8 (1) (b) is considered by itself it is sufficiently wide to cover the case of a submission providing reference to two arbitrators and a vacancy caused by the neglect, refusal to act, incapacity to act, or death or removal of one of the two appointed arbitrators. There is nothing in the words "if an appointed arbitrator neglects, &c." which would necessarily indicate that what is covered by S. 8 (1) (b) is a vacancy in a case where the submission provides for a reference to a single arbitrator. It is therefore necessary to see whether elsewhere in S. 8, Arbitration Act, there is anything which would control such an interpretation of Cl. (1) (b) based on the language used

therein. Now the marginal note to S. 8, Arbitration Act, reads: "Power for the Court in certain cases to appoint an arbitrator, umpire or third arbitrator." A perusal of the Section itself makes it clear that four different contingencies appear to be contemplated by sub-s. (1) of the Section, for the opening words of sub-s. (1) are "In any of the following cases." It is proper to infer therefore that Cls. (a), (b), (c) and (d) of sub-s. (1) of S. 8 contemplate four different contingencies in which a vacancy may occur in the appointment of an arbitrator or umpire in respect of which it is the intention of the Legislature to empower a Court under S. 8 (2) to fill the vacancy. Now it is obvious that sub-s. (1) of S. 8 must be read with and is eontrolled by sub-s. (2) which reads :

> If the appointment is not made within seven clear days, after the service of the notice, the Court may, on application by the party who gave the notice, and after giving the other party an opportunity of being heard, appoint an arbitrator, umpire or third arbitrator, who shall have the like power to act in the reference and make an award as if he had been appointed by consent of all parties.

The person therefore appointed by the Court to fill the vacancy in any of the four contingencies contemplated by Cls. (a), (b), (c) and (d) of sub-s. (1), is given the power to act in the reference and make an award.

Now, there is no difficulty in reading S. 8 (1) (a) with sub-s. (2) of that Section. Where the submission provides that the reference shall be to a single arbitrator and the parties do not concur in the appointment of an arbitrator the law empowers the Court to appoint an arbitrator and that arbitrator has the like power to act in the reference and make an award as if he had been appointed by consent of all parties. Nor is there any difficulty in reading Cl. (c) of sub-s. (1) with sub-s. (2). Where the submission provides that the reference is to be to two arbitrators and the parties are at liberty to appoint an umpire or third arbitrator and do not do so, or where the two arbitrators are themselves to appoint an umpire or a third arbitrator and do not appoint him, the law empowers the Court to make an appointment, and the umpire or third arbitrator so appointed shall have the like power to act in the reference and make an award as if he had been appointed by consent of all parties. Nor is there any difficulty in reading Cl. (d) of sub-s. (1) with sub-s. (2). Where in the case contemplated by Cl. (c) the appointment has been made and the appointed umpire or third arbitrator refuses to act, &c., the Legislature empowers the Court to supply the vacancy and appoint an umpire or a third arbitrator who has the like power to act in the reference and make an award as if he had been appointed by consent of all parties. In each of the cases covered by Cls. (a), (c) and (d) of sub-s. (1) of S. 8 it is the appointment of a single person that is contemplated and it is only that single person who under sub-s. (2) of the Section is empowered to act in the reference and make an award. Now, if Cl. (b) is to be read as covering the contingency of a vacancy occurring in the case of a submission which provides for the appointment of a single arbitrator then Cl. (b) falls into line with Cls. (a), (c) and (d) and no difficulty arises in reading Cl. (b) with sub-s. (2) of S. 8. In a case where the submission provides for a reference to a single arbitrator and that arbitrator refuses to act the Legislature empowers the Court in sub-s. (2) to fill the vacancy and the arbitrator so appointed shall have the like power to act in the reference and make an award as if he had been appointed by consent of all parties. But, if on the other hand, Cl. (b) of sub-s. (1) be construed as empowering the Court to supply a vacancy in a case where the submission provides for the appointment of two arbitrators, then there is no provision in the whole Section empowering the arbitrator so appointed to collaborate with another arbitrator in acting in the reference and making an award. On the vacancy being filled by an appointment by the Court there will be two arbitrators, one originally appointed by the parties and one appointed by the Court. How, in these circumstances, can the words of sub-s. (2) of the Section cover both these arbitrators, for the words are clear that the arbitrator appointed by the Court

> shall have the like power to act in the reference and make an award as if he had been appointed by consent of all parties.

Obviously though one of two arbitrators may act in the reference one of two arbitrators cannot make an award. What I wish to emphasize in this argument is that if Cl. (b) of sub-s. (1) is construed as covering only the case of a vacancy where the submission provides for a reference to a single arbitrator, no difficulty can arise in applying to that arbitrator the words of sub-s. (2) : "Who shall have the power to act in the reference and make an award." Any other construction must involve the difficulty

referred to above. It is an ordinary canon of construction that a Section of a statute should be so construed as to render every part thereof consistent with every other part. It is consistent with the language of the entire Section to construe Cl. (b) as covering the case of a vacancy where the submission provides for reference to a single arbitrator and any other construction would render clause (b) of sub-s. (1) inconsistent with the words of sub-s. (2) of the Section and would necessitate the introduction of words in sub-s. (2) of the Section which do not there exist and for the introduction of which there is no justification. For, if S. 8 (1) (b) covers the contingency of a vacancy in a case where the submission provides for a reference to two arbitrators then to make Cl. (1) (b) read consistently with sub-s. (2) it would be necessary to introduce in sub-s. (2) of S. 8 after the words "make an order" the words "with his co-arbitrator." Obviously this cannot be allowed.

Another argument favouring the construction that S. 8 (1) (b) applies only in a case where the submission provides that the reference shall be to a single arbitrator is the grouping of Cls. (a), (b), (c) and (d). This grouping would indicate an intention on the part of the Legislature. Just as Clauses (c) and (d) contemplate a vacancy occurring in two different contingencies arising out of the same set of circumstances, so Cls. (a) and (b) appear intended to contemplate two different contingencies arising out of another set of circumstances. Where the submission provides that the reference shall be to a single arbitrator, the parties may at the very start disagree and fail to concur in the appointment of an arbitrator. This is covered by Cl. (a). The parties may concur and appoint an arbitrator but that arbitrator may refuse or neglect to act or die, &c.; the contingency at this later stage is covered by Cl. (b). It appears to me therefore that if the interpretation of Cl. (b) of sub-s. (1) of S. 8 is to be wrested from the language of the Section itself, that interpretation must be that Cl. (b) applies only to the case where the submission provides that a reference shall be to a single arbitrator; such an arbitrator has been appointed by the parties, and a vacancy has occurred by the death, refusal to act or incapacity to act or removal of that arbitrator.

The next question is how far does this interpretation of Cl. (b) of sub-s. (1) of S. 8, Arbitration Act, which I accept, find authority in the decisions of High Courts in India. The only direct authority on the point to which my attention has been drawn is the case in 56 Cal 848.[1] In that case an application was made to stay a suit instituted in respect of a dispute which had previously been referred by the parties to the arbitration of two gentlemen appointed by both the parties but one of them had refused to act. It had been held by the trial Judge that the Court had no power to appoint an arbitrator in place of the arbitrator who had refused to act and on that ground the trial Court had refused to stay the suit. On appeal it was held by a Bench of the Calcutta High Court that in the circumstances the Court had the power to appoint an arbitrator in place of the one who had refused to act. In the judgment of the trial Court which is that of Pearson J., the following passage appears:

> It is to be observed that the reference here is not to "two arbitrators, one to be appointed by each party" to which the provisions of S. 9 of the Act would apply for supplying a vacancy. It is here a case of a mutual agreement to refer to two arbitrators nominatim, that is, specified and named in the clause of agreement itself. The only provision which is cited as applicable to such a case is S. 8 (1) (b) of the Act. Taking that sub-section by itself, it may be that the language is wide enough to cover the present case, but clearly it must be read in conjunction with the rest of the Section and the scheme of the Act. In 43 Bom 809[2] it is said at p. 830 that S. 8 (1) (b) only applies in terms to the case of a single vacancy to be supplied by the parties—so far, that would be the case here in filling Mr. Haug's vacancy. But the judgment goes to the length of saying that Cl. (b), like Cl. (a), relates to the case where the submission provides for the reference to be to a single arbitrator. So Hayward J. at p. 833 says that it is not open to the Court to interfere where the reference is to two arbitrators to be appointed, not one by each party but the two jointly by the two parties. Again in Russel on Arbitration (Edn. 11) in dealing with the meaning of 'an appointed arbitrator' under the corresponding S. 5 of the English Act, it is said at p. 126 that the expression must mean a single arbitrator and not one of two appointed arbitrators, because in the concluding words of the Section it is provided that the arbitrator appointed shall have the like power to act in the reference and make an award as if he had been appointed by consent of all parties. I am not prepared to hold that the reasoning or the construction of the Section given in the above cited case is erroneous, particularly because to hold otherwise would seem

1. General Electric Trading Co. v. Siemens, (1929) 16 A I R Cal 177=116 I C 625=56 Cal 848=49 C L J 19=33 C W N 418.
2. Gopalji Kuverji v. Morarji Jeram Narainji, (1919) 6 A I R Bom 24=50 I C 411=43 Bom 809=21 Bom L R 308.

to make S. 8 (1) (b) in certain cases an alternative procedure to that provided by S. 9, which I do not think was intended.

Dealing with this passage in the judgment of Pearson J., Ghose J., who delivered the judgment of the appellate Bench, says :

Now, in this case, two arbitrators have been mutually agreed upon and they have been appointed as such by the parties. Therefore S. 9, Indian Arbitration Act, has no application, because the language used therein has reference to a case where the submission is to two arbitrators, one to be appointed by each party. Let us next see whether there is anything in the language used in S. 8, Indian Arbitration Act, which prevents the application of S. 8 to this case, having regard to the events that have happened. S. 8 (1) (a) obviously has no application, because it deals with the case of a reference to a single arbitrator. Turning to S. 8 (1)(b), there is nothing, in my opinion, in the language used therein which would render it inapplicable to this case. To start with, the arbitrator who has refused to act, &c., is an appointed arbitrator. In the second place, the submission does not show that the place of the arbitrator who has refused to act, &c., should not be filled up. In the third place, it is clear that the parties have not cared to fill up the vacant place. Therefore I do not see why S. 8 (1) (b) should not apply. This is the conclusion I come to on the language used in the Section.

The learned Judge then goes on to refer to the case in 43 Bom 809,[2] which was quoted before him as "concluding the matter," and the learned Judge distinguishes the case in 43 Bom 809[2] on this ground and in these words :

With great respect I am unable to agree with Scott C. J. in his construction of Sec. 8 (1) (b), Indian Arbitration Act. In my opinion, the reasoning of Marten J., is more correct and the construction put by him on the Section should be followed. The basis of Scott C. J.'s judgment is the passage in Russel on Awards, Edn. 11, p. 126 and the English cases which are referred to on page 832 of 43 Bom. If, however, the matter is scrutinized with some degree of care, it would seem that passage in Russel on Awards was originally based on the words used in the English Common Law Procedure Act of 1854 and has been continued in the later editions of Russell without the change brought about by the English Arbitration Act of 1889 being noticed.

The learned Judge concludes by stating :

On all these considerations, I am of opinion that the construction put by Pearson J. on S. 8 (1) (b) of the Act cannot be supported and ought not to be followed.

With the greatest respect for Ghose J. it appears to me on a close examination of his argument that the case in 43 Bom 809[2] is not distinguishable on the ground relied on by Ghose J. S. 12, Common Law Procedure Act of 1854 reads thus :

If in any case of arbitration the document authorizing the reference provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator ; or if any appointed arbitrator refuse to act, or become incapable of acting, or die, and the terms of such document do not show that it was intended that such vacancy should not be supplied and the parties do not concur in appointing a new one; . . . . . .it shall be lawful for any Judge of any of the Superior Courts of Law or Equity at Westminster . . . . . .to appoint an arbitrator, umpire, or third arbitrator, as the case may be, and such arbitrator, umpire and third arbitrator respectively shall have the like power to act in the reference and make an award as if he had been appointed by consent of all parties.

Section 5, English Arbitration Act, 1889, reads thus :

In any of the following cases :

(a) where a submission provides that the reference shall be to a single arbitrator, and all the parties do not after differences have arisen concur in the appointment of an arbitrator ;

(b) if an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied ; and the parties do not supply the vacancy . . . . . the Court or a Judge may, on application by the party who gave the notice, appoint an arbitrator, umpire, or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

It is obvious on a comparison of S. 12, Common Law Procedure Act, 1854, and S. 5, English Arbitration Act, 1889, that the only material difference in the wording of that part of the Section which is relevant in this case is that whereas in S. 12, Common Law Procedure Act, the words used are "any appointed arbitrator" the corresponding words in S. 5, English Arbitration Act are 'if an appointed arbitrator.' If anything, the wording of S. 12, Common Law Procedure Act, is wider than the wording of Sec. 5 (b), English Arbitration Act, for, the word 'any' has a wider significance than the word 'an'. It would appear therefore that the passage in Russel on Arbitration and Awards at p. 117 of Edn. 13 or p. 116 of Edn. 11 to which reference has been made by Ghose J. as the basis of the decision of Scott C. J. in 43 Bom 809[2] is as much an authority under Sec. 5 (b), English Arbitration Act, as it was on Section 12, Common Law Procedure Act. Ghose J. further does not attach any significance to sub-s. (2) of S. 8 which governs all the sub-clauses of sub-s. (1). The words: "Who shall have the like power to act in the reference and make an award as if he had been appointed by consent of all parties," distinctly favour the construction put upon Section 8 (1) (b) by the learned Chief Justice of the Bombay High Court in 43

Bom 809.[2] With all respect to the learned Judges of the Calcutta High Court who decided the case in 56 Cal 848,[1] I am not prepared to accept the decision in that case although it is entirely in point in preference to the judgment of the Bombay High Court in 43 Bom 809.[2] Now, no doubt the case in 43 Bom 809[2] is not strictly applicable in the present case for, in that case the submission was to three nominated arbitrators all of whom after acting had declined to proceed any further; but the provisions of S. 8, Indian Arbitration Act, have been very exhaustively dealt with in this case both by the learned Chief Justice and by Hayward J. and the opinion expressed by these learned Judges supports my construction of Sec. 8 (1) (b). At p. 830 of this judgment the learned Chief Justice states :

> Section 8 (1) (b) does not apply to the case of independent appointments of two arbitrators. In such case when a vacancy occurs, it would ordinarily be filled by the original appointor as contemplated in Sec. 9. Sec. 8 (1) (b) only applies in terms to a single vacancy to be supplied by the parties. Sec. 8 nowhere seems to contemplate the case of two original arbitrators appointed jointly by the parties plus a third of the same class appointed by the two already jointly appointed or by the parties . . . . . In my opinion Cl. (b) must be read with Cl. (a) and Cl. (d) with Clause (c) of Section 8.

At p. 833 in the judgment of Hayward J. he states :

> There is no provision in S. 8 for interference on the failure of the parties jointly to nominate the two arbitrators. Nor do Cls. (a) and (b) read together provide for interference on the failure of two arbitrators so nominated to proceed with the arbitration. These two clauses must, in my opinion, be read together and the words 'the appointment of an arbitrator' at the end of Clause (a) read as repeated in the words 'if an appointed arbitrator' at the opening of Cl. (b), just as the two Cls. (c) and (d) have also plainly to be read together.

There is no authority of our own High Court directly on the point involved in this matter; but in the case of A I R 1929 Sind 55,[3] there are obiter in the judgments of Percival J. C. and Rupchand A. J. C., which favour the construction I place upon S. 8 (1) (b). Percival J. C. says :

> I think that this makes it clear that S. 8 (1) (b) cannot refer to such a case as is dealt with in Section 9 where the submission provides for reference to two arbitrators, one to be appointed by each party. This view of the law, it appears, was approved in 43 Bom 809[2] at p. 830, where it was stated that S. 9 applies only to joint appointment by consent.

In the judgment of Rupchand A. J. C. the matter though obiter is dealt with more fully. He states :

> Now, if Cls. (a) and (b), Sec. 8, Arbitration Act, are carefully analyzed they clearly show that neither of them applies to a submission which provides for the appointment of two arbitrators one by each party. Cl. (a) clearly contemplates a submission to a single arbitrator from its very inception and does not apply to a submission which provides for more than one arbitrator acting in the matter at any time. Clause (b), which follows Cl. (a), deals with appointment of a substitute and prima facie refers to the substitute of a sole arbitrator appointed under a submission of the nature contemplated by Cl. (a), that is to say, a sole arbitrator appointed in pursuance of a submission which does not contemplate the appointment of more than one arbitrator in any event . . . . Our attention has not been drawn to any decided case in which a different view has been taken. On the contrary the case reported in 43 Bom 809[2] supports the view that Cls. (a) and (b), Sec. 8, refer to submissions which provide for the appointment of a single arbitrator.

The case in 43 Bom 809[2] was cited with approval in the case in 54 Mad 198.[4] The Madras case however is not otherwise a useful reference in this matter, for, in that case there was reference to the arbitration of five panchayatdars, a position not contemplated by either Sec. 8 or Sec. 9, Arbitration Act. To my mind therefore, S. 8 must be read as a whole and Cl. (b) of sub-s. (1) must be read as qualified by sub-s. (2) and my interpretation finds considerable support from the Bombay and Sind cases to which I have referred in detail. In this view of the matter the application must fail. The original reference was to two arbitrators jointly appointed by the parties. One of them having died and the parties being unable to concur in the matter of filling the vacancy the Court has no power to interfere either under S. 9 or under S. 8 (1) (b), Arbitration Act. I must accordingly dismiss the application with costs. The costs to be of two hearings.

D.S./R.K. *Application dismissed.*

3. Uttamchand Brijlal v. Balmokand, (1929) 16 A I R Sind 55=107 I C 435.

4. Kunthi Ammal v. Sarangapani Chetti, (1931) 18 A I R Mad 170=130 I C 668=54 Mad 198 =60 M L J 498.

A. I. R. 1939 Sind 85

DAVIS J. C. AND TYABJI J.

Elias — Applicant

v.

Emperor.

Criminal Revn. Appln. No. 190 of 1938, Decided on 31st August 1938, from order of City Magistrate, Karachi, D/- 25th May 1938.

Motor Vehicles Act (1914), S. 16—Rules under, Rr. 31 and 33—Person carrying passengers from outside British territory into British territory in his bus for hire without registration does ply it in British territory and contravenes Rr. 31 and 33.

If a person carries passengers in his bus from outside British territory and comes into British territory without registration, and the passengers pay their fare to him to carry them there and back, he does ply his bus for hire within British territory and the fact that the end of the journey at one side terminates outside British territory does not exclude the bus from the operation of Rr. 31 and 33 so far as the journey within British India is concerned. [P 86 C 1, 2]

B. P. Samtani — *for Applicant.*

Partabrai D. Punwani, Advocate-General — *for the Crown.*

Davis J. C. — This is an application in revision against the order of the City Magistrate, Karachi, who has found the applicant guilty of contravening Rules 31 and 33 of the Motor Vehicle Rules and has fined him Rs. 60 under S. 16 of the Act. This case was tried summarily. Therefore the judgment of the learned Magistrate is the only record to be looked at and the learned Magistrate has found that the applicant did ply his bus for hire in British territory between Karachi and Machko without registering the bus and without taking a permit as required by the rules.

It is argued on behalf of the applicant that he was not in fact plying the bus for hire between Karachi and Machko in British territory at all, because what he did was to take passengers from Las Bela State, outside British territory into Karachi and from Karachi back to Las Bela State. But this argument overlooks R. 6 and R. 6 is referred in R. 31 and this makes it an offence to use a car in British territory without registration. Undoubtedly, this bus was used in British territory without registration, and therefore one offence, in any case, has been committed. But we do not think that the applicant can be heard to say, he does not ply his bus for hire, merely because on one journey his starting point may be outside British territory ; it is a mere accident that Las Bela territory is some 15 miles from Karachi. It might have been 150 miles but be it 15 or 150 miles, if the applicant carries passengers in his bus from outside British territory and comes to Karachi into British territory and passengers pay their fare to him to carry them there and back, he does ply his bus for hire within British territory. This appears to us a fair interpretation of the rules. In short the fact that the end of the journey at one side terminates outside British territory does not exclude the bus from the operation of R. 31 and R. 33 so far as the journey within British territory is concerned. For the journeys through British territory the bus takes passengers who have paid to be taken. The bus is in fact plied for hire. It is run to take passengers and the passengers pay and it runs through British territory. Therefore we see no reason to interfere with the order of the learned City Magistrate.

It is said the fine is heavy and on that account we should interfere. The learned Magistrate has given reason as to why he imposed a heavy fine. He says the applicant was warned and he took no notice of that warning. We therefore dismiss this application.

S.G./R.K. *Application dismissed.*

A. I. R. 1939 Sind 86

DAVIS J. C. AND WESTON J.

Khodromal Jeramdas and another — Appellants.

v.

Nichlomal Totomal and others — Respondents.

First Appeal No. 12 of 1936, Decided on 14th November 1938, against decree of the First Class Sub-Judge, Shikarpur, D/- 27th November 1935.

Will—Proof — Parol evidence of lost or suppressed will is admissible — It is not necessary that parol evidence must be such as to allow will to be enunciated and declared in its entirety — If witness can speak with adequate recollection as regards some bequests, will does not fail even if he cannot remember other bequests.

There is no difference between the proof of a will by parol evidence and the proof by parol evidence of any other document. Parol evidence of a written will that is lost or suppressed is admissible in evidence. It is true that the Court must examine with the greatest care parol evidence as to the contents of a will the execution of which the law surrounds with such precautions, bearing in mind the mischief which may arise, it is thought that it is no difficult matter to destroy or suppress a written will and to prove by parol evidence a will more to a person's liking; but if the Court bearing in mind all the consequences and implications of its decree is satisfied upon the evidence of one witness that the truth as to the contents of a will is before it, it should act upon that evidence. It is desirable that the evidence of that witness should be corroborated, but there is no rule of law that it should be corroborated. It is not

necessary, before a will can be proved by oral evidence that the Court must be satisfied that it is proved in its entirety by the perfect and complete recollection of a witness or by other evidence. If the witness honestly says that he cannot remember some of the bequests, that is no reason why the will should fail as to other bequests to which he can speak with adequate recollection : *(1876) 1 P D 154 and (1886) 11 A C 469, Rel. on.*

[P 89 C 1 ; P 90 C 1, 2 ; P 93 C 1]

Dipchand Chandumal and Kimatrai Bhojraj—*for Appellants (Khodromal and Seoomal respectively).*

Fatehchand Assudomal and Kundanmal Dayaram—*for Respondents (Nichlomal and Totomal, and Jessomal respectively).*

Davis J. C.—This is an appeal against a judgment of the First Class Subordinate Judge of Shikarpur in which is an administration suit brought by two of the respondents in this appeal, Totomal and his son Nichlomal. The Judge found in favour of a will of Rajomal, the brother of Totomal, and ordered administration of Rajomal's estate to be based thereon. This Rajomal was a goldsmith and he lived at Jacobabad and he died on or about 9th January 1926. Totomal, the plaintiff, was one of Rajomal's brothers, and Nichlomal, plaintiff 2, was the son of Totomal. Hiralbai, defendant 1, was the wife of Rajomal ; Jessomal and Totomal were the nephews of Rajomal, being the sons of Rajomal's brother Rochomal. Seoomal, defendant 4, and appellant 2, in this appeal, was also a brother of Rajomal, while defendant 5 Bhooribai was the widow of Sangatmal, the father of Rajomal. Rajomal left a will, and it was alleged in the plaint that it has been suppressed by his widow Hiralbai and the only questions arising for our decision in this appeal are (1) whether Rajomal in fact made a will; (2) whether the will can be proved by parol evidence ; and (3) what were the contents of that will ? Now the learned Subordinate Judge in a very careful judgment has come to the conclusion that Rajomal did make a will on or about 29th December 1925. The Judge relies on the evidence of witness Assardas corroborated by other evidence. Assardas is a Hindu, a man of some sixty years and a zamindar of Jacobabad. He is a Commissioner's Darbari and pays Rs. 600 as income-tax and pays some Rs. 3000 assessment of land owned or leased by him. He was not particularly interested in the affairs of Rajomal, but he was his friend, and the Subordinate Judge was quite clearly impressed by the truth of this witness. He explains why Rajomal called him in to write his will because he did not wish to be troubled by his relations, and judging from the course his affairs took after his death and this litigation, Rajomal was justified in his prudence.

The plaintiff Totomal would have the Court believe that he and others were present when Assardas wrote the will of Rajomal, but as the Judge says, the evidence of the plaintiff and his two witnesses on this point were best ignored. It appears worthless, and on this matter the evidence of Jessomal, defendant 2, that he brought Assardas to write the will appears true. But the existence of a written will of Rajomal does 'not depend on the evidence of Assardas alone, because it is clear that in legal proceedings taken shortly after the will, the existence of the will was affirmed by parties to this suit. Hiralbai, the widow, applied for a succession certificate so as to collect debts due to her husband's estate, and the brother of Rajomal, including the appellant Seoomal, filed a written statement contending that there was a will of Rajomal written by Assardas and suppressed by Hiralbai. Counsel for the appellant Seoomal argues that this written statement was not signed by Seoomal but there appears no doubt that Seoomal knew of these proceedings and that his pleader signed for him with his authority. Though this Seoomal is an ostensible appellant in these proceedings, he appears to have sold his interest in the estate to Khodromal pendente lite who tried unsuccessfully on an application under O. 22, R. 10, Civil P. C. to be brought on the record in place of Seoomal. Seoomal has not therefore an impressive case nor need any importance be attached to his denial that he did not know and did not agree with the written statement to which he was a party, contending that a will, the existence of which he now denies, existed.

It is true that when this Khodromal brought two suits in 1926 for partition as purchaser of Seoomal's share, neither Totomal, Taromal or Seoomal, nor Nichlomal set up his will, nor did Jessomal who though not a party to these proceedings, know of them and took part in them, but this must be because they thought then that it would be more in their interest to keep silent on the point, but already in May 1926 in proceedings in the revenue

enquiry before the Mukhtiarkar on the death of Rajomal, Assardas gave evidence as to the will and said that according to its terms the agricultural lands alone go to Jessomal. Moreover, in Suit No. 93 of 1928 brought by Jessomal upon the will, which suit was subsequently compromised, the writing of the will by Assardas, its execution by Rajomal and its contents are all alleged in the plaint. Moreover, no one reading through the evidence of Assardas could but be impressed by its truth. Rajomal could not sign his name but he used to make the mark of a flower as token of his signature and his thumb impression. Moreover, Jessomal says that he and Totomal actually took the vahi on which the will was written to the Sub-Registrar for registration, but the Sub-Registrar said that the presence of Seth Assardas was necessary before it could be registered, and Jessomal left the will for the time being with Hiralbai and when he asked for it again Hiralbai would not return it. Therefore, there appears no doubt to us that Assardas did write the will of Rajomal and that Rajomal did not destroy it but that his widow Hiralbai suppressed it.

It is then argued that if parol evidence can be given of the will, that evidence, to be admissible, must enable the will to be reconstituted in its entirety. For instance, the Subordinate Judge, while accepting the evidence of Seth Assardas on most points, has not accepted his evidence as to the disposition of the eastern half of his house. Seth Assardas says that the eastern half was to be given to Hiralbai, the wife, during her lifetime, and after her death, it was to be given to Jessomal, defendant 2; but the Subordinate Judge has not accepted Assardas's recollection on this point; also Assardas admits that there were two or three charitable bequests which he forgets. But there is no difference between the proof of a will by parol evidence and the proof by parol evidence of any other document. The principle is the same. In (1876) 1 P D 154[1] at pp. 238-240 the *locus classicus* of these cases, Jessel M. R., on an appeal from the judgment of the President of the Probate Division said as to this point:

The third point is also one of great importance. Can we admit, as a matter of course, secondary evidence in proof of a will? I should have thought that there could be but one answer to that question; and had it not been for the doubt thrown out by a very eminent Judge, in (1864) 3 Sw & Tr 301=33 L J P 75,[2] I should have thought it impossible to argue the question. The object of secondary evidence is to supply the loss of primary evidence by accident or otherwise. It was felt, at a very early period of the establishment of Courts of equity, that it was a great grievance that by the then rules of procedure of the Common law a plaintiff could not recover on a lost deed; it was not a rule of the Common law, but a rule of the procedure of the Common law, which required him to make proof of it in his plea. But where the deed had been lost, the Court of equity interfered, and allowed the plaintiff to produce secondary evidence of it. He was allowed to prove, by other evidence than the deed itself, the existence and the execution of the deed and its contents. After a time the Courts of Common law altered their procedure as I said before, not the law, but the procedure to enable the plaintiff in a Common law action to obtain the same advantages as he could previously have obtained only in equity. But the whole theory of secondary evidence depends upon this, that the primary evidence is lost and that it is against justice that the accident of the loss should deprive a man of the rights to which he would otherwise be entitled. I am at a loss to discover any reason whatever for distinguishing between the loss of a will and the loss of a deed. If it is said that a will requires execution and attestation, a deed requires execution and delivery, and you could not establish a deed until you had shewn that it had been executed, that is, sealed, and delivered. These were the peculiar formalities as regards a deed. As regards some deeds, such as deeds in exercise of powers, attestation was commonly required, and as regards those deeds everything that would be required in the case of a will may be proved by secondary evidence. You must prove, then, not only execution, but that the deed of appointment was duly attested. Therefore, on principle, there is, as it seems to me, no possible distinction to be suggested between the proof of a deed and the proof of a will. Besides this, there was a long course of undisputed authorities all pointing in the same direction. No one had doubted, until the case in (1864) 3 Sw & Tr 301,[2] that you could prove a will by secondary evidence, but a doubt was then suggested whether that could be allowed after the passing of the new Wills Act. It seems to me however that this is not a question of the requirements of the Act, because there was nothing new in the Act in respect of the execution of wills of real estate, except that the legislative requirements were diminished. The Statute of Frauds not only required signature, but required the attestation of three witnesses to pass real estates by will. By the new Statute of Wills that was, as regards free-hold estates, reduced to two witnesses, and there was no other difference, except in the case of the signature, between the requirements of the Statute of Frauds and the requirements of the new Wills Act. Therefore, if you could have proved a will by secondary evidence before that Act, there is no reason, that I can see, why you should not be able to prove it in the same way after.

As regards personal estate no doubt there was a difference, because before the statute if a will had

1. Sugden v. Lord St. Leonards, (1876) 1 P D 154 =45 L J P 49=34 L T 372=24 W R 860.

2. Wharram v. Wharram, (1864) 3 Sw & Tr 301 =33 L J P 75=10 Jur (N S) 499=10 L T 163 =12 W R 889.

not been in writing or signed, there was the possibility of saying that that which is called evidence of the will was the will itself ; but even that was not quite accurate, because our law required the best evidence, and when the will was in writing, and was not produced, it was not proved unless secondary evidence was let in. Therefore, in that case also the decisions which let in secondary evidence went to prove that you could have secondary evidence of a will.

It appears to me therefore clear, both on principle and authority, not forgetting especially the case in (1857) 8 E & B 876 = 27 L J Q B 173,[3] which the Lord Chief Justice mentioned, that secondary evidence can be admitted to prove the contents of a lost will.

It is clear, then, that parol evidence of a written will that is lost or suppressed is admissible in evidence. But the question that arises is as to whether the parol evidence must be such as to allow the will to be enunciated and declared in its entirety whether it is necessary before a will can be proved by oral evidence the Court must be satisfied that it is proved in its entirety by the perfect and complete recollection of a witness or by other evidence, and on this point Jessel M. R. says (page 232) :

The next point which we have to consider is one of a very serious character. It is said and truly said that however great may be the reliance to be placed upon the testimony adduced as to the contents of this will, there is no evidence of the whole of the contents of it; and further there is evidence that a portion of the contents is not now known. Upon that there can be no doubt or question, because the principal witness, in fact, for certain purposes the only witness in support of the instrument, Miss Sugden, herself tells us first as regards the personalty that there were some small legacies the particulars of which she is unable to recollect; and secondly, as regards a considerable portion, in fact, the larger portion of the real estate that there were some limitations over after the seven life estates besides the estates limited to the issue of the tenants for life the particulars of which she does not remember, although she does remember that other estates were left amongst the members of the family. Therefore, we have in the one case legacies, no doubt, of comparatively small amount trifling in themselves, the particulars of which we are unable to discover; in the other case we have limitations, remote, indeed, and unlikely to come into effect, but still which are undoubtedly omitted from the document of which probate has been granted, and the question which we have to decide is whether under such circumstances as these we can admit the will to probate at all.

Now I will consider the argument, first, as affecting the personal estate; and secondly, as affecting the real estate. The argument as to the personal estate was this : It was said, if it is proved to your satisfaction that legacies are omitted, then by granting probate, you are giving a larger proportion of the personal estate to the residuary legatees than was intended for them by the testator, and in so granting probate you are not only not performing the intention, but you are acting contrary to the intention, of the testator. This argument appears to me to be fallacious, it turns on the use made of the word "intention." It seems to me that the testator may be said to have in this respect two intentions : he has a primary intention that the legatee, whether general or specific, shall take the legacy; he has a secondary intention that, if by any reason whatever that legacy cannot take effect, then it is to go, not to his next of kin, but to his residuary legatees. It may be well that we are not able to give effect to the primary intention: but we certainly are able to give effect to the secondary intention; and I see no reason why we should not give effect to the secondary intention because the circumstances which have happened have made it impossible to carry out the primary one to the extent of the legacies, the amount of which, and the names of the legatees of which we do not know. This is by no means a new version of the law.

We are familiar with the law as to personal estate as it existed before the last Wills Act, which has been extended by that Act of devises of real estate, I mean the rule that lapsed or void bequests fall into the residue. Now, the rule which was established by the Judges before the Legislature confirmed it by the Wills Act meant this, not that the testator whose whole property was, say, £11,000 and who gave £10,000 to his son and the residue to his nephew, not contemplating that the son would die in his lifetime, intended the £11,000 for the nephew because everybody knows that the testator, in the absence of express provision to the contrary, contemplates the survival of his legatee; but it meant this : that he intended that particular nephew to take what was left of the personal estate under whatever circumstances the residue might be increased. In the case of lapsed bequests the intention was entirely defeated — in the case of void bequests; say that the testator being possessed of £11,000 consisting wholly of mixed personalty, gives £10,000 to a charity and the residue to *A. B.*, a stranger — it might well have been said he would not have preferred that stranger to his next of kin, had it not been that he died in the belief that the bulk of his fortune would be devoted to charity, and to say that that which the charity cannot take shall go to augment the residue in favour of the residuary legatee, a stranger, is entirely contrary to the intention which might naturally be imputed to the testator. But the law is clear upon the subject that the primary intention not being capable of being carried out, because the charity cannot take, the residuary legatee takes the fund, although it was certainly not the primary intention of the testator. The same principle was extended to the case where it was uncertain who the legatee was. The uncertainty might arise in various ways, the handwriting of the testator (and this has happened in holegraph wills) might be so bad that it was impossible to read the name of the legatee, and there was no other description by which to identify it; in that case the intention of the testator was certainly to benefit the legatee to the extent to which he was mentioned, yet in the uncertainty as to his name, the sum given to him fell into and augmented the residue. Or the uncertainty might arise from other causes; the legatee might be so imperfectly described that it was impossible to ascertain who he was; there

3. Brown v. Brown, (1857) 8 E & B 876=27 L J Q B 173=4 Jur (N S) 163.

might be two or more persons answering the description and no evidence to distinguish between them. In that case the law did not divide the legacy between these two or more persons, but again held that the legacy failed, and that the amount fell into the residue.

Now what difference is there in principle between the cases I have mentioned and the cases which have been alluded to by the Lord Chief Justice ? Take the case of a candle falling on the will and obliterating the name of the legatee; why should there be more difficulty in the Court granting probate with the name omitted by reason of a candle or a chemical liquid, having fallen upon it after the death of the testator, than by reason of the illegibility of his handwriting, or of the uncertainty from the description of the will who the legatee was ? There is no difference as to the intention; in all the cases there is a primary intention which is defeated and a secondary intention to which effect is given. It appears to me there is no difference at all in principle. But is there any difference where the loss of legacies arises, not from actual obliteration upon the face of the will itself but from the obliteration from the tablets of the memory, so to speak, of the witness whose testimony is admitted as secondary evidence of the contents of the will ? It seems to me that in principle it can make no difference whatever, and therefore that there is no objection upon this ground in granting probate as regards the personal estate. Lastly, it appears to me that there are numerous decisions in the old ecclesiastical Courts, which would be followed in the present Court of Probate, confirming this view. I mean those cases, many of which are reported, in which probate has been granted of a will, although it was proved that one or more codicils had existed also. In other words, probate has been granted of part of the whole testamentary instrument, because the will and codicils together make the testamentary instrument, and it does not matter for this purpose whether it is a portion of the will or a portion of the codicil which is lost. I may mention that there are also decisions by which probate has been granted of a codicil or codicils although the will itself was lost. Therefore those decisions shew, that the mere fact of its being known that a portion of the testamentary instrument is wanting is not sufficient to prevent the Court from granting probate of that which is left, it being satisfied that what is left is substantially correct so far as it goes. I think this disposes the argument as to intention as regards the personal estate.

Therefore it appears clear that if Seth Assardas in honesty says, as he does say, that he cannot remember two or three charitable bequests, that is no reason why the will should fail as to other bequests to which he can speak with adequate recollection. It is true that the Court must examine with the greatest care parol evidence as to the contents of a will the execution of which the law surrounds with such precautions, bearing in mind the mischief which may arise, it is thought that it is no difficult matter to destroy or suppress a written will and to prove by parol evidence a will more to a person's liking, but if the Court bearing in mind all the consequences and implications of its decree is satisfied upon the evidence of one witness that the truth as to the contents of a will is before it, it should act upon that evidence. It is desirable that the evidence of that witness should be corroborated, but there is no rule of law that it should be corroborated. Dealing with the question of the sufficiency of evidence, Jessel M. R. says (p. 243) :

Then I come to the question whether, irrespective of the post-testamentary declaration, as I may call them, there would be any ground for saying that there was not sufficient evidence to sustain the proof of this will. I am clearly of opinion there is no such ground. It happens fortunately in this case that these post-testamentary declarations are of comparatively little value. In the only instance in which confirmation is required they are very vague and general. That instance is the share of the residue given to Miss Sugden.

Now, in considering the last point as to the sufficiency of the evidence, I will take the case first irrespective of these post-testamentary declarations which the learned Judge in the Court below felt himself bound, as I think he was bound, by the decision in (1864) 3 Sw & Tr 442=33 L J P 146,[4] to disregard, and I must say I should entirely concur with the learned Judge in his conclusion, even assuming that he was bound, as he was by the decision in (1864) 3 Sw & Tr 442[4] to disregard that evidence. But how does the matter stand ? The will was read frequently, and under peculiar circumstances of interest, by Miss Sugden. She had not only an opportunity of becoming familiar with its contents, but she had the strongest motive for doing so. The will concerned not only herself, but those who were nearest and dearest to her. It would be no idle curiosity which would induce her to read it and re-read it with attention, and to remember its contents with accuracy and fidelity.

Therefore we have the evidence of a witness to be trusted beyond the average of witnesses, more to be trusted even in this respect, supposing there were no question of interest, than an ordinary solicitor who testifies to the contents of a will. He has other affairs to attend to, he has many wills to read, and he has no special or particular interest in the disposition of the property of the testator. Therefore we have a witness peculiarly likely to know what the contents of the will were.

Besides that, we have a witness of unimpeached and unimpeachable integrity. We have the gratification of knowing, in deciding this case, that there has been no question raised as to the credibility of Miss Sugden, and this appears to be an answer to that assumed danger which might apply to other cases in allowing such proof as this to establish wills. The present case has, in my opinion, nothing to do with a case where the credibility of the witness is contested; it does not make the witness's testimony more admissible, but it does add enormously to the weight of it, when you find that the opponent does not dispute the honesty and truthfulness, the entire integrity and veracity of the witness.

4. Quick v. Quick, (1864) 3 Sw & Tr 442=33 L J P 146=10 Jur (N S) 682=10 L T 619=12 W R 1119.

The case is singular in that respect, and I should think it is very likely to remain singular, as regards subsequent cases; therefore there is no danger in admitting this evidence in this particular case, and I see no reason why we should refuse to do justice now because other persons, not credible witnesses may be induced in other cases to attempt to substantiate fictitious wills.

But, no doubt, this observation may be made that Miss Sugden is an interested witness. Here again it is not alleged that the interest is such as to impair her credibility. If it had been, I could have understood the objection, but as it is admitted that she is a veracious person, the objection as to interest fails. The law at one time considered it impossible that a person biassed by the smallest interest could tell the truth, but that law was found so utterly opposed to human experience that it was abrogated by the Legislature and interested witnesses daily give evidence in our tribunals, and subject to the observation that they may be biassed by their interest so as to some extent to affect the weight of their testimony, their evidence is received without doubt or question. No doubt, in the case even of a credible witness even in the case of a witness without interest it is desirable, if possible to procure confirmation to shew the accuracy of the memory of the witness, and for that purpose only. But the moment you admit the witness to be credible, the desirability of the confirmation appears to me to apply just as much to that portion of the evidence as to which he is not interested as to that in which he is.

Now, as regards the evidence of Miss Sugden, she is confirmed in every material respect, except as to the residue of the personal estate. I am not going to repeat the elaborate judgment which has been already given as regards the nature of the evidence, but I will take that to be sufficiently established.

As regards the residue, if you shut out the post-testamentary declaration, there is no actual confirmation except one, that is the confirmation of probability.

Now, I must say that in testing the unsupported testimony of a witness, especially of an interested witness, the position of the testator, and the probability of the disposition which he is said to have made, appear to me to be important element; and how stands the matter here as far as these are concerned? I am not in a position to give accurate figures although I have done my best to ascertain the value, and therefore what I am saying must not be considered to be quite precise, but from the statement made to us, and which was made in the Court below, I should imagine that the testator died possessed of property worth about £300,000, probably more, but not less. He is said to have had between £7000 and £8000 a year in freehold estates, and about £60,000 in personalty, or thereabouts. The state of his family was this: he had had a great number of children; all his daughters were married except one and all his sons were dead except one, although two of the sons had left a child or children. Of all his children, that one single daughter remained with him, and she was, one might say, the prop and solace of his life. That he entertained a great, and, one might say, a deserved affection for her, is clear, from all the testimony we have had before us; that it was his moral duty to provide for her, and to put her in a situation of life such as not greatly to diminish her habits of comfort, or even of luxury, is plain and beyond controversy. Whether he had promised to do so or not does not appear to me to be material; but it is clear he had promised to do so, even before the making of the last will.

Under those circumstances, what does she take by the interest, or rather combination of interests, given her by the will? There again, my figures are probably not accurate, although they are as nearly accurate as I can make them. She takes a portion of £6000, which although it is more than some of her sisters seem to have had, appears to have been calculated with the view of making her equal in that respect with the most favoured of them, although not beyond. Of course, it is perfectly natural that the testator should desire that the unmarried daughter should be at least as well provided for as the married daughters were on the occasion of their marriages; and upon this there is confirmation. She takes a life-interest in a farm which is stated to be worth £350 a year. I am not acquainted with the exact age of Miss Sugden, but she can be no longer very young; and I take the value of her life-interest in that farm to be considerably less than £3000. She takes a house which appears to have cost £1500 and some meadows, the exact value of which does not appear, but which again I say £3000 may very fairly represent. That makes £12,000; and she takes besides one third of the residue, the exact amount of which again does not appear. Of course there are large legacies to be deducted from it, and I should think £10,000 or thereabouts would fairly represent the one-third. But assuming it to be £13,000 which is a very large figure considering the deductions to be made, then you have not more than £25,000, as the provisions made for this lady, who stood in the relation I have mentioned to a testator possessed of this considerable fortune. I think it is not only reasonable to presume that he would have made this, which appears to be by no means an immoderate provision for her, but he would, as I think, have sinned in his grave if he had done otherwise than make such a provision for the child who had devoted to him her whole life.

We have quoted at length from this judgment for great as may be the intervals of time and space which separate the case of this rich and learned lawyer of Boyle Farm in the County of Surrey who died on 29th January 1875 and his devoted daughter, the Honourable Charlotte Sugden, and the poor estate of Rajomal, the goldsmith who died on or about 9th February 1926 in Jacobabad in the Upper Sind Frontier District and his friend and scribe Seth Assardas, the Hindu zamindar, the principles to be applied to the two cases are the same, such is the community of human nature and experience. Moreover, we have here a disinterested witness and a witness who, above all others, was in a position to know the contents of the will for he himself wrote it out at his friend's dictation.

A faint attempt has been made to show that Seth Assardas was an interested witness, because, though a man of substance, indeed of wealth among his neighbours, yet

he owed Rajomal some small amount and he says he repaid it to Jessomal who is to profit by the will. But we agree with the Judge that this in no way should be allowed to affect the value of his evidence. Moreover, Seth Assardas' recollection is corroborated by all the probabilities of the case, for the will to which he testifies is just such a will as a man in the position of Rajomal might make. His estate was a comparatively small estate, recollection of its disposition would be no great tax upon the memory. On page 47 of the paperbook Seth Assardas describes its simple disposition—the house, as many houses in this part are, was divided into two halves, the western half was given to Totomal his brother, the eastern half in which the testator was himself then sitting was to be given for her life to his wife and after that to Jessomal who was living there. The shop was given to another brother Taromal and a debt due by Taromal was remitted: the amount was not mentioned. Rs. 1000 was given to his mother; his cash and ornaments to his wife. He gave his one-fourth share in his lands and the open plot behind the otak to Jessomal. He made no provision as to the devolution of his cash and ornaments after his wife's death, as being a layman and not a lawyer he might not. Jessomal who appears his favourite nephew and who has looked after his widow after his death was appointed to look after the works of charity and he left Rupees 5000 to 6000 for charity.

Now, the Judge accepted the recollection of Seth Assardas as a true and accurate recollection except on one point, and on this point the respondent Jessomal has filed counter-objections and this is as to the eastern half of the dwelling house. The Judge has found this disposition contrary to or unsupported by the allegation of Jessomal himself in his suit in 1928 based upon this alleged will, but we think the Judge is on this one point wrong, and the very absence of precision in this particular claim of Jessomal in the plaint unconsciously supports him. In the plaint in para. (4) (d) (2) Jessomal, as plaintiff, says

> as regards the other half (namely, the half not given to Totomal), it was left for the residence of defendant 1 his (testator's) wife and the plaintiff who was already living in the house to live with her, she living under the plaintiff's protection.

It is true that the plaintiff does not say that this part of the house was to be his own upon Hiralbai's death because that was understood. It was according to the evidence of Seth Assardas, given to Jessomal in place of the half then occupied by him and to be given to Totomal and indeed Jessomal says, and there is no reason to disbelieve him that it was because Hiralbai did not want Totomal in the house that she suppressed the will. But, if Jessomal was to live in the eastern half and to look after and protect the widow as he did, it follows almost necessarily that this part of the house was intended to be his with a life-interest to the widow. The estate of Rajomal was not so great that he would forget this part of it, and it necessarily follows that if he disposed of one-half of the house, he would make a proper disposition of the other half, and accepting Seth Assardas' evidence, this is what he did do and it is in the light of these circumstances that the statement of Jessomal in the plaint in the suit of 1928 must be read.

Therefore all the probabilities support the evidence of Seth Assardas as do the statements in the proceedings before the Mukhtiarkar in the revenue inquiry and in the written statement in the proceedings under the Succession Act when Hiralbai tried to get a succession certificate and Rajomal's brothers and nephews opposed her claim on the ground that there was a will. So far as the charitable bequest is concerned, the Judge has found it as Rs. 6000 and Jessomal gave this sum in his plaint. The fact that Seth Assardas cannot recollect all the charitable bequests does not, as we have shown, affect the validity of the other bequests. We have borne in mind the care which is required to be exercised to exclude fraud in a case such as this where a written will is to be proved by parol evidence. Referring to this aspect of the case, Jessel M. R. said (p. 242):

> When I say equally, perhaps I state the case a little too low, because if there is any case in the world in which it is incumbent upon a tribunal not to grant a premium for fraud or wrong; not to hold out to the world that any man who is able to get hold of the will of a testator which may disappoint him of his expectations, just or unjust, if he once destroys it, shall be able to acquire the property either for himself or for those whom he wishes to benefit,—I say if ever there was such a case it is the case of a lost will. The Court should be anxious, not narrowly to restrict the rules of evidence, which were made for the purpose of furthering truth and justice, but, guided by those great principles which have guided other tribunals in other countries in admitting this kind of evidence generally, to admit it at all

events in the special case which we have under consideration.

And in (1886) 11 A C 469[5] Lord Herschell has said (p. 475):

Now I cannot but be alive to the extreme danger of establishing a will merely by parol evidence of its contents. The Legislature has endeavoured to safeguard the interests and rights of testators by requiring that the expression of their testamentary intentions shall be authenticated in such a manner as to leave no doubt, if possible, that the Court has before it that which really expresses the will and intention of the testator. It is not enough that it is in his own handwriting; it must, even if in his own handwriting, be authenticated by witnesses who must be present and see the testator sign, and must sign in each other's presence. But if upon mere loose statements of the recollection of witnesses as to what has been said to them at some time or other, you were to grant probate of and to establish as the will of the testator, something which no one had ever seen or purported to be able to depose to from recollection, it seems to me that you would be doing that which would be in the highest degree dangerous, and the more so when those statements are statements of witnesses (and one knows how fallible human memory is even when there is no interest to bias it) who have the strongest possible interest in remembering what they remember and in forgetting what they forget. I think therefore that in order to support a will propounded, when it is proved by parol evidence only that evidence ought to be of extreme cogency and such as to satisfy one beyond all reasonable doubt that there is really before one substantially the testamentary intentions of the testator.

It is said that at all events the residuary clause is well established, and that upon the authority in (1876) 1 P D 154[1] probate of this should be granted even if the Court be not satisfied that it has before it the rest of the testamentary intentions of the testator. In (1876) 1 P D 154[1] the facts were very different from the facts here. The evidence, it is true, was the evidence of a person much interested in establishing the will, but it was the evidence, to begin with, of a person who had seen the will and was giving a recollection of its contents. In the next place, that evidence was corroborated in the strongest possible way and in the most material particulars by written documents about which there could be no question. Moreover the Court were satisfied that although there might be some few legacies which were omitted in the recital of the legacies by Miss Sugden, yet they could not be many but must be few, and that they could not be of any material consequence. The Court were satisfied that they had the substantial testamentary dispositions brought to their minds.

We think therefore the appeal must be dismissed and the cross-objections must be allowed with costs and we order accordingly.

D.S./R.K. *Appeal dismissed.*
Cross-objections allowed.

5. Woodward v. Goulstone, (1886) 11 A C 469 = 56 L J P 1 = 55 L T 790 = 35 W R 337=51 J P 307.

*** A. I. R. 1939 Sind 93**

DAVIS J. C. AND TYABJI J.

Kazi Ali Muhammad Khairal Muhammad Sheikh — Appellant.

v.

Gangaram Chatomal — Respondent.

Second Appeal No. 56 of 1936, Decided on 3rd October 1938, against judgment and decree of Asst. Judge, Sukkur, D/- 23rd September 1936.

*** Civil P. C. (1908), S. 48 (1) (b)—'Subsequent order'—Parties entering into compromise changing mode of satisfying decree—Executing Court recording compromise and ordering parties to act upon it—Court's order held amounted to 'subsequent order.'**

The words "subsequent order" in S. 48 (1) (b) show that the order must be subsequent to the decree. Hence the order which the Section contemplates must be passed not in the suit but in execution: *A I R 1933 P C 52 and A I R 1938 Cal 25, Ref.; A I R 1925 Bom 503, Rel. on.* [P 94 C 2; P 96 C 1]

A mere variation as to the time or mode of paying the decretal debt cannot be considered a substitution of one decree for another or any material alteration in the decree which the Civil Procedure Code forbids. [P 95 C 1]

But where the parties, keeping the decretal liability unaltered, enter into a compromise by which the method of satisfying the decree is changed and the executing Court by its order records the compromise and directs the parties to act upon it, the order must be deemed to be a "subsequent order to pay" within the meaning of S. 48 (1) (b) and a fresh period of 12 years runs from the date of such order: *Case law referred; A I R 1925 Bom 503, Foll.; 32 S L R 415 (P C), Explained.* [P 96 C 1]

Srikishindas H. Lulla — *for Appellant.*

Kodumal Lekhraj — *for Respondent.*

Davis J. C.—This is an appeal against the judgment of the Assistant Judge, Sukkur, dated 23rd September 1936 dismissing the appeal against the order of the Subordinate Judge, Rohri, who directed the execution of a decree dated 8th February 1913 to proceed in terms of a subsequent compromise dated 1st May 1924. The main argument in appeal is that the order of the Court directing a compromise to be recorded as an adjustment of a decree operates to extend, or, as the Assistant Judge says, revive time, so that the 12 years in S. 48 (1) (b), Civil P. C., is no bar to the execution of the application before it. The execution Court followed the judgment of the Bombay High Court in 49 Bom 695,[1] and the lower Appellate Court preferred the

1. D. S. Apte v. Tirmal Hanmant, (1925) 12 A I R Bom 503=88 I C 949=49 Bom 695= 27 Bom L R 961.

Bombay ruling to the rulings of the other High Courts.

Now, in appeal it is argued for the judgment-debtor who incidentally has got the benefit of the delay under the compromise of 1924 which he now wishes to repudiate, that the order of 1st May 1924 is not an order under S. 48 (1) (b), Civil P. C., at all, and that the 12 years run from 1st January 1920, the date of payment under the decree of 8th February 1913, so that an execution application made in May 1935, as is this execution application, is clearly time-barred. But it was not until the end of the case that the advocate for the respondent in reply drew our attention to a judgment of this Court in A I R (1935) Sind 140[2] passed in execution proceedings in this same suit upon an execution application in 1927 when this same adjustment now in dispute was recognised and acted upon. In view however of a recent Privy Council judgment to which we shall refer, it matters little whether this compromise was or was not recorded as an adjustment. It can, provided it is in time, be executed by the Court. It is true that there are two rulings of this Court, 30 S L R 249[3] and 31 S L R 491,[4] agreeing with the majority of other High Courts that an executory agreement cannot be deemed an adjustment of a decree within the meaning of O. 21, R. 2, Civil P. C., but those rulings cannot affect the judgment of this Court recognizing the compromise of May 1924 as enforceable by this Court. To that extent the compromise of 1924 is res judicata. The question is whether the order of the Court recording that compromise and directing the parties to act accordingly is a subsequent order within the provisions of S. 48 (1) (b), Civil P. C., and our opinion is that it is. It is clear however the ruling of this Court in 31 S L R 491,[4] and the rulings of other High Courts such as A I R 1931 Lah 608,[5] 54 All 573,[6] and 14 Pat 816,[7] must be read subject to the judgment of the Privy Council in 32 S L R 415,[8] which appeals to support the view taken in 10 Pat 173,[9] that a decree is not deemed to be varied when a compromise is made in execution as to the method in which the decree itself is to be executed.

In the Privy Council case a compromise decree was passed on 12th April 1923 for Rs. 1,04,000, with interest at 6 per cent. and it provided inter alia for a payment of a sum less by Rs. 8000 than the decretal amount by six instalments on different dates, and *D*, a member of the family, mortgaged certain of his property as security for payments under the decree. Default was made in payment of instalments and the whole sum became payable when a compromise was again made on 29th February 1928, and certified as an adjustment of the decree under O. 21, R. 2, Civil P. C. By this compromise only the provisions relating to the payment of the instalments were modified and the liability of *D* under the decree continued on foot. Default was made in payments under the second compromise, and on 13th February 1932 an application was filed for execution of the decree of 12th April 1923. The judgment-debtor filed objections contending (1) that the compromise of 1928 superseded the original decree which was no longer enforceable, (2) that the compromise was not an adjustment under O. 21, R. 2, Civil P. C., and (3) that the executing Court possessed no authority to enforce in execution the new liability under the second compromise, and (4) that *D* was discharged from liability, as time for payment was given to the principal debtor. But the Privy Council found it unnecessary to decide the question whether the compromise of 1928 made in the course of execution was an adjustment; if it was, the Court could recognize it; if it was not, the Court could look into it and take it and payments made under it into account in executing the decree, and limitation was computed under S. 20 from the date of payment under the compromise of 1928, which was on 15th February 1929; and lastly, as it was incredible that *D* did

2. Gangaram v. Ali Mahomed, (1935) 22 A I R Sind 140=157 I C 331.
3. Udharam Baharmal v. Murari Lal Shiam Lal, (1936) 23 A I R Sind 191=167 I C 417=30 S L R 249.
4. Ramibai Jethmal v. Rewachand Santokram, (1937) 24 A I R Sind 229=171 I C 477=31 S L R 491.
5. Bakhshi Ram Varma v. Des Raj, (1931) 18 A I R Lah 608=132 I C 670=32 P L R 365.
6. Gorbardhan Das v. Dau Dayal, (1932) 19 A I R All 273=138 I C 583=54 All 573=1932 A L J 365 (F B).
7. Bishwanath Prasad v. Lachhmi Narain, (1935) 22 A I R Pat 380=156 I C 297=14 Pat 816=16 P L T 506.
8. Hetram Bodhraj v. Aya Ram Tola Ram, (1937) 32 S L R 415=172 I C 999 (P C).
9. Ganga Bishun Marwari v. Raghunath Prasad, (1930) 17 A I R Pat 615=128 I C 786=10 Pat 173=11 P L T 609.

not know of this new arrangement for time he was held bound by it.

Now, though the question of whether the compromise of 1928 was an adjustment under O. 21, R. 2, Civil P. C., was not decided and the rulings that it was not such an adjustment still stand, nevertheless it is clear that a mere variation as to the time and mode of payment of the decretal debt is not considered a substitution of one decree for another or any material alteration in the decree which the Civil Procedure Code forbids. Their Lordships of the Privy Council clearly did not consider that there, in the case before them, was a case of one decree being substituted for another; the application was not to execute the substituted decree of 1928, the second compromise; but the application was to execute the original compromise decree of 1923, but limitation was not counted from the date of payments under the original compromise decree but the payments under the second compromise were regarded and S. 20, Limitation Act, came into operation as regards them. One thing however is clear that the Privy Council permitted one set of instalments to be replaced by another set of instalments by consent of the parties and permitted the original decree to be executed according to the new terms and conditions. The original decretal liability, however remained on foot. Their Lordships said (page 423):

In the argument before their Lordships a number of authorities were cited or referred to, from which it would appear that different Courts in different parts of British India follow different practices in regard to the kind of transaction by way of compromise or adjustment which may or may not properly be recorded as certified under O. 21, R. 2 (2). Their Lordships however are of opinion that in the circumstances of the present case, a consideration of these authorities affords them no assistance in determining the rights of the parties.

They feel no doubt about the proper construction of the compromise come to 1928. The decree of 12th April 1923 had imposed a decretal liability of Rs. 104,000 with interest at 6 per cent. It did not provide for the discharge of that liability by instalments. It contained provisions for the payment of instalments amounting to a smaller sum and at a lower rate of interest upon the observance of which provisions the judgment-debtors could escape the decretal liability. In 1928 those provisions, and those provisions only, were modified. The decretal liability remained, save of course to the extent to which it had in fact been reduced by moneys already paid. The compromise affected only the provisions upon the observance of which the full decretal liability could be avoided. That this is the true construction of the compromise seems to their Lordships clear, apart from the clause which keeps in force the provisions of the decree in regard in Dharu Lal; but that clause places the matter beyond doubt. The liability for which his property stood as security was the decretal amount of Rs. 104,000 with interest at 6 per cent. That liability is kept on foot. But there is no provision which would operate to render his property liable to meet a liability created by the compromise in substitution for and therefore in extinction of the decretal amount under the original decree.

In these circumstances it would seem to be immaterial to consider whether the compromise was or was not an adjustment within O. 21, R. 2 (2). If it was, it was duly recorded or certified, and the Court may recognize it in executing the decree. If it was not such an adjustment, there is nothing to prevent the Court from doing that which it obviously should do, viz. looking at it and taking it and the payments made under it into account in executing the decree. The question then remains of the Limitation Act.

Counsel for the appellants rightly disclaimed the contention which had been raised before the High Court that the application to record the compromise had, in view of Art. 175, Limitation Act, been made out of time. He contended however that the application of 13th February 1932 was barred by limitation under Art. 182. Any question which might otherwise have arisen under that Article is, in their Lordships' opinion, met on the facts of this case by a consideration of S. 20 of the Act. The last payment made in respect of the first instalment and interest was a sum of Rs. 825 paid, as admitted by the parties on 15th February 1929. The payment was made, and necessarily made, in respect of principal and interest ; it was therefore a payment of interest on a debt as such by the person liable to pay the debt. Further, in a letter addressed to the decree-holders and signed by Bodh Raj, he says, referring to the Rs. 825, 'deduct from this the amount that is due to you for my first instalment according to accounts and keep the rest in my name. . . .Send me a formal receipt of the amount of the first instalment together with interest by registered post.' These facts are sufficient to show that S. 20 has come into play, and that accordingly the period of limitation must be computed from 15th February 1929. There can, their Lordships think, be little doubt, in view of the many subsequent payments, that a fresh period of limitation could, if necessary, be shown to start at a much later date—but a period commencing on 15th February 1929 is sufficient to cover the present application.

The question of a subsequent order under S. 48 (1)(b), Civil P. C., was not considered because the last execution application was within 12 years of the decree. The question of S. 48 (1) (b), Civil P. C., however does here arise, because the execution application now in question is more than 12 years after the final payment in the decree. The 12 years expired in 1932 as based upon the original decree. But it appears clear that if a Court can recognize and enforce in execution proceedings a compromise such as that made in this case in May 1924, as clearly from the judgment of the Privy Council it can, it can enforce this compromise only because it has made

the order its own. A Court can only execute its own decree or order or a decree or order transferred to it for execution. Therefore, it appears clear the order, as in this case, recording the compromise and directing the parties to act on it, must be deemed a "subsequent order" to pay money within the meaning of S. 48 (1) (b), Civil P. C., the period of 12 years runs from that time and the application in execution out of which this appeal arises is then admittedly in time.

But it is then argued that the subsequent order under S. 48 (1) (b), Civil P. C., must be passed not in execution but in the suit and that the Privy Council have in 12 Pat 195[10] so decided and the case in 49 Bom 695[1] is no longer good law. But the case in 12 Pat 195[10] merely laid down that the subsequent order must be passed in the same suit and not a different suit, and clearly the words "subsequent order" themselves show that the order must be subsequent to the decree and in execution. This case and many others have been discussed in A I R 1938 Cal 25[11] though it cannot, we think, be correctly said that one decree is substituted for another when the method by which the original decree is to be executed only is altered. It is the original decree in the case of the Privy Council, the decree of 1923, which is to be executed according to the agreement of 1928, as in this case the original decree of 1913 is to be executed according to the agreement of 1924. The decretal liability remains unaltered, merely the instalments or the method of satisfying the decree is by consent changed. We think therefore the lower Courts were right in following the decision of the Bombay High Court in 49 Bom 695,[1] and we dismiss this appeal with costs accordingly.

N.S./R.K. *Appeal dismissed.*

10. Kirtyanand Singh v. Prithi Chand Lal, (1933) 20 A I R P C 52=141 I C 760=12 Pat 195=60 I A 43 (P C).
11. Kartic Chandra v. Bata Krishna, (1938) 25 A I R Cal 25 = 176 I C 212=I L R (1937) 2 Cal 373=65 C L J 403.

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* A. I. R. 1939 Sind 96

DAVIS J. C. AND TYABJI J.

Udharam Dalumal — Applicant.

v.

Rozi Shambe — Opponent.

Civil Revision Appln. No. 22 of 1936, Decided on 21st September 1938.

*** Civil P. C. (1908), S. 60, Prov. (1), Cl. (b) —Scope and application—Implements of husbandry—Engine or water-pump used by agriculturist for irrigation of fields is implement of husbandry.**

The term 'implements of husbandry' in Cl. (b) to Prov. (1) to S. 60 should be interpreted in a fair and reasonable and even a generous spirit and not in a narrow and mean manner. [P 97 C 1]

The clause is not intended to force agriculturists back to primitive ways but to protect them in their livelihood as agriculturists by preventing the attachment even of those mechnical means whereby they plough and irrigate and cultivate the soil and obtain their livelihood as agriculturists. An engine or a water-pump is necessary for the agriculturist to irrigate and cultivate his fields and earn his livelihood as an agriculturist and therefore it comes within the term 'implements of husbandry' : *25 Bom L R 1211, Rel. on.* [P 97 C 1]

Fatehchand Assudomal — *for Applicant.*

Tarachand Khimandas — *for Opponent.*

Davis J. C.—This is an application in revision against the order of the Judge of the Small Cause Court, Karachi, raising attachment on a water pumping engine on the ground that it was an implement of husbandry within the meaning of Cl. (b) to Prov. (1) to S. 60, Civil P. C. The order of the Judge is attacked on the ground that S. 60 is intended to apply only to implements and cattle which are absolutely necessary for the livelihood of an agriculturist of the poorest class and that a machine as such cannot come within the meaning of Cl. (b) to the Proviso, the suggestion apparently being that if an agriculturist has in his possession a machine he cannot be an agriculturist within the meaning of Cl. (b) because he is not a poor agriculturist. But we do not think that Cl. (b) is to be interpreted in so narrow a manner as to limit its application only to such things as wooden ploughs or bullocks, such things as are necessary to maintain the poorest type of agriculturists following the most primitive methods of agriculture or that it was intended to penalize the more progressive type of agriculture. For instance, it is common knowledge that water is drawn from wells either by means of bullocks or by means of camels working Persian-wheels and to attach either these camels or bullocks is to bring the agriculturist's livelihood to an end. To argue that he should then laboriously dig the land with a shovel or to bring water in a pail from the well with his own hand and so earn a miserable livelihood for himself and his dependants, is clearly to violate the spirit and the purpose of Cl. (b) to Prov. (1)

to S. 60, Civil P. C., which is not intended to force agriculturists back to primitive ways but to protect them in their livelihood as agriculturists by preventing the attachment even of those mechanical means whereby they plough and irrigate and cultivate the soil and obtain their livelihood as agriculturists. The difference between a Persian-wheel and an engine or water pump is not an essential difference so as to apply Cl. (b) to the one case and to repel it in the another. Judgments show that the term 'implements of husbandry' in Cl. (b) to Prov. (1) to S. 60, Civil P. C., should be interpreted in a fair and reasonable and even in a generous spirit and not in a narrow and mean manner. For instance, in 25 Bom L R 1211[1] at page 1213, Shah Ag. C. J. said :

The defendants, who are appellants before us are admittedly agriculturists and have reared sugar-cane crop on their field, and on that field they have used articles, one Charak, a kadhai and planks of timber for the purpose of extracting sugar juice from sugar-cane and of turning it into jaggery. It is not necessary for the purpose of this case, and it is not easy to define the exact scope of the expression 'implements of husbandry' used with reference to an agriculturist. But having regard to the nature of the articles in this case, and the use made thereof on the field by the agriculturists, we think that it would be giving effect to the intention of the Legislature to hold that they are 'implements of husbandry' within the meaning of S. 60, Cl. (b), Civil P. C.

But it is urged on behalf of the plaintiff that the burden lies upon the agriculturist who wishes that attachment to be raised to show that his engine or water-pump is necessary to enable him to earn his livelihood as such, but this case has all along proceeded on this basis. This allegation was raised implicitly by the application and it is clear that the order of the Judge was not attacked in the revision application upon this ground at all. It was attacked upon the ground that the engine or the water-pump as such was not an implement of husbandry within the meaning of Cl. (b) of Prov. (1) to S. 60, Civil P. C. It appears clear from the record that this engine or this water-pump is necessary for the agriculturist to irrigate and cultivate his fields and earn his livelihood as an agriculturist, and we see no reason or need to order further inquiry on this point or to set aside the order of the Judge. We therefore reject this application with costs.

N.S./R.K. *Application rejected.*

1. Lakshman Mhasu v. Narhari Dadasa, (1924) 11 A I R Bom 294=81 I C 679=25 Bom L R 1211.

A. I. R. 1939 Sind 97

DAVIS J. C. AND DADIBA C. MEHTA J.

Naraindas Pirumal — Appellant.

v.

Bhojraj Premchand and another — Respondents.

Second Appeal No. 3 of 1935, Decided on 25th May 1938, against decree of Dist. Judge, Sukkur, D/- 15th October 1934.

(a) Second Appeal—Question of law—Whether conclusions of law arising from facts are correct or not is question of law.

Whether legal inferences arise from certain facts, whether conclusions in law arising from certain facts are or are not correct, are questions of law which can be considered in second appeal : *20 Cal 93 (P C) ; 19 Cal 253 (P C) ; A I R 1930 P C 91 and A I R 1937 Sind 51, Rel. on.* [P 98 C 2]

(b) Transfer of Property Act (1882), S. 53—Fraudulent transfer—Suit by trustee for declaration that property is not liable to be sold in execution being transferred in trust by judgment-debtor—Attaching creditor can plead in defence that transfer is fraudulent.

Where the judgment-debtor transfers his property in trust to the trustee 'who brings a suit for a declaration that property which is the subject of a charge by a consent decree cannot be sold in execution of that decree because it is trust property and not the property of the judgment-debtor, it is open to the attaching creditor to plead in defence that the transfer was in fraud of creditors : *A I R 1920 Mad 748, Applied.* [P 98 C2 ; P 99 C 1]

(c) Transfer of Property Act (1882), S. 53—Defrauding one creditor is sufficient to attract operation of S. 53—Test to be applied to cases falling under Sec. 53 stated—Sec. 53 applies to cases where transferor prefers himself to other creditors.

Though the purpose of Sec. 53 is to protect all creditors, the fact that there is only one creditor and not more, is no reason to exclude the application of the Section, if it is clear that the transfer is fraudulent and made for the purpose of defeating or delaying him : *A I R 1927 Lah 420 and A I R 1936 Lah 222, Rel. on.* [P 99 C 1]

But the test to be applied to cases under this Section is whether the purpose of the transfer is to prefer one creditor to the other, or whether the purpose is to prefer the transferor himself : *A I R 1915 P C 115 and A I R 1929 P C 279, Rel. on.* [P 99 C 1]

Section 53 of the Act is not intended to apply to a transfer by which one creditor is preferred to another. It is intended to apply to transfers where the transferor prefers himself to his creditors, where the transaction is a sham and bogus transaction. [P 99 C 1]

Kundanmal Dayaram — *for Appellant.*

Dipchand Chandumal—*for Respondents.*

Davis J. C.—This is an appeal against the judgment of the District Judge of Sukkur who confirmed a judgment of the Subordinate Judge of Shikarpur who decreed the plaintiff's suit which was for a declaration that defendant 1 was not

entitled to sell the interest of defendant 2 in a house upon which defendant 1 had got a charge by a consent decree on the ground that when that consent decree was passed defendant 1 had ceased to have any interest in the house, all his moveable and immovable property being transferred to the plaintiff, his brother, as a trustee on 25th July 1927. The date of the decree of which defendant 2 had sought execution was dated 15th November 1927. Both the lower Courts considered but briefly the question as to whether this transfer of property by defendant 2 to the plaintiff in this trust-deed of 25th July 1927, was voidable as being fraudulent and with intent to defeat or delay creditors and both the lower Courts came to the conclusion that the transfer was not such a transfer. But the real significance of S. 53, T. P. Act, does not appear to have been sufficiently appreciated by the lower Courts which gave more time to the question whether there was a trust or not.

But after having heard the arguments in appeal, and after having carefully considered all the circumstances of the case, we have no doubt that this transfer was made, by way of trust, by one brother, the judgment-debtor, to his brother, the plaintiff, for the express purpose, among others, of evading a debt, existing at the time of the transfer, in settlement of which defendant 2 subsequently obtained his consent decree. We have carefully considered the terms of this trust from the point of view as to whether in its elaborate provisions there was any honest arrangement made for the payment of this debt, the existence of which has been admitted, and which amounted to some Rs. 3000, and we have come to the conclusion in view of the second and third and thirtieth clauses of this trust-deed that it is so worded, and purposely so worded, as to evade the payment of the debtors' personal debts among which we have no doubt the trustee classes this disputed debt. We have not to consider in this appeal the question which was raised, among others, as to whether the property of the one brother could be transferred to the other brother as a trustee, it being argued by the appellant that property was joint undivided property of the joint Hindu family, and therefore one co-parcener could not transfer to the other as a trustee his joint and undivided share, for if we come to the conclusion as we do that this transfer was voidable under S. 53, T. P. Act, this other question does not fall to be decided.

Now, the first point taken in argument by the learned advocate for the respondents was the usual argument that this is not a question to be considered in second appeal, that we are concerned here with a mere question of fact, as to whether the transfer was or was not made with a particular intent. But there are cases which this Court has consistently followed as authority that whether legal inferences arise from certain facts, whether conclusions in law arising from certain facts are or are not correct are questions of law which can be considered in second appeal. Reference may be made to the Privy Council cases in 19 I A 228,[1] 19 I A 48,[2] and 32 Bom L R 380,[3] while one aspect of this matter has been considered and discussed at some length in a case of this Court in 30 S L R 371,[4] and it appears clear that we can consider in second appeal the question whether the transfer evidenced by this trust-deed of 25th July 1927 was a transfer within the provisions of S. 53, T. P. Act and thus voidable by the creditor. Now, it was argued by the learned advocate for the respondents that the plea raised by the judgment-creditor could not be raised by him as defendant at all. If he wished it to be held that the transfer was voidable under S. 53, T. P. Act, he must bring a suit specifically for that purpose; such a plea was not open to him in defence. But there is a judgment of the Full Bench of the Madras High Court in 43 Mad 760,[5] whereby it is clearly laid down that

> in a suit by an alienee, whose claim to property attached under a decree has been rejected, to set aside the order and establish his title, it is open to the attaching creditor to plead in defence that the transfer was in fraud of creditors.

A trustee is an alienee within the meaning of that ruling, and, we think, it makes no difference if the suit is brought as a result of a claim rejected in execution proceedings or whether the suit is brought

1. Ram Gopal v. Shamskhaton, (1893) 20 Cal 93 =19 I A 228 (P C).
2. Luchmeswar Singh v. Manowar Hoosein, (1891) 19 Cal 253=19 I A 48 (P C).
3. Wali Mohammad v. Mohammad Baksh, (1930) 17 A I R P C 91=122 I C 316=11 Lah 199= 57 I A 86=32 Bom L R 380 (P C).
4. Gulabrai v. India Equitable Insurance Co. Ltd., (1937) 24 A I R Sind 51=167 I C 929= 30 S L R 371.
5. Ramaswami Chettiar v. Mallappa Reddiar, (1920) 7 A I R Mad 748=59 I C 947=43 Mad 760=39 M L J 350 (F B).

without the preliminary of a rejected claim in execution proceedings and takes the form of a declaration that property which is the subject of a charge by a consent decree cannot be sold in execution of that decree because it is trust property and not the property of the judgment-debtor, free to be sold in execution of the decree. Now, it is not disputed in this case that at the time this trust deed was executed a debt was due by defendant 2 to defendant 1. It was so admitted in the trial Court. The fact that the consent decree was made after the trust deed, on 15th November 1927, does not appear to us to be decisive in the case, because though in certain circumstances a transfer may be voidable within the provisions of S. 53, T. P. Act for subsequent debts, it is admitted that in this case this substantial debt was in existence at the time of the execution of the trust-deed. Now, S. 53, T. P. Act reads as follows:

53. (1) Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed . . . .

And though it is clear that the purpose of the section is to protect all creditors, the fact that there is only one creditor and not more, is no reason to exclude the application of the section, if it is clear that the transfer is fraudulent and made for the purpose of defeating or delaying him. If authority is necessary for the proposition that the defrauding of one creditor is, the other circumstances being present, sufficient to attract the application of S. 53, reference may be made to the cases in 8 Lah 544[6] and A I R 1936 Lah 222.[7] But the test to be applied to cases under this section has been laid down by the Privy Council in certain cases 43 Cal 521[8] and 7 Rang 624,[9] and this test is whether the purpose of the transfer is to prefer one creditor to the other, or whether the purpose is to prefer the transferor himself. Apart from any special question that arises in the case of bankruptcy, Sec. 53 of the Act is not intended to apply to a transfer by which one creditor is preferred to another. It is intended to apply to transfers where the transferor prefers himself to his creditors, where the transaction is a sham and bogus transaction; and this appears to us precisely to be the case here. The provisions of this trust-deed are not executed carelessly; it is a long and elaborate deed. There are provisions relating to payments of debts, and although the learned advocate for the respondent was prepared to say that in his opinion the present debt of the judgment-creditor would fall under para. 2 of the trust-deed he could not commit his client to any such opinion, and we do not think that the conduct of the plaintiff in this case has shown it to be his opinion. His action in bringing this suit was clearly to evade the payment of this debt. He did not bring the money for the payment of this debt into Court; in fact he alleged that the consent decree had been obtained fraudulently. If that was so, it was open for the judgment-debtor to bring a suit to set aside the decree on the ground of fraud.

In fact the form in which this suit is brought, the conduct of the plaintiff, the elaborate care with which this trust-deed has been drawn up, the fact that apparently there escapes through its provisions just this debt which is to be paid, leaves no doubt in our mind, under all the circumstances, that this was a sham and bogus transfer; there was no question of consideration, because there was no consideration passing from the one brother to the other; there was not here a genuine consideration for the payment of the debt; or a genuine transfer of property in consequence; there was no genuine and real consideration which would prevent the application of S. 53, T. P. Act, which would enable us to hold that this transfer was in any way an honest transfer by this judgment-debtor, so far as this judgment-creditor was concerned. It may be that the plaintiff, the brother, the trustee in this deed, did not know of this particular debt, but in view of the manner in which this deed was drafted, we should say it was extremely probable that he did know. But this is not a case in which we are called upon to consider whether there was a transfer in good faith for consideration because there was no consideration. This is a case where it appears to us it is clear para. 1 of sub-s. (1) of Sec. 53, T. P. Act applies and para. 2 is of no avail.

6. Mohammad Ishaq v. Mohammad Yusaf (1927) 14 A I R Lah 420=101 I C 172 = 8 Lah 544 =29 P L R 114.
7. Mt. Bibo v. Sampuran Singh, (1936) 23 A I R Lah 222=162 I C 922.
8. Musahar Sahu v. Hakim Lal, (1915) 2 A I R P C 115=32 I C 343 = 43 Cal 521 = 43 I A 104 (P C).
9. Ma Pwa May v. S. A. R. M. A. Chettyar firm, (1929) 16 A I R P C 279 = 120 I C 645 = 7 Rang 624 = 56 I A 379 (P C).

We therefore think, with all respect, that the lower Courts were wrong in their appreciation of the nature of this case, and that this is a suit which should have been dismissed. The decrees therefore of the lower Courts must be set aside, the suit dismissed, and the appeal allowed accordingly, with costs throughout.

N.S./R.K. *Decrees set aside.*

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LOBO J.

In re Indus Film Corporation Ltd. (In liquidation) — Debtors.

Amiji Valiji & Sons — Claimants.

Misc. No. 308 of 1936, Decided on 17th August 1938.

(a) Charge—Immediate or future—Creation of—Immediate charge held created.

A corporation with reference to a loan advanced to it gave a writing to the creditor declaring that the latter would have "a lien on all our assets including machinery, shed, laboratory materials and settings now lying or that may be brought hereafter in our studio until payment of the aforesaid loan or interest thereon," but the entries in the cash book of the corporation did not make any mention of the lien :

Held that the declaration created and intended to create an immediate charge. [P 102 C 2; P 103 C 1]

(b) Companies Act (1913), S. 109 (1), Cl. (f) —Floating charge—Meaning of.

Where the assets of a corporation are of a fluctuating nature and must change from time to time in the ordinary course of business, and while taking loan creating charge on their assets, no restraint of any kind whatever is placed on the conduct of the business of the corporation, and the charge does not crystallize into a fixed security, the charge so created is a floating charge : *Case law discussed.* [P 103 C 1 ; P 106 C 1]

(c) Companies Act (1913), S. 109—Instrument creating charge on the property of a corporation is void if it is not registered.

An instrument creating charge on the property of a corporation, if not registered with the registrar as provided by S. 109, is void as against the Official Receiver. [P 106 C 1]

(d) Companies Act (1913), S. 88—Chairman as principal officer of corporation who carries on its business has implied authority to enter into contract on behalf of corporation.

The Chairman of a corporation as principal officer while carrying on business of the corporation executed a declaration creating a lien on property of the corporation in respect of a loan sanctioned by the Board of Directors, but the Articles of Association were silent as to the authority of the person entering into agreement on behalf of the corporation :

Held that the Chairman had implied authority to execute the declaration. [P 106 C 2]

Khanchand Gopaldas — *for Official Liquidator.*

Dingomal Narainsing — *for Claimants.*

Lobo J.—In connexion with the liquidation proceedings relating to the concern known as the Indus Film Corporation Ltd., a point has arisen which has been referred to the Court for decision. In February 1936 when the Corporation was a going concern Amiji Valiji & Sons advanced to the Corporation a sum of Rs. 5000. This money remained unpaid when the Corporation went into liquidation. Amiji Valiji & Sons in the course of liquidation proceedings have presented a claim for Rs. 5000 which the Official Liquidator is prepared to admit; but Amiji Valiji & Sons further claim to be secured creditors with a lien on all the assets of the Corporation including machinery, shed, laboratory, &c. in the Corporation studio on Lawrence Road, and the Official Liquidator who disputes this latter claim has referred the point to the Court for determination. To understand the legal issues involved it is very necessary to have a clear idea of the facts, and these are to be gathered from the evidence of the witnesses examined before me and the documents exhibited. It seems clear that early in 1936 the Corporation was in sore need of funds. Mr. Dastur (Ex. 11) at present Manager of the Sind Provincial Co-operative Bank who in 1936 was for some time a director of the Indus Film Corporation Ltd., states :

I was a director of the Indus Film Corporation Ltd. I know Dr. G. L. Dudani. He was Chairman of the Corporation. I know Amiji Valiji & Sons. In February 1936 the Corporation wanted money; they had not sufficient liquid assets. I was approached to secure a loan for the Corporation. I was approached by Lalji Mahrotra and Dr. Dudani. The latter used to carry on the business of the Corporation. I approached Moosaji of Amiji Valiji & Sons for a loan of Rs. 5000. He agreed, but wanted security in the form of a lien on the Corporation's property. Dr. Dudani agreed to give the security asked for, but said he would consult the other directors. He must have consulted the directors. The loan was given and two cheques of Rs. 2500 each passed through my hands. This is the pronote for the loan (Ex. 12). This is the letter of lien executed by Dr. Dudani, the Chairman (Ex. 13). This was dated 29th February 1936. The dates of Exs. 12 and 13 are different because I detained the second cheque till Ex. 13 was handed to me. The first cheque was dated 12th February 1936.

The witness has also stated that he himself advanced Rs. 2000 to the Corporation on 31st January 1936 and that Lalji Mahrotra, another director of the Corporation, had also given a loan of Rs. 2500. It would appear therefore that in January and February 1936 the Corporation had raised loans to the extent of Rs. 9500. Ex. 12 is

the demand pronote for the loan of Rupees 5000 from Amiji Valiji & Sons : it is dated 11th February 1936, and it is signed "For the Indus Film Corporation, Ltd., G. L. Dudani, Chairman."

Exhibit 14 is a letter dated 12th February 1936 from the Indus Film Corporation Ltd., to M/s Amiji Valiji & Sons. It refers to the pronote for Rs. 5000 and states :

We confirm having received from you payment by two cheques for Rs. 2500 each dated 12th and 17th February 1936 respectively.

Exhibit 13 is the letter of lien and must be set out in full. It reads thus:

With reference to the loan of Rs. 5000 advanced by you to us as per our promissory note for Rupees 5000 dated 11th February 1936, we hereby declare that you will have lien on all our assets including machinery, shed, laboratory materials, settings now lying or that may be brought hereafter in our studio on Lawrence Road in Garden quarter until repayment of the aforesaid loan and interest thereon. We hereby declare that we have not given any lien or right to any other person and that the same are free from any incumbrance.

Exhibit 23 is the entry relating to Rs. 5000 in the cash book of the Corporation. This entry appears at page 143 of the cash book and is dated 11/13th February 1936. It refers to a voucher No. 611 which has been produced and is Ex. 24 in the case. But it makes no reference to any lien. The corresponding entry in the Corporation ledger is Ex. 25. Ex. 17 is a resolution of the Board of Directors of the Indus Film Corporation Ltd., dated 22nd February 1936. It reads thus :

Resolved that the loan of Rs. 9500 taken by the Managing Agents in anticipation of sanction is hereby sanctioned.

The amount of Rs. 9500 referred to in the resolution has been explained in the evidence of Mr. Dastur. It consists of the Rs. 5000 obtained from Amiji Valiji & Sons and the sums of Rs. 2000 and Rs. 2500 lent to the Corporation by Mr. Dastur himself and Lalji Mahrotra. It would appear from the evidence of Mr. Dastur that Dr. G. L. Dudani was attending to all the business concerns of the Corporation in his capacity as Chairman of the Board of Directors. Dr. Dudani appears to have considered that the lien granted to Amiji Valiji & Sons fell under the provisions of S. 109, Companies Act, and required to be registered with the Registrar of Joint Stock Companies. On 10th March 1936, he wrote to the Registrar a letter, Ex. 15, which reads :

We are herewith sending you for registration a statement showing the charges incurred by the Corporation.

The statement referred to is Ex. 15/1. It refers to the loans of Rs. 5000 from Amiji Valiji & Sons and states that the property charged in respect of this loan is all assets including "machinery, shed, laboratory materials, settings." Ex. 15/4 is the reply sent to the Indus Film Corporation Ltd. by the Registrar of Companies, returning the papers sent to him with the letter Ex. 15. Ex. 15/4 reads :

The statement of charges created by the company is not required to be filed. What is required to be registered are the actual mortgages or charges together with their particulars in the prescribed Form IX within 20 days after the date of creation of each charge (vide S. 109, Companies Act, 1913).

All the papers received with your above letter are returned herewith.

At the meeting of the Board of Directors of the Corporation held on 26th July 1936 a resolution was passed which reads :

That a committee of Messrs. Partabrai Daooji and Ishwardas Mallik be and is hereby appointed to look into the loans by the Corporation and have the loans secured as they consider proper.

This is Ex. 19. On 8th August 1936 at a meeting of the Board of Directors of the Corporation one of the resolutious passed was this :

The loans as registered in the books of the Corporation to date were admitted and the report of the Committee to secure them was approved and the necessary documents may be got executed.

It is next necessary to a proper appreciation of the legal issues involved in this matter to be clear about the constitution of the Corporation and the provisions relating to its management. The Indus Film Corporation Ltd., was incorporated under the Companies Act of 1913, and Ex. 5 is a copy of the Memorandum and Articles of Association of the Corporation. The Memorandum of Association does not contain any express provision for the raising of loans by the Corporation but in (S) of para. 3 in which the objects of the Corporation are set out the Corporation is given power to do all such things as are incidental or convenient to the attainment of the objects of the Corporation and this no doubt will include the power to raise money on loans for the carrying on of the business of the Corporation. Article 4 of the Articles of Association reads thus :

The company shall forthwith enter into two agreements with the Sind Talkies, Karachi, and the Silver Screen Syndicate, Karachi as the Managing Agents and Distributors respectively in terms of the draft agreements which have, for the purpose of identification, been signed by three of the subscribers to the Memorandum of Association and the Directors shall carry the same into effect.

Article 78 reads thus :

The Directors shall every year appoint one from among themselves as Chairman. He will be the Chairman of the Board of Directors as well as of the Company. He shall hold office for so long as he continues to be a Director and until a new Chairman is appointed.

Article 84 reads thus :

The control of the management of the business of the company shall be vested in the Directors, who shall manage through the Managing Agents, the Sind Talkies, Karachi, with whom the company has entered into an agreement and the Directors may exercise all such powers and do all such acts and things as the company is, by its memorandum or otherwise, authorized to exercise and do . .

Article 89 reads :

The Directors shall duly comply with the provisions of the Companies Act, 1913, or any statutory modification thereof for the time being in force and shall appoint a person who shall be the principal officer of the company for the purpose of discharging the statutory duties mentioned in the Companies Act.

By a resolution of the Board of Directors dated 15th February 1935, Ex. 16 in the case, Dr. G. L. Dudani was elected Chairman of the Board of Directors of the Corporation for the first year of the Corporation and Mr. Ramchand Jiwanlal was appointed Secretary of the Board of Directors of the Corporation for the first year of the Corporation. By a resolution of the same date the Chairman (Dr. Dudani) was appointed to act as the principal officer of the Corporation for the period during which he was Chairman of the Corporation. By a resolution of the Board of Directors dated 31st March 1936 (Ex. 18) Dr. G. L. Dudani was again elected as Chairman of the Board of Directors of the Corporation. Nowhere in the Articles of Association of the Corporation is there any express provision as to the making and signing of contracts for and on behalf of the Corporation. Ex. 26 is the agreement between the Corporation and its Managing Agents, the Sind Talkies. Cl. 5 (d) thereof provides that subject to the general control of the Directors the Managing Agents may

borrow or raise any sum of money by loan or otherwise on mortgage or hypothecation, on such securities and the terms as deems fit, and execute, sign and seal, or deliver all necessary documents or do any other acts in that behalf.

It is certainly not clear on the record when this agreement (Ex. 26) was executed. It bears the date 23rd February 1935. But the signatures appear on p. 4 on which no part of the agreement has been typed. There is no date for any of the signatures. Below the signatures there is an endorsement by one Govindanand dated 28th July 1936. It reads :

I hereby certify that I have this day witnessed this original document and that it does not bear any endorsement in favour of any person or persons.

Govindanand has signed this endorsement in the presence of Hoosainbhoy Esmailji, First Class Magistrate, Karachi, on 28th July 1936. This point has apparently escaped the learned advocates who argued the matter before me, but as the document stands, it is to my mind very doubtful as to when the agreement (Ex. 26) was executed. The Managing Agents have signed Ex. 26 thus: "Per Pro. Sind Talkies, Karachi, Ramchand Jiwanlal." Ramchand Jiwanlal was the Secretary of the Board of Directors and of the Corporation. Mr. Dastur in his evidence has stated :

The Managing Agents were the Sind Talkies as far as I know. Mr. Ramchand and Dr. Dudani were partners in 'The Sind Talkies'.

At another place in his evidence Mr. Dastur has distinctly stated that Dr. Dudani used to carry on the business of the Corporation. At the meetings of the Board of Directors at which the resolutions Exs. 16, 16/1, 17, 18, 19 and 20 were passed, Ramchand Jiwanlal of the Sind Talkies was present. It would appear, therefore, that whether as a partner in 'The Sind Talkies', the Managing Agents of the Indus Film Corporation Ltd., or as Chairman of the Board of Directors and of the Corporation it was Dr. G. L. Dudani who was carrying on the business of the Corporation at the time when the loan of Rs. 5000 was taken from Amiji Valiji & Sons and for some considerable time thereafter.

Now, the points that arise for decision from the rival contentions of the parties are these: (1) Was any charge created in respect of the loan of Rs. 5000 from Amiji Valiji & Sons ? (2) Is the charge valid in law? (3) Is it binding on the Corporation? I will deal with these points in the order in which I have stated them. As regards the creation of the charge the learned advocate for the Official Liquidator argues that the language of Ex. 13 clearly shows that at that time the Corporation merely agreed to give a lien at some future date. Thus no lien was in fact created by the document Ex. 13. He has relied on the words : "We hereby declare that you will have lien on all our assets including machinery, etc."

I do not however agree that there is any force in this argument. There can be no doubt to my mind that Ex. 13 created and

intended to create an immediate charge. If the phrase used is not accurate and unambiguous, this is clearly attributable to the fact that Dr. Dudani does not appear to be an English scholar. Reliance has also been placed by the learned advocate for the Official Liquidator upon the fact that in the account books of the Corporation, Exs. 23 and 25, there is no mention of any lien and that no register of charges has been produced. On the other hand, there is the clear and definite evidence of Mr. Dastur and I have no reason whatever to reject the word of this witness. Mr. Dastur is a very respectable gentleman. He is the present Manager of the Sind Provincial Co-operative Bank and was in 1936 a Director of the Indus Film Corporation Ltd. I hold therefore on this point that a charge was created in respect of Amiji Valiji's loan of Rs. 5000 and Ex. 13 is that charge. A much more important question however is whether this charge is valid in law. Its validity is attacked by reason of Sec. 109, Companies Act, which provides that certain mortgages and charges referred to therein

shall, so far as any security on the Company's property, or undertaking is thereby confirmed, be void against the liquidator and any creditor of the Company, unless the prescribed particulars of the mortgage or charge together with the instrument (if any) by which the mortgage or charge is created or evidenced, or a copy thereof verified in the prescribed manner, are filed with the registrar for registration in manner required by this Act within 21 days after the date of its creation.

Now Ex. 13, it is common ground, was not registered with the Registrar in the manner provided by Sec. 109, Companies Act, and the whole argument as to the validity of the lien has turned upon the question whether or not the document (Ex. 13) constitutes a floating charge on the property of the Corporation falling under Cl. (F) of sub-s. 1 of Sec. 109, Companies Act. It is common ground that Cl. (E) of the Section which relates to a mortgage or charge not being a pledge on moveable property of the Company can have no application because Ex 13 is dated 29th February 1936 and Cl. (E) came to be inserted in S. 109 only in October 1936.

This question has caused me much anxious thought, but after a careful consideration of the matter from every aspect I have come to the conclusion that Ex. 13 creates a floating charge on the assets of the Corporation within the meaning of Cl. (F) of sub-s. 1 of S. 109, Companies Act and that not having been registered as required by S. 109 it is void against the Official Liquidator. A floating charge has thus been described by Romer L. J. in (1903) 2 Ch 284.[1]

The term 'floating' is one that until recently was a mere popular term. It certainly had no distinct legal meaning. It is not a legal term. It has recently been used in more than one statute; but when the Courts have to consider whether the charge is a floating one within the meaning of the term as used in the Acts of Parliament, and in particular within the meaning of the Companies Act, 1900, one must, I think, deal with the question of substance to be answered according to the circumstances of each particular case. I certainly do not intend to attempt to give an exact definition of the term 'floating charge' nor am I prepared to say that there will not be a floating charge within the meaning of the Act, which does not contain all the three characteristics that I am about to mention, but I certainly think that if a charge has the three characteristics that I am about to mention, it is a floating charge. (1) If it is a charge on a class of assets of a company present and future; (2) if that class is one which, in the ordinary course of the business of the company, would be changing from time to time; and (3) if you find that by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets I am dealing with.

In the same case Cozens-Hardy L. J., gave a more positive description of a floating charge. He says:

My view is that the floating charge need not be on the whole undertaking nor on the whole property of the Company. It must, I think, embrace both present and future property and property of a particular class. It must, I think, contain expressly or by necessary implication a right to the company to deal with it for a certain time as though the charge had never been executed. When these conditions are found, I think you have a floating charge within the meaning of the Act.

These descriptions of a floating charge were supplemented in a later case by Buckley L. J., who, in (1910) 2 K B 979,[2] summarized the decisions as follows:

A floating security is not a future security; it is a present security, which presently affects all the assets of the company expressed to be included in it. On the other hand, it is not a specific security; the holder cannot affirm that the assets are specifically mortgaged to him. The assets are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee. A floating security is not a specific mortgage of the assets, plus a license to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security but not specifically affecting any item until some event occurs or some

1. Houldsworth v. Yorkshire Woolcombers Association Ltd., (1903) 2 Ch 284=72 L J Ch 635.
2. Evans v. Rival Granite Quarries, Ltd., (1910) 2 K B 979=79 L J K B 970=54 S J 580=26 T L R 509.

act on the part of the mortgagee is done which causes it to crystallize into a fixed security.

As Lord Macnaghten observes in (1904) A C 355,[3] a floating charge is

ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.

The latest English case in which the nature and elements of a floating charge have been discussed is the case in (1937) 1 All E R 231.[4] It is a judgment of Porter J. in the K. B. Dn. The learned Judge was there dealing with a case of money borrowed upon the security of letters of hypothecation relating to goods and produce in the borrowers' godowns. The borrowers were free to deal with the goods and produce in the ordinary course of business and the contents of their godowns changed frequently. Referring to the charge in this case Porter J. states :

But when one comes to the question of what a floating charge is, in my view, one gets the best description from what was said by a learned Lord Justice. I will not say 'definition' because one learned Lord of Appeal said he need not define the meaning of the phrase, and a learned Lord Justice, whose definition I propose to adopt, said, to start with : "It is not difficult to define a floating charge," and then proceeded to give what I should have considered a definition if he did not afterwards himself refer to it as a description. In these circumstances, I prefer the description of Fletcher Moulton L. J., which is contained in (1910) 2 K B 979,[2] at p. 994. I think that case in effect says, without limiting or trying to be too exact in the matter, that the main and substantial question is; are you altering from time to time the security which you have given so as to leave that security free for the person making the pledge to deal with, or are you not leaving it free, but are you restraining him from dealing with it in the sense that he has either got to pay the money for which the pledge was given as security to him, or on his behalf, or in the sense that it actually is made his property for the time being though when it is parted with the money may be substituted for the security given. In my view, in the case of the Mercantile Bank of India, Strauss and Co. Ltd., were entirely at liberty to deal with the goods which were pledged, subject to their being a general charge over the property which did not light upon any of their property until the seizure of the goods.

The principle set out in the leading English cases on the subject of a floating charge which have been referred to above has been sought to be applied in several cases in India which have been referred to before me in argument. In 50 Bom 547[5] the facts were that the directors of a company executed an instrument creating a charge in favour of the bank. The instrument states that in consideration of bank advancing a loan of two lacs, the company had "deposited and pledged with and to the bank as security for the repayment of the loan all the liquid assets including stock in process now or at any time hereafter to be stored by the company in its godowns," the keys of which had been delivered to the bank and were to remain in the possession of the bank. The bank took possession of the liquid assets and its clerk was retained in charge thereof. The company agreed to maintain the goods in the godowns at a value of 33 per cent. above the amount for the time being due. The question having arisen whether the instrument created a floating charge, it was held by a Bench of the High Court that the charge created was not a floating charge; it was a mortgage of specific assets with a license to the mortgagor to dispose of them in the course of the business subject to prescribed conditions. The facts of this case are entirely distinguishable from those in the case before me, and this decision is therefore not helpful.

The next case in which the matter of a floating charge has been considered in India is the case in A I R 1926 Bom 28,[6] a decision of a Bench of the same learned Judges as decided the case in 50 Bom 547.[5] In this case the respondent N. H. Moos, a receiver in a suit in the Bombay High Court, lent and advanced to F. F. Gordon Ltd. a sum of rupees two lakhs. In respect of the loan three documents were executed, a resolution authorizing one Mr. Cunnigham to arrange a loan, a demand pronote for Rs. 2,00,000 and an agreement between the company and the receiver signed by Cunnigham. There was also a letter written by Cunnigham to the receiver stating that he had taken possession of the machinery, presses and all moveable property comprised in the said agreement as the receiver's agent and would continue to hold the same as his agent. F. F. Gordon Ltd., it may be explained, were the proprietors of a printing

3. Illingworth v. Houldsworth, (1904) A C 355=73 L J Ch 739=91 L T 602=53 W R 113=20 T L R 633.
4. Mercantile Bank of India Ltd. v. Chartered Bank of India, Australia and China, and Strauss & Co. Ltd., (1937) 1 All E R 231.
5. Bank of Baroda v. H. B. Shivdasani, (1926) 13 A I R Bom 427=96 I C 417=50 Bom 547=28 Bom L R 689.
6. D. Pudumjee & Co. v. N. H. Moos, (1926) 13 A I R Bom 28 = 91 I C 334 = 27 Bom L R 1218.

press and Mr. Cunnigham was the managing director of the company and editor of the "Advocate of India." On the company going into liquidation, the receiver claimed that he was entitled to a preferential charge over the moveables of the company on the ground that he was a pledgee in possession. In deciding the case against the receiver, Coyajee J. who delivered the judgment in the case states :

In my opinion the parties did not create a pledge of existing properties; they intended to create a floating charge on all the properties of the company "except the leaseholds and the goodwill," within the meaning of Sec. 109, Companies Act, 1913, but the charge is void for want of registration.

Macleod C. J. added :

The document of 9th February 1922 did not create a pledge of specific assets belonging to the company in favour of the receiver, but created a floating charge on all the company's assets, and was therefore compulsorily registrable under Section 109, Companies Act.

Yet another case in which the subject of a floating charge has received careful consideration on the basis of the leading English cases on the point is the case in 59 Cal 1372.[7] In that case the document in question was a kabuliyat in respect of a mining lease containing the following stipulation :

Further, the right I have got on the basis of this settlement, the machineries of the said kuthi, the engine and the boilers, &c. will all along remain under first charge for the said royalty and minimum royalty.

After an exhaustive review of the English cases on the point Mukerji J. states as follows :

Bearing these observations in mind, if one examines the character of the charge created in the present case, one finds certain elements present or absent. . . . . It may be conceded that, for a floating charge, it is not necessary that the entire book debts or the entire assets of the business should be charged but it is nevertheless apparent that the governing idea is to allow a going concern to carry on its business in the ordinary course, the effect of which would be to make the assets liable to constant fluctuation. This element is entirely absent in the present case; what is charged being the leasehold and the machineries, engines, boilers, &c. that is to say, the moveables that would be brought on to the premises. With the charge on them, not a single screw could be removed except perhaps for the purpose of being replaced : and neither the moveables nor any parts of them could be disposed of by the lessee. The element of fluctuation due to ordinary wear and tear that is present here is widely different from what would be consequent on the power of disposal in the ordinary course of business, which marks the outstanding feature of property subject to a floating charge.

7. H. V. Low & Co. Ltd. v. Pulinbiharilal Singha, (1933) 20 A I R Cal 154=143 I C 193 =59 Cal 1372.

After quoting Buckley L. J.'s remarks in (1910) 2 K B 979[2] the learned Judge proceeds :

Now, what is the event, on the happening of which, or what is the act or the nature of intervention of the mortgagee, which is required to crystallize the security in the present case? Clearly, no act or intervention on the part of the mortgagee is necessary. What however is said is that until royalty or minimum royalty is due or is in default, the charge will not fasten on the property. This, in our opinion, is not the kind of event contemplated; as soon as the royalty or minimum royalty accrues due, it forms a charge on the assets specified, and no extraneous event is necessary for the charge to fasten itself. This element too is wanting in the present case.

On the facts of the case before me, it appears to me that the case in A I R 1926 Bom 28[6] bears the closest analogy to the present case. Under Exhibit 13 what is charged is

our assets, including machinery, shed, laboratory materials, settings, now lying or that may be brought hereafter in our studio.

These assets are undoubtedly of a fluctuating nature. It may be that the machinery, shed and laboratory are not assets which would fluctuate to any considerable extent, but materials, settings and other things appertaining to a film business are undoubtedly of an extremely fluctuating nature and must change from time to time in the ordinary conduct of the business of a film corporation. This, in the words of Romer L. J., is the first characteristic of a floating charge. Then again, by reason of Ex. 13 no restraint of any kind whatever is placed upon the Indus Film Corporation Ltd. in the carrying on of the business. In the words of Cozens-Hardy L. J. in (1903) 2 Ch 284[1] here is a second characteristic of a floating charge. Cozens-Hardy L. J. said:

It must, I think, contain expressly or by necessary implication a right to the company to deal with it for a certain time as though the charge had never been executed.

Even the third characteristic referred to by Romer L. J., in the same case is to be found in the present case. Not till Amiji Valiji & Sons demand payment of the money lent by them and institute a suit for the recovery thereof does the charge in this case, in the words of Buckley L. J., "crystallize into a fixed security." Or in the words of Lord Macnaughten in (1904) A C 355,[3] "settle and fasten on the subject of the charge within its reach and grasp". The learned advocate for Amiji Valiji & Sons has urged before me that the case really applicable in this matter is the case in 59 Cal 1372[7] but I can-

not agree. What was charged in that case was the leasehold right granted by the settlement, the machineries of the kuthi, and the engines and boilers, &c. These were assets which were not of a fluctuating nature as the learned Judge himself points out; the element of fluctuation was entirely absent. I am therefore of opinion that Ex. 13 constitutes a floating charge on the assets of the Indus Film Corporation, Ltd. falling within the meaning of Clause (F), S. 109, Companies Act and not having been registered it is void as against the Official Liquidator.

In view of my decision the third point for decision which has been set out above does not really arise. If there is no charge valid in law then there is nothing to bind the Corporation. I would however record a finding on this point briefly stating my reasons. Under Sec. 88, Companies Act, a contract on behalf of a company if it is a contract in writing may be made on behalf of the company and signed by any person acting under its authority express or implied. In the present case, the Articles of Association of the Corporation are silent on the point. The agreement with the Managing Agents (Ex. 26) does make specific provision for the entering into and execution of contracts, but, as I have said above, there is considerable doubt as to whether the agreement (Ex. 26) had been executed and was in force in February 1936. But even if it was it makes no material difference. According to the evidence of Mr. Dastur, the business of the Corporation was carried on by Dr. Dudani. The Managing Agents were the Sind Talkies and Mr. Dastur states:

> As far as I know Mr. Ramchand and Dr. Dudani were partners in 'The Sind Talkies'.

There is no other evidence on the record on the point. Ex. 13 was executed by Dr. Dudani as Chairman of the Corporation. Dr. Dudani was elected as Chairman of the Board of Directors and the Corporation on 31st March 1936 by the document Ex. 18. He had already been elected Chairman of the Board of Directors and the Corporation and the Principal Officer of the Corporation in 1935 by resolution Exs. 16 and 16/1. By the Board's resolution Ex. 17, dated 22nd February 1936, the raising of the loan from Amiji Valiji & Sons had been sanctioned. There is every reason to believe that the resolution of the Board dated 8th August 1936, Ex. 20 admitting the loans registered in the books of the Corporation and accepting the report of the Committee that they should be secured and formal documents made out covered the loan of Amili Valiji & Sons. In these circumstances and in the face of these facts it is extremely difficult to accept the argument that Dr. Dudani was not authorized to raise a loan from Amiji Valiji & Sons and execute the document Ex. 13. If there was no express, there was undoubtedly implied authority to Dr. Dudani. I have omitted to mention that at all the meetings of the Board of Directors at which the resolutions Exs. 16, 16/1, 17, 18, 19 and 20 were passed, Ramchand Jiwanlal, the Secretary of the Board of Directors and a partner in the firm of the Managing Agents, was present. Reference has been made to passages in Halsbury's Laws of England, Vol. 5, at pp. 464, 467 and 468 and to several English cases such as (1870) 5 Ch 288[8] and (1856) 119 E R 886[9] on the question as to the binding effect of the Memorandum and Articles of Association upon persons dealing with a company and upon the question as to how far such a person is under obligation to inquire into the constitution and inner working of the company. It is unnecessary for me however to refer to all these decisions at any length, for it appears to me that in this case the facts make it obvious that Dr. Dudani was authorized to execute the document (Ex. 13) giving a charge to Messrs. Amiji Valiji & Sons. As however I hold that the charge is invalid by reason of the provisions of S. 109, Companies Act 1913, my decision must be in favour of the Official Liquidator.

As regards costs, I am not inclined to grant costs in this matter to the Official Liquidator against Amiji Valiji & Sons because for the charge being held invalid the party responsible is the Indus Film Corporation Ltd., who did not take the necessary steps to have the charge registered as required by law.

S.G./R.K. *Answered in affirmative.*

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8. In re County Life Assurance Co., (1870) 5 Ch 288=39 L J Ch 471=22 L T 537=18 W R 390.

9. Royal British Bank v. Turquand, (1856) 6 El & Bl 327=25 L J Q B 317=2 Jur N S 663=119 E R 886.

* A. I. R. 1939 Sind 107

DAVIS J. C. AND TYABJI J.

Mt. Latifanbai w/o Abidali Pirali — Appellant.

v.

Mt. Sakinabai w/o Ghulam Hussein and others — Respondents.

First Appeal No. 40 of 1936 and Misc. Appeal No. 42 of 1935, Decided on 23rd September 1938, against decision of Haveliwala, A. J. C., D/- 22nd July 1936 and 8th November 1935 respectively.

(a) Specific Relief Act (1877), S. 42 — Suit for declaration that plaintiff and defendants as heirs of deceased were entitled to shares in moneys lying to credit of deceased in hands of Provident Trust which was not made party and for injunction restraining defendants from receiving it—S. 42 is no bar to maintainability of suit — Amendment of plaint by addition of prayer for administration does not change nature of suit.

A person brought a suit for a declaration that he and defendants as heirs of deceased were entitled to shares as set out in the plaint in the moneys lying to the credit of the deceased in the hands of the Burmah-Shell Provident Trust Ltd., and for an injunction restraining the defendants from recovering from the Burmah-Shell Provident Trust any of the said moneys or from parting with any of the moneys they might have received. The moneys were in the hands of the Burmah-Shell Provident Trust Fund and the trustees of that Fund were not a party. The Judge allowed the amendment in the plaint by the addition of a prayer for the administration of the estate of the deceased:

Held that S. 42 was no bar. The suit property was in the possession of a third party; therefore a suit for a declaration and injunction would lie. It was not necessary for the plaintiff to ask for possession or partition.

Held further that the amendment of the plaint did not change the nature of the suit at all. What it in effect did was to express the real purpose and nature of the suit, for the suit was in reality a suit for the administration of the estate of the deceased. [P 108 C 1, 2]

(b) Mahomedan Law — Personal law of succession of employee cannot be changed by agreement with employer.

The personal law of succession of a Muhammadan employee cannot be changed by agreement between him and his employer. [P 108 C 2]

*** (c) Provident Fund — Private company — Provident moneys are part of estate of deceased employee and pass on his death to his heirs according to his personal law of succession.**

Provident fund moneys are the property of a deceased employee and pass on his death to his heirs, whoever be nominated by him for the purpose of receiving the moneys from the fund and for giving a full and sufficient quittance to the fund. Hence, the moneys standing to the credit of a deceased Sunni Mahomedan in the Provident Fund at the time of his death are part of his estate and subject to the personal law of succession of the deceased as a Sunni Muhammadan : *A I R 1924 Sind 57, Foll.* [P 109 C 1, 2]

(d) Provident Funds Act (1925), S. 5 — S. 5 does not apply to funds of private company.

Section 5 deals with Government and Railway funds. To the fund of a private company the Act does not and has not been applied [P 109 C 1]

(e) Provident Funds Act (1925), S. 5 — Employee's personal law of succession whether ousted in favour of nominee *(Quaere).*

Whether, if a fund be a fund to which S. 5 applies, the personal law of succession of the employee is ousted in favour of the nominee. [P 109 C 1]

Bhagwandas P. Samtani — *for Appellant.*

Kundanmal Dayaram — *for Respondent (Mt. Sakinabai.)*

Appeal No. 40 of 1936

Davis J. C. — This is an appeal from the judgment of Haveliwala, Additional Judicial Commissioner, in which he purported to pass a decree in what had in fact become during the course of the trial an administration suit, though in its first form it was a suit for a declaration and injunction, that the plaintiff and the defendants were as heirs of the deceased one Abidali entitled to a declaration that they were entitled to shares as set out in the plaint in the moneys lying to the credit of the deceased Abidabli in the hands of the Burmah-Shell Provident Trust Limited, and for an injunction restraining the defendants from recovering from the Burmah-Shell Provident Trust any of the said moneys or from parting with any of the moneys they may have received. In view of the fact that the moneys were in the hands of the Burmah-Shell Provident Trust Fund and the trustees of that fund were not a party, it is clear that no injunction or decree could issue against them; and it is also clear that the prayer for a declaration that the defendants were heirs to the deceased Abidali and were entitled to a specified share in the Provident Fund moneys was directly in conflict with the prayer that they were to be restrained perpetually from recovering their share. It is not strange therefore that the Judge realizing the poverty of the parties and the harm that might come to them from litigation, endeavoured to decide the points really in dispute between them and to give the suit the proper form, and we have no doubt that the parties realizing that this was in their best interests acquiesced in the form in which the suit came finally to be tried. It would, we think, have been better, and would have saved the Appellate Court much time and argument if the learned Judge had

been more careful to see that the technical amendment in the plaint by the addition of a prayer for the administration of the estate of the deceased was made when the suit was before him, and that he had decided and indeed decided first the issue put down as Issue 12, which should have been put down as Issue 1, as to whether the suit was maintainable, or to have put on record the fact that this issue was not pressed. As it was, this issue was not decided nor was it put on record that it was not pressed. In appeal the arguments advanced were based principally on these two objections: (1) that the suit as framed would not lie and the effect of the amendment was to change the nature of the suit, and (2) that the Provident Fund of the deceased was not part of the estate of the deceased.

So far as the objection that the suit as framed would not lie, we do not think that S. 42, Specific Relief Act is a bar. The suit property is in the possession of a third party; therefore, a suit for a declaration and injunction would lie. The injunction asked for, as we have pointed out, was an injunction which could not under the circumstance be granted, and in our opinion, the only really effective and satisfactory manner of deciding the dispute between the parties was to join the trustees of the Burmah-Shell Provident Trust Fund as parties to the suit, and the suit as framed was, we have no doubt, so framed to evade the payment of proper court-fees, an evasion no longer possible after the Full Bench judgment of this Court in 31 S L R 442,[1] but so far as we can see, it was not necessary for the plaintiff to ask for possession or partition. We do not, however, think that the amendment of the plaint allowed by us in appeal changed the nature of the suit at all. What it in effect did was to express the real purpose and nature of the suit, for the suit was in reality a suit for the administration of the estate of the deceased Abidali, for the provident fund money constituted the whole estate. As the suit becomes an administration suit, the trustees of the Provident Fund as creditors of the estate are brought within its scope. Therefore, we are of the opinion that the amendment of the plaint was justified; it did not change the real nature of the suit, and that the suit as a suit for a declaration that the plaintiff and defendants are heirs of the deceased Abidali and as such are entitled to specified shares in the property in suit, and for administration of the estate of the deceased constituted of this property is maintainable, and as such will effectively decide the question which was in issue between the parties from the beginning of the suit. The plaintiff-respondent must, however, pay the full court-fees, and this the advocate concerned has promised faithfully to do.

The only question then left for us to decide is whether the provident fund moneys estimated in the plaint at Rs. 8,500, though they may turn out to be considerably less, formed part of the estate of the deceased Abidali subject to the laws of succession of the Sunni Mahomedans, or are the absolute property of the nominee, one of the widows, Latifanbai. The plaintiff is one of the daughters of the deceased; the second defendant is another widow; defendant 3 is the mother; defendant 4 is the brother, and defendant 5 is the sister of the deceased. Now the question as to whether the moneys to the credit of the employee in a Provident Fund are the property of the employee or part of his estate appears to have been decided by a Bench of this Court in 18 S L R 311,[2] which decision is not only binding on us but with which decision we respectfully agree.

It is argued on behalf of the appellant that the money is trust money and that the trustees of the Provident Fund are trustees, and reference is made to the rules of the Provident Fund and a judgment of the Bombay High Court reported in 33 Bom L R 720.[3] But the personal law of succession of a Mahomedan employee concerned cannot be changed by agreement between him and his employer, and we observe that in rule 1 of the Rules of the Provident Fund there is no declaration that the moneys of the depositors vest in the trustees; it provides merely that the management and control of the Fund shall vest in the Burmah-Shell Trust Fund referred to for convenience as the "Trustees", and even if the deceased was only the beneficial and not the legal owner of this property, we do not see why this beneficial interest should not on his death be

1. Lakhomal Deepchand v. Deepchand Tolaram, (1937) 24 A I R Sind 241=171 I C 420=31 S L R 442 (F B).

2. Aimai Shewakshaw v. Awabai Dhanjishah, (1924) 11 A I R Sind 57=76 I C 739=18 S L R 311.

3. Nadirshaw J. Vachha v. Times of India Employees Death Benefit Fund, (1931) 18 A I R Bom 300=134 I C 558=33 Bom L R 720.

governed by the personal law of the Sunni Mahomedans. Moreover, the rules themselves indicate that the deposits are the property of the depositors. R. 5 speaks of paying sums to the members' account in the Fund. The employee was entitled on his retirement after his full service to withdraw the moneys to his credit; he could nominate a new nominee. The moneys in the Fund standing in the employee's name to his credit at the time of his death seem more in the nature of a debt due by the fund to the employee than anything else, and if the moneys be held in trust by the trustees in virtue of S. 5, Trusts Act, that would not serve to alter the succession of the property of a Sunni Muhammadan employee; he was the beneficial owner; his beneficial interest would pass to his heirs according to his personal law. In any case, we are bound by the decision of a Bench of this Court that provident moneys are the property of a deceased employee, and pass on his death to his heirs whoever be nominated by him for the purpose of receiving the moneys from the Fund and for giving a full and sufficient quittance to the Fund.

We cannot see that S. 5, Provident Funds Act, 19 of 1925, or any other Section of the Act affects in this case the judgment of the Full Bench above referred to, because S. 5 deals with Government and Railway Funds, and this is not such a Fund, but the Fund of a private company to which the Act does not and has not been applied. We leave to a future occasion, when the question arises for decision whether, if a Fund be a Fund to which S. 5 of the Act applies, the personal law of succession of the employee is ousted in favour of the nominee. It suffices to say that we do not regard as binding upon us either the judgment reported in A I R 1932 Sind 115[4] or A I R 1935 Sind 73[5] or A I R 1936 Oudh 32,[6] or any of the other cases to which the trial Judge has referred and his remarks as to the effect of S. 5 on the moneys of Provident or Railway Fund are obiter, and need not further be considered. We think therefore it is clear that the moneys standing to the credit of Abidali in the Provident Fund at the time of his death are part of his estate, in fact the whole of his estate, and subject to the personal law of succession of the deceased as a Sunni Mahomedan.

We think however that we shall have to alter in some ways the order of the trial Judge. The learned Judge says he has no alternative but to decree the claims of the parties. If he means thereby that he must give the plaintiff the injunction she asks for in her plaint, he cannot do so for she asks for a perpetual injunction restraining the defendants from taking that to which the Judge has found they are entitled, nor do we think it is for the Judge to refer to a Commissioner the duty of ascertaining what are the shares of the plaintiff and defendants according to Mahomedan law. The shares of the parties are to be determined according to Mahomedan law and in fact are correctly set out in the plaint. Therefore it remains only for the Commissioner to ascertain the debts of the deceased. So far as the dower of the widows is concerned, the Judge has found that Latifanbai and Aminabai are each entitled to Rs. 100, and it is urged before us that Latifanbai is entitled to Rs. 1000. But we think this sum is purely fictitious. There is no evidence that any prompt dower was paid; this, it is said, is deferred dower; but the deceased was a poor man, a painter in the employ of the Company. We think therefore the Judge was right in rejecting the evidence on this point except the evidence of the retired Subedar, Shaikh Sirajuddin, the President of the Jamait, who was competent to speak and is disinterested. Sakinabai, the daughter, had a dower of Rs. 100, and that, in all probability, would be the dower of the widows. We do not therefore interfere with the finding of the Judge in this respect.

The finding of a sum of Rs. 303-8-0 as the sum due on account of the expenses of illness and funeral of the deceased we consider correct, and we do not interfere with this. We are asked by the advocate for the respondents to pass a final decree at once, for, it is said, all the materials are before us, but the question of the debts of the deceased still remains to be determined by the Commissioner. We therefore give the plaintiff the declaration she prays for, that she and the defendants are the heirs of the deceased Abidali and that they are entitled to the shares set out in Para. 9 of the plaint, namely Sakinabai 1/2, defendants 1, 2 and 3 each respectively, 1/16, defen-

4. Mt. Hurmat Bibi v. Mt. Kaz Banu, (1932) 19 A I R Sind 115=139 I C 775.
5. Hayatuddin v. Mt. Rahiman, (1935) 22 A I R Sind 73=159 I C 427.
6. Muhammad Nain v. Mt. Munimunnissa, (1936) 23 A I R Oudh 32=159 I C 596=11 Luck 611=1935 O W N 1296 (F B).

dant 4, 5/36 and defendant 5, 5/72 in the moneys standing to the credit of Abidali in the Indian Provident Fund of Burmah-Shell Oil Storage and Distributing Co. of India Ltd., these shares of course, being less by any sum which the parties may have already withdrawn under the orders of the Court, and that these are part of the estate of Abidali.

We find that the prayer for the administration of the estate of the said Abidali should be granted. The matter can however now be referred to the Official Assignee as administrator instead of the Commissioner to ascertain the debts payable from the said estate in addition to the debts by way of dower and other charges as determined in the judgment, and we order a preliminary decree to be drawn up accordingly. We dismiss the appeal accordingly, but we think the costs of the parties should come out of the estate. Order accordingly.

Misc. Appeal No. 42 of 1935.

We must also dismiss Miscellaneous Appeal No. 42 of 1935, for it is an appeal against an order of the trial Judge discharging an interim injunction on the ground that the suit is for a declaration. We have held that a suit for a declaration and an injunction would lie, but as the principal appeal is now decided, no question of an injunction now arises. The appeal is dismissed accordingly. Costs of all parties should come out of the estate.

D.S./R.K. *Appeals dismissed.*

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* A. I. R. 1939 Sind 110

DAVIS J. C. AND WESTON J.

Khanchand Jethamal and another — Appellants.

v.

Naraindas Pahlajrai and others — Respondents.

Second Appeal No. 56 of 1935, Decided on 19th July 1938, against judgment of Second Asst. Judge, Hyderabad, D/- 17th August 1935.

*** Easement—Proof—Exercise of right with necessary animus must be proved — Animus—Inconsistent pleas — Claim for right of easement—Evidence showing plaintiff to be owner of land—Evidence destroys plaintiff's case, one plea being fatal to other.**

In order that a plaintiff should prove the right to an easement, he must show the exercise of that right with the necessary animus throughout the statutory period. The question of animus is a question of fact to be proved by evidence. Though a plaintiff in a case to establish right of easement may in his pleadings raise inconsistent pleas, yet if in the witness box he leads evidence to show that he is the owner of the land over the statutory period or some part of it, he clearly destroys his case which is dependent upon his showing that he is not the owner of the land over the statutory period and has not claimed the rights of owner but the exercise of the rights over the land of another. In such a case the plaintiff must necessarily fail on both the grounds as one plea is fatal to the other: *Case law discussed.* [P 110 C 2; P 112 C 2]

Fatehchand Assudomal — *for Appellants.*

Chandiram Thanwerdas — *for Respondents.*

Davis J. C. — This is an appeal against the judgment of the Assistant Judge, Hyderabad. The Assistant Judge dismissed an appeal against the judgment of the Subordinate Judge of Hyderabad who had held that the plaintiff had failed to prove the existence of an easement over a wall for the support of his roof and shelves, and the appeal was argued before us mainly on the ground that both the Judges were wrong when they held in their order that for the plaintiff successfully to prove an easement, he must show that he has exercised the right of easement as such. It is argued that all that is necessary for him to do is to show that he has, for instance in this case, rested the rafters and his shelves upon the walls of another, walls which the subsequent enquiry had found to be the walls of another. It is not necessary, for instance, for the plaintiff, in order to prove his right of easement, to show that he has intentionally, throughout the statutory period, exercised certain rights over servient land as the owner of dominant land. It is necessary only to prove that he has done those things which he claims the right to do, whether as owner of the land or property over which the easement is claimed or not, it does not matter.

Now, the learned advocate admitted that he had against him on this point the bulk of authority, for the bulk of authority is to the effect that in order that a plaintiff should prove the right to an easement, he must show the exercise of that right with the necessary animus throughout the statutory period. But the learned advocate has referred us to a very recent judgment of the Bombay High Court in 35 Bom L R 144,[1] in which, the learned advocate con-

1. Tamanbhat Shankarbhat v. Krishtacharya Tamanacharya, (1933) 20 A I R Bom 122 = 144 I C 998=35 Bom L R 144.

tends, the learned Chief Justice appears to cast some doubt upon the necessity of proving animus, and that according to this judgment the inconsistent pleas of ownership and easement raised in the plaint can be usefully reconciled; for the learned advocate argues, if the bulk of authority is to be followed, while a plaintiff may in his pleadings claim a right as owner and in the alternative claim a right as easement, yet if the evidence of one is to destroy the other, then his right to put forward inconsistent pleas and to raise inconsistent claims in his pleadings is illusory and of no value. It may be, of course, that in the particular case where a right of property and a right of easement are claimed, the evidence necessary to prove the inconsistent claims put forward destroys itself, but that is merely an accident and does not destroy in principle the value of the right of the plaintiff to raise in his pleadings inconsistent claims, and so far as the judgment of the learned Chief Justice in 35 Bom L R 144,[1] is concerned, those remarks upon which the learned advocate relies are, we think, obiter. The learned Chief Justice finally in his judgment followed a previous Bombay case in 46 Bom 200,[2] in which Shah J. said:

> I only desire to add that in both the lower Courts the case has been tried on the footing that the plaintiffs claim by way of easement the right of way over a strip of land which, according to the defendant, forms part of his land. It is no doubt true that in the plaint the plaintiffs put forward the case of ownership over this land and generally speaking that would not be consistent with the case of their having acquired an easement over that land. But the case has been tried on the footing of an easement . . . .

So it is clear that the judgment of Shah J. points the way whereby an honest plaintiff may prove his claim to an easement. He can, when he goes to actual trial, abandon the inconsistent claim of owner and have the case tried upon the footing of an easement when it will be unnecessary for him to introduce evidence which is fatal to the animus or intention which it is necessary to prove if his case of easement is to be substantiated; and the view, that in order that an easement may be constituted and proved, the necessary animus must exist and must be proved, finds support in the high authority of the Privy Council in (1915) A C 599[3] at p. 618 where their Lordships said:

> An easement however is constituted over a servient tenement in favour of a dominant tenement. In substance the owner of the dominant tenement throughout admits that the property is in another, and that the right being built up or asserted is the right over the property of that other. In the present case this was not so. For these reasons their Lordships are of opinion that the grounds upon which the judgment appealed from are put cannot be maintained.

In 34 Bom L R 1015[4] Baker J. refers to the leading cases which follow this judgment of the Privy Council.

The learned advocate for the appellants has argued that if we refer to the words of S. 4, Easements Act (5 of 1882) we will find there nothing relating to animus or intention at all. But S. 4 merely defines a right. It is as follows:

> *4.* An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon or in respect of certain other land not his own.

And S. 4, which is a Section of definition, must be read with S. 15, Easements Act, and that Section relates not to the definition of the right, but, what is equally important, to its acquisition, for the abstract right as such is of little value to this plaintiff or any other, and when we refer to S. 15 of the Act, we find:

> *15.* Where the access and use of light and air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for 20 years and where support from one person's land, or things affixed thereto, has been peaceably received by another person's land subjected to artificial pressure, or by things affixed thereto, as an easement, without interruption, and for 20 years, and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for 20 years, the right to such access and use of light or air, support or other easement shall be absolute.

We emphasize the words "as an easement" and "as of right" that occur in the Section, and referring again to S. 4 we find that what is to be done is to be done by a person upon a land that is not his own; but the doing of that must be done in the manner set out in S. 15, Easements Act if the acquisition of a right by prescription is to be effectual and throughout the leading

2. Dharamdas Kaushalyadas v. Ranchodji Dayabhai, (1922) 9 A I R Bom 199=64 I C 517 = 46 Bom 200=23 Bom L R 1009.

3. Attorney-General of Southern Nigeria v. John Holt and Co. (Liverpool), Ltd., (1915) 2 A I R P C 131=(1915) A C 599 = 84 L J P C 98= 112 L T 955.

4. Marghabhai Vallavbhai v. Motibhai Mithabhai, (1932) 19 A I R Bom 518=139 I C 571 =56 Bom 427=34 Bom L R 1015.

cases it is emphasized that the right must be the right exercised by the owner of dominant land over servient land, and if this right is to be exercised as such, then clearly it cannot be exercised as an incident of ownership by a man upon a land which is his own. And in 49 Mad 820,[5] in the referring judgment of Odgers J., the following passage occurs (p. 824):

In Gale on Easements, p. 238, it is laid down that one of the essentials for an acquisition of easement is that the enjoyment must have been enjoyment of the easement in the character of an easement distinct from the enjoyment of the land itself, and in Goddard on Easements, p. 16, the author says that 'where a man exercises his right in his capacity as owner of the soil the right he exercises is not an easement but a proprietary right incident to the ownership of the land.' In (1903) A C 229,[6] at p. 239, Lord Lindley says: 'I understand the words 'claiming right thereto' and the equivalent words 'as of right' which occur in S. 5 (of the Prescription Act) to have the same meaning as the older expression *nec vi, nec clam, nec precario*', and adds: 'A title by prescription can be established by long, peaceable, open enjoyment only; but in order that it may be so established the enjoyment must be inconsistent with any other reasonable inference than that it has been as of right in the sense above explained . . . If the enjoyment is equally consistent with two reasonable inferences, enjoyment as of right is not established.

In the Full Bench judgment Coutts-Trotter C. J. said:

Though the English cases are of course decisions either under the English Prescription Act or the Common law, we are satisfied that their principles apply to S. 15, Indian Easements Act. It is clear that a man is not finally precluded from claiming the benefit of an easement merely because in the course of legal proceedings he made an unfounded claim to be owner however strongly the making of such a claim might weigh against him. The learned Judges in 38 Mad 1,[7] seem to imply that the assertion of ownership during the period of user is not fatal to the success of a claim to an easement. To this proposition, we cannot assent. Our opinion is that while the mere putting forward of a wider claim in legal proceedings is not conclusive against a right of easement, yet the question *quo animo agerit*, to what purported character are the acts of user to be ascribed, is one which the Court must answer, and if 38 Mad 1[7] implies the contrary we think it is wrongly decided. We agree with the conclusion of Shearman J. in (1914) 3 K B 911[8] that acts done during the statutory period which are only referable to a purported character of owner cannot validate a subsequent claim to an easement. The question of animus in this case is one of fact which must be determined in the light of these observations by the Division Bench to which the case will be sent back.

And as the question of animus is a question of fact to be proved by evidence, we think that if the plaintiff leads evidence in the witness box to show that he is the owner of the land over the statutory period or some part of it, he has destroyed his case which is dependent upon his showing that he is not the owner of the land over the statutory period, has not claimed to exercise the rights of owner but has claimed to exercise the rights over the land of another as being servient land subject to the exercise of his right as owner of the dominant land.

We think therefore that in this particular case as the plaintiff has led evidence to show he has within the statutory period exercised the rights he claims over the walls as owner and an issue was raised to that effect, the fact that he has failed to prove that he is the owner does not permit him to ignore the evidence that he has himself adduced and has asked the Court to rely on, nor may the Court say that as he has failed to prove his right as owner he can be given the lesser right, the right of the owner of an easement, because the evidence that he has led to prove the one case, though finally unsuccessful, is fatal to the other. He cannot in the witness-box assert the exercise of the right of ownership and succeed in a case where he must prove the exercise of his right of easement. We think therefore that both the Judges in the Courts below were right when they came to the conclusion that in order to prove the right of easement the necessary animus in the exercise of that right, must be proved, and while a plaintiff may in his pleadings raise inconsistent pleas, then if the evidence he adduces to prove the one case is such that it may be fatal to the other, it follows that he must fail in both. We think therefore that the judgment of the lower Appellate Court must be confirmed and the appeal dismissed with costs. Order accordingly.

N.S./R.K. *Appeal dismissed.*

5. Subba Rao v. Lakshmana Rao, (1926) 13 A I R Mad 728 = 96 I C 968 = 49 Mad 820 (F B).
6. Gardner v. Hodgson's Kingston Brewery Co., (1903) A C 299 = 72 L J Ch 558 = 88 L T 698 = 52 W R 17 = 19 T L R 458.
7. Konda Reddi v. Ramasami Reddi, (1916) 3 A I R Mad 718 = 17 I C 112 = 38 Mad 1.
8. Lyell v. Hothfield, (1914) 3 K B 911 = 84 L J K B 251 = 30 T L R 630.

A. I. R. 1939 Sind 113

LOBO J.

Tikamdas Mathradas — Plaintiff.

v.

Kalianji Gordhandas and others — Defendants.

Suit No. 26 of 1935, Decided on 21st December 1938.

(a) Hindu Law—Partition—Burden of proof —Two brothers in joint Hindu family joint in food, worship and estate with their father till his death and continuing to be so for some years after his death—Presumption is that they continued to be joint even subsequently—Person alleging that they had separated must prove separation or partition.

Generally speaking, the normal state of every Hindu family is joint. Given a joint Hindu family, the presumption is, until the contrary is proved, that the family continues joint. The strength of presumption necessarily varies in every case. The presumption of union is stronger in the case of brothers than in the case of cousins and the further you go from the founder of the family, the presumption becomes weaker and weaker. [P 116 C 1]

Where therefore two brothers in a joint Hindu family were joint in food, worship and estate with their father till his death and continued to be so for some years after the father's death, there is a strong presumption that they continued to be joint even subsequently. Where it is alleged that they had separated, the burden lies heavily on the person alleging so to establish separation or partition : *A I R 1925 P C 132; 4 M I A 137 (P C); 9 M I A 66 (P C); 11 M I A 369 (P C) and 12 M I A 523 (P C), Rel. on.* [P 116 C 1]

(b) Hindu Law—Partition—Proof of — Principles relating to partition in joint Hindu family enumerated — No document on record clearly indicating intention to separate and hold property in severalty — Question as to whether there has been separation between members is to be decided on evidence in each case—Solitary abstract acts on part of members do not affect severance of status.

Partition is a severance of joint status. All that is necessary to constitute a partition is a definite and unequivocal indication of his intention by a member to separate himself from the family and to enjoy his share in severalty. It is immaterial, in such a case, whether the other members assent. [P 116 C 2]

Where, therefore, there is no document which clearly indicates on the face of it the intention to separate and to hold property, hitherto held jointly, in definite shares as separate owners, the question as to whether there had been a separation between particular members of a joint Hindu family is to be decided on the examination of the evidence in the case. Except in the case where a partition is evidenced by a deed of partition or relinquishment, pure and simple, it cannot be held that this act or that act in the abstract, by this or that member of a joint Hindu family effects a severance of the family tie and amounts to a partition. It is a question of fact to be determined on a consideration of the entire evidence in a case the circumstances and the conduct of the parties : *35 All 80 (P C) and A I R 1936 Sind 217, Rel. on; Case law discussed.* [P 120 C 1]

(c) Hindu Law—Partition—Suit by minor — Minor member can sue for partition not only in case of waste but also when circumstances are such as would render it for his benefit that his share should be divided.

Where a suit is brought on behalf of a minor coparcener for partition, the Court should not pass a decree for partition unless the partition is likely to be for the benefit of the minor by advancing his interests or protecting them from dangers. A minor member in a joint Hindu family can sue for partition not only in cases in which the adult co-parcener who is in possession of the property is wasting the property, but also where circumstances are such as would render it for his benefit that his share be divided off and secured. [P 120 C 1, 2]

(d) Limitation Act (1908), S. 19 — Acknowledgment—What amounts to—Recitals in reference to arbitration admitting liability to pay debt amount to sufficient acknowledgment so as to extend period of limitation.

Recitals in a reference to arbitration admitting liability to pay a debt amount to sufficient acknowledgment of liability in respect of the debt so as to extend the period of limitation even though the reference may prove infructuous : *A I R 1928 Sind 45, Rel. on.* [P 123 C 1]

(e) Hindu Law — Damdupat — Fresh bond passed by debtor for aggregate amount of principal and interest due under old bond—Principal for purpose of rule of damdupat is amount of fresh bond.

The rule of damdupat does not forbid the conversion by subsequent agreement between the debtor and the creditor, of the interest in arrears into capital. Therefore, when a fresh bond is passed by the debtor for the aggregate amount of the principal and interest due under the old bond, the principal for the purpose of the rule of damdupat is the amount of the fresh bond : *24 Bom 305; A I R 1935 Sind 140 and A I R 1936 P C 63, Rel. on.* [P 123 C 2]

(f) Hindu Law—Partition—Mother's share—In case of partition between sons, mother is entitled to a share equal to that of a son—Value of stridhan received by her is to be deducted from her share—No deduction can be made in respect of property inherited by her from her parents.

A mother in a joint Hindu family cannot compel a partition so long as the sons remain united. But if a partition takes place between the sons, she is entitled to a share equal to that of a son in the coparcenary property. She is also entitled to a similar share on a partition between the sons and the purchaser of the interest of one or more of them. If the mother has received stridhan from her husband or father-in-law, its value should be deducted from her share. No deduction, however, can be made from the mother's share of property inherited by her from her parents, which is not her stridhan received from her husband or father-in-law : *12 Cal 165, Rel. on; 16 Cal 758 (P C), Disting.* [P 124 C 2; P 125 C 1]

W. B. V. Vellani — *for Plaintiff.*

Sunderdas Jethanand, Pahlajsing B. Advani, Jamiatrai Lal Chand and Srikishindas H. Lulla — *for Defendants.*

Judgment.—One Morarji Sunderji died on 4th July 1918 leaving him surviving two sons Gordhandas and Mulji who in his lifetime had been joint with him. Morarji Sunderji used to carry on business in two names: Morarji Sunderji and Mulji Morarji Sunderji. Soon after Morarji's death, in December 1918, Gordhandas and Mulji separated. Ex. 26 which bears date 23rd December 1918 is virtually a deed of partition. Gordhandas thereafter assumed charge of the business run in the name of Morarji Sunderji; Mulji took up that run in the name of Mulji Morarji Sunderji. With the fortunes of Mulji Morarji after the separation we are not, in this case, concerned. Gordhandas died in 1924; he left surviving him a widow Javherbai alias Mamibai, defendant 2 in this suit, and two sons, Mathradas and Kalianji, the latter being defendant 1 in this suit. Whether Gordhandas in his lifetime did any business there is no evidence in the case, but the firm of Morarji Sunderji continued and books of account were maintained. The firm continued and kept regular books of account. Even after the death of Gordhandas though it is clear on the record that both Mathradas and Kalianji did no business, loans were raised by them in the firm name of Morarji Sunderji, income-tax was levied on the joint family firm of Morarji Sunderji. The main, if not the only source of income, was the rent of valuable immovable properties which Goverdhandas died possessed of and which were joint family property. It is undisputed that till 1927 the two brothers, Mathradas and Kalianji and their mother Javherbai lived and messed together and constituted a joint Hindu family in every sense of the term. Mathradas had married one Parvatibai and had by her three children Chandra and Saraswati two daughters and a son Tikamdas the minor plaintiff in this suit. Kalianji married early in 1927. Mathradas died on 3rd June 1933, and the main contention in this suit is whether Mathradas and Kalianji were joint in estate till that date or whether the joint family tie had been severed between 1927 and 1933 and if so when. The filing of this suit for partition is proof that up to the date of Mathradas' death there had been no division of the family estate by metes and bounds. This much is proved on the record and really not disputed that in 1927 quarrels and dissensions arose in the family and there was a separation in living and mess. Mathradas with his family took up one part of the residential house, Javherbai and Kalianji with his wife commenced residing separately in another part. Whether at this juncture there was also a division of ornaments, utensils and furniture is a moot point; for the plaintiff this is asserted, for defendant 1, Kalianji, it is denied. Ex. 18, an agreement dated 30th October 1927 and executed by Javherbai or Mamibai, Mathradas and Kalianji in its very preamble makes it clear that owing to disagreement the idea of separation had been definitely entertained; the exact implications of this important document will be considered in more detail hereafter. It is sufficient for the present to state that by this document the executants agreed to do all they could to wipe out the family debts within two years, for this end to limit the expenditure of each to Rs. 100 per month, to arrange for liquidating a large claim of Javherbai or Mamibai herself being her "personal money." In fact in para. 1 of this document its purpose is set out thus:

> That after having made settlement and clearance with one another in respect of running karkhana, by making every possible efforts within two years, every one should be quite separate.

It would appear that Mathradas and Kalianji did nothing to fulfil the purpose of Ex. 18 for on 30th October 1930 they and Javherbai executed a reference to arbitration, Ex. 20, which provides:

> The arbitrators shall before directing partition, ascertain and determine the debts payable by the family and make due provision for payment thereof. The debts shall include the claim of the party of the third part for moneys alleged to be deposited by her with the joint family firm as a creditor.

The difference between the purpose of Ex. 18 and that of Ex. 20 is merely verbal. The arbitrators in Ex. 20, Haridas and Doongersi, appear to have met with much difficulty in their task; on 10th April 1931 they had only been able to accomplish an interim award to "remain in force till the financial position of this karkhana improves." This interim award is Ex. 21. On 24th April 1933 Mathradas, Kalianji and Javherbai executed Ex. 22, a fresh reference to arbitration in favour of the same arbitrators for the same purpose as Ex. 20. The

death of Mathradas on 3rd June 1933 rendered this reference infructuous.

The present suit was filed by Tikamdas, the minor son of Mathradas, through his next friend, his mother Parvatibai, on 23rd February 1935. It is a suit for declaration that Mathradas and Kalianji effected a partition on 30th October 1927 "and/or at any other subsequent date thereafter" and in any event for actual partition by metes and bounds. The original defendants in the suit were Kalianji and Javherbai only. Kalianji in his written statement raised various contentions but mainly urged that there had never been a separation during the lifetime of Mathradas, that after the death of Mathradas he himself became and acted as the karta of the joint Hindu family, that the minor plaintiff's suit was not bona fide and should not be decreed. Javherbai, defendant 2, in her written statement raised no objection to a partition, claimed her share thereat and in para. 2 thereof pleads thus:

It is further submitted that the plaintiff's father and defendant 1 are indebted to this defendant to the extent of Rs. 40,132-5-6. The Honourable Court will be pleased to make a provision in the partition decree for the payment of the said debt to this defendant.

The Court settled the following issues on 19th July 1935:

(1) Was there a severance of the tie of joint family between the plaintiff's father Mathradas and defendant 1? (2) Was the plaintiff's notice dated 18th December 1934 effective and did it sever the joint family tie? (3) Has defendant 1 misconducted himself with regard to the joint family property? (4) Is the partition sought by the plaintiff in his interest as a minor? (5) Is the plaint sufficiently stamped? (6) Is the suit for a mere declaration that the plaintiff is separated and/or in the alternative for partition, &c. competent? (7) Are the plaintiff's father and defendant 1 indebted to defendant 2 to the extent of Rupees 40,132-5-6 or any sum at all? (8) To what share is defendant 2 entitled? (9) General.

Meanwhile the creditors of the family were roused into activity by the pending litigation and on 21st July 1936 the defendant 1 was obliged to apply that they should under O. 1, Rule 10, Civil P. C., be made parties to the suit. On 28th August 1936, this application was granted, the plaint was accordingly amended and the Central Bank of India Ltd., the Karachi Bhatia Goushala and the firm of Lalji Lakshmidas were impleaded as defendants 3 to 5. The added defendants thereafter filed their written statements giving particulars of their claims. On 4th December 1936 the following additional issues were framed:

(1) What provision should be made for the mortgage claim of defendants 3, 4 and 5? (2) What amount is due to the mortgagees and other creditors, if any?

No further progress appears to have been made in this suit for a very considerable time and the causes, which the record shows contributed to this delay, are: (a) the death of Mr. Nadershah, the learned advocate for the plaintiff in England in June 1936; (b) the appointment by the Court of receivers to sell a part of the property and pay off defendants 3, 4 and 5; and (c) complications arising out of Suit No. 240 of 1937 filed by Brijrattan Mohatta to whom in or about November 1934 defendant 1, Kalianji, had contracted to sell the most valuable of the properties sought to be partitioned in this suit. This was the state of affairs when after the vacation this year I assumed charge of the Original Civil Board of this Court and the matter came before me on 15th July 1938. (His Lordship then narrated the further history of the suit and proceeded.) The hearing of the suit thereafter proceeded without any further hitch. As stated before, the controversy between plaintiff and defendant 1 centres round Issue 1: "Was there a severance of the tie of joint family between the plaintiff's father Mathradas and defendant 1?"

In fact as between plaintiff and defendant 1 the only other point at issue is the one embodied in Issues 3 and 4. Whether a partition is in the interests of the minor plaintiff and should be decreed? As between defendants 3 to 5 and the members of the family, plaintiff and defendants 1 and 2 there is no dispute and no contention. The claims of these creditors and the nature of the claims is conceded by plaintiff and defendants 1 and 2. One single item alone in the claim of defendant 3, the Central Bank of India, Ltd., is disputed: a sum of Rs. 350 paid to Mr. Nadirshah, advocate, as fees in connexion with an award which was not filed by the Court but remitted to the arbitrator for reconsideration. The claim of Javherbai to Rupees 41,132-5-6 is fiercely contested by defendant 1 as well as by the plaintiff. There are thus three main points which emerge for serious consideration in this case and these are covered respectively by original Issue 1, by original Issues 3 and 4 and by Issues 7 (a) to (g) framed on 16th August 1938 by my order Ex. 43. Before dealing

with these three points I would like first to clear the ground by disposing of the remaining issues. (His Lordship then dealt with the minor issues in the suit and having disposed of them proceeded.) And now that I have entirely cleared the ground of all other issues I proceed to deal with the three salient points in this case.

Original Issue 1.—Was there a severance of the tie of joint family between the plaintiff's father Mathradas and defendant 1?

In Mulla's Hindu Law (Edn. 8), p. 255, the learned author states as follows :

Generally speaking the normal state of every Hindu family is joint. Presumably every such family is joint in food, worship and estate. In the absence of proof of division such is the legal presumption. In other words "given a joint Hindu family, the presumption is, until the contrary is proved, that the family continues joint." "The strength of the presumption necessarily varies in every case. The presumption of union is stronger in the case of brothers than in the case of cousins and the further you go from the founder of the family the presumption becomes weaker and weaker." The reason is that "brothers are for the most part undivided; second cousins are generally separated" and third cousins are for the most part separated.

The quotation marks indicate that this passage is based on Privy Council decisions and this is clear if reference is made to the case in A I R 1925 P C 132,[1] and the judgments of their Lordships of the Privy Council in 4 M I A 137,[2] 9 M I A 66,[3] 11 M I A 369[4] and 12 M I A 523.[5]

In the present case Mathradas and Kalianji were brothers, joint in food, worship and estate with their father Gordhandas who died in 1924 and admittedly continued joint thereafter up to 1927. There is therefore a strong presumption that they continued joint till the death of Mathradas in 1933 and the burden lies heavily upon the plaintiff to establish a separation or partition. As to what the plaintiff has to prove in order to succeed, reference may again be made to Mulla's Hindu Law. In para. 325 at page 391 the learned author states :

Partition is a severance of joint status and as such it is a matter of individual volition. All that is necessary therefore to constitute a partition is a definite and unequivocal indication of his intention by a member of a joint family to separate himself from the family and enjoy his share in severalty. It is immaterial in such a case whether the other members assent. Once a member of a joint family has clearly and unequivocally intimated to the other members his desire to sever himself from the joint family, his right to obtain and possess his share is unimpeachable whether or not they agree to a separation and there is an immediate severance of the joint status. The intention to separate may be evinced in different ways, either by explicit declaration or by conduct.

Again in para. 326 at p. 394 the learned author states :

As regards partition no act done by any member of a joint family can operate as a partition, unless it has been done with the intention to put an end to his status as a co-parcener and acquire a new status, that is the status of a separate owner. As stated by their Lordships of the Privy Council in the leading case in 11 M I A 75[6] the true test of partition of property according to Hindu law is the intention of the members of the family to become separate owners. Intention being the real test, it follows that an agreement between the members of a joint family to hold and enjoy the property in defined shares as separate owners operates as a partition although there may have been no actual division of the property by metes and bounds. As observed by the Judicial Committee in the case above referred to 'when the members of an undivided family agree among themselves with regard to a particular property that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with, and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided.' In such a case the interest of each member is divided though the property remains physically undivided.

Again in para. 327 at p. 398 the learned author states :

Cesser of commensality, it is stated above, is not a conclusive proof of partition ; the reason is that a member may become separate in food and residence merely for his convenience. Similarly, there are other acts which, though standing by themselves, are not conclusive proof of partition, yet may lead to that conclusion in conjunction with other facts. They are separate occupation of portions of the joint property, division of the income of the joint property, definement of shares in the joint property in the Revenue or Land Registration records, etc. The mere fact that the shares of the coparceners have been ascertained does not by itself necessarily lead to an inference that the family had separated. There may be reasons other than a contemplated immediate separation for ascertaining what the shares of the coparceners on a separation would be." The burden

1. Mt. Bhagwani v. Mohansingh, (1925) 12 A I R P C 132=88 I C 385 (P C).
2. Rewun Persaud v. Mt. Radha Beeby, (1846-51) 4 M I A 137=7 W R 35 = 1 Suther 172 = 1 Sar 327 (P C).
3. Naragunty v. Vengama, (1861-63) 9 M I A 66 =1 W R 30=1 Suther 460=1 Sar 826 (P C).
4. Mt. Cheetha v. Miheen Lall, (1866-67) 11 MIA 369=2 Sar 303 (P C).
5. Nellkisto Deb v. Beerchunder, (1869) 12 M I A 523=12 W R 21=2 Suther 243=2 Sar 523= 3 Beng L R 13 (P C).
6. Appovier v. Rama Subba Aiyyan, (1866-67) 11 M I A 75=8 W R 1=1 Suther 657=2 Sar 218 (P C).

however of proving that the family continued to be joint in such a case lies on the person alleging it.

And in para. 326 at p. 395 the learned author writes :

An agreement to separate is not required by law to be in writing. If it is in writing, and clearly indicates on the face of it an intention to separate and hold the property in defined shares as separate owners, no evidence is admissible of the subsequent acts of the parties to alter or control its legal effect. But where the agreement is not in writing, or, where it is in writing, but does not declare on the face of it what the intention of the parties was, evidence of subsequent conduct of the parties becomes very material in order to determine whether there was a partition or not.

These statements of the law by Sir Dinshah Mulla are based entirely on the dicta of their Lordships of the Privy Council in the various decisions to which reference has been made by the learned author in the footnotes relating to the passages I have quoted. Certain propositions would appear to stand out clearly on a careful reading of all these passages : (1) whether or not there has been a partition is mainly a question of fact ; (2) partition is a matter of intention or individual volition ; (3) the intention to separate in order to be effective and to constitute a severance of the joint status must be manifested by some clear and unequivocal act of a member of a joint Hindu family ; (4) actual partition by metes and bounds is not necessary to a severance of joint status ; (5) if the agreement to separate is in writing and clearly indicates on the face of it the intention to separate, subsequent declarations and acts of the parties will not alter or control its legal effect ; and (6) if the agreement is not in writing or is in writing but is not a clear and unequivocal indication of intention to separate, the evidence of subsequent conduct of the parties is very material in order to determine whether there was a partition or separation or not.

A large number of decisions, most of them of their Lordships of the Privy Council, have been cited before me by the learned advocates for the plaintiff and defendant 1 on this question. I will refer to these decisions in brief hereafter but it does not appear to me that in any one of them there is set out any proposition of law or any principle not involved in the passages from Mulla's Hindu law to which I have referred above and not covered by one or other of the propositions I have deduced from these passages. Whether there has been a separation or not is mainly, if not entirely, a question of fact, and all the cases which have been cited before me are merely decisions of their Lordships of the Privy Council or of the High Courts in India, determining whether on a given set of facts and circumstances a partition and severance of the joint family tie was or was not established.

In the present case there is in my view no document which clearly indicates on the face of it the intention to separate and hold property hitherto held jointly in definite shares as separate owners. It is therefore, to my mind, essential to examine the entire evidence in the case on the question of partition in order to decide whether or not Mathradas and his brother, Kalianji, had separated at any time between 1927 and the death of Mathradas in June 1933.

In 35 All 80[7] it was held by their Lordships of the Privy Council that what may amount to a separation, or what conduct on the part of some of the members may lead to separation of a joint undivided Hindu family, and convert a joint tenancy into a tenancy-in-common, must depend on the facts of each case. A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation ; but to have that effect the intention must be unequivocal and clearly expressed. Separation from commensality does not as a necessary consequence effect a division. A separation in mess and worship may be due to various causes, and yet the family may continue joint in estate. To the same effect is the decision of our own Court in A I R 1936 Sind 217.[8]

The very plaint filed in the suit indicates that the plaintiff is unable to point to any single document or fact as establishing a clear and unequivocal intention on the part of either Mathradas or Kalianji to separate. Para. 12 of the plaint reads thus :

The plaintiff prays judgment and decree as follows : (a) For a declaration that the plaintiff is separate from the defendants, partition having been effected between the father of the plaintiff and other members of the family on 30th October 1927 and/or at any subsequent date thereafter as shown by the respective writings mentioned above, and on the respective dates the said writings were executed.

7. Suraj Narain v. Iqbal Narain, (1913) 35 All 80 =18 I C 30=40 I A 40=16 O C 129 (P C).
8. Manglomal Sugnomal v. Mt. Padibai, (1936) 23 A I R Sind 217=167 I C 444.

In his opening address the learned advocate for the plaintiff contended that Mathradas and Kalianji separated on 30th October 1927 by the document Ex. 18, but continued to hold the property specified in Ex. 15 as tenants-in-common. The learned advocate contended in the alternative that partition was effected between Mathradas and Kalianji on 30th October 1930 by the reference to arbitration (Ex. 20). A third alternative suggested by the learned advocate in his opening address was that the partition took place on 10th April 1931 when there was an award by the arbitrators (Ex. 21). A fourth alternative urged by him was a partition on 24th April 1933 when a reference to arbitration was executed by Mathradas and Kalianji and their mother Javherbai : and yet a fifth alternative was put forward : partition was effected on 18th December 1934 when the notice Ex. 19/4 was served upon defendant 1 by Messrs. Nadirshah & Co., on behalf of the plaintiff. The last of these alternatives, I may mention, was abandoned at the conclusion of the case, the learned advocate for the plaintiff admitting that the plaintiff being a minor the notice Ex. 19/4 on his behalf could not effect a partition.

It is clear therefore that in this case I have not any document or any fact relied upon which is a clear, definite and unequivocal indication of intention on the part of Mathradas or Kalianji or both of them to separate. It is contended that the document (Ex. 18) effected separation between Mathradas and Kalianji. I will proceed to examine this contention. [His Lordship then discussed the evidence and proceeded.] To sum up, I hold that none of the documents, Exs. 18, 20, 21 or 22, effected a severance of the family tie or is a clear and unequivocal indication of the intention of either Mathradas or Kalianji to separate. On the contrary throughout the period between 1927 when trouble first arose in the family and 3rd June 1933 when Mathradas died, Mathradas is proved, from documentary evidence, to have acted as the manager or karta of the joint Hindu family consisting of himself and his brother. After the death of Mathradas and till December 1934 Parvatibai and Kalianji are proved by documentary evidence to have admitted that the family was a joint Hindu family and to have acted accordingly. I will now deal briefly with the various decisions which have been cited and relied on by the learned advocates for the plaintiff and defendant 1.

The learned advocate for the plaintiff strongly relied on the case in 43 I A 151.[9] I cannot see any resemblance between the facts in that case and the facts in the case before me. In 43 I A 151[9] Harihar, one of several coparceners, filed a suit for partition, but died while the suit was pending ; his widow Girjabai sought to continue the suit on the ground that Harihar had separated from his brothers ; it was held that a severance of joint status had taken place. But it must be borne in mind that Harihar had not only filed a suit for partition, but before doing so various acts had been done by him and his coparceners clearly and unequivocally indicating a separation. The filing of the suit preceded by the sending of a notice was a last and final act of a series. It was on such a set of facts that their Lordships of the Privy Council held :

> If therefore a member so intimates his desire and institutes a suit for partition, but dies before obtaining a decree, his widow is entitled to continue the suit and to inherit her deceased husband's share in the joint property.

The case in 54 I A 413[10] does not help the plaintiff. The deed of renunciation in that case was in fact held not to have effected a severance and the decision of their Lordships turns entirely on the facts of the case. Next the learned advocate for the plaintiff relied on the well known *Appovier's case* reported in 11 M I A 75[6] and to a passage therein at pp. 89 and 90 in the judgment of Lord Westbury. But his Lordship is merely laying down in this passage the true notion of a joint Hindu family and I can see nothing in it of help to plaintiff's case.

The case in 1 I A 55[11] illustrates the fifth of the propositions I have in an earlier part of this judgment deduced from the decisions of their Lordships of the Privy Council. In that case the ikrarnamah was so complete a deed of partition that the intention of the parties to effect a severance of the joint family tie was held to be clear and unequivocal. If the same could be said

9. Girjabai v. Sadashiv Dhuniraj, (1916) 3 A I R P C 104=37 I C 321=43 Cal 1031=43 I A 151=12 N L R 113 (P C).
10. Mukund Dharman Bhoir v. Balkrishna Padmanji, (1927) 14 A I R P C 224=105 I C 703 =52 Bom 8=54 I A 413 (P C).
11. Baboo Durga Pershad v. Mt. Kundun Koowar, (1873-74) 1 I A 55=21 W R 214=3 Sar 341 (P C).

of Ex. 18 in this case the learned advocate for the plaintiff would have been justified in relying upon this decision of the Privy Council.

The next case referred to is that in 30 I A 1.[12] But in this case a severance of the family tie had been effected by a decree; division by metes and bounds only remained to be carried out. The case is an illustration of the fourth of the propositions I have deduced from the decisions of their Lordships of the Privy Council; it is of no help to the plaintiff.

The case in 49 I A 358[13] would be of considerable help to the plaintiff if the references Exs. 20 and 22 could have been regarded each as an isolated document. It was held in this case by their Lordships of the Privy Council that :

> Where a member of a joint Hindu family governed by the Mitakshara claims his share of the family property, and the members of the family agree to appoint an arbitrator to partition the property among them, and to accept his partition, the claim and the agreement effect a severance of the joint status of the family.

In the present case there is no evidence that Mathradas made any claim and I have already held that Exs. 20 and 22 were not agreements to effect a severance.

The case in 51 All 1[14] is again of little assistance to the plaintiff. True, in that case a reference to arbitration was held to be a declaration of intention to sever the joint family tie, but it is stated at pp. 5 and 6 of the judgment :

> The words of this document leave no room for doubt that the parties intended at the time to completely divide the estate, and this intention has been expressed without equivocation or mental reservation.

I have already said the same cannot be predicated of Exs. 20 and 22. In 30 Cal 738[15] there was an ikrarnamah clearly defining the shares allotted and it was held that such a document could not be controlled in its terms by subsequent conduct of the parties.

In 32 S L R 392,[16] relied on for the plaintiff, it was held that the partition of joint estate consists in defining the shares of the coparceners in the joint property. The case cannot in any way assist the plaintiff.

The plaintiff's case derives no assistance either from the case in 45 Mad 489.[17] There was a decree in a partition suit and the question was whether the severance of the family tie should be held to have taken place when the decree was passed or when the suit was filed. Their Lordships held that the notice given before the filing of the suit and the filing of the suit itself were clear and unequivocal indications of an intention to separate and the family tie was severed when the suit was filed.

In 57 Mad 931[18] there was a division of property in clear terms by an award. Their Lordships held that in such circumstances the subsequent conduct of some of the members of the family did not control the award.

The case in 8 Pat 153[19] is not at all applicable. In that case a statement of claim by all the parties before an arbitrator for partition of the joint family property was held to be a clear and unambiguous indication of intention to sever the family tie.

On the other hand, in 52 I A 83,[20] their Lordships of the Privy Council have held that the filing of a plaint claiming partition by a member of a joint Hindu family, if the plaint has been withdrawn before trial, does not result in a severance of the family tie.

This case was followed by the Madras High Court in 52 Mad 845[21] though the position was somewhat different owing to the presence of a minor as one of the plain-

12. Ram Pershad Singh v. Lakhpati Koer, (1903) 30 Cal 231=30 I A 1=7 C W N 162=8 Sar 380 (P C).
13. Syed Kasam v. Jorawar Singh, (1922) 9 A I R P C 353=68 I C 573=50 Cal 84=49 I A 358 =18 N L R 127 (P C).
14. Mt. Ram Kali v. Khamman Lal, (1928) 15 A I R All 422=111 I C 33=51 All 1=26 A L J 857.
15. Balkrishen Das v. Ram Narain Sahu, (1903) 30 Cal 738=30 I A 139=8 Sar 489=7 C W N 578 (P C).
16. Mt. Anurago Kuer v. Darshan Raut, (1938) 25 A I R P C 65 = 172 I C 977 = 32 S L R 392 (P C).
17. Ramlinga Annavi v. Narayana Annavi, (1922) 9 A I R P C 201=68 I C 451=45 Mad 489= 49 I A 168 (P C).
18. Babu v. Official Assignee of Madras, (1934) 21 A I R P C 138 = 150 I C 1=57 Mad 931=61 I A 257 (P C).
19. Balmakund Lal v. Mt. Sohano Kueri, (1929) 16 A I R Pat 164=119 I C 817=8 Pat 153 = 10 P L T 259.
20. Palani Ammal v. Muthu Venkata Chala Moniagar, (1925) 12 A I R P C 49=87 I C 333=48 Mad 254=52 I A 83 (P C).
21. Ganapathy v. Subramanyam Chetty, (1929) 16 A I R Mad 738=122 I C 167=52 Mad 845 = 57 M L J 374.

tiffs. In 51 All 519[22] a notice to partition regularly served on the other coparceners by a member of a joint Hindu family through a lawyer and subsequently withdrawn was held not to have effected a severance of the family tie.

These are all or nearly all the rulings which have been cited before me on this point by the learned advocates for the plaintiff and defendant 1, the principal contesting parties on this issue and on a consideration and careful perusal of them all I have merely been confirmed in my view that except in the case where a partition is evidenced by a deed of partition or relinquishment, pure and simple, it is idle to contend or to affirm that their Lordships of the Privy Council have held, that this act or that act in the abstract by this or that member of a joint Hindu family effects a severance of the family tie and amounts to a partition. In the vast majority of cases this is a pure question of fact to be determined on a consideration of the entire evidence in the case, the circumstances and the conduct of the parties.

And this brings me to the second of the three salient points in this case, that were covered by Original Issues 3 and 4 which read as under :

Issue 3 : Has defendant 1 misconducted himself with regard to the joint family property ?

Issue 4 : Is the partition sought by the plaintiff in his interest as a minor ?

The only evidence on Issue 3 is that of Parvatibai (Ex. 19) at lines 54 to 85 and the only allegation contained therein is that defendant 1, Kalianji, has been irregular and remiss in paying the plaintiff's allowance for maintenance. This can scarcely be called misconduct in regard to the joint family property. I find on the issue in the negative. With regard to Issue 4 the law on the point is thus set out in Sir Dinshah Mulla's Hindu Law, page 378, para 308 :

Where a suit is brought on behalf of a minor coparcener for partition, the Court should not pass a decree for partition, unless the partition is likely to be for the benefit of the minor by advancing his interests or protecting them from dangers.

Where an adult coparcener in possession of the family property is wasting the property, or sets up an exclusive title in himself, or otherwise denies the minor's rights, or declines to provide for the minor's maintenance, it is in the minor's interest that the family property should be partitioned, and the minor's share set apart and secured for him. But if there be nothing to show that the partition would be for the benefit of the minor, the Court should refuse to direct partition. The reason is that generally speaking "the family estate is better managed and yields a greater ratio of profit in union than when split up and distributed among the several coparceners;" moreover the minor would as the result of a partition lose the benefit of survivorship which he might obtain if the family continued joint.

But the learned author adds this note below para 306 :

The view taken in some of the earlier cases that a minor can sue for partition only in cases of waste is no longer tenable. The law now is that a minor can sue for partition not only in a case of waste, but also where the circumstances are such as would render it for his benefit that his share be divided off and secured.

The question therefore is whether in the circumstances of this case it would be for the plaintiff's benefit that his share should be divided off and secured. I have given the matter my earnest consideration and have come to the conclusion that Issue 4 must be answered in the affirmative. In this case the minor does not stand to gain by survivorship. Kalianji, defendant 1, the other coparcener, is a young man and has already several children including at least one son. Nor is it a legitimate and proper argument to urge that a present partition will involve Javherbai getting a share which is disadvantageous to the plaintiff reducing his share from one half to one third. And further Javherbai who has given evidence in this case though sixty years of age is by no means feeble or decrepit. She is a vigorous and strong minded woman and likely to live for many years more.

Further, Kalianji, defendant 1, is scarcely a capable karta of any use to the minor plaintiff. Apart from the fact that there is little love lost between the families of Kalianji and the deceased Mathradas, Kalianji has since the death of his brother done absolutely nothing to set the affairs of the family right ; he has simply allowed things to drift. He is a man of little education, he has done nothing all his life for a living, he has just lived on his father's dwindling fortune. He has so little character that on his own admission in November 1935 he allowed himself to be ejected from the family house in a most ignominious manner by his own mother and has not up to date been able to get into the family house. To have such a karta could scarcely, in my opinion, be an advantage to the minor. What is however decidedly to the advantage of the minor plaintiff is that he should

22. Banke Behari Lal v. Brij Bihari Lal, (1929) 16 A I R All 170 = 116 I C 285 = 51 All 519 = 1929 A L J 115.

be freed from an atmosphere charged with family quarrels and dissensions and unpleasantness of every kind and should be allowed with proper safeguards to use his share of what is left of the family fortune for his education and general advancement. From this point of view, I am of opinion that a partition is decidedly in the interests of the minor plaintiff and should be decreed. It is argued that Parvatibai's brothers dominate her and are themselves insolvents. This may or may not be so, but any danger to the minor's estate from this source can be obviated by providing proper safeguards when a final decree is being ordered and the nature and extent of the minor's share has been ascertained.

I now proceed to dispose of the issues connected with the claim of Javherbai, defendant 2, which are set out below :

Issue 7 (a) : Can the money claim of defendant 2 be investigated and adjudicated on without payment of court-fees ?

(b) Is the money claim of defendant 2 time-barred in whole or in part ?

(c) What amount of principal, if any, is due to defendant 2 on the account submitted by her ?

(d) What amount of interest, if any, is due to defendant 2 on the said account ?

(e) Can defendant 2 in any case claim interest in excess of the amount of principal found due to her on the account submitted by her ?

(f) Is defendant 2 in possession of any money belonging to the plaintiff and defendant 1 jointly as alleged in para. 3 of the rejoinder of defendant 1 ?

(g) Is the amount, if any, found due to defendant 2 on the account for principal and interest or any part thereof to be deducted from her share on partition ?

Issue 7 (a) : Can the money claim of defendant 2 be investigated and adjudicated on without payment of court-fees ? I answer this in the affirmative and my reasons will appear in my order Ex. 32. Of course the final decree will not be prepared till the necessary court-fees are paid by all parties who may then be held liable to pay.

Issue 7 (b) : Is the money claim of defendant 2 time-barred in whole or in part ? An enormous amount of argument has been advanced and innumerable authorities have been quoted by the learned advocates for defendants 1 and 2 on this point. Every aspect of the question of limitation has been investigated ; whether defendant 2's money was a loan or a deposit ; if it was deposit whether it was deposit repayable on demand; what Article of Sch. 1, Limitation Act, was applicable ; whether certain alleged payments revived limitation, whether certain entries and documents amounted to acknowledgments entitling defendant 2 to a fresh period of limitation, and so on. And yet all this is wholly unnecessary, for, if the matter is examined carefully, it is a very simple matter and capable of very simple decision. The origin of this claim by defendant 2 is thus set out in her deposition (Ex. 158) :

In my parents' house I was known as Mamibai. In my deceased husband's house I was called Javherbai . . . . My mother's name was Matoobai. My father was Shamji Gopal. He did business in ivory ; he had a place of business in Zanzibar. My father predeceased my mother; he left no son. My mother died about 30 years ago. I was the only surviving child; my father left property . . . . My mother had money in deposit with my husband Gordhandas on interest ; the money was with the firm of Morarji Sunderji; it was about Rs. 10,000. The deposit was in the name of three persons : Bachubai, Matoobai and Shamji Gopal; a part of the deposit was in the name of each. Bachubai was my sister's daughter; she is alive. . . . . After my father's death my mother lived at Mandvi . . . She came to Karachi from there and put up in a rented house, rented from my husband. She died at Karachi. She left a will which is with defendant 1; by her will she left her property to me, apart from a legacy to Bachubai of Rs. 2000 bearing interest, Bachubai has received her legacy. My mother's deposit money with Morarji Sunderji was after her death transferred to my name. Interest payable was 6 per cent.; the deposit was repayable on demand. I actually received interest on one occasion only; otherwise it was credited to my account, at my desire . . . . There was once a fire in my husband's house, 15-16 years ago. After the fire I gave my husband a sum of Rs. 5000 for safe custody. This was credited to my account after my husband's death at the instance of Haridas Lalji. Mathradas then represented the family. Kalianji married about 12 years ago. On this occasion I gave the bride ornaments left by my mother, also cash Rs. 3500. Both ornaments and cash were credited to me in my account in the presence of Seth Haridas and my son-in-law Parshotum. The Rs. 5000 and Rs. 3500 and the ornaments had been inherited by me from my mother. The account books shown to me contain my account with the firm of Morarji Sunderji. I put in the book Ex. 159.

It must here be explained that the book (Ex. 159) is in the nature of a bank pass book. It came into existence about the year 1927 when trouble and dissension first arose in the family. It remained in the possession of defendant 2, Javherbai, but all entries therein have been made either by Javherbai's sons or on their behalf by a mehta. Ex. 124 is the English translation of the book (Ex. 159). Javherbai examined on her behalf one Sunderji, an accountant, for the purpose of placing on record a number of entries from the family books of account. When Sunderji was in the witness box the following note was made by me on

the suggestion of the learned advocates for plaintiff and defendant 1 in order to avoid unnecessary evidence being recorded and the record being burdened with unnecessary exhibits :

Note : Messrs. Vellani and Sunderdas for plaintiff and defendant 1 state that they are prepared to concede that the entries in the translated account of defendant 2 from her own book which has been produced and which is admitted in evidence and marked Ex. 124 subject to the original book being produced and exhibited are to be found in the family account books produced in Court ; the admission however extends only up to and inclusive of the year 1986 as up to that date Ex. 124 appears to have been made up from the family account books produced in Court. In these circumstances Mr. Pahlajsing has only to put in entries from the family account books from the year 1987 onwards and I order accordingly . . .

A further note on the same date reads :

For defendants 1, 3 to 5 and plaintiff it is further admitted that the account of defendant 2 in the family account books is in the name of Mamibai, daughter of Shamji Gopalji.

A perusal of the evidence of Sunderji (Ex. 122 from line 20 onwards) makes it clear that the entire claim of Javherbai is to be found in the family books of account. At p. 37 of the khata of 1983 is a credit entry for a sum of Rs. 3530-4-6 (Ex. 126). This is what Javherbai refers to as the amount credited to her on account of money expended by her on the marriage of Kalianji. At p. 8 of the noondh of 1982 is an entry of Rs. 5000 credited to Mamibai (Ex. 128). This is the Rs. 5000 referred to by Javherbai as having been deposited with her husband after the fire. At page 40 of the noondh of 1987 is an entry of Rs. 2053-4-9 credited as interest to Mamibai (Ex. 129) and the corresponding entry in the khata is Ex. 130. It is not necessary to go into further details. All the necessary information is given in the evidence of Sunderji from line 20 to line 110. Up to 1989 the entire claim of Mamibai is based on entries in the books of account of the family itself. Sunderji says :

There is no rokar for 1990 and subsequent years, nor other account books.

The only cross-examination of Sunderji on the accounts is contained in the line :

I have no personal knowledge of the contents of these books.

Neither Kalianji nor any one on his behalf has denied the correctness of the account books of the family in which is contained from year to year the account of Mamibai dr/o Shamji Gopalji who is Javherbai, defendant 2, in the case. Haridas (Ex. 170) states :

I know Javherbai. I remember having seen her mother who died in Karachi. I knew Javherbai had an account with the firm of Morarji Sunderji. It was in regard to money belonging to her mother and left to Javherbai. I cannot say the exact amount but it was a few thousands.

Thus it will appear that there can be no doubt whatever that Javherbai, defendant 2, inherited money from her parents: that the money was already in deposit with the firm of Morarji Sunderji and that after the death of her parents the deposits were transferred to her name, Mamibai, dr/o Shamji Gopalji. As to the amount, the books of the family are the most cogent evidence. There can be not the least doubt that the money was a deposit. Not only does Javherbai say so but all the circumstances point to the money being a deposit with the firm of Morarji Sunderji. Further, the deposit was repayable on demand. This is asserted by Javherbai and has not been denied. It is admitted that the first serious demand by Javherbai for her money is that referred to in Ex. 18. In fact, as Kalianji has deposed, the main reason for the execution of the agreement (Ex. 18) was the demand made by Javherbai for her money. Para. 2 of Ex. 18 reads thus :

That there is personal money of Mamibai, which owing to being of her mother, is credited in the above karkhana in her name, and on which interest is running as usual at the rate of one half per cent. per mensem. Interest should be credited to her account every year, according to the above rate. And at the time of crediting interest Rs. 100 (in words one hundred) should be paid out of it at that time to Mamibai, and the remaining interest be credited to her. After having made clearance during the aforesaid period, her personal money which may be due to her at that time should be paid to her in cash. Mamibai will manage the same, according to her own will. Bhai Mathradas and Bhai Kalianji have no concern whatever therein.

'The aforesaid period' referred to is that mentioned in para. 1 of Ex. 18 which reads :

That after having made settlement and clearance with one another in respect of the running karkhana, by making every possible efforts within two years, every one should be quite separate.

To my mind one and only one construction can be placed on Ex. 18 so far as it relates to Javherbai's deposit money. Javherbai made a demand on or about the date of Ex. 18 which is dated 30th October 1927. By agreement with the only persons responsible for her money, viz. Mathradas and Kalianji, it was agreed that her deposit would be paid to her after the affairs of the family had been straightened out in the manner contemplated by Ex. 18,

it being anticipated that the process would take about two years. It is clear therefore that the deposit of Javherbai which till then had been a deposit payable on demand became a deposit payable at some indefinite future date and cleared so as to make possible the payment of her money to Javherbai. On this interpretation of Ex. 18, no question of limitation arises at all as up to the date of the suit the family affairs had not been straightened out, the debts and liabilities of the family had not been cleared. But, even if it is argued that a fixed period of two years is referred to in Ex. 18 and that therefore Javherbai's deposit became payable two years after the date of Ex. 18, viz. on 30th October 1929, the two references Exs. 20 and 22 are clearly available to Javherbai as acknowledgments extending limitation. In Ex. 20 the acknowledgment reads thus :

> The arbitrators shall before directing partition, ascertain and determine the debts payable by the family and make due provision for payment thereof. The debts shall include the claim of the party of the 3rd part (Javherbai) for moneys alleged to be deposited by her with the joint family firm as a creditor.

Stress has been laid on the words 'alleged to be deposited.' They have no significance however, because as I have shown above the family books of account contain the entire history of Javherbai's claim and nobody interested ever disputed the fact that Javherbai's money was in deposit with the family and a debt. Ex. 20 is dated 30th October 1930. An acknowledgment of liability in terms almost identical with those in Ex. 20 is to be found in the reference to arbitration (Ex. 22) dated 24th April 1933. That the references Exs. 20 and 22 are sufficient acknowledgments of liability is clear from the case in 22 S L R 117.[23] I am clearly of opinion that this disposes of the question of limitation. Under Ex. 18, the original deposit payable on demand was by agreement converted into a deposit payable on some future indefinite date when the family affairs had been straightened out so as to make possible the repayment of the deposit. As this event had not occurred before the date of the suit, no question of limitation arises. In the alternative the deposit became payable under Ex. 18 within two years and the acknowledgments in Exs. 20 and 22 revive limitation and bring the claim well within time. It is utterly unnecessary in these circumstances to even refer to the elaborate arguments advanced on this point and to the law quoted on each abstract proposition. I pass on to the consideration of Issue 7 (c): "What amount of principal, if any, is due to defendant 2 on the account submitted by her?" [His Lordship then discussed the evidence and proceeded.] My finding therefore on Issue 7 (c) is that the amount due to Javherbai as principal is Rs. 17,354-12-9 as claimed by her and as shown in Ex. 124 less Rs. 2615-5-6.

Issue 7 (d): What amount of interest, if any, is due to defendant 2 on the said account? Javherbai has deposed that her deposit with the firm of Gordhandas Morarji was to carry interest at 6 per cent. and her statement in this regard is fully borne out by the various entries in the family books of account which have been exhibited by the witness Sunderji (Ex. 122). The interest used to be calculated every year and added to the principal, the total being carried forward in the account for the following year. I hold therefore that Javherbai is entitled to interest at the rate of 6 per cent. calculated in the manner shown in the family account books up to the date of the suit, and thereafter to interest on the total at 6 per cent. till date of payment.

Issue 7 (e): Can defendant 2 in any case claim interest in excess of the amount of principal found due to her on the account submitted by her? This issue embodies the well-known rule of damdupat as applicable to Hindus. The rule is thus stated in Mulla's Hindu law at page 616, Para. 596:

> The rule of damdupat is a branch of the Hindu law of debts. According to this rule, the amount of interest recoverable at any one time cannot exceed the principal.

In Para. 598 the learned author states :

> The rule of damdupat does not forbid the conversion, by subsequent agreement between the debtor and the creditor, of the interest in arrear into capital. Therefore when a fresh bond is passed by the debtor for the aggregate amount of the principal and interest due under the old bond, the principal for the purpose of the rule of damdupat is the amount of the fresh bond.

The learned author relies on the case in 24 Bom 305.[24] For other cases bearing upon this point reference may be made to the cases A I R 1935 Sind 140[25] and A I R

23. Hukumatsing Kundanmal v. Nenumal Rajhumal, (1928) 15 A I R Sind 45=104 I C 572=22 S L R 117.

24. Sukalal v. Bapu, (1900) 24 Bom 305=2 Bom L R 18.

25. Gangaram Khemsing v. Ali Mahomed Khair Din, (1935) 22 A I R Sind 140=157 I C 331.

1936 P C 63.[26] In the present case the principle laid down in para. 598 of Mulla's Hindu law will be applicable. The practice in respect of Javherbai's deposit account was to capitalize the interest from year to year. We must therefore infer an agreement between the parties subsequent to the original deposit to exclude the application of the rule of damdupat. Further, on this point reference may be made to the document (Ex. 18), in Para. 2 whereof there is a distinct agreement to capitalize interest in respect of Mamibai's or Javherbai's account. I hold therefore that the rule of damdupat does not apply to Javherbai's claim, and interest is to be calculated in the manner I have indicated when dealing with Issue 7 (c).

Issue 7 (f): Is defendant 2 in possession of any money belonging to the plaintiff and defendant 1 jointly as alleged in para. 3 of the rejoinder of defendant 1?

This has reference to the item of Rupees 5614-5-3 which I have discussed in detail when dealing with Issue 7 (c). For reasons there stated, I hold that defendant 2 is in possession of a sum of Rs. 2615-5-3 belonging to the joint family consisting of the plaintiff and defendant 1 and that she has to account for it in the manner I have stated above. In making up the account of Javherbai the date of the deduction of the sum of Rs. 2615-5-3 will be 17th November 1935.

Issue 7 (g): Is the amount, if any, found due to defendant 2 on the account for principal and interest or any part thereof to be deducted from her share on partition?

The contention of the learned advocate for defendant 1 is that under Hindu law a mother is not entitled to claim partition, but when a partition takes place between her sons, she is entitled to a share equal to that of a son. He argues that the son under Hindu law is bound to maintain his mother and that the idea of giving her a share when a partition takes place between her sons is to provide for her maintenance. If therefore, argues the learned advocate for defendant 1, the mother has other sources of income or has a fortune of her own and is not in need of maintenance then in ascertaining what share she should get at a partition between her sons, the amount of her income from other sources, or her Stridhan, must be deducted from the share she would otherwise have got at the partition. To put the argument in concrete form in the present case, the learned advocate argues that if the Court awards any sum to Javherbai in respect of her deposit account the amount must be deducted from the share which she would ordinarily have received in this partition suit. For defendant 2 however, learned advocate has contended that there is no warrant for such a proposition under Hindu law; that at a partition between her sons a mother is entitled to a share equal to that of a son; and the only deduction provided for under Hindu law is the mother's Stridhan received from her husband or her father-in-law. In support of his contention the learned advocate for defendant 2 has referred to Macnaghten and Colebrook's Mitakshara, Vyavahara Adhyay at p. 287 whereof the following is quoted from the Mitakshara: "Of heirs dividing after the death of their father, let the mother also take an equal share."

There follows an exposition of this direction which reads:

> Of heirs separating after the decease of the father, the mother shall take a share equal to that of a son: provided no separate property had been given to her. But if any had been received by her, she is entitled to half a share, as will be explained.

This matter is also dealt with in Mulla's Hindu Law at pp. 383-84, para. 316. The learned author states:

> A mother cannot compel a partition so long as the sons remain united. But if a partition takes place between the sons, she is entitled to a share equal to that of a son in the coparcenary property. She is also entitled to a similar share on a partition between the sons and the purchaser of the interest of one or more of them: (2) If the mother has received Stridhan from her husband or father-in-law, its value should be deducted from her share.

The case in 12 Cal 165[27] supports the proposition set out by the learned author in the above passage. Reference may also be made to the case in (1874) 12 Beng L R 385.[28] The learned advocate for defendant 1 has not been able to cite any authority for his proposition. He has however referred to the decision of their Lordships of the Privy Council in 16 Cal 758,[29] where it was held:

26. Kusum Kumari v. Debi Prosad, (1936) 23 A I R P C 63=160 I C 285=15 Pat 210=63 I A 114 (P C).

27. Kishori Mohun Ghose v. Moni Mohun Ghose, (1886) 12 Cal 165.

28. Jodoo Nath v. Brojonath, (1874) 12 Beng L R 385.

29. Hemangini Dasi v. Kedarnath Kundu Chowdhry, (1889) 16 Cal 758=16 I A 115=5 Sar 374 (P C).

When the Hindu law provides that a share shall be allotted to a woman on partition, she takes it in lieu of, or by way of provision for the maintenance for which the partitioned estate is already bound.

But this case is of no assistance to the learned advocate for defendant 1, for it was a case under the Dayabhaga School of Hindu law and further the mother in that case was held not to be entitled to a separate share because she was the mother of only one son. This peculiar feature of the Dayabhaga School of Hindu law is referred to in Mulla's Hindu Law at p. 417 thus :

On a partition between sons by different mothers, where there is more than one son of each mother, the rule is first to divide the property into as many shares as there are sons, and then to allot to each mother a share equal to that of each of her sons in the aggregate portion allotted to them. A mother who has only one son is not entitled to a separate share. Her only right is to maintenance out of the portion allotted to him.

The learned author cites in support of this proposition the cases which have been referred to by the learned advocate for defendant 1 : 15 Cal 292[30] and 16 Cal 758.[29] I hold therefore that no deduction is to be made from the share that Javherbai will receive in this suit for partition because the amount found due to her on the deposit account is not Stridhan received by her from her husband or her father-in-law. I have now disposed of all the issues in the case and the three salient points which presented themselves for decision. It only remains for me to set out some directions with regard to the framing of a preliminary partition decree. The decree shall declare that plaintiff and defendant 1 continue members of a joint Hindu family till the date of this decree; that the suit is decreed for partition and that on final partition the mother, defendant 2, is entitled to a share equal to that of the plaintiff and defendant 1. The preliminary decree shall set out the amount found due under the judgment to defendants 3 to 5: it shall also set out that Javherbai's claim on her deposit account is decreed in her favour, the exact amount to be ascertained by the Commissioner appointed to effect a partition. The preliminary decree shall lastly provide that all existing orders appointing receivers and Commissioners are revoked and the Court Commissioner is appointed Commissioner to ascertain the amount due to Javherbai on her deposit claim and to effect a partition of the joint family property set out in Ex. 15 and the one property claimed as the separate property of the plaintiff which I have held in the judgment to be joint family property, viz. half share in survey No. 6L, survey sheet E.11 measuring 1152 square yards, after making due provision for the payment of the debts due to Javherbai and defendants 3 to 5. There remains the question of costs, but this must be reserved for consideration at the time of the final decree. The plaintiff and defendant each to deposit a sum of Rs. 100 towards the Commissioner's fees within 14 days. Report within two months.

R.M./R.K. *Decree passed.*

30. Sorolah Dossee v. Bhoobun Mohun, (1888) 15 Cal 292.

A. I. R. 1939 Sind 125

DAVIS J. C. AND TYABJI J.

Tarachand Khimandas — Applicant.

v.

Syed Abdul Razak Shah and another— Opponents.

Civil Revn. Appln. Nos. 2 and 3 of 1936, Decided on 23rd September 1938, to revise Judgment of Judge, Small Cause Court, Rohri, D/- 15th October 1935.

(a) Award—Enforcement of—Stranger to an award cannot sue for the benefit conferred upon him by it.

A stranger, who renders services to an arbitrator as his legal adviser and indirectly to the parties, not being a party to the award itself and there being no privity of contract between him and the parties to the award, cannot sue for an amount agreed to be paid to him under the same; for the principles of justice, equity and good conscience cannot be extended to cover all cases where parties contract to confer benefit upon a stranger so as to enable him to sue upon the contract but where it is clear on facts that some measure of privity is established between the third person and the contract, he may sue on it : *6 All 322 (P C); (1915) A C 847; A I R 1936 Bom 344; A I R 1930 Mad 382 and 11 Bom 551 (P C), Foll.; A I R 1914 Cal 129; A I R 1934 Cal 682 and 32 All 410 (P C), Disting.* [P 126 C 2 ; P 127 C 1]

(b) Practice—New plea in revision.

A plea based on facts but not raised nor argued in the lower Court cannot be raised for the first time in revision. [P 126 C 2]

(c) Award — Contract — Consent decree — Distinguished.

An award is not a contract inasmuch as the parties to it do not contract with the arbitrator; and it is also different from a consent decree where the order of the Court is imposed upon the agreement of the parties : *A I R 1935 Sind 200, Foll.* [P 126 C 2]

(d) Equity — Justice, equity and good conscience—Meaning of.

Justice, equity and good conscience mean nothing more than the rules of English law so far as they are applicable to Indian society and circumstances in the country : *11 Bom 551, Foll.*

[P 126 C 2]

(e) Legal Practitioner — Parties to reference agreeing in award to pay certain amount to legal adviser of arbitrator as fees—Legal adviser cannot sue to recover the same.

Where an advocate acted as legal adviser of the arbitrator and the parties agreed in the award to pay certain amount to the advocate as his fees and the latter sued them for the same :

Held that the advocate could not succeed on the principle of trust, agency, estoppel or privity of contract : *A I R 1936 Bom 344, Foll.; A I R 1934 Cal 682, Not foll.* [P 127 C 2]

Fatehchand Assudomal—*for Applicant.*

Manghanmal Bhojraj — *for Opponents.*

Davis J. C. — This is an application in revision against the judgment of the Subordinate Judge at Rohri, exercising Small Cause Court jurisdiction, dismissing the suit of the plaintiff, one Tarachand, an advocate, for Rs. 400 agreed to be paid to him by parties to an award which has been filed as a decree made on a reference to which he was not a party. The Subordinate Judge dismissed the plaintiff's suit on two grounds, firstly that as he was not a party to the award, he could not enforce a claim under it, and secondly, that if the award be regarded as a contract he was a stranger to the contract and could not sue to obtain a benefit under it. Now, it may well be, as the applicant alleges, that he has earned this Rs. 400, which was agreed to be given under the award, for services he rendered indirectly to the parties as the legal adviser of the arbitrator, but there is a judgment of the Privy Council in 6 All 322,[1] wherein the Board has held that a person who is no party to an award and who is not bound by it cannot take advantage of it. In that case, a member of a Hindu family, being deaf and dumb, could not inherit property under the Hindu law and was not entitled to share in the joint family property on partition. By a family arrangement embodied in an award, the other members of the family agreed that this afflicted member of the family should have his share with the others and in the award it was so provided, but this member was not made a party to the award; he was not represented in the proceedings and therefore when he sued for partition on the basis of his rights as declared in the award, he failed. Their Lordships concluded their judgment thus :

1. Hira Singh v. Ganga Sahai, (1884) 6 All 322 =11 I A 20=4 Sar 491 (P C).

Hira Singh was a stranger to the submission, and was under no obligation to abide by the award and consequently he could not avail himself of it.

We think the equities are stronger in the case of a member of a family, as in the case of Hira Singh, than in the case of a complete stranger, the advocate Tarachand in this case, and we think that in the light of this ruling alone the plaintiff's case must fail. The learned advocate for the applicant raised the question of estoppel, but no such question was raised and argued in the lower Court. It is a new case based on facts and cannot be raised for the first time in revision. There is nothing on the record to suggest that the plaintiff acted on the representation of the defendant to his prejudice. There is then the question of the right of Tarachand to sue though a stranger to a contract, yet as one on whom under the contract a benefit was conferred. This question was considered at length by the Subordinate Judge in a very careful judgment and argued at length before us here. We will deal with this question though we do not find that an award is a contract for this purpose. An award is different from a consent decree where the order of the Court is imposed upon the agreement of the parties. In an award the parties do not contract with the arbitrator: A I R 1935 Sind 200.[2] The parties agree to submit their dispute to arbitration: thus far it is a contract, but that they do not agree to consent to the award is shown by their objections to it. But assuming even that the award is a contract between the parties to it, then it does not appear that Tarachand, a stranger, can sue to enforce it, for in our opinion, the principle of justice, equity and good conscience cannot be extended, as it was in 61 Cal 841,[3] to cover all cases where parties contract to confer benefit upon a stranger so as to enable him to sue upon the contract. Justice, equity and good conscience mean nothing more, as was pointed out by the Board in 11 Bom 551,[4] than the rules of English law so far as they are applicable to Indian Society and circumstances in this country. It is true that the definition of "consideration" in S. 2, Contract Act, gives a wider meaning

2. Rahim v. Shahban, (1935) 22 A I R Sind 200 =159 I C 125.
3. Khirodbihari Dutt v. Mangobinda, (1934) 21 A I R Cal 682=152 I C 351=61 Cal 841=38 C W N 682.
4. Waghela Rajsanji v. Masludin, (1887) 11 Bom 551 (P C).

to that term than is accepted in English law, because the consideration may move from a person other than a promisee, but this does not mean that that other person can sue upon the contract. In 1915 A C 847,[5] at p. 853, Lord Haldane said:

> My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quæsi tum tertio* arising by way of contract. Such a right may be conferred by way of property, as for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam. A second principle is that if a person, with whom a contract not under seal has been made, is to be able to enforce it, consideration must have been given by him to the promisor or to some other person at the promisor's request.

The general principle here laid down is subject to certain well-recognized exceptions where it is clear that on the facts some measure of privity is established between the third person and the contract on which he sues and which would enable him to get judgment in his favour in a Court of Equity. One exception is where the third person is a *cestui que trust*: another exception is where the third person may be regarded as a principal suing through the agent.

In 41 Cal 137,[6] on which the case in 61 Cal 841[3] is based, but greatly extended in its application, a clear measure of privity was established between one of the contracting parties and the third person, because the party to the contract entered into direct communication with the third person on the subject-matter of the contract, and indeed the third party was thereby induced to act to his detriment, so that there was estoppel, but if the principle that a person not a party to a contract can sue upon it to enforce a term of that contract for his benefit, is to be generally extended, as Beaumont, C. J. remarked in 60 Bom 954[7] at p. 983, that is a matter properly for the Legislature and not for the Courts. To us the Madras decision in 53 Mad 270,[8] which prefers the exceptions to the general rule rather than the new rule laid down in 61 Cal 841,[3] seems preferable. The Privy Council decision in 32 All 410=37 I A 152,[9] seems in reality based on the principle of a trust. The cases of a family settlement where provision is made for the maintenance or the marriage of a minor or a female are also clearly within the exception of the trust and within the ruling in 32 All 410.[9]

Looked at from this point of view, it is not possible to hold that in this case there was a trust for the benefit of the advocate Tarachand. He may have been too trustful, but the mere fact that he worked for the arbitrator and indirectly for the parties to the reference, cannot, we think, make the parties to the reference trustees for the payment to him of his fees. We think that if the parties had agreed among themselves not that Tarachand should be paid Rs. 400 but that he should pay Rs. 400, he might have regarded the equitable relationship now alleged to exist between him and the parties to the reference in a different light. No privity of contract has been established between him and the parties to this award. We think, therefore, with all respect, that the judgment of the Bombay High Court in 60 Bom 954,[6] is to be preferred to the judgment of the Calcutta High Court in 61 Cal 841.[3] We think then that neither on the principle of trust or agency or estoppel or privity of contract can the plaintiff in Suit No. 551 of 1935 (Tarachand v. Syed Razak Shah) succeed. We think, therefore, this revision application as well the second revision application against the other party to the reference, whose case is similar to this and who is the defendant in Suit No. 647 of 1935 (Tarachand v. Mir Sadikali Shah), must also fail, and we dismiss both the applications with costs accordingly.

S.G./R.K. *Application dismissed.*

5. Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd., (1915) A C 847=84 L J K B 1680 =113 L T 386=59 S J 439=31 T L R 393.
6. Debnarayan Dutt v. Ram Sadhan Mandal, (1914) 1 A I R Cal 129=20 I C 630=41 Cal 137=18 C L J 603=17 C W N 1143.
7. National Petroleum Co. Ltd. v. Popatlal Mulji, (1936) 23 A I R Bom 344=165 I C 338 =60 Bom 954=38 Bom L R 610.
8. Subbu Chetti v. Arunachalam Chettiar, (1930) 17 A I R Mad 382=124 I C 55=53 Mad 270 =58 M L J 420 (F B).
9. Khwaja Muhammad Khan v. Husaini Begum, (1910) 32 All 410=7 I C 237=37 I A 152 (P C).

A. I. R. 1939 Sind 127

DAVIS J. C. AND TYABJI J.

Topandas Alimchand — Applicant.

v.

Ammu Mullah Muran and another — Opponents.

Civil Revn. Appln. No. 9 of 1936, Decided on 23rd September 1938.

Karachi Small Cause Courts Act (4 of 1929), S. 28 — Scope — Term 'owner' includes equitable owner.

The words "alleging himself to be the owner" in S. 28 are very wide, and the powers conferred upon the Court by the Section are also very wide. The term 'owner' therefore cannot be strictly construed and may include a legal owner as well as an equitable owner. [P 128 C 1]

Fatehchand Assudomal — *for Applicant.*

Chandiram Thawardas — *for Opponents.*

Davis J. C. — This is an application in revision against an order of the Judge of the Small Cause Court, Karachi, in which he directed on an application by the mortgagee under S. 28, Karachi Small Cause Courts Act, the sale of certain moveable property seized by a landlord for arrears of rent. It is contended by the applicant in revision that "owner" in S. 28, Karachi Small Cause Courts Act, means the legal owner only and cannot include the mortgagee of a chattel as found by the Judge, but it is clear that S. 28 is intended to apply much the same principle and process to distraint for arrears of rent as in English law, for instance, the period during, which application can be made for the release of goods distrained under S. 28 is five days which is the same time as is allowed in English law for application for release to be made by the grantee under a bill of sale of goods distrained for arrears of rent : (see Halsbury's Laws of England, Vol. 3, p. 142, Vol. 11, p. 132, Edn. 1910). Therefore, it appears to us that the term "owner" in S. 28 is to be construed not so strictly as to exclude the equitable owner. The distinction between the legal and beneficial owner so marked in English law is not so marked in Indian law. The use of the term English mortgage illustrates the difference and the word "owner" in S. 28 may well include, as the advocate for the opponent argues, not only the legal but the equitable owner also. But reading through the words of Sec. 28, it is clear that they are wide enough to cover a person whose claim as owner may not satisfy the legal jurist. S. 28 refers to the debtor or any other person alleging himself to be the owner of any property seized. The words "alleging himself to be the owner" are very wide, and the powers conferred upon the Court by the Section are also very wide. It is true that the Judge when he refers "to the lien of the owner" provokes argument because a person cannot have a lien upon his own goods, but a pledgee can have a charge upon goods not his own and when "owner" in S. 28 is construed to include an equitable as well as a legal owner, no difficulty arises.

If the applicant had alleged himself to be the owner of the goods basing his title upon the hypothecation bond, his application would have easily come within the provisions of Sec. 28. We think that this Revision Application is not entitled to succeed. The defect, if any, in the application was one of form rather than of substance, and we dismiss the Revision Application with costs accordingly.

N.S./R.K. *Application dismissed.*

A. I. R. 1939 Sind 128

DAVIS J. C. AND WESTON J.

Tillumal Tekumal — Appellant.

v.

Michumal Khatumal and others — Respondents.

First Appeal No. 42 of 1936, Decided on 16th November 1938, against Judgment and decree of First Class Sub-Judge, Hyderabad.

(a) Civil P. C. (1908), S. 24 — Two persons filing two suits for partition of same property in Courts of First and Second Class Sub-Judges District Judge transferring Second Class suit to First Class Sub-Judge—Judge framing separate issues but consolidating and deciding both suits by one judgment and drawing one decree — Party to Second Class suit appealing to Judicial Commissioner's Court — Consolidation amounts to one First Class suit and appeal lies to Judicial Commissioner's Court.

Two suits for partition of eight annas and two annas shares in the same property were filed by two persons in the Court of First Class Sub-Judge and Second Class Sub-Judge respectively and the Second Class suit was transferred to the Court of the First Class Sub-Judge who framed separate issues but consolidated the two suits and decided them by one judgment and drew up one decree against which the party to the Second Class suit who was not a party to the First Class suit appealed to the Judicial Commissioner's Court :

Held that the consolidation of the two suits must be considered as one First Class suit, and that there being one decree which could not be divided, there could not be separate forums for appeals relating to a particular finding given in one judgment and decree, and hence the appeal relating to a finding on an issue in the Second Class suit could not be treated as an appeal from the Second Class Court decree which did not exist, and that the appeal was properly filed in the Judicial Commissioner's Court. [P 129 C 2]

(b) Registration Act (1908), S. 17 — Mere statement by owner that he had given his property worth more than Rs. 100 to another does not effect valid transfer which requires registered instrument.

A mere statement in a Magistrate's Court by an owner of property that he had given up a portion of the property worth more than Rs. 100 to another is not sufficient to effect a transfer of the same which cannot be done except by a registered instrument. [P 130 C 1]

Dipchand Chandumal — *for Appellant.*

Fatehchand Assudomal — *for Respondent 1.*

Weston J.—This is an appeal against the decision of the First Class Subordinate Judge, Hyderabad. Two partition suits relating to the same property, namely that of one Gangumal who died more than 30 years ago, were filed. One was filed by a stranger who claimed to have purchased an eight anna share in the estate from five reversioners. This suit was filed as a first class suit in the Court of the First Class Subordinate Judge, Hyderabad. The second suit was filed by one of the reversioners only for partition of his one-eighth share of the estate and this suit was filed in the Court of the Second Class Subordinate Judge, Mirpurkhas, but was transferred by the District Judge to the First Class Subordinate Judge, Hyderabad.

Now the parties in the two suits were the same ; the suits related to the same estate and both suits were suits for partition. The learned First Class Subordinate Judge, although he framed separate issues in the two suits, decided the two suits by one judgment and it appears that only one decree was drawn up. The present appellant's father is one of the reversioners who was not the plaintiff in the Second Class suit and who was not one of the reversioners who disposed of part of their share to plaintiff in the First Class suit. Plaintiff in the First Class suit, that is to say the outsider who had purchased from the five reversioners, admitted in his plaint that Tekumal, the father of the present appellant who was defendant 7 in the First Class suit and also a party to the Second Class suit, had a two anna share in the estate, and the only party to the suit who contests the present appeal, namely Michumal who was defendant 8 in the First Class suit, asserted that he, Michumal, was the owner of the whole estate, as he had been adopted to the deceased Gangumal by his widow after his death. He asserted however by his written statement that if his claim to the whole estate failed, then he and the present appellant were each entitled to one-third of the estate and the remaining one-third devolved upon the other defendants. Now this claim was based upon the fact that there were four branches of the family, one of whom was represented by deceased Gangumal, one by Michumal, one by the present appellant and the last by the other defendants. The learned trial Judge held that the adoption of Michumal was not established; he held that each of the eight defendants owned a two anna share, that the plaintiff Bhurasing, the transferee, was entitled to an eight annas share in the estate. He held however that the present appellant's father, Tekumal, had given his share to Michumal; that Michumal therefore was entitled to a four anna share and the present appellant to no share. It is against this finding that the present appeal has been brought.

A preliminary point has been taken by the learned advocate for respondent Michumal that this appeal should have been filed not in this Court, but in the District Court, Hyderabad. His argument is that the decision as to the share of appellant was given on an issue framed not in the First Class suit but in the Second Class suit. But it is clear that although separate issues were framed, the two suits were consolidated; only one judgment was given and only one decree was framed and the decree which has been filed with the present appeal is headed "Decree—In the Court of the First Class Sub-Judge, Hyderabad—Suit No. 18 of 1928," and it is not disputed that Suit No. 18 of 1928 was the First Class suit. Had this appeal been filed in the District Court it must have been returned for proper presentation to this Court and clearly on consolidation of the two suits the consolidation must be considered as a First Class suit. It cannot be said because an issue happened to be raised in the Second Class suit and not separately in the First Class suit that an appeal relating to the finding on this issue can be treated as an appeal from Second Class suit decree which in fact does not exist. An appeal is not an appeal against a portion of a judgment but it is an appeal against a decree. When there is one judgment and one decree clearly neither the judgment nor the decree can be divided up into parts and separate forums cannot exist for appeals relating to particular findings given in one judgment and decree. We think therefore

there is no force in this preliminary objection and that the appeal has been filed in the proper Court.

On the merits of the appeal the appellant clearly must succeed. He claims only a two anna share; this was admitted by all the parties to the suit and in fact the present contending respondent admitted that he had a much greater share. The learned trial Judge has deprived him of this two anna share on the ground that appellant made a statement in the Court of the First Class Magistrate, Digri, in which he said that he had given up his two anna share to Michumal. Clearly, if an eight anna share of this estate was valued at more than Rs. 5000, a two anna share must be worth more than Rs. 100 and no transfer of this share could be effected except by a registered instrument. The learned advocate for Michumal concedes that his only title to the share of the appellant is his statement before the First Class Magistrate, and on this his claim to the share of the appellant cannot be sustained. We must therefore allow the appeal and vary the decree of the trial Court. The share of Michumal must be reduced from four annas to two annas and the present appellant must be allowed the share of two annas. Respondent Michumal must bear the costs of appellant in this appeal.

S.G./R.K. *Appeal allowed.*

A. I. R. 1939 Sind 130

DAVIS J. C. AND WESTON J.

Shewakram Issardas and others
Appellants

v.

Emperor.

Criminal Appeals Nos. 125, 127 and 128 of 1938, Decided on 21st October 1938, against convictions and sentences passed by Addl. Sess. Judge, Hyderabad, D/- 28th May 1938.

(a) Criminal Trial—Appreciation of evidence —Accused can be convicted only on evidence produced by prosecution and not on statement made by co-accused — Statement by accused can be used against his co-accused, only if it is confession within meaning of S. 30, Evidence Act.

The accused persons are to be convicted upon the evidence produced by the prosecution and not by the statements made by co-accused in the trial. A person's position as a witness or accused is, so far as the admissibility of evidence is concerned, determined by, not what was done by the police in the investigation, but by his position at the trial. A statement made by the accused can be used against his co-accused, only if it is a confession within the meaning of S. 30, Evidence Act. Statements made by the accused to police are subject to great restrictions under the Evidence Act. These restrictions are not to be evaded by the subterfuge of making the accused persons as first witnesses and taking statements from them as such. This is a procedure most strongly to be deprecated. [P 131 C 2 ; P 132 C 2]

(b) Penal Code (1860), Ss. 302, 201—Statements by accused to police relied on by prosecution to convict them of offence under S. 201 cannot be used to prove case of murder —Prosecution relying on statements for conviction under Sec. 201 — They must prove their falsity by other evidence.

Where the prosecution rely on certain statements made by the accused to the police to convict them of an offence under Sec. 201, then they can only do so by showing by other evidence the falsity of the statements. Those statements cannot themselves be used as substantive evidence in proof of the truth of the prosecution case of murder (with which the accused are charged in the alternative), in whole or in part. They cannot be relied on as both true and false : *A I R 1925 Sind 257, Rel. on.* [P 132 C 2].

(c) Penal Code (1860), Ss. 302, 201 — Accused tried for murder or for offence under Sec. 201 in the alternative—First information report by one accused, which incriminates him and which is in nature of confession, is inadmissible in evidence to convict accused either under Sec. 302 or Sec. 201.

In a trial for offences under S. 302 or S. 201, a first information report by an accused person, which deeply incriminates him in the crime although intended to exculpate and which is in the nature of a confessional statement made to the police, is inadmissible in evidence at the trial either to convict him of murder or of the lesser offence under Sec. 201. Although accused persons can, in certain cases, be tried for murder and convicted of causing evidence to disappear there is evidence, usually other than the mere statements of the accused, to show that they have caused evidence to disappear. Though in a trial for an offence under S. 201, the first information report can be made the basis of a conviction, in such a case the accused is not tried for murder and his first information is not a confession : *6 Bom 34 ; A I R 1930 Mad 870 and A I R 1925 P C 130, Rel. on.* [P 132 C 2 ; P 133 C 1]

(d) Evidence Act (1872), S. 114—Woman sleeping in room containing two cots—S. 114 does not justify Court in presuming that her husband must have slept on other cot on particular night.

The illustrations to S. 114 show the extent to which Court may draw presumptions and clearly S. 114 is no justification for a Court presuming without evidence that because a woman sleeps in a room with two cots, her husband, an inmate of house, must have slept on the other cot on a particular night. [P 134 C 2]

(e) Criminal Trial—Evidence—Appreciation of.

What a witness does not say is not substantive evidence on which the accused person can be convicted. [P 132 C 1]

Jethanand T. Tahilramani, and Hardasmal T. Tahilramani — *for Appellants 1 and 2, and 3 respectively.*

Partabrai D. Punwani, Advocate-General — *for the Crown.*

Davis J. C.—The three accused in this case, a mother and two sons, were charged with conspiracy to commit the murder of one Varan, wife of one of the sons, Hassomal, and with committing the murder of Varan in pursuance of the conspiracy, and, in the alternative, they were charged with causing evidence of an offence punishable with death to disappear with intent to screen an offender from legal punishment and with giving false information known or believed to be false with respect to the same offence, itself an offence under S. 201, I. P. C. In the result, the accused Hassomal, the husband of the murdered woman, was convicted of murder and sentenced to transportation for life, while the two other accused, his brother Shewak and his mother Mt. Tillan, were convicted of an offence under S. 201, I. P. C., and sentenced to four years' and three years' rigorous imprisonment respectively.

The accused have appealed, and, in my opinion, the appeals must all succeed for, those police officers responsible for the investigation of this case (whether acting under orders or advice, we do not know) and those responsible for the prosecution of this case, have by making quite wrongly, in our opinion, the most material witnesses for the prosecution accused persons, effectively destroyed any chance the prosecution might have had of success, in the result that what appears a very brutal murder goes unpunished. We think also the learned Additional Sessions Judge would be well advised in future to consider more carefully the provisions of the Evidence Act before he proceeds to convict accused not on the evidence of prosecution witnesses, but on the statements of co-accused clearly inadmissible under S. 30, Evidence Act. The manner in which this case has been tried and indeed investigated, can be shown at once by the way in which this motive for the murder is held to be proved. At the end of his judgment the Judge says:

> It is the prosecution case that he (the husband) had motive for the crime in that she (the wife) was unchaste. Deceased was really unchaste as she was treated for gonorrhoea and accused 2 brought medicine for her.

Therefore the Judge holds the prosecution case as to motive proved; but when we look to the judgment to find on what evidence the Judge finds the prosecution case of motive proved, we find this:

> Accused Shewak in his statement Ex. 43, under S. 164, Criminal P. C., stated that about two months after their marriage his brother Hasso, accused, asked him to procure medicine for his wife who was suffering from "garimi" (gonorrhoea). He went to Hassaram Hakim and brought the medicine. She took it for 7 or 8 days and was cured. This statement of Shewak was recorded in the capacity of a witness. Hassaram Hakim has been examined. He says that Shewak accused used to take medicine for himself for liver trouble. He does not remember whether Shewak came to take medicine for any female relative of his for gonorrhoea. But he admits that in case of females, gonorrhoea is described as "garimi" by people. The witness has not the courage to deny that Shewak took medicine for accused 1's wife. The statement of Shewak is therefore true that he took medicine for "garimi" (gonorrhoea) from Hassaram Hakim for accused Hassomal's wife at his instance. Hakim Hassaram is deliberately suppressing the truth. It is in evidence from Sub-Inspector that accused Hasso was sent for medical examination but he was not suffering from any venereal disease. It is therefore clear that Hasso's wife contracted the disease from some one else. This appears to have enraged accused Hasso and is the starting point and motive for the crime.

The learned Judge appears to have forgotten that accused persons are to be convicted upon evidence produced by the prosecution and not by statements made by co-accused to the police. The fact that this statement was made by Shewak when the police chose to treat him as a witness has nothing whatever to do with the case. A person's position as a witness or accused is, so far as the admissibility of evidence is concerned, determined not by what was done by the police during the investigation but by his position at the trial. A simple instance of this proposition is the case of an accused person who, as a first informant, confesses to a murder. The first information cannot be proved in evidence against him. Shewak, accused 2, was for reasons best known to the police, an accused and not a witness at the trial, and any statement made by him and before the Judge at the trial, was a statement made by an accused person and not a statement made by a witness. If Shewak had been a witness, the statement on which the Judge relies would not have been available for use, as the Judge used it, as substantive evidence. It would have been available as corroborative evidence. The substantive evidence would have been the evidence given by the witness before the Judge in Court. As a statement made by the accused Shewak it could only be used against his

co-accused Hassomal, if it was a confession within the meaning of S. 30, Evidence Act. Clearly it was not; clearly then it was inadmissible as evidence against Hassomal. Moreover, the medical evidence does not show the woman was suffering from gonorrhoea; nor does the evidence of Hassaram Hakim. It may be Hassaram Hakim was not telling all he knew, but what a witness does not say is not substantive evidence on which an accused person can be convicted. The prosecution have failed to prove the alleged motive.

Now there can be no doubt that this unfortunate young woman was murdered. The first information was put down as recorded by the Sub-Inspector at 6.40 A. M. on 16th June 1937. The Sub-Inspector says that Jethmal and Bhojumal first came and gave him information about the murder, but they refused to sign a first information in writing so that he went himself to the house of the accused. The accused Hassomal gave him a first information and signed it and all the accused were weeping. He went into the house and found on a cot the body of a young woman. Her throat was cut and the bedding was stained with blood. There was blood on the adjacent wall. Bhojumal and Jethmal were made mashirs. A mashirnama was made and the body sent to the Civil Hospital. The medical evidence shows the neck was almost severed from the body by one deep wound 8″ x 2″. There were no signs of strangulation. The cut was so deep that blood might have spurted out and indeed the adjacent wall was stained with blood. No blood was however found on any of the clothing of the accused. Mt. Varan was aged about sixteen. But beyond this the prosecution have not even proved the simple basic facts in the case. There resided in the rooms in which the murdered woman lived, her husband, the accused Hassomal, his brother Shewak, accused 2, his wife Kalavanti, and the mother of accused 1 and 2, Mt. Tillan, accused 3, and a boy Chandan aged ten. The boy Chandan was presumably too young to give evidence; the brother Shewak and the mother Mt. Tillan might well have given evidence if they had not been made accused. They were made accused, and the statements made by these accused persons, when they were regarded as witnesses, are treated by the Judge as substantive evidence on which the whole case of murder and conspiracy to murder, of the prosecution is to be based and proved. If the prosecution wished to rely on the statements made by the accused Shewak and Mt. Tillan to the police to convict them of an offence under S. 201, I. P. C., then they could only do so by showing by other evidence the falsity of these statements. These statements themselves can certainly not be used as substantive evidence in proof of the truth of the prosecution case of murder and conspiracy to murder, in whole or in part. They cannot be relied on as both true and false. The learned Judge's attention is invited to the case in 19 S L R 6.[1] Then the Judge says:

> On the night of the occurrence accused and his wife were sleeping in the room on the two cots about one foot away from each other. In the adjoining room accused Shewak and his wife were sleeping. Accused, Mt. Tillan, was sleeping in the courtyard. Besides them there was Chandan a young boy aged ten years. This is clear from the evidence of Tirith and the City Police Inspector.

It is not so clear at all. Tirith does not say the accused and his wife were sleeping in the room on the two cots about one foot away from each other. Mt. Tillan merely told him, or so he says, that she was sleeping in the courtyard and did not know what happened. Tirith says accused Hassomal, his brother Shewak accused, his mother Mt. Tillan accused, and Chandan aged ten, and Hassomal's wife Varanbai and Shewak's wife used to live on the groundfloor and he lived on the upperfloor, but he does not say, and probably did not know, that accused and his wife were sleeping on two cots about one foot away from each other. According to the evidence he has no intimate knowledge of the accused's household arrangements. The City Inspector clearly also had no such knowledge and the mashirnama is not substantive evidence. The statements of the accused Shewak and Mt. Tillan made to the police are not admissible to prove these simple facts against either accused 1 or themselves. Statements made by accused persons to the police are subject to great restrictions under the Evidence Act. These restrictions are not to be evaded by the subterfuge of making accused persons as first witnesses and taking statements from them as such. This is a procedure most strongly to be deprecated. The first information of Hassomal, if it be a first information, clearly deeply incriminates him in the crime though intended to exculpate and being a confessional statement made to the

1. Adho v. Emperor, (1925) 12 A I R Sind 257=86 I C 951=26 Cr L J 897=19 S L R 6.

police is inadmissible in evidence in this case at the trial either to convict him of murder or of the lesser offence under S. 201, Penal Code : 6 Bom 34.[2]

Thus the prosecution have not proved the simplest basic facts of the case, the sleeping of the husband and wife in the same room that night on cots one foot apart. All the presumptions and all the inferences drawn from these facts so laboriously by the learned Judge, supported by references to cases, fail because the simple facts which are the very basis of these presumptions and inferences and references fail to be proved. Moreover, while accused persons can undoubtedly in certain cases be tried for murder and convicted of causing evidence to disappear, there is evidence usually other than the mere statements of the accused to show that they do cause evidence to disappear, though in a trial for an offence under Sec. 201, Penal Code, the first information can be made the basis of a conviction, but in such a case the accused is not tried for murder and his first information is not a confession : 54 Mad 68.[3]

The Privy Council case in 52 I A 191[4] is a case in point. In that case, the three accused were convicted of making away with evidence of the crime by removing the body. They were not convicted on their own statements. I fail then to see how the accused can be convicted of the murder of his wife. That his wife was cruelly murdered, there can be no doubt, but in the absence of evidence definitely implicating him in the crime, I do not see how he can be convicted. All the occupants in that set of rooms cannot be convicted of murder on the chance that one of them was the murderer. The husband's failure to go to the police at once is not sufficient evidence. His first information being a highly incriminating statement cannot be admitted in evidence against him, and I cannot attach sufficient importance to the blood-stained piece of paper found on the bed and fitting into another piece of paper found in the house of Nathumal, his employer, to make this the basis of his conviction. All these circumstances, in the absence of the proof of the basic facts of the case, amount to suspicion and nothing more. Similarly, I do not see how he can be convicted of giving false information in a trial for murder where that false information is contained in a confessional statement made to the police and is inadmissible in evidence. Though, then, this cruel murder goes unpunished, the accused Hassomal must be acquitted.

So far as the other two accused Shewak and Mt. Tillan are concerned, their convictions under S. 201, Penal Code, cannot be sustained unless their statements, Exs. 30 and 31, are proved to be false and given with the intention of screening the offender from legal punishment. But these statements are as equally consistent with their innocence as their guilt. There is nothing upon the record to show that if Hassomal, the accused, in the quietness of his room at night, murdered his wife, his brother or his mother knew anything about it or anything more than he told them. If this unfortunate woman had been given her proper place as a witness and not as an accused her statement as evidence would have been of the greatest value to the prosecution. She says in her statement nothing about a dacoity or robbery. She said she heard Hasso screaming. As regards the missing bangles, she appears to have given a reasonable explanation. She says Varan might have taken them off at night at the time of cleaning utensils and forgotten them. The same remarks apply to the statement of Shewak. Moreover, the production of some ornaments by different accused during the course of the police investigation suggests in the circumstances of this case a division of responsibility which inspires no confidence. In my opinion then, the prosecution case fails and the accused must be all acquitted. Order accordingly.

Weston J. — I am in entire agreement with the views expressed by the learned Judicial Commissioner and have only a few words to add. If the inadmissible evidence which has been admitted in this case is excluded, the prosecution case amounts to this : The wife of Hassomal was found murdered in the early morning in a room containing two cots. The premises were occupied by Hassomal, his brother Shewakram, their mother Tillibai, the wives of Hassomal and Shewakram and a small boy, and consisted of two rooms and a courtyard or verandah with a small kitchen and latrine. Some bangles were missing from

2. Imperatrix v. Pandharinath, (1881) 6 Bom 34.
3. In re Chinna Gangappa, (1930) 17 A I R Mad 870=1930 Cr C 1126=129 I C 230=32 Cr L J 263=54 Mad 68=59 M L J 677.
4. Begu v. Emperor, (1925) 12 A I R P C 130=88 I C 3 = 26 Cr L J 1059 = 6 Lah 226=52 I A 191 (P C).

the person of the murdered woman and these were afterwards produced to the police by some of the inmates in the house. A piece of paper was found on one of the cots in the room in which the murder is supposed to have been committed, but the fact that this paper was bloodstained has no significance, as much blood was found in the room and the evidence that this piece of paper had been brought by Hassomal from his shop does not do more than to support the evidence that Hassomal was an inmate of the house. No weapon was found and no motive was proved.

The prosecution suggestion that Shewakram and Tillibai, the brother and mother of Hassomal, had conspired with him to murder the woman is intrinsically improbable and is supported by no evidence at all. The police action in sending up Shewakram and Tillibai for trial jointly with Hassomal could serve no useful purpose. It could only damage the case against Hassomal by excluding the evidence of the only persons who could give evidence likely to be material. For, however unwilling these two persons might be to give evidence against Hassomal, the prosecution could hardly have failed to secure from their evidence important information as to the presence of Hassomal in the house and the place where he slept on the night of the murder. If there was any case against these two persons under Sec. 201, Penal Code, it was open to the police to have considered sending up the case against them separately and at a later stage. Actually, it seems very unlikely that any such case could be substantiated even if it were proved that Hassomal committed the murder for the attempt to divert suspicion by removing bangles of the murdered woman would be attributable to Hassomal and not necessarily to his mother and brother.

If the prosecution had established the simple fact that on the night in question Hassomal slept on the second cot only one foot away from that on which the body of the murdered woman was found, then the case against Hassomal at once would assume a grave aspect. The learned trial Judge does not record a finding on this point. He says: "He was the only man sleeping in the room only one foot away from his wife." Whether this conclusion is based upon the mashirnama Ex. 8 read with the evidence of Sub-Inspector and whether the learned trial Judge considered he was entitled to presume this fact under S. 114, Evidence Act, I have not been able to ascertain. But the mashirnama contains no explicit statement that Hassomal had slept in that room, nor could it contain any such statement for it is obviously a matter not within the personal knowledge of the mashirs, and, in any case, the mashirnama is not substantive evidence. The Sub-Inspector in his evidence does state that the second cot in the room was that of Hassomal but again he could have had no personal knowledge of this fact and his statement is only a conclusion or a presumption based, if at all, upon circumstances or statements which are not in evidence.

The illustrations to Sec. 114, Evidence Act, show the extent to which Court may draw presumptions and clearly S. 114 is no justification for a Court presuming without evidence that because a woman sleeps in a room with two cots, her husband, an inmate of house, must have slept on the other cot on a particular night. There is not even evidence to show that Hassomal usually slept on this second cot. There is therefore nothing more than suspicion against Hassomal and his conviction cannot be supported. It is to be regretted that the case sent up in respect of this horrible murder should end in the way it must, but we have no alternative, in view of the absence of evidence, but to set aside the convictions in the case of all three appellants and order that they should be acquitted.

R.M./R.K. *Convictions set aside.*

A. I. R. 1939 Sind 134

LOBO J.

In re Hormusji Jamshedji — Debtor.

Case No. 26 of 1938, Decided on 20th January 1939.

(a) Interpretation of Statutes—Statement of Objects and Reasons.

While interpreting a statute it is not permissible to make reference to Statement of Objects and Reasons which preceded the passing of it, as throwing light on the interpretation to be placed on it, but the interpretation and the intention of the Legislature must be wrested from the language of the statute itself: *22 Cal 788 (P C); A I R 1920 P C 56 and A I R 1936 Sind 209, Rel. on.*

[P 135 C 2]

(b) Civil P. C. (1908, as amended in 1937), S. 60 (1) (h) — Interpretation.

Clause (h) of sub-s. (1) of S. 60 should be interpreted with reference to the entire Section, and any interpretation founded upon that clause alone would be unsafe and unwarranted by all canons of

interpretation : *A I R 1938 Cal 325, Not foll.* [P 136 C 1, 2]

(c) Civil P. C. (1908, as amended in 1937), S. 60 (1) (h) — The clause protects salary of all persons in receipt thereof other than public officers and servants of railway company or local authority.

On consideration of the entire Section there is no doubt that the latter part of Cl. (h) of sub-s. (1) protects from attachment in execution of a decree salary of all persons in receipt thereof other than public officers and servants of a railway company or local authority. [P 137 C 2]

Dingomal Naraingsing — *for Official Assignee.*

Dayaram Lokmandas — *for Insolvent.*

Order.—The insolvent in this case is an employee in the Central Bank of India Ltd., Karachi, on a salary of Rs. 100 per month; certain deductions are made therefrom for Provident Fund &c., and the net amount which the insolvent receives every month is Rs. 80-12-0. The insolvent's liabilities amount to over Rs. 5000, his assets are nil, and in view of this position the Official Assignee has applied under Sec. 60, P. T. I. Act, that a sum of Rs. 25 per month be ordered to be appropriated out of the salary of the insolvent for the benefit of the creditors. The application is opposed by the insolvent on two grounds : (1) that it will entail very considerable hardship on the insolvent, (2) that under law his salary not being over Rs. 100 no part of it is liable to attachment in execution of a decree under S. 60, Civil P. C., as amended by Act 9 of 1937, and therefore no part of it is liable to appropriation under S. 60, Insolvency Act. As regards hardship, I do not think in the circumstances of the case that any hardship will be involved. The insolvent is living with his parents and is in large measure supported by them. It will be quite sufficient for him even if he has to pay for his board and lodging, if he has a few rupees to meet his personal expenses, tram hire, etc. An appropriation of Rs. 20 a month from his salary would therefore appear to be perfectly reasonable and just both to the insolvent and to the creditors.

The legal point raised however is one of importance and one as to which considerable doubt attaches since S. 60, Civil P. C., has been amended by Act 9 of 1937. I am of opinion however that the learned advocate's contention is sound and must be upheld. The insolvent is an employee in a private concern. Prior to the amendment of S. 60, Civil P. C., by Act 9 of 1937 the salary of persons in private service was not exempt to any extent from attachment in execution of a decree. Under Cl. (1) of the Proviso to S. 60, sub-s. (1), wages of labourers and domestic servants were entirely exempt from attachment, and under Cls. (h) and (i) of the same Proviso the allowances and salary of public officers, of servants in railway companies or under local authorities were to some extent exempt from attachment in execution of a decree. The Amending Act appears to have been intended to enlarge the exemption in respect of public officers and persons in railway service and in the service of local bodies as well as to extend it to salaries of persons in private service. Reference was sought to be made to the Statement of Objects and Reasons which preceded the passing of the Amending Act as throwing light on the interpretation to be placed on Cl. (h) of S. 60 (1) as amended by Act 9 of 1937 but clearly this is not permissible : *vide* 22 Cal 788[1] and 43 Mad 550.[2] In the latter case their Lordships of the Privy Council held that the construction to be placed on the explanation to S. 68, Companies Act, 6 of 1882, must depend upon its terms and no theory of its purpose can be entertained unless it is to be inferred from the language used. No statement made on the introduction of the measure or its discussion in the Legislative Council can be looked at as affording any guidance as to the meaning of the words. In 30 S L R 196[3] a Bench of this Court has held :

> The Statement of Objects and Reasons is not a part of an Act, and is not to be referred to by the Courts in its interpretation. What the Courts have to interpret is the Act as it has finally emerged from the Legislature. What the authors of the bill hope that the Act might achieve is a different thing.

The interpretation of Cl. (h) of S. 60 (1) as amended and the intention of the Legislature must therefore be wrested from the language of the Section itself with the assistance of decided cases. The only reported case in which the point appears to have been considered at all is the case in A I R 1938 Cal 325.[4] At the end of the judgment of Biswas J. in this case the learned Judge states :

1. Administrator General of Bengal v. Premlal Mullick, (1895) 22 Cal 788=22 I A 107=6 Sar 603 (P C).
2. Krishna Ayyangar v. Nellaperumal Pillai, (1920) 7 A I R P C 56=56 I C 163=43 Mad 550=47 I A 33 (P C).
3. Parsram Giandas v. Tarachand Amardinomal (1936) 23 A I R Sind 209=166 I C 321=30 S L R 196.
4. Jnanendra Kumar Roy v. Akash Chandra, (1938) 25 A I R Cal 325=177 I C 352.

There is just one other point which occurs to me in this connexion and this is as to whether the word 'salary' in the new Cl. (h) is used of salary generally without any reference to the class of persons by whom the salary is earned, or it refers merely to the salary of labourers and domestic servants . . . I do not however desire to express any final opinion on the point. All that I need say is that from the collocation of the words used in this clause, it is fairly arguable that the word 'salary' is intended to mean salary of labourers and domestic servants only, seeing that the clause appears to be enacted for the benefit of this particular class of persons.

But these remarks of the learned Judge were obiter and clearly cannot be regarded as an authority on the point. It has been argued that the language of Cl. (h) of sub-s. (1) of S. 60 as amended by Act 9 of 1937 makes it clear that the class of persons sought to be protected is the class of labourers and domestic servants. It is conceded that there is a difference between wages and salary; it is conceded that the remuneration paid to labourers and domestic servants is ordinarily termed a wage and not a salary; but it is contended that in the present advanced state of industry and society the class of labourers and domestic servants has come to include highly skilled persons who are engaged and remunerated on the basis of salary often over well a hundred rupees per month; and that it is these labourers and domestic servants that are intended to be covered by the latter part of Cl. (h). If, it is argued, the word 'salary' in Clause (h) was intended not to refer to remuneration of labourers and domestic servants but to the salary of persons in private employ, this the Legislature would have provided for in a separate clause.

It is further argued that the two parts of Cl. (h) could not have been combined by the Legislature by using the words 'the wages and salary of labourers and domestic servants' because it was not intended that the entire salary of highly skilled labourers and domestic servants should be exempt from attachment in execution of a decree. Now, there is much to be said for this argument and it is probably the argument which inclined Biswas J. to the view expressed by him in A I R 1938 Cal 325[4] to which reference has been made above. But the weakness of this argument is this: that the interpretation of Cl. (h) is sought from a reference to Cl. (h) alone and without considering the entire Section in which Cl. (h) appears. Sec. 60, Civil P. C., is not a simple Section. It is a long and complicated Section divided into sub-sections with provisos and explanations and any interpretation of Clause (h) of sub-s. (1) founded upon the language of that clause alone without reference to the entire Section would be unsafe and unwarranted by all canons of interpretation.

It is necessary in the first place to set out the whole of S. 60, Civil P. C., as it reads after the Amending Act 9 of 1937 :

Section 60.—(1) The following property is liable to attachment and sale in execution of a decree, namely lands, houses, or other buildings, goods, money, bank-notes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities for money, debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, moveable or immovable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf :

Provided that the following particulars shall not be liable to such attachment or sale namely :

(a) the necessary wearing apparel, cooking vessels, beds and bedding of the judgment-debtor, his wife and children, and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman;

(b) tools of artizans, and where the judgment-debtor is an agriculturist, his implements of husbandry and such cattle and seed-grain as may, in the opinion of the Court be necessary to enable him to earn his livelihood as such, and such portion of agricultural produce or of any class of agricultural produce as may have been declared to be free from liability under the provisions of the next following Section;

(c) houses and other buildings (with the materials and the sites thereof and land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him;

(d) books of account;

(e) a mere right to sue for damages;

(f) any right of personal service;

(g) stipends and gratuities allowed to pensioners of the Government, or payable out of any service family pension fund notified in the Gazette of India by the Governor-General in Council in this behalf, and political pensions;

(h) the wages of labourers and domestic servants whether payable in money or in kind; and salary to the extent of the first hundred rupees and one-half the remainder of such salary;

(i) the salary of any public officer or of any servant of a railway company or local authority to the extent of the first hundred rupees and one-half the remainder of such salary :

Provided that where the whole or any part of the portion of the such salary liable to attachment has been under attachment, whether continuously or intermittently for a total period of 24 months, such portion shall be exempt from attachment until the expiry of a further period of 12 months and where such attachment has been made in execution of one and the same decree, shall be finally exempt from attachment in execution of that decree;

(j) the pay and the allowances of persons to whom the Indian Articles of War apply;

(k) all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, 1925, for the time being applies in so far as they are declared by the said Act not to be liable to attachment;

(l) any allowance forming part of the emoluments of any public officer or of any servant of a railway company or local authority which the Governor-General in Council may by notification in the Gazette of India declare to be exempt from attachment, and any subsistence, grant or allowance made to any such officer or servant while under suspension;

(m) an expectancy of succession by survivorship or other merely contingent or possible right or interest;

(n) a right to future maintenance;

(o) any allowance declared by any law passed under the Indian Councils Act, 1861 and 1892, to be exempt from liability to attachment or sale in execution of a decree; and

(p) where the judgment-debtor is a person liable for the payment of land-revenue, any moveable property which under any law for the time being applicable to him is exempt from sale for the recovery of an arrear of such revenue.

Explanation 1.— The particulars mentioned in Cls. (g), (h), (i), (j), (l) and (o) are exempt from attachment or sale whether before or after they are actually payable, and in the case of salary other than salary of a public officer or a servant of a railway company or local authority the attachable portion thereof is exempt from attachment until it is actually payable;

Explanation 2. — In Cls. (h) and (i), 'salary' means the total monthly emoluments, excluding any allowance declared exempt from attachment under the provisions of Cl. (l), derived by a person from his employment whether on duty or on leave.

(2). Nothing in this Section shall be deemed to exempt houses and other buildings (with materials and sites thereof and the lands immediately appurtenant thereto and necessary for their enjoyment) from attachment, or sale in execution of decrees for rent of any such house, building, site or land.

(3). The amendments made by S. 2 shall not have effect in respect of any proceedings arising out of any suit instituted before 1st day of June 1937.

Now it is clear that Expls. 1 and 2 have a direct bearing on Cl. (h) of sub-s. (1) and the provisions with regard to "salary" contained therein. But, it also becomes clear that the argument in support of an interpretation of the provisions regarding 'salary' in Cl. (h) which would confine 'salary' to the class of labourers and domestic servants becomes untenable in view of Expls. 1 and 2. If the word 'salary' as used in Cl. (h) means the total monthly emoluments excluding any allowance declared exempt from attachment under the provisions of Cl. (l) derived by a person from his employment whether on duty or on leave, then obviously 'salary' in Cl. (h) cannot refer to the salary of a labourer or a domestic servant; for, Cl. (l) refers to "any allowance forming part of the emoluments of any public officer or of any servant of a railway company or local authority;" and further the use of the phrase "whether on duty or on leave" can surely not have been intended to apply to labourers and domestic servants for it is wholly inapplicable to that class of service. If the intention of the Legislature in enacting Cl. (h) was to protect the salary of labourers and domestic servants only then we should expect to find in Expl. 1 the words "and in the case of salary of a labourer or a domestic servant" instead of the words therein appearing "and in the case of salary other than salary of a public officer . . . . ."

No doubt the amending Section in this particular has been drafted inartistically and the latter part of Cl. (h) should have been the subject-matter of a separate clause, but on a consideration of the entire Section as amended, I feel no doubt that what the Legislature intended to protect from attachment in execution of a decree in the latter part of Cl. (h) of sub-s. (1) to Sec. 60 was the salary of all persons in receipt of salary other than public officers and servants of a railway company or local authority. For these reasons, I am of opinion that the application of the Official Assignee must be dismissed and I accordingly so order.

S.G./R.K. *Application dismissed.*

A. I. R. 1939 Sind 137

DAVIS J. C. AND WESTON J.

Mir Haji Ghulam Shah — Appellant.

v.

Khanchand Gopaldas and another — Respondents.

Misc. Appeals Nos. 26 of 1935, and 41 of 1936, Decided on 29th July 1938, against decision of First Class Sub-Judge, Hyderabad, D/- 15th February 1935.

(a) Civil P. C. (1908), Ss. 115, 151, O. 47 — O. 47 and S. 151 do not empower Judge to set aside order passed by his predecessor — Order setting aside order passed by his predecessor dismissing suit as against one defendant is one without jurisdiction — Although appeal does not strictly lie against such order, it is open to revision — It is not interlocutory order and is one deciding case within S. 115.

Both O. 47 and Sec. 151 are to be construed strictly, and are not intended to be used, and are not to be used, to allow one Judge to sit in appeal on orders of his predecessor exercising an equal jurisdiction with his own. Where a Judge sets aside an order passed by his predecessor dismissing

suit as against one of the defendants in a suit, his order is one without jurisdiction, inasmuch as he usurps an appellate jurisdiction which he does not possess. Such order, although alleged to be passed under S. 151, is in substance one reviewing the judgment of his predecessor. Although an appeal against such order is not strictly maintainable, such an appeal, treated as revision application, is competent. The order sought to be set aside is not an interlocutory order so as to bar an application in revision, inasmuch as it sets aside an order which is not an interlocutory order. In any case, it is an order deciding a case within the meaning of S. 115, Civil P. C., and a revision application against it is maintainable : *A I R 1934 P C 213 and A I R 1919 Mad 871, Ref. ; 32 Bom 432 and 5 S L R 184, Disting. ; A I R 1930 Bom 294, Doubted.* [P 140 C 1]

(b) Civil P. C. (1908), O. 47, R. 1—Question whether liability to perform contract or to pay damages in breach is included within terms "debts and liabilities" of special enactment is not error apparent on face of record — It is difficult question of law.

A mistake of law is not sufficient in itself to grant a review. The error must be patently gross and manifest. A question so debatable as one, whether the liability to perform a contract or to pay damages in breach, is included within the terms "debts and liabilities" of a special enactment, cannot be said to be an error apparent on the face of the record within the meaning of O. 47, R. 1. It is a difficult question of law : *A I R 1925 Sind 53, Rel. on ; A I R 1937 Sind 101 and 32 S L R 215, Expl.* [P 140 C 2]

(c) Revision — Interference — Judge setting aside order passed by his predecessor and thus usurping appellate jurisdiction which he does not possess — Court of Judicial Commissioner can set aside order in revision.

Ordinarily, the Court of the Judicial Commissioner will not interfere in revision when a remedy will lie by way of appeal, but where one Judge sits in appeal on a judgment or decree of his predecessor and usurps a jurisdiction which he does not possess, it is the duty of the Judicial Commissioner's Court not to permit the case to proceed upon the jurisdiction so snatched, which has no basis or justification in law, and, it should set aside the order in revision as being one without jurisdiction. The Court has also power to set aside, in the revision proceedings, the original order when it is one deciding a case within the meaning of S. 115, and where the papers relating to the case are before the Court and it is necessary in the interests of justice to do so : *A I R 1932 Bom 232; 26 Bom 552 ; A I R 1920 Bom 67 ; 1 S L R 226 ; 2 S L R 22 ; A I R 1921 Sind 38 and A I R 1936 Sind 172, Disting.* [P 141 C 1, 2 ; P 142 C 2]

(d) Civil P. C. (1908), S. 151—Scope—S. 151 is not intended to override plain and express enactment of law—Judge disregarding relevant provisions of Civil Procedure Code and non-suiting plaintiff purporting to act under S. 151 —Order cannot be sustained.

Section 151 is not intended to permit the Court to ignore or override the provisions of the Civil Procedure Code nor is it intended to oust the provisions of the law. It is intended merely to supplement the provisions of the Code and to provide a means of serving justice when the law has provided none. It is not intended to override the plain and express enactment of the law. [P 142 C 1]

Where therefore a Judge allows a question which cuts at the very root of the plaintiff's suit, to be argued before him, without directing the pleading to be amended and without raising the relevant issues and ignores some of the most material provisions of the Civil Procedure Code laid down by the Legislature for the proper administration of justice and non-suits the plaintiff purporting to act under S. 151, his order is one which should not be allowed to stand. [P 141 C 2 ; P 142 C 1]

(e) Practice—Pleadings—New defence raised which cuts at the root of proceedings and which does not arise from pleadings — Pleadings should be amended and proceedings conducted in fair and proper manner.

Although a judgment will not be set aside merely because certain issues have not been framed if those issues have been argued and considered, yet it is to be presumed that those issues arise from the pleadings and that where a new defence is raised which cuts at the root of the proceedings and such defence does not arise from the pleadings, the pleadings will be amended and proceedings conducted in a fair and proper manner. Order passed in such a case without the amendment of pleadings cannot be sustained : *A I R 1930 P C 113, Ref.* [P 142 C 2]

Thakurdas Pribhdas — *for Appellant.*

Dipchand Chandumal—*for Respondents.*

Davis J. C. — This purports to be an appeal against an order of the First Class Subordinate Judge at Hyderabad dated 15th February 1935, setting aside, or, as the learned Judge says, "vacating" an order of his predecessor dated 20th September 1934 in exercise of the inherent powers to do so vested in him under Sec. 151, Civil P. C. Though the learned Judge in a judgment of considerable length clearly reviewed the judgment of his predecessor and used words reminiscent of O. 47, Civil P. C., finding inter alia that the order of his predecessor to be patently erroneous which, in our opinion, it is not, though it may be latently erroneous, he was at considerable pains to show that he was not reviewing a judgment under O. 47 but was exercising an inherent jurisdiction under S. 151, Civil P. C. But we do not think this Section was intended to constitute one Subordinate Judge an appellate authority over his predecessor of like jurisdiction as himself. In fact, we are of the opinion, after having heard very careful and earnest arguments, that the proper order for us to make is to set aside both the orders of the Subordinate Judge, Mr. Gehimal and of his predecessor Mr. Rahim Baksh as being orders made in defiance of the provisions of the Civil Procedure Code, and both fit and indeed, in the interests of justice, to be set aside.

The suit, in the course of which these two orders were passed, was brought by

the plaintiff against the estate of one Khan Bahadur Mir Ghulam Muhammad Khan, deceased, and was for specific performance of a contract for the sale of his lands alleged to have been made between the plaintiff's father and the deceased Khan Bahadur Mir Ghulam Muhammad Khan for Rs. 184,000 on 7th August 1929, and earnest money was paid by the deceased to the plaintiff's father but subsequently he wished to resile from the contract, and after his death the suit was brought against his legal representatives. One of these, defendant 1 in the suit, was his nephew Mir Haji Ghulam Shah who inherited a twelve annas share but was under management by a Notification in the Sind Official Gazette, dated 21st August 1924, and on 10th October 1933 the Manager of the Sind Incumbered Estates by Notification took over the management of Mir Haji Ghulam Shah's twelve annas share in the estate of Mir Ghulam Muhammad, and gave notice to claimants against the debtor. As a result, this defendant applied to the Court for the dismissal of his suit on the ground that it was no longer competent against him.

There was connected with this suit a suit for brokerage in this transaction brought by the broker. This suit was a second class suit, but the Subordinate Judge dealt with these two suits in his order dated 20th September 1934, dismissed both suits against this defendant, ordered the suits to proceed against the other defendants, and the necessary amendments, presumably in the pleadings, to be made.

It is clear from the judgment of the Subordinate Judge, Mr. Rahim Baksh, that his decision turned largely upon the interpretation of the relevant Sections, principally Ss. 8 and 9, Sind Incumbered Estates Act, and he held that as the suit was a suit for specific performance which carried with it a claim for damages for breach of contract, the liabilities of the defendant under the contract were within the term "debts and liabilities" in Ss. 8 and 9, and a suit with respect to them was clearly barred. It was this order the plaintiff then asked the successor of Mr. Rahim Baksh, Mr. Gehimal to vacate, who after criticising defects in the procedure of his predecessor, some of which criticism might have been justified if Mr. Gehimal had been sitting in appeal on Mr. Rahim Baksh's order, came to the conclusion that Ss. 8 and 9 of the Act should not be interpreted as Mr. Rahim Baksh had interpreted them, to include in the term "debts and liabilities" liabilities under a contract to sell land which was the basis of the suit, and that the two suits were competent and should proceed. He therefore vacated or set aside the judgment of his predecessor as constituting among other things an abuse of the process of the Court relying, we think wrongly, upon a judgment in 5 S L R 184,[1] finding, as we think he should not have found, that the order dismissing the suit against the defendant was an interlocutory order.

Now the appeal against the order of Mr. Gehimal came before us as an appeal against an order under O. 47, Civil P. C., for the learned advocate argued that if in fact one Judge reviews the order of another, he cannot escape from the provisions of O. 47, Civil P. C., by placing his order under S. 151, Civil P. C. It is not the name or number which identifies the order: it is its substance. The mere fact that a judgment is headed as an order does not make the judgment any the less a judgment. He relied on A I R 1931 Mad 471.[2] This appears good law and good sense, but the respondent in reply argued that if the appellant placed the order of 15th February 1935, under O. 47, Civil P. C., this appeal will not lie, for the right of appeal against an order under O. 47, Civil P. C., is prescribed by R. 7, and none of the conditions laid down in R. 7 are fulfilled. The confusion which attached in the minds of the respondent or his advisers on this question of review is shown, we think, by their application dated 3rd January 1935, upon which Mr. Gehimal passed his order of 15th February 1935, for it is headed 'under Sec. 151, Civil P. C., read with O. 47, Rule 1, Civil P. C.,' though what S. 151 read with O. 47, Civil P. C.,' means the learned advocate for the respondent is unable to explain to us, while in the body of the application the respondent asks for the order to be vacated, or, in the alternative reviewed. The abuse of Sec. 151, Civil P. C., which these proceedings illustrate however is shown by the application Ex. 45 of the applicant, defendant 1 himself when he prays for the suit to be dismissed against him, for he places his application under S. 151. The Judge's order in response equally lacks precision for it is headed

1. Hemandas v. Chellaram, (1911) 5 S L R 184=13 I C 264.

2. Adinarayana Chetti v. Kopparam Narasimha Chetti, (1931) 18 A I R Mad 471=132 I C 654=54 Mad 337=60 M L J 167.

simply "Order" presumably under S. 151, Civil P. C. But both O. 47 and S. 151 are, we think, to be construed strictly and are not intended to be used and are not to be used to allow one Judge to sit in appeal on orders of his predecessor exercising an equal jurisdiction with his own. The limits which attach to O. 47, Civil P. C., and applications and orders made thereunder are set out in the Privy Council judgment in A I R 1934 P C 213.[3] The appellant has not been able to show on the papers before us that his appeal will lie under Rule 7 (1) (c) on the ground of limitation which was not a ground he took in the lower Court when he opposed the respondent's application to vacate the Judge's order; so that this appeal, if against an order under O. 47, Civil P. C., should take the form of a revision application. It matters not, we think, whether it is a revision application made against the order of the Judge as passed under O. 47 or S. 151, Civil P. C. As a revision application however the case of the appellant is met by the argument that the order of Mr. Gehimal dated 15th February 1935 vacating the order of his predecessor, is an interlocutory order, and no application in revision will lie. We think however that as the order of Mr. Rahim Baksh dismissing the suit against defendant 1 was not an interlocutory order, for it determined the rights of the parties and was in substance a decree against which even an appeal would lie: 42 Mad 219[4] at p. 222; so the order of Mr. Gehimal setting aside that order was also not an interlocutory order. The order of Mr. Rahim Baksh was, in any circumstances, an order deciding a case within the meaning of S. 115, Civil P. C., and likewise, we think, that in consequence the order of Mr. Gehimal setting aside this order of dismissal also decided a case within the meaning of S. 115, Civil P. C., and that an application in revision would lie against it. Moreover, we think it clear Mr. Gehimal was wrong in his opinion, though he states it was not disputed, that the order dismissing the suit against defendant 1 was an interlocutory order, and for this reason, we think, the case in 5 S L R 184,[1] on which he relies, was no precedent, because in that case the learned Judge did not set aside an order dismissing the suit; he set aside an order refusing to dismiss the suit, but his order of dismissal determining the rights between the parties, was in substance a decree and was appealable in consequence.

Moreover, we think that on this question of one Judge reviewing the judgment of another, the judgment of Kennedy A. J. C. in 19 S L R 30[5] is a surer guide. In that case, the learned Judge shows quite clearly that a mistake of law is not sufficient in itself to grant a review. The error must be patently gross and manifest if indeed a review can even then be properly granted, but it is idle to pretend that a question so debatable as the question in this case, whether the liability to perform a contract or pay damages in breach is included within the term "debts and liabilities" of a special enactment is an error apparent on the record within the meaning of O. 47, R. 1, Civil P. C. It clearly is not; it is a difficult question of law. It is true that there are Bombay decisions to the effect that one Judge can correct the order of his predecessor in pending proceedings, but in both the Bombay cases the orders dealt with are interlocutory orders.

In 32 Bom 432,[6] the question was one of correcting errors in a remand judgment; while in 55 Bom 368,[7] Rangnekar J. was dealing with chamber orders, and so far as it relates to judgments or decrees his judgment, though guarded in its terms, appears to us, with all respect, to be open to doubt. It is true that this Court has held that in certain cases a Court can vacate its own order obtained as the result of fraud or deceit, 31 S L R 32,[8] and that in a still more recent judgment, this Court has gone further, 32 S L R 215,[9] and held that in certain cases a Court can vacate its own order when the error of law is patent, but in the latter case the order was one under the Guardians and Wards Act which has its own special provisions, and in our opinion both these judgments should be read

3. Bisheswar Pratap Sahi v. Parath Nath, (1934) 21 A I R P C 213=151 I C 41=56 All 634=61 I A 378 (P C).
4. Rama Rao v. Raja of Pittapur, (1919) 6 A I R Mad 871=49 I C 835=42 Mad 219=36 M L J 169.
5. Firm of Saleh Mahomed v. Nathumal Kessumal, (1925) 12 A I R Sind 53=78 I C 993=19 S L R 30.
6. Balvant Ramchandra v. Secy. of State, (1908) 32 Bom 432=10 Bom L R 531.
7. Yusuf I. A. Lalji v. Abdullabhoy Lalji (No. 1), (1930) 17 A I R Bom 294=125 I C 690=55 Bom 368=32 Bom L R 665.
8. Mohanlal Tejumal v. Khushalibai, (1937) 24 A I R Sind 101=169 I C 918=31 S L R 32.
9. Dholandas Gidumal v. Sadhumal Dolumal, (1937) 32 S L R 215.

with 19 S L R 30[5] and should be limited to their own facts.

It appears to us then that the order of Mr. Gehimal dated 15th February 1935 was made clearly without jurisdiction, that the learned Judge usurped an appellate jurisdiction which he did not possess, and that his order should be set aside. Though the learned Judge has sought to escape the provisions of O. 47, Civil P. C., by declaring the order not to be an order under that Order, it is clear in substance his order was an order reviewing the judgment of his predecessor, and that the appeal against that order treated as a revision application should succeed. It is urged before us that even if we think the order wrong, we should not interfere under Sec. 115, Civil P. C., for the Court will not interfere when a remedy lies by way of appeal, and if the suit goes on as Mr. Gehimal has ordered, the applicant can, if he is aggrieved, appeal. Ordinarily, the Court will not interfere in revision when a remedy will lie by way of appeal. It is indeed a beneficial principle, for otherwise infinite would be the occasions and the variety of interlocutory orders on which the intervention of this Court would be invoked. The rule that

> where an appeal is provided the Court will not interfere by any peremptory order with the ordinary course of adjudication save in cases wherein a defect of law and a grave wrong are manifest and are irremediable by the regular procedure

is an excellent rule and to be followed by the Courts: A I R 1932 Bom 232.[10] It is the rule of the Bombay High Court: *see* 26 Bom 552,[11] 44 Bom 595,[12] A I R 1932 Bom 232;[10] and of this Court in 1 S L R 226,[13] 2 S L R 22,[14] 15 S L R 61[15] and 30 S L R 271,[16] and it is a good and salutary rule, but in none of the cases had one Judge sat in appeal on a judgment or decree of his predecessor, usurped an appellate jurisdiction he does not possess, and we consider it is our duty not to permit this case to proceed upon a jurisdiction snatched, as this jurisdiction has been snatched, and which has no basis or justification in law. We do not regard Mr. Gehimal's order as an interlocutory order, so that rulings that relate to interlocutory orders do not apply. We therefore set aside his order of 15th February 1935 as being utterly without jurisdiction. But the matter is not concluded, for it, by no means, follows that because we disapprove of Mr. Gehimal's order, we approve of the order of Mr. Rahim Baksh, or because we set aside Mr. Gehimal's order, we propose to let Mr. Rahim Baksh's order stand, for Mr. Rahim Baksh's order appears to us an order that should also be set aside. It is clear to us that Mr. Rahim Baksh acted improperly when without directing the pleadings to be amended and without raising the relevant issues he allowed a question to be argued before him which cut at the very root of the plaintiff's suit. This is not a simple question of striking out a defendant who has been improperly joined because he has not any connexion with the case within the meaning of O. 1, R. 10, Civil P. C.

The impropriety of the whole proceeding is seen at once by the fact that the application was made and order presumably passed under Sec. 151, Civil P. C. O. 1, R. 10, Civil P. C., is not mentioned. The plea successfully raised by defendant 1 was not raised by him in his pleadings at all. Both the learned advocates assure us, and we accept the assurance, that the Mir himself kept to himself the fact that he was under management lest his dignity might be hurt. The written statements were filed on 23rd August; issues were framed on 8th September 1933; the final hearing was fixed on 30th October 1933 and though the order relating to the management of the estate devolving on him as heir was published on 10th October 1933, the application to dismiss the suit was made only on 28th July 1934. Notice was issued to the plaintiff and on 20th September 1934 both the suits were dismissed. The learned Judge seems to have ignored some of the most material provisions of the Civil Procedure Code laid down by the Legislature for the proper administration of civil justice. He ignored the provisions of O. 6, Civil P. C., relating to pleadings and amendment of pleadings. He ignored the provisions of O. 8, R. 9, Civil P. C., and the relevant provisions of Orders 14 and 15 relating to

10. Nasarwanji v. Jamshedji Navroji, (1932) 19 A I R Bom 232=138 I C 215=34 Bom L R 876.
11. In the matter of Lakshman Govind Nirgude, (1902) 26 Bom 552=4 Bom L R 276.
12. Irbasappa v. Basangowda, (1920) 7 A I R Bom 67=57 I C 432=44 Bom 595=22 Bom L R 746.
13. Santdas Dayaldas v. Mangatram Bhojraj, (1907) 1 S L R 226.
14. Dero, H. H. Mir Hassanali Khan v. H. H. Mir Abdul Hussein Khan, (1908) 2 S L R 22.
15. Firm of Notandas v. Firm of Pribhdayal, (1921) 8 A I R Sind 38=63 I C 131=15 S L R 61.
16. Hassomal Villaitrai v. Kishinchand Chatomal, (1936) 23 A I R Sind 172=166 I C 365=30 S L R 271.

the trial of preliminary issues, themselves to be raised from the pleadings. The order, Ex. 53, in effect grants amendment of written statement, raises new issues, records findings on the said issues and non-suits the plaintiff all under the specious protection of Sec. 151, Civil P. C. But S. 151, Civil P. C., was not intended to permit the Court to ignore or override the provisions of the Civil Procedure Code, nor was it intended to oust the provisions of the law. It was intended merely to supplement the provisions of the Code and to provide a means of serving justice when the law provided none. It was not intended to override the plain and express enactment of the law.

This is what the learned Judge in his order Ex. 53 did. The learned advocate for the respondent who wished the order of Mr. Gehimal to stand raised no objection to our setting aside the order of Mr. Rahim Bakhsh if we set aside the order of Mr. Gehimal, and he could not in reason upon his own application well object to the case being remanded for the trial of the relevant issues on their merits, for this is what in his application under S. 151, Civil P. C., read with O. 47, Civil P. C., the plaintiff had asked for, but it was the learned advocate for the appellant, who viewing the prospect of issues being raised and tried in a less informal and summary manner was apprehensive and argued that we should not interfere unless we were satisfied that the order of Mr. Rahim Bakhsh was bad on its merits and that the respondents had been prejudiced. We do not wish to deal further with the merits of Mr. Rahim Baksh's order, for we are satisfied that the procedure followed by him in ignoring, as he has done, the provisions of the law was bound to prejudice the plaintiff. The fact that defendant 1 had first made his application under S. 151, Civil P. C., in our opinion provoked the application under the same Section for the opponent. Because of this application he did not proceed with the appeal or revision application he had filed against the order of Mr. Rahim Baksh in this case. Had the pleadings been amended and proper issues been raised, such questions as to whether O. 1, R. 13, Civil P. C., applied would have been argued and considered : *see* 57 Cal 1341[17] at p. 1349. The question of joining the Manager, Incumbered Estates, as a party, *see* S. 39, Incumbered Estates Act, clearly a question which requires consideration, would have been raised and considered, and though a judgment will not be set aside merely because certain issues have not been raised if those issues have been argued and considered, yet it is to be presumed that those issues arise from the pleadings and that where a new defence is raised which cuts at the root of the proceedings and that such a defence does not arise from the pleadings, the pleadings will be amended and proceedings conducted in a fair and proper manner. We do not think in this case the proceedings subsequent to the application under S. 151, Ex. 45 were so conducted. We consider as the papers are before us we have power to set aside the order of Mr. Rahim Baksh as an order deciding a case under S. 115, Civil P. C., and we think it necessary in the interests of justice we should do so. We therefore set aside both the orders dated 15th February 1935 and 20th September 1934 respectively, and remand this case and the connected case for disposal according to law. Costs to be costs in the cause.

R.M./R.K. *Order accordingly.*

17. Adjai Coal Company Ltd. v. Pannalal Ghosh, (1930) 17 A I R P C 113=123 I C 726=57 Cal 1341=57 I A 144 (P C).

A. I. R. 1939 Sind 142

DAVIS J. C. AND TYABJI J.

Premchand Thanwerdas and others — Appellants.

v.

Bibi Satarbegum w/o Ghulam Abbas Shah — Respondent.

Second Appeal No. 30 of 1936, Decided on 14th September 1938, against Judgment of Asst. Judge, Larkana, D/- 4th February 1936.

Sind Incumbered Estates Act (20 of 1896), S. 29— Mortgage decree obtained against person who is zamindar within S. 29 and execution taken out— Judgment-debtor dying during pendency of execution — It is open to his legal representative to raise objection that in view of death of judgment-debtor and provisions of Sec. 29, decree is no longer executable against mortgaged property.

Where, during the pendency of the execution of a mortgage decree obtained against a person, who is a zamindar or jagirdar within the meaning of Sec. 29 and whose estate comes within the provisions of S. 29, the judgment-debtor dies, it is open to his legal representative to raise an objection that owing to the death of the judgment-debtor and the provisions of S. 29 the decree is no longer executable against the mortgaged land. Such an

objection, as it is not raised by the judgment-debtor himself but by his legal representative, is competent. The matter can be decided in the execution proceeding and the legal representative cannot be forced to a separate suit : *A I R 1935 Bom 95, Disting.* [P 143 C 2 ; P 144 C 1]

Kodumal Lekhraj — *for Appellants.*

Fatehchand Assudomal — *for Respondents.*

Davis J. C.—This is an appeal against an order of the Assistant Judge, Larkana, who dismissed an appeal against an order of the Subordinate Judge, Sehwan, refusing execution of a decree against the legal representatives of one Ghulam Kadir Shah who was a zamindar or jagirdar within the meaning of S. 29, Sind Incumbered Estates Act. It appears that the appellants in this case had filed a suit upon a mortgage bond and got a consent decree against certain properties of this Ghulam Kadir Shah on 5th February 1929. They then filed an execution application for the sale of this mortgaged property, and while the application was pending, Ghulam Kadir Shah died and his legal representative, the defendant in this suit, Bibi Satarbegum, was brought on the record, so it was she and not the judgment-debtor himself who raised objection in execution saying that in view of the provisions of Sec. 29, Sind Incumbered Estates Act, Ghulam Kadir Shah having died, this decree could not be executed against what was his property. Now there can be no doubt that Ghulam Kadir Shah's estate comes within the provisions of S. 29, Sind Incumbered Estates Act, which reads as follows:

29. When a jagirdar or zamindar has been restored under Sec. 27, sub-s. (2) to the possession of any property, no mortgage, charge, lease or alienation of such property, or of any part thereof, made or granted by such jagirdar or zamindar shall be valid as to any time beyond his natural life "unless made or granted with the previous sanction of the Commissioner," or in the case of a loan granted under the Land Improvement Loans Act, 1883, or the Agriculturists' Loans Act, 1884, with the previous sanction of the officer granting such loan.

Ghulam Kadir Shah had during his lifetime gone under the protection of the Manager, Incumbered Estates, and the two survey numbers subject to this mortgage were actually under management. It is true that the mortgage was executed on 29th October 1925, and Ghulam Kadir Shah went under management as long as 18th June 1897. But that is of no particular importance for the purpose of this appeal, because the important point is that he did during his lifetime go under management. About July 1917 however, his estate was released from management, and although some objection was taken in the lower Court that this release was not properly proved, there appears ample evidence to justify the finding of fact on this point by the Appellate Judge. As he points out, if the estate had not been released from management this mortgage could not have been executed at all. So, it is clear under the provisions of Sec. 29, Sind Incumbered Estates Act, the mortgage could not extend beyond the lifetime of Ghulam Kadir Shah, and it was after his death that the appellant sought to execute the mortgage decree. His application was met by this effective objection which has in fact resulted in the dismissal of the execution application. But we are asked in appeal to say that this was not a matter that could be decided in execution at all, that the legal representative of Ghulam Kadir Shah, Bibi Satarbegum, should be forced to a separate suit, and the learned advocate for the appellants relies upon a case in 36 Bom L R 1231,[1] but the facts of that case were entirely different. In that case it was not the legal representative of the judgment-debtor or the mortgagor who was disputing the legality of the decree or the execution of the application. It was the judgment-debtor or mortgagor himself, and it is of course obvious that if a party to a suit is to be allowed in execution proceedings to attack the very foundation of the decree passed against him and to which he was a party, as pointed out in that case, there would be no end to litigation. The executing Court would take upon itself to decide the legality of the decree. In that case the learned Judges said :

It is clear that the first point must prevail, and that when once a decree is made against certain property, it no longer is possible in execution for the judgment-debtor to contend that the property decreed against cannot be so treated and executed against on several grounds, the first being that executing Courts cannot inquire into the legality of such a decree, for if they could, there would be no end to litigation, and they would, in fact, be acting as Appellate Courts. It also is clear that matters which could and should have been agitated in the course of the suit cannot be allowed to be raised for the first time in execution.

Now, in this case, it is not the legality of the decree which is being challenged at all. All that is said is that under the provisions of law the decree cannot now be executed against this property, nor can it be said

1. Tatyagouda Ranoji v. Mohodin Sultan, (1935) 22 A I R Bom 95=154 I C 642=36 Bom L R 1231.

that this objection could have been raised in the course of the suit itself, because at that time Ghulam Kadir Shah, the mortgagor, was alive, and the decree could have been executed against him and execution could have been taken against this land. But, if that was not done then, under the provisions of Sec. 29, Sind Incumbered Estates Act, this mortgage could not subsist beyond his own life.

We think therefore that the learned Judge was right in taking into consideration this objection raised not by the judgment-debtor but by the legal representative of the judgment-debtor which made the decree, owing to the death of the judgment-debtor and the provisions of Sec. 29, Sind Incumbered Estates Act, no longer executable against the mortgaged land. We think therefore the appeal must be dismissed with costs, and we order accordingly.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1939 Sind 144

DAVIS J. C. AND TYABJI J.

Sumarmal Shevomal — Applicant.

v.

Sumar Haji — Opponent.

Civil Revn. Appln. No. 6 of 1936, Decided on 16th September 1938, against order of the First Class Sub-Judge, Hyderabad, D/- 19th September 1935.

Promissory Note — Suit on — Surviving coparcener of holder of note cannot sue upon it.

A person who is not the holder of the note but only claims to be the surviving co-parcener of the holder of the note is not entitled to sue on it: *AIR 1935 Bom 343, Foll. ; A I R 1931 Cal 387 and 30 Mad 88, Rel. on ; A I R 1928 Cal 148 and A I R 1934 Mad 529, Disting.* [P 145 C 1]

Dipchand Chandumal — *for Applicant.*

Dingomal Narainsing — *for Opponent.*

Davis J. C.—This is an application in revision against the judgment of the Subordinate Judge, Hyderabad, in his small causes court jurisdiction in which he dismissed the suit of the applicant who as plaintiff sued upon a pronote. The pronote however was not passed to him and he was not the holder of it under Sec. 8, Negotiable Instruments Act, but he claimed as a surviving coparcener of the holder to be entitled to sue. The learned Judge in dismissing the suit referred to A I R 1935 Bom 343.[1] He did not consider that judgment at any length but followed it and, in our opinion, it is, with all respect, a judgment correct in its conclusions and should be followed. In our opinion this case really does not depend upon Hindu law, nor upon Sec. 212, Succession Act, to which the learned advocate for the applicant has referred us because we are dealing with an instrument of commerce, the attributes and the use of which are set out in the Negotiable Instruments Act and we think the value of the pronote as an instrument of commerce would be much diminished and its utility much impaired if a person who is not holder and not even an endorsee should sue upon it or claim the right to pass it from hand to hand. Under Sec. 8, Negotiable Instruments Act, the "holder" of a promissory note means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto. Sec. 32 of the Act makes it obligatory on the maker of the promissory note to pay the amount according to the tenor of the instrument, that is, the holder or the endorsee as the case may be; and under S. 78 of the Act payment should be made to the holder in order to discharge the maker, and in 58 Cal 752[2] the Calcutta High Court held "that no one could maintain a suit on a promissory note except the holder thereof," thus differing from a previous decision of its own in a case in 55 Cal 551,[3] which however was distinguished as being a suit based upon the debt; and in the Madras case in 30 Mad 88,[4] it was pointed out that the words 'in his own name' appearing in Sec. 8 of the Act were inserted by the Legislature to prevent any one from claiming to be the holder of an instrument on the ground that the ostensible holder was merely a benamidar for the true holder. A holder of an instrument is entitled to recover if he is either the payee named in the instrument or the endorsee thereof; if the instrument is payable to a person or bearer, the person to whom it is delivered can recover. An assignee of a promissory note can sue in his own name : *see* 28 Mad 544.[5]

The learned advocate for the applicant directed our attention to the case in 57 Mad 1082,[6] but in that case it is clear the

1. Kamalakant Gopalji v. Madhavji Vaghji, (1935) 22 A I R Bom 343 = 158 I C 145=59 Bom 573=37 Bom L R 405.

2. Harkishore Barua v. Guru Mia, (1931) 18 AIR Cal 387=131 I C 570=58 Cal 752=53 C L J 37=35 C W N 53.

3. Brojo Lal v. Budh Nath Pyarilal & Co., (1928) 15 A I R Cal 148=105 I C 549=55 Cal 551.

4. Subba Narayana Vathiyar v. Ramaswami Aiyar, (1907) 30 Mad 88=16 M L J 508 (F B).

5. Muthar Sahib v. Kadir Sahib, (1905) 28 Mad 544=15 M L J 384.

6. Gopalu Pillai v. N. R. Kothandarama Ayyar, (1934) 21 A I R Mad 529 = 153 I C 916 = 57 Mad 1082=67 M L J 843.

decision was based on the fact that a member of a joint Hindu family could recover the amount of a promissory note taken in the name of the manager of the joint family on the allegations that the debt belonged to the family and on the basis that the suit was on the debt and not on the instrument. Had the opponent in the case now before us chosen to base the suit not on the instrument but on the debt itself, it would have been different. Wadia J. in 59 Bom 573[1] at page 580 says :

The trend of all these decisions seems to be to restrict the liability under a promissory note to the person whose name appears on the face of the instrument. Conversely, it was argued that the meaning of the word "holder" should not be so enlarged as to include in that designation persons other than those who are primarily entitled to sue. It was also pointed out that if a testator bequeathed the amount due under a promissory note to a legatee, the legatee could not maintain an action on the promissory note in his own name even if the executor had obtained probate according to the law, unless the executor had endorsed it in his favour. A co-parcener also who becomes entitled by survivorship to the joint family property of the family to which he belonged cannot sue on a negotiable instrument payable to the deceased or order, for he cannot give a valid and proper discharge to the maker, by reason merely of the operation of the law. It cannot be assumed that because the beneficial interest has survived to him, the legal title must follow suit.

Then he adds :

The coparcener does not represent the estate of the deceased member of the joint family. He gets the property by survivorship in his own right, and not as a representative of the deceased.

We think therefore that as it is clear the suit is not upon a debt but upon a pronote; that it is not by the holder or endorsee but merely by a surviving coparcener; the surviving coparcener as plaintiff could not sue on the pronote and the suit is rightly dismissed. We dismiss the revision application with costs accordingly.

N.S./R.K. *Appeal dismissed.*

*** A. I. R. 1939 Sind 145**

DAVIS J. C. AND WESTON J.

Hollaram Verhomal — Appellant.

v.

Dwarkadas Kodumal and others — Respondents.

First Appeal No. 18 of 1936, Decided on 17th November 1938, from decree of First Class Sub-Judge, Sukkur, in C. S. No. 33 of 1932.

(a) Hindu Law—Joint family business—Mere fact that father carrying on contracting business has performed his ordinary duties of father by feeding, clothing, educating and setting up his sons in business does not raise presumption that he made his business joint family business.

If the contracting business carried on by a father in fact was made by him a joint family business by taking his sons into the business not as servants, nor as partners but as coparceners, then undoubtedly the properties acquired from the profits of that business become joint family property. But, merely because father performed the ordinary duties of a father in that he fed, clothed and educated his sons and set up his grandson in business, it cannot be said that any presumption arises that he made his contracting business a joint family business. It must be shown that son was associated in the contracting business in such a manner as to raise a reasonable inference that father intended and did make the business a joint family business : *A I R 1929 P C 1, Rel. on.* [P 146 C 2; P 147 C 1]

(b) Evidence Act (1872), S. 32 (5) and (7)—Mere statement as to status in will by deceased and not relating to any transaction does not fall either under Cl. (7) or under Cl. (5).

A mere statement in a will as to status made by a person who is dead and not relating to any transaction does not fall within Cl. (7), Sec. 32. Nor can it fall under Cl. (5) which relates only to statements as to relationship by blood, adoption or marriage. [P 147 C 1; P 148 C 1]

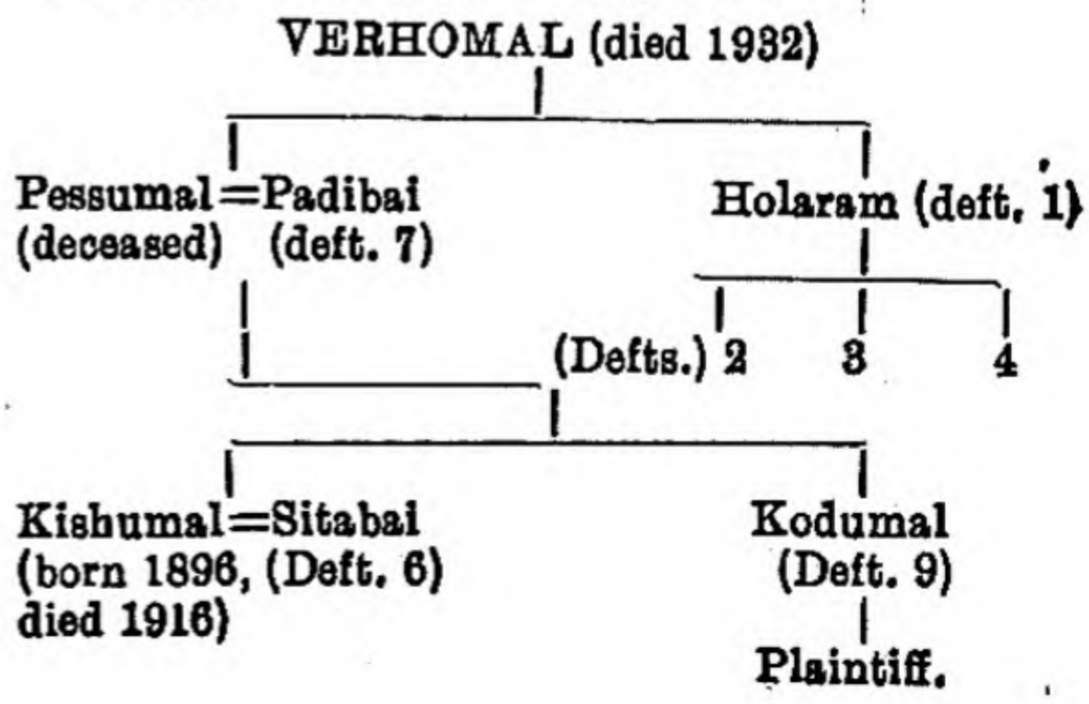
*** (c) Evidence Act (1872), S. 32 (3)—Statement to immediate advantage of maker when he made it—Fact that more remotely it was against his interest does not make it admissible under S. 32 (3).**

The sanctity attaching to a statement by a person who is dead on the ground that it was against his interest to make it must depend upon the measure of that interest, and when it appears that the statement was probably to the immediate interest of the person who made it, the fact that more remotely it was against his interest does not afford much guarantee of its truth. [P 148 C 1, 2]

Kimatrai Bhojraj — *for Appellant.*

Dipchand Chandumal—*for Respondents.*

Weston J.—This is an appeal from the decree passed by the First Class Subordinate Judge, Sukkur, in Civil Suit No. 33 of 1932. Plaintiff in the suit is the minor son of defendant 9, Kodumal, who is the son of Pessumal who died many years before suit. Verhomal, the father of Pessumal, died only in the year 1932 shortly before the suit was filed. The relationship between the parties is shown by the following table :



The suit was for partition of joint family property consisting of five houses and two shops at Sukkur valued at Rs. 31,000, a small share in another shop, and moveable property valued by plaintiff at Rs. 20,440. It is admitted that no ancestral or other property came to the family. According to the plaint the property, partition of which was sought, was acquired mainly by reason of the efforts of Pessumal, grandfather of plaintiff. Para. 3 of the plaint is as follows :

> Pessumal, the father of defendant 9 and grandfather of plaintiff, had started taking up railway and P. W. D. and other contracts in which he associated his father, the said Verhomal, on account of his being the father and head of the family, and both of them carried on the said business of contracts as members of and for the benefit of their joint family, and from their joint earnings and joint family fund substantially aided by the said Pessumal and his son's labours, all the joint family property set forth in Schs A, B and C was acquired by them and by the family as joint family property and for the benefit of their joint family. The acquisition of the various properties whether made before or after the said Pessumal's death and whether made in the name of one or the other member of the family was made by and for the said family.

According to the plaint, Pessumal died 20 to 25 years before suit, that is to say between the years 1907 and 1912. The year of Pessumal's death is disputed, but it is common ground that he was born in the year 1878. Defendant 1, the principal contesting defendant, alleges that Pessumal, his elder brother, died in 1898 and was ill for some time before his death. It may be stated here that the immovable property claimed to be joint family property and set out in schedule 'A' attached to the plaint was all acquired in the name of Verhomal with the exception of one house acquired in the year 1920 in the name of Holaram (defendant 1). The first property, a house, was acquired in 1894. A second house was acquired in 1897. Two shops were acquired in 1900 and the other property at later dates.

Defendant 1 by his written statement denied that any of the suit property was joint family property. He claimed that with the exception of the house acquired by him in 1920 from his own income, the immovable property was acquired by Verhomal from profits earned by him in contracts and was his self-acquired property, that Pessumal was "too young and unfit" to earn when three of the properties were purchased and that the other properties were purchased after the death of Pessumal, that Pessumal took no part in the contracts of Verhomal, that Pessumal died in the year 1898. He also alleged that there had been complete separation in living between Verhomal, defendant 1, and Kodumal father of plaintiff, since the year 1917 and that neither Kodumal nor his brother Kishnomal who died in the year 1916 had anything to do with the contracting business of Verhomal and lastly, that Verhomal made a will in the year 1918 bequeathing his self-acquired property. The trial Court held that Pessumal died in the year 1902, that Pessumal was associated with Verhomal in the contracting business before his death, that the properties were acquired from the profits of the contracting business and as they were acquired from joint earnings they became joint family property and that plaintiff therefore was entitled to a share in the property. A preliminary decree for partition was allowed accordingly. Defendant 1 now appeals against this decree.

The case made out for plaintiff in the trial Court and before us can hardly be said to be that set forth in the plaint where the rise of the family fortunes is attributed to Pessumal who is said to have associated his father Verhomal with him in his business mainly from considerations of filial piety. All that is now urged is that Verhomal took Pessumal into his (Verhomal's) contracting business, that Verhomal made this business, which he had started and built up a joint family business and that therefore Pessumal was entitled to share in that business and in the property purchased from the profits of that business. The learned trial Judge considered that as plaintiff was a minor he should be excused for leading evidence inconsistent with the plaint. But as plaintiff's father Kodumal was alive and appeared and gave evidence in the suit, there does not appear much justification for the learned trial Judge's tolerance. When defendant 1 in his written statement pleaded that Pessumal was too young and unfit to earn when the earlier properties were acquired, the learned trial Judge considered that an assertion in evidence that Pessumal was ill before his death was an afterthought.

Much argument has been advanced before us on the terms "joint family" and "self-acquired" property, but the legal position is really very simple. If the contracting business carried on by Verhomal in fact was made by him a joint family business by taking Pessumal and afterwards Hola-

ram into the business not as servants, nor as partners but as coparceners, then undoubtedly the properties acquired from the profits of that business became joint family property. With the exception of one admission made by Verhomal when recovering a deposit with the Singer Company after the death of Kishnomal in 1916, after Kishnomal had served a few months with that Company, plaintiff has relied upon showing that the business was a joint family business rather than upon showing that the properties acquired were treated as joint family property. As has already been mentioned all the properties save one were acquired in the name of Verhomal and this one was acquired in 1920 in the name of defendant 1. If, however, the contracting business was joint family business, plaintiff must succeed ; for, there is no suggestion that the properties were purchased with funds from any source other than this business.

It was argued in the trial Court and also before us that as admittedly prior to 1917 the family was joint in living, there is a presumption that it was also joint in estate. But we do not think that this is correct. It was laid down by the Privy Council in 31 Bom L R 280[1] that where a member of an undivided Hindu family separately engages in trade he can make separate acquisition of property for his own benefit, and unless it can be shown that the business grew from nucleus of joint family property, or that the earnings were blended with joint family estate, they remain free and separate. It was also held that the burden of proving, in an action by a Hindu for partition of a joint family property, that any particular item of property is joint, primarily rests upon the plaintiff, although circumstances may readily cause the onus to be discharged.

It is true that this was a case of brothers, while the present is a case of father and a son or sons. But we are not able to accept that merely because Verhomal performed the ordinary duties of a father in that he fed, clothed and educated his sons and set up his grandson Kishnomal in business with the Singer Company and Kodumal in a shop, that any presumption arises that he made his contracting business a joint family business. Neither in this Court nor in the trial Court has plaintiff attempted to rely upon defendant 1's association with his father Verhomal as showing that the business was a joint family business. Plaintiff on the case made out by him must show that Pessumal was associated in the contracting business in such a manner as to raise a reasonable inference that Verhomal intended and did make the business a joint family business. The question then is whether there is evidence from which this inference can and should be drawn. In our opinion there is not. The date of Pessumal's death has been the subject of much evidence and discussion. (After discussing certain evidence the judgment proceeded further.) It is very probable that when Pessumal was a boy he was taken by his father to his work. A certificate of Verhomal dated 1892 among those exhibited as Ex. 275 states that he had done petty contracts. It was probably after this that Verhomal became a real contractor. Even in 1900, we find him as a working partner only. But something more than association of a young son on the actual work would be necessary to justify the assumption that Verhomal had during the lifetime of Pessumal admitted him in the business on terms which show that the business was made into a joint family business.

It is true that defendant 1, Holaram worked with his father and this was a circumstance for which plaintiff might have argued that Verhomal made the business a joint family business. It has not been urged before us however that we should consider the position of Holaram. Plaintiff has chosen to rest his case on his assertion that Pessumal was associated with Verhomal. It is fairly clear that the grandsons Kishnomal and Kodumal, father of plaintiff, were not taken into the business. Kishnomal died in 1916 after a few months service with the Singer Machine Company. Kodumal asserts, that he worked on contracts. He says he did so from 1911 to 1913 when according to him he was only 15 years of age. Witness Kishinchand in whose shop Kodumal worked from 1913 states that when he came to them Kodumal was only 12 to 14 years of age. Padibai states that Kodumal was 10 or 12 years old when he worked at the shop but also suggested that Kodumal afterwards left the shop and worked with Holaram on contracts. This is not in accordance with Kodumal's story. It is clear that Kodumal never took any serious part in the business. There is therefore only the fact that Holaram went into the

1. Annamalai Chetty v. Subramanian Chetty, (1929) 16 A I R P C 1=113 I C 897=31 Bom L R 280 (P C).

business to show that it was a joint family business and against this the fact that Kishnomal and Kodumal did not go into the business must be considered. According to defendant 1 he was only a partner with his father and this contention receives some support from the fact that Holaram was described as a partner in the partnership deed (Ex. 266).

Apart from the evidence already described, each side relied upon a document passed by Verhomal. That relied upon by defendant 1 is the will of Verhomal. The trial Judge held that this was inadmissible to prove assertion made in it as to status and there can be no doubt that he was correct in so holding. A mere statement in a will made by a person who is dead and not relating to any transaction does not fall within Cl. (7) of Sec. 32, Evidence Act. Nor can it fall under Cl. (5) which relates only to statements as to relationship by blood, adoption or marriage.

The document relied upon by plaintiff is an application to the District Court, Sukkur, accompanied by an affidavit of Verhomal shortly after the death of Kishnomal. As stated by Padibai, the Singer Company held a deposit of Rs. 100 which had been made by Verhomal on Kishnomal's behalf. The Singer Company demanded a succession certificate before they would hand over the money to Verhomal. Verhomal applied to the District Court for an order that no certificate was necessary as he Kishnomal and Verhomal were joint in estate and in every way. Defendant 1 was not stated to be joint with Verhomal and defendant 1's name does not appear in the application or affidavit. The Court, in view of Verhomal's affidavit, made an order that no certificate was necessary and Verhomal then recovered the deposit. The admission of Verhomal that he was joint in estate with Kishnomal and Kodumal is claimed to be admissible in evidence under S. 32 (3), Evidence Act, as it is a statement of a deceased person against his own interest. But it is fairly clear that at the time it was made the statement was to the immediate advantage of Verhomal, for, the order he obtained saved him from the trouble, delay and expense of obtaining a succession certificate. The sanctity attaching to a statement by a person who is dead on the ground that it was against his interest to make it must depend upon the measure of that interest, and when it appears that the statement was probably to the immediate interest of the person who made it, the fact that more remotely it was against his interest does not afford much guarantee of its truth. It is not the case of plaintiff that defendant 1 had separated from Verhomal while plaintiff's branch of the family remained joint with Verhomal, and even on plaintiff's case the assertions in Exs. 159 and 160, the application and affidavit of Verhomal, are not the whole truth. It does not appear to us that the statements of Verhomal made in these circumstances are of much value.

Lastly, there is some evidence as to a dispute between Verhomal and Kodumal regarding the opening of a door in the house occupied by Kodumal. Into this it is not necessary to enter. There is no evidence on plaintiff's side to show that Verhomal ever treated the house as joint family property. Considering all the evidence we do not think that it establishes that before his death Pessumal was so intimately connected with the contracting business and that a reasonable inference could therefore be made that in Pessumal's life-time Verhomal made the business which he had built up, a joint family business. Further, we do not consider that there is evidence apart from that relating to Pessumal to show that at any time before or after Pessumal's death Verhomal made the business a joint family business. On these conclusions the case of plaintiff must fail and the appeal must be allowed. We set aside the decree of the trial Court and direct that the suit be dismissed. Plaintiff must bear the costs of defendant 1 throughout. We make no further order as to costs.

D.S./R.K. *Appeal allowed.*

A. I. R. 1939 Sind 148

DAVIS J. C. AND WESTON J.

Niaz Muhammad Muhammad Baksh
Applicant

v.

Emperor.

Criminal Revn. Applications Nos. 251, 263 and 264 of 1938, Decided on 6th October 1938.

Criminal P. C. (1898), S. 197—Inspector of police comes within definition of "Subordinate ranks" in amended S. 3 (1), Bombay District Police Act — Being liable to be suspended by Inspector General under S. 29 (3) of the Act, sanction under S. 197, Criminal P. C., is not necessary for his prosecution.

An Inspector of Police comes under the definition of "subordinate ranks" in Sec. 3 (1), Bombay District Police Act. His appointment is to be made by the Inspector-General under Sec. 10 of the Act. His suspension, reduction or removal is governed by the provisions of Sec. 29, which by virtue of Sec. 243, Government of India Act, must control and regulate the conditions of his service, for although S. 29 does not make special reference to the suspension, reduction, or removal, S. 29 (1) when read with S. 29 (3) makes it clear that the word 'punishment' in S. 29 (3) includes power to suspend, reduce or remove. Under Sec. 29 (3) it is the Inspector-General or the Deputy Inspector-General who is to suspend the Inspector. Therefore an Inspector cannot claim that he is removable from office only with the previous sanction of the Local Government and hence sanction under Sec. 197 is not necessary for the prosecution of an Inspector of police. [P 149 C 2 ; P 150 C 1]

P. S. Shahani — *for Applicant.*

Dharamdas Mulchand — *for Opponent (Kabir).*

Partabrai D. Punwani, Advocate-General — *for the Crown.*

Davis J. C.—This is an application by an Inspector of Police, now under suspension, to quash certain proceedings pending against him in the Court of the Sub-Divisional Magistrate, Nara Division, upon three complaints of persons by name Jafar, Kabir and Karimdino. The application for quashing these proceedings was based upon the simple ground that the sanction necessary for the prosecution of the applicant under S. 197, Criminal P. C., had not been obtained, for he was, within the meaning of that Section, a public servant who was not removable from office save by or with the sanction of the Local Government, and the sanction of the Local Government to his prosecution upon no one of these three complaints has been received. But we think that the effect of S. 243, Government of India Act, read with Ss. 10 and 29, Bombay District Police Act, have made the position very clear to the disadvantage of the applicant in this particular case, though we have no doubt the intention of these provisions was to advantage him in other ways. Sec. 241, Government of India Act, deals with recruitment and conditions of the civil services in India and there are in that Section certain saving provisions saving rights enjoyed by the servants of the Crown in India. But, it is clear by reason of S. 243 of the same Act that the provisions of S. 241 and rules made thereunder do not apply to police officers of the subordinate ranks, for they are now governed by a Section of their own which is S. 243, Government of India Act. That Section is as follows :

Notwithstanding anything in the foregoing provisions of this chapter, the conditions of service of the subordinate ranks of the various police forces in India shall be such as may be determined by or under the Acts relating to those forces respectively.

So far then as this Province is concerned, we must turn to the Bombay District Police Act which is now amended by the Government of India (Adaptation of Indian Laws) Order, 1937, which regulates the conditions of service including the appointment and dismissal of subordinate ranks, and by reason of the definition of "subordinate ranks" added by this Order to S. 3, Bombay District Police Act, an Inspector is included within that term. The definition under S. 3 (i) is that "subordinate ranks" means members of the police force below the rank of Deputy Superintendent", and this, therefore, clearly includes the applicant, an Inspector. So far as the appointments of Inspectors are concerned, S. 10, Bombay District Police Act, provides that an Inspector on his appointment shall receive a certificate of his appointment from the Inspector-General, and this Section clearly appears to contemplate the appointment itself is to be made by the Inspector-General; and the provisions relating to the suspension, reduction or dismissal of subordinate ranks are to be found in S. 29, Bombay District Police Act, which, in virtue of S. 243, Government of India Act, must regulate and control the conditions of service of the applicant. S. 29 (1), Bombay District Police Act, reads as follows :

The Governor in Council, or any officer authorized by sub-s. (3) in that behalf, may suspend, reduce or dismiss any member of the subordinate ranks of the police force whom he shall think cruel, perverse, remiss or negligent in the discharge of his duty or unfit for the same, and may fine, to an amount not exceeding one month's pay, any member of the subordinate ranks of the police force who is guilty of any breach of discipline or misconduct which does not require his suspension or dismissal or who, by any act of his own, renders himself unfit for the discharge of his duty.

And the officer mentioned in sub-s. (3) authorized within the meaning of sub-s. (1) is the Inspector General or the Deputy Inspector General. It is true that in sub-s. (3) there is no special reference to suspension, reduction or dismissal. There is general reference to 'punishment.' But reading sub-section (1) and sub-s. (3) together, as we must, it is clear that "punishment" in sub-s. (3) includes the power to suspend, reduce or dismiss specifically referred to in sub-s. (1). Moreover, reading sub-s. (3) to the end, we find that it is the Inspector General or the Deputy Inspector-General

who is to suspend an Inspector who under the provisions of that sub-section has been suspended, pending inquiry by the District Superintendent of Police. We have considered whether the effect of Sce. 241 read with the rules made under S. 96-B, Government of India Act, 1919, was not to save this applicant any rights or privileges which the applicant had before the Act of 1935 came into operation. But the provisions of S. 243 are so clear as to make it plain that it was not intended to bring police officers of the subordinate ranks within the saving provisions of S. 241. By the Act of 1935, the rights and privileges which they might have had under the rules made under S. 96-B of the Act of 1919 are taken away, for S. 243 says: "Notwithstanding anything in the foregoing provisions of this chapter. . . ."

The "foregoing provisions" include S. 241 which does, so far as some other civil services are concerned, save the rights and privileges to which their members were entitled; S. 243 does not; but we have no doubt that S. 243 was so worded with the intention of giving as a whole to police officers greater benefits and protection than were taken away. We think therefore that in view of these provisions to which we have referred, the applicant is an Inspector of Police included within the definition of "subordinate ranks" in amended Sec. 3 (i), Bombay District Police Act, and cannot claim that he is removable from office only with the previous sanction of the Local Government. His plea therefore that S. 197, Criminal P. C., must protect him in these proceedings must fail, and on that ground his application must be rejected. So far as the second ground urged in this application is concerned, that the Magistrate had no power to take cognizance of these three complaints, his duty being only to report to the District Magistrate under S. 203, Criminal P. C., that question, as the Sub-Divisional Magistrate pointed out, has already been decided by this Court on a previous application. Therefore the application must be dismissed.

N.S./R.K. *Application dismissed.*

A. I. R. 1939 Sind 150

DAVIS J. C. AND WESTON J.

District Local Board, Sukkur — Applicant.

v.

Navalrai Topandas — Opponent.

Civil Revn. Appln. No. 81 of 1936, Decided on 14th October 1938.

(a) Bombay Primary Education Act (4 of 1923), Ss. 4 (2) and 8 (2) — Plaintiff serving as teacher in School under local authority — Plaintiff's services transferred under Sec. 8 (2) — Plaintiff made to retire but reinstated and given half pay for part of period of absence — Plaintiff suing for remaining half — Suit lies against District Local Board.

Plaintiff, a teacher in a school under the control and management of local authority, whose services were transferred under S. 8 was made to retire by the District Local Board before he was actually due, but was reinstated after some time and was treated as on leave on full pay for half the period and on half pay for the rest, and he sued the District Board for the remaining half pay :

Held that under sub-s. (2) of Sec. 4, the rights and liabilities of the local authority with respect to the transfers of the teachers were not vested in or transferred to the School Board, and that the Legislature intended that so far as such teachers were concerned the rights as regards them and liabilities towards them should remain with the local authority and not with the School Board, and hence the suit of the plaintiff lay against the local District Board : *A I R 1932 Bom 651, Disting.* [P 151 C 2]

(b) Bombay Primary Education Act (4 of 1923), Sec. 8 — Appeal — Power of appellate authority — Word 'may' in statutory rule does not mean 'shall' but merely confers discretion which when exercised according to statutory rules cannot be interfered with.

Where a teacher in the employ of a District Local Board is given a right of appeal with regard to his suspension, dismissal, etc., and a statutory rule governing such a case provides that in case the appellate authority orders for the reinstatement of such teacher it may grant him full pay for the period during which such teacher was under suspension or dismissal, the word "may" does not mean "shall" but merely confers upon such appellate authority a discretion in the matter, and such statutory discretion if exercised according to statutory rules, cannot be interfered with. [P 152 C 1, 2]

Dipchand Chandumal — *for Applicant.*

Jamiatrai Lal Chand — *for Opponent.*

Davis J. C. — This is an application in revision against an order of the Subordinate Judge of Sukkur sitting in the Court of Small Causes in which he decreed the plaintiff's suit for Rs. 160-2-0. The plaintiff was employed as schoolmaster in a school at Sukkur under the control or management of the local authority and the District Local Board resolved on 1st May 1932 that he and certain other teachers

should be compulsorily retired. The plaintiff however was a teacher whose services were transferred under S. 8, Bombay Primary Education Act of 1923 and therefore under that Section he had a right of appeal to Government. On 30th September 1933, the plaintiff with some other of his fellow teachers in misfortune was reinstated and during this period, namely from May 1932 to September 1933, the District Local Board treated the plaintiff as on leave up to the time that he was due to retire in the ordinary way which in fact was some time between this May and September. For half the period of his enforced absence, the District Local Board decided he should be treated as on leave with full pay and for the other half as on leave with half pay and it is for the difference between full and half pay for the period that he was on half pay that the plaintiff sued the District Local Board. The first point taken by the applicants, the District Local Board, in revision was that the suit should not lie against them but that it should lie against the School Board and reliance was placed in this Court upon the case in 34 Bom L R 1500[1] in which the Court held that a District School Board constituted under S. 3, Cl. (1), Bombay Primary Education Act (Act 4 of 1923) as amended by Act 15 of 1927, is a corporation and is liable to be sued as such ; but learned Judges in that case were not considering Sec. 8 of the Act or the case of a teacher transferred thereunder. It is true that under S. 4, Bombay Primary Education Act, the powers and duties of the local authority in respect of primary education shall be exercised and performed by the School Board, but the words used in sub-s. (2) of S. 4 differ from the words used in sub-s. (2) of S. 8. Sub-s. 2 of S. 8 refers to existing and future rights, liabilities, duties and powers. That Section says :

(1) A local authority shall take over and employ such primary school teachers employed under the Educational Department of the Government as the Government may direct, on the same terms and conditions on which such persons were employed under the said department.

Sub-section (2) says :

The existing and future rights, liabilities, duties and powers of the Government in respect of such teachers shall vest in and be exercised or performed by the local authority.

Provided (a) that any such teacher shall have a right of appeal to the Government against any order of dismissal.

Sub-section (2) of Sec. 4 is as follows :

The School Board shall exercise the powers and perform the duties of the local authority for which it is constituted in respect of primary education and if the local authority is a District Local Board, it shall also exercise the like powers and perform the like duties of the Municipalities in the District which are not local authorities. The School Board shall also enforce the provisions of this Act.

It is argued on behalf of the District Local Board that as under sub-sec. (2), S. 4, the School Board exercises the powers and performs the duties of the local authority, so they have to exercise the powers and perform the duties of the local authority in respect of the plaintiff and his fellow teachers transferred by Government to the employ of the local authority. They have therefore the power and duty to dismiss the plaintiff for incompetence. The words used in sub-s. (2) of S. 8 differ from the words used in sub-s. (2) of Sec. 4. Sub-sec. (2) of Sec. 8 refers to rights, liabilities, duties and powers. Sub-s. 2 of Sec. 4 refers only to duties and powers. Under sub-s. 2 of Sec. 4 the rights and liabilities of the local authority with respect to transfers of teachers are not vested in or transferred to the School Board. So, we think, it is clear the Legislature intended that so far as these teachers are concerned, rights as regards them, and liabilities towards them shall remain with the local authority and not with the School Board. Therefore we think it is clear that in this case the suit would lie against the District Local Board.

The next question taken was that the suit was barred on the ground of limitation; but it is clear from the judgment that in the written statement the period of limitation was taken by the defendants themselves as 8th October 1934, which was the date when the letter was sent to the plaintiff informing him that the District Local Board was not prepared to pay him full pay for half the period of his absence, but the learned Judge has found, and this is a question of fact, that this letter was not sent to the plaintiff on that date and in that month. He gives very good reasons for coming to this conclusion and he finds the period of limitation to be 5th December on which date the plaintiff received his money under protest and at the same time received intimation thereby that his request for full pay was refused. We see therefore no reason to interfere with the finding of the learned Judge on the question of limitation. The third objection taken was that

1. District School Board, Bijapur v. Bhagwan Vasudev, (1932) 19 A I R Bom 651 = 141 I C 874=57 Bom 60=34 Bom L R 1500.

it is not open to the learned Judge to interfere with the statutory discretion conferred upon the Local Board by statutory rules. Under the rule governing this case it is provided as follows :

When the suspension of a Government servant as a penalty for misconduct is upon re-consideration or appeal held to have been unjustifiable or not wholly justifiable, or,

When a Government servant dismissed or suspended pending inquiry into alleged misconduct is upon reconsideration or appeal reinstated the revising or appellate authority may grant to him for the period of his absence from duty

(a) if he is honourably acquitted, full pay to which he would have been entitled if he had not been dismissed or suspended and by an order to be separately recorded, any allowance of which he was in receipt prior to his dismissal or suspension; or,

(b) if otherwise, such proportion of such pay and allowance as the revising or appellate authority may prescribe.

Now the learned Judge has come to the conclusion that the case of the plaintiff falls under Clause (a) and not under Cl. (b) that he was honourably acquitted and therefore it is incumbent upon the District Local Board to give him full pay for the period of his absence. On this it would appear to us the proper comment would be that the rule does not say 'shall' at all but says 'may' and though the learned advocate for opponent contends that the word 'may' must mean 'shall' we think it is clear that the authority framing the statutory rules intended to confer upon the revising or appellate authority a discretion. If the authority framing the rules did not intend to confer upon the revising or appellate authority a discretion, the rule, we think, would have been drafted quite differently and the word 'shall' would occur instead of the word 'may'. Moreover, we cannot find anything upon the record to justify the finding of the learned Judge that the plaintiff was honourably acquitted at all. It appears, he was retired for incompetence and there is nothing to show that in his case the term "honourable acquittal" would have any application. In any case the burden lies upon the plaintiff to prove his case on this as on other points and he has not done so. The learned advocate for the District Local Board contends that while the Court may see that statutory rules are properly followed by the statutory authority, it cannot interfere and decide whether a discretion which is conferred by the rules is justly or unjustly exercised. It can satisfy itself only that a statutory discretion is exercised according to the statutory limitations imposed upon it. There is nothing here to show that this statutory authority did not exercise its statutory discretion according to the statutory rules; on the contrary it appears that the discretion exercised was exercised within the limits of authority conferred by rules made under the statute.

We think therefore on this ground the revision application must succeed and that the judgment of the lower Court must be reversed and the plaintiff's suit dismissed. Costs must follow the event.

S.G./R.K. *Application allowed.*

A. I. R. 1939 Sind 152

LOBO AND WESTON JJ.

Om Radhe

v.

Emperor.

Criminal Revn. Appln. No. 32 of 1939, Decided on 16th February 1939, from order of Addl. Dist. Magistrate, Karachi.

(a) Criminal P. C. (1898), S. 552—Order sufficient to meet purposes of S. 552—Ex parte warrant should not be issued.

Although an order for restoration under S. 552 can be enforced by a warrant if necessary, if an order is ordinarily sufficient to meet the purposes of the Section, the Magistrate should not make an order for the ex parte issue of a warrant.

[P 154 C 1]

(b) Pena Code (1860), S. 363—Girl going to institution with mother's consent—Mother afterwards changing mind — Detention of girl by institution does not amount to kidnapping.

Where a girl originally goes to an institution with the consent of her mother who is her guardian but the mother subsequently changes her mind, the detention of the girl by the institution does not constitute an offence of kidnapping.

[P 154 C 1, 2]

(c) Criminal P. C. (1898), S. 552—Scope and object of S. 552 explained—Detention of girl not specifically alleged to be for unlawful purposes — Guardian's remedy to demand custody is by application under S. 25, Guardians and Wards Act—In absence of allegation that detention is for unlawful purposes, Magistrate should not assume jurisdiction and grant relief under Section 552.

The main purpose of S. 552 is to protect women and girls from detention for immoral purposes, although no doubt the Section would be appropriate to cases where the purposes of the detention are clearly unlawful although not necessarily immoral. The powers given to District Magistrate by Sec. 552 are exceptional powers to be used with caution and only when the conditions of the Section are satisfied. Taking the word 'unlawful' in its ordinary meaning of "contrary to or prohibited by law" in particular cases there cannot be much difficulty in determining whether the purpose is or is not unlawful. Where there is noth-

ing to show that the detention of the girl is for unlawful purposes nor is it suggested by specific allegations how the detention is for illegal purposes but there is only a vague reference to the apprehension that the girl would be spoiled as she has been wrongly detained, the remedy of the guardian to demand custody of the girl is by an application under S. 25, Guardians and Wards Act. The Magistrate cannot assume jurisdiction which in the absence of allegations of unlawful purposes he does not possess under S. 552, Criminal P. C., to give relief, which it is the function of another Court to grant. [P 154 C 2]

Parmanand Kundanmal—*for Applicant.*

Partabrai D. Punwani, Advocate-General — *for the Crown.*

Weston J. — The facts giving rise to this application are as follows: On 18th January 1939, an application purporting to be an application under S. 552, Criminal P. C., was filed in the Court of the Additional District Magistrate, Karachi, by two women Shrimati Bulibai and Shrimati Tillibai. In this application the applicants stated that their respective minor daughters aged 13 and 12 years were induced to come from Hyderabad to Karachi and had been wrongfully detained in an institution known as Om Mandli without the consent and knowledge of their parents. They therefore prayed that the Magistrate would order the girls to be restored to their parents "as there is fear that if the girls remain there they will be spoiled as they have been wrongfully detained for wrongful purposes." On this application the Additional District Magistrate recorded short statements on oath of the two applicants. That of Bulibai is to the effect that her daughter disappeared from Hyderabad. When, on learning that she was at the Om Mandli at Karachi, she came here, her daughter was brought to her by some females of the Om Mandli; but her daughter under instigation was not willing to come to her, and was taken back, and she had to go away. She added that the premises of the Om Mandli had high walls; there was a policeman at the gates and that people were not allowed to enter the institution without the written permission of the authorities. The statement of Tillibai is to a similar effect. The learned Magistrate then passed the following order: "Issue search warrants for the production of the minors Ganga and Hari." The warrant issued purports to be issued under Sec. 100, Criminal P. C., and is as follows:

Whereas information has been laid before me of the commission of the offence under Sec. 363, I. P. C., and it has been made to appear to me that the production of Hari, daughter of Nihalchand, and Ganga, daughter of Tulsidas, is essential to the enquiry now being made (or about to be made) into the said offence;

This is to authorize and require you to search for the said Hari, daughter of Nihalchand, and Ganga, daughter of Tulsidas, in the Om Mandli, Karachi, and if found, to produce the same forthwith before this Court, returning this warrant, with an endorsement certifying what you have done under it immediately upon its execution.

The police in compliance with this warrant produced the two girls before the Magistrate on 19th January 1939 and it appears that when they were produced an application was put in by Mr. Parmanand on behalf of the Om Mandli protesting against the warrant on the grounds that the girls were not detained or kept in confinement; that they were there with the express permission and consent of their parents; that they were not there for any unlawful purpose; that they were not in fact willing to return to their parents, and that the proper remedy for the parents or guardians was to take proceedings under the Guardians and Wards Act. The learned Magistrate however passed the following order:

The minors having been produced are ordered to be kept in the custody of their mothers pending the disposal of the 363 case.

In the present application it is claimed that the procedure adopted by the Additional District Magistrate was without jurisdiction, as it is said there was no information before the Magistrate as to the commission of any offence under S. 363, I. P. C.; that S. 100, Criminal P. C., is applicable only when a person is confined and that confinement is an offence; that S. 552 has no application to the facts of the case; that the Magistrate was wrong in making no inquiry of any kind before issuing the search warrant for the production of the girls, or ordering the girls to go with their mothers, and that the Magistrate in fact has usurped the functions of the District Court under Sec. 25, Guardians and Wards Act. As no reasons have been given by the learned Magistrate for the action he took when issuing the warrant and later when ordering the girls to be handed over to their mothers, it has not been easy for us to determine under which Section of the Criminal Procedure Code he considered he was acting. The application to him, drafted by an advocate, was under S. 552. The warrant issued purports to be under S. 100, Criminal P. C. It seems unlikely that the Magistrate considered the conditions of Sec. 100 to be satisfied, namely that the girls

were wrongfully confined under such circumstances that the confinement amounted to an offence. For, according to the mothers, the girls' desire was to remain with the institution and the mothers had been allowed to see them. As the learned Advocate-General suggests, it seems probable that the Magistrate considered that he was acting under S. 552 and used the form of warrant under S. 100 because it is only this Section which directly provides for a warrant.

Section 552 provides for an order of restoration. No doubt, such an order can be enforced by warrant if necessary, but in many cases an order will meet the purpose; and there is no reason apparent in the present case why the Magistrate considered the ex parte issue of warrant necessary. The Section permits action by a District Magistrate upon a complaint on oath of the unlawful detention for an unlawful purpose of a woman or female child. It may be said that the detention by the Om Mandli institution of the girls against the wishes of their parents was an unlawful detention, although in fact the fathers of the girls do not seem to have appeared in the matter. But it is clear that there was no complaint on oath to the Magistrate that the detention was for an unlawful purpose. In the joint application, the contents of which were sworn to by neither of the women, there is vague reference to apprehension that if the girls remain in the Om Mandli they will be "spoiled" as they have been wrongfully detained for wrongful purposes; but no attempt was made in the statements made on oath to suggest that the girls were detained for any unlawful purpose. We are inclined to think that the suggestion in the application was vague not because the advocate who drafted it was incapable of expressing himself, but because he was unable to specify any purpose which could be considered unlawful. There is reference both in the warrant and in the brief final order to some case under S. 363, I. P. C., but the record shows that the Magistrate did not accept or take cognizance of the application as a complaint under this Section. There is no statement that a complaint under this Section has been made to the police, and we are not able therefore to understand what the Magistrate had in mind. It is fairly obvious that there could be no case under S. 363, I. P. C. It appears that the girls originally went to the institution with their mothers' consent, and the mothers are the only guardians who have appeared. If the mothers later changed their minds, detention of the girls by the institution would not constitute an offence of kidnapping.

The learned Advocate-General has suggested that "unlawful" has a meaning even wider than that given to "illegal" by S. 43, I. P. C. We are inclined to think, as held in 16 Cal 487,[1] that the main purpose of Sec. 552, Criminal P. C., is to protect women and girls from detention for immoral purposes, although no doubt the Section would be appropriate to cases where the purpose of the detention was clearly unlawful although not necessarily immoral. Taking the word 'unlawful' in its ordinary meaning of "contrary to or prohibited by law" we do not think that in particular cases there can be much difficulty in determining whether the purpose is or is not unlawful. And in the present case there is nothing to show that the Om Mandli institution has any unlawful purpose. In these matters the Legislature by S. 25, Guardians and Wards Act, has provided full powers for orders to be made for the custody of minors. The powers given to District Magistrate by Sec. 552, Criminal P. C., are exceptional powers to be used with caution and only when the conditions of the Section are satisfied. It may be that in the present case the learned Magistrate considered that the course he followed was that which would be followed by the District Court upon an application made by the two women under S. 25, Guardians and Wards Act But this was no reason for him to assume a jurisdiction which in the absence of allegations of unlawful purpose, he did not possess, and he should not have strained S. 552, Criminal P C., no doubt with the best of intentions, to give a relief which it was the function of another Court to grant. Although we hold that the learned Magistrate was wrong in the order which he passed, we do not propose to pass any orders in respect to these two girls. We should not be inclined to do so in any case, and as the parents have not been served with notices of this application, it is clearly impossible for us to pass any orders against their interests. We think therefore that it is enough for us to dismiss the present application but to invite the attention of the learned Magistrate to the remarks which we have made.

N.S./R.K. *Application dismissed.*

1. Abraham v. Mahtabo, (1889) 16 Cal 487.

A. I. R. 1939 Sind 155

DAVIS J. C. AND WESTON J.

Sherkhan Dhani Baksh and others
Applicants

v.

Emperor.

Criminal Revn. Appln. No. 192 of 1938, Decided on 6th October 1938.

(a) Sind Encumbered Estates Act (20 of 1896), S. 10—Power of arrest—Manager ordering arrest must mention Section under which order is made and survey numbers in respect of which sums are due.

Under S. 10, the manager has power to arrest during the management of the property, but it is incumbent upon the manager, when he purports to exercise the powers of arrest conferred by the Act, to mention in his order the Section of the Act under which he passes his order and the survey numbers in respect of which he proposes to recover by his power of arrest sums due. [P 155 C 2]

(b) Criminal P. C. (1898), S. 491—Order of arrest passed under Sind Encumbered Estates Act—High Court cannot interfere.

When a manager of an estate orders the arrest of a person in exercise of the jurisdiction conferred upon him under S. 10, Sind Incumbered Estates Act, the High Court cannot interfere under S. 491, Criminal P. C., with the order of the manager: *A I R 1927 Sind 123, Foll.* [P 155 C 2]

(c) Sind Encumbered Estates Act (20 of 1896), S. 10 — General principle in S. 4 of Repealing Act of 1938 and S. 6-A, General Clauses Act, stated — S. 10, Sind Encumbered Estates Act, as it stands now relates to rents, profits and other sums in respect of property under management.

The general principle embodied in S. 4 of Repealing Act of 1938 and in Sec. 6-A, General Clauses Act, 1897, is that textual alterations remained fixed in the parent Act after the Amending Act came into force, though the Amending Act be subsequently repealed. Therefore S. 10, Sind Encumbered Estates Act, even now relates to "rents, profits and other sums in respect of the property under management" as amended by the Repealing Act 2 of 1906 though that Act itself was afterwards repealed by the Repealing Act 1 of 1938. [P 156 C 1]

(d) Sind Encumbered Estates Act (20 of 1896), Ss. 8, 10 and 12 — Unjustified claim to property does not oust manager's power under S. 10 — Order of management under Sec. 8 implies inquiry as to property and decision thereon—Property shown in revenue records as belonging to zamindar also included in notification under Sec. 12 — Third person disputing zamindar's title to property — Presumption under S. 135-J, Land Revenue Code—Property can be regarded as property in management under S. 10.

Assertion of an unjustified claim to property made by a third person is not sufficient to oust the Manager's power of management under S. 10. Under S. 8, the order of management extends inter alia, to all the immovable property, including any interest in joint immovable property of which the debtor is possessed or entitled, and quite clearly such order necessarily implies some inquiry as to what the property is and some decision upon that inquiry. Immovable property does not describe or name itself or itself proclaim the identity of its owner, and where a certain share in the lands is shown as the property of the zamindar in the Record of Rights published by the Manager under S. 12, the manager can rely upon the presumption raised by S. 135-J of the Land Revenue Code and the share can therefore be regarded as property of which he is in management under S. 10 in spite of a third person disputing the title of the zamindar to that share: *A I R 1926 Sind 279 and A I R 1927 Sind 225, Disting.* [P 156 C 2]

Rewachand V. Thadhani — *for Applicants.*

Partabrai D. Punwani, Advocate-General — *for the Crown.*

Davis J. C. — This is an application under S. 491, Criminal P. C., for an order that the seven applicants alleged to have been unlawfully arrested and detained by the Manager of Encumbered Estates be brought before this Court and set at liberty. We have now however only to deal with the case of the principal khatedar, Dhani Baksh Sherkhan, as the other applicants have been already released by the Manager himself. The order of the Manager does not bear, as it should, the Section of the Act under which it is made, nor does it mention the survey numbers in deh petoro in respect of which the Manager claims by means of arrest to enforce the payment of sums due, and we think it is incumbent upon the Manager, when he purports to exercise the powers of arrest conferred by the Act, to mention in his order the Section of the Act under which he passes his order and the survey numbers in respect of which he proposes to recover, by his power of arrest, sums due. We think this much of precision is due not only to those to be arrested but to the Court which may be called upon to adjudicate upon the validity of his order. But these questions of detail apart, we think the Manager had power under S. 10, Sind Encumbered Estates Act, 1896, to arrest the applicant, and it is not for us to interfere with a jurisdiction conferred on him by the Legislature: 22 S L R 24.[1] The zamindar under protection is one Fateh Muhammad and the Manager claims on his behalf an undivided two annas share in certain survey numbers in deh petoro, taluka Johi, of which the applicants as co-owners claim exclusive possession and from which they take the produce, and

1. Ghanshamdas v. Manager, Encumbered Estates, (1927) 14 A I R Sind 123 = 99 I C 930=28 Cr L J 194 = 22 S L R 24.

the Manager claims from them on behalf of Fateh Muhammad a two annas share in this produce which being in arrears amounted in 1936-37 to Rs. 1171-6-0, the sum shown as due in the order of arrest.

On behalf of the applicant two points were raised, firstly that by India Act 1 of 1938, Act 2 of 1906 amending the Sind Encumbered Estates Act was repealed, and that S. 10 of the Act of 1896 in consequence now relates only to rents and profits and not to "rent, profits and other sums", while the learned Advocate-General contended that the effect of the repeal of the Amending Act 2 of 1906 was merely to revive the Section as it stood before it was amended, so that it relates to rents and profits. But we think both arguments are wrong, and that the repeal of Act 2 of 1906 amending the principal Act leaves the principal Act as it now stands amended, so that it relates to "all rents, profits and other sums in respect of property under management." The amendments by Act 2 of 1906 now repealed were merely technical amendments which remain fixed in the parent Act from the time when the amending Act came into force even though it is subsequently repealed. S. 4 of Act 1 of 1938 "The Repealing Act of 1938" itself makes this clear. It is as follows:

4. *Effect of repeal of amending enactment.* — Where this Act repeals any enactment by which the text of any other enactment was amended by the express omission, insertion or substitution of any matter, the repeal shall not affect the continuance of any such amendment made by the enactment so repealed and in operation at the commencement of this Act.

The general principle embodied in this Section and in S. 6-A, General Clauses Act, 1897, is that textual alterations remained fixed in the parent Act after the amending Act has come into force, though the amending Act be subsequently repealed. The first point taken by the applicant fails. The second point taken is that the manager has the management only over property to which his title is undisputed. It is urged that the applicant disputes the title of the zamindar to a two anna share in the survey number in deh petoro, so the manager must go to the Civil Court and get a decision on his title, and reliance is placed upon a ruling of this Court in 20 S L R 183.[2] But the Judges in that case did not discuss or consider S. 10 of the Act, and that decision, in our opinion, is only a binding decision on the question of the right of a claimant to property claimed by the manager to have resort to the Civil Courts; on other questions the remarks are obiter, and we find it difficult to accept the argument that a person has only to assert a claim to property, however unjustified that claim may be, to oust the manager's power of management under S. 10, Sind Incumbered Estates Act. Under S. 8, the order of management extends, inter alia, to all the immovable property, including any interest in joint immovable property of which the debtor is possessed or entitled, and quite clearly such order necessarily implies some inquiry as to what the property is and some decision upon that inquiry. Immovable property does not describe or name itself or itself proclaim the identity of its owner, and where, as in this case, we have the two annas share in the lands shown as the property of the zamindar in the Record of Rights as long ago as 1914, and this property is specifically included in the Notification dated 29th October 1925 published by the manager under S. 12 of the Act in the "Sind Official Gazette" of 12th November 1925, Part 1, we see no reason why the manager should not rely upon the presumption raised by S. 135-J, Land Revenue Code, and this two annas share should not be held to be property of which he is in management under S. 10. S. 135-J is as follows:

135-J. An entry in the Record of Rights and a certified entry in the register of mutations shall be presumed to be true until the contrary is proved or a new entry is lawfully substituted therefor.

We leave for decision on another occasion the case which would arise where there is no entry in the Record of Rights, merely a notification under S. 12, Sind Incumbered Estates Act. Further, in this case, it is clear from the affidavit on record that the manager actually took charge of this two annas share as part of the estate of the zamindar; for five years up to 1930-31 he leased it to the zamindar himself; in the years 1932-33, and 1933-34, he leased it to one Sultan, son of Mahomed Hashim, and was paid lease money; for three years after the two annas share was managed departmentally, and though the applicants recovered the crops, they paid to the manager a sum of Rs. 161-13-0 in 1934-35. We do not think the effect of the ruling in 20 S L R 183[2] is to deprive the manager of the right of the management of this property or prevent him from recovering by

2. Birokhan v. Malik Salukhan, (1926) 13 A I R Sind 279=96 I C 1049=20 S L R 183.

means of arrest profits and other sums due in respect therefor. The case in 22 S L R 82[3] is not much in point. This application must therefore fail and the applicant Dhani Baksh must enter into a bond to present himself before the gaoler of the civil gaol at Sukkur within two days. Order accordingly.

N.S./R.K. *Order accordingly.*

3. Shewakram Gurdinomal v. Ghulamshah, (1927) 14 A I R Sind 225=103 I C 440=22 S L R 82.

A. I. R. 1939 Sind 157

DAVIS J. C. AND WESTON J.

Smt. Durgadevi d/o Lakhmichand and another — Appellants.

v.

Kishenlal Maniram and another — Respondents.

Second Appeal No. 60 of 1936, Decided on 14th November 1938, against decree of Dist. Judge, Sukkur, D/- 23rd September 1936.

(a) Hindu Law — Marriage — Doctrine of factum valet—Marriage of minor girl performed by performing all ceremonies necessary to constitute valid marriage—Fact that marriage was performed without consent of paternal uncle and in defiance of injunction of Court would not invalidate marriage — Doctrine of factum valet applies.

In Hindu law the consent of the paternal relations is not an essential condition of a valid marriage and not being an essential condition, a marriage in which this consent is not given is not thereby invalidated. Hence where all the ceremonies necessary under Hindu law to constitute a valid marriage were performed, the fact that the girl was given in marriage when a child without the consent of the paternal uncle and in defiance of an injunction of the Court passed in proceedings pending under the Guardians and Wards Act, would not invalidate the marriage and the doctrine of *factum valet* would apply : *22 Bom 509, Rel. on; Case law reviewed.* [P 157 C 2; P 158 C 1]

(b) Hindu Law — Marriage — Restitution of conjugal rights — Its grant is matter of judicial discretion — Declaration that marriage is valid is not necessarily followed by decree for restitution.

The English law as to the marriage of minors is widely different from the Hindu law but a decree for the restitution of conjugal rights is an English remedy enforced through Courts based upon the Eastern pattern. It is an equitable remedy and its grant is a matter of judicial discretion. It therefore does not necessarily follow that a declaration, that a marriage is valid, must necessarily be followed by a decree for restitution. [P 160 C 1]

Dipchand Chandumal—*for Appellants.*

Srikrishindas H. Lulla — *for Respondents.*

Davis J. C. — This is an appeal against a judgment of the District Judge of Sukkur dismissing an appeal against a judgment of the Subordinate Judge at Shikarpur decreeing the plaintiff's suit for restitution of conjugal rights. The plaintiff is the husband and the defendants are Shrimati Durgadevi, the alleged wife, her paternal uncle Shankerlal and the mother Shrimati Ramibai. In the lower Courts the factum of the marriage was denied but in appeal the advocate for the appellants, the alleged wife and her uncle, does not dispute the factum of the marriage; he admits that all the ceremonies necessary under Hindu law to constitute a valid marriage were performed, but his case is that as the girl was given in marriage without the consent of the paternal uncle and in defiance of an injunction of the Court passed in proceedings pending under the Guardians and Wards Act, the doctrine of *factum valet* does not apply, and the girl aged sixteen should not be forced into a marriage with the plaintiff, a man of some thirty years of age, performed when she was a child of seven.

But however much we may disapprove of a system of child marriage, now condemned by the Legislature itself, we are here to declare and not to enact laws. The appellant Shrimati Durgadevi as a Hindu is governed by her personal law, and we are by no means satisfied that in this particular case it is not to her benefit that this should be so, for, it appears to us from the record that when the mother in haste procured the marriage of the appellant, then a child, against the orders of the Court and the wishes of her paternal uncle, she acted in the best interests of the child, for the uncle wished to dispose the girl in marriage for his own benefit and advantage. He had already profited by the marriage of his brother's elder daughter and obtained a girl in marriage for himself; this girl had died, and it appears that he hoped by arranging the marriage of the younger daughter Durgadevi, to obtain another wife. Moreover, it appears that after the marriage the guardianship proceedings were compromised and by consent Durgadevi was allowed to live with her uncle, the appellant Shankerlal. He apparently then accepted the marriage as an accomplished fact.

Now so far as this doctrine of *factum valet* is concerned, there is ample authority to support the finding of the lower Courts

that a marriage in Hindu law, otherwise valid, is not invalidated because the girl is not given in marriage by the paternal relations or is given in marriage even in defiance of an injunction of the Court. The consent of the paternal relations is not an essential condition of a valid marriage and not being an essential condition, a marriage in which this consent is not given is not thereby invalidated, and there is direct authority to this effect in a case such as the present where the rival claimants are the mother and the paternal uncle : 22 Bom 509.[1]

It is true that in this Bombay case[1] the mother was appointed guardian by the Court, but this makes no difference to the decision. Indeed, the disobedience to the order of the Court was even more serious in that case than in this case before us, for there the statutory guardian had been ordered not to give the girl in marriage and she did so. In this case the mother had not been appointed guardian and was the natural guardian only. Ranade J., after stating that the Court came to the conclusion that the marriage was performed, said (page 512) :

Bai Diwali was no doubt guilty of disobeying the order of the District Judge; but neither that circumstance by itself nor the disregard of the preferable claim of the male relations would invalidate the marriage. Even where the dispute was between husband and wife, the doctrine of factum valet was allowed to prevail;

and reference is made to the judgment of Sargent C. J. in 11 Bom 247.[2]

Later, in 22 Bom 812,[3] in which the father sued for the custody of his infant daughter and for a declaration that the marriage performed by the mother without his consent was void, Ranade J. said :

This doctrine of *quod fieri non debuit factum valet*, or its Sanskrit equivalent, that a thing cannot be made otherwise by "a hundred texts," has been frequently referred to in our reports in connexion with questions relating to marriage, adoption, alienation and maintenance of widows : 11 Bom 247,[2] 12 Bom H C R 364[4] and 3 Bom 273.[5] The general principles underlying the maxim were laid down in 12 Bom H C R 365[4] and re-affirmed in 3 Bom 273[5] by Sir M. Westropp,

and

most of these cases were reviewed and considered by this Court in 11 Bom 247[2] and by the Madras High Court in 14 Mad 316.[6] In the first of these cases the operation of the maxim *factum valet* was considered, and Sir C. Sargent observed that upon a true construction of the texts the giving of the girl in marriage was not a right but a duty to be discharged, and in the absence of express words invalidating the gift in marriage, the consent of the person upon whom this duty devolves is not of the essence of the marriage, and if it is not, the maxim applies. It is true the learned Chief Justice expressed no opinion as to how far the presence of fraud would invalidate such a marriage, but there, as in the present case, there was no reason for interference, on the ground of fraud the existence of which the lower Court of appeal has expressly negatived in the present case.

The appellant's pleader contended that there was a constructive, if not a direct fraud, upon the father's authority. As the District Court did not grant the injunction which the husband had prayed against his wife and, moreover, as the District Judge has found expressly that the marriage was not an improper one, there is not much room for presuming constructive fraud. Fraud and force, such as was alleged in 6 Beng L R 243,[7] must vitiate any transaction however solemnly celebrated by the observance of the usual ceremonies, and a suit to set aside the marriage will lie. But, in the absence of these elements, the maxim of factum valet will govern, as the texts only refer to the greater or less eligibility of the relations who can claim the right to make the choice and perform the ceremony. The custom of the caste is not shown to be adverse to the celebration of the girl's marriage of 3½ to a boy of 7, and no fraud can be presumed from the fact of this early celebration. The circumstance that remarriage is permitted by the rules of the caste is irrelevant in the decision of the question of the validity of the marriage.

In 37 Bom 18,[8] Sir Narayan Chandavarkar dealt with the rights of the mother thus (page 23) :

The right claimed under the Hindu law arises out of a text of Yajnyavalkya adopted by Vijnaneshwara in the Mitakshara and by Nilkanth, author of the Vyavahara Mayukha, in his Samskara Mayukha. According to that text, the persons entitled to give a girl in marriage are, 'the father, paternal grandfather, brother, kinsman (sakulya), and mother' in the order stated. It follows from this text that the paternal uncle of the girl (who in this case is the respondent) had the right to give her in marriage before the mother. But to entitle the respondent to damages from the mother for having given the girl in marriage so as to exclude his right, regard must be had to the nature of the right itself and it must be established that the right is absolute and exclusive. The text only deals with the bare right to give a girl in marriage. Under the Hindu law, when her father dies, leaving her mother, the mother becomes the legal guardian of the girl. The text cited above does not deprive the mother of this right of guardian-

1. Bai Diwali v. Moti Karson, (1898) 22 Bom 509.
2. Khushalchand Lalchand v. Bai Mani, (1887) 11 Bom 247.
3. Mulchand Kuber v. Bhudhia, (1898) 22 Bom 812.
4. Lakshmappa v. Ramava, (1875) 12 Bom H C R 364.
5. Gopal v. Hanmant, (1878) 3 Bom 273.
6. Venkatacharyulu v. Rangacharyulu, (1891) 14 Mad 316=1 M L J 85.
7. Aunjona Dasi v. Prahlad Chandra Ghose, (1870) 14 W R 132=6 Beng L R 243.
8. Bai Ramkore v. Jamnadas Mulchand, (1913) 37 Bom 18=17 I C 95=14 Bom L R 766.

ship but only specifies who can make a gift of her in marriage. The paternal male relations of the girl are placed above the mother for the purposes of that gift, because women are dependent and, moreover, they cannot perform certain ceremonies essential to or usual in a marriage. Even when, in default of paternal male relations, the mother makes the gift, she has to employ some one of her caste to act on her behalf at the marriage and perform the ceremony of giving which is called Kanyadana. This is well explained in the Dharma Sindhu : " Where the mother has to give her daughter in marriage, she herself must perform the ceremony of nandi shradda. All other ceremonies she must get performed by a Brahmin" : *see* also to the same effect Sir Gooroodass Banerjee's Hindu Law of Marriage and Stridhan, Edn. 2, p. 45. The text of Yajnyavalkya does not say that the mother is to have no voice at all and may be altogether set at naught where there are paternal male relations of the girl, competent to give her in marriage. Had that been the intention of the Hindu law, there would have been express texts to that effect. We cannot infer such intention, by mere implication, because that would lead to very undesirable results, especially in the present state of Hindu society. In that case, any distant male relation of the girl on the father's side might give her in marriage, whether he be interested in her and whether he be really anxious for her welfare or not, without consulting, and having regard to the wishes of the person most interested, that is the mother, who is the natural guardian of the girl. In the absence of the authority of express texts binding on us, the Hindu lawgivers should not be held to have contemplated the total exclusion of the mother from her right as guardian to be consulted as to the choice of a husband for her daughter. This view is substantially supported by the judgment of the Madras High Court in 4 Mad H C R 339,[9] and it is a conclusion which fits in with the principle of the judgment of this Court in 12 Bom 480.[10] Any other conclusion would be highly prejudicial to the best interests of Hindu family life and to the welfare of minor girls, whose marriages are made in many cases the source of profit by greedy relations.

In the Madras case in 14 Mad 316,[6] dealing with marriage as a sacrament, the Court after discussing the essential ceremonies of the ritual of Brahmin marriage, said (page 320) :

It must be remembered that the ritual is prescribed for a minor or a child, for, according to Hindu law and custom, a Brahmin girl must be married before she attains her maturity, and therefore at a time when she is not in a position to choose a suitable husband for herself. Two principles therefore form together the groundwork of the marriage ceremony (1) a natural or legal guardian acting in the interest of the girl with due regard to her welfare should choose a suitable husband for her, and (2) the choice should be consecrated by the marriage rite and thereby unalterably fixed.

Hence, two propositions of law may be taken to be established beyond controversy, viz. (1) where there is a gift by a legal guardian and the marriage rite is duly solemnized, the marriage is irrevocable, and (2) where the girl is abducted by fraud or force and married and there is no gift either by a natural or legal guardian there is a fraud upon the policy of the religious ceremony and there is therefore no valid religious ceremony. In support of the second proposition, we may refer to the dictum of Norman J. in 6 Beng L R 243.[7] In that case the plaintiff, the mother of the girl, sought to set aside her marriage alleging that when the girl visited her sister and was staying with her, the defendant, the sister's husband forcibly carried the girl away from his house and married her without the mother's consent and without gift from anyone. It may also be suggested in support of the dictum that what the public law stigmatizes as a crime cannot be accepted as the source of a legal relation. The third proposition of law which is material to the case before us is that when the mother of the girl acting as her natural guardian in view to her welfare and without fraud or force gives away the girl in marriage and the marriage rite is duly solemnized, the marriage is not to be set aside. This view is supported by authority and is sound in principle.

The learned Judges refer to "a fraud upon the policy of the religious ceremony," and this is open to the argument that the welfare of the minor is not material. It is the fraud upon the religious ceremony and not upon the child herself which counts; it is not the welfare of the child which matters, but in this same judgment the Judges refer to a mother acting with a view to the welfare of the child, and it is obvious that when force is referred to as something which vitiates a marriage, the force is against the minor, and there appears no authority for the argument that if it be proved that a mother acting as natural guardian and not in the interest of the minor but against the interest of a minor procured the marriage of the child, the doctrine of factum valet would apply, if, for instance, the mother married the child to the son of a prostitute knowing the child would be brought up to prostitution. The use of the term "force or fraud" is common to all judgments dealing with this question, yet its application in practice still affords much room for argument. Is the fraud upon the religious ceremony as in 14 Mad 316[6] at p. 320, or is the fraud upon the minor herself or is the fraud upon the father's rights ?

In 11 Bom 247[2] the Court left undecided, as unnecessary to be decided, the question whether the Civil Court would set aside a marriage if a clear case was established of fraud by both parties intermarrying, on the rights of the father as guardian of his daughter for the purpose of marriage. In 22 Bom 812[3] the question of construc-

9. Namasevayam Pillay v. Annammai Ummal, (1869) 4 Mad H C R 339.
10. Shridhar v. Hiralal Vithal, (1888) 12 Bom 480.

tive fraud upon the father's rights was discussed, but was not necessary to be decided. There is also in this case before us no force or fraud, indeed, neither force nor fraud, the lower Courts have found, were pleaded or proved. In 53 All 815[11] the Court limited its decision, though the judgment is a very long one to the question of the effect of the absence of consent of father, paternal uncle or any other preferential male relation and did not express its opinion on the question of force and fraud. It is therefore clear to us that we cannot declare this marriage void on the ground of force or fraud, and that the plaintiff is entitled to the declaration he prays for. It is this declaration the appellant really wishes to get set aside, because so long as her marriage is binding and in force, she cannot remarry. We can also see no reason why the plaintiff should be refused a decree for restitution of conjugal rights.

It is to be noted that in 53 All 815[11] the decree for restitution of conjugal rights was refused, and we think, subordinate Courts in dealing with cases of this nature, should bear in mind and give due consideration to the anomaly that may arise from enforcing Eastern rights by Western remedies. The English law as to the marriage of minors is widely different from the Hindu law as pointed out by Sir Charles Sargent in 11 Bom 247,[2] but a decree for the restitution of conjugal rights is an English remedy enforced through Courts based upon the Eastern pattern. It is an equitable remedy and its grant is a matter of judicial discretion. It therefore does not necessarily follow that a declaration, that a marriage is valid, must necessarily be followed by a decree for restitution. The finding of the Subordinate Judge on Issue 5, that as the husband is the lawful guardian of his minor wife, he is entitled to require her to live with him however young, is not, in our opinion, a correct finding, and in no way to be commended or followed. We see however no reason to refuse the plaintiff the decree for restitution of conjugal rights for which he asks, the more so that under O. 21, R. 32, Civil P. C., as now amended, the decree cannot be enforced by detention of the wife in prison. The result is, the appeal is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

11. Ram Harakh v. Jagarnath, (1932) 19 A I R All 5=133 I C 289=53 All 815=1931 A L J 816.

A. I. R. 1939 Sind 160

DAVIS J. C. AND WESTON J.

Dherumal Namomal — Appellant.

v.

Tejumal Jhamandas and others — Respondents.

Second appeal No. 38 of 1935, Decided on 19th July 1938, against order of Asst. Judge, Larkana, D/- 25th May 1935.

Dekkhan Agriculturists' Relief Act (17 of 1879), S. 21 — Plea of being agriculturist can be raised in execution in spite of provision in decree that judgment-debtor would not raise such plea.

It is open to an agriculturist to plead his status in execution. Immunity from arrest accrues from his status at the time arrest is sought and even if he was not an agriculturist at the time of the decree, he may very well be an agriculturist at the time the decree is sought to be executed. Although a decree cannot be modified at the instance of the judgment-debtor who consented to it, it cannot be executed in a mode contemplated by it, when that mode is contrary to law. [P 161 C 1]

A compromise in terms of which a decree was passed stated that the defendant was not an agriculturist, nor would he raise the plea of being an agriculturist in any execution proceedings of the decree. Decree-holder applied for execution of the decree by arrest of the judgment-debtor, who thereupon pleaded that he was an agriculturist :

Held that in spite of the provisions contained in the decree it was open to the judgment-debtor to raise the plea of being agriculturist in execution proceedings : *A I R 1935 Bom 433, Rel. on.* [P 161 C 1]

Manghanmal Bhojraj—*for Appellants.*

Weston J. — This second appeal raises only one point. The appellant was one of the judgment-debtors in Suit No. 3330 of 1932 in the Court of the Joint Sub-Judge, Larkana. The decree was passed on a compromise which contained the following passage :

Defendants are not agriculturists nor will they raise a plea of being agriculturists in any execution proceedings of this decree; and if they do so it will be deemed to be invalid.

It appears that the execution was sought by arrest of the appellant, who is one of the three judgment-debtors in this suit. He pleaded agricultural status and consequent immunity from arrest. The lower Court held that in view of the provision in the decree recited above, it was not now open to him to raise this plea of agricultural status. In appeal this order was confirmed by the District Court, Larkana, and it now comes in second appeal. The reasoning followed by the learned Assistant Judge is that the executing Court has no power to go behind the decree, or in other words that it cannot entertain any objection as to the

legality or correctness of the decree. In this statement the learned Assistant Judge is correct, but he has not considered two aspects of the matters before him. In the first place it is open to an agriculturist to plead his status in execution. Immunity from arrest accrues from his status at the time arrest is sought and even if he was not an agriculturist at the time of the decree, he may very well be an agriculturist at the time the decree is sought to be executed. In the second place although the decree cannot be modified at the instance of the judgment-debtor who consented to it it is another thing to say that it must be executed in a mode contemplated by it, whether that mode is in accordance with or is contrary to law. The law is definite that an agriculturist is immune from arrest. The point also is covered by authority in 37 Bom L R 778[1] decided after the order of the Subordinate Judge was passed in the matter now before us. In this Bombay case the same point arose and the conclusion is summarized in the following paragraph :

> This being so, there is ample authority for holding that its mandatory provisions, such as the one contained in S. 21, cannot be whittled away by any agreement between a proved agriculturist and his creditor; for the effect of holding otherwise would be to allow what the statute forbids on grounds of public policy—the arrest of an agriculturist judgment-debtor in execution of a money decree, and to afford an easy means of evading, what was intended to be enforced, in suits between parties like those in the present case.

With this view of the matter we are in agreement and we hold therefore that the lower Courts were wrong in deciding that it is not open to the present appellant to raise in execution this plea of agricultural status. We must allow the appeal and remand the case to the original Court in order that parties may have an opportunity of leading evidence and obtaining the decision upon this plea raised. The decree-holders have not appeared before us and we order that costs of the appellant shall be costs in the cause.

N.S./R.K. *Appeal allowed.*

1. Shankerlal Bansilal v. Raghunathdas Anandram (1935) 22 A I R Bom 433=160 I C 38=37 Bom L R 778.

*** * A. I. R. 1939 Sind 161**

FULL BENCH

DAVIS J. C., LOBO AND WESTON JJ.

Seoomal Khemchand and others — Appellants.

v.

Sh. Lahnibai w/o Khiomal and another — Respondents.

First Appeal No. 36 of 1935, Decided on 5th December 1938. Reference by Davis J. C. and Weston J. D/. 28.8.1938.

(a) Civil P. C. (1908), O. 21, R. 50 (2)—Application under O. 21, R. 50 (2) is application in execution of decree.

An application for leave to execute a decree against a partner under O. 21, R. 50 (2), Civil P. C., is an application in execution of a decree within the meaning of Art. 182, Limitation Act : *A I R 1936 Sind 138, Foll. ; A I R 1930 Sind 180, held overruled; A I R 1935 Sind 12, Rel. on.* [P 162 C 1]

*** * (b) Civil P. C. (1908), O. 21, R. 50 (2) and (3) and S. 47—Appeal from order under O. 21, R. 50 (2) and (3) is chargeable with ad valorem court-fee under Art. 1, Sch. 1 and not under Art. 11, Sch. 2, Court-fees Act.**

The words "or otherwise" in O. 21, Rule 50 (3) are wide enough to include court-fee payable. Therefore, for the purposes of court-fees an order under O. 21, R. 50 (2) and (3), granting leave to execute a decree against any person on the ground that he is a partner is not an order within the provisions of Sec. 47, though an order in execution of a decree against the firm. Hence an appeal from such order falls under Article 1 of Sch. 1, Court-fees Act, and not under Cl. 5 of Bombay Government Notification No. 590 issued under S. 35, Court-fees Act, and is chargeable with ad valorem court-fee and not the fee chargeable under Art. 11 of Sch. 2, Court-fees Act : *A I R 1929 Bom 386, Expl. and Rel. on ; A I R 1933 Cal 546 ; A I R 1934 Lah 958 and A I R 1930 Sind 255, Rel. on.* [P 161 C 2 ; P 163 C 1, 2]

(c) Civil P. C. (1908), O. 21, R. 50 (2) and S. 47—Order under O. 21, R. 50 (2) and S. 47—Difference between.

Difference between an order under O. 21, R. 50 (2) and an order under Sec. 47 is that an order under S. 47 may be passed by the Court executing the decree whereas an order under O. 21, R. 50 (2) may be passed only by the Court which passed the decree. [P 164 C 1, 2]

Sunderdas Jethanand — *for Appellants.*

Kundanmal Dayaram—*for Respondents.*

OPINION

Davis J. C. and Lobo J. — Two questions have been referred to us for our decision :

1. Whether an application for leave to execute a decree against a partner under O. 21, R. 50 (2), Civil P. C., is an application in execution of a decree ?

2. Whether the court-fee payable on an appeal from an order under O. 21, R. 50 (2), Civil P. C., is an ad valorem fee or fixed fee under Art. 11 of Sch. 2 to the Court-fees Act ?

So far as the first question is concerned, we think there is no doubt that it must be

answered in the affirmative. There is now a decision of a Bench of this Court that so far as the question of limitation is concerned, an application for leave to execute a decree against a partner under O. 21, Rule 50 (2), Civil P. C., is an application in execution of the decree against the partnership, and though in 24 S L R 132[1] a Judge of this Court was of the opinion, the question being then res integra, that an application under O. 21, R. 50 (2), Civil P. C., "cannot by any stretch of imagination be treated as an application under Art. 182, Limitation Act," another Judge of this Court in a later case, 29 S L R 236,[2] gave very good reasons why it could be so treated following the judgments of the High Courts of Lahore and Bombay to that effect. It seems unnecessary to add anything further to the judgment of a Bench of this Court in 30 S L R 88,[3] which must now be considered the law of this province on this particular point. But this still leaves the second question referred to us to be decided. It does not follow that because an application under O. 21, R. 50 (2), Civil P. C., is an application in execution within the meaning of Art. 182, Limitation Act, an appeal from an order on such an application falls within the provisions of Cl. 5 of the Notification of the Government of Bombay made under S. 35, Court-fees Act, 7 of 1870. This clause directs that the fees chargeable on appeals from orders under S. 47, Civil P. C., shall be limited to the amounts chargeable under Art. 11 of Sch. 2. If however the words of O. 21, R. 50 (3), Civil P. C., are such as to exclude an order made under R. 50 from the provisions of Sec. 47, and to keep it within itself, then though for the purpose of limitation an application made under O. 21, R. 50 (2), Civil P. C., is an application in execution falling within Art. 182, Limitation Act, it may not be an application in execution under S. 47, for the purpose of court-fees. Now, the material parts of R. 50 of O. 21, Civil P. C., are sub-rules (2) and (3). These are as follows :

(2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-r. (1), Cls. (b) and (c), as being a partner in the firm, he may apply to the Court which passed the decree for leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.

(3) Where the liability of any person has been tried and determined under sub-r. (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

And the most material words for the purpose of our decision are the following words in sub-r. (3), namely, "the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree," for, if the words mean that in the matter of court-fees, an appeal against an order is to be treated as an appeal against a decree, as distinct from an appeal against an order in execution, then Art. 1 of Sch. 1 is the Article applicable, and an ad valorem fee is payable, and not the fee chargeable under Art. 11 of Sch. 2. It is to be noted that an appeal against an order in execution does not by means of the order of Government under S. 35, Court-fees Act, change its nature and become an appeal within the meaning of Art. 11. Art. 11 relates to a "memorandum of appeal when the appeal is not from a decree or an order having the force of a decree," and an appeal against an order in execution under S. 47, Civil P. C., is by the definition of decree in S. 2 itself an appeal against a decree. Clause 5 of the Government Notification merely provides that in certain cases appeals from orders which are decrees shall pay the fee chargeable upon appeals against orders which are not decrees or orders which have not the force of a decree. Art. 11 is merely mentioned to identify the amount of the fee chargeable. The fact then that an order under O. 21, Rule 50 (2), Civil P. C., is by the provisions of sub-r. (3) to be treated as if it were a decree, does not of itself exclude the application of Clause 5 of the Government Notification, for this applies to appeals against orders under Sec. 47, Civil P. C., and such orders are decrees by reason of the definition of "decree" in Sec. 2. If therefore an order under O. 21, R. 50 (2), Civil P. C., is an order under S. 47, Civil P. C., Cl. 5 of the Government Notification will apply.

We have held that an order under O. 21, R. 50 (2), Civil P. C., is an order in execution of a decree against the firm, but S. 47,

1. Vishinji Goverdhandas v. Vassumal Wadhu-Mal, (1930) 17 A I R Sind 180=122 I C 392 =24 S L R 132.
2. Noorbhoy Jafferji v. Ghulamali Noorbhoy, (1935) 22 A I R Sind 12=154 I C 339=29 S L R 236.
3. Kishinchand Butamal v. Dhaniram Jamnadas, (1936) 23 A I R Sind 138=164 I C 1011 =30 S L R 88.

Civil P. C., applies only to questions arising between the parties to the suit in which the decree was passed or their legal representatives, and, indeed, sub-s. (3) of S. 47, Civil P. C., itself provides that the question whether a person is the representative of a party shall be determined under that Section, but there is no similar provision when the question is whether a person is a partner within the meaning of O. 21, R. 50, Civil P. C. There is an Explanation to S. 47, Civil P. C., dealing with the case of a plaintiff where a suit has been dismissed, or a defendant against whom a suit has been dismissed. Moreover, under sub-s. (2) of Sec. 47, Civil P. C., provision is made for the payment of additional court-fees when the proceeding under the Section is treated as a suit, and clearly in such a case Cl. 5 of the Government Notification will not apply. Now, in sub-r. (2) of R. 50, O. 21, Civil P. C., it is provided that the issue whether a person is or is not a partner is to be tried in the same way as an issue in a suit, and under sub-r. (3) the order made is to have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree. The words "or otherwise" are clearly wide enough to include the court-fee payable, and if such an order were intended by the Legislature to be within S. 47, Civil P. C., it would be unnecessary to give it the same force as a decree. It would be a decree by reason of the definition of "decree" in S. 2, Civil P. C. My conclusion therefore is that an order under O. 21, R. 50 (2) and (3), Civil P. C., is not an order within the provisions of Sec. 47, Civil P. C., though an order in execution of the decree against the firm. This is the opinion of a Judge of the Bombay High Court in 31 Bom L R 995[4] at page 997. Rangnekar J. said:

But it is to be remembered that the definition of a decree includes an order made within Sec. 47, Civil P. C., and orders under that Section are decrees and are appealable under Sec. 100 of the Code. Is this then an order under Sec. 47, Civil P. C.? It is important to note that all orders in execution proceedings are not appealable. As regards appeals, orders in execution proceedings may be divided into two classes: (1) orders under S. 47, and (2) other orders in execution proceedings; these again may be subdivided into two classes: (i) those which are declared to be appealable under S. 104, Civil P. C., and (ii) those which are not so declared and therefore non-appealable. O. 21, R. 50, sub-r. (3), runs as follows: 'Where the liability of any person has been tried and determined under sub-r. (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.' But for the words 'be subject to the same conditions as to appeal or otherwise as if it were a decree' in this sub-rule I should have had no difficulty in holding that an order under this rule giving leave to a decree-holder to issue execution against a person on the ground that he is a partner is an order under Sec. 47 of the Code inasmuch as it is an order which determines the liability of that person to satisfy the decree on the ground of his being a partner within the meaning of S. 47 of the Code. But my duty is to consider the plain meaning of the words used in the Rule itself. If it was the intention of the Legislature to make an order made under O. 21, R. 50, sub-r. (2) to be an order within S. 47, Civil P. C., it was not necessary at all to use the words which are used in sub-r. (3) of that Rule to which I have already referred. These words give no power to turn the order into a decree. They give to the order the status as a decree for the purpose of appeal and of enforcement but leave it what it was before, namely an order. I therefore hold that an order granting leave to execute a decree against any person on the ground that he is partner, made under O. 21, R. 50, sub-rr. (2) and (3), is not a decree; and therefore Art. 164 would not apply and the present application is not barred by the law of limitation. I have come to this conclusion not without considerable hesitation, and, as similar questions are likely to arise in future particularly in a city like Bombay, I would be glad if an attempt is made to obtain an opinion of the Appeal Court on the point.

A Judge of the Calcutta High Court in 60 Cal 530[5] was of the opinion that an appeal against an order under O. 21, R. 50 (2) and (3), Civil P. C., had to pay an ad valorem fee. This was also the opinion of two Judges of the Lahore High Court in A I R 1934 Lah 958.[6] In both these Provinces a Government Notification containing a provision similar to Clause 5 of the Bombay Government Notification is in force. We think therefore that the answer to the second question referred to us must be that an ad valorem fee is chargeable.

Weston J.—The two questions referred to are (1) whether an application for leave to execute a decree against a partner under O. 21, R. 50 (2) is an application in execution of a decree; and (2) whether the court-fee payable in an appeal from an order under O. 21, Rule 50 (2) is an ad valorem fee or the fixed fee under Art. 11, Sch. 2 to the Court-fees Act. The first question was decided by a Bench of this Court in 30 S L R 88,[3] where it was held that an

4. Kanji Shivji v. Vasanji Shivji & Co., (1929) 16 A I R Bom 386=120 I C 833=53 Bom 839=31 Bom L R 995.

5. Bhutnath Ta v. Barendranath Bhattacharya, (1933) 20 A I R Cal 546=146 I C 123=60 Cal 530=37 C W N 227.

6. Jugal Kishore Gulab Singh v. Dina Nath Siri Ram, (1934) 21 A I R Lah 958=155 I C 639=15 Lah 893=35 P L R 565.

application under O. 21, R. 50, is an application in execution of the decree. I agree with the views expressed in the judgment of the learned Judicial Commissioner in that case and have no further remarks to make. The second question depends upon whether the order on an application under O. 21, R. 50 (2) is an order under S. 47, Civil P. C., or is not such an order. For if it is, then Order No. 590 dated 16th September 1921 of the Government of Bombay under S. 35, Court-fees Act, applies which directs that fees chargeable in appeals from orders under S. 47, Civil P. C., shall be limited to the amounts chargeable under Art. 11, Sch. 2. In 25 S L R 25[7] it was held by a Bench of this Court that an appeal against an order passed under O. 21, Rule 50 (2), requires an ad valorem duty and it appears to have been assumed in this case that such an order is not an order falling within S. 47, Civil P. C. In a Bombay case, 31 Bom L R 995,[4] Rangnekar J. held that an order under O. 21, R. 50 (2) is not an order under S. 47, Civil P. C. As remarked in the judgment of this case all orders in execution are not appealable; whereas all orders under S. 47 are appealable as an order under S. 47 is included in the definition of a decree in S. 2 (2), Civil P. C.

Orders in execution not under S. 47, may be appealable under S. 104, Civil P. C., Cl. (i), S. 104 provides that appeals against orders not provided for by preceding clauses of the Section shall lie only where an appeal is expressly allowed by rules. General provision is made in O. 43, Rule 1 for appeal against orders and orders in execution which are appealable not as orders under S. 47 but by express provision in O. 43, R. 1, are orders under O. 21, R. 34 on an objection to a draft wherein a decree is for the execution of a document, and also orders made under O. 21, R. 92 setting aside or refusing to set aside a sale. An order under O. 21, R. 50 (2), is not made appealable by O. 43, Rule 1 but by O. 21, R. 50 (3) itself which provides that an order made under Cl. (2) shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree. A minor point of difference between an order under O. 21, R. 50 (2) and an order under S. 47 is that an order under S. 47 may be passed by the Court executing the decree whereas an order under O. 21, R. 50 (2) may be passed only by the Court which passed the decree. I do not think there is any real difficulty in holding as was held by Rangnekar J. in the *Bombay case*, (31 Bom L R 995[4]) already quoted, that every order in execution is not necessarily an order under S. 47. The two examples already mentioned under Rr. 34 and 92 of O. 21 clearly were not intended to fall under S. 47. For, they are appealable under O. 43, R. 1 and by reason of S. 104 (2) no second appeal will lie; while against an order under S. 47 a second appeal will lie on the grounds provided in S. 100. In S. 47 it has been considered necessary to make express provision that the determination whether a person is or is not a representative of a party is a question to be decided under that Section. But the Legislature has not included within S. 47 the determination provided for in O. 21, R. 50 (2); but on the contrary has made separate provision for it in that Rule with separate provision for appeal on the order passed. In these circumstances I consider that an order under O. 21, R. 50 (2) does not fall within S. 47. It follows therefore that under existing orders issued under S. 35, Court-fees Act, an ad valorem stamp is necessary on an appeal made under O. 21, R. 50 (3), Civil Procedure Code.

N.S./R.K. *Answer accordingly.*

7. Punjab National Bank Ltd. v. Ranchoredas Gordhandas, (1930) 17 A I R Sind 255=127 I C 704=25 S L R 25.

*** A. I. R. 1939 Sind 164**

DAVIS J. C. AND WESTON J.

Jot Narain Thakur Parsad
Applicant.

v.

Emperor.

Criminal Revn. Appln. No. 223 of 1938, Decided on 21st October 1938.

*** Criminal P. C. (1898), Sec. 195 (1) (a)—False information given to Sub-Inspector — Complaint filed by his successor in office is valid.**

The proper construction of the words "public servant concerned" in S. 195 (1) (a) is the public servant holding for the time being the office held by the public servant to whom the false information was given. The complaint filed by the successor in office of Sub-Inspector to whom false information was given is therefore a valid complaint under Sec. 195 (1) (a) : *34 Cal 551 (FB), Rel. on.* [P 165 C 2]

Kishenchand J. Bijlani—*for Applicant.*

Partabrai D. Punwani, Advocate General — *for the Crown.*

Weston J. — Present applicant made a complaint on 5th August 1937 to Sub-Inspector Mahomedali at the Bagdadi Police Station that Rs. 20 had been stolen from his house, and one Mahes was accused by him of having committed the theft. Sub-Inspector Mahomedali investigated the case, came to the conclusion that the complaint was false and applied for and obtained 'B' summary. Sanction to prosecute the applicant was also asked for, but when the sanction was obtained Sub-Inspector Mahomedali was no longer at the Bagdadi Police Station, as he had been transferred, and the complaint under Sec. 182, I. P. C., was filed by his successor in the Court of the Additional City Magistrate, Karachi.

It was represented on behalf of the applicant in the Magistrate's Court that under S. 195 (i) (a), Criminal P. C., the Court could not take cognizance of the case except on the complaint of Sub-Inspector Mahomedali himself or of a public servant to whom Sub-Inspector Mahomedali was subordinate. The Additional City Magistrate overruled the contention holding that the successor in office of Sub-Inspector Mahomedali is "the public servant concerned" contemplated by S. 195 (i) (a). Applicant now comes to this Court and asks us to quash the proceedings before the Magistrate on the same ground as was urged before the Magistrate. Sec. 195 (i) (a) reads as follows :

> No Court shall take cognizance (a) of any offence punishable under Secs. 172 to 188, I. P. C. except on the complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate.

It is urged by Mr. Kishenchand for the applicant that power to file a complaint as given by Cl. (a) is personal to the public servant and cannot be exercised by his successor. We are not able to accept this contention. Cls. (b) and (c) of S. 195 (i) deal with offences committed in, or in relation to, proceedings in a Court, and it has been held that in these cases the authority to file a complaint is the officer constituting such Court at the time the complaint is made, whether he is the officer constituting the Court at the time the offence was committed or not: 34 Cal 551.[1] It is of course true that in the case of a Court we have Sec. 559, Criminal P. C., which lays down :

> (1) Subject to the other provisions of this Code the powers and duties of a Judge, or Magistrate may be exercised or performed by his successor in office.

But we do not think that there is any difficulty in construing the words 'public servant concerned' in Cl. (a) of Sec. 195 (i) so as to place a public servant in a position similar to that of a Court exercising powers under Cls. (b) and (c) of S. 195 (i), Criminal P. C. There appears to be no decided case on the point, but apart from considerations of obvious convenience and expediency, we think that a clear indication of the intention of the Legislature is afforded by the last few words of Cl. (a). These provide that a complaint may be made not only by the public servant concerned but by some other public servant to whom he is subordinate. It seems to us significant that the words used are not "some other public servant to whom at the time of the offence he (the public servant concerned) was subordinate."

On the view urged by Mr. Kishenchand if "the public servant concerned" dies or retires there is no public servant to whom he is subordinate and therefore it would not be possible for any complaint to be filed even though the offence were gross and palpable. Again if the public servant concerned is transferred, as in the present case, then according to Mr. Kishenchand's view the superior public servant competent to file the complaint is not the Inspector, Deputy Superintendent of Police or higher officer with jurisdiction over the Bagdadi Police Station but a police officer in another district who has no concern with the Bagdadi Police Station. We think therefore that the proper construction of 'public servant concerned' is the public servant holding for the time being the office held by the public servant to whom the false information was given. The complaint filed by the successor in office of Sub-Inspector Mahomedali therefore was a valid complaint under Cl. (a) and the present application must fail. Order accordingly.

D.S./R.K. *Application dismissed.*

1. Begu Singh v. Emperor, (1907) 34 Cal 551=5 Cr L J 398=5 CLJ 508=11 C W N 568 (FB).

A. I. R. 1939 Sind 165

DAVIS J. C. AND DADIBA C. MEHTA J.

Mirza Adamkhan — Applicant.

v.

Tikamdas Wadhumal and another — Opponents.

Civil Revn. Applns. Nos. 9 and 17 of 1935, Decided on 20th May 1938, from order of Judge, Small Cause Court, Karachi.

Karachi City Municipal Act (17 of 1933), Ss. 16 and 17 — Tribunals constituted under new Act are special—Questions determined by Judges are as persona designata and not as Courts.

Where new tribunals are constituted to determine new questions under new Acts, the tribunals so constituted by and for the purpose of those Acts, unless the contrary is expressly enacted or necessarily implied, are special tribunals and the Judges when they are named are named as persona designata and not as Court. Therefore when the Judge of the Karachi Small Cause Court acts under Ss. 16 and 17 he acts as a persona designata and not as a Court. [P 166 C 2 ; P 167 C 1]

H. T. Raymond (in No. 9) and Fatehchand Assudomal (in No. 17) — *for Applicant.*

Kimatrai B. (in No. 9) and Khanchand Gopaldas and Dipchand Chandumal (in No. 17) — *for Opponents.*

Davis J. C. — We have here before us two applications in revision purporting to fall under S. 115, Civil P. C., against two orders of the Judge of the Karachi Small Cause Court — one made under Sec. 16, City of Karachi Municipal Act, 1933, in which he dismissed the petition of the present applicant, Mirza Adamkhan against one Tikamdas Wadhumal, on the ground that the said Tikamdas Wadhumal was disqualified for being a Municipal Councillor ; while the other application was by the same Mirza Adamkhan against the Municipal Corporation, Karachi, under Sec. 17 (1), Municipal Act, on the ground that the Chief Officer of the Corporation had wrongly rejected his nomination paper. In the one case this petition was dismissed, in the other case it was allowed.

But we are not at present concerned with the success or failure of these petitions ; we are concerned only with the question as to whether, when the Judge of the Karachi Small Cause Court acted under Ss. 16 and 17 he acted as a persona designata or as a Court. Now, there is a long series of decisions to the effect that when by an Act of the Legislature a new authority is constituted for the purpose of determining questions concerning rights which are in themselves the creation of that same Act and the Judge or presiding officer of the Court, as distinct from the Court itself, is directed to perform the functions of the newly created authority, then it must be presumed, unless the contrary is expressly enacted or necessarily implied, the intention of the Legislature was that the Judge or presiding officer should perform those functions as persona designata and not as a Court, and it was relying to a large extent upon Bombay decisions to this effect that the High Court in Rangoon held that the Chief Judge of the Rangoon Small Cause Court acting under Sections almost identical in wording with the Sections of the Karachi Small Cause Courts Act, which we are now interpreting, acted as a persona designata and not as a Court. It is true that the Judges of the Rangoon High Court found in the case before them that the presumption to which we have referred was strengthened by the fact that in the Court of Small Causes of Rangoon there was more than one Judge and that as the Chief Judge had been named in the Act from among other Judges, so he was a persona designata. Clearly, such a difference dependent upon the number of Judges in the Court is not decisive and was merely one item in the case to which the Judges referred as strengthening the presumption that already existed.

Moreover, Ss. 16 and 17 must be read with S. 251, Municipal Act, which provides that the Judge of the Karachi Small Cause Court may exercise for the purpose of any appeal or inquiry or proceeding powers conferred on him by the Code of Civil Procedure or by the Provincial Small Cause Courts Act, and it is clear that if the Judge of the Karachi Small Cause Court was acting under Ss. 16 and 17 of the Act not as a persona designata but as a Court, a conferment upon him of the powers which his Court possesses would have been unnecessary. We see therefore no reason why we should presume that the Legislature in this case departed from the long established practice, whereby matters in dispute in elections which require prompt disposal are decided by Judges, it is true, but not by Courts. The procedure of Courts though doubtless dignified, is often slow and might cause in such disputes such delay as would render the decisions infructuous or make municipal government very difficult if not impossible.

It is true that there is not in Ss. 16 and 17, City of Karachi Municipal Act, those words which occur in sub-s. 2 of S. 20 of Bombay Act 3 of 1901 or sub-s. 2 of S. 19 of Act 6 of 1925, empowering the Government or the Governor in Council to appoint and name Judges who are to enquire into election disputes. But while the existence of such words may exclude some matter from debate or in argument, their absence does not appear to us to affect the general

principle to which we have referred in the beginning of this judgment, that is, that where new tribunals are constituted to determine new questions under new Acts, the tribunals so constituted by and for the purpose of those Acts, unless the contrary is expressly enacted or necessarily implied, are special tribunals and the Judges when they are named are named as persona designata and not as Court. We think therefore that in neither of the cases now sought to be brought before us have we any power to interfere under S. 115, Civil P. C., and we dismiss them accordingly.

B.D./R.K. *Petitions dismissed.*

A. I. R. 1939 Sind 167

DAVIS J. C. AND WESTON J.

Smt. Jasoda Lekhraj and others
Applicants

v.

Emperor.

Criminal Revn. Appln. No. 289 of 1938, Decided on 21st November 1938.

(a) Criminal P. C. (1898), Ss. 112 and 439—Magistrate applying powers under Sec. 112 equally to wrong-doers as well as to wronged — High Court would interfere in revision.

High Court is always very unwilling to interfere in the case of orders passed under the preventive Sections of the Criminal Procedure Code. These orders are largely of an administrative nature; but these orders, though largely of an administrative nature, have a legal basis, and if it is clear that an order under S. 112 has no legal basis and that the Magistrate has proceeded upon a wrong legal principle, applying equally to the wrong-doers as well as to the wronged, the wide powers conferred upon him by the law for the restraint of the wrong-doers and for the protection of the wronged, High Court is bound to interfere. [P 168 C 1]

(b) Criminal P. C. (1898), Ss. 112 and 107—How far order under S. 112 can exceed information given under S. 107 *(Quære).*

It is doubtful how far an order under Sec. 112, Criminal P. C., can properly exceed the information given under S. 107. [P 168 C 2]

(c) Criminal P. C. (1898), S. 107—'Wrongful act' — S. 107 is to be applied against wrong-doers and not also against wronged—Magistrate under Sec. 107 cannot take action to prevent lawful acts which may result in breach of peace owing to wrongful acts of others.

The word "wrongful" in S. 107 must mean something more than wrongful in the opinion of the Magistrate, and "wrongful act" must mean some act wrongful according to some law. Sec. 107 cannot be intended to authorize a Magistrate to take action to prevent lawful acts which may result in a breach of the peace because of the wrongful or unlawful acts of others. Sec. 107 is intended to be applied against the wrong-doers and not also against the wronged. It was never the intention of the Section that the wrong-doers and the wronged should be classed together as wrong-doers and made the subjects of a common complaint and common action. The collection or the acquiescing of collection of women for the purpose of religious instruction, discourse or songs, the meeting together of men and women for a joint satsang or meeting is no offence under the law, nor is the education of children; and the Magistrate cannot take action to prevent such lawful act even though it would result in a breach of peace because of the wrongful acts of others : *32 All 571; A I R 1915 Mad 81; 34 Cal 935; A I R 1926 Lah 683 and A I R 1931 Lah 191, Rel. on; (1883) 9 Q B D 308, Applied.* [P 169 C 1, 2; P 170 C 1]

(d) Criminal P. C. (1898), Sec. 144 — Even under Sec. 144 Magistrate's action should be directed rather against wrong-doers than wronged *(Obiter).*

Even in the case of an order in an emergency under S. 144, the Magistrate's action should be directed rather against the wrong-doers than the wronged, though the nature of the emergency may make it necessary for a time, in the public interest, to interfere with the lawful exercise of private rights : *6 Mad 203, Rel. on.* [P 169 C 2]

P. S. Shahani — *for Applicants.*

Partabrai D. Punwani, Advocate-General — *for the Crown.*

Davis J. C. — This is an application in revision asking this Court to quash proceedings pending on an order passed by the City and Sub-Divisional Magistrate, Hyderabad, under Sec. 112, Criminal P. C., calling upon the five applicants, three of whom are women, to show cause why they should not be bound down for six months to keep the peace and restrained from holding joint satsangs or meeting of males and females during the pendency of these proceedings. It is common ground that the proceedings are connected with the activities of one of the applicants, Bhai Lekhraj Khubchand, who has founded two houses known as "Om Mandli" and Om Nivas." The applicants claim that the movement is entirely good; they seek to ameliorate the condition of women in Sind, particularly in the Bhaibund community and to spread religious knowledge and its influence for good among persons of both sexes by means of religious discourses and bhajans or religious songs in meetings known as satsangs. In "Om Nivas" children of from four to twelve years of age are housed and fed and taught in the same spirit of religion as that in which the parent institution of "Om Mandli" is conducted. This movement as is the not uncommon fate of a new movement, met with disapproval and opposition, particularly, it is alleged, from the guardians and relations of the "women and girls and other children," in the words of the complaint, under Sec. 107, Criminal P. C., who went to the "Om Mandli" and "Om Nivas" against their wishes. This

disapproval and opposition found expression, it is alleged, in obstruction and wrongful restraint by picketeers under the leadership of Bapo Kishinchand, named also as a disturber of the public peace, with four companions, and the five applicants in the complaint made by the City Police Inspector of Hyderabad under the orders of the District Magistrate on 16th August 1938.

Now, this Court is always very unwilling to interfere in the case of orders passed under the preventive Sections of the Criminal Procedure Code. These orders are largely of an administrative nature; they are concerned with the maintenance of the public peace and the prevention of breaches of the public peace for the maintenance of which the District Magistrate is responsible, and the needs of which he, as the responsible officer on the spot, is presumably in the best position to know; but these orders, though largely of an administrative nature, have a legal basis, and if it is clear that an order under Sec. 112 has no legal basis, and that the learned District Magistrate has proceeded upon a wrong legal principle applying equally to the wrong-doers as well as to the wronged the wide powers conferred upon him by the law for the restraint of the wrong-doers and for the protection of the wronged, this Court is bound to interfere, and we think that this is the case here. Now an order under S. 112, Criminal P. C., is dependent upon the provisions of S. 107, Criminal P. C. S. 112 refers to a Magistrate acting under S. 107, and S. 107 permits a Magistrate to act when he is informed

> that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity, and in the Magistrate's opinion there is sufficient ground for proceeding . . . . .

The information given to the City and Sub-Divisional Magistrate of Hyderabad is contained in a complaint under Sec. 107 given by the City Police Inspector under the orders of the District Magistrate, and the complaint is made against two sets of five persons. Presumably, the District Magistrate considered both parties equally to blame, but while it is clear from the wording of the complaint itself that the picketeers Bapo Kishichand and his four companions can be said to be guilty of wrongful acts, which may probably occasion a breach of the peace and disturb the public tranquillity, for, it is stated in the complaint or information that they are causing obstruction and wrongful restraint to persons visiting the "Om Nivas" and that members of the "Om Mandli" were prevented from entering the "Om Nivas", it is not clear of what wrongful acts within the meaning of S. 107, Criminal P, C, the members of the "Om Mandli", Bhai Lekhraj and his four companions, are guilty. Clearly they are not guilty of wrongful acts merely because they are the victims of the wrongful acts of others.

The learned Advocate-General admits that the carrying on of satsangs or meetings within the "Om Mandli" and "Om Nivas", private properties, is not a wrongful act, but he argues that Bhai Lekhraj and his companions in charge of the "Om Mandli" and "Om Nivas" are guilty of wrongful acts "owing to women and girls and other children going there against the wishes of their guardians and other relations," and he points to the order under S. 112, Criminal P. C., passed by the learned Magistrate on the complaint or information under S. 107, Criminal P. C., in which the five applicants are charged that:

> You are almost every day collecting or acquiescing in the collection of women, girls and other children in the houses known as "Om Mandli" and "Om Nivas" or allowing them to come and stay there against the wishes of their husbands, guardians and other near male relatives interested in them.

And it is further stated :

> That by such wrongful act you are causing such unrest, enmity or resentment in the town of Hyderabad as to make or immediately likely to occasion disturbance of the public tranquillity and breaches of the public peace.

It is doubtful how far an order under S. 112, Criminal P. C., can properly exceed the information given under S. 107, Criminal P. C., but, presuming the District Magistrate intended the City Police Inspector to say that which is stated as the information in the order under S. 112, Criminal P. C., it is difficult to see what wrongful act within the meaning of S. 107, Criminal P. C., the applicants are charged with. The learned Advocate-General said that neither the complaint under S. 107 nor the order under S. 112, Criminal P. C., are happily drafted. We agree, but we do not think it is through lack of care. Our opinion is that the complaint and the order are carefully drafted to put the case against the applicants at its highest, and that they fail to carry conviction or disclose any satisfactory cause for action under S. 107, Criminal P. C., because the Section is being turned to a purpose for which it was not

intended, that is to say to prevent not acts which are wrongful in the eye of the law but acts which are wrongful in the eyes of the District Magistrate.

Now, it is clear that the word "wrongful" in S. 107, Criminal P. C., must mean something more than wrongful in the opinion of the District Magistrate, and it appears to us that "wrongful act" must mean some act wrongful according to some law. S. 107, Criminal P. C., cannot be intended to authorize a Magistrate to take action to prevent lawful acts which may result in a breach of the peace because of the wrongful or unlawful acts of others: 32 All 571,[1] 25 I C 989,[2] 34 Cal 935,[3] 7 Lah 482[4] and 12 Lah 457.[5] Clearly, the purpose of the Section is to allow the law-abiding to follow their lawful avocations in peace and to prevent the law-breakers from their committing wrongful acts. The learned Advocate-General was constrained to admit that "wrongful" in S. 107, Criminal P. C., must mean something wrong in law, but he said that although it could not be wrong in law for adult women to attend a satsang without their husbands' consent or even against their wishes, yet it is clear, reading the complaint and order, that the charge is that the five applicants committed some offence in the case of the girls and children; they enticed minors from the guardianship of their parents, that is they kidnapped them from lawful guardianship. There is no suggetion here that girls are enticed for immoral purposes so as to attract any of the provisions of the Penal Code. But we think that if it were the case of the District Magistrate that girls and other children were kidnapped or enticed away, he would have said so, and, in our opinion, the case against the five applicants is purposely left vague because the weakness of the case against them in law is appreciated either by the learned District Magistrate or his legal advisers.

We cannot agree that "wrongful act" in S. 107, Criminal P. C., covers social activities otherwise lawful, of which the District Magistrate disapproves, and if we were to accept the position taken by the District Magistrate, a few persons of conservative minds and not averse to violence could successfully obstruct any social movement of reform by obstructing and wrongfully restraining the social reformers. But Sec. 107, Criminal P. C., is intended to be applied against the wrong-doers and not also against the wronged. It was never the intention of the Section that the wrong-doers and the wronged should be classed together as wrong-doers and made the subjects of a common complaint and common action. "The collection or the acquiescing of collection of women" for the purpose of religious instruction, discourse or songs, the meeting together of men and women for a joint satsang or meeting is, so far as we know, no offence under the law nor is the education of children. We cannot believe that if children do go and stay in "Om Nivas", it is done against the wishes of the mothers; and the fathers should not require the assistance of the District Magistrate under Ch. 8, Criminal P. C., for either the exercise of parental or conjugal rights. The Guardians and Wards Act and the Civil Procedure Code afford aggrieved fathers and husbands such remedies as the Legislature thinks proper. The provisions of Ch. 8, Criminal P. C., are not intended and are not appropriate for this purpose.

With all respect to the District Magistrate, we think he has failed sufficiently to appreciate the difference between the position of wrong-doers and wronged. On the complaint made under his order, and we have no doubt in accordance with his instructions, against the picketers, subject to anything they may say, should their case come before us, it would appear he had a legal basis for his action under Sec. 107, Criminal P. C., against the five applicants, it would appear, he had no such legal basis. Even in the case of an order in an emergency under S. 144, Criminal P. C., the Magistrate's action should be directed rather against the wrong-doers than the wronged, though the nature of the emergency may make it necessary for a time, in the public interest, to interfere with the lawful exercise of private rights. But, in any case, the authority of Magistrates should, we think, be exercised in defence of rights rather than in their suppression, in repression of illegal rather than in interference

1. Emperor v. Muhammad Yaqub, (1910) 32 All 571=6 I C 454=7 A L J 649.
2. In re Desikachari, (1915) 2 A I R Mad 81=25 I C 989=15 Cr L J 661.
3. Dindayal Mozumdar v. Emperor, (1907) 34 Cal 935=11 C W N 1002=6 Cr L J 230.
4. Khazan Chand v. Emperor, (1926) 13 A I R Lah 683=97 I C 39=7 Lah 482 = 27 Cr L J 1063=27 P L R 810.
5. Shadilal v. Emperor, (1931) 18 A I R Lah 191 = 1931 Cr C 311 = 134 I C 585 = 32 Cr L J 1207=12 Lah 457=32 P L R 138.

with lawful acts : 6 Mad 203.[6] We are not however here dealing with an order under S. 144, Criminal P. C., where in case of emergency the public interest must prevail over private rights, 51 Mad 1006,[7] and the temporary and emergent nature of such orders are well recognised being limited, in the first instance, to two months. We are dealing here with religious meetings in two private houses, and the learned Advocate-General has not been able to show us that the holding or attendance of such meetings is unlawful, and the common law principle set out by Field J. in a well-known case in (1882) 47 L T 194,[8] namely that a man cannot be punished for acting lawfully even if he knows that his so doing may induce another to act unlawfully, though that case is to be read subject to the statute law of this Province, appears to apply in this case. "Wrongful act" in S. 107, Criminal P. C., appears to mean an unlawful act.

We would point out that the latter part of the order of the City and Sub-Divisional Magistrate, Hyderabad, which forbids the holding of joint satsangs or joint meetings pending the proceedings is without lawful authority. S. 117 (3), Criminal P. C., provides for action in emergency but not for such an injunction as the Magistrate has passed. We have power under S. 439 read with S. 423 (1) (c) and S. 561-A, Criminal P. C., to set aside the Magistrate's order under S. 112, Criminal P. C., and to quash proceedings so far as the five applicants are concerned, based upon the complaint or information under S. 107, Criminal P. C., and as we think the Magistrate's order is without proper legal basis, we set aside the order under Sec. 112, Criminal P. C., and quash the proceedings based upon the complaint or information under S. 107, Criminal P. C., accordingly.

D.S./R.K. *Order set aside.*

6. Sundaram v. The Queen, (1883) 6 Mad 203=2 Weir 77 (F B).
7. In re Visvanadha Rao, (1928) 15 A I R Mad 1049=112 I C 863=30 Cr L J 31=51 Mad 1006=55 M L J 442 (F B).
8. Beatty v. Gillbanks, (1883) 9 Q B D 308=51 L J M C 117=31 W R 275=15 Cox C C 138 =46 J P 789=47 L T 194.

A. I. R. 1939 Sind 170

DAVIS J. C.

Charandas Kanayalal—Appellant.

v.

Emperor.

Criminal Appeal No. 45 of 1938, Decided on 1st June 1938, against conviction and sentence passed by Addl. City Magistrate, Karachi, D/- 19th March 1938.

(a) Penal Code (1860), Sec. 191 — Accused making two conflicting statements in criminal trial one of which was false—No charge framed against him in the alternative under Sec. 236, Criminal P. C. — No evidence to show, other than statement of accused himself, which of two statements was true—Magistrate deciding that one of the statements was false relying on statement of accused himself—Conviction held could not be sustained.

The accused was convicted under Sec. 191, Penal Code, for making a false statement on oath in a criminal trial. He made two conflicting statements, one of which admittedly was false. No charge was framed under S. 236, Criminal P. C., in the alternative. The Magistrate came to the conclusion that one of the statements was false on the statement of the accused himself, who in the Magistrate's opinion was a liar. Besides the statement of the accused himself, there was no other evidence to show, which of the two statements made by the accused, who was admittedly a liar, was true :

Held that under the circumstances of the case the conviction could not be sustained : *5 S L R 136, Foll.* [P 171 C 1 ; P 172 C 1]

(b) Criminal P. C. (1898), Ss. 476, 537—Court filing complaint under S. 476—Failure to record express finding that it is expedient in interest of justice that inquiry should be made does not invalidate complaint—It is sufficient if record shows that Court has applied its mind to the question—Omission is cured by S. 537.

Although it is necessary that a Court deciding to make a complaint under S. 476, Criminal P. C., should record a finding that in its opinion it is expedient in the interest of justice that an inquiry should be made, the absence from the record of an express finding, or a finding in the exact words of the Section will not invalidate the complaint. It is sufficient if the record shows clearly that the Court has applied its mind to the question of expediency and has come to the conclusion that an inquiry is expedient. S. 537, Criminal P. C., would, in appropriate cases, apply to the failure to record an express finding under the provisions of S. 476, especially when the objection is taken at so late a stage that it is not possible for the Government to find out, whether among other papers not before the Court, the finding required by S. 476 has not been expressly recorded : *A I R 1931 Cal 190, Foll.* [P 171 C 1, 2 ; P 172 C 1]

Kishinchand Jethanand—*for Appellant.*

Hatim B. Tayebji, Asst. Public Prosecutor — *for the Crown.*

Judgment. — In this case the accused has been convicted of making a false statement on oath in the course of judicial pro-

ceedings and sentenced by the Magistrate to six months' rigorous imprisonment. Apparently the accused in this case was a witness in a sodomy case and he made two conflicting statements, one, in which he said that the boy on whom the offence was committed was brought by one Bhajan, and two, in which he said that the boy was brought by a person named Sobho. Clearly, one of these two statements was false, and if the Magistrate had framed a charge under S. 236, Criminal P. C., in the alternative, it would have been difficult for the accused to meet this charge successfully. But the Magistrate did not do so, apparently both the Magistrate by whom the complaint was made and the Magistrate who tried the case, were satisfied that the statement in which the accused implicated Sobho and not Bhajan was false. But the learned Magistrate could only come to this conclusion on the statements of the accused himself, who in the Magistrate's opinion was a liar. That being so, it appears to me difficult to find which of the two statements made by a person, who is admittedly a liar, is true, in the absence of other evidence besides the statement of the accused, the liar, himself, and in this case there was no other evidence.

In 5 S L R 136[1] a Bench of this Court was of the opinion that in such a case the conviction could not be sustained, and I think myself the last paragraph of that judgment applies with much force to the particular facts of this case and shows indeed how the same mistakes are apt to occur from time to time. The learned Judges there said:

> Had the original order under Sec. 476 been in proper form, setting out clearly the statement alleged to be false, the Magistrate would have probably discovered, either that a clear case could be made out by including in the charge two contradictory statements and alleging that one or other was false, or else that there was no reasonable chance of proving the case against the accused at all. If the proper procedure had been followed, either there would have been no trial at all, or a conviction would have resulted as a moral certainty.

And this paragraph also emphasizes a point raised by the learned advocate at a very late stage, namely after he had actually filed his memorandum of appeal in this Court, that the finding required by S. 476, Criminal P. C., that it was expedient in the interests of justice that an inquiry should be made, had not in fact been recorded by the Court concerned. The learned advocate was prepared to read to me a large number of rulings in which some of the High Courts have held that if no finding is expressly recorded as required by S. 476, Criminal P. C., then the proceedings are bad and should be quashed. But if I may say so, with respect to these judgments of these High Courts, a judgment of the Calcutta High Court in 58 Cal 1117[2] at p. 1122, takes a sensible view of the Section, where the learned Judges look to the substance rather than to the form. They say:

> In our opinion, although the provisions of the Section are mandatory but permissive, yet, if the Court decides to make a complaint, it must record a finding that in its opinion it is expedient in the interests of justice that an enquiry should be made. Moreover, it would be convenient and would save the time of an Appellate Court if such finding were expressly recorded. But the absence from the record of an express finding, or a finding in the exact words of the Section will not invalidate the complaint.
>
> The Court need not repeat the exact words of the Section like a parrot. It is sufficient, if the record shows clearly that the Court has applied its mind to the question of expediency, and has come to a conclusion that an enquiry is expedient. A finding merely that there is a prima facie case, or that statements were contradictory, as in the two cases mentioned above, 55 Cal 1312[3] and 51 C L J 208,[4] will not be sufficient. It is not in every one of such cases that an enquiry is expedient in the interests of justice. But a finding that the evidence given was false, followed by a complaint, might be sufficient to raise the inference that the Judge found that an enquiry was expedient, *see* 55 Cal 279[5] at p. 284, per C. C. Ghose J. and the view which we have expressed seems to have been adopted by Pearson J. in the later case in 52 C L J 52,[6] and finds some support also in the judgment of Rankin C. J. in 55 Cal 1312.[3]

That judgment does not refer to S. 537, Criminal P. C., but, speaking for myself, I see no reason why S. 537, Criminal P. C., should not in appropriate cases apply to the failure to record an express finding under the provisions of S. 476, Criminal P. C.; and indeed that Section is very useful in meeting a case such as this, where an

1. Bakshali v. Emperor, (1912) 5 S L R 136 = 13 I C 220 = 13 Cr L J 28.

2. Superintendent and Remembrancer of Legal Affairs, Bengal v. Ijjatulla Paikar, (1931) 18 A I R Cal 190 = 1931 Cr C 254 = 132 I C 160 = 53 C L J 177 = 32 Cr L J 842 = 58 Cal 1117 = 35 C W N 400.

3. Karamat Ali v. Emperor, (1928) 15 A I R Cal 862 = 113 I C 842 = 30 Cr L J 221 = 55 Cal 1312.

4. Surendra Nath v. Kumeda Charan, (1930) 17 A I R Cal 352 = 126 I C 416 = 51 C L J 208.

5. Bhuban Chandra v. Emperor, (1927) 14 A I R Cal 628 = 104 I C 111 = 28 Cr L J 783 = 55 Cal 279 = 31 C W N 828.

6. Satis Chandra Maulik v. Emperor, (1930) 17 A I R Cal 705 = 1930 Cr C 1105 = 129 I C 110 = 32 Cr L J 237 = 52 C L J 52.

objection on this ground is taken at so late a stage that it is not possible for Government to find whether among other papers not before the Court the finding required by S. 476, Criminal P. C., had not been expressly recorded, for S. 537, Criminal P. C., has this important explanation. It says :

In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

As however I think, the accused should be acquitted on other grounds, it is not necessary for me to further deal with this aspect of the case. I therefore set aside the conviction and sentence and order the accused to be acquitted.

R.M./R.K. *Conviction set aside.*

A. I. R. 1939 Sind 172

DAVIS J. C. AND DADIBA C. MEHTA J.

Mangharam Rupchand, Firm — Applicants.

v.

Haji Sorik Punhoo — Opponent.

Civil Revn. Appln. No. 61 of 1935, Decided on 31st May 1938, to revise decree of Small Cause Court Judge, Karachi, D/- 12th March 1935.

(a) Limitation Act (1908), S. 22—Substitution of party—Distinction between alteration amounting to misdescription and substitution—Amendment seeking to substitute one legal entity for another cannot be allowed after limitation.

The essential difference between an alteration that comes under the head of mere misdescription and an alteration that comes under the head of substitution is that in the case of a misdescription there is the same person or legal entity throughout; merely the name of the person is to be altered; but when one person, be it a legal or other person, is to be substituted for another, then the alteration cannot fairly come under the head of misdescription. It is a case of substitution, and S. 22 applies. Therefore an amendment of a plaint which seeks to substitute one legal entity for another after the period of limitation has passed cannot be allowed : *A I R 1928 Bom 191 and A I R 1934 Bom 385, Rel. on ; A I R 1935 Rang 240 and A I R 1924 Sind 47, Ref.* [P 172 C 2; P 173 C 1]

(b) Civil P. C. (1908), O. 30, R. 10—Firm of one person—Suit in firm's name is incompetent.

When a firm is only of one person a suit in the name of the firm is incompetent and will not lie under O. 30, R. 10 : *A I R 1931 Cal 770, Rel. on.* [P 172 C 2; P 173 C 1]

Santdas Idanmal — *for Applicants.*

Tarachand Khimandas — *for Opponent.*

Davis J. C.—This is a revision application against a judgment of the Judge of the Small Cause Court dismissing the plaintiffs' suit on the ground that the suit brought in the name of a firm should have been brought by the proprietor in his own name, and that to give leave to amend the plaint, as the plaintiffs prayed, would be to deprive the defendant of the defence of limitation. It is urged in revision before us that this is a case of mere misdescription, and that the Judge was wrong when he held that S. 22, Limitation Act, applied, but that even if this was the case of the substitution of one plaintiff for another, then it was a matter of form and not substance, and neither O. 30, R. 10, Civil P. C., nor S. 22, Limitation Act, is a bar to the alteration of the plaint as prayed for, and for this argument the learned advocate had authority in A I R 1935 Rang 240.[1] For the opponent however, it was argued that this is not a case of misdescription but the substitution of one legal entity for another, and the learned advocate relied on 17 S L R 263.[2]

Now, we think that the essential difference between an alteration that comes under the head of mere misdescription and an alteration that comes under the head of substitution is that in the case of a misdescription there is the same person or legal entity throughout; merely the name of the person is to be altered; but when one person, be it a legal or other person, is to be substituted for another, then we think the alteration cannot fairly come under the head of misdescription. It is a case of substitution, and S. 22, Limitation Act, applies. In this case, the plaintiffs are described in the plaint as the

firm of Mangharam Rupchand consisting of more partners than one and carrying on business at Karachi and registered under the Partnership Act,

and the plaint is signed by one Nazikmal Bassarmal as managing partner; but, it appears that the contract on which the plaintiffs sued was made by this Nazikmal Bassarmal when he was not the member of a registered firm at all; but he was sole proprietor of a business carried on under the assumed name of Mangharam Rupchand, the name subsequently given to the registered firm. Quite apart, then, from the fact that a suit will not lie in a firm's name

1. L. N. Chettyar Firm v. M. P. R. M. Firm, (1935) 22 A I R Rang 240=159 I C 138.
2. Manghoomal Jethanand v. Aratmal Satramdas, (1924) 11 A I R Sind 47=76 I C 119=17 S L R 263.

when the firm is only of one person, under O. 30, R. 10, Civil P. C., and such a suit is incompetent (35 C W N 432[3]) we have here the fact that it was sought by the amendment of the plaint to substitute one legal entity for another—a registered firm of two persons by one person, and the fact that this person was a common factor in both legal entities, does not seem to us to affect the case. We are asked to admit an amendment of a plaint which substitutes one legal entity for another after the period of limitation has passed and this we do not think we can do: *see* 30 Bom L R 117[4] and A I R 1934 Bom 385.[5] We think therefore that this application should be dismissed with costs and we order accordingly.

N.S./R.K. *Application dismissed.*

3. Neogo Ghose & Co. v. Sardar Nehal Singh, (1931) 18 A I R Cal 770=134 I C 1200=35 C W N 432.
4. Vyankatesh Oil Mill Co. v. N. V. Velmahomed, (1928) 15 A I R Bom 191=109 I C 99=30 Bom L R 117.
5. Krishnaji Shivaji v. Hanmaraddi Mallaraddi, (1934) 21 A I R Bom 385=153 I C 800=58 Bom 536=36 Bom L R 814.

A. I. R. 1939 Sind 173

DAVIS J. C. AND LOBO J.

Gopaldas Metharam — Appellant.

v.

Lokamal Chellaram and others — Respondents.

First Appeal No. 26 of 1936, Decided on 23rd December 1938, against decree of Rupchand Bilaram A. J. C., D/- 27th January 1936.

(a) Limitation Act (1908), Article 60 — "Demand" — Essentials of, stated — Deposit payable to more than one person — Demand must be made by person in position to give legal discharge on behalf of himself and others — Demand not addressed to depositee directly but merely made in written statement in suit to which claimant and depositee are co-defendants is not demand contemplated by Art. 60.

The demand contemplated in Art. 60 must be a legal demand. It must be made by a person capable of giving a valid discharge in the event of payment being made. If the deposit is payable to more persons than one it equally follows that the demand must be made by them all or at least by one of them duly authorized by the others and in a position to give a legal discharge on behalf of himself and the others. In the same way the demand referred to in Art. 60 must be a demand made directly on the party with whom the deposit lies in his capacity as depositee. The demand must be an unqualified demand for the whole sum due. A claim to deposit not addressed to depositees but put forward in written statement in a suit in which both the claimant and the depositee were co-defendants is not a demand of the nature contemplated in Art. 60: *AIR 1932 Mad 685, Rel. on.* [P 175 C 2; P 176 C 1]

(b) Debtor and Creditor — Right to recover debt devolving on sons jointly — They can file only one suit against their debtor — Some of them cannot split cause of action and sue for their share only.

Where the right of a person to recover certain debt has devolved upon his sons jointly, they can only file one suit against their debtors for recovery of the whole amount. Some of them cannot split the cause of action and sue for their share only on the ground that others did not join with them as co-plaintiffs. In that case it would be incumbent upon such of them as are filing the suit to claim the whole amount on behalf of themselves and their brothers on payment of the full court-fees and making their brothers, who had refused to join, as co-defendants. [P 176 C 1, 2]

(c) Civil P. C. (1908), O. 6, R. 17 — Amendment should not be allowed if prejudice results to other side which cannot be compensated in costs.

No doubt the powers of the Court to permit amendments under O. 6, R. 17 are very wide and should be freely exercised, but the exercise of this jurisdiction must not be resorted to where prejudice is likely to result to the other side which cannot be compensated in costs. [P 176 C 2]

Srikishendas H. Lulla — *for Appellant.*

Dipchand Chandumal—*for Respondents.*

Lobo J. — The facts which have given rise to this appeal are these: One Khushalibai, wife of Topumal, had deposited a sum of Rs. 4000 with her husband's brother Shewaram Ramrakhiomal who died in 1899. Topumal, Khushalibai's husband, had predeceased Shewaram. Shewaram had four brothers besides Topumal, Metharam, Rewachand, Hemandas and Ghandumal. Of these brothers Topumal and Metharam were full brothers; the others were step-brothers. Shewaram left a will which in one way or another has been the subject-matter of litigation in this Court for more than a generation. Under the will he appointed four executors and trustees one of them being his step-brother Hemandas. Khushalibai died about 1909. The deposit that she had made with Shewaram continued till her death and has continued thereafter in the hands of the executors and trustees of Shewaram's estate. But Khushalibai had left a will under which she bequeathed this money to Sitabai, the daughter of Shewaram and wife of Basarmal Tarachand, one of the executors and trustees of Shewaram's will. Metharam, the full brother of Shewaram, died in 1916 and Ghandumal, one of the half-brothers, died some year later leaving a son Motiram. Metharam had left several sons: Tejan.

mal, Sunderdas, Gopaldas, Khemchand and Tikamdas. Of the sons of Metharam, Tejanmal died in 1927. Between the death of Khushalibai in 1909 and the death of Tejanmal in 1927 no member of the family appears to have made any claim to the deposit money of Khushalibai in the hands of the executors and trustees of Shewaram's estate and it would appear that this money is still in their hands and that the only person they acknowledged as entitled thereto is Sitabai, daughter of Shewaram and wife of Basarmal, to whom the money was left under the will of Khushalibai. In 1928 however Motiram, son of Ghandumal, filed a suit in this Court, No. 360 of 1928, claiming a sum of Rs. 2000 out of this deposit of Khushalibai. He averred in the plaint that the amount of the deposit was Rs. 4000; that interest thereon had accrued at the rate of 9 per cent., that under the rule of damdupat interest could not be claimed in excess of the capital; that the deposit therefore amounted to Rs. 8000; that after Khushalibai's death her estate passed to the heirs of her deceased husband Topumal; that these heirs were four in number, Metharam, Hemandas, Rewachand and his own deceased father Ghandumal; and that he was thus entitled to one-fourth of Rs. 8000. The defendants in that suit were the executors and trustees of Shewaram's estate, defendants 1 to 4, the sons of Metharam deceased, defendants 5 to 8, the sons of Tejanmal deceased, defendants 9 to 11 and the sons of Rewachand deceased, defendants 12 to 14. The executors and trustees of Shewaram's estate were then represented by Lokamal Chellaram, Visumal Pablajraj, Hemandas Ramrakhiomal and Tikamdas Basarmal. Three of them filed a written statement opposing the claim on the grounds mainly that Ghandumal as a half brother of Topumal was not an heir of Khushalibai; and secondly, that under Khushalibai's will the deposit money had been bequeathed to Sitabai. Of the sons of Metharam the eldest Sunderdas and Khemchand were ex parte Gopaldas and Tikamdas were defendants 6 and 8; they appeared and filed a written statement. They averred therein that Khushalibai left as her heir their father, Metharam, the only full brother of Topumal, her husband; that Metharam on his death left defendants 5 to 8 and Tejanmal and his sons as survivors; that Tejanmal died in 1927 leaving defendants 5 and 6 as survivors of the family consisting of the deceased Tejanmal and defendants 5 and 6. Para. 10 of their written statement reads:

> As submitted above these defendants and defendants 5 and 7 are entitled to the entire sum of Rs. 8000 and therefore pray for a decree in their favour.

This suit however was dismissed for default of appearance of the plaintiff and there the matter rested till in 1932 Sunderdas and Gopaldas, sons of Metharam, Gopaldas being defendant 6 in the suit of 1928, filed suit No. 160 of 1932 claiming a sum of Rs. 4000 out of the same deposit of Khushalibai, in the hands of the executors and trustees of Shewaram's estate. In the original plaint they impleaded as defendants the four executors and trustees of Shewaram's estate, defendants 1 to 4, and Khemchand and Tikamdas. Defendant 7 was the Official Receiver representing the estate of the insolvent Khemchand. The executors and trustees of the estate of Shewaram in this suit adopted the pleas which they had taken in the previous suit. One of them however Hemandas filed a separate written statement of a colourless description merely requiring that the plaintiffs be put to proof of their claim. Tikamdas, defendant 6, does not appear on the record before us to have filed any written statement. Khemchand, defendant 5, supported the plaintiffs' claim and claimed his share. Certain issues were framed in the suit on 24th November 1932 but on 27th November 1935 Rupchand A. J. C. passed an order raising two preliminary issues:

> (1) Whether the suit was barred by limitation?
> (2) Whether the suit should be for recovery of the whole amount of the deposit?

The hearing of these issues as preliminary issues was adjourned to 10th December 1935. They were however actually heard and disposed of by the learned Judge on 27th January 1936. The learned Judge held on both these issues against the plaintiffs and ordered that the suit be dismissed with costs. It is against this decision and the decree which followed thereon that the present appeal has been filed, strange to say not by both the plaintiffs in Suit No. 160 of 1932 but by plaintiff Gopaldas alone. The plaintiff Sunderdas' name does not even appear in the category of respondents. The Honourable Mr. Rupchand A. J. C. held on the issue of limitation that Art. 60, Sch. 1, Limitation Act, was applicable; that limitation ran against the plaintiffs from 10th October 1928 on which date plaintiff Gopaldas and his brother Tikamdas had filed their written statement

in suit No. 360 of 1928 in para. 10 whereof they had claimed for themselves and defendants 5 and 7 in that suit the entire sum of Rs. 8000. The learned Judge held that this was a demand such as Art. 60 required; that the present suit having been filed in July 1932 was more than three years after the date of the demand and was therefore time-barred. The learned Judge states on this point :

Metharam was admittedly alive when Khushalibai died. That being so, the right if any of Khushalibai to recover the amount in suit devolved on Metharam. On his death that right devolved jointly upon his sons who were joint with him. In 1928 a nephew of Metharam filed Suit No. 360 of 1928 claiming that Metharam alone was not entitled to this amount and that all the brothers of Metharam and their sons were equally entitled to share the money with Metharam. To that suit the sons of Metharam were parties. Two of them remained ex parte and two others, namely Gopaldas and Tikamdas filed a defence in which they stated inter alia as follows :

'As submitted above these defendants and defendants 5 and 7 are entitled to the entire sum of Rs. 8000 and therefore pray for a decree in their favour.'

This was a clear demand made by Gopaldas and Tikamdas on behalf of themselves and their brothers, defendants 5 and 7. And therefore assuming that Art. 60, Limitation Act, applies, the period of three years commenced to run from 10th October 1928 which is the date of this written statement containing a clear demand for payment of the money. If Gopaldas was joint with Tejanmal and Sunderdas, this was a demand made by Gopaldas on behalf of all the three, assuming for the moment that there is no proof one way or the other that Tikamdas was also joint with Gopaldas and brothers. So far as Tikamdas is concerned he himself has signed the written statement and he cannot therefore plead that he made no demand. The demand contained in the written statement was therefore a joint demand on behalf of all the four sons of Metharam. Apart from this it would appear that there was a clear denial in the written statement filed in that suit by the trustees Lalchand, Lokumal, and Tikamdas, that Metharam or his sons were entitled to claim this money as heirs of the deceased Khushalibai. They not only set up a will of Khushalibai by which the money was left to Sitabai, w/o Basarmal Tarachand, but also stated that the trustees had passed a resolution that the amount be paid to Sitabai. The sons of Metharam were fully aware that their right to claim the money was being denied and that the money was not being held in deposit for them. The agreement if any to hold the money in deposit was at an end. That being so, the suit is barred by limitation whatever Article may be applicable to it, it having been filed in 1932, four years after the date of demand and refusal.

With this finding of the learned Judge we are not in agreement. Art. 60, Sch. 1, Limitation Act, provides a period of three years for the recovery of a deposit under an agreement that it shall be payable on demand from the time 'when the demand is made.' Obviously the demand contemplated must be a legal demand. It must be made by a person capable of giving a valid discharge in the event of payment being made. If the deposit is payable to more persons than one, it equally follows that the demand must be made by them all or at least by one of them duly authorized by the others and in a position to give a legal discharge on behalf of himself and the others. In the same way, it seems to us clear that the demand referred to in Art. 60 must be a demand made directly on the party with whom the deposit lies in his capacity as depositee. In A I R 1932 Mad 685[1] it was said that the starting point of limitation under Art. 60 is the date when the demand is made. Such a demand must be an unqualified demand for the whole sum due. Where the person demanding stated that he was in need of money and asked for payment of the whole if it suited the convenience of the depositee but in any case he asked him to send such money as he may be able to collect it was held that a qualified demand of this nature would not cause time to run for the whole amount due. It would appear further therefore that the demand contemplated by Art. 60 must be for the entire deposit and must be unqualified. It appears to us that the alleged demand in this case was not a legal or proper demand such as to result in causing time to run against the plaintiffs in the suit. In the first place, the demand was not made on the executors and trustees of the estate of Shewaram who were the depositees after the death of Shewaram. It was not addressed to them. It was merely a claim put forward in their written statement by one of the plaintiffs and a brother of his who were defendants in a suit in answer to the plaintiff's claim, a suit in which both they and the depositees were co-defendants. We do not think it can fairly be said that this was a demand of the nature contemplated in Art. 60, Sch. 1, Limitation Act.

Then again it was the case of the parties making that demand that the money was due and payable not to themselves alone but to themselves and defendants 5 and 7 in that suit, viz. Sunderdas and Khemchand, sons of Metharam. The defendants making the claim, Gopaldas and Tikamdas, had no authority to represent defendants 5 and 7

1. Subbiah Chetty v. Visalakshi Achi, (1932) 19 A I R Mad 685=139 I C 164=63 M L J 232.

to whom they refer in para. 10 of the written statement containing the demand. In fact if, as the learned Judge has held, Gopaldas and Tikamdas were joint with Sunderdas, then Sunderdas as the eldest member of the joint family and the karta thereof was the only person who could make a valid demand and give a valid discharge in the event of payment binding himself and the other members of the joint family. In these circumstances we are of the opinion that the demand made in the manner and the circumstances set out above by Gopaldas and Tikamdas was not in any sense such a demand as is required by Art. 60, Sch. 1, Limitation Act. Whether from the point of view of the persons demanding or from the point of view of the persons from whom the demand was made the demand was not such as to cause limitation to run against the plaintiffs. But though we differ from the decision of the learned Judge on the question of limitation we feel that the appeal must fail on the other issue which the learned Judge has decided against the present appellant and his brother Sunderdas. The learned Judge states on Issue 2:

> Apart from this it would appear that the suit is also incompetent as being on part of the cause of action. If the right of Metharam to recover the money devolved upon his sons jointly, they could only file one suit against their debtors for recovery of the whole amount. Some of them could not split the cause of action and sue for their share only on the ground that others did not join with them as co-plaintiffs. In that case it would be incumbent upon such of them as were filing the suit to claim the whole amount on behalf of themselves and their brothers on payment of the full court-fees and making their brothers who had refused to join as co-defendants.

We think that the learned Judge was right. The plaint in the suit made out that Gopaldas and Sunderdas were members of a joint Hindu family on 10th October 1928 when the written statement in the previous suit, No. 360 of 1928, had been filed by Gopaldas and Tikamdas. The learned Judge in his order dated 27th November 1935 to which reference has been made above had permitted the plaintiffs to apply for amendment of their plaint if they so wished to make it clear that Gopaldas and Sunderdas were not members of a joint Hindu family on 10th October 1928. The plaintiffs had failed to amend though the opportunity was afforded them. The debt consisting of the amount of the deposit made by Khushalibai was one and indivisible. The claimants to it as alleged by the plaintiffs in the suit constituted a joint Hindu family. In the circumstances it was not open to the plaintiffs to split up the claim and institute a suit for a part thereof on their own behalf. If the others entitled to share in the deposit were unwilling to join, then the only course open to the plaintiffs was to file a suit for the entire amount of the deposit paying court-fees on the entire amount, to implead the other claimants as defendants and pray for a distribution of the deposit amount to the parties entitled thereto with an appropriate order as to costs. This the appellant and his co-plaintiffs failed to do and the learned Judge has rightly held that the suit as brought was incompetent.

The learned advocate who has appeared for the appellant has argued that if this is our view it is open to us even at this stage to permit the appellant to amend the plaint and pay the necessary court-fees in accordance with our finding. No doubt the powers of the Court to permit amendments under O. 6, R. 17, Civil P. C., are very wide and should be freely exercised, but the exercise of this jurisdiction must not be resorted to where prejudice is likely to result to the other side which could not be compensated in costs. In the circumstances of this case we are not at all prepared at this stage to accede to such a prayer.

One other point was made by the learned advocate for the appellant before us and that is that the learned Judge erred in allowing six different sets of costs to the defendants in the suit some of whom had made common cause with the plaintiffs. The learned Judge has allowed separate sets of costs for defendants 3, 5, 6 and 7, one set of costs to defendants 1, 2, 4 and 9 and one set to defendants 8, 10, 11 and 12. Defendant 5 was Khemchand Metharam who was adjudicated insolvent and defendant 7 is the Official Assignee representing his estate; only one set of costs can be allowed to defendants 5 and 7. Defendant, Hemandas, No. 3 did not oppose the claim of the plaintiffs. Though impleaded as a respondent in this appeal he instructed his advocate at the hearing before us to withdraw. No costs should be allowed to him. To this extent we vary the order of the learned Judge in the matter of costs. But otherwise the appeal fails and is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Sind 177

DAVIS J. C. AND WESTON J.

Harchandrai Goumal — Plaintiff — Appellant.

v.

Gopaldas Parsram — Defendant — Respondent.

First Appeal No. 6 of 1936, Decided on 14th November 1938, against decree of First Class Sub-Judge, Hyderabad (Sind), D/- 29th January 1936.

(a) Civil P. C. (1908), O. 21, R. 63—Decree-holder filing suit against successful claimant need not join judgment-debtors as parties to suit but must prove his case by legally admissible and best evidence available.

In a suit under O. 21, R. 63, against the successful claimant, the judgment-debtors, his vendors, through whom he holds, are not necessary parties. They having parted with their interest in the property, it matters not to them if the defendant or the plaintiff has it, but the rules of evidence which require a plaintiff to prove his claim are not abrogated in his favour because he brings a suit against a successful claimant. The plaintiff must therefore succeed on the strength of his own title and must prove his case by legally admissible evidence and by the best evidence available: *28 All 41, Ref.* [P 177 C 2]

(b) Practice—Admission of documents—Duty of Courts — Papers in unsorted bundle should not be accepted or exhibited without determining their admissibility.

Judges should discriminate between documents which are admissible in evidence and are proved and documents which are not, and decline politely the invitations, however tactful or pressing, of learned advocates to accept and exhibit on the record papers in unsorted bundles. [P 178 C 1]

Kodumal Lekhraj — *for Appellant.*

Dipchand Chandumal — *for Respondent.*

Davis J. C. —This is a first appeal from a judgment of the First Class Subordinate Judge at Hyderabad in which he dismissed a suit brought by the plaintiff under O. 21, R. 63, Civil P. C., for a declaration that certain property was liable to be attached in execution of a decree obtained by him in Suit No. 59 of 1930 in the First Class Subordinate Court at Hyderabad against five brothers Thaumal, Kishinchand, Bhagumal, Kan and Vashdev. This property City Survey Nos. 1467, 1472, 1473, Ward C, in Hyderabad, was first attached in execution of the decree, but the defendant in this suit successfully asserted his claim, so plaintiff filed this suit within the year. Now defendant in this suit claims by reason of a sale to him by Radhibai, the widow of Gidumal, on behalf of her two minor sons Kan and Vashdev. She was the second wife of Gidumal and the three other sons of Gidumal, Thaumal, Kishinchand and Bhagumal, are her step-sons. The sale-deed is dated 13th June 1929, and is months prior in point of time to the suit. But the plaintiff claims that Radhibai could not sell to the defendant because the property was not the property of her two minor sons but was the joint family property of all the five sons of Gidumal and three sons were no party to the sale. Also he alleges that the sale was a bogus sale for the purpose of defrauding creditors. The defendant contended in reply that the sale was a genuine sale for good consideration, and that Radhibai as the guardian of her two sons was competent to sell and that Gidumal's sons were separated from Gidumal and the property sold was the property of Gidumal's two sons by his second wife Radhibai. He also contended that Radhibai and her three step-sons were necessary parties.

Now, it should be conceded that in a suit under O. 21, R. 63, Civil P. C., against the successful claimant, the judgment-debtors, his vendors, through whom he holds, are not necessary parties. They have parted with their interest in the property. It matters not to them if the defendant or the plaintiff has it. The position is different where the unsuccessful claimant brings a suit when the judgment-debtors are necessary parties, because the unsuccessful claimant is claiming against them, 28 All 41,[1] but the rules of evidence which require a plaintiff to prove his claim are not abrogated in his favour because he brings a suit against a successful claimant under O. 21, Rule 63, Civil P. C. The plaintiff must succeed on the strength of his own title, and if, as here, he claims that Radhibai could not sell these three City Survey Numbers because they were the joint property of Gidumal's five sons, he must prove that the property was the joint property of Gidumal's sons by legally admissible evidence and he must prove it by the best evidence available. If, as the plaintiff says, the five sons of Gidumal are still members of a joint family and these three City Survey Numbers are joint family property, he should call, or endeavour to call as his witness, the manager of the joint family, the eldest of the five sons. This the plaintiff has not done or attempted to do, and yet he asks in his plaint in

1. Ghasi Ram v. Mangal Chand, (1905) 28 All 41 =1905 A W N 172=2 A L J 491.

the alternative that the 3/5th share of these three sons, who are not parties to the sale deed to the plaintiff should be declared liable in execution of his decree. The sale challenged by the plaintiff in these proceedings is the sale under the registered deed of 13th June 1929, and to this sale deed only the two minor sons Kan and Vashdev through their mother and the defendant were parties. It is on this sale deed that the defendant has successfully claimed, and it is this sale deed the plaintiff seeks to have declared of no effect. We are not here concerned with the interest of the judgment-debtors who are not parties to that deed. We do not think we can take into account here admissions contained in written statements made by the three sons, Thaumal, Kishinchand and Bhagumal, in a suit brought against them in which they admitted they were separate from Gidumal, their father. Not one of these three brothers was called as a witness nor are these admissions made by them proved. The mere fact that a plaintiff who brings a suit under O. 21, R. 63, Civil P. C., need not join the judgment-debtors as parties does not entitle him to freedom from the provisions of the Evidence Act, and if he does not choose to call the judgment-debtors as witnesses, he cannot prove statements made by them unless the provisions of Sec. 32 or Sec. 33, Evidence Act, apply. These provisions do not apply in this case and the admissions therefore made by these three judgment-debtors in one suit and denials made by them in another suit are not admissible merely because they are not called as witnesses, and in this case these statements are not proved. Subordinate Judges would be well advised to discriminate between documents which are admissible in evidence and are proved and documents which are not, and to decline politely the invitations however tactful or however pressing, of learned advocates to accept and exhibit on the record papers in unsorted bundles.

Apart however from inadmissible evidence, it is clear the plaintiff fails to prove any of his allegations. In the unexplained absence of those best able to speak to the joint family and its property, any one of the three elder brothers, the learned Subordinate Judge was abundantly justified in relying upon the evidence of Radhibai herself. She says, as is quite probable, that on her marriage to him the sons by the first wife separated from their father Gidumal. This is easily understandable. The plaintiff's own witnesses Detaram and Lekhraj show that the sons had separated from their father and set up business on their own and they lived separately. The plaintiff himself did not come forward to give evidence but filed this suit through one Lekhraj. The plaintiff lives at Penang; the defendant lives at Rangoon, and defends the suit through an attorney Gidumal. We agree then with the Subordinate Judge that the plaintiff fails to show that the three sons of Gidumal and brothers of Kan and Vashdev had any subsisting interest in these three City Survey Numbers. We agree also with the finding of the Subordinate Judge that the sale deed Ex. 59 is proved and that there was consideration, and that it was not fraudulent. Radhibai proves the sale deed as does an attesting witness Kauromal. The relationship between Radhibai and the defendant is too remote to be considered. The defendant is a son of Radhibai's father's step-sister. It is clear that Radhibai was left in need of money. She had to incur expenses in connexion with her husband's death and death ceremonies. She had to maintain herself and her two children. She gave up possession of this very property to the purchaser. There is the evidence of one Manghanmal that she lived in a rented house. Another witness Nathirmal falsely said that he took the house on rent from Radhibai for his pocket-book showed the signature of the attorney of the defendant. The evidence of the witness Kalachand unsupported by any receipt or written evidence of his tenancy and a relation of the plaintiff was rightly rejected by the Judge. The witness Mengho was clearly a false witness and the oral evidence of Lekhraj was falsified by written rent notes; so is the evidence of Hakim Jamiatrai. The evidence of Detaram is falsified by the evidence of Mengho. On the other hand, the evidence of Gunomal, the attorney of the defendant, that the defendant took over the possession of the house is supported by written rent notes, municipal bills and receipts. The evidence of Chatomal supports the evidence of Radhibai herself that she has now to live in a rented house and has done so for some years. In our opinion, there is no evidence that Radhibai or the defendant acted fraudulently. We think it is clear that the plaintiff's case is a worthless case supported by worthless evidence, and that his suit was rightly dismissed, and that the

appeal must be dismissed with costs, and we order accordingly.

N.S./R.K. *Appeal dismissed.*

*** A. I. R. 1939 Sind 179**

DAVIS J. C. AND WESTON J.

Mahomed Nagman — Applicant.

v.

Zullekhan — Opponent.

Criminal Revn. Appln. No. 270 of 1938, Decided on 9th November 1938, to revise order of Addl. City Magistrate, Karachi, D/- 18th June 1938.

*** Criminal P. C. (1898), S. 488 (2) — Relations of husband and wife existing on date of application —Magistrate can direct husband to pay maintenance from date of application until expiry of period of iddat — Husband cannot avoid payment by divorcing his wife in middle of proceedings.**

For an order under S. 488 (2) the proper date to be considered is a date on which the application was made. If on the date on which the application is made relations of husband and wife exist, the Magistrate has jurisdiction to pass order under S. 488 (2) directing the husband to pay sums due on account of maintenance from the date of that application until the period of iddat has expired. There is nothing in the provisions of Sec. 488 which suggest that a husband can avoid payment of sums which a Magistrate might order to be paid under S. 488 (2) by divorcing his wife in the middle of the proceedings : *19 All 50, Ref.*

[P 179 C 1, 2 ; P 180 C 1]

Tarachand Khimandas — *for Applicant.*

Advocate-General — *for Opponent.*

Davis J. C.—This is a revision application to this Court from an order of the Additional City Magistrate, Karachi, ordering the applicant to pay maintenance of Rs. 3 per month to his wife Zullekhan and Re. 1-8-0 to his infant daughter Aidan from 30th May 1935, the date on which Mt. Zullekhan applied under S. 488, Criminal P. C. to 13th March 1937, the date of the expiry of the period of iddat, because during the pendency of these proceedings the husband on 14th December 1936 divorced his wife. It is contended on behalf of the husband in this revision application that the fact that he divorced his wife pending these proceedings deprived the Magistrate of jurisdiction, as Sec. 488, Criminal P. C., contemplates an order only as to future maintenance. But reference to S. 488 (2), Criminal P. C., quite clearly shows that the Section contemplates an order for arrears of maintenance payable from the date of application.

In this case the proceedings have been prolonged owing to mistake of the two learned Magistrates who dealt with this case from time to time. In the first instance when the application was made the husband came forward with a promise to maintain the wife and the Magistrate passed an order embodying this agreement. The opponent however failed to abide by the terms of this agreement and his wife was compelled to come and ask the Court to order maintenance in accordance with the terms of the agreement which the Court had made its own order; and the learned Magistrate who then dealt with the application refused to listen to the objections of the present applicant, the husband, as to the powers of his predecessor to make an order embodying the compromise until payments of arrears under this compromise had been made. The present applicant, the husband, then came to this Court in revision and this Court came to the conclusion that the Magistrate in embodying the terms of the agreement between the husband and wife in his order in the first instance, had exceeded his jurisdiction, because the compromise order provided something more than the mere payment of maintenance; it provided for conditions as to the wife's behaviour to her husband.

This Court also was of opinion that the Magistrate who refused to hear the applicant when he objected to the order of the Magistrate which embodied the compromise, had acted without jurisdiction and that he had no power to impose an order that arrears due under the compromise should be paid before he would listen to the applicant ; and this all took time; but we do not see why the wife should suffer because a husband failed to honour the compromise to which he was a party and because learned Magistrate who dealt with the wife's application made some mistake in law. It is clear that when the High Court set aside the two orders of the Magistrate which they thought were wrong, they sent the case back to be heard on the original application dated 30th May 1935 and it is this original application of the wife that the Additional City Magistrate, the third Magistrate to deal with the case, has taken as the basis of the proceedings before him and as a date from which he has ordered maintenance to be paid under Sec. 488 (2), Criminal P. C. In this, we think, he has acted quite rightly and we can see nothing in the provisions of S. 488,

Criminal P. C., which suggest that a husband can avoid payment of sums which a Magistrate might order to be paid under Sec. 488 (2) by divorcing his wife in the middle of the proceedings.

It is said that the case in 19 All 50[1] is authority for the statement that the relations of husband and wife must subsist throughout all the proceedings however prolonged under S. 488, Criminal P. C., if the Magistrate is to have jurisdiction. But we think the proper date to be considered is a date on which the application was made. If, on the date on which the application is made, relations of husband and wife exist as in this case, we think the Magistrate has jurisdiction to pass an order under Sec. 488 (2) directing the husband to pay sums due on account of maintenance from the date of that application until the period of iddat has expired. It is also urged in this case that the wife could not under Section 488 (3), Proviso 2, have asked for arrears of maintenance because more than a year has passed, but that Proviso merely lays down that a warrant shall not issue for the recovery of any amount due under the Section unless application is made within the period of one year of the date from which the amount sought to be recovered became due and in this case the amount which the wife seeks to recover became due under the order of the Magistrate on the date of that order, which is 18th June 1938. Clearly the application was in time. We see no merits in this application in any way and dismiss it accordingly.

D.S./R.K. *Application dismissed.*

1. Shah Abu Ilyas v. Ulfat Bibi, (1897) 19 All 50=1896 A W N 173.

A. I. R. 1939 Sind 180

DAVIS J. C. AND WESTON J.

Jasodabai w/o Tarachand — Applicant.

v.

Tarachand Tekchand—Opposite Party.

Criminal Revn. Appln. No. 274 of 1938, Decided on 7th December 1938, to revise order of City Magistrate, Karachi, D/- 28th July 1938.

Criminal P. C. (1898), S. 488 (3), Proviso — Mere absence of application for maintenance within one year of order of maintenance does not deprive wife of her right of maintenance under order for maintenance.

It is a general principle of law that an order whose term is not fixed and whose currency is not made expressly dependent upon the continued existence of some circumstance or set of circumstances remains in force until it is cancelled and prima facie this rule applies to maintenance orders passed under S. 488. Hence where the wife is not living in adultery, nor does she refuse to live with her husband, she is not deprived of her right to maintenance under the order merely because she has not applied for maintenance within one year of the order of maintenance : *A I R 1927 Mad 376, Rel. on.* [P 180 C 2; P 181 C 1]

Tarachand Khimandas — *for Applicant.*

Partabrai D. Punwani, Advocate-General — *for the Crown.*

Davis J. C. — This is an application against an order of the City Magistrate, Karachi, in which he dismissed the application of one Jasodabai, wife of Tarachand, for arrears of maintenance on the ground that her claim was time-barred. The order of the Special Magistrate was Rs. 20 per month payable to the applicant with effect from 8th March 1935, and the first application for arrears of maintenance was made on 8th February 1938. But the fact that the applicant so long delayed does not under Prov. 2 to sub-s. (3), S. 488, Cr. P. C., as the learned City Magistrate thinks, deprive her entirely of all rights of maintenance or to an order for maintenance; that Proviso merely provides that if an applicant delays the making of the application for the payment of arrears she can recover no more than 12 months' arrears due to her at the time of her application. The learned City Magistrate has in effect held that the absence of an application within 12 months of the order of maintenance extinguishes such orders. There is nothing in the words of the Section which in our opinion justifies that interpretation. It is a general principle of law that an order whose term is not fixed and whose currency is not made expressly dependent upon the continued existence of some circumstance or set of circumstances remains in force until it is cancelled, and prima facie this rule applies to maintenance orders passed under S. 488, Criminal P. C.: *see* 50 Mad 663.[1]

It is not contended that in this case any of those circumstances exist other than the lapse of time in making her application which would disentitle the wife to her maintenance. She is not, for instance, nor is it alleged, living in adultery, nor does she refuse to live with her husband. Therefore we cannot see that the applicant is depriv-

1. Kanagammal v. Pandara Nadar, (1927) 14 A I R Mad 376=100 I C 239=28 Cr L J 271 =50 Mad 663=52 M L J 176.

ed of her right to maintenance under the order which still exists and which is still effective, merely because in the Civil Court in certain circumstances certain applications may be barred after a lapse of three years. This Section must be read as it stands, and the nature of proceedings in Civil Courts, whether leisurely or otherwise, has nothing whatever to do with the case. We think therefore the application should be allowed, the order of the Magistrate should be set aside and the case sent back to him so that he may issue a warrant for the recovery of maintenance due for a period of 12 months prior to the date of the application, the 8th February 1938. Order accordingly.

D.S./R.K. *Application allowed.*

A. I. R. 1939 Sind 181

DAVIS J. C.

Jethanand Hemandas — Applicant

v.

Emperor.

Criminal Transfer Appln. No. 31 of 1939, Decided on 28th March 1939.

(a) Criminal P. C. (1898), S. 476 — "Court" in the Section contemplates Court itself and not the personality of the Magistrate.

Section 476 refers not to the Magistrate but to Court and contemplates the Court itself and not the personality of the trying Magistrate. Hence by reason of the words of the Section, the request for a transfer of a case to the file of the trying Magistrate before whom the alleged offence is committed which would otherwise be reasonable cannot be granted on the ground that he will be the best Magistrate to decide whether complaint should be made or not. [P 181 C 1]

(b) Criminal P. C. (1898), S. 526— Grounds of transfer —Fact that advocate appearing in the case is the official superior of brother of the Magistrate is not sufficient ground for transfer of case.

Where the advocate appearing in the case is the official superior of the Magistrate's brother, it should better be left to the good sense of the Magistrate whether to try the case himself or not and if in a particular case by reason of his brother's relationship with the advocate he feels in any way embarrassed in dealing with the case he should send the papers to the superior Court which can in the inquiry held by itself make any necessary complaint. [P 182 C 1]

Manaram A. Vaswani — *for Applicant.*

Balkrishin H. Lulla — *for Opponent.*

Partabrai D. Punwani, Advocate-General — *for the Crown.*

Order. — This is an application for the transfer of proceedings pending under Section 476, Criminal P. C., from the Court of the First Class Magistrate at Rohri to the Court of Mr. Abdul Hamid, now Magistrate at Garhi Yasin, on the ground that Mr. Abdul Hamid himself tried the case in which the alleged offences in which the inquiry under S. 476, Criminal P. C., is to be held were committed, and that he himself is the proper Magistrate to appreciate whether the complaint under S. 476, Criminal P. C., read with Sec. 195 should or should not be made. There is a great deal to be said for this argument and for the point of view that the Magistrate who himself presided in the case in relation to which the alleged offence, for which his complaint is necessary, was committed is the best Magistrate to decide whether complaint should or should not be made. But the actual wording of S. 476, Criminal P. C., appears to put some difficulty in the way of what is otherwise a reasonable procedure, for Sec. 476, Criminal P. C., refers not to the "Magistrate" but to the "Court." S. 476, Criminal P. C., says :

> When any Civil, Revenue or Criminal Court is . . . . . of opinion that it is expedient in the interests of justice that an inquiry should be made, . . .

and then the Section goes on to refer to "such Court" holding a preliminary inquiry if any; so that it would appear that what the Section contemplates is the Court itself and not the personality of the trying Magistrate. Therefore, it is not possible by reason of the words of the Section (Sec. 476, Criminal P. C.) to grant, what might otherwise be considered a very reasonable request: and it is obvious that the position of a Magistrate may be of some difficulty when the Magistrate has before him as an advocate, one who as President of a Municipality, is the official superior of his own brother who is the Assistant Chief Officer and whose promotion, it may be said, depends upon the good will of this advocate who may directly or indirectly influence the brother of the learned Magistrate or the Magistrate himself. Though I should be unwilling to think that such a thing is likely or probable, and I should say myself that a learned Magistrate so circumstanced would be particularly careful to see that in any proceedings in which the official superior of his brother appeared as an advocate great care was taken to see that the case of the other side, in which the learned advocate did not appear, was dealt with in a most careful and impartial manner. Moreover, as is clear, if it was only necessary to

say, that an advocate is the official superior of a Magistrate's brother, to get any case in which such advocate appeared before that Magistrate transferred, that advocate might most unfairly suffer in his work.

I think in this case the matter should better be left to the good sense of the Magistrate and if he feels that in this particular case, by reason of the relationship of his brother to this advocate, as a municipal subordinate to a Municipal President, he feels himself in any way embarrassed in dealing with this matter, he should send the papers to the Sessions Court which under S. 195, Criminal P. C., will be the "superior Court" for the purpose of the Section and which could, in the inquiry held by itself, make any necessary complaint. With these remarks I think the transfer application should be dismissed. Order accordingly.

S.G./R.K. *Application dismissed.*

A. I. R. 1939 Sind 182

DAVIS J. C. AND LOBO J.

Ghulam Mustafa Gahno—Accused

v.

Emperor.

Criminal Appeal No. 214 of 1937, Decided on 20th April 1938, against conviction and sentence passed by First Addl. Sess. Judge, Sukkur, D/- 29th November 1937.

Penal Code (1860), S. 300, Exception 1—In deciding whether provocation was grave and sudden, the Court will consider whether it was such as to deprive an ordinary man of the class or community to which offender belongs of power of self-control—But particular idiosyncracies of accused will not be considered.

In deciding whether the provocation was grave and sudden within the meaning of S. 300, Exception 1, it is not open to the accused to show that he was a person of particular excitability or of a particular mental instability or of a particularly volatile temperament. The Court would not take into account the particular idiosyncracies of the offending individual and would only consider the habits, manners and feelings of the class or community to which the accused belongs. And in determining whether the provocation was so grave and sudden as to deprive the offender of the power of self-control, the Court will consider whether that provocation would be so grave and sudden as to deprive the ordinary man of the class or community to which offender belongs of the power of self-control. While it is the offender whom the Court regards when considering the question whether he was deprived of the power of self-control by grave and sudden provocation it decides whether this was so by the test of the normal man of the community to which the accused belongs. The law against murder is not lightly to be relaxed.

[P 183 C 2; P 184 C 1]

Where therefore the accused alleged that he was deprived of the power of self-control by reason of a 'booja' (gesture of contempt) shown to him by the deceased his wife, and contends that among the Baluchis who are excitable people a 'booja' shown to them enrages them so much as to deprive them of self-control, he must show that showing a 'booja' is to Baluchis so grave and sudden provocation as would deprive the ordinary normal Baluchi of the power of self-control : *(1914) 109 L T 745, Ref.*

[P 184 C 1]

Partabrai D. Punwani—*for the Crown.*

Davis J. C. — In this case the accused, a youth of some seventeen years of age, has been found guilty by the Additional Sessions Judge of Sukkur, of a very brutal murder of his young wife, a girl of some thirteen or fourteen years of age and has, on account of his youth, been sentenced not to death but to transportation. There appear to us only two points in this case which require further consideration and discussion, and that is, (1) whether the murder was committed by two persons or one, by the accused and his father, or by the accused alone, and (2) whether the provocation given by the girl was sufficient to reduce the offence from one of murder to culpable homicide not amounting to murder.

Now, the learned Judge has dealt very carefully with the case, and he has given very good reasons for his conclusion that the murder was committed by this youth alone and not by his father also, as some of the girl's relations say. It is true that in the first information the girl's uncle who was the first informant implicates both the accused and his father Gahno. He says that in the first instance, the accused Ghulam Mustafa struck her on the neck with his hatchet, and the girl fell on her knees, but the father snatched the hatchet away and hit her again on the side of the neck; thereupon she fell senseless.

The medical evidence does indeed show that this unfortunate girl had two incised wounds, one a long gaping wound 5" long on the head itself, and one gaping wound $1\frac{1}{4}$" long on the face, and as a result of the first injury the brain substance was cut deeply. The murder therefore was a most brutal murder, and the relations of the girl must naturally have been incensed. Therefore it is not surprising if they brought into the first information not only the young husband himself but the father also. But when the uncle Morio went and

informed his zamindar, one Jagan Khan, a man of undoubted respectability and a disinterested witness and an unusually large landowner, he implicated only the accused Ghulam Mustafa, and even one Nazar, an uncle of the girl supports the case for the defence rather than the case for the prosecution, implicating only the accused Ghulam Mustafa who confessed to the murder. Chodio, the father of the girl, supported Morio in his implication of both father and son.

Chodio, Morio, Nazar and the accused all live close together and the quarrel appears to have arisen out of the absence of the girl from her husband's house, but as they live close together, the absence could not have been of a very long duration or such as justifiably to have aroused suspicion. There is no suggestion that the husband ever went to find his wife, and that he could not find her. It appears that her brother had come back with his bullock-cart from market at Shikarpur bringing certain things he had purchased and this girl had gone to her brother to get some of these things. In her absence therefore, there can appear to be no provocation. But the grave and sudden provocation urged by the defence is said to lie in the fact that when the girl was reproved by her husband for her absence, she showed him a "booja," that is to say, made a gesture of contempt, and it is urged that among the Baluchis who are excitable people, a "booja" shown to them so enrages them as to deprive them of self-control, and the learned Judge has considered carefully what is or is not grave and sudden provocation so as to reduce the offence of murder to one of manslaughter, and he quotes part of a judgment of so distinguished an authority as Lord Reading in (1914) 3 K B 1116,[1] as follows:

> It substantially amounts to this, that the Court ought to take into account different degree of mental ability in the prisoners who come before it, and if one man's mental ability is less than another's, it might be taken as a sufficient defence if the provocation given to that person in fact causes him to lose his self-control, although it would not otherwise be a sufficient defence because it would not be provocation which ought to affect the mind of a reasonable man. We agree with the judgment of Darling J. in (1914) 109 L T 745[2] and with the principles enunciated in (1871) 11 Cox C C 336,[3] where it is said that 'there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion.' We see no reason therefore to dissent in any way from the principle of law on which this case was tried. On the contrary, we think it is perfectly right. This Court is certainly not inclined to go in a direction of weakening in any degree the law that a person who is not insane is responsible in law for the ordinary consequences of his acts.

Lord Reading was dealing presumably with Englishmen or some people like them. He was not dealing with Baluchis nor do we think that judgment was intended to lay down that what is grave and sudden provocation to a Baluchi is grave and sudden provocation to an Englishman or vice versa. In short the "reasonable man" always a somewhat ideal figure, is not a person of identical habits, manners and feelings wherever he may be. We think the generality of the words used in the judgment necessarily imply some qualification. The "reasonable man" is the normal man of the same class or community as that to which the accused belongs; and we think the judgment which refers however specifically to "mental ability" should be read in conjunction with Exception 1 to S. 300, I. P. C., which is as follows:

> Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

Now, it is to be noted that the Exception refers to the offender. The words are: "Culpable homicide is not murder if the offender, whilst deprived of the power of self-control . . . ;" it does not say "if the offender being a reasonable man," but we think it means so, bearing in mind the habits, manners and feelings of the class or community to which the offender belongs. We do not think it was intended that in deciding whether the provocation was grave and sudden, it is open to an accused person to show that he was a person of particular excitability or of a particular mental instability or of a particularly volatile temperament. It was not intended that the law should take into account the peculiar idiosyncracies of the offending individual, but it was intended that the Court should take into account the habits, manners and feelings of the class or community to which the accused belonged. And in determining whether the provocation was so grave and sudden as to deprive the offender of the power of self-control the Court will consider whether that provocation would be so grave and

1. Rex v. Lesbini, (1914) 3 KB 1116=84 L J K B 1102=112 L T 175=24 Cox C C 516.
2. Rex v. Alexander, (1914) 109 L T 745=23 Cox C C 604.
3. Reg v. Welsh, (1871) 11 Cox C C 336.

sudden as to deprive the ordinary man of the class or community to which the offender belonged of the power of self-control. Therefore then the ordinary man, or, what we may call in the words of Lord Reading, the "reasonable man" comes in the interpretation of this Exception to Sec. 300, I. P. C. in this way : that while it is the offender whom the Court regards when considering the question whether he was deprived of the power of self-control by grave and sudden provocation, it decides whether this was so by the test of the "reasonable man," the ordinary normal man, the ordinary normal Baluchi, when dealing with Baluchis and the ordinary normal Englishman when dealing with the English. Clearly, there rests with the Judge and there was intended to rest with the Judge, a judicial discretion. Each case must be dealt with on its own facts. The law against murder however is not lightly to be relaxed. So far as the Sessions Judge in the case now before us decides that what constitutes grave and sudden provocation does not vary among different peoples in different countries at different times, and that what is not grave and sudden provocation to one is not grave and sudden provocation to any, we think he must be wrong. But it is clear that the learned Judge on other grounds has come to a proper conclusion. The mere fact, as he says, that when the Baluchis are shown a "booja" they get excited is not in itself sufficient to give them the benefit of the Exception. They must show that showing a "booja" is to Baluchis so grave and sudden a provocation as would deprive the ordinary normal Baluchi of the power of self-control, within the meaning of the Exception, and this on the evidence, the accused clearly fails to do. When Morio, the uncle of the murdered girl, the complainant and a Baluchi was asked definitely whether if his wife showed "booja" to him, he would kill her, he said "No, if my wife shows booja to me, I would beat her but will not kill her."

Therefore looking at this case from the point of view as to whether the provocation shown was such as to deprive an ordinary reasonable man of the class or community to which the accused belonged of the power of self-control, the Court came to the conclusion with evident justification, that no such grave and sudden provocation was proved. Rightly therefore the Court refused the accused the benefit of this Exception and found him guilty of the offence of murder. It was a particularly brutal murder, and it is only because of the youth of the accused that it could be said any mercy can be shown. The accused however as the Judge has said, is a young offender, and he did not consider it proper in the circumstances to pass a sentence of death. We therefore confirm the conviction and sentence and dismiss the appeal.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1939 Sind 184

DAVIS J. C.

Sat Narain Amratlal — Appellant

v.

Emperor.

Criminal Appeal No. 154 of 1938, Decided on 12th January 1939, against conviction and sentence passed by Second Special Additional City Magistrate, Karachi, D/- 13th October 1938.

Bombay Prevention of Gambling Act (4 of 1887), Ss. 4, 5, 6, 7 and 12—Word 'place' in S. 4 has wide meaning and its application is not excluded by Sec. 12 — Presumption under S. 7 can be drawn against keeper of shop which is " placed " under Sec. 12 and his conviction under S. 4 is proper.

The word 'place' in Sec. 4 has a wide meaning and its application is not excluded by S. 12 in proper cases even though the latter section might apply to the same 'place'. Hence a shop abutting on to a public street though a 'place' under S. 12 is a place under S. 4, and a search warrant under the Act can be issued and presumption under S. 7 can be drawn against the keeper of such a shop for the purposes of gaming for profit, and he can be convicted under S. 4 : *A I R 1926 Bom 149, Rel. on; 15 Bom L R 689, Ref.* [P 185 C 1]

Sobhanmal B. Ojha — *for Appellant.*

Nadirbeg K. Mirza — *for the Crown.*

Judgment.—The appellant in this case, one Sat Narain, was tried by the Second Special Additional City Magistrate, Karachi, with two others for offences under the Prevention of Gambling Act, and the appellant was convicted under Sec. 4 and sentenced to pay a fine of Rupees 100. He has appealed, and in argument the learned advocate based his case principally upon the argument that as the place where the alleged offence is found to have been committed was a shop looking on to the street, and therefore a place accessible to the public under S. 12 of the Act, the conviction if at all should have been under that section; no presumption under S. 7 could arise and

apart from that presumption, there is no sufficient evidence to convict the appellant. Put briefly, his case is that S. 12 and S. 4 of the Act are mutually exclusive, and that a 'place' within the meaning of S. 12 cannot be a place within the meaning of S. 4. But I do not think, it necessarily follows at all that because a place such as a shop abutting on to a public street might be a place within the meaning of S. 12, it cannot be a place within the meaning of S. 4. So to hold would be to allow persons to gamble in a shop so situated, free from the application of the provisions of Ss. 4, 5, 6 and 7. Such a shop could be kept for the purposes of gaming but no search warrant under the Act could be issued nor could the keeper of such a shop kept for the purposes of gaming for profit be convicted under S. 4. Further, as under S. 12 provision is made only for the search of a person, the shop itself could not be searched. I do not think this is a proper interpretation of the relevant sections.

In my opinion, a place may be a 'place' within the meaning of S. 12 as in the case in 28 Bom L R 92,[1] and still be a place within the meaning of S. 4. The word "place" in S. 4 has a wide meaning. It has been held to include a small open space surrounded by houses on all sides accessible by a narrow lane: 15 Bom L R 689.[2] S. 12 does not, in my opinion, exclude the application of S. 4 in proper cases even though in certain circumstances S. 12 might apply to the same "place". This being my view of the law, I can see no reason to interfere with the conviction by the Magistrate of the appellant.

The Magistrate, so far as the appellant is concerned, has raised two points: (1) whether the accused Sat Narain's shop is a common gaming house, (2) if so, whether Sat Narain is its keeper? And he found on these two points in the affirmative. There is clearly evidence to justify these findings which in my opinion are correct. The warrant under Sec. 6 was properly issued, and the presumption under S. 7 was properly raised. Ghulam Hyder, the Sub-Inspector, says he got information from a plain clothed head constable Akbar that the appellant Sat Narain was seen taking bets on American Futures, and Akbar, the head constable, testified to this in Court. One Madhowji who was used as a decoy and who placed a bet of a marked rupee with accused 2, gave evidence which clearly showed that the shop of which the appellant is the admitted tenant was used as a common gaming house. Accused 2 admits that the marked rupee was given to him by Madhowji but he says that he did not accept the bet but threw the rupee away. Madhowji's evidence is corroborated by the witness Alli Hashim, Ex. 4. It appears that Ghulam Hyder came to the shop disguised with a false moustache and that it was because the moustache dropped off prematurely that accused 2 took alarm and threw away the marked rupee, which Madhowji had given him, upon the counter, and accused 3 threw away the betting slip Ex. 1-D which was found on the ground near the shop. All this evidence, apart from the presumption, is sufficient to show that the house was kept as a common gaming house. Gambling in American Futures is carried on with slips such as Ex. 1-D, and it is unreasonable to suggest that such gambling in such circumstances was not carried on for profit and that the appellant, the tenant or occupier of the shop, did not know what his brother accused 2 was doing. Moreover, the marked rupee which was an instrument of gaming within the definition was found in a "place" within the meaning of S. 7, and is evidence until the contrary is proved, that the shop was used as a common gaming house, and the contrary had not been proved. The evidence of the two defence witnesses Hari, Ex. 12, and Sugar Bahadur, Ex. 13, clearly cannot be believed. It appears to me therefore that the appellant has been rightly convicted and sentenced, and I dismiss this appeal accordingly.

S.G./R.K. *Appeal dismissed.*

1. Emperor v. Fakirbhai Nathubai, (1926) 13 A I R Bom 149=98 I C 244=27 Cr L J 452=28 Bom L R 92.
2. Emperor v. Fattu Mahomed, (1913) 37 Bom 651=20 I C 609=15 Bom L R 689.

*** A. I. R. 1939 Sind 185**

DAVIS J. C.

Pritam Hariomal and others
Appellants
v.
Emperor.

Criminal Appeals Nos. 102, 107, 110, 112 and 120 of 1938, Decided on 3rd October 1938, against convictions and sentences passed by Addl. City Magistrate, Karachi, D/- 30th June 1938.

✲ (a) Evidence Act (1872), Ss. 10 and 25 — Statement to police by conspirator incriminating himself or others is not admissible — S. 10 does not avoid operation of Sce. 25, Evidence Act or S. 162, Criminal P. C.

Section 10 does not apply to incriminating statements made by accused to the police in the course of the investigation, whether they incriminate themselves or others unless the special provisions of S. 27 let in part of a confession to a police officer. A confession by a conspirator made to a Magistrate in Court implicating other conspirator is admissible in evidence under S. 30 but statements made by a conspirator to the police are not admissible in evidence if they are incriminating. For S. 10, Evidence Act, is not intended to remove those restrictions which the Evidence Act and the Criminal Procedure Code place upon the admissibility of statements made to the police. S. 10, Evidence Act, does not avoid in appropriate cases the operation of either S. 25, Evidence Act or S. 162, Criminal P. C. : *A I R 1932 Bom 56 and 38 Cal 169, Rel. on.* [P 188 C 2; P 189 C 1, 2]

It makes no difference if because a man is deaf these statements are written. [P 190 C 1]

✲ (b) Evidence Act (1872), Sec. 10 — S. 10 refers to common intention in future and not to one in past.

When S. 10 refers to the common intention of the conspirators, it refers to the common intention in the future, not to the common intention in the past: *A I R 1932 Bom 56 and 38 Cal 169, Rel. on.* [P 188 C 2]

(c) Criminal P. C. (1898), S. 162—Statement by accused to police—Admissibility—True test laid down.

The better and truer test of the admissibility of statements made by accused to police is whether the statement is incriminating in itself or exculpatory. If the statement is incriminating in itself, an accused will not desire to put it in evidence; if it is exculpatory in itself, but may by relation to the other evidence be made an incriminating statement, then it is admissible in evidence, because the accused's use of that statement as an exculpatory statement may well be permitted to prevail to his advantage over the use by the prosecution of that statement as an incriminating statement : *A I R 1930 Sind 225, Not foll.; 5 Bom L R 312 and 6 Bom 34, Ref.* [P 189 C 2]

K. H. Nagrani, P. S. Shahani, William Lobo and Balkrishna H. Lulla — *for Appellants.*

Nadirbeg Mirza, Asst. Public Prosecutor — *for the Crown.*

Judgment. — In the case out of which these appeals arise, seven persons were convicted under S. 120-B, Penal Code by the Additional City Magistrate, Karachi, of a conspiracy to cheat by passing off as genuine forged coupons of "Players" cigarettes. Of these seven accused, one Frederic alias Ramchand was convicted on his own plea on 17th November 1937, after he had confessed to his crime in Court and he has not appealed. Of the remaining six accused, one Pritam was sentenced to 12 months' rigorous imprisonment on account of previous convictions, and the remaining five Uttam, Tikam, Kakoo, Dhano and Bhagwano were each sentenced to six months' rigorous imprisonment. Uttam has not appealed and I have now to consider only the cases of Pritam, Tikam, Kakoo, Dhano and Bhagwano, who have appealed. In addition to the conviction under Sec. 420, I. P. C., Frederic alias Ramchand and Uttam were convicted of the substantive offence of cheating one Nirmaldas at Karachi in pursuance of the conspiracy, and Dhano and Bhagwano were each convicted of cheating in like manner one Tejumal at Sukkur. Uttam, Dhano and Bhagwano were each sentenced to six months' rigorous imprisonment for the substantive offences under S. 420, I. P. C. but as these sentences are concurrent with their other sentences, this is not of much importance.

Now, the principal witness for the prosecution is one Fatehchand who is employed by the Imperial Tobacco Company to operate a Redemption Mart for the coupons issued in the packets of Player's cigarettes. At about 10 P. M. on 14th April 1937, this Fatehchand was standing outside the shop of one Harumal, a dealer in cigarettes, when one Nirmaldas came to the shop with 74 coupons to dispose of. When Fatehchand saw these coupons he was struck by the colour and the paper and he took them away to test. He found that of the 74 only two were genuine. He then went to Harumal's shop and told him to go with him to Nirmaldas' shop and they went to Nirmaldas' shop and enquired from where he got these coupons. Nirmaldas gave the name of one Uttam and identified the other as a Christian. On 15th April, Fatehchand went with the Manager of the Imperial Tobacco Company to the police station and gave a first information, and he handed over the 74 coupons to the police. The Sub-Inspector then commenced his investigation and Nirmaldas took the police to Lalan Market and pointed out Uttam who was arrested. He had some "Cavenders" cigarettes under his shirt and he took the police to his room and it was searched. Packets of cigarettes were found and a photo in which Uttam identified Frederick alias Ramchand who was arrested. This Ramchand took the police back to Uttam's room and he pointed out on the veranda outside Uttam's room, a tin under a gunny

bag containing sheets and bundles of forged Player's coupons which were seized by the police. On information obtained from him the police went to the room of Pritam, broke open the lock and found forged coupons in a suit case. Pritam's son came into the room and claimed the suit case and was arrested, but was subsequently discharged by the Magistrate.

On information given by Pritam, the police went with Pritam to Sukkur. They arrived at Sukkur at 11 P. M. on 21st April and were there met by one Tikam and some conversation took place between Tikam and Pritam in the presence of police officers on which conversation has been subsequently based the conviction of Tikam. Search was made for the blocks used to print the forged coupons, but the search was unsuccessful, but Kaku, the keeper of a Press, was arrested. He was deaf and was accustomed to converse with his friends by writing on paper and the police secured from Pritam some pieces of paper on which messages to and from Kaku were written on which the convictions of Kaku and to some extent the conviction of Pritam have been based: these are Exs. 16, 16/1, 16/2 and 16/3. Tikam also was arrested. Then the appellants Bhagwano and Dhano who were implicated by Tejumal were arrested and then Pritam was arrested, and on 17th May all the accused were challaned to the City Magistrate's Court. Now as regards the guilt of Frederick alias Ramchand and Uttam, who have not appealed, there is ample evidence from Karachi itself. It is only when the scene shifts to Sukkur that the case requires more careful consideration.

So far as Karachi is concerned, there is the evidence of the complainant Fatehchand, of Harumal, the cigarettes dealer, and of Nirmaldas, whose evidence directly implicates both Uttam and Ramchand. Uttam was pointed out by Nirmaldas to the police; Ramchand, the so-called Christian, was identified by a photo in Uttam's room and arrested and identified by Nirmaldas. The forged coupons were taken possession of from Fatehchand, the complainant, as soon as they passed into the possession of Harumal. The forged coupons were found in a tin box in the verandah just outside Uttam's room and on 21st April the accused Ramchand took the police to the shop of Rodrigues & Co. and 100 forged coupons were seized, and on 27th April he took the police to the Elphinstone Restaurant and 380 forged coupons were seized in the presence of mashirs, and the accused Frederick alias Ramchand has confessed in Court. Therefore there can be no question as to the correctness of the conviction of Frederick and Uttam, and the Magistrate is clearly right when he says that a plan of this sort could not have been carried out without a criminal conspiracy. His opinion is that the accused Pritam was the chief of the conspiracy and that the forged coupons were printed at Kakumal's press, but even if he were wrong in this, it is clear there was a criminal conspiracy to which Frederick on his own confession and the evidence, and Uttam on the evidence, were clearly parties. Moreover, it is clear that the forged coupons found at Sukkur from the possession of Tejumal were also passed off as the result of this same conspiracy. The Magistrate may be wrong when he says that when Pritam was arrested he agreed to produce the blocks and point out the conspirators, and the Sub-Inspector Ghulam Hyder rather than the Magistrate more correctly appreciates the law when he states in his evidence that on his arrest he enquired from Pritam and Pritam then took them to Sukkur. But the letter Ex. 59 from the agent of the Imperial Tobacco Company saying that he has 375 forged coupons is only dated 19th April. The police arrived at Sukkur on the night of 21st April and on the 23rd the police secured from him a bundle of 374 forged coupons. This is something more than mere coincidence, and there can be no reasonable doubt that the conspiracy at Sukkur and Karachi to pass off forged coupons was one and the same. As at Karachi there is the direct evidence of Harumal and Nirmaldás, so at Sukkur there is the direct evidence of Kevalram, the Company's Sukkur agent, and Tejumal implicating both Bhagwano and Dhano. It is said that the evidence of Kevalram, the Sukkur agent, is unreliable. He did not mention names in his letter of the 19th, but this was merely prudence; he would have been unwise to mention names until a police enquiry had confirmed suspicions.

Kevalram's evidence is corroborated by the evidence of one Manickam, a commercial traveller of the Company. Manickam says that on 21st April 1937 Kevalram told him he had received some 377 coupons from one Tejumal; Tejumal went to Dhano and Dhano ran to Bhagwano. What Keval-

ram told Manickam that Tejumal had told him is hearsay but Tejumal himself gave evidence. Tejumal says definitely that Dhano and Bhagwano both brought him the 375 coupons. Dhano would come when he was called to Kevalram but Bhagwano would not. It is said for Dhano and Bhagwano that they might both have been innocent agents, that Kevalram has no account of this transaction in his books and that even if Dhano was guilty, it is argued that Bhagwano is not. He may have been an innocent companion of Dhano and he has been prejudiced by his relationship with Pritam. There appears little force in these arguments. There appears to me no question but that Dhano and Bhagwano who were dealing in these coupons, as the evidence of Tejumal shows, knew that they were forged. Dhano is a panwalla. Bhagwano was working ostensibly in a cloth merchant's shop. It seems to be that Dhano and Bhagwano are as properly convicted for their participation in the conspiracy and for the cheating of Tejumal at Sukkur as Frederick and Uttam were properly convicted for their share of the conspiracy in Karachi and their cheating of Harumal at Karachi. There remains then the case of Tikam, Kakumal and Pritam. Dealing with the case generally and summing up his conclusions the Magistrate says (*see* p. 136 of the paper book):

> Pritam is the ringleader from whom everything originates. Kakoomal is the owner of a Press and has done the printing. Uttam has sold the coupons and got assistance in selling them. Tikam is the general assistant to Pritam for his Sukkur branch. Bhagwano and Dhano have sold the coupons at Sukkur either directly or with the assistance of others.

Now, this may be a true allocation of responsibility and division of labour, but the guilt of Pritam, Tikam and Kaku must be proved from evidence legally admissible; and so far as Tikam is concerned, the case is summed up by the Magistrate thus:

> As regards the accused Tikam, I refer to his conversation with Pritam at the Sukkur station platform and his interest in the chits which he sent to Uttam. If he were not in the conspiracy why should he take this interest ?

Now, it appears that when Pritam went with the police to Sukkur he was met on the railway platform by Tikam and Tikam spoke to Pritam in the hearing and presence of the Sub-Inspector Ghulam Hyder and the constable Sher Ahmed who were in plain clothes, and Tikam asked Pritam what had happened to his son Gopal, and Pritam replied he was under arrest. Tikam then said:

> Do not worry as the blocks have been removed to another place where they are safe. He also said that he had read Sind Samachar paper and had learnt about this case.

He then went away. It is upon this evidence that the Magistrate has chiefly relied to convict Tikam, and the learned Magistrate appears to consider that the evidence is admissible under Sec. 10, Evidence Act, which admits the evidence of conspirators, at any time and place free from all those limitations which affect statements made by the accused or witnesses to the police, even incriminating statements made by conspirators when accused persons to the police. Now it is clear that S. 10, Evidence Act, does not apply to incriminating statements made by accused to the police in the course of the investigation, whether they incriminate themselves or others unless the special provisions of S. 27 let in part of a confession to a police officer. When S. 10 refers to the common intention of the conspirators, it refers to the common intention in the future, not to the common intention in the past and this has been decided in cases. In 55 Bom 839[1] at p. 843, Barlee J. said:

> Reading S. 10 it appears to me that narratives coming from the conspirators as to their past acts cannot be said to have a reference to their common intention. The word 'intention' implies that the act intended is in the future and the Section makes relevant statements made by a conspirator with reference to the future. I interpret the words "in reference to their common intention" to mean in reference to what at the time of statement was intended in the future. This appears to me the ratio decidendi of the Calcutta cases, 38 Cal 169[2] and 46 Cal 700,[3] though the full argument is not contained in the judgments of their Lordships. On principle this interpretation seems to be correct. The principle on which S. 10 is based is that of agency: see the extract from the judgment of Crump J. at p. 519 in 31 Bom L R 515[4]: 'When concert have once been proved, each party is the agent of all the others, and acts done by him in pursuance of the common design are admissible against his fellow conspirators.' It can scarcely be said however that one conspirator has any implied authority to make a confession after his arrest as

1. Emperor v. Vaishampayan, (1932) 19 A I R Bom 56=1932 Cr C 40=134 I C 1238=33 Bom L R 1159=33 Cr L J 76=55 Bom 839.
2. Emperor v. Abani Bhusan, (1911) 38 Cal 169 =8 I C 770=15 C W N 25.
3. Sital Singh v. Emperor, (1920) 7 A I R Cal 300=54 I C 53=21 Cr L J 5=46 Cal 700=30 C L J 255.
4. Emperor v. Shafi Ahmed, (1925) 31 Bom L R 515.

in 38 Cal 169,[2] or even as in this case to give a description of past events to his co-conspirator.

In 38 Cal 169,[2] it was laid down that a confession by a conspirator made to a Magistrate after arrest disclosing the existence of a conspiracy, its objects and the names of its members, is not admissible, under S. 10, Evidence Act, against the co-conspirators jointly tried with him, but only under S. 30 of the Act. S. 10 is intended to make as evidence communications between different conspirators while the conspiracy is going on with reference to the carrying out of the conspiracy. The confession of a co-accused was not intended to be put on the same footing as a communication passing between conspirators or between conspirators and other persons with reference to the conspiracy. The evidentiary value of such a confession, under S. 30, is not higher than that of the statement of an accomplice, and it cannot be acted upon unless corroborated by independent testimony implicating the accused in the design with which they are charged.

The confession then of Frederic alias Ramchand made to a Magistrate in Court implicating Uttam and Pritam is admissible in evidence, is a confession under S. 30 but statements made by Pritam to the police or by Tikam or Kakumal to the police are not admissible in evidence if they are incriminating, for S. 10, Evidence Act is not intended to remove those restrictions which the Evidence Act and the Criminal Procedure Code place upon the admissibility of statements made to the police. S. 25, Evidence Act, lays down that "no confession made to a police officer shall be proved as against a person accused of an offence." There is no question in this Section of the custody of the police. Sec. 162, Criminal P. C., lets in the statements of witnesses subject to certain conditions. The conspirators in this case are accused, not witnesses. S. 10, Evidence Act, does not avoid in appropriate cases the operation of either of these Sections. Moreover, it has been laid down by this Court in A I R 1930 Sind 225,[5] that a useful test of the admissibility of statements made by the accused to the police is to ascertain the purpose for which it is being put by the prosecution. If they are to be used by the prosecution to incriminate the accused, then they are not admissible, even if they are made by the accused in his own defence and intended to exculpate him. With all respect to the learned Judges who decided that case, it appears to me a matter of some argument whether this is the proper test, for it is not difficult to think of a case where an accused most urgently desires that an exculpatory statement made by him to the police at an early stage of the investigation should be put in evidence to prove his innocence, and yet the prosecution may desire themselves to use the same statement, read with other evidence in the case, to incriminate the accused. To shut out this evidence might do the accused grave harm and injustice, and it may be that the better and truer test is whether the statement is incriminating in itself or exculpatory. If the statement is incriminating in itself, an accused will not desire to put it in evidence; if it is exculpatory in itself, but may by relation to the other evidence be made an incriminating statement, then it appears to me there is much to be said for the argument that it is admissible in evidence, because the accused's use of that statement as an exculpatory statement may well be permitted to prevail to his advantage over the use by the prosecution of that statement as an incriminating statement. Two cases of Bombay are somewhat in point: 5 Bom L R 312[6] and 6 Bom 34.[7]

But this particular aspect of this question is of no moment here, for, it is clear that the prosecution wish to use against Tikam to incriminate him statements made by him on the railway platform during the course of the police investigation, and made in effect to the police. The argument that they were made to Pritam and not to the police is a mere subterfuge. A Sub-Inspector and a constable bring these statements of Tikam on the record as made in their hearing and in effect to them. This is clearly not the sort of evidence on which an accused can be convicted. It is inadmissible under S. 25, Evidence Act interpreted by the ruling of this Court to which I have referred. The chits on which the Magistrate further relies to convict Tikam owe their existence to the fact that Kaku being deaf used to converse by writing on paper, are worthless in themselves as evidence and inadmissible as incriminating statements made by accused persons to a police officer in the course of an investigation. Tikam therefore must be acquitted and discharged, and I order accordingly.

Similarly, there appears no sufficient evidence against Kakumal. The Magistrate finds him the owner of the Press which

5. Muhammad Yusif v. Emperor, (1930) 17 A I R Sind 225=1930 Cr C 865=126 I C 449 = 31 Cr L J 1026.

6. Emperor v. Mahomed Ebrahim, (1903) 5 Bom L R 312.

7. Imperatrix v. Pandharinath, (1881) 6 Bom 34.

printed these forged coupons, but no forged coupons and no blocks were found in this Press, but Kakumal was deaf and communicated with his friends in writing, and the Magistrate has relied on certain chits and slips of paper written to and by Kakumal or at his instance in the course of the police investigation to convict Kakumal. The evidence of Khemchand, a former Municipal Councillor proves nothing against Kakumal, and so far as the writings by and to Kakumal or at his instance are concerned, it would appear they were made at the instance of Pritam in the presence of the constable Sher Ahmed. Statements made to the police by accused persons, to incriminate them, are inadmissible in evidence, as I have pointed out. It makes no difference if because a man is deaf these statements are written. There appears therefore no admissible evidence sufficient to convict Kakumal, and he must be acquitted and discharged, and I order accordingly.

So far as Pritam is concerned, he is implicated in the confession of Frederick alias Ramchand. This is evidence only under S. 30, Evidence Act, and subject to the infirmities of such evidence, but it is clear that he lived with Uttam and when he moved lived a few doors away. He had, it is clear, close associations with him. Forged coupons were found in a suit case in his room but they were claimed by his son Gopal and this cannot go against him. Any incriminating statement made by him to the police is admissible only so far as it leads to the discovery of any fact. Sukkur was not discovered as the result of Pritam's confession, but against him stands the evidence of Kishinchand. He is a block maker and he states that two months before the police recorded his statement, Pritam had come to him to get a block made of a Player's coupon. Now, I have read through the statement of this witness carefully and I can see no possible reason to reject it. It appears clear also that Pritam himself brought the police to his shop. Moreover, he tried to give the police the slip in Karachi. He went into hiding. Against this evidence is the evidence of Pritam's witnesses: Inspector Tobin, Thakurdas Mohandas, fruit hawker, Frederick alias Ramchand giving evidence for the defence as a witness and not as an accused, Dr. Tekchand, Laikram, head constable, and Girdhari Lal, a hawker (see p. 134 of the paper book), but all this amounts to nothing in rebuttal of the prosecution case against him.

I am forced therefore to the conclusion that Pritam was in this conspiracy and has been rightly convicted. His conviction and sentence must be confirmed accordingly. The appeals of Tikam and Kaku are allowed and the appeals of the other appellants dismissed. Order accordingly.

D.S./R.K. *Order accordingly.*

A. I. R. 1939 Sind 190

DAVIS J. C. AND LOBO J.

Kadur Baksh Waroo and another
Appellants
v.
Emperor.

Criminal Appeal No. 207 of 1938, Decided on 13th January 1939, against judgment of First Addl. Sess. Judge, Hyderabad, D/- 27th August 1938.

Penal Code (1860), Sec. 489-D — Accused found in possession of instruments or materials for purpose of being used for counterfeiting— He is guilty under Sec. 489-D even though instruments found were not all articles required for counterfeiting.

The wording of S. 489-D is very wide and would clearly cover a case where a person is found in possession of machinery, instruments or materials for the purpose of being used for counterfeiting currency notes, even though the machinery, instruments or materials so found were not all the articles required for the purpose of counterfeiting : *21 M L J 766, Rel. on.* [P 192 C 2]

Syed Md. Aslam — *for Appellants.*

Partabrai D. Punwani, Advocate-General — *for the Crown.*

Lobo J. — The two appellants in this case Kadir Baksh alias Kadri, son of Waroo, and Saleh, son of Kamil, have been tried and convicted by the First Additional Sessions Judge of Hyderabad of an offence under S. 489-D, I. P. C., and have been sentenced each to undergo rigorous imprisonment for four years. The facts of the case are quite simple. On 3rd June 1937 one Umer Gado made a statement to the District Superintendent of Police, Karachi, which was recorded wherein Umer stated that appellant Kadri alias Kadir Baksh was counterfeiting currency notes. The statement was made over to Inspector Shafi Muhammad for investigation. The Inspector proceeded to Tatta and on 5th June obtained a warrant from the First Class Magistrate, Tatta, empowering him

to search the house of Kadri in the village of Rais Muhammad four to five miles from Tatta. Accompanied by mashirs Damodardas and Bakadar Sheikh the Inspector on 6th June went to the village of Rais Muhammad which he reached at 11 A. M. They found the house indicated in the warrant to consist of two landhis facing east and west with a common wall between and surrounded by an enclosure. In the western landhi were appellant Kadri, his wife and the wife of appellant, Saleh the sister of Kadri. The Inspector proceeded to search. From a locked trunk in the landhi which was opened with a key obtained from appellant Kadri was found a bundle of five P. O. P. papers three of them of the size of a five rupee note. From a locked tin box lying under the trunk which the Inspector also opened with a key obtained from appellant Kadri were found some small bottles containing powders, some boxes of soap and two pieces of plates of wood of the size of a ten rupee note. Concealed in a pile of bedding were found two plates or sheets of glass of the size of a ten rupee note. The eastern landhi was next searched and from a wall thereof were found two bundles of prints of ten rupee notes, six in number. A mashirnama was prepared. Appellant Kadir Baksh was present throughout the proceedings; appellant Saleh and one Bhambho who has been acquitted came there while the search was in progress. Appellant Kadir Baksh was arrested and taken by the police to Tatta where the Inspector recorded a formal first information report. Saleh and Bhambho were thereafter arrested and all three were challaned to the Court of the First Class Magistrate, Tatta, on 27th June 1937.

Appellant Kadri alias Kadir Baksh alleged the case against him was false; Umer Gado was his enemy; they had disputes over land; Umer's grand-mother had eloped with his cousin Muso Rais; Umer's sister was on terms of intimacy with him. The Inspector of Police was also inimical to him because he had "come within his jurisdiction" and when questioned about it he had given the Inspector "a curt reply." He even alleged enmity between himself and Saleh appellant to whom he said the house searched belonged. In the Sessions Court he further denied that he had produced the articles seized by the Police in the search. Appellant Saleh admitted the house searched was his but said he was not present at the search. On the day in question he had gone to Muhammad Rais a carpenter and the police "fetched" him from there. When he was brought to his house Kadri and Bhambho "were both sitting there" and "the property in Court was already before them." Appellant Kadri was his enemy "on the question of girls."

Now, there can be no doubt that on 6th June 1937 the Inspector Shafi Muhammad searched these premises in the village of Rais Muhammad in the presence of mashirs Damodhardas and Bakadar Sheikh Mahomed Usman and prepared a mashirnama (Ex. 14). The mashirnama has been signed by the mashirs and sets out in clear terms whence the police found the various articles seized by them and mentioned in the mashirnama. When the police arrived they found the premises in the occupation of appellant Kadri, his wife and the wife of appellant Saleh; Saleh and Bhambho came there of their own accord while the search was proceeding. It was appellant Kadri who produced the keys of the two receptacles in which some of the articles seized by the police were found. Evidence on all these points has been given by Inspector Shafi Muhammad (Ex. 3), by the mashirs Damodardas (Ex. 19) and Bakadar (Ex. 20). The Inspector has denied the existence of any enmity between him and appellant Kadri, and there has been no suggestion why Damodardas and Bakadar Sheikh should give false evidence against the appellants. The learned advocate for the appellants faintly suggested that the incriminating articles referred to in the mashirnama (Ex. 14) might have been introduced by Umer Gado who was present with the search party. But there is nothing to support the suggestion. The evidence clearly shows that during the search Umer Gado who had acted as a guide to the Inspector was kept outside the premises and could have had no opportunity of planting incriminating articles on the occupants. Besides several of these articles were found in locked receptacles opened by the Inspector of Police with keys produced by appellant Kadri. Moreover the search was conducted in broad daylight and any attempt at introducing incriminating articles into the premises searched could easily have been discovered by the appellants and brought to the notice of the Inspector and the mashirs. There is no evidence that the appellants or any of the occupants did any such thing. That the appellants were in

conscious possession of the articles seized by the police and referred to in the mashirnama (Ex. 14) cannot be doubted. Saleh admits the landhis belong to him and that he lives there; Kadri was found in occupation and in his possession were the keys of the receptacles lying in one of the landhis. The appellants have admittedly married each other's sisters and both these women were present when the police arrived to search the premises. There would appear to be no substance whatever in the statements of the appellants that they were at enmity with each other over women.

But the main argument urged by the learned advocate for the appellants was that assuming that the appellants were found in possession of the articles seized by the police, these articles were of an innocent nature, might well have been possessed for innocent purposes, and cannot be held to have been in the possession of the appellants for the purpose of being used or with the knowledge that they were intended to be used for forging or counterfeiting currency notes. On this point the prosecution have placed on record the evidence taken on commission of the Master Security Printing,India,and of the Engraver Security Printing, India, both of whom were examined at Nasik on interrogatories sent to the District Magistrate of Nasik. In their opinion, of the articles sent to them for examination, the P. O. P. papers, the two pieces of glass and the photographs or prints of ten rupee notes are articles which could be used in the process of counterfeiting currency notes; "the prints could be used as a photographic basis on which to draw coloured counterfeit notes by hand." The appellants are mere rustics living on cultivation in an out of the way village some miles away from Tatta, and it is very difficult to conceive of any innocent purpose for which they could have been in possession of P. O. P. papers and P. O. P. prints of ten rupee notes. So far from suggesting any innocent purpose the appellants have denied possession of the incriminating articles. The learned advocate for the appellants argues that the appellants might have been in possession of these papers and prints to enable them to cheat some simple and unwary cultivators with the usual note-doubling trick. But the appellants themselves have made no such suggestion and it is difficult to understand why even for such a purpose ten rupee note prints should be kept in stock.

Next it is argued by the learned advocate for the appellants that the articles alleged to have been found in the possession of the appellants were by no means all the articles required for counterfeiting currency notes and that therefore the appellants cannot be convicted of an offence under S. 489-D, I. P. C. We do not think however that this argument avails the appellants. The wording of Sec. 489-D is very wide and would clearly cover a case where a person is found in possession of machinery, instruments or materials for the purpose of being used for counterfeiting currency notes, even though the machinery, instruments or materials so found were not all the articles required for the purpose of counterfeiting. In the case of 21 M L J 766[1] it was stated by Sundara Aiyar J. :

> If the purpose and intention of the accused be proved it is not necessary that all the articles required for counterfeiting should be found on him to hold him guilty of an offence under S. 489-D, I. P. C. A man may not be able to command all the articles required for the purpose but he may be actually proved to be in possession of only some. This would not deter the Court from convicting him of an offence under the statute.

On the evidence on the record and the circumstances of the case we feel no doubt whatever that the appellants were in possession of the incriminating articles referred to in the mashirnama (Ex. 14) for the purpose of using them for forging or counterfeiting currency notes. We see no reason therefore to differ from the conclusion arrived at by the learned Additional Sessions Judge who tried this case and of the three assessors who were unanimously of the opinion that the appellants were guilty of the offence with which they were charged. We accordingly confirm the convictions and sentences of the appellants and dismiss this appeal.

D.S./R.K. *Appeal dismissed.*

1. Abdul Rahman v. Emperor, (1911) 21 M L J 766=11 I C 241.

*** A. I. R. 1939 Sind 193**

FULL BENCH

DAVIS J. C., WESTON AND TYABJI JJ.

Mt. Harbai, w/o Ratna—Applicant.

v.

Raya Premji and another —

Non-applicant.

Criminal Revn. Appln. No. 40 of 1939, Decided on 23rd May 1939, to revise order of 3rd Addl. City Magistrate, Karachi, D/- 26th January 1939.

(a) Criminal P. C. (1898), Ss. 437, 403 Expln., 203 and 259—Scope of S. 437—Complaint dismissed under Sec. 203 or accused discharged under S. 259 — Any Magistrate (of co-ordinate jurisdiction) can entertain second complaint on same facts although order of dismissal or default is not set aside: *23 S L R 43= A I R 1929 Sind 61=112 I C 681, Overruled.*

Section 437 is only an enabling Section and does not take away by implication the jurisdiction vested in a Magistrate to hear the complaint again: *29 Cal 726 (F B), Rel. on.* [P 194 C 2]

Where therefore a Magistrate dismisses a complaint for default under Sec. 203 or discharges an accused under Sec. 259, it is competent for that Magistrate or his successor in office or any other Magistrate having co-ordinate jurisdiction to entertain a second complaint on the same facts although the order of dismissal or discharge may not have been set aside by a higher Court: *23 S L R 43= A I R 1929 Sind 61=112 I C 681,* **Overruled.** *Case law discussed.* [P 193 C 1]

Such Magistrate, while entertaining the second complaint should however keep in mind the default committed in the earlier proceedings for that default may have a bearing not only upon any subsequent default committed but also upon merits of the complaint. [P 196 C 1]

(b) Criminal P. C. (1898), Ss. 203 and 259—Order dismissing complaint under S. 203 or discharging accused under S. 259 is not judgment.

The word 'judgment' indicates some final determination of the case which would end it once for all, such as an order of conviction or acquittal. Hence an order dismissing a complaint under Sec. 203 or discharging an accused under S. 259 is not a judgment: *28 Cal 652 (F B); 29 Mad 726(F B) and A I R 1939 F C 43, Rel. on.* [P 195 C 2]

Kishinchand J. Bijlani —

for Applicant.

Partabrai D. Punwani, Advocate-General — *for the Crown.*

Weston J. — The question referred to the Full Bench is :

Whether it is competent for a Magistrate to entertain a second complaint upon a statement of facts which constituted a first complaint which has been dismissed for default under S. 203, Criminal P. C., or in which the accused have been discharged under S. 259, Criminal P. C., the order of dismissal or discharge, as the case may be not having been set aside by a higher Court,

and has been made because of the Bench decision of this Court in 23 S L R 43[1] which has been followed in subsequent cases. In 23 S L R 43[1] the following question arose :

Whether it is open to a Magistrate to entertain a complaint when a similar complaint has been dismissed by another Magistrate of co-ordinate jurisdiction and the dismissal has not been set aside by higher authority.

It was held that the answer to this question should be in the negative. Reliance was placed upon two cases, 22 All 106[2] and 23 Cal 983,[3] and the following passage from the judgment of the Allahabad case was approved :

It is utterly contrary to sound principles that one Magistrate of co-ordinate jurisdiction should, in effect and substance, deal with, as if it were an appeal or a matter for revision, a complaint which had already been dismissed by a competent tribunal of co-ordinate authority.

It is to be noted that this question is not identical with that now referred to us although the two have common ground. That in 23 S L R 43[1] related to the entertainment of the second complaint by a Magistrate other than the Magistrate who disposed of the first complaint, but covered not only cases where the first complaint had been dismissed for default, whether under S. 203, or under S. 259, Criminal P. C., but also cases where the complaint had been dismissed under S. 203, Criminal P. C., on consideration of its merits or the accused had been discharged under S. 253, Criminal P. C. The question now referred to us is restricted to cases of dismissal for default but includes all second complaints whether made to the Magistrate who dealt with the first complaint, to his successor-in-office, or to another Magistrate of co-ordinate jurisdiction.

In the Allahabad and the Calcutta cases the dismissals of the first complaints had been under S. 203, Criminal P. C., but were not dismissals for default of appearance by complainants. These authorities have been considered in later cases of the same High Courts. The present view of the Allahabad High Court does not differ from that expressed in 22 All 106[2] and it is given in 56 All 425.[4] In this, three classes of cases are

1. Mt. Tirathbai v. Mt. Sugnibai, (1929) 16 A I R Sind 61=112 I C 681=29 Cr L J 1097 =23 S L R 43.
2. Queen-Empress v. Adam Khan, (1900) 22 All 106=1899 A W N 211.
3. Nilratan Sen v. Jogesh Chundra, (1896) 23 Cal 983=1 C W N 57.
4. Ramanand v. Sheri, (1934) 21 A I R All 87= 150 I C 373=35 Cr L J 1062=56 All 425.

set out: (1) When the subsequent complaint is filed before the same Court presided over by the same Magistrate, (2) when the subsequent complaint is filed before the same Court presided over by the successor-in-office of the Magistrate who had dismissed the first complaint, and, (3) when the subsequent complaint is filed before a Court other than the Court which dismissed the former complaint. It was held settled that there is no bar to the entertainment of the second complaint by the same Magistrate who has dismissed the first complaint, and reference was made to four cases of the Allahabad High Court, the two latest being 29 All 7[5] and 36 All 53.[6] It was also held that the entertainment of the second complaint by a successor-in-office of a Magistrate who has dismissed the first complaint is competent. Reference was made to 36 All 129.[7] As for the third class, it was held that 22 All 106[2] had not been overruled by cases relating to the first and second classes and that a second complaint on the same facts should not be entertained by another Magistrate of co-ordinate jurisdiction. The passage from 22 All 106,[2] already quoted, was approved.

It is not clear upon what legal basis the Allahabad High Court considers that the distinction made in the three classes of cases is justified. No doubt under Sec. 561 (A), Criminal P. C., the High Court has power to make such orders as may be necessary to prevent abuse of the process of a Magistrate's Court, and in particular cases it may be proper and desirable that the High Court should quash proceedings taken on second complaints. But such orders may also be proper and desirable in the particular circumstances of the case, when the second complaint is made to the Magistrate who dismissed the first complaint or to the successor-in-office of such Magistrate. In 12 Lah 9[8] the Lahore High Court held that the dismissal of a complaint, even when that dismissal had been upheld by the Sessions Judge in revision, was not a bar to a second complaint, apparently made to the same Magistrate, but as they found no good grounds for reconsideration of the case they quashed proceedings on the second complaint as an abuse of the process of the Court. The argument of convenience or sound principle hardly seems to justify a hard and fast distinction.

We also think that the undesirability of one Magistrate entertaining a complaint when a first complaint on the same facts has been disposed of by another Magistrate can be overstressed. We do not think that generally there is any unhealthy spirit of emulation among Magistrates which makes them eager to entertain complaints dismissed by their colleagues, and a Magistrate who showed this spirit would quickly attract the notice of the higher authorities. The Calcutta High Court seems to have departed entirely from the view expressed in 23 Cal 983.[3] In 28 Cal 211[9] it was held that the view expressed in 23 Cal 983[3] could not be applied to Presidency Magistrates to whom Ss. 436 and 437, Criminal P. C., do not relate. 28 Cal 652[10] is a similar ruling by a Full Bench dealing with Presidency Magistrates. In 29 Cal 726[11] a Full Bench considered the question :

> Whether a Magistrate in a warrant case having passed an order of discharge is competent to take further proceedings and issue process against the accused in respect of the same offence unless an order of further inquiry shall have been passed under S. 437, Criminal P. C., having the effect of setting aside the order of discharge.

The question was answered in the affirmative. It was held by Maclean C. J. that S. 437, Criminal P. C., is only an enabling Section and does not take away by implication the jurisdiction vested in a Magistrate to hear the complaint again. In 36 Cal 415[12] it was held that a Subordinate Magistrate who had dismissed a complaint under S. 203, Criminal P. C., was competent to revive it notwithstanding that the District Magistrate had refused to order a further inquiry in the matter on application made to him for that purpose. In 40 Cal 71,[13] an accused had been discharged in the Sessions Division of the High Court on

5. Emperor v. Mehrban Hussain, (1907) 29 All 7 =1906 A W N 245=3 A L J 562=4 Cr L J 59.
6. Emperor v. W. C. Keymer, (1914) 1 A I R All 179=22 I C 145=15 Cr L J 1=36 All 53=12 A L J 1.
7. Ram Bharos v. Baban, (1914) 1 A I R All 79= 22 I C 734=15 Cr L J 158 = 36 All 129=12 A L J 106.
8. Allah Ditta v. Karam Bux, (1930) 17 A I R Lah 879=1930 Cr C 923=127 I C 15=31 Cr L J 1180=12 Lah 9=32 P L R 208.
9. Queen-Empress v. Dolegobind Dass, (1901) 28 Cal 211=5 C W N 169.
10. Dwarka Nath Mondul v. Beni Madhab Bannerjee, (1901) 28 Cal 652=5 C W N 457 (F B).
11. Mir Ahwad Hossein v. Mohamed Askari, (1902) 29 Cal 726=6 C W N 633 (F B).
12. Jyotindra Nath Daw v. Hem Chandra Daw, (1909) 36 Cal 415=2 I C 293=9 Cr L J 563= 13 C W N 193.
13. Emperor v. Idoo, (1913) 40 Cal 71=15 I C 488 =16 C W N 983.

a *nolle prosequi* entered by the public prosecutor. The accused was subsequently placed on his trial on the same facts before a Magistrate. It was held following 29 Cal 726,[11] that the Magistrate was wrong in declining jurisdiction which he undoubtedly had to hear the case.

The Madras High Court in 29 Mad 126[14] followed 28 Cal 652,[10] although the case before it was not one of the Presidency Magistrate, and held that the same Magistrate could entertain a second complaint. In 55 Mad 622,[15] it was held that when a complaint is dismissed under Sec. 203, Criminal P. C., any Magistrate having co-ordinate jurisdiction can take cognizance of a subsequent complaint on the same facts, notwithstanding that the order of dismissal has not been set aside. In 8 Pat 537,[16] a second complaint before the same Magistrate was held to be competent. In 27 Bom L R 352,[17] it was held that when an accused is once discharged by one Magistrate under Sec. 203, Criminal P. C., it is open to the complainant to file another complaint on the same facts before another Magistrate, although it was considered incumbent on the complainant to inform the second Magistrate of the disposal of the first complaint, and 22 All 106[2] was dissented from. In 31 Bom L R 146[18] a second complaint to the same Magistrate was held to be competent. There is therefore general authority that when a complaint has been dismissed or the accused have been discharged, a second complaint is competent notwithstanding that the order of dismissal or discharge has not been set aside by a higher authority.

As pointed out by Maclean C. J. in 29 Cal 726,[11] S. 437, Criminal P. C., is an enabling Section. The Explanation to Sec. 403, Criminal P. C., states that a dismissal of a complaint or discharge of the accused is not an acquittal for the purposes of this Section. If the Legislature had intended to qualify this Explanation so that the dismissal of the complaint or the discharge of the accused is to be a bar to fresh proceedings on the same facts unless the order of dismissal or discharge is set aside by a higher Court, we think the Legislature would have said so either explicitly or by omitting the Explanation altogether.

In 28 Cal 652[10] the question was raised whether S. 369, Criminal P. C., which provides that a Magistrate may not alter or review a judgment passed by him, does not prevent the entertainment of a second complaint. Maclean C. J. expressed the opinion that an order dismissing the complaint or discharging an accused is not a judgment and that the word 'judgment' indicates some final determination of the case which would end it once for all, such as an order of conviction or acquittal. In the same case Ghose, J. who dissented from the final conclusion expressed by the Full Bench, considered that when a Magistrate investigates the merits of a complaint either by examination of the complainant or by taking such evidence as is produced and when his order discharging the accused is based on this investigation, then his order would be a judgment. He conceded however that an order dismissing a complaint for default could not be a judgment. In 29 Mad 126,[14] it was held by White C. J. that an order of dismissal of a complaint under S. 203, Criminal P. C. is not a judgment. A detailed discussion of the point appears in the judgment of Sulaiman, J. in a recent case of the Federal Court of India, (12th April 1939), (Case No. 1 of 1939)[19] in which the learned Judge adopted the view expressed by Maclean C. J., in 28 Cal 652.[10]

It is not necessary for us to consider the possible effect of S. 369, Criminal P. C., on the question considered in 23 S L R 43.[1] As already remarked, the question now referred to us is not identical with that decided in 23 S L R 43.[1] Although the words in S. 259, Criminal P. C., are "may in his discretion . . . . discharge the accused," we think that this discretion relates to the nature of the default rather than to the merits of the complaint we think that an order dismissing for default a complaint made either under S. 203 or under S. 259, Criminal P. C., is not a judgment. Also we do not think that considerations of sound policy can bar the entertainment by a

14. Emperor v. Chinna Kaliappa Gounden, (1906) 29 Mad 126=16 M L J 79=3 Cr L J 274.
15. In re Ponnuswami Gounden, (1932) 19 A I R Mad 369=1932 Cr C 353 = 137 I C 317 = 33 Cr L J 454 = 55 Mad 622 = 62 M L J 469 (F B).
16. Janakdhari Singh v. Emperor, (1929) 16 A I R Pat 469=1929 Cr C 353=120 I C 632=31 Cr L J 146=8 Pat 537=10 P L T 725.
17. In re Mahadev Laxman, (1925) 12 A I R Bom 258=87 I C 527=26 Cr L J 991=27 Bom L R 352.
18. Emperor v. Amanat Kadar, (1929) 16 A I R Bom 134=116 I C 251=30 Cr L J 594=31 Bom L R 146.
19. Dr. Horim Ram Singh v. The Crown, *Reported in* (1939) 26 A I R F C 43=181 I C 317.

Magistrate of co-ordinate jurisdiction of a complaint when a first complaint has been dismissed for default, and we do not think it necessary to say more than that when entertaining a second complaint a Magistrate should keep in mind the default committed in the earlier proceedings, for this default may have a bearing not only upon any subsequent default committed but also upon the merits of the complaint. We therefore answer the question referred to us in the affirmative.

N.S./R.K. *Answer in affirmative.*

A. I. R. 1939 Sind 196

TYABJI J.

In the matter of All India Home Relief Insurance Co., (in liquidation.)

Misc. Appln. No. 293 of 1935, Decided on 2nd September 1938.

(a) Companies Act (1913), S. 227 (2)—Payments by insurance company after commencement of winding up, to policy-holders in respect of policies, are void and cannot be validated.

Where an insurance company makes payments, between the commencement of the winding up and the date of the winding up order, to some of its policy-holders in respect of their policies, the amount of which had become due, such payments being payments of debts by company to its creditors clearly amount to dispositions of property within the meaning of S. 227 (2) and are not only void but cannot be validated : *English Case law discussed and Rel. on* ; *A I R 1931 Bom 2, Rel. on.* [P 197 C 2]

(b) Companies Act (1913), S. 227—S. 227 and S. 57, Presidency Towns Insolvency Act—Distinction stated.

The difference between S. 57, Presidency Towns Insolvency Act, and S. 227, Companies Act, is that while bona fide payments to creditors by an insolvent, subject to the very important foregoing Sections in the Insolvency Act are permissible and valid, and may generally be quite proper, payments to creditors, of debts previously incurred by a company from the moment of the presentation of a winding up petition, become improper alienations and void. It necessarily follows from this, that while such payments by an insolvent made bona fide to his creditors may be regarded as payments made in the ordinary course of business, payments by a company of debts existing at the time of the presentation of a petition for winding up, made after the presentation of the petition, cannot be so regarded. Transactions which the law regards as improper and declares void, and which a company conducted with due care and attention ought to avoid cannot be regarded as transactions in the ordinary course of business. Secondly, for the purposes of S. 227, it is wholly immaterial whether the person making or receiving the payment had or did not have notice of the presentation of the petition for winding up, and the operation of that Section is not in any way made to depend upon such notice, whereas it would be essential under S. 57, Presidency Towns Insolvency Act, for a person claiming the protection of that Section to show that the transaction claimed to be valid was without notice of the presentation of any petition. [P 198 C 2; P 199 C 1]

(c) Companies Act (1913), S. 227 (2) — Transactions which Court would validate under S. 227 (2) mentioned.

Transactions made after the commencement of a winding up which a Court would validate under S. 227 (2), are transactions bona fide entered into by a company for the benefit of the company and those interested in the assets of the company, for preserving the business of the company as a going concern, and not to the detriment of other creditors. [P 199 C 1]

Hakumatrai M. Eidnani and Pahlajsingh B. Advani — *for Applicants.*

Radheylal Aggarwal and Parmanand Thakurdas — *for Opponents.*

Order.—This is an application by the Official Liquidator under S. 227, Companies Act, in respect of certain payments by the All India Home Relief Insurance Co. Ltd., now being wound up, made between the commencement of the winding up and the date of the winding up order. The Official Liquidator asks for a decision whether these payments are to be dealt with in this winding up, as wholly void, or whether this Court will otherwise order and validate the payments under Cl. (2) of S. 227. The business of this company was inter alia to grant relief on marriages, maternity and betrothals. They issued policies on receipt of certain initial payments, and received periodical subscriptions payable on the policies, and on the occasion of marriages, maternity and betrothals, the policies entitled the holders to receive certain payments, by way of relief under the rules of the company. The rules also entitled the policy-holders to certain refunds of the amounts paid as subscriptions under certain circumstances.

The company came to grief in the latter part of the year 1935. Its affairs were carried on by a Board of four directors through their managing agents. Of these directors one resigned on 7th August, and two others on 13th August. The fourth director, who was also one of the managing agents, was arrested by the police on 20th September and remained in jail till after 5th November. On 17th September shortly before the arrest, the managing agents appointed one Gokaldas as their attorney, who continued to transact the business of the company after the three directors had resigned and the fourth one had been

arrested. On 11th October a petition was filed for winding up the company compulsorily, but the business of the company was continued until 5th November, on which date the petition filed on 11th October was published in the newspapers, and the company stopped further business. A provisional Official Liquidator was appointed on 28th November and an order of the Court for winding up the company was made later. During the period, 11th October to 5th November the company paid very nearly Rs. 34,000 to various policy-holders, claiming the amounts as due to them on their policies or as refunds. The Official Liquidator has filed lists of these persons whose number is extremely large. In view of the impracticability of serving and hearing all these persons, the learned Judge before whom this matter came up, on 16th May 1938, ordered that a certain number of these persons should be selected, and an opportunity given to them for being heard on this question. Notices have now been served upon 27 such persons, several of whom have filed their objections and are represented by advocates. On behalf of the Official Liquidator, I am now merely asked to declare that all these payments are wholly void and that they cannot properly be validated. I am not now asked to make any further order against any of the persons who have been served, in respect of the payments received by them. The Official Liquidator reserves the right to proceed against these persons later, in case I hold these payments void and refuse to validate them. The general question common to all these payments alone is therefore the subject of this order.

It is not disputed that the winding up commenced on 11th October 1935, the date of the petition, by virtue of Sec. 168, and that the payments, being dispositions of property by the company, are therefore void, unless this Court exercises its discretion and "otherwise orders" under S. 227. The main ground on which I am asked to exercise the discretion and to affirm and validate these payments under S. 227, is that they were made bona fide and in the ordinary course of current business to persons who had no notice of the presentation of the petition, and as such, were payments which ought to be upheld by this Court. There are very few decisions of the Indian Courts (only two have been cited before me), but as S. 227 is for all practical purposes identical with S. 153 of the English Companies Act 1862 and S. 173 of the English Act of 1929 English cases in point directly apply. The case in 54 Bom 718[1] also exhaustively deals with this subject. Referring to the English Section which corresponded to Sec. 227, Companies Act, and provided that all dispositions of property by a company after the commencement of a winding up were void. Lord Cairns L. J. in (1868) 3 Ch 443,[2] at pages 446-447, said:

> This is a wholesome and necessary provision to prevent during the period which must elapse before a petition can be heard, the improper alienation and dissipation of the property of a company in extremis

and Sir G. Mellish L. J. in (1874) 9 Ch 511[3] pointed out that the result of the petition was that the assets of the company were as from that date to be divided equally amongst its creditors, and that anything contrary to that sound principle, which had always prevailed in bankruptcy could not be allowed. In the present case I have to deal with the cases of persons who have after the date of the petition received amounts from the company by reason of the fact that they were policy-holders and these sums had become due to them. The payments were therefore clearly payments of debts by the company to its creditors, and it is well-settled law that such payments are not only void but cannot be validated: In (1874) 18 S J 78,[4] Lord Romilly refused to validate the payments to the policy-holders made by the Insurance Company after the date of the petition, although the payments had become due and been proved several months before the date of the petition. The receivers of the payments were ordered to refund the amounts: In (1887) 58 L T 220,[5] Chitty J., stated:

> The proposition that payment by a company after the commencement of a winding up of a bona fide debt previously incurred will be affirmed by the Court under S. 153 is wholly untenable.

And he ordered that that part of the payment which was for a debt incurred by the company before the date of the petition, should be refunded. Similarly in (1895) 2

1. Tulsidas v. Industrial Bank of Western India, (1931) 18 A I R Bom 2=127 I C 82=54 Bom 718=32 Bom L R 953.
2. In re Wiltshire Iron Co.; Ex parte Pearson, (1868) 3 Ch 443=37 L J Ch 554=18 L T 38 =16 W R 682.
3. In re Liverpool Civil Service Association; Ex parte Green Wood, (1874) 9 Ch 511 = 43 L J Ch 609=30 L T 451=22 W R 686.
4. In re European Assurance Society: Brown and Tylden's case, (1874) 18 S J 78.
5. In re Civil Service and General Stores Ltd., (1887) 58 L T 220=57 L J Ch 119.

Manson 314,[6] Vaughan Williams J. ordered Boosey & Co. to refund a payment made to them by the Repertoire Co., incurred before, but paid after, the date of the petition. In Halsbury's Laws of England, Vol. V Para. 1076 the rule is stated in these words :

> The payments of debts will not be sanctioned. A creditor who receives payment between the petition and the winding up order is compelled to refund ; and directors who make any improper payments out of the company's assets after the commencement of the winding up, are themselves liable to the company for the moneys paid away.

It is therefore clear that such payments are to be regarded as improper alienations and dissipation of the Company's property, void in law, and those receiving such payments must be made to refund them. When dealing with the case of certain banks, who obtained security from a company after the presentation of a petition in respect of advances which had been made before the date of the petition, Marten C. J., and Patkar J. of the Bombay High Court, in 54 Bom 718[1] refused to validate the transactions. The learned advocates who appear to support these payments have not been able to show anything which would save these payments from the application of the rule just referred to ; and in fact the payments in this case were as bad a case of improper dissipation of a Company's property as one could come across.

Although what has just been stated is sufficient for the disposal of the matter before me, I must deal with the very lengthy argument which has been addressed to me by the learned advocates. It was argued that the effect of Sec. 229, Companies Act, was to bring into application the same rules and principles which prevailed in insolvency proceedings to the winding up of a company, and as bona fide payments made by an insolvent to his creditors before the date of the adjudication order without notice of the presentation of any insolvency petition, were subject to certain important foregoing provisions, valid under the protection Section (S. 57, Presidency Towns Insolvency Act), so bona fide payments in the ordinary course of business made by a company before the date of the winding up order, provided they were made to persons without notice of the presentation of the winding up petition, should be validated by the Court as a general rule when exercising the discretion under S. 227, Companies Act. The entire argument is based on a series of misconceptions. S. 229, Companies Act merely enacts that the same rules will prevail among the claimants from a company in winding up proceedings, inter se, as those which prevail among the creditors inter se in insolvency proceedings. S. 229 is as follows :

> *Application of Insolvency rules in winding up of insolvent companies* : In the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up, and make such claims against the company as they respectively are entitled to by virtue of this Section.

What the argument of the learned advocates entirely overlooks is the very vital difference between S. 57, Insolvency Act, and S. 227, Companies Act. While bona fide payments to creditors by an insolvent, subject to the very important foregoing Sections in the Insolvency Act are permissible and valid, and may generally be quite proper, payments to creditors of debts previously incurred by a company from the moment of the presentation of a winding up petition, become improper alienations and void. It necessarily follows from this, that while such payment by an insolvent made bona fide to his creditors may be regarded as payments made in the ordinary course of business, payments by a company of debts existing at the time of the presentation of a petition for winding up, made after the presentation of the petition, cannot be so regarded. Transactions which the law regards as improper and declares void, and which a company conducted with due care and attention ought to avoid cannot be regarded as transactions in the ordinary course of business. As Marten C. J. says in 54 Bom 718[1] at page 753 :

> There is I think a dividing line between what is in the ordinary course of business before a winding up petition is presented, and what is the ordinary course afterwards. Before a petition is presented it is in the ordinary course of business for a company to pay all its debts and incidentally to give security to its bankers for any overdraft or loan it may arrange. But after a petition is presented, the situation is different, prima facie all debts will have to be paid *pari passu*. Therefore it is no longer in the ordinary course of business to pay one creditor in full to the detriment of his fellow creditors.

6. In re Repertoire Opera Co., (1895) 2 Manson 314.

It is also difficult to treat such payments as bona fide payments by the company, even when no fraud or improper motives are attributed to the parties actually concerned in the transactions, for, quite apart from the motives or intentions of such individuals, the very fact that a company ought not to make such payments, which the law regards as improper dissipations of property to the detriment of other creditors, brings into application the rule that nothing can be said to be done in good faith which is done without due care and attention. It may also be pointed out that for the purposes of S. 227, it is wholly immaterial whether the person making or receiving the payment had or did not have notice of the presentation of the petition for winding up, and the operation of that Section is not in any way made to depend upon such notice, whereas it would be essential under Sec. 57, Presidency Towns Insolvency Act, for a person claiming the protection of that Section to show that the transaction claimed to be valid was without notice of the presentation of any petition. In (1926) 1 Ch 828[7] Romer J. while validating a transaction entered into between the company and Rowley with knowledge of the fact that a petition for winding up has been presented, observed :

> If therefore I were to hold that no one who knows of the presentation of a petition can safely enter into any arrangement with the company, I think I should be depriving the company of the benefit which according to Lord Cairns the provision of the Section was intended to secure to it.

This is therefore another important point which shows that the considerations upon which transactions may be held to be valid or otherwise, under S. 57, Insolvency Act, and under S. 227, Companies Act, are entirely different. Transactions made after the commencement of a winding-up which a Court would validate under S. 227 (2), are transactions bona fide entered into by a company for the benefit of the company and those interested in the assets of the company for preserving the business of the company as a going concern, and not to the detriment of other creditors. In (1868) 3 Ch 443[2] at p. 447, Lord Cairns after speaking of improper alienations says:

> But where a company actually trading, which it is in the interest of every one to preserve and ultimately to sell as a going concern, is made the object of a winding up petition, which may fail or may succeed, if it were to be supposed that transactions in the ordinary course of its current trade, bona fide entered into and completed, would be avoided and would not in the discretion given to the Court be maintained, the result would be that the presentation of a petition, groundless or well-founded would, ipso facto, paralyze the trade of the company, and great injury without any counterbalance of advantage, would be done to those interested in the assets of the company;

and in that case, ultimately, the transaction entered into between Pearson and the company after the presentation of the petition for the sale of iron manufactured by the company, was affirmed and validated. In (1870) 10 Eq 312,[8] a transaction by which a company in an emergency obtained money to carry on its business was held to have been made bona fide, "with the view of preventing a state of things most disastrous to all parties concerned," and was upheld. Similarly, in (1926) 1 Ch 828,[7] where after the presentation of the petition, Rowley was induced to advance to the company a sum of money on the security of a debenture in order to enable the company to pay their workmen and carry on their business, Romer J. validated the transaction as being one for the benefit of the company. In 54 Bom 718,[1] the reason why Marten C. J. refused to validate the giving of the security to the Imperial Bank was stated in these words:

> There was no real necessity to give the Imperial Bank this security in preference to their fellow creditors when the only benefit to be received by the company was time, whereas time was a concession all the creditors were bound to give in view of the winding-up petition already on the file and the Court's powers thereunder.

The transaction in other words was not for the benefit of the company and those interested in the assets of the company, but for the benefit of the bank. Bona fide payments for supplies made to a company in the course of its current business have generally been allowed, as was done in 54 Mad 324.[9] The payments now under consideration cannot possibly be regarded as belonging to this class of transactions. The result is that no case has been made out for validating these payments by the company under the management of Gokaldas as the attorney of the arrested managing agents. They were clearly payments to creditors of debts due by the company and as such improper alienations of the property of the

7. In re Park Ward and Co., (1926) 1 Ch 828 = 95 L J Ch 584=135 L T 575=70 S J 670 = (1926) B and C R 94.

8. In re International Life Assurance Society; Ex parte Gibbs, (1870) 10 Eq 312=39 L J Ch 667=23 L T 350=18 W R 970.

9. Sabapathy Rao v. Sabapathy Press Co. Ltd., (1930) 17 A I R Mad 1012 = 129 I C 40 = 54 Mad 324=59 M L J 826.

company, to the great detriment of the other creditors. They were in no way payments made for the benefit of the company and those interested in the assets of the company, or made bona fide in the course of current business in consideration of goods supplied or services rendered, belonging to the class of payments, which merit being validated. I must accordingly refuse to validate them, and they will be dealt with in these winding-up proceedings as wholly void.

N.S./R.K. *Order accordingly.*

A. I. R. 1939 Sind 200

DAVIS J. C. AND WESTON J.

Milkimal Ramrakhiomal—Plaintiff — Appellant.

v.

Totomal Harchandmal and others — *Defendants* — Respondents.

Second Appeal No. 57 of 1936, Decided on 14th November 1938.

Evidence Act (1872), S. 92, Prov. 6—Scope —Document executed by agriculturist as sale deed alleged to be in reality mortgage—In suit for redemption executant proved not to be agriculturist — As between parties to transaction, direct or circumstantial evidence to prove that deed was mortgage and not sale is inadmissible—As against persons not parties to deed executant can show that document purports to be mortgage.

Section 92, Proviso 6 does not apply to a case where a document is clear and unambiguous in its terms. [P 201 C 1]

Where a document executed by an agriculturist is on the face of it a sale deed but is alleged to be only an ostensible deed of sale being in reality a mortgage, and in a suit by the executant for redemption of the mortgage he pleads a contemporaneous oral agreement to reconvey, but it is proved that the executant is not an agriculturist, the beneficient provisions of S. 10, Deccan Agriculturists Relief Act, cannot be taken advantage of, so that even assuming the case of the executant to be true, so far as parties to the transaction are concerned, he cannot bring either direct or circumstantial evidence to show that the document was intended to operate as a mortgage and not as a sale-deed : *A I R 1920 Bom 143, Rel. on; 22 All 149 (P C); 30 Bom 119 and 35 Bom 93, Ref.; A I R 1917 P C 207 ; A I R 1924 P C 221 ; A I R 1925 P C 75 and A I R 1936 P C 70, Disting.* [P 200 C 2; P 201 C 1]

He can however show as against persons who are neither parties to the transaction nor are representatives-in-interest of any such parties that the deed purports to be a mortgage and not a sale : *A I R 1917 P C 207 and A I R 1918 Bom 145, Rel. on.* [P 203 C 1]

Dip Chand Chandumal — *for Appellant.*

William Lobo — *for Respondents.*

Davis J. C. — This is an appeal against the judgment of the Assistant Judge, Sukkur, setting aside a judgment of the Subordinate Judge at Rohri who decreed the plaintiff's suit for redemption of land mortgaged by him as an agriculturist with defendant 1, his uncle, by an ostensible deed of sale. Defendants 2 and 3 were joined as subsequent purchasers from defendant 1 with the knowledge that the land was mortgaged and not sold. Defendants 2 and 3 admitted that they knew the land was mortgaged and not sold. Defendant 4 was joined as a purchaser from defendant 3 and contends that the land was sold out and out. Now the appellant has not put upon the record in this appeal either the plaint or written statement or even a copy of the sale deed itself, but it is clear from the judgment of the Subordinate Judge and the issues raised that this was an ordinary suit by an agriculturist alleging a contemporaneous oral agreement to reconvey. The Subordinate Judge says at page 7 of the paper-book :

> For these reasons I am of opinion that the transaction, though ostensibly a sale, was in fact only a mortgage by conditional sale. There must therefore have been an agreement between the parties to reconvey the property to the plaintiff. I see no reason therefore to disbelieve the plaintiff regarding the terms of such oral agreement, though, of course, the presence of the plaintiff's witnesses at the time of the settlement of the terms is an exaggeration made out of nervous anxiety.

It appears then to us that this is an ordinary case within those rulings which lay down that oral evidence as to the intentions of the parties is not admissible to vary a written agreement; and once it is found, as the Appellate Court quite rightly finds, that the plaintiff is not an agriculturist, so far as defendant 1 is concerned, the bottom falls out of the plaintiff's suit. The advocate for the appellant does not dispute in this Court the finding of the lower Appellate Court that the plaintiff is not an agriculturist. The Assistant Judge has given convincing reasons for his decision on this point, and it is clear that the plaintiff is an unreliable witness. The Subordinate Judge, in fact, discards the evidence of the oral agreement and relies on the circumstances of the case, the circumstances of the sale, the relationship between the parties and the inadequacy of the price, to support his conclusion that the transaction was a mortgage by way of conditional sale. There could be no objection to this so long as the plaintiff could bring his suit within the beneficient provision of the Dekkhan Agriculturists Relief Act, but once he is found not to be agriculturist, we do not see how

he can bring either direct or indirect evidence to show that the document was not what it purports to be, a sale, but a mortgage. It appears in the lower Court and in this Court reliance was placed upon S. 92, Evidence Act, and it would appear from the judgment of the Assistant Judge that reliance there was placed upon Proviso 6; it was sought to show by surrounding circumstances what was the intention of the parties, but it is not intended that Proviso 6 should apply to a case where a deed is clear and unambiguous in its terms. Dealing with a case where the question of intention was raised in relation to a deed of unambiguous language, McLeod C. J. in 44 Bom 710[1] at page 716, said :

An attempt was made by the defendant to show that the transaction evidenced by that document was a sham transaction, but he failed entirely to prove that allegation. But the Appellate Court has come to the conclusion that Ex. 71 must be read as a mortgage. The learned Judge has rightly excluded the evidence of intention. But he has admitted exactly the same evidence that would have been admitted if evidence of intention had been allowed under Proviso 6 to S. 92, Evidence Act, and he has come to the conclusion really that when the parties executed the sale deed, they intended that it should be a mortgage transaction. The only circumstance upon which the defendants could possibly rely for their contention is the statement made by Balvantrao when acknowledging execution before the registrar in which he referred to the document as a sale by way of a mortgage. I cannot see myself how a party who has put his signature to a document, which is clearly a sale deed, can alter the nature of the document by writing on it when the document is registered that it means something else than it really appears to be. Then the learned Judge has considered various facts with regard to the value of the property and the inadequacy of consideration, all of which may be evidence that the three brothers when they executed a sale deed intended that it should be a mortgage.

We think the case clearly comes within the decision in 30 Bom 119.[2] Sir Lawrence Jenkins C. J. said :

If we look to the deed alone, it is clear that the decree is correct, and that the plaintiff's father parted with his interest in the property. But it is said that the circumstances to which we have alluded require that we should draw an inference that the document is not what it appears to be. We can only understand that as meaning that the document was accompanied by a contemporaneous oral agreement or statement of intention which must be inferred from these several circumstances. But it has been pointed out by the Privy Council in 22 All 149,[3] that in questions of this kind the Courts in India must be guided by S. 92, Evidence Act.

The defendant has relied upon a dictum of the Privy Council in 38 All 570,[4] at p. 574, where their Lordships say :

It was not disputed that the test in such cases is the intention of the parties to the instruments. That intention however must be gathered from the language of the documents themselves viewed in the light of the surrounding circumstances.

This is evidently a reference to Proviso 6 to S. 92, Evidence Act, which states that "any fact may be proved which shows in what manner the language of a document is related to existing facts." That is one of the Provisos which is the despair of the Judge and the joy of the lawyers. It may be read in many ways. But it is not easy to see in what sort of a case this Proviso would be directly applicable. If you have to look at surrounding circumstances in order to ascertain the intention of the parties, which has already been clearly expressed in the deed, it seems to me it would be very easy to go over the line and attempt to prove from the surrounding circumstances that the intention of the parties was not what it appears to be. A very general statement no doubt is made by the Proviso, and what their Lordships say in the passage I have just read is merely a repetition of the Proviso. But on reading the whole of the judgment in that case, it seems clear that they had not applied that Proviso to the facts of that case, as they merely considered the two documents before them, and gave them the construction which they thought was the proper one from the consideration of what was written in the documents themselves. We have also been referred to the decision in 45 Cal 320.[5] But the facts of that case are entirely different because the interests of a third party were involved, and the head-note says :

The language of S. 92, Evidence Act 1872, with regard to a 'contract, grant or disposition reduced to writing,' in terms applies, and applies alone, 'as between the parties to any such instrument, or their representatives in interest.' Wherever, accordingly, evidence is tendered as to a transaction with a third party, it is not governed by the Section or by the rule of evidence which it contains, and in such a case therefore the ordinary rules of equity and good conscience come into play unhampered by the statutory restrictions . . . . In this case both the grantor and the grantee in transactions by deed regarding certain land were shown

1. Ganpatrao Appaji v. Bapu Tukaram, (1920) 7 A I R Bom 143=58 I C 574=44 Bom 710=22 Bom L R 831.
2. Datoo v. Ramchandra, (1906) 30 Bom 119=7 Bom L R 669.
3. Balkishen Das v. W. F. Legge, (1900) 22 All 149=27 I A 58=7 Sar 601 (P C).
4. Jhanda Singh v. Wahid-ud-din, (1916) 3 A I R PC 49=36 IC 38=43 IA 284=38 All 570 (PC).
5. Maung Kyin v. Ma Shwe La, (1917) 4 A I R P C 207=42 I C 642=44 I A 286=45 Cal 320=9 L B R 114 (P C).

by the evidence to have dealt with it with the knowledge that it belonged to a third person who was not a 'party to the deeds or a representative in interest of a party' to them .... Held, that S. 92 Evidence Act was no bar to the admission of evidence to show what was the true nature of the transactions: it did not prevent fraudulent dealing with a third person's property.

In 22 All 149,[3] at page 159, their Lordships said :

The case must therefore be decided on a consideration of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts.

That appears to me to show that where a document itself is a perfectly plain, straightforward document, no extrinsic evidence is required to show in what manner the language of the document is related to existing facts. There may be cases where such extrinsic evidence is required, and it will therefore be admitted. But, it can only be in such cases where the terms of the documents themselves require explanation, and then evidence can be led within the restrictions laid down by the Proviso.

In 45 Cal 320,[5] the Privy Council has affirmed the ruling in 22 All 149,[3] and approved that interpretation of that ruling by Jenkins C. J. in 30 Bom 119.[2] In that case Jenkins C. J. said at page 121 :

If we look to the deed alone, it is clear that the decree is correct, and that the plaintiff's father parted with his interest in the property. But it is said that the circumstances to which we have alluded require that we should draw an inference that the document is not what it appears to be.

We can only understand that as meaning that the document was accompanied by a contemporaneous oral agreement or statement of intention which must be inferred from these several circumstances. But it has been pointed out by the Privy Council in 22 All 149,[3] that in questions of this kind the Courts in India must be guided by S. 92, Evidence Act ; and that we cannot have recourse to those equitable principles which enable the Court of Chancery to give relief in those cases of which (1858) 2 De G & J 97,[6] or (1859) 4 De G & J 16,[7] furnish us with examples. We think that the contention urged by the appellant is opposed to the ruling of the Privy Council. This does not preclude a litigant from relying on the provisos to the section ; but there is no case made here which would enable us to say that any of them are applicable to the circumstances of this case.

Assuming that the plaintiff's case as set out in the plaint will support a case based upon any one or more of the provisos, we do not see how it can be said that oral evidence which the Subordinate Judge has properly rejected as unreliable can be relied on to prove that it was never intended that the deed should operate as a sale at all, and in 35 Bom 93,[8] at p. 95, Scott C. J. was of the opinion that such a deed could not be entertained. The Chief Justice said :

The learned Judge, for the reasons stated in the appendix to his judgment, is of opinion that a person who wishes to set aside an ostensible sale-deed can do so on proving that a representation was made to him at the time of execution that it would not be enforced as a sale-deed, and he accordingly states as the first question which arises for decision in the appeal before him : 'Did the defendant at the time of the execution of the sale-deed represent to the plaintiff that the sale-deed would not be enforced as such ?' In other words, did the defendant promise to the plaintiff that the sale-deed would not be enforced as such ? Stated in this form the question propounded by the learned Judge is whether or not there was a contemporaneous agreement between the parties inconsistent with the written document executed by them. We think it is clear upon the authorities binding upon us that no evidence of such an agreement or promise or representation can be admitted. The Court's view of the law expressed in 22 All 149[3] was acted upon in 30 Bom 119,[2] and again in 8 Bom L R 287,[9] and in 25 Mad 7.[10] Batty J. in 8 Bom L R 287,[9] said: '... the fraud which under Proviso 1, S. 92, may be proved must be fraud which would invalidate a document, and therefore subsequent fraud in respect of the document not such as to invalidate it could not be a ground for admitting extraneous oral evidence under Proviso 1 of S. 92. The real effect of admitting such evidence would not be to prove fraud in the execution of the document, but the existence of a different intention than that which appears on the document itself. In other words, it would be an attempt to prove a different contract from that expressed in the document without proving any fraud in the preparation of the document which would invalidate it.'

With that judgment we, with respect, agree, and we can see nothing in the three judgments of the Privy Council on which the learned advocate for the appellant relies to the contrary, for the facts of all three cases are distinguishable : A I R 1924 P C 221,[11] A I R 1925 P C 75[12] and A I R 1936 P C 70.[13] The learned advocate for the appellant did not refer to the Privy Council case in 22 All 149.[3] Nor did he

6. Alderson v. White, (1858) 2 De G & J 97 = 4 Jur (N S) 125=6 W R 242=119 R R 38.
7. Lincoln v. Wright, (1859) 4 De G & J 16 = 5 Jur (N S) 1142=7 W R 350=124 R R 133.
8. Dagdu Sadu v. Nana Salu, (1911) 35 Bom 93 =8 I C 644=12 Bom L R 972.
9. Keshavrao v. Raya, (1906) 8 Bom L R 287.
10. Achutaramaraju v. Subbaraju, (1902) 25 Mad 7 = 11 M L J 370.
11. Vaidyanatha Ayyar v. Swaminatha Ayyar, (1924) 11 A I R P C 221 = 82 I C 804 = 51 I A 282 = 47 Mad 884 (P C).
12. Baijnath Singh v. Hajee Vally Mohomed, (1925) 12 A I R P C 75=86 I C 332=3 Rang 106 (P C).
13. Tyagaraja Mudaliyar v. Vedathanni, (1936) 23 A I R P C 70 = 160 I C 384 = 63 I A 126 = 59 Mad 446 (P C).

refer, nor has it apparently been referred to in the lower Courts, to another aspect of this question, and that is the application of S. 92 to third parties. Defendants 2, 3 and 4 are not parties to the sale-deed which is now challenged; nor does it appear they are the representatives-in-interest under the deed of defendant 1 within the meaning of S. 92: *see* 45 Cal 320.[5] Therefore, it would appear that it is open to the plaintiff to show as regards them that the deed was a mortgage and not a sale : 42 Bom 512.[14] But there is no reliable evidence. The oral evidence of the plaintiff and his witnesses the trial Judge rejected as unreliable, and we cannot say that the evidence of price is sufficient to show that defendants 2, 3 and 4 dealt with the land of the plaintiff knowing that it was land which had been mortgaged and not sold. The statement in the judgment of the trial Court that defendants 2 and 3 admit they purchased the land knowing it was mortgaged, appears to us to go too far. We have had the written statements of defendants 2 and 3 translated and they admit only that they knew the transaction was alleged by the plaintiff to be a mortgage. Defendant 4 admits even less. This aspect of the case was not argued in or dealt with by the lower Court, and there is no sufficient evidence for us to interfere in second appeal upon this ground. We think therefore that the appeal must fail, and we dismiss it with costs accordingly.

N.S./R.K. *Appeal dismissed.*

14. Ganu Ramji v. Bhau Bapuji, (1918) 5 A I R Bom 145 = 46 I C 662 = 42 Bom 512 = 20 Bom L R 684.

A. I. R. 1939 Sind 203

DAVIS J. C. AND LOBO J.

Ghous Baksh Muhammad Amin and others — Appellants

v.

Emperor.

Criminal Appeal No. 216 of 1938, Decided on 10th January 1939, against convictions and sentences passed by Addl. Sess. Judge, Sukkur, D/- 31st August 1938.

(a) Criminal P. C. (1898), S. 310—Accused must not be prejudiced in his trial for subsequent offence by recital of previous convictions —Statement of accused relating to previous convictions and subsequent offence treated as a whole and read out at one time to accused—Procedure is contrary to S. 310.

In a case where it is intended to prove previous convictions for the purpose of enhanced punishment the trial is in effect divided into two parts: firstly the trial for the subsequent offence and the opinion of the assessors thereon, and secondly, if the accused be convicted of that subsequent offence there is what amounts to a trial on the charge of previous convictions on account of which the accused is liable to receive enhanced punishment. This second part of the trial of course may be very short, but it is nevertheless to be kept as something apart and separate from the first part of the trial in the sense that it shall not be allowed to influence the assessors or jurors in their opinion as to the guilt of the accused of the subsequent offence for which the accused is at first to be tried. If the statement of the accused relating to the previous convictions and the subsequent offence is treated as a whole and read out at one time to the accused this procedure is clearly contrary to the provisions of Sec. 310, Criminal P. C., and though it is true that under S. 221 (7), Criminal P. C., the charge must contain details of the previous convictions which it is intended to prove for the purpose of enhanced punishment, that Section must be read subject to S. 310, Criminal P. C., and the accused must not be prejudiced in his trial for the subsequent offence by a recital of his previous convictions: *A I R 1935 Sind 115, Rel. on.* [P 204 C 2; P 205 C 1]

(b) Criminal P. C. (1898), Ss. 310 and 511—There must be legally admissible evidence justifying charge based on previous conviction — This evidence must fall either under S. 511, Criminal P. C., or S. 54, Evidence Act.

Before an accused can be questioned about previous convictions, there must be evidence legally admissible upon the record which shows that he has committed these previous offences about which he is examined by the Court; and legally admissible evidence as to previous convictions must fall either within S. 511, Criminal P. C., or Sec. 54, Evidence Act. [P 205 C 2]

Hashmatrai G. Chainani — *for Appellants.*

Partabrai D. Punwani, Advocate-General—*for the Crown.*

Davis J. C.—In this case, three accused persons, Ghous Baksh, Hakimali and Jiand, have been convicted of offences of rioting and grievous hurt and sentenced to various terms of rigorous imprisonment. But the most serious case is that of accused 1, Ghous Baksh, who has been sentenced by the Additional Sessions Judge to seven years' rigorous imprisonment for an offence under Sec. 326, I. P. C., read with S. 23 (1) (a), Criminal Tribes Act, because being a member of a criminal tribe at the time of his conviction by the Additional Sessions Judge, he had to his account a previous conviction under S. 326, I. P. C., one of the offences scheduled in the first schedule to the Criminal Tribes Act. The two other accused were sentenced only to six months' rigorous imprisonment each, of which the greater part must have been served.

Now, the learned advocate for the three accused bases his case against the conviction of accused 1 mainly upon the ground that the provisions of Sec. 310, Criminal P. C., have not been followed by the learned Judge, and it is inevitable that his client must have been prejudiced, for, before the assessors gave their opinion as to the guilt of Ghous Baksh for the subsequent offence for which he was being tried, they knew that he had previous convictions to his account; and as Ghous Baksh must have been prejudiced by this failure to comply with the provisions of S. 310, Criminal P. C., so the other two accused tried with him — Hakimali and Jiand—must also have been prejudiced in the eyes of the assessors because they were associated with this previous convict. But further, the learned advocate argues that as regards the accused Hakimali and Jiand there is no sufficient evidence on the record on which they could properly be convicted of any offence at all. But as we must set aside the convictions of all the accused on the ground that they must have been prejudiced by the failure of the learned Judge to follow the provisions of S. 310, Criminal P. C., so we think we should order a retrial of all three accused, remarking however that the learned Judge, if the accused Hakimali and Jiand are upon a retrial again convicted, will take into account the fact that they have already served the greater part of the sentences passed upon them at this trial and will determine any other sentence accordingly. S. 310, Criminal P. C., lays down a very simple procedure where accused are to be tried for previous offences proof of which will render them liable to enhanced punishment for the subsequent offence for which they are tried. As this Section escaped the notice of the learned Judge and was not brought to his attention by the Public Prosecutor who conducted the case on behalf of the Crown, we think the Section should be set out at length. It is as follows:

310.—In the case of a trial by a jury or with the aid of assessors, when the accused is charged with an offence and further charged that he is by reason of a previous conviction liable to enhanced punishment or to punishment of a different kind for such subsequent offence, the procedure prescribed by the foregoing provisions of this Chapter shall be modified as follows, namely:

(a) Such further charge shall not be read out in Court and the accused shall not be asked to plead thereto, nor shall the same be referred to by the prosecution, or any evidence adduced thereon, unless and until, (i) he has been convicted of the subsequent offence, or (ii) the jury have delivered their verdict, or the opinions of the assessors have been recorded, on the charge of the subsequent offence.

(b) In the case of a trial held with the aid of assessors, the Court may, in its discretion, proceed or refrain from proceeding with the trial of the accused on the charge of the previous conviction.

This case was tried with assessors so that the charge of previous convictions should not have been read out and the accused should not have been asked to plead thereto nor should it have been referred to by the prosecution or evidence adduced thereon until the accused had been convicted of the subsequent offence for which he was then being tried and the opinion of the assessors had been recorded on the charge of that subsequent offence. But referring to the record of this case, we find that the charge must have been read out as a whole, and the Sub-Inspector in his evidence gave details of the previous convictions of the accused Ghous Bux and the admission of the accused as to the previous convictions in the committing Magistrate's Court must according to the record of answers and questions put by the Judge in the Sessions Court, have been read out in Court and before the assessors when the accused was examined on the subsequent offence for which he was then being tried. We find, indeed, from the statement recorded by the Additional Sessions Judge that he did not put directly to the accused the question of his previous convictions, and it does not appear that the part of the charge which relates to the previous convictions was separately read out to the accused at all or that he was asked to plead to the charge. It appears the statement of the accused in the lower Court relating to the previous convictions and the subsequent offence was treated as a whole and read out at one time to the accused. This procedure is clearly contrary to the provisions of S. 310, Criminal P. C., and though it is true that under S. 221 (7), Criminal P. C., the charge must contain details of the previous convictions which it is intended to prove for the purpose of enhanced punishment, that Section must be read subject to S. 310, Criminal P. C., and the accused must not be prejudiced in his trial for the subsequent offence by a recital of his previous convictions. In 29 S L R 121,[1] at

1. Bhurasing v. Emperor, (1935) 22 A I R Sind 115=158 I C 282=36 Cr L J 1310=29 S L R 121.

page 157, Ferrers J. C. dealing with this question of previous convictions and discussing the development of the law in this matter said:

By S. 54, as it now stands, evidence of a previous conviction is not wholly excluded, but it is not admitted except under close restrictions. There are two stages at which a previous conviction can be proved. One is before conviction of a subsequent offence, the other is after such conviction. Before conviction such evidence is admissible if evidence has been given that the prisoner is of good character, or if the bad character is in itself a fact in issue. The admission of evidence of a previous conviction after conviction for a subsequent offence is regulated by the Criminal Procedure Code, S. 221 (7). If the accused having been previously convicted of any offence, is liable by reason of such previous conviction to enhanced punishment or to a punishment of a different kind for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence, the fact, date and place of the previous conviction shall be stated in the charge. S. 310 further provides that in this case such further charge shall not be read out in Court and the accused shall not be asked to plead thereto nor shall the same be referred to by the prosecution or any evidence adduced thereon unless and until he has been convicted of the subsequent offence.

So it is clear that in a case where it is intended to prove previous convictions for the purpose of enhanced punishment the trial is in effect divided into two parts, firstly, the trial for the subsequent offence and the opinion of the assessors thereon, and secondly, if the accused be convicted of that subsequent offence, there is, what amounts to a trial on the charge of previous convictions on account of which the accused is liable to receive enhanced punishment.

This second part of the trial of course may be very short, but it is nevertheless to be kept as something apart and separate from the first part of the trial in the sense that it shall not be allowed to influence the assessors or jurors in their opinion as to the guilt of the accused of the subsequent offence for which the accused is at first to be tried. Furthermore, it is necessary that as an accused in order to be convicted of the subsequent offence must also be convicted upon evidence which is legally admissible and which must justify his committal to the Sessions Court, so on a charge of previous convictions there must be evidence in the committing Magistrate's Court which must justify the charge based on previous convictions on which the accused is also to be committed to the Court of Session, and we would invite the attention of the learned Judge to the case in 28 Cal 689.[2] In that case an accused Nazim had admitted in his examination in the lower Court three previous convictions and in consequence was sentenced for his subsequent offence to ten years' rigorous imprisonment, and the Judges in that case said (page 693):

Now, there is on the record no copy of any judgment or extract from a judgment or any other documentary evidence of the fact of such previous convictions as is required by S. 91, Evidence Act, or S. 511, Criminal P. C. There was thus no legal evidence to support the charge in respect of such previous convictions. The examination of the appellant in the lower Court in respect of those convictions was also without legal warrant or justification: *see* S. 342, Criminal P. C., and the case in 26 Cal 49.[3] But on the Sessions record, pp. 39 and 46, we have a record of an admission by the appellant Nazim of the previous convictions duly recorded. Under S. 310, Criminal P. C. the Judge was justified in proceeding to pass sentence on him accordingly. The irregularity in the inquiry is to be regretted, and should have been detected and remedied at the trial, but it does not appear that the accused was prejudiced by reason of it.

This judgment seems to proceed upon a very simple principle that before an accused can be questioned about previous convictions, there must be evidence legally admissible upon the record which shows that he has committed these previous offences about which he is examined by the Court; and legally admissible evidence as to previous convictions must fall either within S. 511, Criminal P. C. or S. 54, Evidence Act.

It appears that in this case there was some evidence brought on the record in the committing Magistrate's Court of previous convictions which was made the basis of the examination of the accused on his previous convictions by the committing Magistrate, because the Sub-Inspector produced extracts of previous convictions from a register of the personal record of the accused Ghous Bakhsh. But this evidence does not appear to satisfy the conditions as to proof of previous convictions either within the provisions of S. 54, Evidence Act, or S. 511, Criminal P. C.; and furthermore, the accused in the Sessions Court only admitted his previous convictions by an admission in his statement recorded by the committing Magistrate, based upon this evidence of the Sub-Inspector which was inadmissible as proof of previous convictions. There was thus this further

2. Yasin v. Emperor, (1901) 28 Cal 689=5 CWN 670.
3. Basanta Kumar v. Queen-Empress, (1899) 26 Cal 49.

irregularity in the proceedings both in the committing Magistrate's Court and the Court of Session in this matter of previous convictions. We have no doubt however in other cases the learned Additional Sessions Judge will bear the special provisions of Ss. 310 and 511, Criminal P. C. in mind. We think, therefore, there is no doubt that upon the record it must be held that the accused have been prejudiced in their trial for the offences of which they have been convicted, and we should set aside their convictions and order their retrial, and we order accordingly. As accused 2 and 3, Hakimali and Jiand were on bail in the lower Court they can be granted bail by the lower Court pending their retrial.

D.S./R.K. *Retrial ordered.*

A. I. R. 1939 Sind 206

DAVIS J. C. AND TYABJI J.

Lokramdas Chatomal, Firm and others — Plaintiffs — Appellants.

v.

Tharumal Shewaram and others — Defendants — Respondents.

Misc. Appeal No. 15 of 1937, Decided on 28th February 1939, against Judgment of First Class Sub-Judge, Sukkur, D/- 8th March 1937.

(a) Partnership Act (1932), S. 69—Objection regarding registration can be allowed to be taken for first time in appeal.

Section 69, prevents a Court from taking cognizance of a suit brought by an unregistered firm, in the same way a Court shall not take cognizance of a suit barred by limitation ; and to hold that because as the result of ignorance of mistake objection was not taken by the defendant in the suit, so the provisions of the law could be flouted, would be to frustrate the intention of the Legislature clearly expressed. Therefore the Judge is right in allowing to be taken or himself taking the objection under S. 69 in appeal for the first time.

[P 206 C 2]

(b) Partnership Act (1932), Ss. 69 and 74—Suit by unregistered firm for rent due before October 1933 is saved by S. 74.

Section 74 not only saves the rights but also the suits to enforce these rights. There is no reason to restrict S. 74 by saying that it covers only a right not dependent upon the adjudication of a Court. Hence a suit by an unregistered firm for rent due up to October 1933 is not barred but is saved by S. 74 : *A I R 1939 Bom 61 ; A I R 1938 Rang 273 ; A I R 1936 All 3 (F B) and A I R 1938 Mad 688, Rel. on ; A I R 1934 Cal 754, Dissent.*

[P 206 C 2 ; P 207 C 1]

Dipchand Chandumal — *for Appellants.*

Kundanmal Dayaram—*for Respondents.*

Davis J. C. — This is an appeal from a judgment of the First Class Subordinate Judge at Sukkur in which he remanded to the Court of the Subordinate Judge at Jacobabad a suit, brought by certain plaintiffs as firms, for a finding on the question whether the plaintiffs are barred under S. 69, Partnership Act, from instituting the suit. In appeal it was contended that the Appellate Judge had no power to remand the suit for a finding on this issue because, whether a firm was or was not registered, or whether the persons suing were shown in the register of firms as partners, were all questions of fact which had not been raised on the pleadings, which could not be raised in appeal. Further, it was contended that the plaintiffs were suing the defendants for rent for use and occupation of land, and the right they sought to enforce was not a right arising from contract but in tort. We do not think it matters that the question of registration has been raised for the first time in appeal, for Sec. 69, Partnership Act, prevents a Court from taking cognizance of a suit brought by an unregistered firm, in the same way a Court shall not take cognizance of a suit barred by limitation and to hold that because as the result of ignorance or mistake objection was not taken by the defendant in the suit, so the provisions of the law could be flouted, would be to frustrate the intention of the Legislature clearly expressed. Therefore we think the Judge was right in allowing to be taken or himself taking the objection under S. 69 in appeal.

But it is then contended that even if S. 69, Partnership Act, applies, the right of the plaintiffs to sue in the present suit is saved by S. 74 of the Act. Under S. 74 it is provided that nothing in the Act shall affect any right, title or interest acquired or accrued before the commencement of the Act or any legal proceeding in respect of such Act : so it is contended that as the Act commenced only on 1st October 1933 the right of the plaintiff firms to rent up to that date and the right to sue for that rent was saved by the provisions of S. 74, Partnership Act. Against this it is urged that S. 74 does not cover merely a right to sue; it covers only a right not dependent upon the adjudication of a Court.

We do not think however there is any reason to restrict S. 74 in this manner. There is now much authority to the contrary. In A I R 1939 Bom 61[1] the Bombay

1. Revappa Nandappa v. Babu Sidappa, (1939) 26 A I R Bom 61 = 179 I C 832 = I L R (1939) Bom 104=40 Bom L R 1275.

High Court held that S. 74 not only saved the mortgage rights but the right to sue to enforce those rights and this appears only reasonable for there is little purpose or profit in saving a right and taking away the right to enforce it. Sub-cls. (a) and (c) of S. 74 save existing rights, and sub-cl. (b) saves any legal proceedings or remedy in respect of such rights. This is also the view of the Rangoon High Court, (A I R 1938 Rang 273),[2] of the Chief Justice of the Allahabad High Court, (58 All 495),[3] and of two Judges out of three in the Madras High Court: A I R 1938 Mad 688.[4] Another view is taken by the Calcutta High Court in 62 Cal 213,[5] on the ground that as the Legislature had postponed the commencement of the Act for a year to allow firms time to get themselves registered, so they could not have intended to save to unregistered firms the right to sue. This may have been the intention of the Legislature, but this is not what was enacted. The words of S. 74 of the Act are plain, and there is no such conflict between them and the Act as a whole as to justify the Court in not giving the words their ordinary plain and grammatical meaning. So far therefore as the right to sue for the rent up to October 1933 is concerned, we think it matters not that the firm is unregistered. But so far as rent due after that date is concerned, the saving provisions of Sec. 74 would not apply, and the question as to whether the plaintiffs are barred under Sec. 69, Partnership Act, from instituting a suit for rent due after 1st October 1933, must be answered on remand as the appellate Judge has directed. In considering this question the trial Court will also consider and decide whether the right to sue for rent is a right arising out of a contract within the meaning of S. 69, for if it is not a right so arising, then it would appear the bar of S. 69 would not apply. We must therefore dismiss the appeal. Costs to be costs in the cause. Order accordingly.

D.S./R.K. *Appeal dismissed.*

2. Soonoiram v. Junjilal, (1938) 25 A I R Rang 273=176 I C 691=1938 R L R 371 (F B).
3. Danmal Parshoramdas v. Baburam Chhotelal, (1936) 23 A I R All 3= 160 I C 277 = 58 All 495=1935 A L J 1245.
4. Girdharilal Sons & Co. v. B. K. Gowder, (1938) 25 A I R Mad 688=179 I C 16=(1938) 2 M L J 44.
5. Surendranath De v. Manohar De, (1934) 21 A I R Cal 754=153 I C 671=62 Cal 213=39 C W N 67.

A. I. R. 1939 Sind 207

DAVIS J. C.

Emperor

v.

Ramzan Ghulam Hyder and another—Accused.

Criminal Ref. No. 353 of 1938, Decided on 21st December 1938; reference from Addl. Sess. Judge, Larkana, to quash commitment, D/- 17th November 1938.

Penal Code (1860), S. 75—Mere attempt to commit offence under Chap. 12 or Chap. 17 does not bring into operation S. 75.

A mere attempt to commit an offence falling under Chap. 12 or Chap. 17 is not sufficient to bring into operation the penal provisions of S. 75, I. P. C.: *10 Bom L R 26, Rel. on.* [P 207 C 2]

Partabrai D. Punwani, Advocate-General—*for the Crown.*

Order. — This is a reference by the Additional Sessions Judge of Larkana recommending that the committal of the two accused persons, Ramzan and Rasulo, to his Court for trial of offences under Ss. 457, 511 and 323 read with S 75, Penal Code, be quashed on the ground that S 75 will apply to offences falling under Sec. 457, I. P. C., but not to offences under S. 457 read with S. 511, I. P. C. Not only as the Additional Sessions Judge says, is there the clear wording of the Section, but there is a long line of authorities referred to in 10 Bom L R 26.[1] In that judgment it is laid down that Sec. 75, I. P. C., being a penal Section must be construed strictly. It applies to offences under Chap. 12 or Chap. 17. But it does not apply to an attempt to commit an offence, such as in this case, which falls under Chap 23 or to abetment, which falls under S. 5, but with which we are not concerned. Clearly then, a mere attempt to commit an offence falling under Chap. 12 or Chap. 17 is not sufficient to bring into operation the penal provisions of S. 75, I. P. C. As that is the only reason why the Resident Magistrate, Larkana has not tried this case himself but committed it to the Court of Session, I quash the commitment and order this case to be sent back to the Resident Magistrate Larkana to hear and decide it himself.

D.S./R.K. *Commitment quashed. Case sent back.*

1. Emperor v. Kashia Antoo, (1908) 10 Bom L R 26=7 Cr L J 82.

A. I. R. 1939 Sind 208

DAVIS J. C.

Jeoomal Tikamdas — Applicant

v.

Emperor.

Criminal Revn. Appln. No. 15 of 1938, Decided on 1st June 1938, from order of Addl. City Magistrate, Karachi, D/- 15th February 1938.

(a) Criminal P. C. (1898), Ss. 200 and 203 —Magistrate must deal with complaint according to provisions of S. 200 and Sections following it—There is no provision in S. 203 for issue of "C" summary.

A Magistrate, when there is a complaint before him, must deal with it according to S. 200 and the following Sections of the Criminal P. C. If he wishes to postpone the issue of process under Sec. 202, he must comply with the provisions of that Section, and if as a result of a preliminary inquiry he wishes to dismiss the complaint then he must do so according to the provisions of S. 203. There is no provision in Sec. 203 for the issue of a "C" summary. The question of issuing summaries is a mere administrative matter and is not a judicial order passed under the Criminal P. C. at all. [P 208 C 1, 2]

(b) Criminal Trial — Report of investigation or inquiry ordered by Magistrate — Magistrate should exercise his own independent judgment.

The Magistrate should exercise his own independent judgment when he receives the report of the investigation or inquiry that he has ordered, and he does not exercise his independent judgment when he merely accepts without giving reasons the opinion of the police prosecutor. [P 208 C 2]

K. H. Nagrani — *for Applicant.*

Hatim B. Tayebji — *for the Crown.*

Order.—This is an application to me to order further inquiry into the complaint of the applicant which, it is the case of his advocate, has not been dealt with by the learned Magistrate according to law at all, because apparently this complaint has been disposed of by a brief order which was as follows: "Issue summary under Cl. C."

Now my impression has always been that this question of issuing summaries is a mere administrative matter. It is merely for the maintenance by the executive authorities of a record of cases according to three classes and is not a judicial order passed under the Criminal Procedure Code at all. Apparently by issuing a summary of Cl. "C" the Magistrate intended it to be understood that the case was neither false nor true and he dismissed the complaint accordingly. But a Magistrate, when there is a complaint before him, must deal with it according to S. 200 and the following sections of the Criminal Procedure Code. When he receives a complaint and takes cognizance of it under S. 200, Criminal P. C., he must examine the complainant under oath and reduce the substance of the examination to writing, subject to certain exceptions given in the three clauses to the proviso which did not here apply, and if he wishes to postpone the issue of process under S. 202, Criminal P. C., he must comply with the provisions of that section, and if as a result of a preliminary inquiry he wishes to dismiss the complaint then he must do so according to the provisions of Sec. 203, Criminal P. C., but if the learned Magistrate refers to Sec. 203, he will find no provision for the issue of a "C" summary, and though apparently the Magistrate intended to dismiss the complaint under Sec. 203, Criminal P. C., there is no express order that he has done so. Clearly, then, this is a case wherein there should be a further inquiry and the Magistrate should act according to the provisions of the Criminal Procedure Code.

Also it appears to me that the provisions of the Criminal Procedure Code contemplate that he should exercise his own independent judgment when he receives the report of the investigation or inquiry that he has ordered, and it appears to me that he does not exercise his independent judgment when he merely accepts without giving reasons the opinion of the police prosecutor. It is not for the Magistrate to surrender his discretion or his judgment to that of the police prosecutor. It is not desirable for me at this stage to discuss in any way the merits of this case. All I would do is to refer the learned Magistrate to a judgment of this Court which it is true is available only in an unauthorized Law Report, A I R 1937 Sind 56,[1] but which judgment may be of assistance to him, and should he have any difficulty in obtaining the volume of the law report in which this judgment is contained, I have no doubt that one of the learned advocates concerned will assist him with the loan of a copy. This case therefore should go back through the District Magistrate, Karachi, to the learned Additional City Magistrate, Karachi, or such other Magistrate as the District Magistrate deems fit, for further inquiry and disposal according to law.

D.S./R.K. *Order accordingly.*

1. Shivnath Sahibram Kaul v. Jethanand Moorlimal, (1937) 24 A I R Sind 56=167 I C 873 = 38 Cr L J 510.

A. I. R. 1939 Sind 209

DAVIS J. C. AND LOBO J.

Shewaram Jethanand Shivdasani and another — Appellants

v.

Emperor.

Criminal Appeals Nos. 132 and 133 of 1938, Decided on 14th November 1938, against convictions and sentences passed by Haveliwala J., D/- 20th May 1938.

(a) Criminal Trial—Sessions trial—Appeal—Sentence passed by Judge of Judicial Commissioner's Court sitting in its Sessions jurisdiction—Appeal lies to Judicial Commissioner's Court on point of law only.

An appeal lies to the Judicial Commissioner's Court against convictions and sentences passed by a Judge of the Judicial Commissioner's Court, sitting in its Sessions Court jurisdiction with a jury only on a point of law. [P 211 C 2]

(b) Criminal Trial — Trial by jury — Judge putting on accused burden of proving their innocence—It amounts to error of law—Error colouring whole charge to jury and finding expression in specific misdirections — Accused are bound to be prejudiced and verdict and convictions should not be allowed to stand.

While the prosecution must prove the guilt of the accused there is no such burden laid on the accused to prove his innocence and it is sufficient for him to raise a doubt as to his guilt ; he is not bound to satisfy the jury of his innocence. [P 213 C 1]

Where a Judge, although he has rightly put the burden of proving the guilt of the accused upon the prosecution has wrongly put the proof of their innocence upon the accused, it amounts to an error of law, and where the error appears to colour the whole of his charge to the jury and finds expression in specific misdirections to the jury, the accused are bound to be prejudiced by the misdirections and the verdict of the jury and conviction should not be allowed to stand : *(1935) A C 462, Ref.* [P 212 C 2]

(c) Evidence Act (1872), S. 106 — Scope — S. 106 cannot be used to place upon accused burden of proving their innocence.

Section 106 was never intended to be used to place upon the accused the burden of proving their innocence. S. 106 is not a Proviso to the rule that the burden of proving the guilt of the accused is upon the prosecution, but on the contrary, the Section is subject to that rule. The burden of proving a particular fact or a particular defence is a different matter. S. 106 does not enable the Judge to say to the jury that the accused must explain this and that he must satisfy him on this point or that or be found guilty : *A I R 1936 P C 289 and A I R 1936 P C 169, Rel. on.* [P 212 C 2]

(d) Evidence Act (1872), S. 105—Even in a case to which S. 105 applies, accused is entitled to acquittal, if prosecution has not proved the offence and there is reasonable doubt as to guilt of accused.

Even in a case to which S. 105, applies, an accused may rely upon an exception in his defence and fail to prove it, and yet be entitled to an acquittal for the prosecution may have failed to prove all the necessary elements in the offence of which the accused has been charged, or the accused may by his statement, read with the other evidence on record, have raised a reasonable doubt in the mind of the Court and so have entitled himself to an acquittal. [P 212 C 2]

(e) Criminal Trial — Duty of prosecution — Prosecution must fully prove guilt of accused — Merely proving prima facie case is not sufficient.

In a criminal trial the prosecution have to do more than merely prove a prima facie case against the accused ; they must prove the guilt of the accused. There is no principle in English law which provides that if prosecution has proved a prima facie case the accused must bring evidence in rebuttal or be convicted. [P 213 C 2; P 214 C 1]

(f) Criminal Trial—Trial by jury—Misdirection — Judge by his charge leading jury to believe that burden of proof on prosecution and on defence is on same footing—It amounts to misdirection.

Where a Judge in his charge to the jury says that it is the duty of the accused to prove this fact or that, to satisfy the jury on this point or that and leads the jury to believe that the duty of the prosecution and the duty of the defence, so far as the "burden of proof" of their respective cases is concerned, is upon the same footing, so that as the prosecution must prove their case, so the accused must prove theirs, it amounts to a misdirection. [P 214 C 2]

(g) Criminal Trial—Trial by jury—Misdirection—Judge not sufficiently distinguishing cases of individual accused which are widely different—It amounts to misdirection.

Where the Judge in his charge to the jury has not sufficiently distinguished the cases of each of the two accused who are being tried and whose cases are widely different, so as to make a difference on the admissibility of evidence, it amounts to a misdirection. [P 214 C 2]

(h) Evidence Act (1872), S. 15—Scope—Sec. 15 is not so wide as to make admissible hearsay evidence or evidence of facts discovered by investigating officer and not properly proved—Judge should point out to jury facts in favour as well as against accused.

The words of S. 15 are not so wide as to admit hearsay evidence or the evidence of facts alleged to have been discovered by the investigating officer in the course of his investigation and not properly proved. There is also a difference between the admissibility of evidence and its cogency or weight and it is the duty of the Judge in a Sessions trial to point out to the jury the facts in favour of the accused as well as the facts against him. [P 215 C 1]

(i) Criminal Trial—Trial by jury—Charge to jury—Duty of Judge— In case depending upon circumstantial evidence Judge should point out to jury that verdict of guilty is proper only if inference of guilt can reasonably be drawn from facts proved — Inference of guilt must be the only inference possible from circumstances.

In a case dependent upon circumstantial evidence, it is the duty of the Judge to point out

clearly to the jury, that in the case of circumstantial evidence, a conviction is only right and proper, if, from the proved circumstances, the inference of guilt only can reasonably be drawn, and if, from the proved circumstances two inferences can reasonably be drawn, the inference of innocence as well as guilt, the jury is bound to draw the inference of innocence. The fact that the jury can draw from the circumstances of the case an inference of guilt is not sufficient. The inference of guilt must be the only reasonable inference to be drawn from the circumstances. [P 215 C 2; P 216 C 1]

(j) Criminal Trial — Charge to jury — Misdirection — Judge exhorting to jury that whole city and commercial world is watching their verdict — It amounts to clear direction to convict and amounts to misdirection.

Where a Judge in his charge to the jury exhorts the jury as follows : "The whole of Karachi is watching you. The whole commercial world is watching you," it amounts to introducing into the case extraneous consideration and amounts to a clear direction to the jury to convict. It can mean nothing else and does not leave the jury to come freely to their conclusions. In giving such a direction to the jury, the Judge passes beyond the limits of wise guidance or advice, or that expression of opinion of fact, which the Code of Criminal Procedure allows in the charge of a Judge to jury : *A I R 1925 Sind 116, Ref.* [P 216 C 1]

(k) Criminal Trial — Trial by jury — Misdirection — Powers of Judicial Commissioner's Court— Judicial Commissioner's Court, on appeal, can order retrial or can itself dispose of case—Where however case is such that guilt of accused should be decided by Judge and jury, who have personally seen witnesses and heard their evidence, Judicial Commissioner's Court should not decide case on paper record — Retrial is the proper course.

The Judicial Commissioner's Court has no doubt powers in a case of misdirection to jury to order a retrial of the accused or to enter into merits of the case and dispose of it. Where however the case is essentially one where the guilt or innocence of the accused should be determined by a Judge and jury, who have seen the witnesses and heard them give evidence, and, where much depends upon the impression made upon the Court by the witnesses in their evidence and by the accused in their statements, it is not a case in which the Judicial Commissioners should decide the case in an appeal on the paper record. It is a case in which there should be a retrial : *A I R 1925 Sind 116, Ref.* [P 216 C 2]

(l) Criminal Trial—Trial by jury — Retrial—Sufficient evidence on record on which jury can reasonably arrive at verdict of guilt—Mere fact that they might come to contrary conclusion is not sufficient reason for Judicial Commissioner's Court to acquit accused.

Where there is sufficient material on record on which the jury could reasonably come to a conclusion that the accused were guilty, the mere fact, that in the opinion of the Judicial Commissioner's Court, the jury might come to a contrary conclusion is not sufficient for that Court to take upon itself the duty of acquitting the accused. Where, there is sufficient evidence on record to justify a retrial, and it is in the interests of justice that the accused should be retried, an order for retrial is the proper order. [P 216 C 2 ; P 217 C 1]

(m) Criminal P. C. (1898), Ss. 266, 276, Proviso 3, Cl. (b) — Judicial Commissioner's Court is "High Court" within meaning of Proviso 3 to S. 276 — Judge of that Court sitting in its Sessions jurisdiction has power to direct special jury to be empanelled under S. 276, Proviso, Cl. (b) — Procedure of other High Courts in the matter should be followed.

The Judicial Commissioner's Court is a High Court within the meaning of Proviso 3 to S. 276, and a Judge of that Court, sitting in its Sessions Court jurisdiction, has power to direct a special jury to be empanelled under Cl. (b) of that Proviso. In a matter, which affects the summoning and empanelling of a jury, the procedure of a High Court should be followed by the Judicial Commissioner's Court exercising its original criminal jurisdiction. Proviso 3 to S. 276, so far as the Judicial Commissioner's Court is concerned, refers to the Court in the exercise of its original criminal jurisdiction and S. 276 in S. 266 must be read as referring to the Section itself and not to the Provisos. [P 218 C 1, 2]

(n) Criminal P. C. (1898), S. 276 — Judicial Commissioner's Court is a Court of Session following procedure of High Court.

The Judicial Commissioner's Court is a Court of Session following the procedure of a High Court, as the Bombay High Court, in Criminal Sessions : *A I R 1925 Sind 249 (F B) and A I R 1928 Sind 149 (F B), Ref. ; (Opinions of Aston and Rupchand A. J. C.s approved.)* [P 218 C 2]

(o) Criminal P. C. (1898), S. 276, Provisos 3 and 4—Word "chosen" means chosen by lot.

In the absence of words to the contrary in the context, the word "chosen" in Proviso 3 and also in Proviso 4 to S. 276 must mean chosen by lot as in the substantive part of the Section : *A I R 1928 Cal 83 (F B), Disting.* [P 219 C 2]

(p) Criminal P. C. (1898), Ss. 276, Proviso 2 and 315, 279 — Deficiency occurring after names of persons summoned as jurors and present have been exhausted by lottery and challenge—Deficiency can be filled only by choosing juror from among persons present — Persons even qualified cannot be called from outside precincts of Court—Choosing of jury should be continuous process at beginning of trial and from persons summoned and present in Court at time of commencement of proceedings—Jury held not to be properly constituted and trial held vitiated by reason of irregularities in choosing of jury.

Both the substantive part of S. 276, and the second proviso to S. 276 govern both common and special juries and proceedings in High Court and Sessions Court. When the trial of the case has not begun S. 276, Proviso 2 would apply and in such a case a juror can only be chosen from the persons present. Persons, even if qualified, cannot be called from outside the precincts of the Court. Ss. 276 and 279 contemplate that the choosing of the jury shall be a continuous process at the beginning of the trial, and from persons summoned to appear and present in Court at the time of the commencement of the proceedings. A deficiency is only apparent after the names of all those summoned and present have been exhausted by the chances of lottery and challenge. Ss. 276 and 279 do dot contemplate that a deficiency shall be recognized and then obviated by the summoning of fresh

jurors, so that the jury can be summoned and chosen in three instalments. It is the actual presence of the potential juror in the Court at the time the deficiency occurs, which is the condition of his eligibility. That is the safeguard that even in this case there shall be an element of chance which is present in the choosing by lot of the other jurors. The fact then that the person subsequently summoned may be on the special jury list is no substitute for the fact that he was not present. S. 315 (3) does not apply to the choosing of a jury in a particular case where a deficiency of one or more members has appeared within the meaning of Ss. 276 and 279 (2) and the trial has already begun. [P 219 C 1, 2; P 220 C 1]

In a Sessions trial before a Judge of the Judicial Commissioner's Court, sitting in its Sessions Court jurisdiction, 30 persons were called in the first instance from the special jury list; of these 11 were unserved and 19 were present in the Court. After the parties had exercised their right of challenge under S. 297, only 8 persons out of the 9 required under S. 274 (1) had been secured. The Judge directed the clerk in accordance with the rules framed by the Judicial Commissioner's Court to issue fresh summons and more persons were summoned. Of these one *M* arrived and was chosen. He was not chosen by lot. One of the jurors already chosen asked to be excused on account of urgent business and he was allowed to go and juror recently chosen took his place. Still one juror being wanted the clerk issued summons to four persons. Out of these only two appeared; of these two one was chosen by lot :

Held that there were irregularities in empanelling the jury and the jury was not properly constituted and the trial was vitiated thereby. There was an irregularity when *M* was chosen as a juror because he was not chosen by lot or from persons summoned before deficiency appeared. There was further irregularity in the choosing of the last juror. So far as R. 18 of the Rules of the Judicial Commissioner's Court authorized the procedure followed, it was ultra vires : *A I R 1931 Cal 793; A I R 1929 Cal 728 and A I R 1937 Cal 389, Rel. on.* [P 218 C 2; P 220 C 2]

(q) Criminal P. C. (1898), S. 282 (2) — S. 282 (2) contemplates addition of juror after trial has begun and not before.

Sub-s. (2) to S. 282 contemplates the addition of a juror after the trial of the case has begun and not before. S. 282 is limited to cases where a jury had been properly empanelled at the outset and one or more of the casualties, which, are bound to occur sometimes in human lives, has in fact occurred. [P 220 C 1]

(r) Criminal P. C. (1898), S. 536, 537—Irregularity in constitution of jury is not irregularity in proceedings before or during trial within meaning of S. 537—It is in public interest that jury must be constituted strictly according to law—Material irregularity in constitution of jury affects constitution of Court and its competence and vitiates the trial.

In certain cases, the failure to choose a jury is not fatal. Assessors may be chosen instead of jury and vice versa and the failure to take objection at the time is an answer to a subsequent objection that a case tried by jury was tried with assessors but that is the result of special statutory provisions. S. 536 presumably contemplates a jury lawfully empanelled. S. 537 also makes a provision for errors in the jury list but an irregularity in the constitution of the jury cannot be said to be an irregularity in the proceedings before or during the trial within the meaning of S. 537. The words "other proceedings" must be read ejusdem generis with the words which precede them. S. 537 refers to a Court of competent jurisdiction. It does not refer to anything done in the matter of the constitution of the trial Court, and in a trial by Judge and jury, the Court is the Judge and jury. Any material irregularity in the constitution of the jury affects the constitution of the Court and its competence. It must be in the public interests that a body of persons, in whom lies the power to give a verdict of guilty or not guilty, should be constituted strictly according to law. [P 220 C 2]

C. H. Carden Noad and Rewachand V. Thadhani — *for Appellants 1 and 2 respectively.*

Partabrai D. Punwani, Advocate-General — *for the Crown.*

Davis J. C.—The accused Shewaram, son of Jethanand, and Harnamsing, son of Kewalsing, were tried by a Judge and jury in the Sessions Court at Karachi for offences in connexion with a fire which took place in a toy-shop in Elphinston Street, Karachi, belonging to a partnership, in which Shewaram was a partner, and Harnamsing was a servant. Shewaram has been convicted of offences under S. 120-B, I. P. C., (conspiracy) and Ss. 435 and 436, I. P. C., (mischief by fire), read with S. 109, I. P. C., (abetment), and has been sentenced to three years' rigorous imprisonment and a fine of Rs. 1000, or in default to further rigorous imprisonment for six months for the offence under Sec. 120-B, I. P. C., and to three years' rigorous imprisonment for the offences under Ss. 435 and 436 read with S. 109, I. P. C., the sentences to run concurrently; while Harnamsing, the servant, was sentenced to three years' rigorous imprisonment for the offence under S. 120-B, I. P. C., and for offences under Ss. 435 and 436, I. P. C., respectively, the two sentences to run concurrently. The verdict of the jury was a majority verdict of six to three. The charge of the Judge to the jury is a very long charge running from page 414 to 470 of the paper-book, while the memorandum of appeal of Shewaram appears excessively long, running from page 479 to 513 of the paper-book: the memorandum of appeal of Harnamsing runs from page 515 to 532 of the paper-book.

An appeal lies to this Court against convictions and sentences passed by a Judge of this Court sitting in its Sessions Court jurisdiction with a jury only on a point of

law, and the convictions of the two appellants have been challenged on the ground that their trial in the Sessions Court by a Judge sitting with a special jury is not authorized by law. It is contended that the Criminal Procedure Code does not confer upon a Judge of this Court, sitting as a Sessions Judge, the power to direct a case to be tried with a special jury. It is further contended that even if this power be conferred the special jury was not properly constituted. Further, the charge to the jury is attacked generally on the ground that it is so unfair to the accused that its unfairness amounts to a misdirection in law, while it is attacked on many specific points, such as the admission of inadmissible evidence, the failure of the Judge to put correctly before the jury evidence on the record in favour of the accused in matters such as the alleged indebtedness of accused 1, the value of his stock-in-trade and the amount of his insurance, matters which the prosecution made the basis of their case against him. And so far as accused 2 is concerned, the charge to the jury is attacked, among other grounds, on the ground that the Judge had not sufficiently directed the jury to distinguish between the case of accused 1 and accused 2, particularly in the matter of the evidence of previous fires, which though it may be evidence against accused 1 is not evidence against accused 2, who was in no way concerned in them. There is also a complaint in the memoranda of appeal that the learned Judge has not left the jury free to form their own opinion of the evidence upon the record, his references to their being free to come to their own conclusions, independently of his conclusions which were unduly emphasized, being merely illusory and that the jury have been coerced into their verdict and at the end of the charge, have been threatened.

It is not however necessary for us to consider the cases of the appellants at length in all their aspects, because it appears to us that early in his charge, the learned Judge has fallen into a serious error of law on the question of the "burden of proof" in a criminal case, an error which appears to us to colour the whole of his charge and finds expression in specific misdirections to the jury in certain passages, to which we will refer, so that it is not possible for us to hold that the accused were not prejudiced and to allow the verdict of the jury and the convictions of the accused to stand.

Briefly, the error in law of the learned Judge lies in this, that while he has rightly put the burden of proof of the guilt of the accused upon the prosecution, he has wrongly put the proof of their innocence upon the accused. In para. 4 in his charge to the jury the learned Judge refers to this principle that the burden of proving the guilt of the accused lies upon the prosecution. He refers to it as "the first and foremost cardinal principle of British jurisprudence," but there is, he says, "a proviso" to this and some four pages after, he refers to this proviso as contained in Sec. 106, Evidence Act. S. 106, Evidence Act, lays down, the learned Judge says, the proviso that if any fact is specifically within the knowledge of any person, and clearly in this case by "person" he means the accused, the burden is on him to prove it. Reference however to that Section and to the two illustrations contained therein make it clear that it was never intended to be applied, as the learned Judge has applied it, to a case of this kind, and to be used to place upon the accused the burden of proving their innocence, even to the extent of disproving, on an important point in the case, evidence of the prosecution which was not even admissible in law.

The learned Judge has cited no case, and the learned Advocate-General has cited no case wherein it is laid down that the burden of proof, that duty which rests upon the prosecution, of proving the guilt of the accused, is subject to this proviso in the sense that the learned Judge has used it in his charge to the jury. In our opinion, S. 106, Evidence Act, is not a proviso to the rule that the burden of proving the guilt of the accused is upon the prosecution but on the contrary, the Section is subject to that rule. The burden of proving a particular fact or a particular defence is a different matter. The learned Judge was not even dealing with one of those exceptions to the general law on which an accused may rely and to which S. 105, Evidence Act, applies; but even in such a case an accused may rely upon an exception in his defence and fail to prove it and yet be entitled to an acquittal, for the prosecution may have failed to prove all the necessary elements in the offence of which the accused has been charged, or the accused may by his statement, read with the other evidence on record, have raised a reasonable doubt in the mind of the Court and so have entitled himself to an acquittal. In this case, it is not till the last paragraph

but one of this very long charge, when some hours must have passed, that the learned Judge refers to this question of "reasonable doubt" and this reference can in no way cure the fundamental error in the charge. In the recent case in (1935) 51 T L R 446[1] at p. 450, Lord Sankey L. C. said :

If at any period of a trial it was permissible for the Judge to rule that the prosecution had established its case and that the onus was shifted on the prisoner to prove that he was not guilty, and that unless he discharged that onus the prosecution was entitled to succeed, it would be enabling the Judge in such a case to say that the jury must in law find that the prisoner was guilty and so make the Judge decide the case and not the jury, which is not the common law. It would be an entirely different case from those exceptional instances of special verdicts where a Judge asks the jury to find certain facts and directs them that on such facts the prorecution is entitled to succeed. Indeed, a consideration of such special verdicts shows that it is not till the end of the evidence that a verdict can properly be found and that at the end of the evidence it is not for the prisoner to establish his innocence, but for the prosecution to establish his guilt. Just as there is evidence on behalf of the prosecution so there may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case he is entitled to the benefit of the doubt. But while the prosecution must prove the guilt of the prisoner there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence.

This is the real result of the perplexing case in 11 Cr App Rep 45[2] which lays down the same proposition, although perhaps in somewhat involved language. Juries are always told that if conviction there is to be, the prosecution must prove the case beyond reasonable doubt. This statement cannot mean that in order to be acquitted the prisoner must 'satisfy' the jury. This is the law as laid down in the Court of Criminal Appeal in 8 Cr App Rep 211[3] the headnote of which correctly states that where intent is an ingredient of a crime there is no onus on the defendant to prove that the act alleged was accidental. Throughout the web of the English criminal law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt, subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner whether the prisoner killed the deceased with a malicious intention and the prosecution has not made out the case the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

Now, in this case, there is no question of a defence based upon an Exception under S. 105, Evidence Act, and of the presumption therein referred to; and the judgment of Lord Sankey applies with full force. But on the question of the burden of proof and the proof to the satisfaction of the jury by the accused of his innocence of the truth of the facts on which he relies in his defence, the learned Judge in this case said at p. 415 of the paper-book:

That is the first and foremost principle of British jurisprudence. But there is a proviso to that and that is this: When the prosecution leads evidence and at a stage you believe that evidence led by the prosecution to be sufficient to sustain a conviction, then the presumption of innocence disappears. Then naturally you will inquire of the accused as to what he has to say and if the accused says something or relies upon certain facts or circumstances or offers an explanation, he must prove those facts or circumstances to your satisfaction. If he fails to do so, the law entitles you to presume that what he says is not true. Nevertheless, it is the duty of the Crown to prove the case against the accused. First you must start with the presumption of innocence against the accused. It is the duty of the prosecution to prove the case against the accused by satisfactory evidence, and after prosecution leads evidence, and at a stage you find that that evidence is sufficient to convict the accused, you will ask the accused as to what he has to say, and if the accused says something, he must prove it by satisfactory evidence. For instance if the accused says that he was not in Karachi on the day of the occurrence, he must prove that to your satisfaction. If you are not satisfied with what he says you may draw your inferences from that circumstance. Nevertheless, it is the duty of the prosecution to prove the case against the accused.

This, it appears to us, can only mean that the accused must prove certain facts or be found guilty. Then further on the learned Judge says :

Then hear the evidence for the prosecution and after hearing the evidence for the prosecution, if you come to a conclusion that the case against the accused is proved, you will ask the explanation of the accused, and if the accused offers an explanation, he must satisfy you on that.

That the idea conveyed in these passages was that the accused was to meet the proof of the prosecution case by proof of his own case appears to us clear from other passages which occur from time to time throughout the charge. For instance, on p. 428 the learned Judge says:

Opportunity was given to Shewaram to prove that he paid Rs. 6000 to N. H. Advani and whether he received it. He was unable to do so, and that fact is before you.

Then at page 441 he says:

Prosecution's duty is to prove a prima facie case. They have placed these materials before you by the documentary evidence and if you believe that and if the accused wish to establish something, then apply the principle which I explained to you,

1. Woolmington v. Director of Public Prosecutions, (1935) A C 462=104 L J K B 433=25 Cr App R 72=153 L T 282=79 S J 401=51 T L R 446.
2. Rex v. Abramovitch, 11 Cr App Rep 45.
3. Rex v. Davies, 8 Cr App Rep 211.

it is then their duty to show satisfactorily with all facts and figures what they want to show. That you will bear in mind and consider.

There is in this portion of the charge a further error in that the Judge directs the jury that the "Prosecution's duty is to prove a prima facie case." The prosecution have to do more than that; they must prove the guilt of the accused; and we know of no principle in the English law whereby if the prosecution has proved a prima facie case, the accused must bring evidence in rebuttal or be convicted. Then at p. 467 the learned Judge says:

The testimony of Fazulallah is that there was no treatment given by Dr. Kalliandas and that is the sworn testimony on oath. To disprove that, it was the duty of the accused to show what he says is true. There is no such evidence. I hope you do not believe in evil influences.

There is in this portion of the charge the further error that the accused is called upon to disprove what Sub-Inspector Fazulallah said in his evidence which was itself not admissible in evidence. Dr. Kalliandas was not called as a witness. Fazulallah was an investigating police officer; he could not therefore give evidence as to what Dr. Kalliandas told him, even if Dr. Kalliandas was called as a witness, unless the accused wished to cross-examine the witness upon his statement to the police under the provisions of S. 162, Criminal P. C. The use of S. 106, Evidence Act, as the learned Judge has used it, has been discussed in two recent cases before the Privy Council, and it is clear that the Section cannot be used as the learned Judge has used it. In 39 Bom L R 1[4] and 38 Bom L R 700[5] the operation of S. 106 of the Ceylon Ordinance No. 14 of 1895, which is in wording similar to S. 106, Evidence Act, was considered by their Lordships of the Privy Council and they made it clear that this Section did not enable the Judge to say to the jury that the accused must explain this or that; he must satisfy them on this point or that or be found guilty. The case in 7 S L R 109[6] at p. 112, we think, takes this Section, as far as it can properly be taken in a case of this kind, against the accused. In that case, the accused gave what appeared to be a false explanation as to what he did upon a particular day, but the Court did not say that he must prove this fact or that or satisfy the jury on this point or that or be convicted. What the Court said was:

It is urged on behalf of the accused that he owes no duty to the prosecution and is under no liability to give any explanation. If no prima facie case had been made against the accused it is open to the accused to rely safely on the presumption of innocence or on the infirmity of the evidence for the prosecution. But when a prima facie case is made out and the presumption of innocence is displaced, then as said by Wills J. in his work on "Circumstantial Evidence" at p. 97, the force of suspicious circumstances is augmented whenever the party attempts no explanation of facts which he may reasonably be presumed to be able and interested to explain.

And the substance and conclusions of that judgment appear properly set out in the head-note which says:

If no prima facie case be made against the accused it is open to him to rely on the presumption of innocence. But where a prima facie case is made out and the presumption of innocence is displaced, then the force of suspicious circumstances is augmented whenever the party attempts no explanation of facts which he may reasonably be presumed to be able and interested to explain.

But in his charge to the jury in this case the learned Judge has gone far beyond this. He has said, as we have pointed out, that it is the duty of the accused to prove this fact or that, to satisfy the jury on this point or that, and, with all respect to the learned Judge this is not the law. We think the fundamental error in his charge is that he has led the jury to believe that the duty of the prosecution and the duty of the defence so far as the "burden of proof" of their respective cases is concerned was upon the same footing, so that as the prosecution must prove their case, so the accused must prove theirs. There are however other errors on which, we think, we should have had to set aside the conviction on the ground of misdirection. The first is, that we do not think that it can be said that the learned Judge has sufficiently distinguished the cases of accused 1 and accused 2 and they are widely different.

Against accused 1 it was the case of the prosecution that he had been concerned in a series of fires. Against him this evidence clearly was admissible under S. 15, Evidence Act. But against accused 2 this evidence was not admissible. He was a young man who had been in the employment of accused 1 for a short time only: it was not proved by the prosecution that he was concerned in the fire in Bombay when he came to Karachi as a servant in the Karachi shop. Therefore the fact that accused 1 was con-

4. Stephen Senevirathne v. The King, (1936) 23 A I R P C 289=1936 Cr C 900=164 I C 545 =37 Cr L J 963=39 Bom L R 1 (P C).
5. Attygalle v. The King, (1936) 23 A I R P C 169=1936 Cr C 623=162 I C 450=37 Cr L J 628=38 Bom L R 700 (P C).
6. Issarsing Sanwansing v. Emperor, (1913) 7 S L R 109=24 I C 585.

cerned in a fire in the Standard Bookstall, if he was so concerned, where he was employed in 1926 or 1927, or in a fire in Quetta, where though the fire was next door, the goods of his shop were damaged and he got Rs. 6700 from the Insurance Company for goods damaged by smoke or water, or in a fire in Bombay in the godown of himself and one Naraingsing H. Advani, or in a fire in a portion of the godown leased to a Mochi in Parr Street, is not evidence against accused 2, but even as against accused 1, we think, it was only fair that the learned Judge should have pointed out to the jury that if he was concerned in the fire in the Standard Bookstall it might well be that he was concerned only to some small extent. The learned Judge however so stresses the case against this accused that he permits himself to say that

> it is on record now, which you cannot question, that he was in the service of the Bookstall on Rs. 100 a month for some time, at any rate before the fire which took place in the Standard Bookstall in 1927.

This clearly was a suggestion to the jury that he held a place of some importance in this Bookstall and they were directed that it was a matter of record which they could not question. Yet when we asked to be referred to that part of the record of this case where this fact, which the learned Judge said in his charge was recorded and could not be questioned, was, we find that it is a matter of hearsay evidence brought out by the learned advocate for the accused against his client's interest in his cross-examination of the Sub-Inspector, Fazulallah at p. 32 of the paper-book. The words of S. 15, Evidence Act, are wide, for the material word used is "concerned", but they are not so wide as to admit hearsay evidence or the evidence of facts alleged to have been discovered by the investigating Police Officer in the course of his investigation and not properly proved. There is also a difference between the admissibility of evidence and its cogency or weight, and facts in favour of an accused as well as facts against him should be pointed out by the Judge to the jury.

The case of accused 2 was different from the case of accused 1. The learned Judge, so far as accused 2 is concerned, stresses the fact that he was an Advani as was Naraingsing H. Advani, a partner of the firm in Bombay, and he would appear to suggest at one place in his charge to the jury, that this Advani in Bombay sent Harnamsing, the other Advani, to Karachi in agreement with Shewaram, accused 1, for the purpose of this fire. The learned Judge says that Advani Naraingsing belongs to the same community as Harnamsing in the way that he was also Advani or Amil. But when the learned Judge was stressing this relationship, this intimate association and this confidence which appeared to him to exist between this servant and his master, he should have pointed out that there was nothing upon the record to contradict the statement of this accused, that when he came to Karachi, far from being taken into the home of Shewaram or one of his relations he stayed first in a hostel and then at a hotel. It is true that at p. 427 the learned Judge considers the past history of Shewaram, accused 1, and that he refers specifically to the Quetta fire and the Bombay fire in reference to this accused 1, that at page 450 he says :

> I have dealt so far as Shewaram is concerned showing his conduct and preparations therein of a man that have bearing on what was to happen later,

and then he goes on to deal with what he calls the transfer of accused 2, Harnamsing to Karachi, and then at p. 454 he says "Here comes Harnamsing in the picture". But when we asked the learned Advocate-General if he could point out to us in the whole of this long charge where the learned Judge has pointed out clearly to the jury that against accused 2 they must not consider the evidence of previous fires in which he was not concerned, he said he could not do so, and we think that in view of the form the charge took, it was inevitable that the jury thought they should consider this evidence against accused 2 as also against accused 1. Then, again, in a case such as this, dependent upon circumstantial evidence, we think it was the duty of the Judge to point out very clearly that in the case of circumstantial evidence a conviction is only right and proper, if from the proved circumstances the inference of guilt only can reasonably be drawn, and if from the proved circumstances two inferences can reasonably be drawn, the inference of innocence as well as the inference of guilt, the jury is bound to draw the inference of innocence. At page 419 the learned Judge says :

> Then, gentlemen, in a case like this evidence may be direct or circumstantial. Now, evidence is divided in two kinds, namely direct and circumstantial evidence. This case depends entirely on circumstantial evidence, and so far as the proof is concerned, the same definition applies, that is to say, as reasonable men you can draw your

inference, from the circumstances of the case and from the facts of the same.

This again, with all respect to the learned Judge, we do not think is a proper statement of law. The fact that the jury can draw from the circumstances of the case an inference of guilt is not sufficient. The inference of guilt must be the only reasonable inference to be drawn from the circumstances. It is true that at p. 467 the learned Judge seems to have intended to indicate to the jury that this was the law, but in language so vague and obscure as must, we think, have left no clear impression upon the minds of the jury. The learned Judge says :

As soon as you find the combustible material is collected there by some one, and then if there is no other possibility or any reasonable hypothesis I am sure it cannot be anything but the case of arson.

We cannot consider that sentence appearing at that time and at that place in the charge as an adequate exposition or adequate substitute for the exposition of this aspect of the law of circumstantial evidence to which we have referred. Lastly, we think that the learned Judge in his exhortation to the jury in the last paragraph of his charge has passed beyond the limits of wise guidance or advice or that expression of opinion on facts which the Criminal Procedure Code allows in the charge of a Judge to a jury. His exhortation to the jury: "The whole of Karachi is watching you, the whole commercial world is watching you," appears to us to introduce into the case those extraneous considerations which the Judge warned the jury to exclude from their minds, and in view of the nature of the charge to be a clear direction to the jury to convict. It could, in our opinion, mean nothing else and it did not leave the jury to come freely to their own conclusions. In A I R 1925 Sind 116[7] at p. 123 the learned Judge, Madgavkar A. J. C. had said in addressing the jury :

Gentlemen, I have done. This trial is a trial in one sense of the accused. But you must not forget that in another sense we all of us are not less on our trial. The witnesses, the Bar, you and I, we are also on our trial, a trial no less real in that it rests with ourselves to acquit or condemn ourselves.

The learned Judges in that case held that this exhortation vitiated the verdict. We think therefore there has been established such misdirection as must have prejudiced the accused, and we must therefore set aside the convictions of the accused. We have then to consider what further course we should take. The case in A I R 1925 Sind 116[7] to which we have referred, lays down that this Court has power in a case of misdirection to order a retrial of the accused or to enter into the merits of the case and dispose of it. Mr. Carden Noad argues on behalf of the accused that if we could dispose of it ourselves, we could not on the evidence convict; that there is not sufficient evidence on which we should order a retrial. But we do not think that this is a case in which we should proceed to decide upon the paper record. It is a case where we think much must depend upon the impression made by the witnesses in their evidence and the accused in their statements upon the Court. In A I R 1925 Sind 116[7] it was the wish of the accused that the Court itself should deal with and dispose of the case. In 21 S L R 356[8] where the Court proceeded to set aside the acquittal based upon the verdict of the jury, the facts were simple. But though this case, if it were properly handled, may well lend itself to far simpler treatment than it has received, the guilt of the accused depending in the end upon answers to questions which can be clearly and simply stated, nevertheless we think this is essentially a case where the guilt or innocence of the accused should be determined by a Judge and jury, who have seen the witnesses and heard them give their evidence, who have seen the accused and who have heard them give their statements. We think therefore it is clear that there should be a retrial which should be before another Judge and jury and we should not proceed to decide this case finally upon the paper record before us.

Mr. Carden Noad in dealing with the case of accused 1 was bound also to deal with the case of accused 2. He argued that the case against accused 2 could not stand. He had been convicted of conspiracy but also for the substantive offences of mischief by fire under Ss. 435 and 436, Penal Code, and if the case against him failed, the case against accused 1, guilty of conspiring with him and abetting him must fail also. A man cannot be convicted of conspiring with himself. But we cannot say that the circumstances of this alleged fire, the past history of accused 1 with fires, the association of accused 1 and 2 is such as should enable us to say that there is no material

7. Topandas v. Emperor, (1925) 12 A I R Sind 116=81 I C 249=25 Cr L J 761.

8. Emperor v. Saran, (1927) 14 A I R Sind 104=99 I C 98=28 Cr L J 66=21 S L R 356.

on which a jury could reasonably come to a conclusion that the accused were guilty. The jury might reasonably come to a contrary conclusion. But that is not the point. That, we think, is not a sufficient reason for us to take upon ourselves the duty of acquitting them. It is clearly in our opinion not to the interest of the accused that we should further discuss the evidence. It suffices to say that there is, in our opinion, sufficient evidence upon the record to justify their retrial, and that it is in the interests of justice that they should be so retried and we so order.

We would point out that it should not have been necessary for the learned Assistant Public Prosecutor at so late a stage as when the advocate for the accused was addressing the jury, to rise in Court and say that as accused 2 was not in Karachi before 28th April 1937, the case of the prosecution was not that the conspiracy was from August 1936 to May 1937, as stated in the charge, but was from 28th April to 16th May when the fire took place. The prosecution should have known that this was their case at the beginning of the trial. We have then to consider the question of the constitution of the jury which is now of no importance in this case because we have decided to set aside the convictions and order a retrial on other grounds, but which as it involves questions which will be raised in future trials, and which have in this appeal been argued before us with care and ability, we think we must now consider and decide.

It is contended on behalf of the accused that this Court is not a High Court within the meaning of Proviso 3 to S. 276, Criminal P. C., and that a Judge of this Court in Sessions Court jurisdiction has no power to direct a special jury to be empanelled under Cl. (b) of that Proviso. S. 266, Criminal P. C., which declares the Judicial Commissioner's Court to be a High Court for the purpose of Ch. 23 and of Ch. 18 would appear to exclude the Judicial Commissioner's Court from S. 276, Criminal P. C., which enables a High Court Judge to direct a special jury to be empanelled; but if the Judicial Commissioner's Court is not a High Court within the meaning of S. 276, Criminal P. C., neither is a Chartered High Court, for Sec. 266, Criminal P. C., in its terms applies in precisely the same way to a Chartered High Court as to this Court. It is strange that this point is raised for the first time at this time and in this case in view of the fact that S. 266, Criminal P. C., which includes the Judicial Commissioner's Court of Sind among other High Courts to which the provisions of Chaps. 23 and 18 are applicable was amended in 1923. But the provisions of S. 266 have been considered in relation to other matters in 19 S L R 309[9] and 22 S L R 349[10] and it is not unreasonable to suggest that if this point were of any substance, it would not have escaped the notice of advocates of this Court for so long. Any doubt which exists in the interpretation of the Sections arises from the fact that Secs. 266 and 276 have been amended from time to time. S. 266, as it first stood, did not include S. 276, but only S. 307 which by its terms required the wider definition of "High Court" given in S. 4 (1) (j), Criminal P. C. In the Act of 1882 which consolidated and amended the law relating to criminal procedure in Chartered High Courts and others Courts, S. 266 was as follows :

> In this chapter, except in S. 307, the expression 'High Court' means a High Court of judicature established or to be established under the twenty-fourth and twenty-fifth of Victoria, Chap. 104, and includes the Chief Court of the Punjab, and such other Courts as the Governor-General in Council may, by notification in the Gazette of India, declare to be High Courts for the purposes of this chapter.

There is no reference in this Section to S. 276 at all, but, it would appear, doubt arose as to whether High Courts other than those mentioned in S. 266 had power to make rules regarding the summoning and choosing of jurors. Therefore, S. 276 was excluded from the restrictive provisions of S. 266 by S. 8 of Act 10 of 1886. In S. 276 and in S. 307 the term "High Court" was to have the meaning given to it by the definition in S. 4 (1) (j), but it was for this purpose and it would appear for this purpose only, S. 276 was to be omitted from S. 266; otherwise the Section would have needed no amendment. S. 276 was not to be omitted from S. 266 for the purpose of preventing the Courts named in S. 266 as High Courts from possessing or exercising the power of appointment of special juries under the latter part of the Section, and at that time that Section by reason of the Act of 1882 was as follows :

> *276.* The jurors shall be chosen by lot from the persons summoned to act as such, in such

9. Haji Khudabux v. Emperor, (1925) 12 A I R Sind 249=85 I C 706=26 Cr L J 562=19 S L R 309 (F B).
10. Emperor v. Jianand, (1928) 15 A I R Sind 149 =111 I C 865=29 Cr L J 945=22 S L R 349 (F B).

manner as the High Court may from time to time by rule direct :

Provided that —

first, pending the issue under this Section of rules for any Court, the practice now prevailing in such Court in respect to the choosing of jurors shall be followed :

secondly, in case of a deficiency of persons summoned, the number of jurors required may, with the leave of the Court, be chosen from such other persons as may be present; and

thirdly, in the Presidency-towns : (a) if the accused person is charged with having committed an offence punishable with death, or (b) if in any other case a Judge of the High Court so directs, the jurors shall be chosen from the special jury list hereinafter prescribed.

"High Court" then in that Section already had two different meanings. In the wording of the Section itself, it meant a High Court as defined in S. 4 (1) (j) and in Proviso 3 it meant a High Court in a Presidency-town. In Proviso 1 the "Court" therein referred to appeared to mean a High Court or Sessions Court indifferently. But it is clear that the inclusion of S. 276 in S. 266 was not intended to exclude the Courts named in S. 266 in the exercise of their original criminal jurisdictions from appointing special juries. So in 1923 when the Court of the Judicial Commissioner of Sind was included among High Courts within the meaning of S. 266, it could not have been intended to exclude it from the provisions of Proviso 3 which gave other High Courts in the exercise of their original criminal jurisdiction the power to empanel a special jury, and it must be remembered that by the same amending Act as included in S. 266 among "High Courts" the Judicial Commissioner's Court Proviso 3 to S. 276 was amended so as to extend to all High Courts, and for this purpose "High Court" must mean High Court as defined in S. 266, the power of empanelling special juries. For by the amending Act of 1923, the power of empanelling special juries was extended to Courts other than High Courts in Presidency-towns, so that while Proviso 3 before the amendment of 1923 reads :

thirdly, in the Presidency-towns : (a) if the accused person is charged with having committed an offence punishable with death, or (b) if in any other case a Judge of the High Court so directs, the jurors shall be chosen from the special jury list hereinafter prescribed ;

after the amendment of 1923, it read :

thirdly, in a trial before any High Court in the town which is the usual place of sitting of such High Court, (a) if the accused person is charged with having committed an offence punishable with death, or (b) if in any other case a Judge of the High Court so directs, the jurors shall be chosen from the special jury list hereinafter prescribed.

Clearly, then, Proviso 3 to S. 276, so far as this Court is concerned, now refers to this Court in the exercise of its original criminal jurisdiction, and S. 276 in S. 266 must be read as referring to the Section itself and not to the Provisos. It matters not that this jurisdiction is exercised, owing to the peculiar constitution of this Court through a Sessions Court.

To hold otherwise would be to render purposeless all the other Sections in Chap. 23, Criminal P. C., for instance, Ss. 312 to 318, relating to the summoning of jurors by the clerk of the Crown which, by reason of the definition of "High Court" in S. 266 apply to this Court. Moreover, if we accepted the argument advanced on behalf of the accused, this Court would have no power to empanel a special jury even in the case of European British subjects in relation to whom in criminal trials it is by virtue of S. 4 (1) (j), a High Court. The argument that Proviso 4 to S. 276 applies to this Court and that Government could issue a notification under that Proviso has little force, for that Proviso contemplates the application of the provisions of S. 325, but that Section is clearly inapplicable to a "High Court" within the meaning of S. 266.

It is said that this Court has already decided that this Court in its original criminal jurisdicition is a Court of Session in the ordinary sense of that word; but reference to the case in 19 S L R 309[9] shows that that was not the opinion of the Judges of this Court before the reference to the Full Bench in 22 S L R 349;[10] nor was it the opinion of two out of the four Judges in this latter case; and with all respect we prefer, for the reasons given, the conclusions of Aston and Rupchand A. J. C.s in that case, that this Court is a Court of Session following the procedure of a High Court, such as the Bombay High Court, in criminal sessions, to the contrary conclusions of Percival J. C. and DeSouza A. J. C.; and if in such an important matter as the powers of this Court as Court of Session to make a reference upon a verdict of a jury, this Court is to follow the procedure of a High Court, and such now is the law, we find no difficulty in holding that in a matter which affects the summoning and empanelling of a jury the procedure of a High Court should be followed by this Court exercising its original criminal jurisdiction.

The question then lastly arises, whether this special jury was properly empanelled, and if it was not whether the defects in its constitution are such as would in themselves vitiate the trial? First, as to the facts. It appears that in the first instance thirty persons were called to serve as jurors from the special jury list prepared by the clerk of the Crown in accordance with Ss. 313 and 314, Criminal P. C., and of these eleven were unserved and nineteen were present in Court. After the parties had exercised their right of challenge under S. 277, Criminal P. C., only eight jurors out of the nine required under S. 274 (1) had been secured. It was then open to the Judge to proceed under Proviso 2 to S. 276, Criminal P. C., and choose the one juror wanting from among persons present in Court; but it would appear the Judge did not do so but directed the clerk of the Crown in accordance with the rules framed by this Court, to issue fresh summonses and two more persons were summoned. Of these one Mr. Jagmohanlal Kaishilal Manabai Shah arrived and was chosen. He was not chosen by lot, and then one juror, Mr. Reid, already chosen, asked, on the ground of urgent business, to be excused, and he was allowed to go and Mr. Shah took his place. Still one juror was wanted and then the clerk of the Crown ordered summonses on four other persons from the special jury list to be issued for 3 o'clock that day, and out of those four persons summoned two appeared. Of these two one Mr. Milner, it appears, was chosen by lot. The jury was thus at last completed.

Now it is argued that so soon as the number of persons summoned as jurors was exhausted either by challenge or by the fact that they were not challenged but chosen, the Judge had no alternative but to choose the one juror wanting from the persons present in Court or discharge the jury and start all over again; and reliance is placed upon the case of the Calcutta High Court in 55 Cal 371;[11] but the question for decision in that case really was whether the word "chosen" in Proviso 2 in S. 276, Criminal P. C., in reference to the choosing of persons from among those present in Court meant chosen by lot, as in the substantive part of the Section, or chosen by the Judge, and it was decided that "chosen" meant chosen by the Judge. The question of whether "chosen" in Cl. (b) in Proviso 3 meant chosen by lot, as in the substantive part of the Section, or chosen by the Judge, as in Proviso 2, was not considered; but our own opinion is that in the absence of words in the context to the contrary, "chosen" in Proviso 3 and also in Proviso 4 must mean chosen by lot, as in the substantive part of the Section, and that this is the meaning; and they must be summoned and chosen by lot in such manner as the High Court by rules directs.

It would appear however that both the substantive part of the Section and Proviso 2 govern both common and special juries, and proceedings in High Courts and Sessions Courts: 58 Cal 1272[12] at p. 1278. S. 315 (3), Criminal P. C., allows further persons to be summoned during the course of the High Court sessions when the number summoned is insufficient. S. 327 allows further jurors to be summoned in the mufassil when the length of the sessions would make the attendance of one body of jurors oppressive. Neither S. 315 nor S. 326 nor S. 327 contemplate the summoning of jurors for a particular case. S. 282 relates to the discharge of a juror during the trial of a case, but sub-s. (2) of that Section makes it clear that the Section relates to a case where the trial of the case has begun; when the trial of the case has not been begun, S. 276, Proviso 2, would apply. A juror can only be chosen from the persons present. Persons even qualified cannot be called from outside the precincts of the Court: 56 Cal 835.[13] Ss. 276 and 279 contemplate that the choosing of the jury shall be a continuous process at the beginning of the trial, 58 Cal 1272,[12] and from the persons summoned to appear and present in Court at the commencement of the proceedings: *see also* I L R (1937) 2 Cal 482.[14] A deficiency is only apparent after the names of all those summoned and present have been exhausted by the chances of the lottery and challenge and these Sections do not appear to contemplate that a deficiency shall be recognized and then obviated by the summoning of fresh jurors, so

11. Kedar Nath v. Emperor, (1928) 15 A I R Cal 83=108 I C 577=29 Cr L J 437=55 Cal 371 =32 C W N 221=47 C L J 43 (F B).

12. Saheb Ali v. Emperor, (1931) 18 A I R Cal 793 =1931 Cr C 1057 = 135 I C 435 = 33 Cr L J 129=58 Cal 1272=54 C L J 307=35 C W N 711.

13. Emporor v. Abedali Fakir, (1929) 16 A I R Cal 728=1929 Cr C 364=121 I C 560=31 Cr L J 281=56 Cal 835=33 C W N 722.

14. Suba v. Emperor, (1937) 24 A I R Cal 389 = 170 I C 237=38 Cr L J 870 = I L R (1937) 2 Cal 482.

that, as in this case, the jury can be summoned and chosen in three instalments.

We think then that there were in the case of empanelling of this jury irregularities. There was an irregularity when Mr. Manabai Shah was chosen as one juror when he appeared in answer to a summons because he was not chosen by lot or from among the persons summoned before a deficiency appeared, nor can he be deemed to have been added to the jury in place of Mr. Reid under the provisions of S. 282, Criminal P. C., because sub-s. (2) to that Section appears to contemplate the addition of a juror after the trial of the case has begun and not before. Also clearly the Legislature intended to limit this Section to cases where a jury had been properly empanelled at the outset and one or more of those casualties which are bound to occur at some time in human lives has in fact occurred. So too in the case of the last and ninth juror. If he had been present at the time the deficiency became apparent, he undoubtedly could have been added under Sec. 279 (2) of the Code read with S. 276. For it does appear that it is the actual presence of the potential juror in the Court which is the condition of his eligibility. That is the safeguard that even in this case there shall be an element of chance which is present in the choosing by lot of the other jurors. The fact then that the person subsequently summoned may be on the special jury list is no substitute for the fact that he was not present. S. 279 (2) especially provides for the selection of a person on the jury list, not summoned but present. This appears to be the view taken in 56 Cal 835,[13] and in the other cases therein referred to. In that case, the requisition of the services of a local schoolmaster without ballot, though on the special jury list, was held to vitiate the trial. S. 537 was not discussed as it was not discussed in 55 Cal 371[11] or 58 Cal 1272.[12] It was however discussed in 7 Pat 61[15] where it was pointed out that every irregularity in the appointment of a jury does not necessarily vitiate the trial, which was the opinion of the Calcutta High Court in 8 Cal 739,[16] where, when a Judge himself appointed the jurors instead of their being chosen by lot and no objection was taken at the trial, it was held that the irregularity was not fatal to the trial.

In the Patna case, one Judge, Wort J. dissented. In the Patna case,[15] S. 536 was referred to, and it appears clear that in certain cases the failure to choose a jury is not fatal. Assessors may be chosen instead of a jury and vice versa and a failure to take objection at the time is an answer to a subsequent objection that a case triable by a jury was tried with assessors, but this is the result of special statutory provisions, and S. 536 presumably contemplates a jury lawfully empanelled. S. 537 also makes provision for errors in the jury list, but it appears to us difficult to hold that an irregularity in the constitution of the jury is an irregularity in the proceedings before or during the trial within the meaning of S. 537, for the words "other proceedings" must, we think, be read ejusdem generis with the words which precede these. S. 537 refers to a Court of competent jurisdiction. It does not refer to anything done in the matter of the constitution of the trial Court, and in a trial by Judge and jury the Court is the Judge and jury. Any material irregularity in the constitution of the jury affects the constitution of the Court and its competence. S. 315 does not appear to us to cover the case of either the 8th or 9th juror in this case, so that, it appears to us, the jury was not properly constituted. It must be in the public interest that a body of persons in whom lies the power to give a verdict of guilty or not guilty should be constituted strictly according to law. Sec. 315 (3) does not appear to us to apply to the choosing of a jury in a particular case where a deficiency of one or more members has appeared within the meaning of Ss. 276 and 279 (2), and the trial has already begun; and so far as R. 18 of the Rules of this Court authorizes the procedure followed in this case, it is, in our opinion, ultra vires.

Therefore on the ground also that the jury was not properly constituted, we think the convictions would have to be set aside, but not however because the jury empanelled was a special jury, for the direction given by the learned Judge that a special jury should be empanelled in this case appears to us a lawful and proper direction. For these reasons our order is that the convictions of the two appellants and the sentences imposed upon them be set aside but that they be retried.

R.M./R.K. *Order accordingly.*

15. Akbar Ali v. Emperor, (1928) 15 A I R Pat 1 = 104 I C 897 = 7 Pat 61 = 28 Cr L J 881 = 8 P L T 800 (S B).
16. Empress v. Jhubboo Mahton, (1882) 8 Cal 739 = 12 C L R 233.

A. I. R. 1939 Sind 221

DAVIS J. C. AND WESTON J.

Moolomal Dharamdas and another — Appellants.

v.

Lal Singh — Respondent.

Misc. Appeal No. 6 of 1938, Decided on 21st October 1938, against order of First Class Sub-Judge, Shikarpur, D/- 9th December 1937.

(a) Provincial Insolvency Act (1920), Ss. 3 and 75—Subordinate Court of First or Second Class invested with insolvency jurisdiction is subordinate to District Court for appeal which cannot be entertained in High Court.

A Subordinate Court whether of the First or Second Class is a Subordinate Court to a District Court within the meaning of Sec. 3 in relation to the investment of the powers by the Local Government ; and such Court though exercises concurrent jurisdiction with the District Court does not cease to be subordinate for the purposes of appeal under S. 75 which the High Court has no jurisdiction to entertain : *A I R 1934 Rang 155, Rel. on.* [P 221 C 1, 2]

(b) Civil P. C. (1908), Order 7 and S. 141—Provisions of O. 7 apply to memoranda of appeals as well as to plaints.

Provisions of Order 7 by reason of S. 141 of the Code, apply mutatis mutandis to memoranda of appeals as well as to plaints. [P 221 C 2]

Dipchand Chandumal—*for Appellants.*

Kundanmal Dayaram—*for Respondent.*

Davis J. C. — This purports to be an appeal from an order made by the First Class Sub-Judge, Shikarpur, who has been invested with insolvency jurisdiction under S. 3, Provincial Insolvency Act. A preliminary objection is taken that no appeal will lie from an order made by a Judge subordinate to a District Court, to this Court, for the provisions of Section 75, Provincial Insolvency Act, contemplate appeals to the High Court from the District Court. It is true that under S. 3 Government invests a Court Subordinate to District Court with jurisdiction and that the Court so invested shall within the local limits of its jurisdiction have a concurrent jurisdiction with the District Court. But that does not mean that the Subordinate Court so invested ceases to be a Subordinate Court for the purpose of appeal under S. 75 ; for, if that were so, Sec. 75 would have no purpose as there would be no subordinate Courts to the District Court from which appeals could lie. It was then argued however that a Court of First Class Subordinate Judge which is the Court at Shikarpur is not a subordinate Court within the meaning of S. 3, for it is a Court subordinate to a High Court ; but if we were to accept this argument, under Sec. 3 Government would be empowered to invest a Second Class Subordinate Court with powers of insolvency and not a First Class Subordinate Court. We do not think that such a state of things was ever contemplated and in our opinion the subordinate Court whether of the First or the Second Class is a subordinate Court to a District Court within the meaning of S. 3 in relation to the investment of powers by the Local Government. Therefore it appears to us clear that an appeal should be made to the District Court. Reference may also be made to the case in 12 Rang 352,[1] where under the same Act it was held that an appeal from an order of an Assistant District Court lies to the District Court, an Assistant District Court being deemed a Court subordinate to the District Court for the purpose of S. 3 and Sec. 75, Provincial Insolvency Act.

On behalf of the respondent it is urged that we should dismiss the appeal and on behalf of the appellant it is urged that we should return the appeal for presentation to the proper Court. We think the proper order we should make is that the appeal should be rejected. As it is not within our jurisdiction, it is not for us either to allow or to dismiss it. Moreover, it would appear that provisions of Order 7, Civil P. C., by reason of S. 141, Civil P. C., apply mutatis mutandis to memoranda of appeals as well as to plaints. The reasons we have given for rejection of this appeal are a sufficient compliance with O. 7, R. 12 which requires reasons for rejection of a plaint to be recorded in an order. As the respondent has appeared in answer to the application of the appellants there is no reason why he should not receive his costs. The appeal is therefore rejected with costs. Order accordingly.

S.G./R.K. *Appeal dismissed.*

1. Ah Fwaik v. Receiver, District Court of Insein, (1934) 21 A I R Rang 155=151 I C 790 = 12 Rang 352.

A. I. R. 1939 Sind 222

DAVIS J. C. AND TYABJI J.

Jashanmal J. Gulrajani and others
Applicants

v.

Emperor.

Criminal Revn. Applns. Nos. 381 and 382 of 1938 and Cri. Tr. Appln. No. 27 of 1939, Decided on 16th March 1939.

(a) Criminal P. C. (1898), S. 195 — Purpose of S. 195 explained—Offence of forgery committed in relation to proceedings before Court, forming part of same transaction with offences which Court is inquiring — Court can itself inquire into offence of forgery and if necessary commit case to Sessions Court.

The purpose of S. 195 is not that one Court should keep check upon another, because if that were so, the Court itself would not be entrusted with the making of a complaint as it is under the provisions of the Section. The purpose of the Section is to provide, inter alia, that an offence of forgery, for instance, shall be inquired into upon a complaint of a Court before which the forged document was produced and not upon the complaint of a private individual. It is the Court before whom the forged document is produced which is to decide whether there should be or should not be an inquiry in the first instance. Since a Court is entrusted by the Legislature with this discretion and with this power it follows that it is itself entitled to inquire into an alleged offence committed in relation to proceedings before it provided no other Section of the Criminal P. C., bars the way, when that alleged offence is part of the same transaction, with the offences of which the Court has already taken cognizance and the Magistrate can in such case convert the proceedings before him into one for committal to the Court of Session: *AIR 1932 Bom 545, Foll.* [P 223 C 2; P 224 C 1]

(b) Criminal P. C. (1898), S. 208—Committal—Purpose of — Scope of S. 208—Magistrate cannot refuse to call evidence on behalf of accused merely because he would have ample opportunity of producing whatever evidence in Sessions Court on being committed—Charge of forgery brought in course of proceedings for other offences—Accused should be allowed to adduce evidence in defence to such charge.

A committal to the Court of Session is a very serious matter indeed for an accused person, and he is to be given every reasonable opportunity to show that there is no ground to commit him to the Court of Session because of the evidence he has adduced in his defence. The purpose of committal proceedings is not merely to place on record the case for the prosecution, but to commit to the Court of Session for trial an offence which, after having heard the evidence for the prosecution and for the defence, the Magistrate thinks has been committed. It is true that under Sec. 208 (3), a Magistrate can for reasons to be recorded refuse to issue process to compel the attendance of any witness but the Section clearly contemplates evidence on behalf of the prosecution and evidence on behalf of the accused or evidence which may be called by the Magistrate, if he thinks it in the interests of justice. Therefore it is not correct for the Magistrate to refuse to call evidence on behalf of the accused persons in committal proceedings merely because they will have ample opportunity to produce whatever evidence they wish later on when they have been committed. Particularly in a case where the charge of forgery is brought for the first time against an accused in the course of proceedings for other offences, every proper opportunity should be given to him to meet a charge which he may with some reason say has taken him by surprise. [P 224 C 1, 2; P 225 C 1]

(c) Criminal P. C. (1898), S. 526 — Convenience and expediency.

While it is true that convenience and expediency are factors to be considered in the trial of a case, beyond even those considerations is the more important consideration that justice should be done. [P 225 C 1]

P. S. Shahani — *for Jashanmal.*

H. T. Raymond — *for Charanjilal.*

Partabrai D. Punwani, Advocate-General — *for the Crown.*

Davis J. C.—We have before us three applications relating to an inquiry into offences of cheating, criminal misappropriation and forgery, arising from a complaint made by one Charanjilal before the Subdivisional Magistrate, Mirpurkhas. This Charanjilal claimed to be a policy-holder in the General Assurance Society of Ajmer, and the two accused upon his complaint are (1) Jashanmal, the agent of this Assurance Society, and (2) his brother Udharam. The offences alleged are of cheating and criminal misappropriation in relation to a sum of Rs. 221-4-0 alleged by the complainant to have been paid by him as premium to the agent Jashanmal. In the course of the trial upon the complaint of these two offences of cheating and criminal misappropriation, a receipt was produced by Jashanmal and he offered it by way of defence showing that he had actually paid the money he had received, into the head office of the Company, and this defence was met by the allegation that the receipt was a forgery. The Sub-Divisional Magistrate considered that there were grounds for believing that this receipt was a forgery, and he therefore proceeded to inquire into this alleged offence of forgery as part of the same transaction in which the offences of cheating and criminal misappropriation were alleged to have been committed and to treat the proceedings before him as committal proceedings with a view to commit the accused to the Court of Session to stand their trial on the charge of forgery. A point was then taken on behalf of the accused that it was not competent for the Magistrate himself to inquire into this alleged

offence of forgery as the bar under S. 195 (1) (c) applied, and that all that he could do was himself as a Court to make complaint before another Court for inquiry by this other Court into this alleged offence of forgery committed in relation to a document produced in the proceedings before him. Therefore, we are asked in the first application to quash the proceedings before the Sub-Divisional Magistrate, not so far as they relate to the offences of cheating and criminal misappropriation, but so far as they relate to the alleged offence of forgery. Then we have a second application in which we are asked to set aside an order of this learned Magistrate wherein he refused to allow the accused to adduce evidence in their defence under S. 208, Criminal P. C., on the ground that the proceedings before him were purely committal proceedings and that the accused would have ample opportunity to bring evidence in his defence before the Court of Session. Then thirdly, and lastly, we have on behalf of the complainant, this Charanjilal, an application for transfer of this case to the Court of the same learned Magistrate at Naushahro, to which place the Magistrate has been now transferred.

So far as the first point is concerned, that is, that it is not competent for the learned Magistrate in the course of an inquiry into the alleged offences of cheating and criminal misappropriation, to inquire into the alleged offence of forgery, part of the same transaction, with respect to a document produced before him in the course of that inquiry, we do not think that there is any such bar as the learned advocate for the two accused persons contends. It is true that if S. 195 is read merely in terms and without consideration of its purpose, it might be said that a Court could not itself inquire into an offence of forgery relating to a document produced before it in the course of the inquiry into other offences, even if the alleged forgery and other alleged offences formed part of the same transaction. But when S. 195 is read and considered carefully, we think it is clear that the word "Court", for instance, in S. 195 (c) means any "other Court", and that it cannot mean that when a Court is inquiring into offences, all part of the same transaction, and it appears that forgery has been committed with respect to the document produced in evidence before it, it cannot itself inquire into the offence of forgery of which that document is evidence and itself commit to the Court of Session; that it must, as it were, adjourn its proceedings, itself go to another Court and itself make complaint. The purpose of S. 195, Criminal P. C., is not, we think, that one Court should keep check upon another, because if that were so, the Court itself would not be entrusted with the making of a complaint as it is under the provisions of the Section. The purpose of the Section, in our opinion, is to provide, inter alia, that an offence of forgery, for instance, shall be inquired into upon a complaint of a Court before which the forged document was produced and not upon the complaint of a private individual. It is the Court before whom the forged document is produced which is to decide whether there should be or should not be an inquiry in the first instance, and we think it unreasonable to say that while a Court is entrusted by the Legislature with this discretion and with this power it should not be entitled itself to inquire into an alleged offence committed in relation to proceedings before it, provided no other Section of the Criminal Procedure Code bars the way, when that alleged offence is part of the same transaction, with the offences of which the Court has already taken cognizance. In support of this interpretation of this Section we may refer to the case in 56 Bom 488[1] at p. 498. In that case, a Sub-Inspector of Police was committed to the Court of Session for trial of an offence under S. 218, I. P. C. To meet the charge against him he had produced a forged diary in evidence on his behalf, and he was thereafter further charged in the Court of Session with an offence of forgery under Sec. 465, I. P. C. It was contended that the offence of forgery could not be inquired into by the Court before which the forged diary had been produced. But both the learned Judges were of the opinion that this contention could not stand. Broomfield J. said:

> We have not been referred to any other case where the question of the necessity for sanction or complaint arose in respect of a document alleged to be forged which was produced for the first time at the trial or in the inquiry preliminary to the trial of the forgery itself. The cases cited were all cases of production of the document in an independent proceeding. Let us suppose for the sake of argument that the police here had treated this as an offence of forgery and not as an offence under S. 218. In that case there could have been no question of moving any Court to make a complaint,

1. Sanjiv Ratnappa v. Emperor, (1932) 19 A I R Bom 545=1932 Cr C 777=142 I C 386=34 Cr L J 357=56 Bom 488=34 Bom L R 1090.

because the document had not been produced in any proceeding in Court. The only thing that could be done would be to send up the accused for trial or for the Magisterial inquiry preliminary to the trial. At the same time, of course, the document alleged to be forged, the corpus delicti so to speak, would have to be produced in Court. Mr. Velinker's argument would require us to hold that the Court instead of inquiring into the case or trying it could do nothing but make a complaint and send it to some other Court to deal with. That, I think, would be an absurdity which the Legislature can hardly have intended, and it would be equally absurd to require a complaint of another Court when the Sessions Judge frames the charge himself. There is nothing in any of the cases cited which would make it necessary for us to hold a complaint to be necessary in such a case, and in my opinion, S. 195 (1) (c) has no application when the document which is alleged to be forged is produced at the trial of the person alleged to have forged it, not having been produced in any independent proceeding.

We think therefore that there was nothing to prevent the Sub-Divisional Magistrate in this case from inquiring into the offence of forgery which came to light during the course of the proceedings before him and of converting proceedings, which, in the first instance, were in a warrant case, into proceedings for committal to the Court of Session. If he were to hold otherwise, we would, for instance, be compelled to find that merely because a police report was sent up against an accused person for an offence of simple hurt or grievous hurt, the Magistrate could not find that there was a prima facie case of murder and commit the accused to the Court of Session. We think therefore that the learned Magistrate was right when he said that having taken cognizance of these two offences of cheating and criminal misappropriation, he was entitled also to take cognizance of the offence of forgery which was alleged to be part of the same transaction and which came to light during the proceedings before him. Therefore the first revision application asking us to quash the proceedings is to be rejected.

So far as the second revision application is concerned, that is, the application against the order of the learned Magistrate in which he refused to allow certain witnesses to be summoned by the accused in their defence, we think that the learned Magistrate has misunderstood the nature of committal proceedings. The purpose of committal proceedings is not merely to place on record the case for the prosecution, but the purpose of the committal proceedings is to commit to the Court of Session for trial an offence which, after having heard the evidence for the prosecution and for the defence, the learned Magistrate appears to think there are reasonable grounds has been committed. But while it is intended that the prosecution should be allowed to adduce all material evidence in support of the prosecution case, so it is intended, to be fair, that the accused shall also be entitled to adduce all material evidence in their defence. It is true that under S. 208 (3), Criminal P. C., a Magistrate can, for reasons to be recorded, refuse to issue process to compel the attendance of any witness. But it does not mean that the Magistrate shall refuse the application of the accused to call witnesses because these witnesses can be called hereafter in the Court of Session. For instance, the learned Magistrate in his order when refusing to allow the accused to call a handwriting expert says :

> In case this Court decides to commit, accused will have ample opportunity to produce whatever evidence he wishes on his behalf later on.

It may be, of course, that the learned Magistrate is right in the reasons he gives as to why a handwriting expert should not be called, for instance, that the writing upon the receipt is not itself seriously disputed. The signature is the admitted signature of the complainant; the writing in the body of the receipt is in the admitted handwriting of accused 2. But apart from the refusal to compel the attendance of this particular witness, we do not think it is correct for the Magistrate to refuse to call evidence on behalf of accused persons in committal proceedings merely because they will have ample opportunity to produce whatever evidence they wish later on when they have been committed. A committal to the Court of Session is a very serious matter indeed for an accused person and he is to be given every reasonable opportunity to show that there is no ground to commit him to the Court of Session because of the evidence he has adduced in his defence. S. 208, Criminal P. C., under which the Magistrate has acted, says :

> (1) The Magistrate shall, when the accused appears or is brought before him, proceed to hear the complainant (if any), and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution or in behalf of the accused, or as may be called for by the Magistrate.

Therefore the Section clearly contemplates evidence on behalf of the prosecution and evidence on behalf of the accused, or evidence which may be called by the Magistrate, if he thinks it in the interests of

justice. So that it cannot be the purpose of the Section that while the prosecution shall be entitled to call all material evidence, the defence shall not be entitled to call material evidence. And, indeed, one of the purposes of committal proceedings and of the inquiry which precedes committal to the Court of Session is, that the case, whether for the prosecution or the defence, shall be properly prepared and put on record for trial in the Court of Session. Therefore we think that we should say that with reference to the application on the order of the Magistrate refusing to summon witnesses, that this question should be considered afresh by the Magistrate before whom this case will proceed, because the learned Sub-Divisional Magistrate whose orders are the subject of these revision applications is no longer in Mirpurkhas and will, unless we transfer the case to him, not hold further proceedings. We think, particularly in a case like this, where the charge of forgery is, for instance, brought for the first time against an accused in the course of proceedings for other offences, that every proper opportunity should be given him to meet a charge which he may, with some reason, say has taken him by surprise. The order of the Magistrate refusing to summon certain witnesses for the defence is therefore set aside. And so far as the third application is concerned, that on the ground of expedition and convenience this case should be sent to the Sub-Divisional Magistrate at Naushahro, we think that there is no reason why this case should be transferred from Mirpurkhas. Mirpurkhas is a railway station and is, therefore, quite, if not more, as convenient for witnesses from Hyderabad as the railway station of Naushahro, an even smaller place; and while it is true that convenience and expedition are factors to be considered in the trial of a case, it must be remembered that beyond even these considerations is the even more important consideration that justice should be done, and the necessity for expedition should not be allowed to deprive the accused of a reasonable opportunity to call evidence in defence on a charge of an offence of which, at the outset of the proceedings, he had no knowledge he would be called upon to meet. We see, therefore, no reason why we should transfer this case from Mirpurkhas to Naushahro and the transfer application is refused accordingly.

N.S./R.K. *Order accordingly.*

A. I. R. 1939 Sind 225

DAVIS J. C. AND TYABJI J.

Firm Malabar Steamship Co. — Appellants.

v.

Central Bank of India Ltd., and others — Respondents.

First Appeal No. 59 of 1935, Decided on 23rd September 1938, against judgment and decree of Rupchand Bilaram A. J. C., D/- 15th July 1935.

(a) Shipping — Bill of lading — Liability of shipping company—*M* purchasing bags of foodstuffs and putting them in lighter for transhipment in ship due to arrive next day — Ship not arriving as expected and *M* in anticipation of her arrival obtaining from manager of shipping company bills of lading duly filled — Bills of lading pledged by *M* with Bank and Rupees 5000 obtained— *M* absconding subsequently — Bank suing shipping company, its Manager, and unpaid vendors for realization of amount— Shipping Company held owed duty to Bank of not issuing bill of lading unless goods were on Board — Principle of estoppel held applied and shipping company were bound by statements made in bill of lading to the effect that the goods were received on board and they were liable to compensate Bank for loss caused by their action — Question of fraud did not affect rights of Bank — No valid charge held created in favour of Bank by pledging of false bills of lading — Bank held had no claim against goods or against unpaid vendors.

One *M* purchased in the local market some bags of food-stuffs and after lodging the shipping bills with the customs, obtained the necessary permission to export and the goods were put in a lighter for transhipment in a ship which was expected to arrive the next day. The ship did not arrive as expected and in anticipation of her arrival, *M* obtained from the Manager of the shipping company bills of lading duly filled in, which he pledged with a Bank the same day and on those bills of lading backed by insurance policies, he obtained from the Bank about Rs. 5000 and disappeared. One of the unpaid sellers made a complaint of cheating against *M* and the police seized all the bags which formed the consignment. As a result, the ship sailed without the consignment which was never put on the Board. The Bank sued the shipping company, its manager, the shipper *M* who had absconded and all the unpaid vendors of foodstuffs sold to *M*:

Held that the shipping company owed to the Bank as an endorsee of the bill of lading a plain duty not to issue a bill of lading till the goods were on the board. The case of the Bank against the shipping company could be dealt with simply on the principle of estoppel, and the shipping company were bound by their own statements in the bills of lading that the goods were received on board in apparent good order and condition (although they were not received on the board at all). The Bank in consequence acted to their detriment in advancing money to *M* and the shipping company were liable to compensate the Bank for the loss suffered by their action. Ordinarily the measure of damages

was the value of the bills of exchange drawn against the bills of lading. Neither the shipping documents nor the boatnotes were documents of title and even if the shipper *M* had defrauded the shipping company, the fraud did not affect the title of the Bank, they being endorsees for value without notice. No valid pledge of the goods was created in favour of the Bank when the bills of lading were pledged with them by *M* in exchange for their advance. There was no bailment to the Bank apart from the pledge of the bills of lading and the Bank had no claims against the goods in possession of the unpaid vendors or against the unpaid vendors. The Bank was not concerned in whose possession the goods were then or in future. Even if the Bank had a claim against the unpaid vendors that would not prevent them from enforcing their undoubted claim against the shipping company : *(1906) 1 K B 237 and A I R 1938 P C 152, Rel. on.* [P 227 C 2; P 228 C 1, 2; P 229 C 1]

(b) Shipping — Bill of lading— Bill of lading defined —Possession of bill of lading is equivalent to possession of goods specified therein — On transfer of bill of lading by way of sale, mortgage or pledge, property in goods passed to transferee — This applies however only to true bill of lading and not to false bill of lading, to goods shipped and not to goods intended to be shipped — In order that bill of lading should operate as document of title, goods must be on board as it certifies.

A bill of lading is a document of title signed by the shipowner or by the master or other agent of the shipowner which states that certain specified goods have been shipped upon a particular ship and which purports to set out the terms on which such goods have been delivered to and received by the ship. The bill of lading is a symbol of the right of property in the goods specified therein. Its possession is equivalent to the possession of the goods themselves, and its transfer, being symbolical, delivery of the goods themselves has, by mercantile usage, the same effect as an actual delivery in the circumstances. On a transfer therefore of a bill of lading by way of sale, mortgage or pledge, the property in the goods passes either absolutely or otherwise according to the intention of the parties, to the transferee provided that the transferor was competent to dispose of the goods. These attributes however attach only to a true bill of lading and not to a false bill of lading, to goods shipped and not to goods intended to be shipped, and that an essential condition of the operation of a bill of lading as a document of title and as a symbol of the goods is that the goods are on board as the bills of lading certify. It is essential for the purpose of commerce that a necessary condition of the operation of a bill of lading as a document of title, is the receipt on board the ship, of the goods which the bills of lading cover, and which it is so declared in the bill itself. [P 229 C 1, 2 ; P 230 C 1]

Srikishindas H. Lulla —*for Appellants.*

Dipchand Chandumal, Hukumatrai M. Eidnani, Fatehchand Assudomal, Khanchand Gopaldas, and Kundanmal Dayaram — *for Respondents 1, 3, 4, 5 and 6 respectively.*

Subramanier Iyer (Respondent 7) in person.

Davis J. C. — This is an appeal by the Malabar Steamship Company against a judgment of Rupchand, Additional Judicial Commissioner, against the Shipping Company in favour of the plaintiffs, the Central Bank of India Ltd., for Rs. 4095-13-0 with interest at six per cent. per annum and costs. There were in all seven defendants, defendant 1 being the Shipping Company, defendant 2, the Manager of the Company, defendant 3, the shipper, who absconded and was the principal cause of the trouble, and defendants 4 to 7, the unpaid vendors of the goods sold to the shipper and which defendant 4 caused to be seized by the police while in the lighter and before they were put on board the ship. The Judge however made no order against defendant 2, the Manager of the Company, as the Company accepted responsibility for his acts ; an ex parte decree was passed against defendant 3 for the same amount as against the Shipping Company, while the Judge dismissed the suit against defendants 4 to 7, the unpaid vendors, on the ground that as the bills of lading were issued before the goods were on board, no valid pledge was created in favour of the Bank who had therefore no claim against the goods or against the unpaid vendors. The Shipping Company have appealed and joined as respondents the plaintiff Bank and the Manager of the shipping company, the shipper and the unpaid vendors.

Now the main facts in the case are not in dispute. One Maganlal trading as Dhirajlal Maganlal purchased in the local market some 200 bags of atta, 225 bags of paparkhar and 80 bags of rice and after lodging the shipping bills with the Customs on 16th January 1931, he obtained the necessary permission to export and the goods were put in lighter for transhipment to the S. S. JANAKI which was expected to arrive in Karachi on 17th January, but she did not arrive as expected, and in anticipation of her arrival this Maganlal obtained from the Manager of the Shipping Company bills of lading duly filled in which he pledged with the Bank the same day and on those bills of lading backed by the insurance policies he obtained from the Bank Rs. 5038-6-0 or something less and disappeared. Late at night on 18th January, one of the sellers made a complaint to the police of an offence of cheating against this Maganlal with respect to the atta sold to him, and the police after obtaining from the City Magistrate the

necessary orders, seized not only the atta in respect of which the unpaid vendor had complained, but the rice and paparkhar which formed part of the same consignment. As a result, on the 19th, the S. S. JANAKI sailed without this consignment which was never put on board. One of the other vendors supplemented the action of the police by filing a suit in the Small Cause Court against Maganlal and obtained attachment before judgment. As the goods were of a perishable nature both the City Magistrate and the Judge of the Small Cause Court allowed the unpaid vendors to sell the goods on their giving security to answer to the Court for the value of the goods when called upon and security was given.

Mr. Lulla for the appellant Shipping Company first based his case upon the Judge's reliance upon the statement of the law by Ashhurst J. in (1787-94) 1 Sm L C 703.[1] The Judge, he argued, had proceeded upon the assumption that if there are two innocent parties, both must not suffer; one the more innocent must be compensated. It is true that the words of the Judge can be so read, and he does not refer to the duty of the Shipping Company to the Bank. Lord Sumner in (1926) A C 670[2] at p. 692, said :

> The question, which of two innocent persons is to suffer by third party's fraud, and the proposition, that some one "acts to his detriment on the faith of" something done by another, never seem to me clear in themselves. The question assumes, that the law must in such a case interfere on behalf of one or the other. This does not follow without more.

Lord Sumner goes on to say :

> There was no duty between Jones Ltd., and Waring-Gillow Ltd., and without that, the wide proposition of Ashhurst J. in (1787-94) 2 T R 63[1] at p. 70, would not apply: *see* observations of Lord Macnaghten and Lord Lindley in (1902) A C 325[3] at pp. 335 and 342 and of Lord Parmoor in (1918) A C 777[4] at p. 836, which were apparently overlooked in (1926) A C 72.[5]

Now it must be conceded to Mr. Lulla that the bare proposition that one of two innocent parties must be compensated is modified by this qualification of duty, but, in this case, there can, we think, be no doubt that this Shipping Company owed to the Bank as an indorsee of the bill of lading a plain duty not to issue a bill of lading for goods not on board. We also think, with all respect to the learned trial Judge, that there is some ground for the complaint that he has not dealt with this case, so far at least as the Shipping Company is concerned, from the point of view of estoppel, for had he done so, he would, we think, have greatly simplified the position. Now, so far as Mr. Lulla's argument is concerned that the Shipping Company owed no duty to the Bank, the indorsee of the bill of lading, and indeed generally on the question of estoppel and bills of lading, we would refer to the judgment of Channell J. in (1906) 1 K B 237[6] and to the following passage in particular :

> Bills of lading are transferable, and the object of the shipper in asking for the insertion of the statement that the goods are in good condition at the time of shipment is clearly rather to have evidence to offer to his transferee than for his own direct benefit. The advantage of what is known as a clean bill of lading is obvious, and I think it would be idle for a master of a ship to say that he did not contemplate a purchaser of the goods acting on the statement that the goods were shipped in good condition. In England there appears no direct authority, but I think there are passages in several judgments in accordance with my view and none to the contrary. In America this question has been considered. In (1861) 85 Mass 103[7] there is what seems a well reasoned judgment as to the estoppel between the indorsee of a bill of lading on the one hand and the master and the shipowner on the other, and the rule is laid down that there is such an estoppel between the indorsee and the master as to statements in the bill of lading so far as they relate to matters which are, or ought to be, in the master's knowledge, and that the owners are estopped in the same way by such statements if they are within the scope of the master's authority. Passages to the above effect from that judgment are quoted with approval in Parsons on Shipping and in the Scotch case, (1895) 6 R 1269[8] at p. 1281. Lord Shand quotes the passage from Parsons, and says: 'That passage from a writer of eminence on this subject undoubtedly gives countenance to the argument of the pursuers in this matter (that is, the argument that there was an estoppel), but I find that, with the exception of a case which is referred to in support of the concluding words of the passage, all the authorities referred to are American.' He goes on to say: 'I do

1. Lickbarrow v. Mason, (1787-94) 1 Sm L C 703 = 2 T R 63 = 1 H Dl 357 = 1 R R 425=4 Dr P C 57=60 East 20*n*.
2. E. Jones & Co. v. Waring and Gillow, (1926) A C 670=95 L J K B 913=135 L T 548=32 Com Cas 8=70 S J 756=42 T L R 644.
3. Farquharson & Co. v. King & Co., (1902) A C 325=71 L J K B 667=86 L T 810=51 W R 94.
4. London Joint Stock Bank v. Macmillan, (1918) A C 777=88 L J K B 55=119 L T 387 =23 Com Cas 415=62 S J 650=34 T L R 509.
5. Commonwealth Trust v. Akotey, (1926) A C 72=94 L J P C 167=41 T L R 641=134 L T 33.
6. Compania Naviera Vasconzada v. Churchill & Sim, (1906) 1 K B 237=75 L J K B 94 = 94 L T 59=54 W R 406 = 11 Com Cas 49 = 10 Asp M C 177=22 T L R 85.
7. Sears v. Wingate, (1861) 85 Mass 103.
8. Craig v. Delargy, (1895) 6 R 1269.

not think it is necessary here to decide the general question as to the effect of a representation in the bill of lading, though if it did arise, I must say that the American law seems to me to be rested on reasonable grounds.' There is therefore the authority of Lord Shand's opinion on the question I am deciding. As the estoppel arises on a direct statement of fact which is incorrect, I do not consider that the question of negligence really arises, but, as I have already said, I should be prepared, if necessary, on the facts of this case to find the statement to be negligent, provided, of course, that there is a duty towards the indorsee to take care. As to this duty, although in my view the incorrect statement cannot be sued on directly as a breach of contract, yet I think the transfer of the contract to the indorsee does create a privity between the endorsee and shipowner, and this gets rid of the doctrine in (1893) 1 Q B 491,[9] and the other cases in which it has been held that a duty arising solely out of contract is only a duty towards parties to the contract. It was suggested that the words at the end of the fourth Section of the Harter Act prevent any estoppel by saying that the statement is to be prima facie evidence. I think not, because it is not said, that it is only to be prima facie evidence, and it is consistent with the words of the Section, that, upon something further happening—viz. the acting upon it—it may become conclusive, and also because what is said in the Section is that the statement is to be prima facie evidence 'of the receipt of the merchandize therein described.' The object of these words, or, at all events, one object of them, appears to be to preserve the doctrine in (1851) 10 C B 665,[10] and Mr. Newton Crane, who was called before me as an expert in American law to prove the Harter Act, said that (1851) 10 C B 665[10] is still recognized as law in America since the Harter Act. In order to make the statement in the bill of lading binding as an estoppel, it is of course necessary that it should have been acted on to the prejudice of the person so acting.

We do not think therefore that it can be said that the Shipping Company did not owe a duty to the Bank, the indorsee of the bill of lading, and, we think, the case of the Bank against the Shipping Company can be dealt with simply on the principle of estoppel. The Company are bound by their own statements in the bill of lading that the goods were received on board in apparent good order and condition. They were however not received on board at all. The Bank in consequence acted to their detriment in advancing money to the shipper, and we think there can be no doubt that the Shipping Company must compensate the Bank for loss suffered by their action. Ordinarily we think the measure of damages must be the value of the bills of exchange drawn against the bills of lading. This is given in the plaint as Rs. 5038-6-0, while the total claim with interest is Rs. 5140-6-0. The Judge has however allowed only Rupees 4055-13-0 being the value of the goods in Karachi with insurance and Port Trust charges, but, as he points out, it is not possible to value the goods at the port of discharge. The Bank advanced something less than the full amount of the bills. No cross-objections have been filed against this finding of the learned Judge and his decree for this amount must stand. Mr. Lulla in the course of his argument relied upon the case in (1851) 10 C B 665.[10] The master of a ship, he argued, had no authority to sign for goods not put on board, and when it was pointed out to him that the master had not signed the bills but they were signed by the manager on behalf of the company, the manager, he argued, had no authority to sign, and he pointed out that the manager signed *per pro*, and he relied upon the judgment of Jervis C. J. in the case above referred to, as supporting his argument of the manager's limited authority. But this case is a new case raised in appeal and the Company cannot now be heard to deny responsibility for the acts of their manager, for in the trial Court they accepted responsibility for his acts, and it is because of this that the Judge did not pass any order against defendant 2. This defence was not taken in their written statement, and it cannot be taken now.

We have then to consider the case against the unpaid vendors, and Mr. Lulla has argued that before the Shipping Company can be held liable, the Bank must exhaust its remedies against the unpaid vendors, and he argued not only that the goods had passed into the possession of the shipowners so as to be on board the steamer and covered by the bills of lading, but that the bills of lading covered goods not only shipped but intended to be shipped and that a valid pledge in favour of the Bank was created when the bills of lading were pledged with the Bank in exchange for their advance. But on the question of fact we agree with the trial Judge that the goods had never left the lighter and passed into the possession of the shipowners. We do not believe that the manager ever received the boat's receipt from the lighterman; the boat's receipt was to be given to the master of the ship under Sec. 70, Sea Customs Act; the shipping bills are not documents of title but are required for the Customs: *see* Ss. 137 and 140, Sea Customs Act. It was no part

9. Le Lievre v. Gould, (1893) 1 Q B 491=62 L J Q B 353=4 R 274=68 L T 626=57 J P 484 =41 W R 468.

10. Grant v. Norway, (1851) 10 C B 665 = 20 L J C P 93=15 Jur 296.

of the case of defendants 1 in the written statement that they had possession of the boat notes through their manager, and we agree with the trial Judge that the evidence of the manager cannot be relied on. It is true the property in the goods had passed from the unpaid vendors to the shipper, but the property remained with the shipper as possession remained with the lighterman on his behalf until the goods were seized by the police. Moreover, neither the shipping documents nor boat notes are documents of title (*see* 32 S L R 502[11]) and even if the shipper Maganlal had defrauded the Shipping Company the fraud would not have affected the title of the Bank being indorsees for value without notice : *see* 32 S L R 502.[11] Moreover, no fraud is pleaded or proved and no criminal offence has yet been proved against the absconding shipper. We find then as a fact that the goods were never on board and were never in possession of the Shipping Company. We are not here concerned with bills of lading in the new form "received for shipment." The three bills of lading in this case are in the form "received on board in apparent good order and condition."

The question then arises whether a valid charge was created in favour of the Bank by pledging of these bills of lading which purported to cover and did not in fact cover goods on board the S. S. JANAKI, and indeed it was on the question of the validity of this pledge that the trial Judge decided the whole case not dealing with the question of estoppel.

Now there is no direct authority on this question, and so far as the Shipping Company is concerned, the principle of estoppel is a complete answer to the Shipping Company's defence and renders as regards them any consideration of this question unnecessary, but it is the shipowner only who is estopped from questioning the statements in the bills of lading, not third parties, and Mr. Lulla appearing for the Shipping Company argues that he can press the claims of the Bank against the goods in the possession of the unpaid vendors or against the unpaid vendors themselves. They are tied, he said, by equities.

In this case it is clear the unpaid vendors had no right of stoppage in transit; but if the Bank had no valid pledge it concerns them nothing that the goods should be in the possession of the unpaid vendors.

Now a bill of lading is a document of title; it is a symbol of the goods; it represents the goods themselves, and it appears to us that as a document of title it is a document of title to specified goods in specified place and that a pledge of goods not on board ship by way of the pledge of the bill of lading is no more a pledge of goods on board the ship than the deposit of the keys of warehouse B in which the pledged goods are not stored would transfer possession or evidence a pledge of goods stored in warehouse A. A bill of lading is a document of title signed by the shipowner or by the master or other agent of the shipowner which states that certain specified goods have been shipped upon a particular ship and which purports to set out the terms on which such goods have been delivered to and received by the ship. This is the definition given in Halsbury, Vol. 26, para. 229, p. 144 and it is the definition generally accepted, and the bill of lading is a symbol of the right of property in the goods specified therein. Its possession is equivalent to the possession of the goods themselves, and its transfer being a symbolical delivery of the goods themselves has by mercantile usage the same effect as an actual delivery in the circumstances. On a transfer therefore of a bill of lading by way of sale, mortgage or pledge, the property in the goods passes either absolutely or otherwise according to the intention of the parties to the transferee provided that the transferor was competent to dispose of the goods : Halsbury, Vol. 26, pp. 146-147. But we think these attributes attach only to a true bill of lading and not to a false bill of lading, to goods shipped and not to goods intended to be shipped, and that an essential condition of the operation of a bill of lading as a document of title and as a symbol of the goods is that the goods are on board as the bills of lading certify, for if it were to be held that the pledge of a false bill of lading passed any property in the goods, the indorsee of such a bill would not know if his goods were in Karachi or in China or Peru. It appears to us essential for the purpose of commerce that a necessary condition of the operation of a bill of lading as a document of title is the receipt on board the ship of the goods which the bills of lading cover and which it is so declared in the bill itself.

11. Nippon Yusen Kaisha v. Ramjiban Serowgee, (1938) 25 A I R P C 152 = 174 I C 564 = 65 I A 263=32 S L R 502=I L R (1938) 2 Cal 881 (P C).

This being so, we do not think the Bank had a valid pledge of the goods covered by these false bills of lading, nor has the Bank filed cross-objections against the judgment dismissing their suit against the unpaid vendors, and though we could doubtless in this suit as framed give the Bank against the unpaid vendors a relief it does not seek under O. 41, R. 33, Civil P. C., did we consider a valid pledge of the goods was created in their favour, we do not think such a pledge was in law created.

But Mr. Lulla then urged that the Bank and the unpaid vendors were tied together by equities, that as against the unpaid vendors the Bank had a just claim. There was however no bailment to the Bank apart from the pledge of the bills of lading and we cannot see in 32 S L R 502[11] authority for the existence of these equitable rights, with which the Shipping Company wish to invest the reluctant Bank. We do not think therefore it is a matter which concerns the Bank in whose possession the goods for which they can obtain compensation for the shipping company are now or at any future time. Indeed should the Bank have a claim against the unpaid vendors, this would not prevent them enforcing their undoubted claim against the shipping company : *see* (1906) 1 K B 237[6] above referred to.

In the result we see no reason to interfere with the judgment of the trial Court, and we think the appeal should be dismissed with costs. We also see no reason to interfere with the order of the trial Judge refusing costs to the unpaid vendors. They are not wholly blaimless in this affair. The appeal is therefore dismissed with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1939 Sind 230

LOBO AND TYABJI JJ.

Pir Gul Hassan Sahib — Applicant.

v.

Emperor.

Criminal Revn. Appln. No. 29 of 1939, Decided on 27th January 1939, against order of Dist. Magistrate, Hyderabad, D/- 11th January 1939.

(a) Criminal P. C. (1898), Ss. 144 and 439—High Court may send for record to satisfy itself that order of Magistrate under Sec. 144 is not arbitrary—Order under S. 144 made after due and careful consideration calls for no interference.

Under S. 144, the Legislature has invested Magistrates with wide powers and discretion and the High Court should not as a rule interfere but the High Court may in a case send for the record in order to satisfy itself that the order of the Magistrate was legal and that the Magistrate had not acted in an arbitrary manner. If the order of the Magistrate is legal and made after due and careful consideration it calls for no interference.

[P 231 C 1]

(b) Criminal P. C. (1898), S. 144—S. 144 does not require Magistrate to uphold rights whether constitutional or otherwise— Disturbance of public tranquillity apprehended from certain act—Magistrate can direct person to abstain from that act even if it is otherwise lawful—He is not required to deliberate upon rights of parties before acting.

There is nothing in Sec. 144 requiring the Magistrate to uphold rights whether constitutional or otherwise, and there is nothing in the Section requiring the Magistrate to hold a judicial inquiry into the rights of the parties involved. Once a Magistrate is of opinion that there is sufficient ground for proceeding under S. 144, once a Magistrate considers that there is "apprehended danger" which can only be averted by directing a person or persons to abstain from a certain act which may result in danger to human life or a disturbance of the public tranquillity or a riot or an affray, he is entitled to make an order directing that person or those persons to abstain from such act even though such act was otherwise lawful, even though such person or persons may be acting lawfully in the exercise of a right. This Section is intended to provide for an emergency, and it is idle to contend that in an emergency when a riot is apprehended and when there is apprehension of a serious disturbance of the public tranquillity the Magistrate is required to deliberate upon and decide the rights of the parties before acting: *6 Mad 203 (F B) and A I R 1928 Mad 1049 (F B), Rel. on; A I R 1931 Mad 242 and A I R 1937 Mad 311, Disting.*

[P 232 C 2]

C. H. Carden Noad — *for Applicant.*

Partabrai D. Punwani, Advocate-General — *for the Crown.*

Lobo J. — This is an application to revise an order passed by the learned District Magistrate of Hyderabad under Sec. 144, Criminal P. C. The applicant is Pir Gul Hassan Sahib, the Pir of Luari, who is stated in the application to be the greatest Pir in Sind. The application states that it has been the custom for the Pir of Luari from the days of the Kalhoras to hold an annual religious festival at Luari on 9th and 10th of the month of Zal Haj and that this festival is commonly known as a fair; that at this festival nothing is done beyond the offering of the usual prayers enjoined on all Mahomedans, the recitation of verses in praise of God, the Holy Prophet and his companions and the Saints of the Shrine. The applicant states that on 11th January 1939, the District Magistrate of Hyderabad issued an order under Sec. 144, Criminal

P. C., prohibiting processions and congregations on the occasion referred to, preventing him from holding such processions congregations and strictly warning and enjoining him not to take any part in the said processions and congregations from 10th January 1939 to 10th February 1939. This is the order which the applicant Pir asks us to revise. Now, S. 144, Criminal P. C., is in very wide terms and vests in the Magistrates referred to in the Section a very wide discretion. It provides that :

> Where in the opinion of a District Magistrate or certain other Magistrates there is sufficient ground for proceedings under this Section and immediate prevention or speedy remedy is desirable, such Magistrate may by a written order stating the material facts of the case . . . . direct any person to abstain from a certain act . . . . . if such Magistrate considers that such direction is likely to prevent, or tends to prevent . . . . . danger to human life, health or safety, or a disturbance of the public tranquillity or a riot or an affray.

But though we considered that in a matter in which the Legislature has invested Magistrates with such wide powers and discretion, the High Court should not as a rule interfere, the wording of the order itself and certain facts placed before us by the learned advocate for the applicant appeared to us to make it desirable to admit the application to a regular hearing and to send for the record in order to satisfy ourselves that the order was legal and that the learned District Magistrate of Hyderabad had not acted in an arbitrary manner. But having done so, and having the record now before us and after hearing the learned advocate for the applicant, we are satisfied that the order of the learned District Magistrate is legal, made after due and careful consideration and calls for no interference. It appears from the record that already in November 1938, representations began to be made to the District Magistrate of Hyderabad drawing his attention to the Luari festival or fair and the occurrence there on the occasion of that celebration in 1938. These representations the learned District Magistrate of Hyderabad sent to the Sub-divisional Magistrate, Tando, within whose jurisdiction Luari is situated for report. On 26th November 1938 the Sub-divisional Magistrate, Tando, submitted a report to the District Magistrate in which he detailed various acts which were done and recitations which were made at Luari on the occasion of the so-called Haj in February 1938 which acts and utterances he stated were regarded by orthodox Mahomedans as 'blasphemous'. The report then goes on to state :

> On the occasion of last Haj in February last, this agitation assumed unprecedented proportions . . . . There collected 10 to 12 thousand people at Badin who came from almost every district in this Province and Cutch, when Satyagraha was started to obstruct the followers of the Pir from proceeding to Luari. This began on the 7th and within the next two days 613 volunteers were arrested. The situation was extremely grave and pregnant with many possibilities. The District Magistrate, the District Superintendent of Police, Hyderabad, the Deputy Superintendent of Police and myself and several Sub-Inspectors and a considerable number of police force had to encamp at Badin to watch and control it. Even the military was kept in readiness at Hyderabad with orders to leave for Badin at a moment's notice from the District Magistrate. On 9th February, when the matters looked very black, the District Magistrate moved the Government not to permit the Pir to leave Karachi for Luari. This was done by means of a telegram in code letters and a special Sub-Inspector was also sent to Karachi with a letter to the Chief Secretary. The District Magistrate's suggestion was approved and the Pir was stopped from leaving Karachi. The absence of the Pir on the following day (Haj-day) eased the situation and the Haj day passed off peacefully.
>
> The old Pir Ahmed Zaman is now dead. He expired in September last, and his son Pir Gul Hassan has succeeded him on the Gadi. It is reported that he also is bent upon celebrating the Haj-day like his deceased father . . .

The report concludes by stating that unless action is taken under S. 144, Criminal P. C., and certain Sections of the Bombay District Police Act "there is very great fear of breach of peace and consequences might be well nigh disastrous." The record further shows that the learned District Magistrate of Hyderabad requested the District Superintendent of Police to interview representatives among the followers of the Pir of Luari and ascertain from them their position with regard to this annual religious function. This interview was held and there is on the record a document signed by the persons who attended the interview setting out the case from the point of view of the Pir and his adherents. Early in January 1939, the Secretary of the Anjuman Muridan-e-Luari, Thar Parkar District, addressed the District Magistrate of Hyderabad on the subject and again placed before him the case from the point of view of the followers of the Pir of Luari.

On 5th January 1939, the learned District Magistrate of Hyderabad issued a notice to a number of influential Moulvis and zamindars to interview him on 7th January as he has information that

> there was a difference of opinion regarding the Luari Haj which was likely to lead to a disturbance of the public peace.

It is conceded that the learned District Magistrate did meet these Moulvis and zamindars some day after 7th but before 11th January. The record further shows that on 6th January a telegram was received by the District Magistrate of Hyderabad from the Anjuman Muridan-e-Luari referring to disturbances which took place at the time of the Luari Haj in February 1938 and calling for protection from Government owing to 'expectation of great trouble, mob violence, bloodshed and riot.' The telegram concludes: "Pray arrange adequate Hindu or Gorkha Sikh police for our protection, safety of life and respect." On 9th January 1939 the learned District Magistrate of Hyderabad addressed a letter to the Subdivisional Magistrate of the Hala Division asking for information as to the true Muslim public opinion with regard to the holding of the Luari Haj by the Pir of Luari, asking in particular whether orthodox Muslims consider the Luari Haj merely undesirable or definitely irreligious. The Subdivisional Magistrate of Hala replied on the same day stating that Muslim public opinion was very much against the holding of the Luari Haj; and that even liberal-minded Muslims considered this Haj as very objectionable from the religious point of view. The letter concludes thus:

> The result therefore is that Muslims consider this Haj which is held at Luari instead of Mecca as 'batil' and definitely irreligious and they oppose it on the ground of the dictates of the Qoran more than on conventional grounds.

Finally the learned District Magistrate of Hyderabad asked the applicant himself to interview him. This interview, we are told, took place on 10th January, and on 11th January the learned District Magistrate has made the order which is now sought to be revised. On these facts and in these circumstances, it is manifest that the order which is sought to be attacked was issued only after long and careful consideration of the situation as put before the learned District Magistrate by both sides. Mr. Carden Noad contended in the first place that the order was illegal because the learned District Magistrate had entirely failed to consider that religious liberty and the right of the subject to practise his religion without let or hindrance was a fundamental, nay, a constitutional right which Government was bound to uphold and defend. Here the applicant and his followers were intending merely to exercise their constitutional right and the learned District Magistrate, instead of protecting them in doing so and taking preventive measures against those who threatened to interfere because of religious differences, had by his order deprived the applicant of a constitutional right.

To this argument there are several answers; but S. 144, Criminal P. C., itself affords an answer. There is nothing in the Section requiring the Magistrate to uphold rights whether constitutional or otherwise; there is nothing in the Section requiring the Magistrate to hold a judicial inquiry into the rights of the parties involved. S. 144, Criminal P. C., is the one single Section in Chap. 11 and that chapter is headed 'Temporary orders in urgent cases of nuisance or apprehended danger.' Once a Magistrate is of opinion that there is sufficient ground for proceeding under S. 144, Criminal P. C., once a Magistrate considers that there is 'apprehended danger' which can only be averted by directing a person or persons to abstain from a certain act which may result in danger to human life or a disturbance of the public tranquillity or a riot or an affray, he is entitled to make an order directing that person or those persons to abstain from such act even though such act was otherwise lawful, even though such person or persons may be acting lawfully in the exercise of a right. This Section is intended to provide for an emergency, and it is idle to contend that in an emergency when a riot is apprehended and when there is apprehension of a serious disturbance of the public tranquillity the Magistrate is required to deliberate upon and decide the rights of the parties before acting.

Another and sufficient answer to the argument of the learned counsel for the applicant is to be found in the decision of the Full Bench of the Madras High Court in 6 Mad 203.[1] This was a case relating to an order under the corresponding Section of the Criminal Procedure Code, 1872. In the judgment of Sir Charles Turner C. J. at p. 220, the following passage occurs:

> The first duty of Government is the preservation of life and property, and, to secure this end, power is conferred on its officers to interfere with even the ordinary rights of members of the community. The order of 26th March 1859 appreciates the distinction between rights which have a primary and rights which have a secondary claim to such protection as the Government can afford; and where the Government cannot protect both classes of rights, it may and it ought to abandon the latter to secure the former. In this view, it

1. Sundaram Chetti v. The Queen, (1883) 6 Mad 203=2 Weir 77 (F B).

matters not whether the exercise of the rights of possession is of ancient usage or a novelty; the Government is not bound to deprive some members of the community of the services of the force that is found necessary for the protection of their lives and property to enable others to exercise a right which not only is not indispensable to life or to the security of property, but, in the case assumed, creates an excitement which endangers both.

The only other ground urged by Mr. Carden Noad in his attack upon the legality of the order made by the learned District Magistrate of Hyderabad was that a perusal of the order itself made it clear that the learned District Magistrate passed the order without due consideration proceeding merely upon his own opinion of the religious attitude of the applicant. He refers to that part of the order which reads:

And whereas you seek to create an impression on your followers and the public at large that the said prayers at Luari on the Haj Day have the same effect for participators as the prayers at Holy Mecca and that a visit to Luari on the said date has the same sanctity as a visit to Holy Mecca, which impression you seek to create by adopting, inter alia, the following blasphemous devices . . . .

He also refers to another part of the order which reads:

And whereas by holding or permitting the holding of the said fair and congregation and/or procession by you, with deliberate and malicious intention of outraging the religious feelings of Mussalmans, are insulting and/or attempting to insult the religion and religious beliefs of Mussalmans. . . . .

The manner in which the order is worded is not very happy and lends some colour to the argument. But if the order is examined along with the other documents on the record which relate to the prolonged and careful inquiry made by the learned District Magistrate before he issued the order, it becomes plain that the statements in those passages which have been relied upon by Mr. Carden Noad do not really state the personal opinions of the District Magistrate, but the allegations made by the orthodox Muslims against the Pir and are taken almost verbatim from passages in the report of the Sub-divisional Magistrate of Tando, and other representation which were before the learned District Magistrate. These were intended to be set out as the materials upon which the District Magistrate had come to the conclusion that there was sufficient reason to make the order in order to prevent a disturbance of the public tranquillity. We have already stated before that the record makes it clear that the order of the learned District Magistrate was the result of a very careful inquiry into the situation and this argument of the learned advocate for the applicant therefore is unsubstantial.

The learned advocate finally referred to certain cases reported in the Madras Law Journal in which individual Judges of the High Court of Madras appear to have given expression to views regarding the applicability and use of S. 144, Criminal P. C., not quite consistent with the principles laid down by the Full Bench of the Madras High Court in 6 Mad 203.[1] But those decisions can have little value in view of the decision of the Full Bench of the Madras High Court in 51 Mad 1006.[2] In this case the Hindus of a certain town had obtained from a competent Civil Court a declaration of their right to conduct processions with music past the mosques of that place, subject to certain limitations, and the District Magistrate having jurisdiction over the locality passed an order under S. 144, Criminal P. C., prohibiting the Hindus from taking any procession with music in any street of Nellore where there were mosques. The matter came before the High Court and at the request of Government was referred to a Full Bench in order that an authoritative pronouncement on the matter may be obtained. It was held by the Full Bench that if Government considered the exercise of such a right as the Hindus had obtained could not be secured without taking measures which would jeopardize the public peace it was not for the High Court to say whether the Government ought to adopt such measures or to suggest other means of enforcement as to the efficacy or advisability of which Government were the proper judges. In such a case the High Court would not interfere: 6 Mad 203[1] was followed. In this judgment of the Full Bench, the following passage occurs:

Mr. Ethiraj for the petitioners concedes that he cannot contend that it is the duty of the authorities who are responsible for the preservation of the public peace in the town of Nellore, to enforce the decree in all circumstances and at all costs. If that be so, *cadit quæstio*. If we are not being asked to lay down that that is their duty, it is difficult to see what we are being asked to say. We are not here to advise the Government what measures they should take to protect the rights of the Hindus or to preserve the public peace at Nellore. The preservation of the public peace is their function and in the performance of that function, it may be necessary for them to override temporarily private rights.

2. Visvanadha Rao v. Emperor, (1928) 15 A I R Mad 1049 = 112 I C 863 = 30 Cr L J 31 = 55 M L J 442 = 51 Mad 1006 (F B).

There follows with approval a quotation of the passage from the judgment of Sir Charles Turner C. J. in 6 Mad 203,[1] which we have set out in an earlier part of this judgment and the judgment concludes thus:

Where there is a conflict between the public interest and a private right, the former must prevail.

But Mr. Carden Noad also referred us to some decisions of the Madras High Court subsequent in date to the Full Bench ruling in 51 Mad 1006.[2] He referred us to the case in 60 M L J 370.[3] He also referred us to the case in A I R 1937 Mad 311.[4] But these cases are not helpful. They are judgments of single Judges of the Madras High Court; they make no reference to the Full Bench decisions of the Madras High Court in 6 Mad 203[1] and 51 Mad 1006,[2] and a perusal thereof shows that the learned Judges in those cases were dealing with situations very different from that with which we are concerned. We are therefore of opinion that the order of the learned District Magistrate was a perfectly legal and proper order and that we should not interfere. We accordingly dismiss this revision application.

D.S./R.K. *Application dismissed.*

3. Sriramamurty v. Emperor, (1931) 18 A I R Mad 242=1931 Cr C 362 = 131 I C 649=32 Cr L J 763=60 M L J 370.

4. In re Srikanta Iyer, (1937) 24 A I R Mad 311 =168 I C 720=38 Cr L J 582.

A. I. R. 1939 Sind 234

DAVIS J. C. AND TYABJI J.

Sm. Gopibai d/o Mulchand, and another — Appellants.

v.

Chuhermal Mulchand — Respondent.

Misc. Appeals Nos. 50 of 1936 and 26 of 1937, Decided on 3rd October 1938, against orders of First Class Sub-Judge and First Asst. Judge, Hyderabad, D/- 12th August 1936 and 15th May 1937 respectively.

(a) Civil P. C. (1908), S. 47 and O. 22, Rr. 12, 3 and 4—Order on application to bring legal representatives of deceased decree-holder falls under S. 47, and is appealable and O. 22, Rr. 12, 3 and 4 do not apply.

An order on application in execution to bring the legal representatives of a deceased decree-holder on record falls under S. 47, and is appealable and provisions of O. 22, Rr. 12, 3 and 4 are not applicable : *A I R 1930 Sind 283, Rel. on; A I R 1928 P C 162, Ref. ; A I R 1925 All 578, Foll.* [P 235 C 1, 2]

(b) Evidence Act (1872), S. 114 — Mother and daughter dying together in earthquake — In the absence of evidence no presumption can be drawn that mother died first.

Where mother and daughter met their death in the Quetta earthquake and there is no reliable evidence to show which of the two died first there can be no presumption in law that the elder died before the younger : *(1861) 30 L J Ch 65, Foll. ; (1935) A C 243, Ref.* [P 235 C 2 ; P 236 C 1]

(c) Evidence—Appreciation of.

If evidence on oath coming from the mouth of a witness whom the Judge has seen is such that he cannot believe it, and there is good reason for his disbelief, a Court of appeal will not prefer its own appreciation of the oral evidence to that of the trial Judge. [P 237 C 1]

(d) Hindu Law — Succession — Stridhana — Maiden — Step brother succeeds in preference to unmarried sister.

According to the Hindu law of succession, stridhana of a maiden, would go first to her mother and in her absence to her father and if he is also dead then to her father's heirs in order of propinquity. Where a Hindu maiden dies leaving behind her unmarried sister and step-brother, so far as her stridhana is concerned the step-brother is the legal representative of the deceased. [P 237 C 1]

Bhagwandas Amulrai — *for Appellants.*

Hukumatrai M. Eidnani — *for Respondent.*

Davis J. C.—This appeal No. 50 of 1936, is an appeal against the order of the First Class Subordinate Judge upon an application made in execution of a decree of one Papurbai, widow of one Dewan Mulchand, who died in October 1929 and left a will in which he bequeathed certain moneys to his widow and made provision for the marriage of his daughters. This Dewan Mulchand also left a son Chuhermal who became insolvent and in fact it was due to this son's mismanagement of his father's business that Papurbai, his step-mother, was compelled to bring a suit against him in which she obtained a decree, in execution of which this application was made; and the Subordinate Judge when he dealt with this execution application out of which this appeal arises, also dealt with two other applications arising out of the insolvency of this Chuhermal. One was made by the Official Receiver of the estate of the insolvent Chuhermal and the other was made by the insolvent's son, and the Subordinate Judge dealt with all these three applications together. But we will deal first with his order in this execution application and so far as this appeal is concerned, it affects only Rs. 10,000 left by Dewan Mulchand to his daughter Mathuribai who died in the Quetta earthquake with her mother Papurbai, and in fact the only question in dispute before us is one of fact whether

Mathuribai died before her mother Papurbai, because if she died before her mother Papurbai, as she was a maiden, this legacy of Rs. 10,000 would go to Kalawantibai, her maiden sister, who is the appellant in this appeal.

The Subordinate Judge in his judgment dealt with four items of property involved in the suit of Shrimati Papurbai. One was an item of Rs. 10,000 payable to Papurbai under the will of her husband Dewan Mulchand and about this there is now no dispute. It has gone to Kalawantibai, the surviving unmarried daughter, and no cross-objections have been filed against the order of the Judge on this point. As regards the item 2 of Rs. 10,997-9-4 with interest due to plaintiff Papurbai, upon a deposit, by Dewan Mulchand, there is again no dispute. This has also gone to Kalawantibai, the unmarried surviving daughter. So far as item 3 is concerned, an item of Rs. 30,000, being a sum of Rs. 10,000 each bequeathed to each daughter for the purpose of her marriage, again there is no dispute as regards the legacy of Gopibai, the married daughter, who is alive and Kalawantibai the unmarried surviving daughter, each of whom takes Rs. 10,000; but the dispute is about Rs. 10,000 bequeathed to Mathuribai. Item 4 to which this suit of Shrimati Papurbai related was as to the half-share of Bhagwani in the residue of Dewan Mulchand's estate. Bhagwani died as a minor in 1910 and there is now no doubt that this half-share goes to the insolvent Chuhermal as did the other half-share under the will of his father. So the only question we have to decide is, who is the legal representative of Mathuribai. The application in execution was an application to join Gopibai, wife of Gobindram defendant 2 in the suit and Kalavantibai, daughter of Papurbai defendant 4, as the heirs of the plaintiff Papurbai and Mathuribai, defendant 3; and the order we pass upon this application depends upon whether Mathuribai died before Papurbai in the Quetta earthquake in which both met their death.

A preliminary objection was taken in appeal to the appeal lying at all against an order upon this application in execution to join Gopibai and Kalawantibai as legal representatives of Shrimati Papurbai and Mathuribai in execution proceedings. The learned advocate argued that Order 22, R. 12, and Rr. 3 and 4, Civil P. C., under which the applications in execution are purported to have been made do not apply. His argument is that the applicants must take upon themselves this responsibility of deciding who are the legal representatives of Papurbai and Mathuribai and cannot ask the Court to decide this question for them. But a similar objection was taken in 24 S L R 195.[1] In that case it was pointed out that the question as to whether an application such as has been made in this case can be made was decided in the affirmative by the Privy Council in 30 Bom L R 1373.[2] It is pointed out in the Sind case[1] that no application could be made by a legal representative to be joined as such until his right as legal representative had been recognized and that if the legal representative is precluded from having his right decided and recognized he would be precluded from making an application under R. 16. In an Allahabad case, 47 All 365,[3] which is a case in point, it has been laid down that

> the decision of a Court in execution proceedings adjudicating upon the claims of certain persons who asserted that they were the legal representatives of a deceased decree-holder is appealable under S. 47, Cl. (3), Civil P. C.

In that judgment the learned Judges said:

> There can be no doubt that O. 22, R. 5, Civil P. C., has no application to the present case. The controversy has arisen during the execution of a decree. Ordinarily, therefore, S. 47 would be the only Section which would apply to the case. As for the argument that it was only for the decree-holder himself to say who would be brought on the record as the legal representative of the deceased judgment-debtor, it has to be pointed out that the legal representative of the judgment-debtor is not entitled to bring a suit of his own to have any question that arises in the execution decided.

The Judges went on to say that they were decidedly of the opinion that the case came under Cl. (3) of S. 47, Civil P. C., and that an appeal lay; and the learned advocate for the respondent did not, after reference was made to these rulings, press his objections.

Now so far as the question of the death of Mathuribai is concerned, the learned advocate for the appellant Kalawantibai attacked the judgment of the learned Judge upon two grounds: firstly, he said that he has left undecided the question as to who died first, Mathuribai or Papurbai, and that

1. Showkomal v. Nichumal, (1930) 17 A I R Sind 283=123 I C 303=24 S L R 195.
2. Jang Bahadur v. Bank of Upper India, (1928) 15 A I R P C 162=109 I C 417=55 I A 227 =3 Luck 314=30 Bom L R 1373 (P C).
3. Khemsingh v. Raghubir Singh, (1925) 12 A I R All 578=86 I C 1048=47 All 365.

there can be no presumption in law that the elder died before the younger; and secondly, that he has not correctly appreciated the evidence of the two witnesses, Tejumal, the maternal uncle, and Gopibai, the sister, who say that when Mathuribai was taken out of the ruins of the fallen house she was dead and Papurbai lived for a few minutes after her rescue. Now it is true that there is no presumption in law that the elder died before the younger. The case in point is (1861) 30 L J Ch 65,[4] a case of the House of Lords, where the Lord Chancellor in giving judgment said that a Mr. and Mrs. Underwood had both left a will in which they left their property to the survivor and the question was which outlived the other in a shipwreck in which both lost their lives. The point of view from which such cases can be regarded may be gathered from the statement of material facts as set out in the reported case which are as follows :

On 13th October 1853, Mr. and Mrs. Underwood and their three children embarked on board the Dalhousie, 1400 tons burthen, lying in the Thames, and bound for Australia, which vessel was wrecked, on 19th October following, off Beachy Head, on the coast of Sussex, when all the passengers and all the crew, except Joseph Reed, a seaman, perished. From his evidence, it appeared that Mr. and Mrs. Underwood and their two sons were all washed overboard together by a wave which broke violently over that part of the vessel where they were standing clasped together; that he never saw them again, but he had no doubt that they were swept into the whirlpool caused by the heave of the ship's counter while on her starboard beam ends, and that it must have taken them down, none of them ever coming in sight again; and that he did not think any swimmer could have struggled against the whirlpool so as to have come up again. Joseph Reed afterwards lashed the daughter, Catherine Underwood, to a spar, and cut the lashings which attached the spar to the ship and it was washed overboard, and he saw her alive and floating upon the water. The captain was also lashed to this spar, and several other persons hung to it and the ship afloat about ten minutes after the spar got clear, at which time Reed was on the boat's chuck, from which he was subsequently picked up. Catherine Underwood had not been since heard of, and Reed had no doubt that she was lost.

John Underwood, when he embarked was about forty-three years of age; he was in robust health, and he was a good swimmer. His wife was about forty years of age; she was in a weak state of health, and she could not swim; their three children, Catherine, Frederick and Alfred, were of the respective ages of eighteen, fifteen and thirteen and were unmarried.

And then the Lord Chancellor went on to say in his judgment as follows :

For that purpose the wills of the husband and of the wife were relied on; and it was argued that the evidence justified the inference that the husband survived the wife, so that, under her will, the whole vested in the husband, whose will carried the property to Wing, the children having all died before an interest vested in them. The Master of the Rolls and the Lord Chancellor decided that there was no such evidence, and they were right. According to our law (unlike the Code Napolean, which had been relied on) where two individuals perished from the same calamity, there was no inference of law as to age or sex which was the survivor. There must be evidence of the fact, and the onus probandi lay on the party who asserted the affirmative. There certainly was some evidence here that the husband had survived the wife but there was also evidence on the other side ; and it was impossible to say that the two learned Judges in the Court below were wrong in determining that the evidence of the husband surviving was not sufficient to justify a decision to that effect. This being a question of fact, the House could derive no assistance from the various cases cited, where Judges under other circumstances had held a particular person to have been the survivor of two who had perished by the same calamity.

There was no foundation for the supposed doctrine that where the evidence left it doubtful which of two individuals died first, there was a presumption of law that they died at the same time.

Now in this case there is the evidence of Tejumal as to the death of Mathuribai that she died previously to her mother; this statement is to the benefit of the appellant Kalavantibai. This Tejumal was himself living in the house in Quetta with his sister Papurbai, Mathuribai, her daughter and Papurbai's two other daughters, Gopibai and Kalawantibai. He stated that when he took out Papurbai and Mathuribai from the ruins of the house in which they lived, Mathuribai was dead and Papurbai had some life in her. Gopibai, Papurbai's married daughter, gave evidence two and a half months later and her evidence on commission corroborates the evidence of Tejumal. Now as to Tejumal's evidence the Judge says that he could not possibly believe that in the confusion and terror that must have followed this disaster, Gopibai and Tejumal could possibly have played the parts to which in their evidence they testify. Gopibai and Tejumal were both injured, and bearing in mind that these people belonged to a Hindu Banias family they could not be expected in times of such disaster to show the courage and hardihood of countrymen.

We cannot also believe that the learned Judge was wrong in his appreciation of the evidence of this Tejumal and Gopibai. Tejumal he saw, and the Judge formed the opinion that he could not play the part he claimed in the rescue of his sister and his

4. Wing v. Angrave, (1861) 30 L J Ch 65 = 8 H L C 183.

niece in this calamity. The evidence of Gopibai can be of very little value. She gave evidence on commission two and a half months after Tejumal gave evidence. The Judge did not see her and we can attach little importance to the evidence of this young woman who apparently was not prepared to go and give evidence even in the Judge's Chamber. There is abundant force in the contention of the learned advocate for the respondent that this Court though a Court of Appeal upon facts will not lightly interfere with the finding of the trial Judge on facts and he has referred us to the case in (1935) A C 243[5] where this question is discussed at great length by the learned Lords. It is urged on behalf of the appellant that in that case there was a conflict of evidence while in the present case there is no such conflict. There is no evidence in rebuttal of the evidence of Tejumal given on oath. But if evidence on oath coming from the mouth of a witness whom the Judge has seen is such that he cannot believe it, and there is good reason for his disbelief, this makes no difference to the general principle laid down by the House of Lords that a Court of Appeal will not prefer its own appreciation of the oral evidence to that of the trial Judge. We have no reason to suppose, on the contrary we have good reason to believe, that the Judge was right in his appreciation of this witness's evidence and in its rejection. We are therefore not in a position where it can be said whether Mathuribai or Papurbai died first. We only know that they are both dead.

We must then look for Mathuribai's heirs among the living. So far as this Rs. 10,000 of Mathuribai is concerned, according to the Hindu law of succession, being stridhana of a maiden, it would go first to her uterine brother, but there is none; then it would go to her mother who is dead; then to her father who is dead; and then to her father's heirs in order of propinquity (*see* Mulla's Hindu Law, Edn. 8, page 139) and this is her step-brother, Chuhermal, the insolvent. While therefore we can understand the desire that the money of the sister Mathuribai should pass rather to her unmarried sister Kalawantibai than to her insolvent step-brother, nevertheless upon the facts and upon the law of Hindu succession as stated which the learned advocates do not dispute, we must agree with the order of the Subordinate Judge, that as far as this Rs. 10,000 is concerned, the legal representative of Mathuribai is her step-brother Chuhermal and he should be joined as legal representative so far as this Rupees 10,000 is concerned and the appeal must fail.

We have then to deal with Miscellaneous Appeal No. 26 of 1937 which is against the order of the Assistant Judge who heard an appeal against this same order of the Subordinate Judge, so far as it related to the two petitions in insolvency; and for the appellant, the same Kalawantibai, it is said that under S. 4, Provincial Insolvency Act, the Subordinate Judge was not competent to deal with the claims of the insolvent Chuhermal as against a third party but the learned advocate for the appellant himself has stated that as we have decided who is the legal representative of Mathuribai, so far as this Rs. 10,000 is concerned, so the appeal against the order of the Assistant Judge is one of academic importance only, for it is on the same point. We think, it is a matter of little importance, whether the order of the Judge be deemed to be an order passed by him as a Subordinate Judge in execution proceedings or as a Judge sitting in insolvency. The same question is to be decided whether it be on appeal against an order of execution, or a second appeal within the provisions of S. 75, Provincial Insolvency Act, against an order of the Assistant Judge on appeal against the order of the Subordinate Judge in his insolvency jurisdiction. The question in either case is who is the legal representative of Mathuribai. Therefore the question of law which can only be argued in Miscellaneous Appeal No. 26 of 1937 which is whether the Judge in his insolvency jurisdiction could decide this question, is of no importance, because it is clear he could decide it and has decided it as a Subordinate Judge in the execution proceedings before him. This Appeal No. 26 of 1937 must therefore also be dismissed.

One small point however remains. The advocate for the appellant claims that the two receivers in charge of the property of Papurbai appointed by the Court in the course of the execution of the decree and in charge also of the three legacies to the daughters which are charged upon the estate, have been ordered by the Judge to pay Rs. 200 as fees to the advocate appearing for Chuhermal, the insolvent, and that the proper persons to pay fees are not the receivers in charge of Papurbai's property,

5. Powell v. Streatham Manor Nursing Home, (1935) A C 243=104 L J K B 304=152 L T 568=79 S J 179=51 T L R 289.

but the Official Receiver in charge of the insolvent's estate. It appears to us clear that the receiver referred to in the order of the Subordinate Judge dated 20th August 1936 appearing at p. 42 of the paper-book must be the Official Receiver in charge of the insolvent's estate and no doubt or ambiguity on this point should therefore arise. These two appeals therefore are both dismissed with costs.

S.G./R.K. *Appeals dismissed.*

A. I. R. 1939 Sind 238

DAVIS J. C.

Om Radhe, President, Om Mandli
Applicant

v.

Emperor.

Criminal Transfer Appln. No. 57 of 1939, Decided on 3rd April 1939.

(a) Criminal P. C. (1898), Ss. 526 (8) and 107—'Party' in S. 526 (8) includes informant under S. 107.

The word 'party' within the meaning of S. 526 (8) does include an informant under S. 107. [P 239 C 1]

(b) Criminal P. C. (1898), S. 526 (8) — Procedure — Magistrate doubtful whether person asking for adjournment is 'party' within S. 526 (8) — Safe course is to grant adjournment—Effect of refusing adjournment stated.

Where a Magistrate is doubtful whether a person applying for stay of proceedings under S. 526 (8) is or is not a party within the meaning of that sub-section, the safe course for him is to adjourn the case under S. 526 (8), because if he refuses the adjournment and it is afterwards found that such person is 'party' within the meaning of S. 526 (8), all proceedings from the date of refusal would be illegal : *29 Cal 211, Rel. on.* [P 239 C 1]

(c) Criminal P. C. (1898), S. 526—Extent of High Court's powers of transfer under S. 526 explained — Where applicant does not apprehend that Magistrate will not deal fairly and honestly in deciding questions in dispute, case cannot be transferred.

High Court can, if it thinks proper, act upon the application of a witness, and would certainly do so if it is satisfied that the process of the Court is being abused, that the proceedings are sham or bogus proceedings instituted or continued for some ulterior purpose, for a purpose not within the intention and provisions of the relevant Sections of the Code. But where no useful purpose, public or private, would be served by the transfer of the case nor is there any reasonable ground for apprehension on the part of the applicant that the Magistrate will not deal fairly and honestly in his final order with the questions under the provisions of the Criminal Procedure Code before him for his decision, the case cannot be transferred. [P 239 C 2 ; P 240 C 2]

(d) Criminal Trial — Evidence — Extent to which accused can be allowed to bring evidence.

Undoubtedly, a Magistrate is bound to allow accused to defend himself, but on the charge brought against him and to which he has to answer ; but the Magistrate should not allow, for instance, an accused person charged with theft to bring evidence to justify his theft. He can however bring evidence to explain his motive and his actions so that the Court can come to a true and just decision. [P 239 C 2]

(e) Criminal P. C. (1898), Sec. 107 — Proceedings under—Nature of.

Proceedings under S. 107 are proceedings for the preservation of peace and not for the preservation of morals. [P 240 C 1]

(f) Criminal Trial — Transfer — Fact that Magistrate wrongly admitted evidence is not ground for transfer of case.

While it is easy for an Appellate Court to say that this or that evidence should not have been admitted on the record, it is not so easy for a Magistrate who is recording the evidence constantly to interrupt the advocate and shut out the questions and answers the purport or purpose of which may not be clear until some time after the questions have been asked, answered and recorded. It is true the duty lies upon the Court to exclude evidence which is inadmissible in law but the fact that the Magistrate wrongly admits evidence, an error in law, is not of itself necessarily good ground to transfer a case. [P 240 C 1]

Parmanand Kundanmal—*for Applicant.*
D. N. O'Sullivan — *for Opponents.*
Partabrai D. Punwani, Advocate-General — *for the Crown.*

Davis J. C. — This is an application by one styling herself Om Radhe and President of an institution called "Om Mandli" to transfer certain proceedings under Ch. 8, Criminal P. C., and to which she was once a party, from the Court of the City Magistrate, Hyderabad, on the ground that the Magistrate is biased and has permitted proceedings against her and her companions which were quashed by this Court to be continued under pretended proceedings against her opponents. This application was admitted principally on the ground that the learned Magistrate in his order refusing to stay the proceedings before him so that the applicant might move this Court to transfer the case appeared to consider that the appropriate sub-section, namely sub-s. (8) of S. 526, Criminal P. C., applied only to a complainant or an accused person and that the applicant as a witness had no right to move his Court to stay proceedings. It is true that sub-s. (8) before amendment referred to "the Public Prosecutor, the complainant or the accused" as persons competent to move a Court to stay proceedings under Sec. 526 (8), Criminal P. C., but that Section has been amended and for the words "the Public Prosecutor, the complainant or the accused" the words "any party interested" have been substituted, and this amendment was made, in

my opinion, not in order to bring sub-s. (8) in harmony with sub-s. (3) in which these words already occurred but to cover cases under Chap. 8 where the informant wishes to move the Court. For instance, under S. 107, Criminal P. C., under which the City Magistrate first issued notice on the applicant and others the Magistrate is to take action on information, which clearly contemplates the existence of an informant. Therefore in my opinion the word "party" within the meaning of S. 526 (8), Criminal P. C., does include an informant under Sec. 107, Criminal P. C., so that if the applicant is in fact the informant under S. 107 in these proceedings, she is a party within the meaning of S. 526 (8) and the Magistrate was wrong in refusing to stay proceedings. I would not construe the word "informant" narrowly and had I believed that she was the real informant and Mr. Lewis, the City Police Inspector, only the nominal informant, I should have found that the Magistrate had wrongly refused to stay the proceedings, but although there is some resemblance between the statements of facts contained in the representation of Om Radhe and others to the Collector of Hyderabad, dated 22nd June 1938, and the information of the City Police Inspector to the City Magistrate dated 16th August 1938, the evidence of Mr. Lewis shows, that the trouble started as far back as May 1938. The learned advocate for the applicant stated explicitly that he had no complaint of any sort or kind to make against the police officers in this matter. I see therefore no reason to suppose that what Mr. Lewis says in this matter is not correct and it therefore appears to me that he and not the applicant is the real informant within the meaning of S. 107, Criminal P. C., in this matter and that therefore the Magistrate, for reasons different from those he gave, was not bound to adjourn proceedings; but I should advise the learned Magistrate that if in future a doubt exists whether the applicant is or is not a party within the meaning of sub-s. (8) of S. 526, to err on the safe side and to grant the adjournment for otherwise he may find all the proceedings from the date of his refusal declared illegal: 29 Cal 211.[1]

So far as the transfer of cases is concerned however the powers of this Court are wide. The Court can of its own motion under sub-s. (3) transfer a case; it can if it thinks proper, act upon the application of a witness, and would certainly do so if it was satisfied that the process of the Court was being abused, that the proceedings were sham or bogus proceedings instituted or continued for some ulterior purpose, for a purpose not within the intention and provisions of the relevant Sections of the Code. And this indeed is the main argument of the learned advocate for the applicant. It was his argument that the City Magistrate was the mere tool of the District Magistrate for the purpose of continuing proceedings against the applicant and others, which proceedings this Court had quashed. With the moral aspects of this problem I am not concerned. I am not prepared to permit this Court to be made a place for the exposition and furtherance of the doctrine and practices of those who are either for or against the Om Mandli and there is, in my opinion, no doubt that the learned advocate can find, in the mass of unnecessary detail the learned Magistrate has recorded in the evidence of the witnesses for the defence, material for the argument that the learned Magistrate did permit his Court to be made a place for attacks upon the Om Mandli.

The learned advocate for the opponents argued that the Magistrate was bound to permit the accused to defend themselves and to justify their actions. Undoubtedly, the Magistrate was bound to allow the accused to defend themselves, but on the charge brought against them and to which they had to answer; but the Magistrate should not allow, for instance, an accused person charged with theft to bring evidence to justify his theft; that is a novel doctrine and a bad doctrine and will not be tolerated in the Courts of this Province. An accused can bring evidence to explain his motive and his actions; to show, for instance, he stole because he was starving, and to explain all the circumstances of his offence, so that the Court can come to a true and just decision. This is however a very different matter from permitting accused person or persons called upon to show cause why they should not be bound down; to justify their crimes or to justify the use of force or violence unless, of course, they wish to take advantage of one of the exceptions to the general law, which is not here the case. And it is because I consider that the Magistrate in allowing the evidence regarding the practices and conduct of the Om Mandli to go on record was not per-

1. Surat Lall Chowdhry v. Emperor, (1902) 29 Cal 211=6 C W N 251.

mitting and did not intend to permit his Court to be used as a place whereby the opponents of the Om Mandli could give publicity and support for their case against the Om Mandli that I do not transfer this case. But it is obvious that if, as the learned advocate for the opponents says, that those called upon to show cause were entitled to show that the Om Mandli was a bad institution, those responsible for that institution were entitled to show that it was a good institution, in common justice. This at once shows how necessary it is for a Magistrate in a case of this kind to remember the true nature of the proceedings before him. These proceedings are proceedings for the preservation of the peace and not for the preservation of morals.

The prosecution quite properly adduced the evidence of police officers which was relevant to this question of the preservation of the peace, and the burden lay upon the opponents or the accused, however they be called, to meet that evidence and the case therein against them. They do not meet this case by justifying their actions through witnesses or by inviting the Court to enter into a detailed inquiry as to the conduct of this institution or the doctrine or morals of its devotees. But for this, the opponents or their legal advisers are primarily to blame. The Magistrate was in a difficult position. If he had not allowed the opponents or the accused full latitude to state their case, however misguided their case may be, it would be said that he had not been fair to them. Moreover, while it is easy for an Appellate Court to say that this or that evidence should not have been admitted on the record, it is not so easy for a Magistrate who is recording the evidence constantly to interrupt the advocate and shut out questions or answers the true purport or purpose of which may not be clear until some time after the questions have been asked, answered and recorded. It is true the duty lies upon the Court to exclude evidence which is inadmissible in law but the fact that the Magistrate wrongly admits evidence, an error in law, is not of itself necessarily good ground to transfer a case. One argument at least of the learned advocate for the applicants was strangely inconsistent. He complained that none of the signatories of the petition to the Collector of 22nd June 1938, not even Om Radhe herself, whom he describes as the true complainant, was called as a witness for the prosecution; she was called as a witness for the defence; but her position would have been no better, it would have been worse from his client's point of view, if she had been called as a witness for the prosecution, because the advocate for the opponents would have then been entitled as of right to cross-examine her. As a witness for the defence she could only be cross-examined as a hostile witness with the permission of the Court. Therefore, it appears that what the learned advocate desires should have been done was done, if anything, to the advantage of his client.

I cannot therefore see that there is any justification for the transfer of this case from the Court of the City Magistrate at Hyderabad. Should the applicant wish to lead further evidence to rebut the evidence the Magistrate has permitted to go upon the record, that the institution of Om Mandli is a bad institution, he must, within reasonable limits, in common fairness permit her so to do, even if he has to call the witnesses as court witnesses, but no such request has been made or has been refused. But the fact that in common fairness he must now grant such a request, should it be made, shows how necessary it was for him to bear in mind the true nature of these proceedings, and the limited extent to which evidence showing the motive or explaining the conduct of the opponents or the accused should have been allowed upon the record. The Magistrate will also bear in mind, when he comes to write his order, that his Court is a Court of law and not of morals and that the matter before him is whether the accused should or should not be bound over to keep the peace or be of good behaviour within the terms of the notice under S. 112, Criminal P. C., issued on them and within the provisions of Sec. 118 of the Code. I can see however no useful purpose, public or private, to be served by the transfer of this case. I cannot see any reasonable ground for apprehension on the part of the applicant that the Magistrate will not deal fairly and honestly in his final order with the questions under the provisions of the Criminal Procedure Code before him for his decision. Moreover, if this case is to be transferred it is to be transferred by this Court of its own motion. This I am not prepared to do. I am concerned now only with this question of transfer and nothing more. I dismiss this transfer application accordingly.

N.S./R.K. *Application dismissed.*

*** A. I. R. 1939 Sind 241**

FULL BENCH

DAVIS J. C., LOBO AND WESTON JJ.

Kishinchand Changomal and another— Applicants.

v.

Takhitram Tulsidas — Opponent.

Civil Revn. Applns. Nos. 12 and 47 of 1937, Decided on 27th February 1939: Reference made by Davis J. C. and Dadiba C. Mehta J., D/- 24th May 1938.

*** (a) Civil P. C. (1908), Sch. 2, Para. 15 — Words "or being otherwise invalid"—Scope — Court in considering objections to award under Para. 15 can consider objections to validity of reference — It makes no difference if in doing so Judge must decide question affecting his own jurisdiction because his decision on question of jurisdiction will not be final : *15 S L R 165=A I R 1922 Sind 1=65 I C 50, Overruled.***

There is nothing in the words "or being otherwise invalid" themselves or in their context to limit their operation to cases where an award is invalid only on the ground of something done after the reference and not before or in the reference itself. The words "or being otherwise invalid" include within their meaning questions relating to the validity of a reference. Hence it is open to the trial Court in considering objections to an award under Para. 15 of Sch. 2 to consider and decide objections raised to the validity of the reference : *A I R 1935 Rang 94 ; A I R 1932 Lah 239 ; A I R 1937 All 65 (F B) ; A I R 1924 Bom 324 and A I R 1930 Bom 431, Rel. on.* [P 243 C 2]

It makes no difference if thereby a Judge may find that his own order of reference is invalid or find that he must thereby reconsider any previous order he has passed on this question. It also makes no difference if thereby the Judge must decide questions which affect his own jurisdiction because his decision on questions of jurisdiction will be subject to revision or appeal on the principle that a Court cannot be the final judge on the question of its own jurisdiction : *A I R 1937 Sind 110, Rel. on ; 15 S L R 165=A I R 1922 Sind 1=65 I C 50*, **Overruled.** [P 244 C 2; P 245 C 1]

(b) Civil P. C. (1908), S. 105 — Validity of order setting aside award can be attacked in appeal under Section 105.

The validity or otherwise of an order setting aside an award affects the decision of the case as a simple question of jurisdiction would affect the decision of a case. Hence the validity of an order setting aside an award can be attacked in appeal under the provisions of S. 105 : *A I R 1932 Bom 232, Rel. on.* [P 245 C 1]

*** (c) Civil P. C. (1908), Sch. 2, Para. 15 and S. 115 — Order setting aside award under Para. 15 does not decide case within meaning of Section 115.**

Whether an order does or does not decide a case within the meaning of Sec. 115, Civil P. C., must be considered in each case. An order of the Court setting aside an award under Para. 15 of Sch. 2, Civil P.C., and fixing the suit for final hearing does not decide a case within the meaning of Sec. 115 : *AIR 1936 Sind 205 and AIR 1938 Sind 76, Disting.; AIR 1938 All 557, Rel. on.* [P 245 C 1, 2]

D. N. O'Sullivan — *for Applicant* (Kishinchand Changomal).

Dipchand Chandumal — *for Opponent.*

OPINION

Davis J. C.—There are referred for our decision two questions:

(1) Whether an order of the Court setting aside an award under Para. 15 of Sch. 2, Civil P. C., is an interlocutory order, or a "case decided" within the meaning of Section 115, Civil P. C.;

and

(2) Whether it is open to the trial Court in considering objections to an award under Para. 15 of the Schedule aforesaid to consider and decide objections raised to the validity of the reference.

This reference to us arose out of a revision application against an order of the First Class Subordinate Judge, Hyderabad, dated 21st November 1936, in which he set aside an award under Sch. 2, Civil P. C., on the ground that the reference itself was an invalid reference, and though upon our answer to the first question depends the fact whether this Court can under S. 115, Civil P. C., consider at all an order setting aside an award as a "case decided" within the meaning of Sec. 115, Civil P. C., it will be convenient to deal first with the second question which the learned advocate for the applicant asked leave at first to argue. Briefly, the second question raised the issue whether the words "or being otherwise invalid" enable the trial Court to consider and decide the question whether the reference itself made by its own order is valid or invalid. The learned advocate for the applicant argues that he cannot do so because Para. 15 of Sch. 2 refers only to what is done or happens after the reference itself, and that any question of the validity or invalidity of the reference is outside the scope of Para. 15 and can be questioned only in revision to this Court under S. 115, Civil P. C.; moreover, it involves a Judge in the decision of questions on which his own jurisdiction is based and which indeed may involve him in the decision that an order of his own is bad.

The applicants' case may be summarized in the argument that the words "or being otherwise invalid" must be construed on the principle of *ejusdem generis*, and the learned advocate relies strongly on the ruling of the Calcutta High Court in 58 Cal 628.[1] There are, however, we think,

1. Golnur Bibi v. Abdus Samad, (1931) 18 A I R Cal 211 = 130 I C 209 = 58 Cal 628 = 35 C W N 238 = 52 C L J 298.

not only reason and convenience but the preponderance of judicial opinion against him on the narrow construction of Para. 15 for which he argues, quite apart from the very wide meaning of the words "otherwise invalid" themselves. The learned advocate has particularly stressed the argument that 29 Cal 167[2] has been misunderstood, and that if rightly interpreted, this judgment of the Privy Council was intended to exclude not only from appeal but also from revision questions falling within the provisions of Para. 15 of Sch. 2, save so far as an appeal is provided for in Para. 16, and Para. 16 does not provide for an appeal against a decision on this question of the validity of a reference.

In one way this argument is against him for he himself comes to this Court in revision against an order on this very question but he meets this objection by the argument that as trial Court has no power to decide any question relating to the validity of a reference under Para. 15, a decision to this effect is outside the paragraph, and is clearly without jurisdiction, and an application under Sec. 115, Civil P. C., to this Court will therefore lie. The learned advocate also meets the objection that the trial Court cannot be expected to pass by all errors in the order of reference which may be brought to its notice, by the argument that all sufficient power to rectify an improper order of reference can be found in the provisions of Ss. 114 and 151, C. P. C., and he refers to a passage in Mukerji J.'s judgment in 58 Cal 628,[1] at p. 641, where the learned Judge points out two ways in which a bad order of reference may be rectified; it may be reviewed or revised.

In 58 Cal 628,[1] the question before the Court was the question so frequently raised whether despite the provisions of Para. 16 of Sch. 2, Civil P. C., an appeal will lie against a decree based on an award on the ground that the reference itself was invalid and in that case Mitter J. was of the opinion that an appeal would lie contrary, it would appear, and as Mukerji J. pointed out, to the decision of the Privy Council in 29 Cal 167,[2] and to his own opinion, and Mitter J. differed from Mukerji J. on that point so that the judgment has not the virtue of unanimity. Both learned Judges, however, were of the opinion that the words "or being otherwise invalid" must be construed *ejusdem generis* and that this construction prevented the trial Court from considering and deciding under Para. 15 questions relating to the validity of the reference which were not questions which could be argued or considered under that Paragraph. This judgment then, on which the learned advocate for the applicant so strongly relies, is not a very satisfactory judgment, and in 12 Rang 675[3] Page C. J. has discussed at length the decisions of the Calcutta High Court on this question and pointed out that one Division Bench has differed from another Division Bench and in certain cases the same learned Judge has differed from himself. The case that the words "or being otherwise invalid" are to be construed *ejusdem generis* and thus exclude from the jurisdiction of the Judge under Para. 15 any question of the validity of his reference is perhaps best set out in the words of Mukerji J. himself as follows (page 640) :

> The matter, upon which I most fully concur with my learned brother Mitter J., is the meaning that he has placed upon the expression 'or being otherwise invalid' in cl. (C) of sub-para. (1) of Para. 15. He has held that the words must refer to invalidity of the kind referred to in the preceding sentences of the said clause. Whether the decision of the Judicial Committee in 53 Cal 258 =53 I A 1,[4] inferentially supports this interpretation or not, that interpretation, in my opinion, is the only interpretation that the words bear. When the provision begins with the restrictive words, 'but no award shall be set aside except on one of the following grounds' to hold that the words 'or being otherwise invalid' may let in any ground of invalidity, in my judgment, would be entirely wrong. I would, therefore, respectfully dissent from such decisions as have taken a contrary view. A ground of objection, which challenges the validity of the reference, is not a ground which may be put forward when under Para. 15 the Court is asked to set aside an award; the objections to be taken at that stage are objections to the proceedings, as were had before the arbitrators. I am of opinion that the Legislature has deliberately restricted Para. 15 in this way, leaving it to the parties to challenge the reference, which is an order of the Court and not an act of the arbitrator, by appropriate proceedings. It is true that those proceedings are not specifically defined in the Code, but the fact that no appeal is allowed from the decree by no means suggests that there are no other means available to an aggrieved party to get the order of reference quashed. Two such means may at once be pointed out, by way of an application for review and by way of revision. However reluctant Courts may have been in the past to resort to S. 622 of the old Code or S. 115 of the pre-

2. Ghulam Khan v. Muhammad Hasan, (1901) 29 Cal 167 = 29 I A 51 = 25 P R 1902 = 6 C W N 226 = 8 Sar 154 (P C).

3. U Sein Win v. Central Plumbing Co. Ltd., (1935) 22 A I R Rang 94 = 156 I C 414 = 12 Rang 675.

4. Ram Pratap Chamaria v. Durga Prosad Chamaria, (1925) 12 A I R P C 293 = 92 I C 633 = 53 I A 1 = 53 Cal 258 (P C).

sent one, they are gradually leaning to a more liberal view in matters of this kind : *See* 43 All 305;[5] 46 All 686;[6] 36 Bom 105,[7] 49 Bom 535.[8] It would be remembered, however, that it has been observed by the Judicial Committee in the case of an award, to which finality must attach under the law, revision would be more objectionable than an appeal, 29 Cal 167.[2] Consequently, the revision should be asked for not of the arbitrator's award but of the order of the Court. In *Ghulam Khan's case*[2] the application was for revision of the award; that is why their Lordships said that, "In cases falling under Head I the agreement to refer and the application to the Court founded upon it must have the concurrence of all parties concerned and the actual reference is the order of the Court. So that no question can arise as to the regularity of proceedings up to that point." I respectfully disagree with those cases, in which it has been suggested on the strength of the aforesaid observations that an order of reference is not open to revision."

These arguments and these conclusions are, it is argued by the applicant, supported by reference to the paragraphs of Sch. 2, for, from Para. 1 onwards they proceed in orderly sequence, so that by the time Para. 15 is reached the question of the reference has long been passed, and what can then be considered are only questions relating to the proceedings after the reference and not before. But in our opinion the words "or being otherwise invalid" must have some meaning, and whether they were added to Para. 15 to confirm the principle of finality explained by the Privy Council in 29 Cal 167[2] or to supersede, as Mulla in his commentary on the Civil Procedure Code says, Calcutta and other decisions which allow an appeal from a decree based on an invalid award, the fact remains that they must have some purpose. It does appear however from the consideration of the case law on the subject, that they were added to exclude, inter alia, from Para. 16 an appeal in a case where the validity of the reference was in question. Then clearly to be operative at all, they must have included within their meaning questions relating to the validity of a reference. Otherwise, these questions would not have been excluded from Para. 16, as was intended, by this addition to it. It is indeed difficult to find words wider in their scope or meaning than these words "otherwise invalid," and there is in our opinion nothing in the words themselves or in their context to limit their operation to cases where an award is invalid only on the ground of something done after the reference and not before or in the reference itself. Therefore, if the words " or being otherwise invalid" include within their meaning for one purpose questions relating to the validity of a reference, which we are of the opinion they do, so they include within their meaning these same questions for other purposes and generally, and the answer to the question, whether these words empower a Court to consider objections relating to the validity of a reference under Para. 15, must be in the affirmative. And this is the opinion of a preponderance of judicial authority.

In 12 Rang 675[3] Page C. J., said at page 685 :

In 34 C W N 813[9] and 58 Cal 628[1] Mitter, J. (with whose opinion on this point Mukerji. J., expressed concurrence) held that the words 'or being otherwise invalid' in Para. 15 (1) (c) of Sch. 2 must be construed ejusdem generis with the two preceding grounds of invalidity set out in Para. 15 (1) (c). I am not confident, however, that it could be held that these two grounds form a genus; but, be that as it may, in my opinion the contention that the words 'or being otherwise invalid' must be treated as ejusdem generis with the two preceding grounds of invalidity has been satisfactorily answered by Shadi Lal, C. J. in 13 Lah 528.[10] To my mind, with all respect to the learned Judges who have taken the opposite view, it is clear beyond doubt or controversy that the Legislature by inserting the words 'or being otherwise invalid' in Para. 15 (1) (c) intended and provided that every ground upon which the validity of the award in law could be challenged should fall within the ambit of Para. 15 (1) of Sch. 2 and could be relied on as a ground for setting aside the award; thus obviating the difficulty that had arisen by reason of the ruling in 29 Cal 167,[2] and the decisions in the earlier cases in which it had been held that an award could only be set aside upon the grounds specifically set out in S. 521 of the Code of 1882.

In 13 Lah 528[10] Shadi Lal, C. J., said at page 532 :

It is to be observed that, prior to the enactment of the Civil Procedure Code of 1908, there was a divergence of judicial opinion on the question of whether an appeal would lie from a decree based upon an award, when the award itself is invalid. This controversy was however set at rest by the Code of 1908 which enlarged the scope of the grounds for setting aside the award by inserting the words 'or being otherwise invalid' in Para. 15, sub-para. (1), cl. (c) of Sch. 2, Civil P. C. The

5. Kanhaiya Lal v. Jagannath Pershad, (1921) 8 A I R All 16=60 I C 857=43 All 305=19 A L J 33.
6. Gobind Singh v. Bhirgu Nath Singh, (1924) 11 A I R All 788=82 I C 16=46 All 686=22 A L J 676.
7. Merali Visram v. Sheriff Dewji, (1911) 36 Bom 105=12 I C 687=13 Bom L R 1017.
8. Bhikalal Girdhardas v. Acharatlal Lallubhai, (1925) 12 A I R Bom 341 = 87 I C 910 = 49 Bom 535=27 Bom L R 423.
9. Durga Charan Debnath v. Ganga Dhar Debnath, (1931) 18 A I R Cal 109=130 I C 137=34 C W N 813.
10. Rala Ram Walaiti Ram v. Bansi Lal Jaggan Nath, (1932) 19 A I R Lah 239=136 I C 11=13 Lah 528=33 P L R 163.

award can now be challenged, not only on account of irregularities in the procedure of the arbitrator, but also on the ground that it was made by a person who had not been properly appointed to act as arbitrator. This amendment of the law shows that the Legislature intended that all objections to the award should be determined by the Court which made the reference, and that, if that Court overrules the objections, including the one impeaching its validity, the decree based upon such award should not be open to an appeal. The learned Judges of the Calcutta High Court however restrict the scope of the words 'being otherwise invalid' by applying the doctrine of ejusdem generis, and hold that the invalidity of a reference is not an objection ejusdem generis with those specifically mentioned in cl. (c), and cannot therefore be made a ground of attack under that clause. It is evidently assumed that the invalidity of reference can be raised independently of any provision in the Schedule, and that the decision of the Court upon it can be attacked on appeal.

It must be remembered that their Lordships of the Privy Council made it clear in their judgment in 29 Cal 167,[2] that no appeal lay against a decree passed in accordance with an award made in the course of litigation, and they emphasized the principle of finality attaching to such decree. It was after that pronouncement that the Civil Procedure Code of 1908 was enacted, and the addition made to Para. 15, sub-para. (1), cl. (c), was intended to give finality to a decree based upon an award, irrespective of the nature of the objections advanced against the award. It was accordingly provided that all objections should be urged before the Court dealing with the award, and that its decision thereupon should not be challenged in appeal. An objection to the validity of an award includes an objection impeaching the reference upon which he award is founded, and the latter objection comes within the purview of cl. (c). There is no cogent reason for distinguishing the one from the other, for the purpose of finality attaching to the decision of the Court upon the objections.

The doctrine of ejusdem generis cannot, in my opinion, be invoked to restrict the full and natural meaning of the phrase 'or being otherwise invalid.' Ordinarily, a general word receives its natural meaning, but a general word, which follows particular and specific words of the same nature as itself, may take its meaning from them and may be presumed to be restricted to the same genus as those words. It is however clear that this rule of construction is used only for the purpose of ascertaining the intention of the Legislature, and, as observed by Maxwell in his book on the Interpretation of Statutes, Edn. 7, at p. 288 the restricted meaning which primarily attaches to the general word in such circumstances is rejected when there are adequate grounds to show that it has not been used in the limited order of ideas to which its predecessors belong. If it can be seen from a wider inspection of the scope of the legislation that the general words, notwithstanding that they follow particular words, are nevertheless to be construed generally, effect must be given to the intention of the Legislature as gathered from the 'larger survey.' Now, the history of the law on the subject of appeal in cases of arbitration under the supervision of the Court points to the conclusion that the Legislature intended to give finality to the decision of the trial Court on all objections to the award, and to restrict the appeal to the solitary case in which the decree is at variance, or not in accordance, with the award, and, even then to confine its scope to that part of the decree which differs from the award.

This is also the view taken by a Full Bench of the Allahabad High Court in I L R (1937) All 317.[11] It is pointed out to us that on this question the Full Bench relied upon the decision of another Full Bench in 36 All 69[12] and that decision is itself based upon a misreading of the Privy Council judgment in 29 Cal 167,[2] and that the emphasis by the Judicial Committee upon the necessity of finality in awards would operate to exclude from, rather than include in, Para. 15 questions relating to the validity of a reference, but, as we have already pointed out, the words "or being otherwise invalid" were intended to include in Para. 15, so as to exclude from Para. 16, questions relating to the validity of a reference. Therefore such questions fall, in our opinion, despite the rule of ejusdem generis, within the provisions of Para. 15. To the same effect are the decisions of the Bombay High Court in 26 Bom L R 171[13] and 32 Bom L R 389.[14]

We think, then, that the second question must be answered in the affirmative, and we think it makes no difference if thereby a Judge may find that his own order of reference is invalid or find that he must thereby reconsider any previous order he has passed on this question. We also think it makes no difference if thereby the Judge must decide questions which affect his own jurisdiction because his decision on questions of jurisdiction will be subject to revision or appeal on the principle laid down in 31 S L R 55,[15] at page 65, namely that a Court cannot be the final judge on the question of its own jurisdiction. We therefore differ from the finding in 15 S L R 165,[16] that the decision of a Judge on the question of the validity of a reference, involving as it does the question of

11. Mariam Bibi v. Amna Bibi, (1937) 24 A I R All 65=167 I C 99 = I L R (1937) All 317 = 1936 A L J 1333 (F B).
12. Lutawan v. Lachiya, (1914) 1 A I R All 446= 21 I C 989=36 All 69=12 A L J 57 (F B).
13. Mahomed Valli Asmal v. Valli Asmal, (1924) 11 A I R Bom 324=79 I C 723=26 Bom L R 171.
14. Raoji Narainji v. Ratansi Kanji, (1930) 17 A I R Bom 431=126 I C 305=54 Bom 696= 32 Bom L R 389.
15. Rochanbai Udhomal v. Motumal Shewaram, (1937) 24 A I R Sind 110 = 169 I C 623 = 31 S L R 55.
16. Emnabai Hassan v. Fakir Muhammad, (1922) 9 A I R Sind 1=65 I C 50=15 S L R 165.

his own jurisdiction, even though only indirectly is final, and to that extent we think the judgment of Raymond A. J. C., with all respect, is wrong.

We have then to consider the first question referred to us, and that as applied to the facts of this case is whether the order of a Judge, as in this case, setting aside an award and fixing the suit for final hearing, decided a case within the provisions of Sec. 115, Civil P. C., so as to attract its application, and our opinion is that it did not. It is said that this Court has in two decided cases, one reported in A I R 1936 Sind 205,[17] and the other in 32 S L R 703,[18] in cases analogous to this, decided that the orders in those cases are "decided cases" within the meaning of Sec. 115, Civil P. C., and that revision lay, but those cases are clearly distinguishable from this.

In the one case the rights of the parties had been concluded by an ex parte decree which was set aside by an order, while in the other case the order was made under the Arbitration Act, the provisions of which differ materially from the provisions of Sch. 2. It is however difficult to say what case the order of the Subordinate Judge in the case before us now decides. It does not decide the rights between the parties because these are to be decided in the suit, nor is its decision not subject to appeal, because we are of the opinion that, as held in 34 Bom L R 376,[19] the validity of such an order can be attacked in appeal under the provisions of S. 105, Civil P. C. It is argued that the validity or otherwise of an order setting aside an award does not affect the decision of the case within the meaning of S. 105, but we think it as clearly affects the decision of the case as a simple question of jurisdiction would affect the decision of a case; and it could not reasonably be contended that an appeal would not lie against a decree on the question as to the jurisdiction of the Court or the validity of an order in the exercise of that jurisdiction because an appeal on a question of jurisdiction is not an appeal on the merits of the case and does not affect the decision of the case within the meaning of S. 105, Civil P. C. As was pointed out in 32 S L R 703,[18] where the ruling in 24 S L R 277[20] was considered and explained, whether an order does or does not decide a case within the meaning of S. 115, Civil P. C., must be considered in each case, and there is no anomaly in holding that an order directing an award to be filed does decide a case within the meaning of S. 115, Civil P. C., while an order setting aside an award and referring the parties back to the suit does not so decide a case. Reference may also be made to the case in I L R (1938) All 805,[21] which decides that an order setting aside an award does not decide a case within the provisions of Sec. 115, Civil P. C.

Our opinion therefore is that the answer to the first question is that an order of the Court setting aside an award under Para. 15 of Sch. 2, Civil P. C. does not decide a case within the meaning of S. 115, Civil P. C.

D.S./R.K. *Answer accordingly.*

17. Indo-Persian Trading Co. v. Parmanand Harnamsing (firm), (1936) 23 A I R Sind 205=166 I C 541.
18. Zenab Sukhio v. Muhammad Haji Allandino, (1938) 25 A I R Sind 76=174 I C 572=32 S L R 703.
19. Nasarwanji Hormusji v. Jamshetji Naoroji, (1932) 19 A I R Bom 232=138 I C 215=34 Bom L R 376.
20. Khudabux v. Panjo, (1930) 17 A I R Sind 265 =127 I C 673=24 S L R 277 (F B).
21. Gobind Das v. Indrawati, (1938) 25 A I R All 557=177 I C 981=I L R (1938) All 805= 1938 A L J 813 (F B).

* A. I. R. 1939 Sind 245

LOBO J.

Bachraj Factories Ltd. — Plaintiffs.

v.

Bombay Telephone Co. Ltd. — Defendants.

Suit No. 20 of 1938, Decided on 30th May 1939.

(a) Evidence Act (1872), S. 106 — Instrument hired by person being in his exclusive possession—Instrument damaged — Onus is on him to prove that it was case of ordinary wear and tear and not of carelessness.

Where an instrument hired by a person was for all practical purposes in his exclusive possession, it is for him to explain how it came to be damaged. It is for him to establish that it was a case of ordinary wear and tear and not of carelessness or negligence in any degree. [P 247 C 2]

*** (b) Evidence — Expert evidence — Telephony is science or art — Evidence on matters regarding telephony of witnesses holding diploma in telephony and engineering is not only relevant as expert evidence but is also of great weight.**

Telephony is a science or art and the witnesses' knowledge of the telephone and of engineering generally places them in a special position and makes them competent to express an opinion upon articles and matters which are largely in use in the department of the telephone and of engineering generally. The evidence of these witnesses is relevant and admissible as opinion of experts

and the expert evidence of these witnesses is entitled to very considerable weight if they hold diploma in telephony and engineering and also have great experience. [P 248 C 2]

Khanchand Gopaldas — *for Plaintiffs.*

Pahlajsing B. Advani — *for Defendants.*

Judgment. — The facts leading up to this litigation are these. The plaintiffs are subscribers of the Bombay Telephone Co. Ltd., at Karachi. On 24th August 1936, by an agreement, Ex. 6 in the case, they hired from the defendants the use of a private telephone circuit between the office of Messrs. Bachraj Factories Ltd., on Serai Road and their Broker's room No. 55 in the Karachi Indian Merchants' Association building for a sum of Rs. 210 per year. On 20th April 1937 by an agreement, Ex. 7 the plaintiffs hired from the defendants one telephone instrument at the office of the plaintiffs connected with the defendant company's local exchange system for a sum of Rs. 280 per year. This connexion had two extensions. It appears that in December 1937 an Inspector of the defendants on his inspection rounds noticed that some parts of the instruments hired by the plaintiffs were damaged. The Inspector made a report and as a result on 25th December 1937 the defendants wrote to the plaintiffs the letter Ex. 11. They refer to the receiver caps, mouthpiece and cradle as being broken, they state that the costs of replacement will be Rs. 9-8-0 and they request that a form which had been enclosed with their letter be signed by the plaintiffs and returned. Ex. 11 was followed up on 4th January 1938 by Ex. 12. In this letter the defendants refer to Ex. 11 and forward a fresh form with particulars of damages to be signed and duly returned by the plaintiffs with a remittance within 48 hours. The plaintiffs replied to Ex. 12 on 5th January 1938 by their letter Ex. 13. In this they raised two points: (1) that the damage referred to by the defendants was trivial and due to normal wear and tear, and secondly, that they were under no obligation to pay for repairs during the term of their agreement; if they were liable at all they would be liable on termination of the agreement and hence they were prepared to make a deposit of Rs. 9-8-0 against their liability, if any, on the termination of the agreement.

On 10th January the defendants replied to Ex. 13 by their letter Ex. 14. They contend in this letter that the subscriber is bound to pay for the cost of replacements and payment cannot be deferred till the telephone is given up. They further contend that the entire apparatus supplied is the property of the defendants including the broken parts thereof. This letter evoked a reply from the plaintiffs on 12th January which is Ex. 15. The plaintiffs in this letter reiterated even more forcibly than they previously had what they considered their legal position in the matter. The reply to Ex. 15 is not on the record but Ex. 17 is a letter dated 18th January 1938 from the plaintiffs to the defendants in which they definitely decline to comply with the requirements of the defendants. On 25th January 1938, the defendants wrote to the plaintiffs a letter which is Ex. 18. After again requiring the plaintiffs to comply with their requirements and return the form sent with their letter of 4th January duly signed with the necessary remittance within 48 hours they conclude: "failing which we shall reluctantly be compelled to disconnect your line." The plaintiffs replied by filing the present suit on 28th January 1938. Their main contentions are set out in paras. 8 to 10 of their plaint thus :

Para. 8. — It is submitted that the plaintiffs have been taking reasonable care of the telephone hired to them and that no loss or injury had been caused to it by careless use or negligence on the part of the plaintiffs or their servants during the time it has remained with them.

Para. 9. — Further it is submitted that in any case no immediate necessity had arisen for repairs much less replacements of the said parts or any of them.

Para. 10. — Therefore it is submitted that the defendants had no right to call upon the plaintiffs either to execute the said agreement or to pay the said sum of Rs. 9-8-0 and the plaintiffs rightly declined to do so.

Paragraph 17 is the prayer clause in the plaint and reads thus :

Para. 17.—The plaintiffs pray for a declaration as set out in para. 14 above and for an injunction prohibiting the defendants and their agents from disconnecting the plaintiffs' line and doing any other act depriving the plaintiffs of the right to receive calls from and to make calls on the other subscribers during the term of the contract in suit and/or any other further relief that the Honourable Court shall deem fit and costs of the suit.

The defendants have filed a long written statement. It is unnecessary to refer to all its details; it is a mere reiteration of the position taken up by them in the correspondence to which I have referred above. The following issues were framed by the Court on 8th July 1938 :

(1) Did the plaintiffs hire from the defendants also the telephone circuit and instrument referred to in paras. 1 and 2 of the W. S. ?

(2) On what terms were the instruments in suit hired ?

(3) Was any of the instruments broken or damaged during the time they remained with the plaintiffs ? If so what were the instruments and what was breakage or damage ?

(4) Was the said breakage or damage not due to the carelessness or negligence in handling the said instruments by the plaintiffs or their servants or other persons permitted by them to use the same ?

(5) (a) Were the plaintiffs bound to maintain the instruments at all times in the same condition in which they were given to them ?

(b) Is a breach of such alleged obligation continuous until repairs or replacements take place ?

(6) Were the defendants entitled to forthwith replace the parts alleged to be broken or damaged and charge the plaintiffs for the same ?

(7) Were the defendants entitled to call upon the plaintiffs to execute the agreements to pay or to pay Rs. 9-8-0 for replacing the said parts ?

(8) Was there on the part of the plaintiffs any breach of the hire agreements such as is alleged by the defendants ?

(9) Were and are the defendants entitled to disconnect the plaintiffs ?

(10) Are the plaintiffs entitled to the reliefs claimed by them or any of them, and if so in what terms ?

(11) General (with special reference to costs).

Some of the issues cover points which are now no longer in dispute between the parties and some of the issues overlap. I will however deal with them seriatim. Issue 1 : Did the plaintiffs hire from the defendants also the telephone circuit and instrument referred to in paras. 1 and 2 of the W. S. ? There is no dispute on this point. I therefore answer this issue in the affirmative. Issue 2 : On what terms were the instruments in suit hired ? Exs. 6 and 7 are the written agreements between the parties. It is not the case of either side that there were any terms of hiring outside the agreements Exs. 6 and 7. Issue 3 : Was any of the instruments broken or damaged during the time they remained with the plaintiffs ? If so, what were the instruments and what was breakage or damage ? The answer to this issue is to be found in the evidence of Mr. Tancred, the manager of the defendant-firm at Karachi; (Ex. 22). He states :

The following damage has been caused to the plaintiffs' instruments with which this suit is concerned :

(a) The private line standard pedestal instrument has the earcap broken (Ex. 19);

(b) The switch board of telephone No. 2246 has the earcap broken (Ex. 26);

(c) Extension No. 1 connected to the switch board hand microtelephone instrument has the mouthpiece chipped and the cradle fixed part chipped (Ex. 10). The dispute between the plaintiffs and the defendants refers to the above.

Exhibits 19, 26 and 10 are before the Court and there is no dispute that these instruments are damaged in the manner specified by Mr. Tancred. Issue 4 : Was the said breakage or damage not due to carelessness or negligence in handling the said instruments by the plaintiffs or their servants or other persons permitted by them to use the same ? Now though at first the learned advocate for the plaintiffs was inclined to urge and did in fact urge that the damage to Exs. 19, 26 and 10 could only be attributed to ordinary wear and tear he was constrained ultimately to concede that the damage to the instruments Exs. 19 and 26 could not fairly be attributed to wear and tear and must necessarily therefore be attributed to some degree of carelessness or negligence. The learned advocate however urged very strongly that so far as the instrument, Ex. 10 was concerned this was clearly a case of ordinary wear and tear and such damage as was visible could not possibly be attributed to carelessness or negligence. The case on this issue therefore may well be confined to Ex. 10 though the evidence on the point covers also the damage to the instruments Exs. 19 and 26. In my opinion the burden of proof on this issue is on the plaintiffs. The instrument Ex. 10 was in the exclusive possession of the plaintiffs and not only so but it might almost be said that it was in the exclusive possession of Lalji Mahrotra (Ex. 8), the manager of the plaintiffs, because the instrument was in his office room on his office table and he has deposed that so long as he was in the office, Ex. 10 was not used by any other member of his office. Sec. 106, Evidence Act, provides : "Where any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

When the instrument, Ex. 10 was for all practical purposes in the exclusive possession of Mr. Lalji Mahrotra the managing partner of the plaintiffs, I think there can be no doubt that it was for him to explain how the mouthpiece and cradle of the instrument Ex. 10 came to be damaged. It was for him to establish that it was a case of ordinary wear and tear and not of carelessness or negligence in any degree. But all that Mr. Lalji has said on this point is in these words : "The cradle of Ex. 10 has a chip off it. I cannot say when it got chipped or how." He makes no reference whatever to the damage to the mouthpiece. On the other hand, there is definite evidence led by the defendants that the damage to Ex. 10 as well as the damage to

Exs. 19 and 26 cannot be attributed to wear and tear and can only be attributed to carelessness or negligence in some degree. Mr. Tancred (Ex. 22) states :

The damage I have specified above is in my opinion not occasioned by wear and tear. It is the result of careless use or negligence.

Mr. Humphrey (Ex. 31), the manager of Cable and Wireless Ltd., states :

In my opinion parts of instruments made of bakelite would not break by ordinary normal use. I am shown the damaged parts of Exs. 10, 19, 26 and 27. The damage is not due to ordinary wear and tear.

Omeshankar (Ex. 36) is a Subdivisional Officer in the Telegraphic Department. He states :

Bakelite parts of instruments do not break in normal use. I am shown the damaged parts in Exs. 10, 19, 26 and 27. The damage is not the result of normal use. It is not ordinary wear and tear.

The learned advocate for the plaintiffs has contended that this evidence of Mr. Tancred, Mr. Humphrey and Mr. Omeshankar is evidence of opinion ; that they are not experts in any sense of the word so far as the broken parts of these instruments are concerned; that their evidence is either irrelevant or in any case even if it be relevant is worth little. As to the relevancy and admissibility of the evidence of these witnesses on the point in question I feel no doubt. In Ameer Ali's Evidence Act, Edn. 9 at pp. 446-447 the following passage occurs under the heading "Subjects of expert testimony" :

The subjects of expert testimony mentioned by the Section are foreign law, science, art, and the identity of handwriting. The words 'science or art', if interpreted in a narrow sense, would exclude matters upon which expert testimony is admissible both in England and America, such as questions relating to trades and handicrafts. But it is apprehended that these words are to be broadly construed, the term 'science' not being limited to the higher sciences and the term 'art' not being limited to the fine arts but having its original sense of handicraft, trade, profession and skill in work, which, with the advance of culture, has been carried beyond the sphere of the common pursuits of life into that of 'artistic' and 'scientific' action. In some cases it may be difficult to determine whether the particular question be one of a scientific nature or not, and consequently, whether skilled witnesses may or may not pass their opinions upon it. The following test may be applied: Is the subject-matter of inquiry such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without the assistance of experts ? Does it so far partake of the character of a science or are as to require a course of previous habit or study in order to obtain a competent knowledge of its nature or is it one which does not require such habit or study.

To my mind the witnesses, Messrs. Tancred, Humphrey and in a lesser degree Mr. Omeshankar, are experts because telephony is a science or art and the witnesses' knowledge of the telephone and of engineering generally places them in a special position and makes them competent to express an opinion upon articles and matters which are largely in use in the department of the telephone and of engineering generally. But not only am I of the opinion that the evidence of these witnesses is relevant and admissible as opinion of experts, but it seems to me that the expert evidence of these witnesses is entitled to very considerable weight. Mr. Tancred has been several years in the employ of the defendant firm in Bombay and Karachi. He is an Associate Member of the Institute of Electrical Engineers of London and holds a diploma from the City and Guilds in automatic telephony. He was employed as an Engineer in Liverpool in a telephone company in the Installation and Designs Departments and has had 17 years' experience as an Electrical Engineer dealing with telephones. Mr. Humphrey (Ex. 31) holds no engineering degree but he has been trained as an engineer and has been practising as one for many years. Omeshankar (Ex. 36) is a B. Sc. and a Civil Engineer of Roorkie and has been in the Telegraph Department dealing with the telephone system of that department for four years. I cannot conceive how it can be argued with any force that the opinions of three persons like Mr. Tancred, Mr. Humphrey and Mr. Omeshankar is evidence of little value when they depose that in their opinion and from their experience the damage to the instruments Exs. 19, 26 and 10 could not be the result of wear and tear but is necessarily the result of carelessness or negligence in some degree.

The learned advocate for the plaintiffs next contended that bakelite parts are naturally brittle and liable to chip off and break when brought into even ordinary contact with other substances. The learned advocate even faintly suggested that the defendant-company had deliberately introduced the use of parts made of this brittle composition with the object of making money out of their subscribers. This latter suggestion however is not based on any evidence in the case and I think it is sufficiently met by the evidence of Mr. Tancred who states :

We make no profit in replacing parts of instruments. We charge only for labour plus cost of

material .... Damaged parts of instruments removed by us are destroyed.

There is also the evidence of Mr. Bharucha (Ex. 32), the Internal Auditor of the defendant company, who came from Bombay to give evidence in the case. He states: "Damaged parts are brought back to the office and destroyed. The company buys instruments and parts thereof."

The argument as to bakelite parts being brittle and liable to break in ordinary wear and tear advanced by the learned advocate for the plaintiffs was based on Exs. 23 and 24 in the case. Referring to Ex. 24 the learned advocate pointed out that in the year 1937 in Karachi the defendants had 1967 instruments on hire, and that in that same year subscribers paid a sum of Rupees 782-12-0 for replacements. He then referred to Ex. 23 and reading Ex. 23 with Ex. 24 argued that this amount of Rs. 782-12-0 paid for replacements by subscribers of the defendant-company in Karachi in the year 1937 was for replacements which cost not more than Re. 1-8-0 each and hence a sum of Rs. 782-12-0 represented about 500 replacements in the course of a year. If in regard to 1967 instruments, argues the learned advocate, 500 replacements took place in the course of a year, surely the damage which was replaced could not be attributed to anything but ordinary wear and tear and the brittle nature of the parts of instruments made of bakelite. This argument however to my mind is fallacious. There is in the first place no connexion between Exs. 23 and 24: In the second place there is nothing in Ex. 24 or in any other evidence recorded in the case to show for what replacements the sum of Rupees 782-12-0 was paid by subscribers in the year 1937.

There is nothing further to show in respect of how many instruments these replacements were paid for, and lastly there is nothing whatever to show that the sum of Rupees 782-12-0 is made up wholly or largely by replacements costing Re. 1-8-0 each. Exs. 23 and 24 were put in by the witness, Mr. Tancred for entirely different purposes and purposes which were unconnected and any argument therefore based on the combination of these two exhibits is liable to be fallacious. But the argument of the learned advocate for the plaintiffs cuts both ways. It might equally well be argued that the fact that 500 replacements had to be made in regard to the instruments in use in Karachi during the year 1937 is an indication that negligence and carelessness is the order of the day among subscribers of the defendants. But there is further evidence on the record that telephone instruments if used in a normal way cannot be damaged in the way that Exs. 19, 26 and 10 have been damaged by ordinary wear and tear. Ex. 34, Fernandes, is the telephone clerk of the Bombay Steam Navigation Co. Ltd. He has been in charge of the telephone from 1920. He deposes that since 1920 no part of his instrument had been replaced. Ex. 35, Menezes, the Superintendent Accountant of David Sassoon Co. Ltd., states that his office has been a subscriber of the defendant-company since 1904 and that he has been in the office of David Sassoon & Co. in the Accounts Department for 35 years. He states that no part of their telephone instrument has had to be repaired in all these years. Though he is not in charge of the telephone he has stated that as the accountant he would come to know if the office paid anything for breakage or damage to the telephone. Mr. Humphrey, Ex. 31 states:

My company is a subscriber of the defendants. I came to Karachi in December 1935. We are using both the standard pedestal type and the hand microphone instrument. In our private system we have a hand microphone instrument. In my time we have had no occasion to purchase parts of instruments. We have had no instance of chipping or breaking in the hand microphone instrument.

The evidence of these witnesses is not at all difficult to understand. The use of the telephone to a man who continually uses it becomes second nature just as riding a bicycle or driving a motor becomes by constant practice almost second nature. It can well be understood then that in using a telephone in the normal manner it is impossible to find damage and breakage such as is evident in Exs. 19, 26 and 10. In each case as is clear from the evidence of Mr. Humphrey (Ex. 31), the damage is due to a blow i. e. the damaged part coming into forcible contact with something else. He states:

The damage to the cradle of Ex. 10 may be due to a blow from the hand-set. The damage to the mouthpiece of Ex. 10 is also due to a blow from something. The damage to Exs. 26 and 27 is extensive and must be due to a very heavy blow or impact with some object.

In re-examination he has stated: "Impact or blows cannot occur in normal handling." I am therefore of the opinion that the answer to issue 4 must be that the breakage or damage to the instruments Exs. 19, 26 and 10 is due to carelessness or

negligence in handling the instruments by the plaintiffs or other persons using the instruments with the permission of the plaintiffs.

Issue 5(A).—Were the plaintiffs bound to maintain the instruments at all times in the same condition in which they were given to them? (B) Is a breach of such alleged obligation continuous until repairs or replacements take place?

As to (A) there is no dispute. Even the learned advocate for the plaintiffs has conceded that the plaintiffs were bound to take ordinary care of the instruments given to them for hire and to return them in the condition in which they had been so given at the termination of the agreement subject to ordinary wear and tear. Part (B) of the issue is to my mind unintelligible and in any case needs no answer as it has not been pressed by either side.

Issue 6. — Were the defendants entitled to forthwith replace the parts alleged to be broken or damaged and charge the plaintiffs for the same?

The answer to this issue is simplified to a very large extent by my finding on Issue 4. This point is entirely covered by the conditions of the agreements, Exs. 6 and 7. Conditions 4 and 7 in Ex. 6 are for all practical purposes identical with conditions 5 and 8 in Ex. 7. It will be sufficient therefore to quote conditions 4 and 7 in Ex. 6. Condition 4 reads thus:

> The subscriber shall conform to all the rules and regulations of the company for the time being in force, and shall be responsible for loss of or any damage to the company's apparatus from the time of delivery to him to the time of re-delivery to or removal by the company. In the event of the apparatus being lost or destroyed by fire or otherwise, the subscriber shall pay to the company. . . . The subscriber shall grant to the company access to his premises at all reasonable times for the inspection, repair and removal of the apparatus, and shall surrender the same in good order and condition at the expiration or sooner determination of the hiring contract.

Condition 7 reads thus:

> The subscriber shall pay the prescribed rental for any additional apparatus which may be supplied to him and for the cost of all removals, and for such repairs and replacements to both the original and any additional apparatus as may be rendered necessary by careless use or negligence on the part of himself or his servants.

It seems to me that these two conditions must be read together and if so read their meaning is plain and simple. In respect of instruments hired to a subscriber he is bound to surrender the same at the expiry of his contract in good order and condition. During the continuance of the contract of hire the subscriber is to give to the company access to his premises for inspection, repairs and removal of the apparatus. Not only is the subscriber bound at the termination of his contract to surrender the instruments hired to him in good order and condition but if during the pendency of his contract damage is caused to any instrument and is caused by careless use or negligence the subscriber is liable to pay for replacement of the damaged instrument or part thereof. This is my interpretation of conditions 4 and 7 in Exs. 6, 5 and 8 in Ex. 7; and if this interpretation is correct, then, on my finding on Issue 4 that the damage to Exs. 19, 26 and 10 was the result of carelessness or negligence on the part of the plaintiffs or those to whom they permitted use of the instruments, the defendants were entitled to forthwith replace the parts damaged and to charge the plaintiffs for the same, and this is exactly what was done or sought to be done. But not only is the case of the defendants on this point supported by a reading of the clauses in Exs. 6 and 7 to which I have referred above, but it is argued for the defendants and with considerable force that the replacing of broken parts of instruments during the continuance of a contract of hire is one of the rules and regulations of the company; and under condition 4 in Ex. 6 and condition 5 in Ex. 7 the subscriber has contracted to conform to all the rules and regulations of the company. That it is a rule or regulation of the company to replace immediately broken parts at the cost of the subscriber if the damage is attributable to carelessness or negligence is established by the evidence of some of the witnesses examined for the defendants. (After stating some evidence on this point the judgment proceeded further.) This evidence to my mind establishes that it has been the practice and that it is the rule or regulation of the company to replace forthwith during the continuance of the agreement of hire any part of instruments which have been damaged by carelessness and negligence on the part of the subscriber and the replacement is at the cost of the subscriber. My answer therefore to Issue 6 is that the defendants were entitled forthwith to replace the broken and damaged parts and to charge the plaintiffs for the same.

Issue 7: Were the defendants entitled to call upon the plaintiffs to execute the agreements to pay or to pay Rs. 9.8.0 for replacing the said parts?

As a separate issue this was unnecessary. It is merely a part of the procedure connected with the wording of condition 7. I answer issue 7 in the affirmative.

Issue 8 : Was there on the part of the plaintiffs any breach of the hire agreements as is alleged by the defendants ?

In so far as the plaintiffs refused to allow the defendants to replace the broken parts and in so far as they refused to pay for the replacements the plaintiffs committed a breach of the agreements, Exs. 6 and 7.

Issue 9 : Were and are the defendants entitled to disconnect the plaintiffs ?

My answer to this issue is in the affirmative for, condition 3 of Ex. 6 and condition 4 of Ex. 7 provides :

If the subscription or any other charge or sum payable by the subscriber to the company either under the contract or in respect of any other account, matter or thing relating to or in connexion with the apparatus leased under this contract or its installation or any other telephone service, remains unpaid for 48 hours after becoming due . . . the company shall be entitled at any time thereafter on giving notice to the subscriber to disconnect the subscriber . . . .

Issue 10 : Are the plaintiffs entitled to the reliefs claimed by them, or any of them, and if so, in what terms ?

For the reasons which I have given in this judgment I hold that the plaintiffs are not entitled to any of the reliefs they have claimed.

Issue 11: General, with special reference to costs. The plaintiffs' suit must therefore be dismissed with costs. Out of the amount of Rs. 9-8-0 deposited by the plaintiffs in Court a sum of Rs. 8-8-0 may be paid to the defendants.

D.S./R.K. *Suit dismissed.*

A. I. R. 1939 Sind 251

DAVIS J. C. AND WESTON J.

Premgir Chatagir and another — Defendants — Appellants.

v.

Wawa Community, Karachi and others Plaintiffs — Respondents.

First Appeal No. 38 of 1936, Decided on 23rd November 1938, against judgment and decree passed by Haveliwala, Addl. J. C., Sind, D/- 2nd June 1936.

(a) Decree — Compromise decree by mother on behalf of minors — Minors on attaining majority not suing to set it aside within time cannot challenge its validity and binding force.

Though a decree can be set aside like other contracts on the ground of fraud, yet, in its nature, it differs from a contract between two parties, which has not been impressed with the seal of the Court. So impressed, it becomes a Sovereign order and cannot be ignored. Hence where a compromise decree has been entered into by mother on behalf of minors, and the minors have not sued to set it aside within the time allowed after their minority, they cannot question its validity and binding force: *A I R 1926 Sind 15, Rel. on.* [P 252 C 1, 2]

(b) Master and servant—Managers of temple, by agreement, given discretion to dismiss pujari —They can dismiss pujari without hearing him and without giving reasons provided they act fairly and honestly in exercise of their discretion.

Where by an agreement the managers of a temple have been given power to dismiss pujari of the temple in their discretion, the managers can dispense with the services of the pujari without hearing the pujari and without giving reasons for doing so. The pujari cannot complain that he has not been heard or misconduct has not been proved to the satisfaction of the Court. The managers may have good reason for their action and yet not be able to call witnesses or prove their case. They must however act fairly and honestly and not corruptly in the exercise of their discretion: *(1874) 18 Eq 28; (1845) 6 Q B 682 and A I R 1921 Sind 106, Rel. on.* [P 253 C 2]

Kimatrai Bhojraj — *for Appellants.*

Sunderdas Jethanand—*for Respondents.*

Davis J. C.—This is an appeal from the judgment of Haveliwala A. J. C. sitting in District Court jurisdiction decreeing the plaintiffs' suit for possession of the suit property, a temple and connected buildings, and for an injunction restraining the defendants from interfering with the worship at the temple and from receiving offerings and decreeing mesne profits and directing an account. The plaintiffs claim and, indeed, are duly found to be representatives of the Wawa community at Karachi, sweetmeat sellers, with a right to appoint the worshippers and manage the affairs of a temple known as Sitla Mata in the Garden Quarter at Karachi, and they claim lawfully to have terminated the services of the defendants as pujaris or worshippers. The defendants, on the other hand, claim to be the hereditary worshippers of the temple, that they are not bound by a compromise decree entered into in 1910 by their mother on their behalf when they were minors, and that, in any case, their services were not lawfully terminated by the plaintiffs or duly appointed representatives of the Wawa community.

Only two points were argued before us in appeal, and, indeed, they appear to be the only two arguable points. For instance, it is clear that this is not a suit to which S. 92, Civil P. C., applies. The property is not a public charitable or religious trust,

and it is a suit to eject trespassers, and it was not argued before us that the suit is bad because of the want of sanction ; but it is argued, firstly, that the defendants are not bound by the compromise decree, Ex. 12, and that in defence they can show that they are not bound; and, secondly, even if they are bound, then their services have not been lawfully terminated under the agreement. Now, it appears, there has been for long trouble between the Wawa community and these pujaris at this temple and as long ago as October 1901, Chhatagir, the then pujari, entered into an agreement with the managers of the community whereby he agreed to be of good behaviour and to render himself liable to eviction if he were not. The deed is called a trust deed, but this is clearly a misnomer. Some years after Chhatagir regretted this agreement, and he filed Suit No. 333 of 1910 for a declaration of his proprietary rights or in the alternative for a declaration that he and his chelas were hereditary pujaris of the temple, but during the pendency of the suit he died and it was continued by his widow Umibai, mother of the minors Premgir and Keshowgir, the present defendants.

Now, this compromise, Ex. 22, has been made a decree of the Court and is not a nullity. The appellants did not sue to set it aside within the time allowed after their minority or at all, and we do not think they can question its validity and binding force in their defence in these proceedings. It is argued that as a contract embodied in a decree, like any other contract, it can be set aside on the ground of fraud or other grounds, so in defence its nullity can be pleaded to defeat the plaintiffs' claim, but though a decree can be set aside like other contracts on the ground of fraud, yet, in its nature, it differs from a contract between two parties, which has not been impressed with the seal of the Court. So impressed, it becomes a Sovereign order and cannot be ignored. In a case of this Court, A I R 1926 Sind 15,[1] Kennedy J. C. dealing with an award filed in Court and which had not been set aside in a suit said :

> But assuming the facts to be stated and assuming that by a proper proceeding it would have been possible for Pevandbai to have obtained rescission of the award and a declaration that the award was not binding on any of the parties to the reference, the question still remains whether she is entitled to proceed with her suit on the basis that she need take no notice of the award. We are of the opinion that she cannot. It is no doubt well established that in a case of a conveyance or an instrument no one is bound to sue to rescind a void conveyance or instrument although he may, if so advised, do so. Thus a minor who has alienated his property is not bound to bring an action for the rescission of the deed or conveyance. He may proceed to deal with his property as if the conveyance which is an actual nullity had never existed. But however true this may be, as regards conveyance and other instruments executed by private parties, there is no warrant for the doctrine that an order of a Court having jurisdiction can be treated as a nullity without the formal order of the Court which passed the decree or of some superior Court.

And :

> But where there is a tribunal having jurisdiction and there are parties over whom that jurisdiction is exercised and the Court has issued its decree, it is not open to anybody to treat that decree as a nullity. On the contrary, it must be taken, until it is set aside by due course of law, to be valid being in effect the command of the sovereign power which regulates the relation of the parties to the litigation and to the others.

With respect, we think that that judgment correctly states the law, and we do not think the defendants can plead that the consent decree lawfully entered into on their behalf, and which is still in force, does not bind them. We would add however that we agree with the learned Judge that there was nothing improper in any way with this compromise which was sanctioned by the Court, we have no doubt, in the true interests of the minors, by an order, Ex. 21, dated 26th April 1912, almost a month after the compromise was signed. The appellants must fail on this point. The next point taken is that assuming the appellants are bound by the compromise, the terms of the agreement were not faithfully carried out by the managers of the Wawa community. It is said that before the appellants were dismissed, there should have been an inquiry by impartial men, and in this case there has been no such inquiry, one of the two Judges, Pahlajrai, in particular, having sworn an affidavit in the suit brought in 1929 to the effect that the appellants are guilty of misconduct, and reliance is placed particularly on the case in (1874) 18 Eq 28,[2] but that case does not help the appellants much, for in refusing leave to amend, the Vice-Chancellor said (p. 87):

> It is impossible for this Court, when Parliament has put it so absolutely in the power of the governing body, to interfere. I repeat that according to the construction of the Act of Parliament, my opinion is, that every head master of a public school, that is, of the great public schools — for I believe every one of them is subject to this Act (Public

1. Pevandbai v. Thaoomal Panjoomal, (1926) 13 A I R Sind 15=88 I C 744.

2. Hayman v. Governors of Rugby School, (1874) 18 Eq 28=43 L J Ch 834=30 L T 217 = 22 W R 587.

Schools Act, 1868, 31 and 32 Vict. c. 118) — that every head master is as much at the mercy of the governing body as a coachman is at the mercy of his master, and can be dismissed with or without reason; they are not obliged to give any reason whatever, and the Court must presume that they exercise their discretion properly, unless the contrary can be distinctly shown.

It is true that the position of Dr. Hayman in that case was governed by an Act of 1868 by which he held office at the pleasure of the governing body and was consequently liable to be dismissed without notice and without any reason being assigned, the probable intention of the Legislature being to avoid contests in the Courts, yet it is clear that the power of dismissal without hearing and without reasons given, may in certain cases be exercised, the only condition being that the power must be fairly and honestly exercised. In (1845) 6 Q B 682,[3] in which the governing body, incorporated by Queen Elizabeth, had a power of dismissal for any just cause, it was held by the Queen's Bench and the Court of Exchequer, affirming their judgment, that by the terms of the Charter the governors might in their discretion remove a master without summons or hearing and although no charge against him had been exhibited or made. The judgment of the Court of Queen's Bench was delivered by Lord Denman. Lord Denman there says: (page 695)

'They'—that is the governing body—'are bound to remove any master whom according to their sound discretion they think unfit and improper for the office; and as that discretion may possibly be well exercised for defects of various kinds, not amounting to misconduct, so there may be misconduct incapable of proof by witnesses, but fully known to the governors themselves, on which they could not abstain from exercising their power of removing the master without the abandonment of their duty.' Then he stated that a bye-law had been passed, and they held that to be invalid. Then Lord Denman further says: But they might be reasonably satisfied of the truth of the charges, without possessing any means of proving them by evidence; and even if they had no charge before them, they might still in the exercise of their discretion remove him from reasonable cause. The prosecutor "the prosecutor of course here was the school master"—has denied the charges and the trial, but he does not deny the exercise of discretion, which might have been disproved, in fact, as by showing that malicious feelings against the master were indulged by the governors, or that they had some interest to serve in promoting another to his place. The allegation of removal in the exercise of discretion, is an independent allegation which the prosecutor does not deny, though it is accompanied with reasons which on the trial he disproved. But the powers of the governors so to remove justifies their so doing; and it is not to be restricted by any opinion which we may form of the reasons on which they may have been induced to exert it.

If therefore the agreement of 1910 gives the managers power to dismiss in their discretion, the appellants cannot complain that they have not been heard or misconduct has not been proved to the satisfaction of the Court. Now the terms of the agreement give the managers of the community as represented by Matanomal and Mulchand or those nominated to succeed them after their death wide powers. Paras. 7 and 8 of the agreement are as follows:

7. That if at any time the plaintiffs commit any act of misconduct or mismanagement in the opinion of Matanomal Devanmal, defendant 1, and Mulchand Assoomal, defendant 2, or if at any time the plaintiffs become in the opinion of the aforesaid defendants Matanomal and Mulchand for any reasons whatever, which they will not be bound to disclose, unfit or incapable of acting as managers or servants of the temple, the defendants shall be entitled to turn them out from the temple premises and every portion of the aforesaid plot and dispense with their services and the plaintiffs shall have absolutely no right to oppose and shall have no right to question the validity and propriety of the dismissal.

8. That in the event of death of any or either of the aforesaid defendants, i. e. Matanomal and Mulchand, their place would be taken by any other person of the defendants' community as is from time to time nominated by the defendants' community for the above purpose.

It appears then that Matanomal and Mulchand were given power to dismiss the plaintiffs in their discretion; they need not give reasons for much the same cause that governors of a school need not give reasons when they dismiss the head master; they may have good reason for their action and yet not be able to call witnesses or prove their case; they must act however fairly and honestly and not corruptly. There is in this case no doubt that Messrs. Mulchand and Pahlajrai were duly appointed in place of Messrs Matanomal and Mulchand in a meeting of the community on 7th April 1934. They gave the appellants every opportunity of being heard, though they need not have done so under the terms of the agreement, and the appellants refused, without good cause, to avail themselves of the opportunity and these two gentlemen gave it as their opinion that the appellants were unfit to continue as pujaris of the temple and notice to quit was accordingly given. But, it is said, that Mr. Pahlajrai could not have given an honest or unbiased opinion because he had, in proceedings in Court in a suit in 1929, the predecessor to this suit, which was withdrawn with leave

3. Reg v. Darlington School, (1845) 6 Q B 682 = 14 L J Q B 67.

to bring a fresh suit, sworn an affidavit to the effect that the appellants were guilty of misconduct and that in (1847) 11 Jur 421,[4] the Vice-Chancellor had held that an inquiry was vitiated by the fact that three members of the governing body had already in writing expressed their belief in the guilt of the school master and he left the governing body to reconsider the matter, in the meantime granting an injunction. But the same three trustees with another trustee, who it appears was also adverse to the master, sat again, and again came to the same conclusion, and the learned Judge let the governing body then have its way; and it is clear that if in cases of this kind the expression of a previous unfavourable opinion is to disqualify, it might be difficult for these domestic tribunals to carry out their duties.

It was a mere accident that the suit of 1929 had to be withdrawn, and that this particular defence was open to the appellants. Unless the community had good reason for believing the pujaris guilty of misconduct, they would never have brought the suit in 1929, no affidavits would have been sworn in that suit nor would this suit have been necessary. The decision to dismiss the appellants was only taken as the result of inquiry and opinions formed from that inquiry, and it appears to us to matter not whether those qualified to dismiss did or did not express their opinion before notice was given. It is necessary only that the opinion should be fairly and honestly formed and the power of dismissal fairly and honestly exercised:

All that he can ask the Court in cases of this character is whether the act of the defendant was an honest and bona fide exercise of their powers under cl. 11 of the agreement: 17 S L R 9[5] at page 14.

In our opinion, Messrs Mulchand and Pahlajrai exercised their discretion and their powers fairly and honestly and the services of the appellants were lawfully terminated and they must go. There remains however the question of mesne profits and accounting to the receiver, but the respondents do not wish to press the appellants hardly, and their learned advocate stated in Court that he would agree that the decree be varied so that no order as to mesne profits or accounts would be made, and the order of the learned Judge will be varied accordingly. Otherwise, the order of the trial Court is affirmed, and the appeal dismissed with costs.

D.S./R.K. *Decree varied.*

4. In re Fremington School, (1847) 11 Jur 421.
5. L. Collins v. Charles Booth & Co. Ltd., (1921) 8 A I R Sind 106=80 I C 958=17 S L R 9.

A. I. R. 1939 Sind 254

DAVIS J. C. AND WESTON J.

Shivkumar Radhakishindas—Plaintiff — Appellant.

v.

North British Mercantile Insurance Co. — Defendants — Respondents.

First Appeal No. 36 of 1936, Decided on 23rd December 1938, against judgment and decree of Rupchand Bilaram A. J. C., Sind, *Reported in A I R 1936 Sind 222.*

Insurance—Avoidance of contract—Fraud—What amounts to—Wilful omission of material facts in the insurance proposal and declaration amounts to fraud and company can avoid the contract.

In a proposal for insurance utmost degree of good faith is required. Where the insured in reply to the questions of the insurance company during the course of inquiry into his proposal withholds the facts that his proposal has been accepted by another company on special conditions and that he has got himself insured for Rupees 15,000 in another company, and deliberately gives false replies, such withholding of material information is wilful and in the nature of fraud and the company is entitled to avoid the contract: *(1879) 11 Ch 363, Rel. on.* [P 255 C 2; P 256 C 2]

Dipchand Chandumal — *for Appellant.*

D. M. O'Sullivan — *for Respondents.*

Weston J.—This appeal arises on a suit filed by present appellant to recover a sum of Rs. 5000 with interest being the amount claimed due from the defendant insurance company on a policy of insurance on the life of the deceased father of the plaintiff. The policy was effected in March 1930 and plaintiff's father died on 10th May 1931. A number of defences to the suit were raised. Among these it was urged that the contract between the defendant company and deceased was void because of omissions and mis-statements made by the deceased in his answers to the questions on the proposal form. Some of these mis-statements refer to inquiries as to the medical attendant of the deceased and the times when he received medical attention; others refer to information asked for regarding existing insurance effected by the deceased with other companies, or regarding proposals for life assurance which might have been made by deceased with other companies. It was claimed by the defendant company that although in the proposal form deceased admitted that his life had been proposed

for insurance with two companies, the Bharat Insurance Company and the Brittania Company in the years 1928 and 1929, he gave a negative reply to the question : "Has a proposal on your life ever been dropped or withdrawn or accepted by any office at an extra premium or on special terms? If so, state when, and the name of the office or offices"; while in fact the Bharat Company had accepted his proposal only on special conditions. It is not disputed that the deceased's proposal with the Bharat Company had been accepted by that company only on special conditions and that actually deceased did not pursue the matter further and no policy was taken out by him. It was further pleaded by the defendant company that the deceased had concealed altogether the fact that in February 1929 and in August 1929 he had taken out two assurances on his life each for an amount of Rs. 5000 with the Bombay Life Assurance Co. Ltd. It appears that both the present defendant company and the Bombay Life Assurance Co. Ltd., resisted the claims made in respect of the three insurance policies taken out by deceased and that three suits were filed by the present appellant to recover on these three policies. These three suits were tried together and disposed of by one judgment. The learned Judge decided all three suits against the plaintiff. Appeals against the Bombay Life Assurance Co. Ltd., Suits Nos. 80 and 81 of 1933, have not been filed. Para. 1 of the policy issued by the defendant company states as follows :

> The said proposal and declaration shall be the basis of this contract, it being nevertheless hereby expressly declared that neither error in nor omission from such proposal and declaration not wilful and in the nature of fraud shall render this policy void.

Much of the earlier part of the learned Judge's judgment is taken up with considerations of the general principles of good faith applicable to contracts of insurance and these considerations arose more particularly in the suits against the Bombay Life Assurance Co. Ltd., the policies issued by which did not contain the proviso appearing in the policy issued by the present defendant as set out above. In the second part of his judgment, the learned trial Judge deals more particularly with the present case and remarks that the terms of the policy throw upon the defendant company the burden of proving that the errors and omissions on which their defence is based were both wilful and in the nature of a fraud. He accepts the case of defendant that the failure to disclose that the proposal to the Bharat Company was not accepted by that company except on special terms was a fact material to the proposal made to the present defendant company ; that if the defendant company had been aware that the proposal had been accepted by another company only on special terms, they would have had reason for hesitation or further inquiry before accepting the life of the deceased as a first class life. He also accepts that the failure by the assured to disclose the fact that he had obtained two policies on his life from the Bombay Life Assurance Company is enough to vitiate the policy with the present defendant company, and holds that the failure to disclose these material facts was wilful and in the nature of fraud.

The learned advocate for the defendant company has represented before us that he is prepared to support the findings of the learned trial Judge not only on the points decided in his favour but on points relating to non-disclosure of illness and medical attention which have been decided against him. But as in our opinion the findings set out in the preceding paragraph are clearly correct and are fatal to the suit and to the appeal, it is not necessary for us to consider any further defences set up by defendant to the suit. It is well-settled, and it is not disputed before us, that in proposals for insurance the utmost degree of good faith is required. If the proponent conceals anything which he knows to be material it is a fraud (*see* remarks in *Dalglish* v. *Jarvie*[1] quoted by Jessel M. R. in (1879) 11 Ch D 363 at p. 368.) In this case, (*London Assurance* v. *Mansel*[2]), it was held that the failure by a party to disclose the fact that he had made proposals to several other insurance offices, which proposals had been declined, was a material fact entitling the plaintiff insurance company to withdraw their acceptance of the proposal made by that party.

We think there can be no doubt that the withholding by deceased in the present case of the fact that his proposal to the Bharat Company had been accepted only on special terms was material. It is equally clear that the withholding of the fact that he had recently effected two insurances of his life

1. (1851) 2 Mac & G 231 = 2 H & Tw 437 = 20 L J Ch 475=14 Jur 945.
2. London Assurance v. Mansel, (1879) 11 Ch 363.

with the Bombay Assurance Company was material. Deceased at the time of his proposal to the defendant company was not a young man. He was 43 years of age and until a year or two earlier does not appear to have attempted to insure his life. The Branch Manager of the defendant company has stated in his evidence that if in a short period a person is found to have insured himself heavily, this is a circumstance which puts an insurance company on its guard and causes it to make inquiries as to the health, general habits and antecedents of the proponent. We have no doubt that this is correct. The only question remaining therefore, is whether this withholding of information in respect of these two matters was wilful on the part of the deceased. In respect of the information relating to the Bharat Company it is urged that deceased did disclose that he had made a proposal to this company, that the defendant company could have obtained all the information by inquiry and that the omission of further information was not wilful, particularly as deceased is said to have been illiterate.

Deceased was a merchant of Shikarpur and it is urged on behalf of appellant that life insurance to an amount of Rs. 15,000 was not excessive having regard to his position. We are not prepared to assume that a man of this position was ignorant and unable to understand the meaning of the questions in the proposal form or the meaning of the replies entered, it is said, by the defendant company's canvasser. It is not suggested that this canvasser suppressed information given by deceased. We have no hesitation in holding that the answers represent statements made deliberately by a man who had full knowledge of the questions he was required to answer. When he replied in the negative to the question "Has a proposal on your life ever been dropped or withdrawn or accepted by any office at an extra premium or on special terms" his answer was false, and, in our opinion, it was deliberately false. The suggestion that "accepted" was understood to relate only to policies actually taken out is absurd, and in any case an omission to disclose information, the materiality of which deceased was in doubt, would be "wilful."

In respect of the insurance effected with the Bombay Assurance Company the case is even stronger. No mention of these insurances was made in answer to the question: "Has your life ever in the past been proposed for assurance, either formally or informally, at this or any other office? If so, state where and to which office or offices?" In our opinion, the omission could not have been other than deliberate. We think therefore that the defendant company proved wilful omission of material facts in the proposal and declaration. On the principle set out in (1879) 11 Ch 363[2] at p. 368, such wilful omission must be held to be in the nature of fraud. The defendant company therefore is entitled to avoid the contract. The appeal fails and is dismissed with costs. No order is necessary on the cross-objections filed by the defendant company, by which no relief is sought.

S.G./R.K. *Appeal dismissed.*

A. I. R. 1939 Sind 256

LOBO, J.

Dalmia Cement Ltd.—Plaintiffs.

v.

Naraindas Anandji Bechar—Defendant.

Suit No. 25 of 1939, Decided on 20th February 1939.

(a) Civil P. C. (1908), O. 39, R. 2—Suit for declaration and injunction—Temporary injunction will be granted if prima facie case is made out and balance of convenience is on side of party asking such injunction.

Where in a suit for a declaration and injunction it is alleged that the defendant accompanied by some person armed with lathis is trespassing on the plaintiff's land and staging demonstrations thereon which are calculated to overawe and intimidate the plaintiff and his workmen, temporary injunction under O. 39, R. 2 if prayed for, will be granted if plaintiff has made out a prima facie case and the balance of convenience is on his side. [P 257 C 2; P 258 C 2]

(b) Trade Unions Act (1926), S. 18—Scope.

Section 18 does not afford immunity to a trade union or to an officer thereof for an act of deliberate trespass. [P 258 C 1]

(c) Trespass—Lawful entry—Burden of proof—Employees housed by employer in houses built on his land for convenience of trade are mere licensees—Stranger entering upon such land without employer's permission must prove that his entry was justified.

If employees are housed by the employer for the convenience of his trade in the houses built on his own land, the relation between the employer and employees is not that of landlord and tenant. The employees are mere licensees of the employer, and the entire land would be deemed to be in occupation of the employer. If therefore a stranger enters upon such land without the permission and against the wishes of the employer, the burden of proving that

his entry on such land was lawfully justified, lies on him : *(1861) 128 R R 681; (1818) 106 E R 174 and (1860) 122 R R 746, Rel. on.* [P 258 C 1]

D. N. O'Sullivan—*for Plaintiffs.*

Srikishindas H. Lulla—*for Defendant.*

Order.—This is a suit for a declaration and injunction and along with the plaint the plaintiffs applied under O. 39, R. 2, Civil P. C., for a temporary injunction. On 27th January, I granted the prayer for interim injunction and issued notices to the defendant. It is this matter which is before me for disposal now. A brief statement of the facts will suffice. The plaintiffs are the Dalmia Cement Ltd., a large industrial concern which recently acquired an extensive piece of land near Drigh Road where they set up and completed a cement factory as recently as July 1938. The plaintiffs employ a very large number of mechanics, labourers and workmen, a good proportion of these are provided with quarters near the factory on the plaintiffs' land. In January 1938, it is alleged by the plaintiffs, a Trade Union was formed by the men employed in their factory which was registered under the Trade Unions Act as the 'Cement Factory Workers' Union' and Mr. R. K. Sidhwa, M. L. A., was elected President thereof. The plaintiffs allege that in or about September 1938, the defendant Naraindas Anandji Bechar resenting this establishment of a Labour Union otherwise than under his leadership started a campaign the object of which was to destroy the union under the leadership of Mr. R. M. Sidhwa and establish one under his own leadership. That on 22nd December 1938, owing to the defendant's activities in this regard, the plaintiffs informed the defendant that he was not to enter the plaintiffs' premises. It is alleged that for some time, in fact, till 19th January 1939, the defendant created no trouble, but it is the plaintiffs' case that from 19th January 1939 the defendant from day to day with an ever increasing body of men armed with lathis began to trespass on the plaintiffs' land and stage demonstrations thereon calculated to overawe and intimidate the plaintiffs and their workmen, that for these activities the defendant chose the hour of 7.30 A. M. which was the time when the plaintiffs' workmen came to their work either from outside or from their lodgings in the plaintiffs' property.

No written statement has yet been filed by the defendant but his defence has been set out in great detail in his counter affidavit. It is the defendant's case that he is the President of the Karachi Factories Workers' Union, the President of the Sind Provincial Trade Union Congress, and the representative of labour on the Sind Provincial Legislative Assembly : that it is his business in life to protect the interests of labour, that the labourers employed by the plaintiffs were subjected to considerable hardships and disadvantages, that over 400 of them had joined his Union and that in going to the premises of the plaintiffs he was doing so for an entirely peaceful purpose in the interest of labour and in the interest of the employees of the plaintiffs. The 400 of the labourers who were members of his Union had invited him to their quarters and it was for the purpose of meeting them that he went to the plaintiffs' property. He admits that because obstruction had been caused to him in these peaceful activities he had been obliged to take with him "an increasingly large number of members" of his Union; but there had been no demonstrations, there had been no force or violence or show thereof, he and his men had never gone anywhere near the factory and works, everything was peaceful and legitimate. The plaintiffs' suit was for trespass, there could be no case of trespass when the defendant was there on the invitation of the workmen of the plaintiffs' tenants on the plaintiffs' property; the suit was clearly barred by Sec. 18, Trade Unions Act, 16 of 1926. I have heard the learned advocates for the plaintiffs and the defendant and have come to the conclusion that the rule issued by me must be made absolute. In granting or refusing a temporary injunction in such a suit the Courts generally consider two matters: (1) Has the plaintiff made out a prima facie case? (2) On which side lies the balance of convenience? It does not appear to me in the first instance that S. 18 of Act 16 of 1926 is any bar to the present suit. If the Section is carefully read and if the object of the Legislature is carefully considered it will be clear that whereas ordinarily a person is liable in tort if he deliberately brings about a breach of contract of employment between employer and employee, the Section provides that a registered trade union or an officer or member thereof is protected from a suit or a legal proceeding if he induces some person to break a contract of employment or interferes with the trade, business or employment of some other person, in contemplation or furtherance of a trade dispute, &c. The important and significant words in the

Section are "on the ground only." The Section does not afford immunity to a trade union or to an officer thereof for an act of deliberate trespass.

It is not necessary for me at this stage to go any further into the matter. This is merely an interlocutory application and any detailed discussion of the merits of the suit on law or facts is undesirable. Nor do I think that there is any substance in the contention of the learned advocate for the defendant that the defendant is not a trespasser because he enters the premises of the plaintiffs on the invitation of their tenants. The relations between the plaintiffs and such of their workmen as they have housed on their own property are not those of landlord and tenant at all. These workmen are housed by the plaintiffs for convenience of their trade. These workmen therefore are mere licensees of the plaintiffs and the entire property is in the occupation of the plaintiffs. Reference on this point may be made to the case in (1861) 128 R R 681,[1] and to the cases in (1860) 122 R R 746[2] and (1818) 106 E R 174.[3] The plaintiffs are therefore in possession and the defendant in coming upon their land without their permission and against their orders is a trespasser and the burden lies on him to prove lawful justification for his entry. I am not prepared to accept on the bare statement of the defendant the allegation that he has been coming on the property of the plaintiffs on the invitation of the plaintiffs' workmen. The defendant could have supported this statement with a number of affidavits since he states that no less than 400 or 500 workmen of the plaintiffs are members of his Union. He has not chosen to file the affidavit of a single workman. Nor am I prepared to accept the defendant's assertion that his visits with "an increasingly large number of members" to the plaintiffs' premises are entirely peaceful in their nature. The plaintiffs have with their affidavit filed a number of photographs taken on each morning after 19th January and it is obvious from a look at these photographs that the persons who trespass on the plaintiffs' premises, in some instances near the office and factory of the plaintiffs, are armed with lathis, and their attitude is defiant and menacing. In most of the photographs the defendant figures. In my opinion there can be no doubt that the plaintiffs have made out a prima facie case for a temporary injunction. As regards the balance of convenience there can be no question. The demonstrations have been systematically staged at a time when the plaintiffs' workmen come to their work and the obvious result of this is to terrorize the plaintiffs' workmen and disorganize the plaintiffs' business. It is the plaintiffs alone who suffer. I therefore make the rule absolute and award the plaintiffs the costs of this application.

N.S./R.K. *Rule made absolute.*

1. White v. Bayley (1861) 128 R R 681=10 C B (N S) 227=32 L J C P 253=7 Jur (N S) 948.
2. Smith v. Overseers of St. Michael, Cambridge, (1860) 3 El & El 383 = 30 L J M C 74 = 7 Jur (N S) 24=3 L T (N S) 687=122 R R 746.
3. The King v. Oadby, (1818) 1 B & Ald 475 = 106 E R 175.

A. I. R. 1939 Sind 258

DAVIS J. C. AND WESTON J.

Matiomal Hassanand and others — Appellants.

v.

Tirithmal Kundanmal — Respondent.

Second Appeal No. 43 of 1935, Decided on 13th July 1938, against judgment of Asst. Judge, Sukkur, D/- 22nd June 1935.

(a) Hindu Law — Debts — Father — Debts incurred by father—Subsequent partition between father and sons—Suit after partition for debts against father—On father's death sons made parties as representatives — Property fallen to share of sons is liable for debt.

Debts incurred by a father for family purposes before partition between the father and sons can be enforced against property which falls to the shares of sons on partition even when suit on such debts is brought after the partition has taken place, because the liability rests on the property as such, whether at the time the liability is to be enforced the property should or should not have been divided. When suit on such debts is brought only against father but on his death, the sons are made parties as his legal representatives, the question whether the father died during the pendency of the suit or even after the suit, is not a matter of importance so far as liability of the property that was joint property in the hands of the sons is concerned : *A I R 1931 Sind 84, Foll.; A I R 1935 Pat 275 (F B), Not foll.; A I R 1928 Bom 232 and A I R 1928 Mad 657 (F B), Rel. on.*

[P 259 C 1, 2; P 260 C 1]

(b) Civil P. C. (1908), Ss. 47 and 53—Scope —S. 53 applies to ancestral or joint family property coming to hands of descendant on partition.

There is nothing in S. 47 or S. 53 which limits the scope of the enquiry or the remedy to property devolving by survivorship. S. 53 which is very comprehensive, applies equally to ancestral or joint family property which comes into the possession of the son or other descendant on partition between him and his ancestor. It is therefore deemed to be the property of the judg-

ment-debtor for the purpose and within the meaning of S. 53 : *A I R 1931 Sind 84, Foll.*

[P 260 C 1, 2]

Dipchand Chandumal — *for Appellants.*

Kodumal Lekhraj — *for Respondent.*

Davis J. C.—This is an appeal against a judgment of the Assistant Judge at Sukkur who set aside an order of the Subordinate Judge, Rohri, raising an attachment on certain immovable property in the possession of the sons of one Hassanand who had before partition between himself and his sons incurred liability upon a pro-note. The Subordinate Judge was of the opinion that the property in the possession of the sons could not be made liable for the debt of the father, because though the debt of the father was incurred before partition, the suit upon the pro-note for recovery of the debt was made after partition, though during the pendency of the suit, Hassanand died and his sons were joined as legal representatives. But the learned Appellate Judge came to the conclusion that the order of the Subordinate Judge, which directed the raising of the attachment of the joint family property, divided and in the hands of the sons and attached for the debt of the father, could not stand, because of a judgment of this Court in 25 S L R 374.[1] Now the learned advocate for the appellant first took the ground that the property in the hands of the sons of Hassanand could not be made liable for the debt of Hassanand because this suit was brought against Hassanand after the joint family had divided after Hassanand was separate from his sons, and after the property of Hassanand was separate from the property of his sons. But we think that apart from the ruling of the Bench of this Court above referred to, the better view is that it makes no difference whether joint family property is or is not divided in the matter of the liability of this property for the debts of the joint Hindu family or for the debts of the father, for the liability rests upon the property as such, whether at the time the liability is to be enforced that property should or should not have been divided. This view, we think, has common sense to support it, for if it were held otherwise, the members of a joint Hindu family would be able to evade the liability of the joint Hindu family for the debts incurred by the manager of the joint Hindu family, and sons would escape the pious obligation to pay their father's debts, merely by partition, by the simple device of dividing the property among themselves. We do not think that the fact that the property has been partitioned makes any difference in this matter of the liability of the joint family property in the hands of the sons for the father's debts. In 52 Bom 376[2] Baker J. observed thus :

The authorities which he (Patkar J. sitting with him) has quoted make it clear that the son is liable for the debts of the father, other than those contracted for an illegal or immoral purpose and whether the father is alive or dead, and the fact that the debts were incurred in trade started by the father does not affect this liability : 49 Mad 211.[3] As to the contention raised on behalf of the appellant that though the liability was incurred while the family was joint and though the decree is against the joint family property, it is open to defendant 2, the son, to avoid the liability by a partition made during the progress of a suit, this appears an extraordinary proposition which would render suits against a joint family nugatory in many cases, as it would be open to the members of the family to escape the decree by the device of a partition. The case from Allahabad, A I R 1927 All 714[4] quoted in support of this argument, is a case where the son was not a party to the suit which was against the father alone, and we have direct authority to the contrary in 24 Mad 555,[5] 38 Mad 1120[6] and 47 Mad 621.[7]

Then there is a decision of the Madras High Court, 51 Mad 361[8] at p. 383, in which this question was discussed at great length and the question referred to the Full Bench was put as follows :

Whether a simple creditor of a father in a Hindu joint family is entitled to recover the debt from the share of the sons after a bona fide partition has taken place between the father and the sons ?

And the answer of the majority of the Full Bench to that question was in the affirmative. It is true that in his judgment the learned Appellate Judge has said that

1. Radhakishen Tolaram v. Firm of Jhamandas Radhomal, (1931) 18 A I R Sind 84=134 I C 386=25 S L R 374.

2. Annabhat Shankarbhat v. Shivappa Sundappa, (1928) 15 A I R Bom 232=110 I C 269=52 Bom 376=30 Bom L R 539.

3. Achutaramayya v. Ratanjee Bhootaji, (1926) 13 A I R Mad 323 = 92 I C 977 = 49 Mad 211 = 50 M L J 208.

4. Gaya Parsad v. Murlidhar, (1927) 14 A I R All 714=104 I C 406=50 All 137=25 A L J 829.

5. Ramchandra Padayachi v. Kondayya Chetti, (1901) 24 Mad 555.

6. Kameswaramma v. Venkata Subba Row, (1914) 1 A I R Mad 328 = 24 I C 474 = 38 Mad 1120=27 M L J 112.

7. Jagannatha Rao v. Viswesam, (1924) 11 A I R Mad 682 = 80 I C 228 = 47 Mad 621 = 46 M L J 590.

8. Subramania Ayyar v. Sabapathy Aiyer, (1928) 15 A I R Mad 657 = 110 I C 141 = 51 Mad 361=54 M L J 726 (F B).

the father died before the suit when in fact he died pending the suit, and the sons were joined as his legal representatives, but we think the question as to whether the father died before the suit or during the pendency of the suit or even after suit is not a matter of importance so far as the liability of property, that was the joint family property, in the hands of the sons is concerned. We think therefore that there is ample authority for the judgment of the Bench of this Court in 25 S L R 374,[1] which holds that notwithstanding the partition of joint family property between the father and his sons, the sons' interest continues to be liable for the debts of the father incurred before the partition which debts were neither illegal nor immoral, and we do not think it necessary merely because the judgment of the Patna High Court in 14 Pat 732[9] is to the contrary effect, to refer this question to a Full Bench.

But the second question then raised by Mr. Dipchand for the appellant is that if the property in the hands of the sons be liable for the debts of the father, nevertheless they cannot be made liable in execution proceedings; their liability can only be determined and enforced in a separate suit; and he points out that in the majority of decided cases which refer to the first question with which we have dealt, the suit was brought against the father and sons as such, whereas here the suit was brought against the father, and after his death against the sons, not as sons, but as legal representatives, and his argument is that S. 53, Civil P. C., is to be read with S. 52, Civil P. C., and was not intended to apply to a case such as this where joint family property is in the hands of the sons not as the result of the death of the father but as the result of partition. But this point has been dealt with by the Bench of this Court in 25 S L R 374,[1] referred to above. It is pointed out that S. 53 is as comprehensive as it can be. It does not limit the liability of ancestral property to property devolving by survivorship, and Rupchand A. J. C. who gave judgment was of the opinion that it would apply equally to ancestral or joint family property which came into the possession of the son or other descendant on a partition made between him and his ancestor. It is deemed to be the property of the judgment-debtor for the purpose and within the meaning of S. 53, Civil P. C., and the learned Judge goes on to point out that S. 47 and the corresponding Section of the old Code have always received a liberal construction, and he was of the opinion that there was nothing in S. 47 or S. 53 which limited the scope of the inquiry or the remedy to property devolving by survivorship. No argument and no case has been placed before us which will satisfy us that the judgment of this Court in 25 S L R 374[1] was bad in law or practice. We think therefore that the judgment of the lower Appellate Court was right, and we dismiss this appeal with costs.

N.S./R.K. *Appeal dismissed.*

9. Atul Krishna v. Lala Nandanji, (1935) 22 A I R Pat 275=157 I C 53=14 Pat 732 = 16 P L T 393 (F B).

A. I. R. 1939 Sind 260

DAVIS J. C. AND LOBO J.

Emperor

v.

Nur Muhammad Kalu Khan.

Criminal Ref. No. 387 of 1938, Decided on 13th January 1939, on a reference made by Dist. Magistrate, Nawabshah, D/- 22nd December 1938.

Criminal P. C. (1898), S. 562 (1-A)—Youthful offender aged 17 to 19 committing offences under Ss. 380 and 457, Penal Code—Offender unable to give sureties and possessing no property of his own — Proper course held was to admonish him for offence under S. 380 and to sentence him to imprisonment till rising of Court for offence under S. 457.

A youthful offender aged 17 to 19 committed offences under Ss. 380 and 457, Penal Code. He could not give sureties and possessed no property of his own :

Held that the Magistrate should not have sent this young offender to prison. He should have known the evil effects a short term of imprisonment, or indeed, imprisonment at all, may have upon a young offender. The proper course in this case for the Magistrate, when it was clear that the accused could give no sureties, was to admonish him for the offence under S. 380, I. P. C., under S. 562 (1-A), Criminal P. C., and to sentence him to imprisonment till the rising of the Court for the offence under S. 457, Penal Code. [P 260 C 2; P 261 C 1, 2]

Partabrai D. Punwani, Advocate General — *for the Crown.*

Davis J. C.— This is a reference by the District Magistrate of Nawabshah recommending that a youthful offender aged 17 to 19 should be released on his personal bond. He has been convicted by the Resident Magistrate of Tando Adam of breaking into and stealing from a railway vendor's stall some biscuits and cigarettes and sentenced to two months rigorous imprison-

ment. He could not give sureties and possessed no property of his own and the Resident Magistrate was therefore of the opinion that S. 562, Criminal P. C., would not apply to his case. This case would appear one in which an admonition would have been a suitable punishment, but the Magistrate could not apply sub-s. (1-A) of S. 562, Criminal P. C., because this sub-section is not applicable in the case of an offence under S. 457, I. P. C., housebreaking by night, of which the accused has been convicted, though it would apply to the other offence, one under S. 380, I. P. C., theft in a building. Further, in view of the fact that the accused was a minor and could offer no sureties, it does not seem the Magistrate could have released the accused on his own bond. S. 514-B, Criminal P. C., now provides, in the case of a minor, for a bond to be executed by his sureties, corresponding with Prov. 3 to S. 118 in cases in security proceedings, but S. 514-B, Criminal P. C., does not free the minor of his contractual incapacity which prevents his entry into a valid and binding contract with the Court or any other person.

Another difficulty in the taking of a bond in this case would appear to be that a bond involves some forfeiture of money in case of breach. Sch. 5, Criminal P. C., provides no form of bond in proceedings under S. 562, and Forms 10 and 11 in that Schedule, in the case of security proceedings, which are the forms of bonds for keeping the peace and for good behaviour, each contains a forfeiture clause, but that difficulty could have been met by the insertion of a nominal sum of one rupee. The difficulty as to minority, as the accused is a minor, does not however appear to be so easily overcome. The accused could be sentenced to whipping under S. 3, Whipping Act, but it appears rather hard that a young offender should be whipped because he is too young to enter into a personal bond or too poor to provide sureties. This case appears to illustrate a defect in S. 562, Criminal P. C., which legislation only can remove. We think it a matter of regret that the Resident Magistrate should have sent this young offender to prison. He should know the evil effects a short term of imprisonment, or indeed, imprisonment at all, may have upon a young offender. It places the stigma of prison upon him; it may remove the fear of prison from his mind and by bringing him into contact with old offenders may turn him towards a life of crime. The proper course in this case, we think, for the Magistrate, when it was clear that the accused could give no sureties, was to admonish him for the offence under S. 380, I. P. C., under S. 562 (1-A), Criminal P. C., and to sentence him to imprisonment till the rising of the Court for the offence under S. 457, I. P. C. We therefore reduce the sentence upon the accused to the imprisonment already suffered, and direct him forthwith to be set at liberty. Order accordingly.

D.S./R.K. *Sentence reduced.*

A. I. R. 1939 Sind 261

DAVIS J. C. AND TYABJI J.

Emperor

v.

Alisher Dost Muhammad and others.

Criminal Revn. Appln. No. 77 of 1939, Decided on 5th April 1939, to quash the order, and all proceedings pending before Sub-Divisional Magistrate, Naushahro.

Criminal P. C. (1898), Ss. 110, 112 and 145 —Applicability—Where substance of information relates to disputes relating to land, special provisions of S. 145 apply excluding S. 110.

Where the substance of information received under S. 110 as set out under S. 112 relates to disputes relating to land, special provisions of S. 145 apply excluding the general provisions of S. 110.

[P 262 C 2]

Partabrai D. Punwani, Advocate-General — *for the Crown.*

Kundanmal Dayaram — *for Informant (Khushiram).*

Davis J. C. — This is an application by Government to quash certain proceedings pending in the Court of the Sub-Divisional Magistrate of Naushahro under S. 112, Criminal P. C., against three men, Alisher, son of Dost Muhammad, Abdul Razak, son of Alisher, and Muhammad Nawaz, son of Parial, on the ground that it is clear from the information upon which the Sub-Divisional Magistrate has acted that the real dispute between the parties relates to lands and that S. 110, cls. (a), (b) and (c) under which it appears the Magistrate has taken action are in no way appropriate to the circumstances of this case. In arguments before us the learned Advocate-General first took the point that a mere repetition of the words contained in cls. (a), (b) and (c) of S. 110, Criminal P. C., does not satisfy the requirements of S. 112, Criminal P. C. That Section requires that the substance of the information received shall be set forth. There is a ruling of this Court

to the effect that a mere repetition of the clauses of S. 110 does not satisfy the provisions of S. 112, for, the purpose of S. 112 is to give the accused notice of the case he has to meet, and a mere repetition of some of the clauses of S. 110, Criminal P. C., does not do this. But that ruling does not lay down that the proceedings as a result are nullified. That ruling is to the effect that the omission to state the substance of the information is a grave and substantial irregularity and if it be shown that the accused has thereby been prejudiced the order of the Court should be set aside but that in the absence of such prejudice the proceedings cannot be treated as void ab initio; and the view of the Madras High Court, 43 Mad 450,[1] is much the same.

We ourselves think that the application of the material words in S. 112, Criminal P. C., must depend upon the circumstances of each case. S. 112 requries that the substance of the information received shall be set out. S. 110 empowers certain Magistrates upon the receipt of information to require persons to show cause, and what the substance of the information within the meaning of S. 112, Criminal P. C., may be, depends upon the information received by the Magistrate under S. 110. Both Sections, in fact, must be read together and what is necessary to constitute the substance of information within S. 112 will depend upon what is the information received under S. 110, Criminal P. C. Presumably a Magistrate will not act under S. 110 unless he has information the substance of which he can set out under S. 112, Criminal P. C. But we do not think that the real point in this case is the fact that the Magistrate has merely repeated some of the clauses of Sec. 110, Criminal P. C., because, we think, that the information upon which he has acted and which is upon the record and which is a petition by 9 persons, all Hindus, in the villages Gajra, Bhorti and Tharushah, shows quite clearly that the proper Section, if any, is not S. 110 at all but S. 145, Criminal P. C., and if the learned Magistrate has set out the substance of information on which he acted, as S. 112, Criminal P. C. required, he would have been bound to give first place to that part of the information which relates to a dispute about land, for, it appears to us that the allegations against the three men, upon whom notice has been issued, that they give refuge to thieves and badmash and they encourage thieves in their thefts are merely matters of form put in as an introduction to the real complaint. The real complaint begins :

> They encroach upon the old kabuli and keep possession forcibly over the other lands. They do not allow the owners of the land to come in their lands.

Then the petition proceeds to facts and gives instances of disputes about land, so that where the petition approaches precision and gives facts it relates not to matters to which clauses (a), (b) and (c) of S. 110, Criminal P. C., apply but to matters appropriate to S. 145, Criminal P. C. After 2½ pages of detail relating to disputes over land the petition closes with a repetition of the statement first made that they give refuge to dacoits and thieves. It appears to us clear and we think that it should on reconsideration be clear to the learned Sub-Divisional Magistrate that if he were to set out the substance of information within the meaning of Sec. 112, Criminal P. C., that information would relate to disputes relating to land and to such disputes, S. 145, Criminal P. C., specifically applies. Sub-cl. (10) of S. 145, Criminal P. C., says :

> Nothing in this Section shall be deemed to be in derogation of the powers of the Magistrate to proceed under Section 107.

The Magistrate has not proceeded under Sec. 107, Criminal P. C. We think that where, as in the circumstances of this case, a special provision of the Code, S. 145, is applicable, that special provision excludes the general provision of S. 110, Criminal P. C., as the Section under which action should be taken. In short, read as a whole, the petition, upon which it would appear the learned Sub-Divisional Magistrate has taken action is a petition that relates to disputes about land, and that the charges which fall under clauses (a), (b) and (c) of S. 110, Criminal P. C., are supported in no way by the statement of facts as the real matter in dispute. We think therefore that these proceedings under S. 110, Criminal P. C., are misconceived and have no legal basis and should be quashed. We order accordingly.

S.G./R.K. *Proceedings quashed.*

1. Ranga Reddi v. Emperor, (1920) 7 A I R Mad 534=55 I C 722=21 Cr L J 354 = 38 M L J 97=43 Mad 450.

*** A. I. R. 1939 Sind 263**

DAVIS J. C. AND TYABJI J.

Mt. Aisha Bibi w/o Sardar Muhammad — Defendant — Appellant.

v.

Mt. Begum Bibi w/o Hakim-ul-din and others — Plaintiffs — Respondents.

Second Appeal No. 36 of 1936, Decided on 3rd October 1938, against decision of Second Assistant Judge, Hyderabad, D/- 29th February 1936.

(a) Custom (Punjab)—There is no presumption in favour of parties being governed by customary law—Custom has to be proved.

There is not even in the Punjab any presumption in favour of parties to a suit being governed by customary as against personal law. It must be proved. It may be proved easily in the Punjab by the production in evidence of Government records, the riwaj-i-am, in which the customs of the agriculturists are recorded : *A I R 1919 P C 181, Rel. on.* [P 264 C 1]

(b) Custom (Punjab)—Migration — Agricultural tribe migrating to new colony continues to be governed by custom of place from where it migrated *(Obiter).*

In the Punjab when a family or a tribe of agriculturists migrates from one canal colony to another, it continues to be governed by the provisions of customary law prevailing in the district from which it migrated : *A I R 1935 Lah 298, Rel. on.* [P 264 C 1, 2]

(c) Custom — Manuals of customary law — Value of.

The Manuals of customary law prepared from official sources are of great authority : *A I R 1928 P C 294, Rel. on ; A I R 1916 P C 129 and A I R 1932 Lah 222, Ref.* [P 265 C 1]

(d) Custom (Punjab)—Migration — Jat agriculturists of Gurdaspur District of Punjab migrating to Sind under colonization scheme to cultivate land are governed by Punjab Customary law — Widows and daughters are excluded by sons—Widow loses her right of maintenance by remarriage.

The Jat agriculturists of Gurdaspur District of Punjab who have migrated to Sind nearly forty years ago under a colonization scheme to cultivate land watered by the Jamrao canal have not adopted the system of law practised by the people of Sind but have continued to follow the Punjab customary law according to which widows and daughters are excluded by sons and the right of a widow for maintenance is lost by her remarriage. [P 266 C 1]

*** (e) Mahomedan Law— Succession — Rule of succession is according to personal law except when law is ousted by prevailing custom—Persons claiming to be bound by custom must be shown to have definitely claimed to be outside system of personal law** *(Per Tyabji J.)*

In the case of Mahomedans, the rule of succession must be according to their personal law, that is Mahomedan law, "the system of law which naturally follows from their religion," except in so far as this personal law is modified or is ousted by a valid and actually prevailing custom. Among Mahomedans the system of law which naturally follows from their religion is Mahomedan law, and in every case where a custom at variance with Mahomedan law is alleged to be prevailing, it must be shown that the body of persons claiming to be bound by that custom did definitely claim to be outside the system of law governing their other co-religionists. [P 268 C 1, 2]

*** (f) Custom (Punjab) — Muslim agriculturists desiring to give up customs and to follow Mahomedan law can do so by declaration** *(Per Tyabji J.)*

By the very act of professing the Muslim faith, a person embraces Islam, no matter whether he be a Christian or a Buddhist or of any other religion, and no matter what customs and practices or manner of living he may have been following up to that moment, and immediately becomes subject to Mahomedan law. This is in no way affected by the fact that where it is proved as a matter of fact that a Mahomedan and his ancestors had for a very long period not adopted the practice enjoined by Islam, but had been governed by ancient and not invalid customs, the customs actually practised and followed would be given effect to. Hence the Muslim agriculturists desiring to give up the customs by which they had been bound in the Punjab, and to adopt Mahomedan law can do so by an express declaration : *A I R 1934 Lah 371 (F B), Dissent.* [P 269 C 1, 2; P 270 C 1]

Syed M. Aslam — *for Appellant.*

A. P. Fonseca — *for Respondents.*

Davis J. C. — This is an appeal against the judgment of the Second Assistant Judge at Hyderabad, dated 29th February 1936, who set aside a judgment of the Subordinate Judge of Mirpurkhas dismissing the plaintiffs' suit on the ground that they were women members of a Punjabi agricultural family governed by the customary law of the Punjab in the matter of succession and were thus excluded from inheritance. The plaintiffs are the widows and two daughters of one Hakim-ul-din. Since the death of Hakim-ul-din the widow, who is plaintiff 1, has been twice married, her two daughters, plaintiffs 2 and 3, are aged 21 and 19 respectively. The defendants are the widow and the infant daughter of Sardar Muhammad, the son of this Hakim-ul-din. The Subordinate Judge dismissed the plaintiffs' suit because he was of the opinion that they were governed by the customary law of succession of the Punjab according to which the widow and daughters were excluded in favour of the son and that the widow had no right of maintenance if she re-married as this widow had done. The Assistant Judge in appeal, however, was of the opinion that it was not proved that the parties were governed by the Punjab customary law or that the Punjab customary law excluded women from succession and he awarded the plaintiffs respectively the shares to which they

would be entitled under their own personal law as Sunni Mahomedans and decreed partition and possession as they prayed.

Now the questions for our decision are whether the parties are governed by the Punjab customary law and whether this law excludes them from succession. My answer to these questions is in the affirmative. The parties live at present in Sind. There is not even in the Punjab any presumption in favour of parties to a suit being governed by customary as against personal law. It must be proved. It may be proved easily in the Punjab by the production in evidence of Government records, the riwaj-i-am, in which the customs of the agriculturists are recorded. In 12 S L R 104,[1] the Privy Council laid it down that neither S. 26 of the Bombay Regulation, 4 of 1827, nor S. 5, Punjab Laws Act, raises any presumption in favour of any custom as against the general or personal law. It is only when custom is established that it is to be the rule of law. It was also laid down in the same case that any special usage modifying the ordinary law of succession should be ancient and invariable and should be so established by clear and unambiguous evidence, and that the best evidence of custom is found in connexion with the division of land; and the revenue records are therefore of considerable value.

Now it appears to me clearly proved that the parties to this case are agriculturists governed by the customary law of their community which excludes daughters and the mother in favour of the son. The parties are Jats from the Gurdaspur district of the Punjab and they came to Sind under a colonization scheme to cultivate land watered by the Jamrao canal nearly forty years ago. They came as members of the agricultural classes of the Punjab; it is clear, they came as agriculturists bringing their cattle and their implements and their womenfolk to live in Sind the same life as they lived in the Punjab. They passed over what was merely an artificial boundary; they tilled almost the same soil and watered their lands in all probability from the same river and lived the same lives under the authority of their village officers, the lambardars, as they would have done in the Punjab. Had they moved from one canal colony in the Punjab to another canal colony no question would really arise as to the binding force of their customary law: A I R 1935 Lah 298.[2] It is unreasonable to suggest that they did not bring with them, when they came to Sind, their customary laws including the customary law of succession and that the customary law would not stand the strain of this short migration.

In 4 Bom L R 365[3] the Privy Council pointed out that the tenacity of customs regulating succession, even under the strain of migration, is repeatedly recognized by law. That the Punjabis bring with them, when they come to Sind, their customary law has already been recognized by this Court in A I R 1924 Sind 17.[4] That the parties to this suit are governed by customary law and that this law excludes females with rare exceptions in the presence of males is, I think, clearly proved from the evidence on record. The plaintiff herself admits that if she was in the Punjab, the daughters would be excluded by the son. She says (Ex. 30):

> My father is dead. He died about 20 years back. He left some land in the Punjab. He left one square. He left two sons and three daughters. We did not get a share. If we had filed a suit we would have got it. In the Punjab the daughter is excluded by the son but not in Sind.

It is clear then that the plaintiff herself admits a customary law in the Punjab that would exclude daughters from succession in the presence of a son, but she distinguishes between succession in Sind and succession in the Punjab. She seeks in effect to derogate from the customary law in favour of a special custom but this like a general custom must be proved to be invariable, ancient and well established. In short, if it is to be proved that an old custom has fallen in desuetude and been replaced by a new custom, the new custom must be proved by evidence of conduct over a long period of years. I am not now considering the question of the special and particular force which may, under the shariat, attach to a formal declaration, for it is not suggested that Sardar Muhammad sought to disavow the customary laws by any such declaration. This particular aspect of the question was not considered by the learned Judges in 15 Lah 425,[5] when Tekchand J. in that

1. Abdul Hussein Khan v. Mt. Bibi Sona Dero, (1917) 4 A I R P C 181=43 I C 306 = 45 I A 10=45 Cal 450=12 S L R 104 (P C).

2. Sardar Muhammad v. Satyapal Singh, (1935) 22 A I R Lah 298.

3. Parbati Kumari Debi v. Jagadis Chunder, (1902) 29 Cal 433=6 C W N 490=8 Sar 205= 4 Bom L R 365 (P C).

4. Santsing v. Raribai, (1924) 11 A I R Sind 17= 76 I C 408=17 S L R 206.

5. Mt. Sardar Bibi v. Haq Nawaz Khan, (1934) 21 A I R Lah 371=149 I C 575=15 Lah 425 =35 P L R 760 (F B).

case said: "It is not open to a man at his pleasure to change the rule of succession to property by a mere declaration."

Now the parties have not produced the riwaj-i-am which set out the custom by which they were governed in the Punjab. It would greatly have facilitated the proof of their case if they had done so, but, it is not in the circumstances reasonable to expect them to have done so. They live in country districts and the best legal advice is not available to them. The manuals of customary law prepared from official sources are of great authority. In A I R 1928 P C 294,[6] Sir John Wallis delivering the judgment of the Board said (p. 299):

In these circumstances it has been rightly held in the Lahore Court in the case above mentioned, 110 P R 1906,[7] that, where a custom is alleged, a duty is imposed on the Courts to endeavour to ascertain the existence and nature of that custom; and the Local Government has come to their assistance by establishing a riwaj-i-am or record of custom in the different parts of the Punjab, including the North-West Frontier Province which was formerly included in it. It has been held by this Board that the Riwaj-i-am is a public record prepared by a public officer in discharge of his duties and under Government rules; that it is clearly admissible in evidence to prove the facts entered thereon subject to rebuttal; and that the statements therein may be accepted even if unsupported by instances: 44 Cal 749[8] and 6 Lah 502.[9] Further, manuals of customary law in accordance with riwaj-i-am have been issued by authority for each district, and in their Lordships' opinion stand on much the same footing as the riwaj-i-am itself as evidence of custom. In these circumstances their Lordships are of opinion, that, even though there be no evidence of instances, still, if the custom spoken to by the party's witnesses is in accordance with the custom applicable to his community according to the manual of the customary law of the district, there is sufficient prima facie evidence of the existence of the custom, subject, of course, to rebuttal, and that it ought not to be held insufficient merely for want of instances.

Reference may also be made to 44 Cal 749[8] and 13 Lah 410.[10] But though we have in this case no riwaj-i-am, reference may be made to Rattigan's Digest of Customary Law and to the evidence of persons who can speak with authority as to the customs of their people, and whose evidence appears to be disinterested. (After stating certain evidence the judgment proceeded further.) Upon this evidence, I think the proper conclusion that is to be drawn is that these Punjabi settlers in Sind settled in Sind for less than 40 years maintaining their connexion with their homeland, even in some cases their own speech, are governed by their customary laws and these may be taken as set out in Rattigan's Digest of Customary Law referred by the Privy Council with approval in 44 I A 89[8] at p. 96, and other cases. In this case paras. 6, 16, 21, 22, 23, 24 and 32 may be considered. Under para. 6 sons are first entitled to the inheritance and exclude daughters. Under para. 16 a widow in the presence of a son is entitled to maintenance; under para. 21 it is not dependent upon her residence with her husband's family, but she loses the right of maintenance on her re-marriage: she also loses her life interest in her husband's estate though not future rights of maintenance: paras. 22 and 32. Under para. 23 daughters are excluded by sons or by near male collaterals of the father but a daughter may exclude male collaterals if she marries a near male collateral descended from the same common ancestor as her father, and this explains the evidence of Begum Bibi, Ex. 30, the plaintiff herself, when she says that she can only give three cases of daughters taking a share in their father's estates in the presence of a son, for, in the first case, that of Sardar Bibi there was no such son; in the second case, Emna Bibi was married to a cousin, and about the third case, Daroo's daughter, no details are known.

We think therefore that we have here not a case, as the learned Appellate Judge says, where it must be shown that there was no single instance when women did lose the inheritance but a case where on the admission of the plaintiff herself and on the evidence of those in authority able to speak the parties to this case in the Punjab would be governed by the customary law, whereby sons exclude daughters and the mother. The inference is irresistible that this law of inheritance was brought from the Punjab to Sind by the colonists and that, if the plaintiff is to succeed, she must show by reason of the fact that the burden is shifted by the evidence of the defendants and indeed by her own evidence that her family is not governed by the customary law of the Punjab but by a spe-

6. Mt. Vishno Ditti v. Mt. Rameshri, (1928) 15 A I R P C 294=113 I C 1=55 I A 407=10 Lah 86 (P C).
7. Daya Ram v. Sohel Singh, (1906) 110 P R 1906=31 P L R 1907=59 P W R 1907 (F B).
8. Beg v. Allah Ditta, (1916) 3 A I R P C 129=38 I C 354 = 44 I A 89=44 Cal 749=45 P R 1917 (P C).
9. Ahmad Khan v. Mt. Channi Bibi, (1925) 12 A I R P C 267 = 91 I C 455 = 52 I A 379=6 Lah 502 (P C).
10. Fazl-i-Hussain v. Tafazal Hussain, (1932) 19 A I R Lah 222=136 I C 545 = 13 Lah 410=33 P L R 105.

cial custom or that the existing law has fallen into desuetude in his family in Sind. This, I think, it is clear, she fails to do. The land records relating to this very land are against her, for, when reference was made to these in this Court, it was found that the land was in the name of Sardar Muhammad, Hakim-ul-din's son. This record is important. Sardar Muhammad died some 10 or 12 years after Hakim-ul-din, his father, but the plaintiff made no claim to the land in his son's lifetime.

Looking then at the evidence of the plaintiff in this light, it is impossible to say that she can show that the customary law of the Punjab in the matter of succession had been changed to the Sunni Mahomedan law in the case of her own family. (After stating certain evidence the judgment proceeded further.) It appears to me that it is clearly proved by the evidence that the parties being Punjabi agriculturists are governed by the customary law of the Punjab to an extent, at least, that is sufficient for the decision of this suit and must lead to its dismissal, that is to say, it is proved that Sardar Muhammad excludes from inheritance in his father's agricultural land both his sisters and that his mother forfeited her right of maintenance by her remarriage. The plaintiffs claim through Hakim-ul-din as widow and daughters but if they had based their case on their relationship to Sardar Muhammad, the last male holder, that of mother and sisters their case is no better : plaintiffs 2 and 3 are excluded as sisters ; they will be excluded by the rule in para. 24 of Rattigan's Digest, by the widow's life interest (para. 11 ibid), and by the daughter (para. 23 ibid). Under para. 22 plaintiff 1 could not succeed to a life interest because she has remarried and Sardar Muhammad has left a widow. But we should limit our finding only to her case in the plaint, and that is the case of the widow and unmarried daughters seeking to succeed to the lands of the husband and father Hakim-ul-din according to Sunni Mahomedan law, and I think that in the presence of the son, Sardar Muhammad, the widow and daughters should be excluded by the ancient and invariable custom of the Punjab whereby the parties to the suit are governed and that the widow is entitled to a life estate to their exclusion.

I should perhaps remark that the advocate for defendant 2 stated that after full consideration he has associated himself with the arguments of the advocate for defendant 1 and supported his contentions, for, it is in the interests of the infant daughter that he should do so. As to what will happen on Aisha Bibi's death or remarriage, I am not now concerned to enquire or decide. The judgment of the trial Court should, in my opinion, be restored, and the appeal allowed with costs throughout accordingly. Order accordingly.

Tyabji J.—This is an appeal against the judgment and decree passed by the Second Assistant Judge of Hyderabad, reversing the judgment and decree passed by the Sub-Judge of Mirpurkhas who had dismissed the suit filed by the plaintiffs, and decreeing in appeal the plaintiff's suit for partition of certain agricultural lands, in Deh No. 269, Taluka Jamesabad, on the basis that the plaintiffs under Mahomedan law were entitled to the shares claimed by them in the lands.

The parties are Punjabi agriculturists, being members of a colony of Jats, who came from Gurdaspur District to Sind about 40 years ago. They claim through one Hakim-ul-din who died about 1918. He left him surviving his widow plaintiff 1, Mt. Begum Bibi and his daughters, plaintiffs 2 and 3, Mt. Hakima Bibi and Mt. Talia Bibi, and a son Sardar Muhammad. On the death of Hakim-ul-din, mutation of the lands was effected in favour of the only son Sardar Muhammad, who remained in possession until his death in 1934. Sardar Muhammad left him surviving a widow Mt. Aisha Bibi, defendant 1, and a minor daughter Mt. Ahmed Bibi, defendant 2. Shortly after the death of Sardar Muhammad, the plaintiffs filed this suit for partition and separate possession of their shares in the land. The plaintiffs claimed that on the death of Hakim-ul-din, they became entitled under Mahomedan law, to thier respective shares as the widow and daughters of Hakim-ul-din, along with the son Sardar Muhammad, and that on Sardar Muhammad's death plaintiff 1 again further became entitled to a mother's share out of the property left by Sardar Muhammad. In this way the plaintiffs together will be entitled to very nearly two-thirds of the property, and the defendants to about a third.

As against this it is contended on behalf of the defendants that the parties are governed in matters of succession, not by the Mahomedan law, but by the customary law; it is claimed that under the general custom which prevails among Punjabi agriculturists, and is also followed by the Jats

of Gurdaspur District, the entire land on the death of Hakim-ul-din passed by succession to his only male child Sardar Muhammad to the exclusion of the daughters (plaintiffs 2 and 3) and the widow (plaintiff 1), that in any case plaintiff 1 who had admittedly re-married after the death of Hakim-ul-din, forfeited on that account any claim she might otherwise have in the property, and that on the death of Sardar Muhammad, his widow, defendant 1, became entitled to a life estate in the entire land to the exclusion of the mother (plaintiff 1) and the sisters (plaintiffs 2 and 3) of Sardar Muhammad. It has been admitted before us, although it was not so admitted at the trial, that the law applicable, to the parties as Jats of the Gurdaspur District before they came to Sind was this customary law and not Mahomedan law. The defendants claim that all these Punjabi agriculturists have brought their customary law with them and that they continue to be governed by that law, whereas the plaintiffs claim that on leaving the Punjab and settling down upon the soil of Sind, they left their customs behind, that they do not continue to be still bound by those customs, which have not in fact been followed in practice, and that the law applicable to them is their personal law, namely Mahomedan law.

The main issue in the case therefore was whether or not the parties were governed by customary law. A large number of witnesses were examined by both parties, and the Sub-Judge came to the conclusion that it had been established that the parties were governed by their customary law, and that by reason of the customs applicable, the plaintiffs were wholly excluded from any share in the property. He therefore dismissed their suit. He believed the oral evidence in the case regarding the prevalence of the custom among the Punjabi Jats of Gurdaspur, to which community the parties belonged, both in the Punjab as well as in Sind and he also relied upon judicial decisions of the Punjab Courts and such authorities as Rattigan's Digest of Customary Law for arriving at his conclusions. The lower Appellate Court came to a contrary conclusion. It did not regard either the decisions cited or the authority of a work like Rattigan's Digest as sufficient to prove the existence of the customs alleged in the suit even in the Punjab, and on the view which he took of the oral evidence on the record, he concluded that no such customs as alleged had been proved to prevail either in the Punjab or among those Punjabi colonists in Sind.

In dealing with this question in this manner the learned Assistant Judge has clearly been in error and this error has entirely vitiated his conclusions. There cannot today be any question regarding the fact that so far as the agricultural communities of the Punjab are concerned, "custom is the first rule of decision in all questions regarding succession, special property of females . . . . &c." (*cf.* Rattigan). Apart from the very large number of judicial decisions of the Punjab Courts on the point, and the ruling of this Court in A I R 1924 Sind 17,[4] it is only necessary to refer to such cases as 44 I A 89[8] and A I R 1928 P C 294[6] to show that it is impossible to disregard the prevalence of custom among Punjabi agriculturists. It is therefore not at all necessary to insist upon a great deal of fresh evidence to prove the existence of each of such customs in detail, as if they were being alleged for the first time. Besides this, there is abundant evidence including that of the plaintiff herself to prove that the parties and their relations in the Punjab were governed by custom in the Punjab. Once this has been established, it becomes very much easier for the defendants to prove that they did not give up but retained their particular customs, and continued to follow them and to regard them as being of binding force even after thay settled down in Sind.

Starting therefore with the established fact that the Jat agriculturists of Gurdaspur were governed by customary law before they left the Punjab, there is a very strong presumption that they carried their customs with them when they crossed the boundaries of the Punjab and settled in Sind, especially when they did so, not as stray individuals, but, as was admittedly the case here, in groups and colonies of considerable numbers, and though they belonged to different tribes and came from different parts of the Punjab, a large body of their customs was common to them all as Punjabi agriculturists. This presumption is discussed in the Privy Council case in 4 Bom L R 365.[3] In A I R 1924 Sind 17[4] it was held that the Sikh Jats on migration to Sind carried with them their personal law as to custom prevailing in the Punjab, and it has been held in numerous cases in the Punjab that when a family or a tribe of agriculturists migrates from one

canal colony to another it continues to be governed by the provisions of customary law prevailing in the district from which it migrated: *cf.* A I R 1935 Lah 298[2] at page 300 and A I R 1935 Lah 370[11] at p. 374.

It is true that apart from and in addition to the fact that these Jats from Gurdaspur were governed by custom while in the Punjab, and in addition to the presumption that they retained their customs as agriculturists when after migration they continued their occupation as agriculturists when they settled in Sind, sufficient evidence was necessary to establish the fact that at the time of the deaths of Hakim-ul-din and Sardar Muhammad the customs alleged were prevailing in the community to which they belonged, and that they regarded themselves as bound by these customs, before the defendants could succeed on this issue. In the case of Mahomedans the rule of succession must be according to their personal law, that is Mahomedan law, "the system of law which naturally follows from their religion," to use the words of Lord Haldane in 43 I A 35,[12] except in so far as this personal law is modified or is ousted by a valid and actually prevailing custom. As stated in Abdur Rahim's Mahomedan Jurisprudence (p. 137), a custom "has authority only so long as it prevails." What it is necessary to prove in cases where Mahomedans admittedly governed by a custom in one locality move to another locality, when the question arises whether the custom still continues to have binding authority over them, has been dealt with by the Privy Council in 43 I A 35.[12] In this case, the Board had to consider the question of succession on the death of a Memon from Cutch who with his family had settled in Mombasa for a long time. There were at least a hundred Memon families in Mombasa, and the Memons in Cutch, the country of their origin, as is well-known, had never in their history been governed by the Mahomedan law of succession and followed in practice the Hindu law. Hamilton C. J., the trial Judge, had taken the view that under the circumstances the burden lay on the plaintiff Halimabai who claimed a share under Mahomedan law to prove that the custom governing Cutchi Memons in Cutch had been superseded by another long-standing custom in favour of Mahomedan law. Reliance has been placed upon certain cases dealing with the presumption in similar cases of Hindus. Lord Haldane delivering judgment pointed out the difference between the cases of Hindus and Mahomedans. He said:

> Where a Hindu family migrate from one part of India to another, prima facie, they carry with them their personal law, and, if they are alleged to have become subject to a new local custom, this new custom must be affirmatively proved to have been adopted, but when such a family emigrate to another country, and, being themselves Mahomedans, settle among Mahomedans, the presumption that they have accepted the law of people whom they have joined seems to their Lordships to be one that should be much more readily made. All that has to be shown is that they have so acted as to raise the inference that they have cut themselves off from their old environments.

And "the question is simply one of the proper inference to be drawn from the circumstances." And

> there seems to be no sufficient reason in what has been brought before the Courts in this case for regarding the Memons who have emigrated from Cutch to Mombasa as other than a number of individual Mahomedans who have settled down among a people who are of their own religion. It does not appear that these Memons have ever as a body claimed to be outside the system of law which naturally follows from that religion and so prevails among the Mahomedans at Mombasa.

It is true that the presumption in favour of the continued prevalence of a custom peculiar to agriculturists may be said to be much stronger in the case of agriculturists migrating from one province to another, than a similar presumption in the case of non-agriculturist Memons leaving India and settling in Africa, but one must remember the difference that exists between the cases of Hindus and Mahomedans, and the fact that among Mahomedans the system of law which naturally follows from their religion is Mahomedan law, and that in every case where a custom at variance with Mahomedan law is alleged to be prevailing, it must be shown that the body of persons claiming to be bound by that custom did definitely claim to be outside the system of law governing their other co-religionists. The learned counsel for the appellants cited to us the case in 15 Lah 425[5] a Full Bench decision of the Lahore High Court, and argued that even if Hakim-ul-din or Sardar Muhammad or their family had desired to give up the customs by which they had been bound in the Punjab, and to adopt Mahomedan law, they could not have done so, even by an express declaration, and that unless and until it could be proved that the

11. Mt. Zenab Bibi v. Nasur Ullah Khan, (1935) 22 A I R Lah 370.
12. Abdurrahim v. Halimabai, (1915) 2 A I R P C 86=32 I C 413=43 I A 35=30 M L J 227 (P C).

customs by which they had been bound had lost their legal force by reason of having been abandoned and having fallen into desuetude for a long period, their existence and validity could not be challenged.

Now in the present case before us there is no allegation of any attempt by declaration or otherwise having been made by any one of these Punjabi agriculturists we are concerned with to free himself from the customs and adopt Mahomedan law, nor is there any such evidence on the record from which we could conclude that the customs had even for a short time been abandoned, and the question of the application of this decision does not therefore really arise. The decision however does appear to me to be extremely difficult to reconcile, with some of the most fundamental principles of Mahomedan law, which do not appear to have been at all considered by the learned Judges who decided the case. They appear to have applied certain principles to the case of Mahomedans, which may be applicable to Hindus under somewhat similar circumstances, but which, as pointed out by Lord Haldane in the case above referred to, would not be applicable to Mahomedans at all. They appear to have entirely ignored the fundamental fact that by the very act of professing the Muslim faith, a person embraces Islam, no matter whether he be a Christian or a Buddhist or of any other religion, and no matter what customs and practices or manner of living he may have been following up to that moment, and immediately becomes subject to Mahomedan law. This is in no way affected by the fact that where it is proved as a matter of fact that a Mahomedan and his ancestors had for a very long period not adopted the practices enjoined by Islam, but had been governed by ancient and not invalid customs, the customs actually practised and followed would be given effect to. The result of accepting this Lahore decision as correct would be that while, e. g., a Burmese (*cf.* the case in 21 I A 56[13]) on embracing the Mahomedan faith becomes subject to Mahomedan law, the agriculturist Mahomedans of the Punjab are to be regarded as having been deprived, by their past subjection of custom, of the power to avail themselves whenever they so choose, of their true personal law, of that system of law which they may think to be the most perfect and which not only followed from their religion, but may be regarded as enjoined upon them by their very faith.

It also appears that 43 I A 35[12] was not referred to at all, and that the learned counsel who argued the case had conceded, it does not appear on what grounds, that it was not open to an individual whose family or tribe had for generations followed custom, suddenly to give up that custom and adopt Mahomedan law by merely making a declaration to that effect. The declarations actually made by the parties in that case were inquired into by the learned Judges and found to lack that mature deliberation and genuine determination which if present would have induced the learned Judges to accept them. It was from a very different point of view that their Lordships of the Privy Council considered a question of conversion in 21 I A 56,[13] in which they deprecated an inquiry into the state of mind of the alleged convert, and held that no Court could test or gauge the sincerity of religious belief, and that if the alien in belief embraced the Mahomedan faith, profession, with or without conversion, was necessary and sufficient, and Mr. Ameer Ali in his Mahomedan Law, Vol. 2, page 36, states :

> The Mahomedan law applies to all Mussalmans whether they are so by birth or by conversion. . . Any person who professes the religion of Islam, in other words, accepts the unity of God and the prophetic character of Muhammad, is a Moslem and is subject to the Mussalman law. So long as the individual pronounces the Kalma of Tauhid, the credo of Islam, it is not necessary for him or her to observe any of the rites and ceremonies, or to believe in particular doctrines which imply Iman or belief. This distinction has often been lost sight of by the British Indian Courts which have, in dealing with Mahomedan cases, assumed the position and function of Courts of conscience.

Every branch of Mahomedan law testifies to the fact that a Muslim may, except in the cases of a few well-defined prohibitions, affect his entire rights by making declarations, a power given equally to men as well as to women. This is an outstanding feature of Muslim jurisprudence. Any decision which would take away this power from these agriculturists professing the Muslim faith, and hold them bound even against their desire by customs which, whatever their value from other points of view, relegate women to an inferior position in law, strikes in my opinion at the very roots of Muslim jurisprudence. It was this inferior legal status of women against which the Prophet laboured and which the

13. Abdul Razak v. Aga Mahomed Jaffer Bindaneed, (1894) 21 Cal 666=21 I A 56=6 Sar 389 (P C).

Quoran abolished. I am unable therefore as at present advised to accept this decision on this point as correct or to rely upon it for the purposes of this case.

Bearing in mind therefore the presumption referred to above, and following the course which is indicated by the case in 43 I A 35,[12] we have to examine the evidence in the case to find whether these Punjabi agriculturists after migrating from the Punjab and settling down in Sind had cut themselves off from their old environments and practices and settled down as a number of individual Mahomedans among a people of their own religion and adopted the law enjoined by their religion, or whether they as a body claimed to be and continued to remain outside the system of that law practised by the people of Sind amongst whom they settled. The evidence in the case has abundantly and unmistakably proved the latter to be the case. (After examining evidence the judgment proceeded further.) That these colonists did not merge themselves among the local people among whom they settled is already sufficiently indicated by this evidence, and there is a great quantity of such evidence which we are satisfied is in the main true. A great deal of the evidence naturally deals with instances which go to show that customary law and not Mahomedan law was followed. A sufficient number of such instances have been proved to show unmistakably the prevalence of the alleged customs. As stated before, there is not a single clearly established instance to the contrary effect. The learned Assistant Judge cited two instances which he thought proved that the custom had not been followed but a reference to the evidence shows that he either did not correctly follow what the rule of custom was, or overlooked the evidence on the point. He said :

It must also be shown that there were no instances in which women did not take the inheritance. In the present case we have got the admission of the defendant's witnesses that K. B. Illahibuksh's daughters got the share and also Hamidali's sisters were shown in the mutation register as the sharers of the property.

Now, K. B. Illahibaksh did not leave any son and his daughters were married to his own nephews and under such circumstances even according to the customary law the daughters would be given their shares. Similarly, Hamidali's sisters got their shares because they were married in the family. In view of what has been stated above, I agree with the learned Judicial Commissioner that it has been clearly proved that the parties are governed by their customary law, that the respondents were excluded from any share in the lands left by Hakim-ul-din and Sardar Muhammad, that the decree of the Court of the Subordinate Judge must be restored and this appeal allowed with costs throughout.

D.S./R.K. *Appeal allowed.*

A. I. R. 1939 Sind 270

DAVIS J. C. AND TYABJI J.

Peoples Bank of Northern India Ltd., (in liquidation) — Appellants.

v.

Nanikram Charatsing and another — Respondents.

Second Appeal No. 41 of 1936, Decided on 14th September 1938, against order of Second Asst. Judge, Hyderabad, D/- 1st April 1936.

(a) Contract Act (1872), S. 128 — Surety — Extent of liability — Surety binding himself to secure attendance of judgment-debtor in Court when ordered by Court — Judgment-debtor attending for some hearings and informed about next hearing date—Judgment-debtor absconding on such date and Court dismissing execution application as infructuous, not being able to deal adequately with it — Surety held liable.

A surety bond provided that the surety shall secure attendance of the judgment-debtor in Court on a particular day and on subsequent days when ordered by the Court. The judgment-debtor appeared on some hearings and was informed about the next hearing date; but he absconded with the result that the Court could not deal adequately with the execution application which was ultimately dismissed and the surety was proceeded against:

Held that the judgment-debtor was ordered to appear within the meaning of the bond and he disobeyed that order. Therefore prima facie the surety was liable : *14 Cal 757, Disting.*

[P 271 C 2]

(b) Civil P. C. (1908), S. 145—Surety can be proceeded against for liability accrued before dismissal of execution application.

There is nothing in S. 145 or any other Section to prevent the judgment-creditor from proceeding against the surety in respect of a liability accrued before an execution application is dismissed and dismissal of the application has no retrospective effect so as to excuse the surety from any liability incurred before the dismissal. [P 272 C 1]

Dingomal Naraingsing — *for Appellants.*

Fatehchand Assudomal — *for Respondents.*

Davis J. C. — This is an appeal against the judgment of the Second Assistant Judge of Hyderabad who confirmed an order of the Subordinate Judge at Hyderabad, dismissing the application of the appellants to

execute against the surety of an absconding judgment-debtor a bond into which this surety had entered. Both the lower Courts were of the opinion that the appellants could not succeed in their application because, firstly, it had not been shown that there was any breach of any condition of the bond, and secondly, the execution application for which the bond was intended to secure the appearance of the judgment-debtor had been dismissed, and, therefore, as the proceedings in which this bond was taken and in which the judgment-debtor had to appear were ended, so was the surety bond and the liability of the surety thereunder. The lower Courts relied on a case in 14 Cal 757,[1] which, however, was under the old Act, and otherwise can clearly be distinguished from the case before us, for, there the application to proceed against the surety was made after the execution application was dismissed. Here the application was made before.

Now we think the appellants in this case should succeed. So far as the bond is concerned, it is provided that the surety shall secure the attendance of the judgment-debtor on 20th December 1932, and thereafter when ordered by the Court to appear. The judgment-debtor did not appear before the Court so as to enable the Court to deal adequately with the execution application before it because the judgment-debtor absconded. But the fact that the judgment-debtor absconds does not necessarily involve a breach of a condition of the bond that he should appear, if the bond provides he should appear only when ordered by the Court, and if the Court has permitted him to absent himself, and he then absconds, the bond could not be enforced against the surety.

But looking at this case as we see it, it is perfectly clear that when the Court adjourned the case from time to time, it at the same time ordered, by necessary implication, if not expressly, the judgment-debtor to appear. For instance, on 20th December there is an order of the Court that "the judgment-debtor has appeared and has been informed of the next date." That the information to the judgment-debtor as to the next date was by necessary implication an order under the circumstances of this case to appear is clear from the fact that on the next hearing the judgment-debtor did appear even though he was ill and had to come to Court in a gharry. A similar order to the order of 20th December, understood by the judgment-debtor as an order to him to appear, was passed on 4th February, that is to say, the order was for adjournment, and by necessary implication, a clear intimation to him that he should appear on 25th March, the date to which the case was adjourned, and on 25th March the judgment-debtor put in an application through his pleader that he was ill, asked that his attendance might be excused and put in his medical certificate. His application that he might be excused personal attendance was granted but the application itself is an admission, he had been ordered to appear and an order was passed that the hearing was fixed on 1st April 1933, and it was clearly intended by the Court to convey, and it is clear it was so understood by the judgment-debtor's advocate, that the judgment-debtor should appear on 1st April. He did not do so and absconded, and he is now to be permitted, if the judgments of the lower Courts are allowed to stand, to take advantage of the fact that he did not appear through illness and his first default was excused, to justify his second default. So we have the strange argument, which apparently commended itself to the two lower Courts, that, if a judgment-debtor in the first instance disobeys the order to attend the Court, so no order can be given to him personally to attend again, he can thereafter abscond with impunity and take advantage of his own default. We do not think that such an argument can be taken seriously, nor do we think it should have commended itself to the two lower Courts. We think that construing this surety bond reasonably, construing reasonably the orders passed by the Court and the response of the judgment-debtor in the first instance to them, it is clear in this case that he had been within the meaning of the bond ordered to appear and he disobeyed that order. Therefore prima facie the surety is liable under the terms of his bond.

But then another argument was advanced which has commended itself to the lower Courts, and that is, that because the accused absconded and the proceedings against him became infructuous and the execution application was dismissed, so the surety is discharged from this liability under the bond, though the liability was incurred before the execution application was dismissed, and though before that execution application was dismissed, the ap-

1. Lalji Sahoy v. Odoya Sunderi Mitra, (1887) 14 Cal 757.

pellants or judgment-creditors had made an application to the Court dated 5th October to proceed against the surety. The learned Judges have not found, and we think they would have difficulty in finding, a case which would support this order dismissing this execution application against the surety of the judgment-debtor who has absconded and their conclusion that as he has absconded, and the execution application was dismissed on that account, he will free the surety from a liability he had incurred before the order of dismissal of the execution application was wrongly or rightly made. So far as we can see, there is nothing in S. 145, Civil P. C., or any other Section to prevent the judgment-creditor proceeding against a surety in respect of a liability accrued before the execution application was dismissed, as is the case here. There is nothing in that Section to suggest that the dismissal of the execution application has retrospective effect so as to excuse the surety from any liability incurred before the dismissal.

Mr. Dingomal has argued that the surety bond as worded in this case relates not only to this execution application, but to any further execution application that may be made in execution of this decree against the judgment-debtor, and that the surety for instance must be held bound for howsoever long execution proceedings may be taken against this judgment-debtor, for a period of years. We are not at present prepared to accept this proposition in all its amplitudes and it is not at present necessary for us to do so, nor is it necessary for us to give any decision upon this point because this is not the case we have to deal with. We have to deal with this particular application made in this particular proceeding upon the execution application dated 5th October 1933, and to that application and the proceedings based directly upon it we limit this decision. We think therefore that the appeal should be allowed with costs throughout and the case sent back to the Court for the execution application to proceed against the surety according to law.

S.G./R.K. *Appeal allowed.*

A. I. R. 1939 Sind 272

DAVIS J. C. AND TYABJI J.

Dolaram Aratmal — Appellant.

v.

Mulomal Radhakishindas and another — Respondents.

Second Appeal No. 16 of 1937, Decided on 22nd February 1939, against order of First Class Sub-Judge, Sukkur, D/- 5th January 1937.

Limitation Act (1908), Art. 182 (5)—"In accordance with law"—Application dated 1-2-32 though omitting to mention previous application of 5-2-29 and on face of it barred by time, admitted by Court and notices ordered to be issued—Subsequent application of 8-12-32 also omitting reference to application of 5-2-29 but subsequently sought to be amended — Application of 1-2-32 held not in accordance with law—Application of 8-12-32 held time-barred.

It is a matter of policy laid down by the Legislature that application to Court for its assistance must be in time and it does not matter whether that application takes the form of a plaint or an application in execution. [P 273 C 2; P 274 C 1]

Although duty is cast upon the Court under O. 21, R. 17 to see whether the requirements of Rr. 11 to 14 are complied with, if the Court fails to do so, the decree-holder is not protected from the ordinary consequences which follow when his request to the Court for its assistance is barred by time. [P 273 C 2]

An execution application filed on 1-2-32 omitted all reference to a previous application of 5-2-29 and was on the face of it barred by time; but the Court instead of complying with the provisions of O. 21, R. 17, admitted the application and ordered notices to issue and costs to be deposited. In the subsequent application filed on 8-12-32 the decree-holder again omitted to mention the application of 5-2-29 but subsequently applied for amendment of the application :

Held that application dated 8-12-32 was time-barred and there was no substance in allowing the amendment as the application dated 1-2-32 which omitted reference to the application of 5-2-29 and which was therefore out of time was not in accordance with law and therefore it did not give a fresh starting point of limitation. The fact that it was an error to allow the execution application dated 1-2-32 did not make any difference: *A I R 1922 Sind 29, Rel. on; A I R 1926 Cal 1077 and 10 Cal 541, Disting.; A I R 1928 Mad 24, Ref.* [P 274 C 1]

Srikishindas Lulla — *for Appellant.*

Kundanmal Dayaram—*for Respondents.*

Davis J. C.—This is an appeal against a judgment of the First Class Subordinate Judge of Sukkur with appellate powers in which he allowed an appeal against an order of the Joint Subordinate Judge of Shikarpur who allowed execution to proceed upon an execution application dated 8th December 1932 of a decree dated 20th September 1922. The appeal was allowed on the ground that a previous execution application dated 1st February 1932 was

not an execution application made in accordance with law, as it did not mention a yet more previous execution application dated 5th February 1929 which it should have mentioned if the application of 1st February 1932 itself was to be in time. There were in these proceedings five execution applications: the first was of 8th March 1924; the second of 20th March 1925; the third of 5th February 1929; the fourth of 1st February 1932, and the fifth and last is that which is the subject of the appeal and is dated 8th December 1932. Now there can be no doubt that the execution application of 1st February 1932 was not made in accordance with law. It omitted all reference to the previous execution application of 5th February 1929, so that between the application of 20th March 1925 and the application of 1st February 1932 there was a period of more than three years and the application dated 1st February 1932 should have been rejected by the Court under O. 21, R. 17, Civil P. C., as being barred by time. But the Court did not comply with the provisions of O. 21, R. 17 as on the face of it the execution application was time-barred, but ordered notice to issue under O. 21, R. 22 and costs to be deposited. No costs were in fact deposited, so that this execution application was infructuous. In the execution application of 8th December 1932 the decree-holder omitted to mention the execution application of 5th February 1929 and the executing Court allowed the application of 8th December to be amended in exercise of its discretion; but as the learned appellate Judge has pointed out, this amendment would be of no avail if the execution application preceding it, namely that of 1st February 1932, was itself out of time by reason of the fact that it omitted to mention the previous application of 5th February 1929. There was no point therefore in allowing the execution application of 8th December 1932 to be amended when the previous application of 1st February 1932 itself was time-barred.

Now the learned advocate who has appeared for the decree-holder and has argued the case with great diligence and care contends that even if the omission to state in the execution application of 1st February 1932 the previous execution application of 5th February 1929 is a material omission so as to make the execution application in which that omission occurs not 'in accordance with law', yet the case before us can well be distinguished from the case in 15 S L R 156[1] in that, in this case the Court however wrongly accepted the execution application of 1st February 1932, ordered it to be registered and costs to be deposited; and the fact that costs were not deposited did not affect the case; for once the Court ordered the execution application to be registered, it must be deemed that that execution application was in accordance with law. Under O. 21, R. 17 the duty rests upon the Court of seeing that an application in execution is within time. The learned advocate relies strongly upon two cases, wherein the point is stressed that the decree-holder should not suffer for the fault of the Court. In 10 Cal 541[2] the defect was not a material defect at all. It was merely a case where the wrong number of a suit was given; while in the Madras case in 54 M L J 154,[3] the point was again stressed that the party should not be made to suffer by reason of the failure of the Court to check the correctness of the entries in the execution application. But we think that if we listened to this argument *ad misericordiam* in this case, we should just as well listen to it in a case where a plaint on the face of it is time-barred and should not have been accepted by the Court. We do not think that a plaintiff, when at some later stage in his suit the fact that his suit was time-barred was discovered, could be heard to say that he should not suffer because the Court should not have accepted the plaint in the first instance. We do not think that because the duty is cast upon the Court under O. 21, R. 17 to see whether the requirements of Rr. 11 to 14, Civil P. C., are complied with, the decree-holder is therefore protected from the ordinary consequences which follow when his request to the Court for its assistance is barred by time. The matter of time so far as execution application is concerned is dealt with in Art. 182 (5), Sch. 1, Limitation Act, and we think, it matters not whether the Court has before it a plaint or execution application, the burden lies upon the Court under any circumstances to see that its assistance is sought for in time. If it does not do so, then we do not think that either the plaintiff or

1. Sahijram Tahilram v. Tower, (1922) 9 A I R Sind 29=65 I C 14=15 S L R 156.
2. Fuzloor Rahman v. Altaf Hossen, (1884) 10 Cal 541.
3. Maheswaran Nambudripad v. Velappa Menon, (1928) 15 A I R Mad 24=107 I C 303=54 M L J 154.

the decree-holder is freed from the consequences of his delay. It is a matter of policy laid down by the Legislature that applications to the Court for its assistance must be made in time and whether that application takes the form of a plaint or an application in execution, we think it matters not.

We think therefore, there is no real difference between this case and the case in 15 S L R 156[1] by which we are bound. The learned advocate referred us to another case, the case in 53 Cal 664[4] at p. 673, but again in that case the Court had before it an execution application which was not defective in material particulars. In that case Suhrawardy J. said :

On a consideration of the cases to which I have made reference and the other cases which have been cited at the Bar, the conclusion to which I have arrived is that the expression "in accordance with law" in Art. 182 (5) should be taken to mean that the application though defective in some particulars was such upon which execution could be issued.

The case however before us is quite clear. The Court could not order execution to issue upon an application that was on the face of it out of time. The fact that it was an error to allow the execution application to be registered appears to us to make no difference. We think therefore the judgment of the lower Court is right and the appeal is dismissed with costs accordingly.

N.S./R.K. *Appeal dismissed.*

4. Pittambar Jana v. Damodhar Gachait, (1926) 13 A I R Cal 1077=98 I C 166=45 C L J 86 =30 C W N 918=53 Cal 664.

A. I. R. 1939 Sind 274

DAVIS J. C. AND LOBO J.

Jhamatmal Alumal—Applicant

v.

Emperor.

Criminal Revn. Appln. No. 347 of 1938, Decided on 13th January 1939, to revise order of Addl. Sess. Judge, D/. 8th November 1938.

(a) Penal Code (1860), Ss. 182 and 211—Scope of S. 211—Information to police given by accused leading to arrest of third person on murder charge — Third person discharged — Accused alleged to be responsible for proceedings against third person—Accused held guilty under S. 211 and not S. 182.

Section 211 may cover the institution of proceedings through the police as well as by way of complaint to the Magistrate direct. Where a complaint is made both to the police and a Magistrate, the Magistrate's jurisdiction overrides that of the police and the provisions of S. 195 (1) (b), Criminal P. C., cannot be evaded by placing an offence under S. 195 (1) (a): *A I R 1938 Sind 213; A I R 1929 Sind 115 ; A I R 1929 Sind 132 and A I R 1937 Sind 209, Rel. on.* [P 275 C 1]

Where upon the information given to the police by the accused a third person was arrested on a charge of murder and challaned to the Court of a Magistrate by whom he was subsequently discharged and it was the prosecution case that the accused was responsible for the proceedings instituted against the third person :

Held : that the offence committed by the accused was one under S. 211 and not under S. 182. [P 275 C 1]

(b) Penal Code (1860), S. 182—Scope—S. 182 applies to cases of false information given to police during investigation.

If a witness answers questions because he is compelled to answer by reason of the powers of the police, that in itself may well be sufficient to negative the guilty intent or knowledge necessary for a conviction under S. 182. The information is then not so much given as taken. But it cannot be said that S. 182 can never apply to false information given to the police during the course of an investigation : *A I R 1936 Sind 94, Approved ; 31 Mad 501; 6 S L R 143 ; A I R 1925 Rang 364 and 20 W R Cr 66, Ref.* [P 275 C 2; P 276 C 1]

Parmanand Kundanmal—*for Applicant.*

Partabrai D. Punwani, Advocate-General —*for the Crown.*

Davis J. C.—The accused in this case is one Jhamatmal and he has been convicted by the Resident Magistrate of Nawabshah of an offence under S. 182, I. P. C., and sentenced to rigorous imprisonment for four months and a fine of Rs. 200. He appealed and his appeal was summarily dismissed by the Additional Sessions Judge, and he has applied in revision to this Court, and his application has been argued principally on two grounds: (1) that if the accused should have been convicted at all, he should have been convicted of an offence under S. 211, I. P. C., for which the complaint of the Court of the Resident Magistrate of Nawabshah was necessary under S. 195 (1) (b), Criminal P. C., and (2) that an accused cannot be convicted of an offence under S. 182, I. P. C., with respect to a statement made to the police under S. 161, Criminal P. C., during the course of an investigation. The case of the prosecution was that the accused was on terms of illicit intimacy with a woman named Maluki Dahriani who subsequently left him and married one Sono Khan. The accused was on terms of enmity with this Sono Khan in consequence, and taking advantage of the murder of one Seth Assumal falsely implicated Sono Khan in the murder when the police came to the village to investigate the crime. The first information of the murder of Seth Assumal was given to the police at the

police thana by one Shamumal, the partner of Seth Assumal, from whom the police learned of the accused as a person who could give evidence against Sono Khan. And there can be no doubt that it was on information given by the accused that Sono Khan was arrested for the murder of Seth Assumal and challaned to the Court of the Resident Magistrate at Nawabshah by whom he was subsequently discharged. It is clear, therefore, that the Resident Magistrate had actually taken cognizance of the offence in which Sono Khan was challaned so that if any offence falling under S. 195 (1) (b), Criminal P. C., has been committed in relation to those proceedings, the complaint of the Magistrate was necessary before cognizance could be taken thereof. Now, on the prosecution itself, from the joint complaint of the Sub-Divisional Inspector and of the Superintendent of Police and on the finding of the Magistrate, we think it is clear that the prosecution case was that this accused was responsible for these proceedings against Sono Khan: that he with the necessary intent caused them to be instituted within the meaning of Sec. 211, I. P. C., and therefore the complaint of the Resident Magistrate was necessary to institute proceedings under S. 211, I. P. C., against the accused, and this complaint was not made. Therefore, on this ground, the conviction of the accused must be set aside.

This Court has held that S. 211 may cover the institution of proceedings through the police as well as by way of complaint to the Magistrate direct : A I R 1938 Sind 213.[1] This Court has also consistently held that where a complaint is made both to the police and a Magistrate, the Magistrate's jurisdiction overrides that of the police : 23 S L R 225,[2] 23 S L R 285,[3] 31 S L R 429;[4] and that the provisions of S. 195 (1) (b), Criminal P. C., cannot be evaded by placing an offence under S. 195 (1) (a). Thus, we think, it is clear that if the accused has committed any offence at all, it must rather be an offence under S. 211, I. P. C., than under S. 182, I. P. C. But it is then argued that as the false information was given to the police during the course of an investigation, it was not information given within the meaning of S. 182, I. P. C., and reliance has been placed upon a ruling of this Court in 6 S L R 143,[5] relying on a ruling in 20 W R Cr 66,[6] to show that "to give information" within the meaning of S. 203, as well as within the meaning of S. 182, I. P. C., means "to volunteer information," and that however false and however guilty be the intent with which information is given to the police during the course of the investigation, the offender must be immune from prosecution.

So far as S. 203, I. P. C., is concerned, the case in 6 S L R 143[5] is authority for the statement that "whoever gives any information" means "whoever volunteers any information"; but we are not here concerned with an offence under S. 203, I. P. C., in which no question of intent arises; even so, that ruling, we think, does not exclude the application of the Section in a case where a person "volunteers" a statement to the police in the course of an investigation. However that may be, and that question is not here to be decided, so far as offences under S. 182, I. P. C., are concerned, there is the authority of this Court that a person who gives false information with the necessary guilty intent will be guilty of an offence under S. 182 even if that information be given in the course of a police investigation, 30 S L R 75,[7] and we ourselves think the necessity of proving the guilty intent or knowledge within the meaning of S. 182 is ample safeguard against the abuse of these Sections and the persecution and intimidation of witnesses by the police during the course of an investigation; and we can see no reason why, if a person can be prosecuted for giving false information to the police at the police station as first informant, he cannot be prosecuted for giving false information to the police in a village nearby because the investigation has started and he willingly, indeed eagerly, gives a long and incriminating statement in answer to a formal question put by a police officer. The first informant may be merely a tool intended to bring the police to the village where

1. Dharamdas v. Emperor, (1938) 25 A I R Sind 213=178 I C 218=40 Cr L J 12.
2. Ramchand Nanumal v. Emperor, (1929) 16 A I R Sind 115=1929 Cr C 106=115 I C 313 =30 Cr L J 399=23 S L R 225.
3. Chuharmal Nihalmal v. Emperor, (1929) 16 A I R Sind 132=1929 Cr C 160=117 I C 147 =30 Cr L J 732=23 S L R 285.
4. Mehroo Venko v. Emperor, (1937) 24 A I R Sind 209=170 I C 608=38 Cr L J 951 = 31 S L R 429.
5. Emperor v. Akhtiar Sanwan, (1912) 6 S L R 143=19 I C 508=14 Cr L J 256.
6. Queen v. Joy Narain, (1873) 20 W R Cr 66.
7. Emperor v. Gopaldas Khemchand, (1936) 23 A I R Sind 94=1936 Cr C 678 = 163 I C 910 =37 Cr L J 870=30 S L R 75.

another far more influential person can give the police false information with the guilty intent of causing another harm. The mere fact that this information is given in answer to a question by a police officer appears of itself no sufficient reason to render the guilty person immune from prosecution. If a witness answers questions because he is compelled to answer by reason of the powers of the police, that in itself may well be sufficient to negative the guilty intent or knowledge necessary for a conviction under S. 182, I. P. C. The information is then not so much given as taken. But to hold that S. 182, I. P. C., can never apply to false information given to the police during the course of an investigation, appears to us to go further than the words of S. 182, I. P. C., or the public interest properly allows. We do not think therefore that there is any reason to doubt the correctness of the ruling of this Court in 30 S L R 75,[7] as thus interpreted or to prefer the rulings in 31 Mad 506[8] and 3 Rang 577[9] and it is to be noted that in 3 Rang 577,[9] the learned Judge was of the opinion that the words "whoever gives" in S. 182, Penal Code, should not be restricted to imply "whoever volunteers." We ourselves think that the test of guilty intent or knowledge within the meaning of S. 182, I. P. C., is a safer and sufficient guide. The same reasoning and conclusions, we think, apply to an offence under S. 211, I. P. C.

We think therefore that in this case, we must set aside the conviction and sentence, and leave the Resident Magistrate of Nawabshah free to decide whether he will or will not make a complaint under S. 195 (1) (b), Criminal P. C., against the accused for an offence under S. 211, Penal Code, and these papers should be sent to the Resident Magistrate through the District Magistrate accordingly. As the accused is on bail the bail bond is cancelled.

N.S./R.K. *Conviction set aside.*

8. Chinna Ramana Gowd v. Emperor, (1908) 31 Mad 506=9 Cr L J 77=18 M L J 573.
9. Sultan v. Major C. De M. Wellbourne, (1925) 12 A I R Rang 364 = 90 I C 316 = 26 Cr L J 1532=3 Rang 577.

A. I. R. 1939 Sind 276

DAVIS J. C. AND WESTON J.

Haji Ghulam Kadir Abdullah — *Plaintiff* — Applicant.

v.

Mohidin Haji Ahmed — *Defendant* — Opponent.

Civil Revn. Appln. Nos. 126 and 128 of 1936, Decided on 17th November 1938, to revise order of Judge, Small Cause Court, Karachi, D/- 12th August 1936.

(a) Karachi Small Cause Courts Act (4 of 1929), Ss. 25 and 28 — Distress — Principle of English law — Applicability — Goods attached under order of Court in execution of decree are in custodia legis and cannot be distrained for rent by landlord upon his premises.

English common law process of recovery of rent by distraint has been made applicable to certain parts in India by statute. But when the Legislature made the old common law process of distraint applicable to Karachi City it meant to apply it with its usual attributes and exceptions; but statutory exception of English law in favour of the landlord cannot be grafted on to common law process as applied by S. 28, unless the Legislature specifically says that the rights of landlord upon goods distrained shall have precedence over the rights of an attaching creditor under an attachment prior in point of time to distress. Hence goods which had been attached under order of Court in execution of a decree are in *custodia legis* and cannot be distrained by landlord upon his premises as in common law and there is no question of conflicting rights of landlord and attaching creditor or of any principle of their claims inter se : *(1848) 12 Q B 673; (1843) 63 R R 500; 1 Ind Jur (N S) 361 and (1875) Mad Jur 340, Ref.* [P 277 C 2; P 278 C 1]

(b) Civil P. C. (1908), S. 60 — Applicability —Distress.

Distress is not permitted under Civil P. C., and provisions of S. 60 cannot be applied by analogy to distraint. [P 277 C 2]

Kundanmal Dayaram — *for Applicant.*

Davis J. C. — This is an application in revision against an order of the Judge, Karachi Small Cause Court, who ordered the applicant to refund Rs. 144-8-0, the proceeds of goods distrained upon premises of which he was the landlord, on the ground that prior to the distraint the goods had been attached under the order of the Court in execution of a decree and were there therefore in *custodia legis* and immune from distraint. It is urged before us that S. 28, Karachi Small Cause Courts Act, does not exempt goods in *custodia legis* from distraint as does the corresponding S. 57, Presidency Small Cause Courts Act, 15 of 1882, and therefore it must be assumed that when S. 28, Karachi Small Cause Courts Act, authorizes distraint upon goods, it authorizes distraint subject to no qualifi-

cation whatever. S. 28, Karachi Small Cause Courts Act, appears to suffer from the defect of brevity, and is so brief as to be obscure, but I find it difficult to hold that when the Legislature made applicable to Karachi City the old common law process of distraint, it meant to apply it free from those restrictions which attach to it in common law. In Woodfall on Landlord and Tenant, 23rd Edn., p. 536, "distress" is defined as follows:

A distress is one of the most ancient and effectual remedies for the recovery of rent. It is the taking, without legal process, cattle or goods as a pledge, to compel the satisfaction of a demand, the performance of a duty, or the redress of an injury, the act of taking, the thing taken, and the remedy generally, having been called a distress, an inaccuracy which the older text-writers usually avoided.

On p. 565 is given a list of "things absolutely privileged," and among those things are "things in the custody of the law." Firstly, a distress being anciently a pledge, nothing could be distrained unless it could be returned in specie and undamaged and in the same state as when taken. Thus, tenant's fixtures are exempt for it is obvious that a tenant's fixtures might be broken or damaged in removal and could not be returned undamaged in specie. So things in actual use are privileged. Secondly, things in actual use are absolutely privileged from distress for rent, or even for damage feasant, because of the danger to the public peace. Therefore, a horse whilst a man is riding upon him, or an axe in a man's hand cutting wood, or the like, cannot be distrained, as also clothes actually in wear. Yet, if we were to accept the argument for the applicant, we would have to hold that under S. 28, Karachi Small Cause Courts Act, tenant's fixtures would not be exempt because the Section does not say so; clothes could be taken from a man's back. I cannot however assume that when the Legislature applied to Karachi a process of the English common law they did not intend to apply it with its usual attributes and exceptions. And "goods in the custody of the law are not distrainable for rent; for it would be repugnant that it should be lawful to take goods out of the custody of the law:" (page 574, *ibid*). It is true that there are now grafted on the common law process certain statutory exceptions in favour of the landlord's claim for rent:

By the Landlord and Tenant Act, 1709, 8 Ann. c. 14, (c. 18 in the Statutes Revised), S. 1, no goods taken on any lands leased for life, years, at will, or otherwise, shall be taken in execution unless the party at whose suit execution issued, before removal of the goods, pay to the landlord the arrears of rent, if not exceeding one year's rent; and if more, then the amount of one year's rent, due at the time of the execution. There are similar enactments, with variations, in the Act relating to the county Courts, and the Court of Admiralty: (page 575, *ibid*);

but in (1848) 12 Q B 673,[1] at page 678, Patterson J. said:

The statute says that no goods shall be liable to be taken by virtue of any execution unless the party at whose suit the execution is sued out shall, before the removal of such goods from off the premises by virtue of such execution, pay to the landlord of the premises rent, not exceeding one year. These words cannot be taken literally; the true construction is given in (1843) 63 R R 500,[2] by Parke, B.; the meaning is, that the Sheriff shall not remove the goods unless a year's rent be first paid. The seizure is lawful prima facie; but, if the goods be removed without payment of the rent, after notice that it is due, such removal renders the whole proceeding unlawful as regards the landlord, and subjects the Sheriff to an action on the case at his suit. The goods however in the meantime, until they are removed, are in custodia legis . . . . . This appears to be the reasonable construction of the statute of Anne in regard to goods of any kind seized by the Sheriff: and it is more strongly so in regard to growing crops, which, although liable to be taken in execution by the common law, were not liable to be distrained for rent until the Statute 11, Geo. II, c. 19.

So far as growing crops are concerned, the decision in (1848) 12 Q B 673[1] was reversed by the Landlord and Tenant Act 1851, which made growing crops liable for rent after seizure, and so long as they were on the land, but the principle of immunity of goods in *custodia legis* remained, and we are not concerned here with growing crops. I can find nothing in S. 25, Karachi Small Cause Courts Act, to assist, for distress is not permitted under the Civil Procedure Code, and I cannot by analogy apply the provisions of S. 60, Civil P. C., to distraint, an altogether different process. Nor can we graft on to the common law process, as applied by S. 28 of the Act, the statutory exceptions of English Statute law. If the Legislature thinks that goods in *custodia legis* shall not be immune from distraint or that the rights of a landlord upon goods distrained shall have precedence over the rights of an attaching creditor under an attachment prior in point of time to the distress, it will be open to it to say so. Until then we must hold that goods in *custodia legis* are exempt from distraint as in common law. As the goods in *custodia legis* are exempt from distraint, no question of the conflicting rights of landlord or

1. Wharton v. Naylor, (1848) 12 Q B 673.
2. Riseley v. Ryle, (1843) 63 R R 500=11 M & W 16=12 L J Ex 322.

attaching creditor arises or of the priority of their claims inter se. I think therefore this Revision Application No. 126 of 1936 and Revision Application No. 128 of 1936, which goes with it, must fail and I would dismiss them accordingly.

Weston J. — There can be no doubt that the English Common law process of recovery of rent by distress now applies in certain parts in India but that it does so by virtue of statute. The first statute applying the process appears to be Act 7 of 1847 "an Act to regulate Distresses for Small Rents in Calcutta." This Act empowered the Commissioners of the Court of Commissioners for the recovery of small debts in and for the Settlement of Fort William in Bengal to appoint bailiffs to whom warrants could be issued directing recovery of arrears of rent not exceeding Rs. 100 by seizure of goods and chattels upon the premises in respect of which rent was claimed. The Act did not contain any of the common law limitations on distraint of goods in actual use, necessary wearing apparel, and goods in the custody of the law nor did it specifically exempt the goods of third parties on the premises. But it seems to have been held, 1 Ind Jur (N S) 361,[3] that the goods of third parties on the premises were not distrainable under this Act. Act 9 of 1850, the Small Cause Courts Act, from which the present Presidency Towns Small Cause Courts Act (Act 15 of 1882) has evolved, extended the provisions of Act 7 of 1847 to Madras and Bombay and also enlarged them. S. 89 of Act 9 of 1850 provides that the powers of Act 7 of 1847 to regulate distresses of small rents in Calcutta shall be extended to the recovery of all arrears of rent not exceeding Rs. 500 and the Judges of Small Causes of Calcutta, Madras and Bombay were empowered to exercise within their several jurisdictions the extended powers of Act 7 of 1847. In Act 9 of 1850 also, the common law limitations on distress did not find expression. It appears however that before these statutes were enacted the process of distress did exist in the Presidency Towns. In a Madras case reported in the Madras Jurist of 1875 at page 340 it was remarked by Morgan C. J. and Kindersley J. :

> That the right to distrain for rent in arrear has always to some extent existed and been recognized in Presidency Towns is certain; and the Acts passed since 1847 are distinct declarations by the Legislature made while regulating the exercise of the right and providing for its exercise only through the intervention of a Judge of a Court of Small Causes, that the right itself subject to the restriction, above referred to, is general . . . . .

In the Presidency Towns Small Cause Courts Act (Act 15 of 1882) Ch. 8 deals with distresses. S. 57 restricts property which may be seized by the bailiff in pursuance of a warrant issued under S. 54, to property found within the house or premises mentioned in the warrant and the property of the person from whom rent is claimed. It also exempts from seizure: (a) things in actual use; (b) tools and implements not in actual use, where there is other moveable property in or upon the house or premises sufficient to cover such amount and costs; (c) the debtor's necessary wearing apparel; (d) goods in the custody of the law. Succeeding sections deal with appraisment and sale of goods distrained, applications to discharge or suspend the warrant, claims by stranger to goods distrained, power to award compensation to a debtor or claimant and penalties for making illegal distress. It would seem therefore that in respect of distress the evolution from common law to statute law is now practically complete in the Presidency towns. It has not been suggested before us that the right to distrain for rent existed in Karachi before the enactment of the Karachi Small Cause Courts Act 4 of 1929, but by this Act the process of distress has been introduced in much the same manner as it was first introduced or recognized in Calcutta by Act 7 of 1847. We have only two sections of the Karachi Act, Ss. 27 and 28, which deal with distress. S. 27 is as follows :

> 27. (1) Any person claiming to be entitled to arrears of rent of any house or premises situate within the local limits of the Court's jurisdiction of which the annual rental does not exceed two thousand rupees may apply to the Court for a distress warrant in accordance with the provisions of this Act. (2) The application shall be supported by an affidavit or affirmation to the effect of Form A in the Schedule hereto annexed. (3) Nothing in this section shall apply to (a) any rent due to Government; (b) any rent which has been due for more than twelve months before the application mentioned in sub-s. (1).

Section 28 provides only for application to discharge or suspend the warrant which application must be made within 5 days of the seizure of the goods. Although the right to recover rents by distress may not have existed in Karachi before the year 1929 it seems impossible to hold that the Legislature intended that the right should be free of all the restrictions which from very

3. Dwarka Nath Biswas v. Uddit Churu Addy, 1 Ind Jur (N S) 361.

early days in England and also, it appears, in the Presidency towns in India, have been recognized to exist. It may perhaps be doubtful whether exemption of goods of third parties now provided for in the Presidency Towns Small Cause Courts Act applies in Karachi. Such goods under the common law were not exempted from seizure although by reason of statute considerable limitations on the power to distrain goods of strangers now exist. But I think it must be taken that when applying to Karachi a process of common law which has never been applied either in England or in India without many restrictions the Legislature must have intended at least that the common law limitations should go with it. As pointed out by the Hon'ble the Judicial Commissioner, it is impossible for us to hold that the Legislature intended that the clothes should be removable from the person of the debtor or that fixtures should be removable and their value thereby impaired in execution of a process which is really a seizure as a pledge for rent claimed. Similarly, I think it may be held that the common law restriction by which goods in the custody of the law are not distrainable for rent must be held to apply. The reason for this exemption was that it would be repugnant that it should be lawful to take goods out of the custody of the law, (Woodfall, Landlord and Tenant, p. 565) and that reason to my mind has as much force in India as it has in England. In the Presidency Towns Small Cause Courts Act the exemption of goods in the custody of the law finds specific mention. I agree therefore that in the present case the learned Judge of the Small Cause Court was correct in refusing to allow distraint as the goods were already under the attachment of the Court.

It has been urged before us that if we apply common law principles to the process of distraint under the Karachi Small Cause Courts Act, we should equally apply the limitations imposed in England by statute and in particular that we should apply the Landlord and Tenant Act, 1709, which provided that no goods should be taken in execution unless the party at whose suit execution has issued should pay to the landlord the arrear of rent, if not exceeding one year's rent, before removal of the goods. But it is one thing to apply a common law principle with common law limitations which have always been recognized, and it is quite another thing to introduce into India statutes of England. And in my opinion until the Legislature seeks to elaborate the principles under which the process of distress has been introduced in the Karachi Small Cause Courts Act, we cannot go further than holding that the process should be applied with such common law modifications as have always been recognized to exist. I consider therefore that it is not open to us to make any order as regards payment of rent by the executing creditor. I agree that the two revision applications should be dismissed accordingly.

S.G./R.K. *Applications dismissed.*

A. I. R. 1939 Sind 279

DAVIS J. C. AND TYABJI J.

Ramchand Kimatrai and others —Applicants.

v.

Udhalmal Dwarkadas and others —Opponents.

Civil Revn. Application No. 7 of 1936, Decided on 16th September 1938, from order of joint Sub-Judge, Shikarpur, D/- 7th November 1935.

Court-fees Act (1870), S. 12 (ii) — Court ordering payment of deficit court-fees after decree signed and sealed — Party asked to pay court-fees receiving benefit under decree — High Court in revision from such order, can take action under S. 12 (ii) before passing final orders.

After a decree has been signed and sealed the Judge would be acting without jurisdiction if he orders the deficit court-fees to be paid. But although the party asked to pay the court-fees may have a genuine grievance that he had not the opportunity of being heard and that the Court was functus officio, if he gets benefit from the decree it is but reasonable that he should pay the court-fee on the benefit so received and hence the High Court, in revision from such order, can, before passing final orders, take action under S. 12 (ii): *AIR 1932 Pat 228 and AIR 1919 Cal 520, Expl.* [P 280 C 2; P 281 C 1]

Suganlal Hassanand — *for Applicants.*

K. H. Nagrani — *for Opponents.*

Partabrai D. Punwani, Advocate-General — *for the Crown.*

Davis J. C.—This is a revision application against the order of the joint Sub-Judge of Shikarpur dated 7th November 1935, in which after a compromise decree had been signed and sealed by the Court on 14th October 1935, the Judge ordered deficit court-fee upon Rs. 11,000 to be paid. The applicant in this revision application who is the plaintiff, is aggrieved and says that the Subordinate Judge was functus officio when he passed this order as to the payment of court-fee and while his learned

advocate asks us in revision to set aside the order of the Subordinate Judge, he at the same time says that we have no power under S. 12 (ii), Court-fees Act, to remedy the mistake to the detriment of the revenue in the payment of the court-fee which the record before us may show. Now so far as the order of 7th November is concerned, it does appear that this order was made without jurisdiction. The compromise decree was signed and sealed on 14th October. Therefore, so far as the Court's power was concerned, that decree, except so far as it is provided by the Code of Civil Procedure that a judgment can be altered or be reviewed, was final, so far as the Court which passed it is concerned. In 11 Pat 532[1] at p. 535, the Court held that where judgment is pronounced and signed and sealed the decree must follow and the Court cannot even direct the preparation of the decree to be stayed until the payment of the deficit court-fee. But that case is not entirely in point. In the case before us the Judge did not order the decree to be postponed till the payment of the deficit court-fee because the decree was signed and sealed before the order of payment was made. It is not therefore necessary for us to decide whether it is not even competent to a Court before a decree has been signed and sealed but after judgment has been pronounced and signed, to order the drawing up of the decree to be postponed, until a deficit court-fee has been paid. But once the decree has been signed and sealed, it appears to us that the Judge of that Court cannot order deficit court-fees to be paid. In the Patna case the learned Judge said :

> After the judgment has been pronounced and it has been signed and sealed, no power is left in the Court to alter it or add to it or subtract anything from it; and the judgment having been pronounced a decree must be prepared in accordance with it. Sec. 28, Court-fees Act, in our opinion, does not empower the Court to call upon the parties to pay the deficit court-fee after judgment has been pronounced. It only provides for validating certain acts which would be invalid if a certain document was not properly stamped. We are fortified in the view we take by a Full Bench decision of our own Court in 4 Pat L J 472[2] where it was held that when the High Court dismisses an appeal for whatever cause, it ceases to have seisin of the appeal or case and is powerless to call upon the respondent to pay any deficiency due by him in respect of court-fees payable in the lower Court and consequently has no jurisdiction in such circumstances to restrain the respondent from executing the decree obtained by him. The same view was taken in the Calcutta High Court in 46 Cal 520.[3]

The Calcutta case to which this judgment refers, 46 Cal 520,[3] was a case where the suit was dismissed and the plaintiff was ordered to pay the deficit court-fee after the judgment was delivered, and the Court accepted without much argument the contention that the Judge acted without jurisdiction, in that after giving judgment, his powers to order the deficit court-fee to be paid, had gone. But we do not think that either of the decisions prevent us before we have passed final orders in a revision application either allowing or dismissing it, from taking action under S. 12 (ii), Court-fees Act. We are not concerned with sub-s. (i) to S. 12, Court-fees Act, because that relates to the Courts first accepting a plaint or a memorandum of appeal and has no reference to the alteration of a court-fee by another Court in appeal. Sec. 12 (i) is as follows :

> Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit.

Sub-section (ii) of S. 12 relates to cases such as this, where the order in a suit has come before a Court of reference or revision as the order in this suit is before us in revision and if then we consider, as we do, that the question as to court-fee has been wrongly decided to the detriment of the revenue, by the lower Court, we consider we have power to require the party by whom such fee has been paid to pay such additional fee as would be payable were the question rightly decided. S. 12 (ii) is as follows :

> But whenever any such suit comes before a Court of Appeal, reference or revision, if such Court considers that the said question has been wrongly decided to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided, and the provisions of S. 10, para. 11, shall apply.

The learned advocate for the applicant says that there has been in fact no decision by the trial Court so as to give this Court jurisdiction under S. 12 (ii), because no specific issue as to the court-fee to be paid was raised and decided in the lower Court. It is clear however that when a plaint is admitted, by necessary implication there is

1. Kedar Nath v. Maharaja Chandra Mauleshwar Prasad Singh, (1932) 19 A I R Pat 228 = 137 I C 855=11 Pat 532=13 P L T 304.
2. Radhika Raman v. Mt. Janki Kuer, (1919) 6 AIR Pat 9=51 I C 756=4 Pat L J 472 (FB).
3. Jatra Mohan Sen v. Secy. of State, (1919) 6 A I R Cal 194=52 I C 435=46 Cal 520.

a decision that the right court-fee has been paid and in fact in this case the applicant as plaintiff was ordered to pay an additional court-fee on Rs. 2000 based on his claim as a creditor against the partnership firm. The statement in the memorandum of appeal that the plaintiff only asked for declaration that he was a creditor is incorrect, and of course such a prayer could not stand alone and must be followed by a prayer for some consequential relief, that for instance an order be passed that the sum found due to him should be paid to him.

A reference to the plaint would show this prayer in fact was not made. The plaintiff sued as legal representative of his father, one Seth Shivaldas, who was a partner with Seth Dwarkadas in a firm, for the settlement of partnership accounts. He also alleged that he was separate from his father and had advanced money by way of loan to the partnership business and he asked for a declaration that he was such a creditor and for a prayer that he should be paid from the partnership assets the money he had lent to the partnership firm. His claim was settled by compromise and it is in relation to this compromise that this question of court-fee has been raised because under the terms of the compromise he was to get 11 survey numbers. He was also to get the balance due under a decree in Suit No. 84 of 1927 and apparently on these two items the Judge has placed the value Rs. 7000 and Rs. 4000 respectively. He complains that these values were placed upon these items without his knowledge and without his being heard and after the Court was functus officio. It appears also that in the settlement of the partnership accounts the applicant was awarded a sum of Rs. 542. On the ground that he had not the opportunity of being heard and on the ground that the Court was functus officio, the applicant may have a genuine grievance, but it appears to us not unreasonable that as the applicant has got the benefit of this compromise decree he should pay the court-fee upon the benefits so received. He has already paid court-fee on Rs. 2000 as his share on settlement of partnership accounts. This share was settled at only Rupees 542. The balance of the court-fee so paid can therefore be taken into account in his favour when the court-fee payable by him on the other part of his claim as creditor of the partnership valued by the Judge at Rs. 11,000 is settled. He has also paid court-fee on the declaration which, however, he has obtained.

We do not think we should now pass any final order allowing or rejecting this revision application, for if we did, our action might be open to the same objection as in this case is raised, that having allowed or dismissed the revision application we are functus officio and can make no order under sub-sec. (ii) to Sec. 12. That such an argument under the circumstances would be a good argument, we think a matter of some doubt. But we think it better not to make any final order rejecting or allowing the revision application, that is to say, setting aside or refusing to set aside the order of the Judge passed without jurisdiction until proper court-fee has been paid in the suit out of which this revision application arises. The Judge in the trial Court should therefore give notice to the applicant and inquire into and decide as to what proper court-fee is payable and report to us. We shall then decide what proper court-fee is payable and when this has been paid we shall then pass final orders on this revision application. The Judge should report as to the court-fee payable within two months. Order accordingly.

N.S./R.K. *Order accordingly.*

A. I. R. 1939 Sind 281

DAVIS J. C. AND WESTON J.

Kulsambai, w/o Tayabali Mulla Jiwanjee — Plaintiff — Appellant.

v.

A. K. Mandviwalla Firm — Defendants — Respondents.

First Appeal No. 48 of 1936, Decided on 23rd December 1938, against judgment and decree of Rupchand Bilaram, A. J. C., Sind, D/- 20th August 1936.

(a) Benami—Negotiable instrument—Person suing for money belonging to another alleging that it was hers—No suggestion either in plaint or in deposition about her benami character but plaintiff persisting in the falsehood even in appeal — She is not entitled to a decree as benamidar nor can she be allowed to amend the plaint—She can only succeed secundum allegata et probata.

Plaintiff sued for the recovery of a large sum of money alleging that the same belonged to her and that she had deposited the same with defendant. There was no suggestion either in the plaint or in her deposition that she was a benamidar for her husband. Her case was however found to be false but she persisted in the falsehood even in appeal :

Held that the plaintiff must be held bound by her false and perjured case in which she persisted even in appeal, and could not be allowed to amend the plaint and that it was not open for the Court either to decree a false and bogus claim or force upon the plaintiff the character of a benamidar which she had repudiated. The plaintiff can only succeed *secundum allegata et probata* : *11 MIA 7 (P C) and AIR 1914 P C 36, Rel. on*; *AIR 1926 Bom 115, Disting*; *35 Cal 551 (PC)*; *A I R 1918 PC 140*; *5 Bom L R 315; AIR 1932 Bom 190 and A I R 1936 P C 70, Ref.* [P 283 C 1,2; P 286 C 1]

(b) Negotiable Instruments Act (1881), S. 4 —Promissory note—Requirements of—A document to be promissory note must not only be such in form but must also be intended to be negotiable — Acknowledgment executed by defendant in false name of wife of state of account between her husband and defendant not intended to leave their custody is not a promissory note—Art. 73, Limitation Act, does not apply.

In order that a document should be a promissory note within the meaning of S. 4 not only must it be a promissory note in form but it must in addition be intended by the parties to be a promissory note, i. e. it must be intended to be negotiable and to pass from hand to hand. Where a document executed by defendant is merely an acknowledgment in the false name of the plaintiff of the state of account between her husband and the defendant and never intended to leave her custody or that of her husband, it is not a promissory note and Art. 73, Limitation Act, does not apply: *AIR 1936 PC 171, Rel. on.* [P 286 C 2; P 287 C 1]

Srikrishindas H. Lulla — *for Appellant.*

Fatehchand Assudomal — *for Respondents.*

Davis J. C.—This is an appeal from the judgment of Rupchand A. J. C. sitting in District Court jurisdiction, dismissing the plaintiff's suit for Rs. 1,29,871-12-6, being the amount claimed as due to her on account of a deposit of Rs. 80,000 with interest at 5 per cent. per annum made by her with the defendants, Messrs. A. K. Mandviwalla through their proprietor Tayabali Abdul Hussain Mandviwalla. The plaintiff is described as Kulsambai, daughter of Allibhoy, and wife of Tayabali Mulla Jiwanjee Bohri. The defendants had denied that the plaintiff had deposited Rs. 80,000 as alleged or any money at all. They contended that the money was her husband's and not hers, the subject of an account between them in business and that after their claims against the plaintiff's husband had been set off, nothing was due to plaintiff's husband. Further, they contended that the suit was time-barred, whether the money with them be regarded as a loan or a deposit or whether the plaintiff based her claim upon the receipt dated 1st November 1918, which should be treated as a pro-note.

The learned Judge came to the conclusion that the claim was in any case time-barred, and that, further, the plaintiff's claim was an unrighteous claim and supported by perjured evidence. He came to the conclusion that so far as the plaintiff was concerned, Ex. 4/1 was a sham transaction never intended to operate between the parties and intended merely to conceal for the purpose of deception the plaintiff's husband's interest in the business, he being the real party to the transaction, but that, in any case, the plaintiff's claim was time-barred. As a pronote dated 1st November 1918, it was time-barred the suit being brought on 27th August 1934, and the learned Judge found Ex. 4/1 to be a pro-note and not a deposit receipt. Further, he found that even if Ex. 4/1 was a deposit receipt, the plaintiff's husband had made a demand on her behalf in February 1931, and the claim was again time-barred. On Issue 4, the issue relating to limitation, the learned Judge found that the suit was governed by Art. 73, Limitation Act, as Ex. 4/1 was a pro-note, but if it was not a pro-note, then Art. 59 or Art. 115, Limitation Act, applied; and the plaintiff had not brought herself within Art. 60 of the Act for the deposit was not made by her but by her husband. On the question whether the plaintiff could sue for a deposit which the learned Judge found that she had not made, the learned Judge came to no definite conclusion. He said :

> If, on the other hand, it be held that Ex. 4/1 was executed by the defendant at the request of Tayebali not with the object of handing it over to the plaintiff but for a different purpose altogether, it is arguable whether the plaintiff can maintain the present suit at all. The contract which forms the foundation of the present suit was between the defendant and Tayebali; the plaintiff was not a party to it; she was not even interested in it as a beneficiary so as to give her a right of suit on the authority of the decision in 37 I A 152,[1] or the rule laid down in (1861) 2 Lev 210,[2] which in itself is not now good law in England in view of the later decision in (1861) 124 R R 610.[3] Nor can the case be brought within the purview of the ruling in 46 Cal 566[4] and 34 Bom L R 164,[5] the present suit

1. Khwaja Muhammad Khan v. Nawab Husaini Begam, (1910) 32 All 410=7 I C 237=37 I A 152 (P C).
2. Dutton v. Pooh, (1861) 2 Lev 210 = 1 B & S 399=83 E R 523.
3. Tweedle v. Atkinson, (1861) 1 B & S 393 = 30 L J Q B 265 = 8 Jur (N S) 332 = 4 L T (N S) 468 = 9 W R 781 = 124 R R 610.
4. Gur Narayan v. Sheolal Singh, (1918) 5 A I R P C 140 = 49 I C 1 = 46 I A 1=46 Cal 566 (P C).
5. Murlidhar Narayandas v. Parmanand Luchmandas, (1932) 19 A I R Bom 190 = 137 I C 560=34 Bom L R 164.

not being based on title but on contract. It is, however, unnecessary to pursue this point further or to give a finding upon it, because, whether the plaintiff has a right of suit or not, she has failed to prove that her case comes within the purview of Art. 60, Limitation Act.

The case set up by the plaintiff that she deposited the money herself and obtained Ex. 4/1 in proof thereof, has failed. Ex. 4/1 was given in respect of an account which had been opened by Tayebali and therefore the only person who could speak to the nature of the account between the parties was Tayebali himself. He has been kept out of the witness box and the onus which lay upon the plaintiff to bring her case within Art. 60, therefore, remains undischarged.

We will deal with the question of limitation, on which the learned Judge has dismissed the plaintiff's suit, hereafter, but to us it appears that apart from any question of limitation, the plaintiff's suit must fail because on her pleadings and her evidence her case is false. Her case was that the money was hers and not her husband's. This case was false and false to her knowledge: it was persisted in appeal as the memorandum of appeal shows: and we do not think it is open to her or her advocate to change her case, to say that the case to which she had deliberately sworn, that the money was hers, saved by her and given by her to the defendants, was not hers but her husband's, and that, therefore, she is entitled to a decree as his benamidar any more than it would be open to a plaintiff suing as full owner in his personal capacity to change the case and ask that he be deemed to have sued as a trustee and a decree be given to him accordingly. But the plaintiff has not changed her case. There is this to be said for her and her advisers: they have persisted in falsehood to the end, and we do not see how this Court can decree a false and perjured claim or force upon the plaintiff the character of a benamidar which she repudiates. The plaintiff can only succeed *secundum allegata et probata*: 6 W R 57;[6] 36 All 195.[7] When we pointed out this aspect of the case to the learned advocate, he asked to be allowed to amend the plaint so as to frame the suit as a suit of a benamidar. We would not under the circumstances of this case allow the plaint to be amended.

The learned Judge has framed and found upon the issues arising from the written statement upon a case of benami, but our conclusions strengthened by all the argument we have heard are that the plaintiff must be held bound by the false and perjured case in which she has persisted even in appeal, and that it is not for the Court either to decree a false and bogus claim or force upon the plaintiff the character of a benamidar which she repudiates. Her learned advocate has contended that a benamidar is a mere alias, 35 Cal 551,[8] and that a plaintiff can maintain a suit as benamidar and that the real owner is bound. There is clear authority that a benamidar can maintain a suit and the real owner is bound: 46 Cal 566,[4] 5 Bom L R 315,[9] 34 Bom L R 164.[5] But when we asked the learned advocate if he could refer us to an authority which laid down that a plaintiff having brought and persisted in a false case even in appeal that he was the true owner could nevertheless be given a decree as benamidar, he said he could not do so, but referred us to 27 Bom L R 1240.[10] We cannot believe that a false and perjured claim persisted in, as this claim has been persisted in, should be allowed to succeed on the plea that the plaintiff is entitled to a decree in a capacity which she repudiates.

It is true in 27 Bom L R 1240,[10] above referred to, a case brought by a plaintiff as true owner was allowed to succeed, though the evidence showed that he was a benamidar, but that was a case under the Dekkhan Agriculturists' Relief Act, and the true owner was in Court with all his books. Here the real party has purposely avoided the Court, forced, it would appear, his wife, a woman of 59, married when she was 13, with a son of 42, to go into the witness-box and swear and persist in swearing falsely to a false claim. We think 27 Bom L R 1240[10] has gone as far as cases of this kind should be allowed to go; and used, as it has been used in this case, the character of a benamidar ceases to possess that harmless character and attributes with which it is in 46 Cal 566[4] at p. 574 endowed. Moreover, the cases relating to suits by a benamidar are more or less irrelevant. The plaintiff does not sue as a benamidar and she repudiates that character. The learned advocate for the appellant stated that he

6. Eshandhunder Singh v Samachurn Bhutoo, (1866) 11 M I A 7=6 W R 57 (P C).
7. Bakhtawar Begam v. Husaini Khanum, (1914) 1 A I R P C 36=23 I C 355 = 41 I A 84=36 All 195 (P C).
8. Petherpermal Chetty v. Muniandy Serval, (1908) 35 Cal 551=35 I A 98=7 C L J 528 = 4 L B R 266 (P C).
9. Shivram v. Ambaji Babaji, (1903) 5 Bom L R 315.
10. Narayan Keshav v. Kaji Gulam Mohidin, (1926) 13 A I R Bom 115 = 91 I C 353 = 49 Bom 832=27 Bom L R 1240.

could not argue upon the evidence that the plaintiff's case, as she swore to it in Court, and which was her case in the pleadings and in the memorandum of appeal, was true. In the circumstances of this case, that admission appears to us to conclude the appeal before us. It is perhaps as well to state the plaint in full :

Plaintiff aforesaid begs to state as under :

(1) That about 1st November 1918, the plaintiff deposited with the defendants a sum of Rs. 80,000, rupees eighty thousand, as a deposit which was payable to the plaintiff on demand by her. The said amount was to carry interest at 5 per cent. per annum. The defendants executed a receipt to that effect in favour of plaintiff, which is in original filed herewith marked 'A'.

(2) That the said amount has continued to remain as deposit with the defendants.

(3) That the amount now due to the plaintiff on account of deposit and interest up to date, after deducting the amount received by her, is Rupees 1,29,871-12-6, rupees one lakh twenty-nine thousand eight hundred and seventy-one annas twelve and pies six only.

(4) That about the beginning of the year 1934, the plaintiff made a demand on the defendants for return of the amount due, but the defendants have failed to pay the same.

(5) That the cause of action arose at Karachi within the jurisdiction of this Honourable Court in the beginning of the year 1934, when the plaintiff made a demand on the defendants for return of the amount and when the amount became payable.

(6) That the value of the subject-matter of the suit for the purpose of jurisdiction and court-fees is Rs. 1,29,871-12-6.

(7) That the plaintiff prays judgment and decree for Rs. 1,29,871-12-6, and further interest at 6 per cent. from date of suit till payment.

There is no suggestion here that the money was not hers, but her husband's, that there was a previous account or that she sued as benamidar, the position which the learned advocate asked us to accept, nor is this her case in her deposition. She says :

All the Rs. 80,000 belonged to me. Rs. 20,000 I had got from my father. Rupees 60,000 more were my own collections. At the time I sent Rupees 60,000 my husband was worth rupees two crores. My husband had no interest in the sum of Rs. 80,000. This was my deposit. I deposited the money with the defendants as I considered his firm as my own house.

And

The key of the safe was with me. The duplicate key of the safe was also with me. What business had my husband with keys ? Rs. 60,000 I sent to the defendant one month after I sent Rs. 20,000. Rs. 60,000 were also sent in notes. I cannot say if they were in notes of Rs. 100 and notes of Rs. 10. But, they were all in notes.

And

My husband did not know that Rs. 80,000 was in my safe. He only came to know when I sent the money through him. He did not know that any money was lying with me. He had no keys. How would he come to know ? He was on good terms with me all the time. And we lived as husband and wife. He had full confidence in me.

Q.—Do you want the Court to believe during all these 28 years you did not inform him that you had such a large sum of money ?

A.—I did not inform him that I had money. He came to know when I sent the money through him. My husband used to give me Rupees 1000 to Rs. 2000 per month.

And

I have not drawn even a pie out of this money. I wrote a letter demanding the money six months ago. As the defendants refused to pay I sent a notice.

And

Defendant brought Ex. 4/2. Again says : I went to him and asked for receipt. He gave me Ex. 4/1, and said that if I demand money at midnight it will be paid and thereafter he brought me Ex. 4/2 himself. I cannot say how long after I brought Ex. 4/1, defendant brought me Ex. 4/2. It was 12 years ago.

As to this the learned Judge says :

I shall first deal with the question of fact whether or not the plaintiff deposited her own money with the defendant as alleged, or, was it Tayeball who opened an account in the name of his wife. In 1934, at the time of giving her evidence, the plaintiff was 57 years old. She states that she was 13 years old when she married, and therefore she married in 1890. Her case is, that in that year she received a sum of Rs. 25,000 from her father at the time of her marriage, that she spent Rs. 5000 out of it, and up to 1918 kept the balance with herself: that during the intervening 28 years she collected another sum of Rs. 60,000 out of the monthly allowances received by her from her husband for expenses of her household: that for the first time in 1918 she thought of depositing Rupees 80,000 with the defendant; and that during this long intervening period of 28 years she did not deposit her money with anyone. She states that she had the whole sum of Rs. 80,000 lying in her safe up to the time she thought of depositing the money with the defendant; and she can assign no reason why she sent the money to the defendant in two sums, Rs. 20,000 first and Rs. 60,000 a month later. She wants the Court to believe that her husband did not know that she possessed money up to the time she thought of depositing it with the defendant. She has a large family, her eldest child was 42 years old and her youngest child 21 years when she gave evidence: and yet she was able to collect such a large sum of money as Rs. 60,000 from her allowance for household expenses and did not spend the same on the education and marriages of her children. Lastly, she was able to keep the same with herself without the knowledge of her husband with whom she was living all this time on very good terms.

With regard to the mode in which the deposit was made by her, she has prevaricated and has tripped very badly in her deposition. At first she stated that she had sent both sums of money to the defendant through her husband. Subsequently she resiled from that statement and said that she had paid the money herself and had personally obtained Exs. 4/1 and 4/2. Later on, she again went back upon that statement and said that Ex. 4/2 was brought to her by her son. Except her own statement that she received Rs. 25,000 when she married and that she collected Rs. 60,000

more from the allowances given to her for household expenses, there is no other evidence either oral or documentary on that point.

Apart from the absurdity of her story that although at the time of her marriage she was a minor and her mother-in-law was alive, she kept with herself such a large sum of money, it is hardly likely that she could have got anything from her father. When questioned about the financial position of her father, she said: "I do not know if my father's business had failed before he died. At the time of his death I cannot say if my father was rich or poor. I do not know if he ran away to Goa. I cannot say if he went to Goa. My brother Muhammadali is dead. There is no trace of his property. He left no property." Not only is the whole story given by the plaintiff unbelievable, but there is strong evidence that it was her husband who opened this account and several other accounts with the defendant in different names and operated upon them for his own benefit.

We agree with the learned Judge that her evidence that this money was hers or that she ever deposited is manifestly false, and as her learned advocate cannot even argue it is true, it would appear that her case on that sufficient ground must fail. But the learned Judge goes on to consider the plaintiff's husband's account, the real plaintiff in these proceedings, working through his wife to avoid counter-claims by the defendants against himself, and to show quite clearly that Ex. 4/1, the deposit receipt or pro-note, was a sham and bogus transaction, never intended to be acted upon and proved to be such by oral evidence in accordance with the Privy Council ruling in 63 I A 126,[11] at p. 137. The deposit receipt Ex. 4/1 is dated 1st November 1918, but the plaintiff had a nominal account before that in the defendants' books. Ex. 7/1 is the first khata of the plaintiff in the defendants' books. It is for Sambat 1974-1917 A. D. and the first item is an item of Rs. 26,910, balance brought forward from the previous books: the second credit item is Rs. 20,000, dated 13th July 1917; the third credit item is Rs. 6910 dated 23rd October 1917, and the fourth credit item is Rs. 965-4-0 entered up to 31st December 1917. As the learned Judge points out, reference to the cash books show that the first item in Ex. 7/1 is made up of Ex. 7/2 and Ex. 7/3. Ex. 7/2 is the entry of Rupees 20,000 dated 13th March 1917, credited to the plaintiff made up of Rs. 6000 paid in cash and Rs. 14,000 paid by cheque. The cheque was on the National Bank and the Bank books show that the cheque was issued by Tayebali and debited to his account in the Bank's books. Ex. 7/3 is an entry dated 23rd October 1917 of Rs. 6918, cash credited to plaintiff, but the plaintiff nowhere alleges that she has made such a deposit, nor given any explanation of this item. Clearly, then, the account was in existence long before 1st November 1918; Tayebali was operating on the account, and the plaintiff deposited neither Rs. 80,000 nor any other sum in cash. Moreover, debit items against this Rs. 27,000 shows money paid on behalf of Tayebali, even Rs. 251 for his club bill and cash paid to himself and others, while Ex. 7/4 shows credit and debit entries of a cheque of Rs. 27,000 of Tayebali on the Punjab National Bank. This was carried over and an account in 1918 started with Rs. 27,000. But, Exs. 7/14 & 7/15 show Tayebali's own account in 1918. There is a credit item of Rs. 60,000 dated 28th October 1918, and Tayebali gave a cheque for Rs. 30,000 on the Punjab National Bank and paid Rs. 30,000 cash, and the Bank's books show that Tayebali was debited with Rs. 30,000, but subsequently Tayebali's books in the defendants' account was transferred and this Rs. 60,000 transferred to plaintiff's account.

In 1918-19 the plaintiff's nominal account shows her husband's dealings in real property and a cheque of Rs. 20,000 paid to her husband. Finally, the plaintiff's khata for 1918-19 shows a credit balance of Rs. 81,117-5-9 of which one, an item of Rs. 19,000, is a cheque taken by Tayebali and returned by him, and Ex. 4/1, the deposit receipt or promissory note, represents this item of Rs. 19,000 and an item of Rs. 61,000. Clearly then up to the date of Ex. 4/1 the account was in reality the plaintiff's husband's account and operated on by him and thereafter up to the date that it was closed in 1923, and the chief items relate to the plaintiff's husband's dealings in Bombay property which, according to the defendant and which appears true, resulted in loss to them all and which is the cause of dispute between them and this suit as framed. There is no reason to disbelieve the defendant's statement that the husband used the plaintiff's name in order to keep from the knowledge of his brothers his dealings in property and his excessive drawings from the firm. Clearly the account was kept in the wife's name for the purpose of some concealment or deceit. Even the plaintiff's real name was not given: She was described not as the wife of Tayebali but as the daughter of Allibhoy. This

11. Tyagarja Mudaliyar v. Vedathanni, (1936) 23 A I R P C 70=160 I C 384 = 63 I A 126=59 Mad 446 (P C).

again was for the purpose of deceit. We attach no importance to Ex. 4/2. It purports to show a balance of Rs. 80,126-12-6 due on 1st April 1922, and a debit item of Rs. 300, but it is not proved, and, if proved, proves nothing of importance. Ex. 7/23 is the last account in 1923. The learned advocate takes exception to the fact that the learned Judge ascribes this to the fact that the firm of A. M. Jiwanjee had stopped business and that Allibhoy, the eldest brother, was adjudicated insolvent. It would be more accurate from the record to say that Allibhoy the eldest brother was arrested in execution of a warrant and all the family left for Africa where Allibhoy Jiwanjee lived on an allowance from a Receiver.

It is clear then that Ex. 4/1 represents a sham or bogus transaction, that, as the learned Judge says, the plaintiff does not bring herself within Art. 60, Limitation Act, for her case of a deposit by her is false. But while the learned Judge did not dismiss the suit generally on the broad ground that the plaintiff must be held to her pleadings and to the case she has brought before the Court, it is on this broad point that we think this false and perjured claim must be dismissed. A plaintiff is entitled to succeed only *secundum allegata et probata*. But as the learned Judge has dealt with this case on the ground of limitation holding that the document Ex. 4/1 was a pro-note and the suit as based upon a pro-note was barred by limitation, and it was barred also as a suit based upon a deposit under Art. 60 being a claim as made in February 1931, we think it only proper that we should consider this aspect of the case which has been argued so diligently before us. Ex. 4/1 is as follows :

Karachi, dated 1st November, 1918.

To : Bai Kulsambai Allibhoy.

Written by Allibhoy Karimji Mandviwalla Rupees 80,000, in words rupees eighty thousand, have been received from you in cash. The same shall be paid whenever you demand.

Signature on one anna stamp.

Sd. A. K. Mandviwalla.

Dated 1st November 1918. per Tyeb.

And the learned Judge has pointed out that it appears to possess all the essential attributes of a promissory note. It contains (1) an unconditional undertaking, (2) signed by the maker, (3) to pay a certain sum of money only, and (4) to or to the order of a certain person or to the bearer : (see p. 125 of the paper-book). It resembles closely, as the learned Judge says, Illustration (b) in Art. 4, Negotiable Instruments Act. The learned Judge relies among other cases on 8 Cal 645,[12] but this case has been overruled by the Privy Council in 38 Bom L R 739,[13] and that case would seem to lay down the general rule that in order that a document shall be a promissory note within the meaning of S. 4, Negotiable Instruments Act, not only must it be a promissory note in form, it must in addition be intended by the parties to be a promissory note ; it must be intended by the parties to be negotiable and pass from hand to hand, and the learned advocate for the respondents admitted in this case that he could not pretend that it was ever intended or contemplated by the unfortunate lady Bai Kulsambai and the defendants or between the lady's husband and the defendants that this document should be negotiable, or, indeed, even leave the custody of the plaintiff or her husband. It was an acknowledgment in a false name of the state of the account between the plaintiff's husband and the defendants. In 38 Bom L R 739,[13] at p. 748 their Lordships said :

If this document is otherwise within the definition of a promissory note, it would seem that it must be negotiable, for there appear to be no words prohibiting transfer or indicating an intention that it should not be transferable. It must be admitted that it would be a somewhat unusual visitor in the accustomed circles of negotiable paper. It is indeed doubtful whether a document can properly be styled a promissory note which does not contain an undertaking to pay, not merely an undertaking which has to be inferred from the words used. It is plain that the implied promise to pay arising from an acknowledgment of a debt will not suffice, for the third illustration indicates that an IOU is not a promissory note, though of the implied promise to pay there can be no doubt. The second illustration however seems to show that the express words "I promise" or "I undertake" are necessary. The form of words is taken from an early English case, *Casborne* v. *Dutton*, reported in Selwyn's Law of Nisi Prius, 13th Edn., p. 329, from Scacc, M. I. Geo. II MSS., where according to the learned author the Court stated that the words "to be paid" in the document there sued on amounted to a promise to pay : observing that the same words in a lease would amount to a covenant to pay rent. It does not appear to form a useful general illustration except in the case of a document in that particular form of words.

Their Lordships prefer to decide this point on the broad ground that such a document as this is not and could not be intended to be brought within a definition relating to documents which are to be negotiable instruments. Such documents must come into existence for the purpose only of recording an agreement to pay money and nothing more,

12. Manick Chund v. Jamoona Doss, (1882) 8 Cal 645.

13. Mohammad Akbar Khan v. Attar Singh, (1936) 23 A I R P C 171=162 I C 454=63 I A 279 =17 Lah 557=38 Bom L R 739 (P C).

though of course they may state the consideration. Receipts and agreements generally are not intended to be negotiable, and serious embarrassment would be caused in commerce if the negotiable net were cast too wide. This document plainly is a receipt for money containing the terms on which it is to be repaid. It is not without significance that the defendants who drew it, and who were experienced money-lenders, did not draw it on paper with an impressed stamp as they would have had to if the document were a promissory note, and that they affixed a stamp which is sufficient if the document is a simple receipt. Being primarily a receipt, even if coupled with a promise to pay, it is not a promissory note. This view of the meaning of a promissory note appears to coincide with the grounds of decision in (1888) 21 QBD 352,[14] where the English Court of Appeal found themselves bound to give a restricted meaning to the much wider definition in the Indian Courts notably the case in 8 Cal 645,[12] where the defendant had given a sale note to his customer recording a sale to him of certain rupee paper previously brought from the customer, and bringing out a difference expressed to be payable on a day in the next month. The document was a sale note coupled with an account, and in no way resembled a promissory note, or anything capable of being a negotiable instrument. Once it is decided that the document has not to be stamped as a promissory note, their Lordships are not called upon to decide whether the document otherwise bears a sufficient stamp. If that question had been raised it is sufficient to say that if improperly stamped it could have been stamped after execution under a penalty.

With all respect therefore to the learned Judge we think this document is not a promissory note and that therefore Art. 73, Limitation Act, does not apply. If the document were not a sham and did not represent a sham and bogus transaction, we should have thought that it was a deposit receipt rather than a promissory note: but the learned Judge was of the opinion that as such it was time-barred because a clear and definite demand is made by the plaintiff's husband for the money in Ex. 7/42 in the words: "You will pay the deposits to the parties, whose (deposits) are lying with you;" and the learned Judge thinks that in a subsequent letter, Ex. 7/44, the plaintiff's husband asked the defendants to consider his letters of 11th December 1930 and 21st February 1931 cancelled, thus leading the defendants to believe that the claim to his money had been abandoned. But, with all respect to the learned Judge, we cannot read into this letter Ex. 7/44 the word "cancelled" at all; the word is not there, and the Gujerati words appear to us to mean that these letters should be considered; attention (*dhyan*) should be paid to them. In short, the plaintiff's husband is not resiling from his previous writing; he is maintaining his ground, but this reading rather strengthens than weakens the force of the demand contained in Ex. 7/42, for, while it was argued that these words were intended merely as an exhortation or a reproach, it does not appear the defendant took them as such. The letter, Ex. 7/42 was written in reply to a long letter from the defendant to the plaintiff's husband which was itself a reply to Ex. 7/40 in which the plaintiff's husband denied any share in the Bombay property. The defendant reproaches the plaintiff's husband with his falseness and the plaintiff's husband reproaches the defendant in return in the letter Ex. 7/42 which contains these words in the context:

> My brothers, having dealt with me dishonestly, have put me to loss of lacs of rupees, and further they have mortgaged me. But by the grace of God I do not feel sorry for that; God will give me strength to take further burden of a lac or two if it comes. You will pay the deposits to the parties, whose (deposits) are lying with you. I do not know even in a dream that you must have written the fact in the letter (under reply) thinking that thereby you will inspire more confidence (of others) and you will take the contents written in my letter of 11th December 1930 as reply to your letter of 1st January 1931 and you will act thinking yourself in the presence of God.

Exhibit 7/43 is the reply to this, and it would appear that the defendant read into this letter the demand by the plaintiff's husband for his money, for the defendant says:

> Had we been misappropriators of deposit of any one, why would we have paid your money, which you had deposited with us in the names of your daughters, in spite of lacs of rupees being due to us. If you require more instances than this, I shall give you in my next letter. If further money was due to you, why did you not receive or demand the same, at the time of receiving the money, which you had deposited in the name of your daughters.

It is true that the words of demand contained in this letter Ex. 7/42 are not as detailed as the demand in Ex. 7/45 dated 21st February 1934 made strangely enough three years after, but that was a formal demand and probably drafted by a lawyer thought to be within time as being within three years of the previous demand in 1931. The words however in Ex. 7/42 are clear and unequivocal. It is admitted that if time started from 21st February 1931 the suit was out of time. We agree with the learned Judge that on this ground the suit is time-barred. But even if it were not the plaintiff's suit would fail on the broad ground of falsity, the failure of the plain-

14. Mortgage Insurance Corporation v. Commissioners of Inland Revenue, (1888) 21 QBD 352 =57 L J Q B 630=36 W R 833.

tiff to prove a false case. We therefore dismiss the appeal with costs.

S.G./R.K. *Appeal dismissed.*

A. I. R. 1939 Sind 288

LOBO AND WESTON JJ.

Virbhandas Shamsing and others — Appellants.

v.

Dasumal Keshowdas and others — Respondents.

First Appeal No. 53 of 1935, Decided on 22nd August 1938.

Transfer of Property Act (1882), Ss. 5 and 130 — Dissolution of partnership — Certain partners paid off and in return assigning their interest in assets of partnership to remaining partners — This amounts to transfer — Assignment to those remaining partners of debt due to firm can only be made by writing signed by other partners.

The definition of transfer of property is sufficiently wide to cover cases in which on dissolution of a partnership certain partners are paid off and in return give up or assign their interests in the assets of the partnership. An arrangement by those partners that remaining partners are to be entitled to the debt due to the firm is an arrangement amounting to a transfer of an actionable claim and under S. 130 such transfer can be made only by a writing signed by the other partners: *63 Cal 194 and A I R 1926 Sind 78, Disting.*

[P 289 C 1, 2]

Dipchand Chandumal — *for Appellants.*

Srikishindas H. Lulla—*for Respondents.*

Weston J. — The facts leading to this litigation are as follows: Suit No. 62 of 1931 in the Court of the First Class Sub-Judge, Sukkur, was filed in the name of the Firm of Virbhandas Shamsing of Sukkur, said to have been already dissolved, by two partners Changomal and Seoomal against another Firm Dasumal Keshowdas of Pir Jo Goth through nine persons. The defendant partners are said to be the descendants of one Takhandas and to have formed a joint family business among themselves. Although in the plaint it is suggested that defendants were the only partners of the Firm of Dasumal Keshowdas it was pleaded by defendants that there were also certain other partners in this firm. The nine defendants were also concerned in the plaintiff firm of Virbhandas Shamsing and it appears that this Firm of Virbhandas Shamsing was made up of the two plaintiffs, the nine defendants and three other persons, who were not made parties to the suit, as partners. This is not stated in the plaint but was disclosed by plaintiffs following an application by defendants under O. 30, R. 2, Civil P. C., 1908. The case of plaintiffs was that the Firm of Virbhandas Shamsing was dissolved on 30th October 1930 and that a balance sheet or potamel was drawn up at that time. The two plaintiffs then took on the business with its assets and liabilities and the other partners then ceased to have any connexion with the firm. The firm of Dasumal Keshowdas as such had had dealings with the firm of Virbhandas Shamsing and on the date of the dissolution of the latter firm, owed it an amount of about Rs. 15,000. The present suit therefore filed originally, as has been stated, in the name of the firm of Virbhandas Shamsing was for the recovery of this amount of Rs. 15,000 from the firm of Dasumal Keshowdas.

Defendants among other defences pleaded that the suit was not maintainable and that as plaintiff's firm had been dissolved, all the partners of that firm were necessary parties to the suit. After written statements were filed plaintiffs Changomal and Seoomal applied to amend the plaint by striking out the firm of Virbhandas Shamsing and continuing the suit themselves in their personal capacity. The application was allowed and an amendment made. The learned Subordinate Judge held that on the evidence it was proved that there had been dissolution of the partnership of Virbhandas Shamsing and that plaintiffs had taken up the assets and liabilities of the partnership. He held however that as the suit was by plaintiffs in their individual capacity as assignees of the outstandings of the firm of Virbhandas Shamsing, this assignment of the debt due to the firm could only be made under S. 130, T. P. Act, by means of an instrument in writing signed by the transferors or their duly authorized agents. As there was no such instrument he has dismissed the suit with costs.

Plaintiffs appeal and it is contended by Mr. Dipchand on their behalf, firstly, that no document in writing was necessary in order to give plaintiffs a right to sue for a debt due to the firm, and secondly, in the alternative that even if a document in writing is necessary, yet such a document exists by reason of the potamel drawn up at the time of dissolution of the partnership. In view of the amendment of the plaint it is no longer necessary to consider whether, although the firm of Virbhandas Shamsing had ceased to exist, the suit by Changomal and Seoomal in the name of the firm was not maintainable in view of the fact that

the firm existed and these persons were partners when the cause of action accrued. Plaintiffs probably in view of the provisions of O. 30, R. 9 have chosen to base their case upon the arrangements said to have been made at the dissolution of partnership.

We would remark that the evidence that the arrangement pleaded was accepted by all partners appears to us very unsatisfactory. It is admitted that there were partners other than plaintiffs and defendants, but we have not been able to find evidence that these other partners who are not parties to the suit were consulted about or accepted the arrangements said to have been made. On this ground alone we think that plaintiffs must fail. Assuming, however, that the arrangement was proved that all the partners agreed that Changomal and Seoomal were to be entitled to the suit debt, in our view such an arrangement amounts to a transfer of an actionable claim, and under S. 130, T. P. Act, such a transfer could be made only by a writing signed by the other partners. That the suit debt is an actionable claim appears from the definition in Sec. 3, T. P. Act. S. 5 of the same Act, defines transfer of property as an act by which a person conveys property to one or more persons or to himself. Mr. Dipchand has relied upon certain cases of joint Hindu family businesses such as 63 Cal 194,[1] in which it was held that in a Mitakshara joint family business no assignment is necessary when a coparcener retires from membership of the family business. But we do not think that these cases can be applied to other partnerships. In our view the definition of transfer of property is sufficiently wide to cover cases in which on dissolution of a partnership certain partners are paid off and in return give up or assign their interests in the assets of the partnership. In England when a change in a firm has occurred assignment of the debts of the old firm in the new firm is necessary if the new firm wishes to sue to recover these debts: *vide* Lindley on Partnership, 10th Edn., p. 359. In the present case, we understand that partners other than plaintiffs were given cash credits in consideration of their giving all rights in the assets of the firm. This being so, we hold that S. 130, T. P. Act, requires that the acquisition by plaintiffs or the assignment to plaintiffs of the actionable claim now in suit could not be effected except by a document in writing signed by the other partners.

Mr. Dipchand has relied upon the ruling of this Court reported in A I R 1926 Sind 78,[2] which is said to lay down that S. 130, T. P. Act, is not exhaustive of all methods of devolution of interest. This was a case where there had been a devolution by a decree of the Court, but such a devolution is expressly saved from the operation of S. 130 by S. 2 (d), T. P. Act, and this ruling cannot be taken to mean that devolutions other than those exempted from the operation of S. 130 are valid. It only remains to see whether in the present case the writing acquired by S. 130 exists. No such writing appears on the record of the case, and for evidence of the existence of any such writing we do not think we need go further than the statement of the plaintiff Changomal when (at p. 16 of the paper book) he says: "There were no signatures on the potamel." The conclusion must be that no writing signed by other partners was made to effect the assignment of the suit debt to the present plaintiffs. The suit as brought therefore was not maintainable. The appeal must fail and is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

1. Brijmohan v. Mahabeer, (1936) 63 Cal 194=40 C W N 808.

2. Mulibai v. Shewaram Menghraj, (1926) 13 A I R Sind 78=90 I C 111.

* A. I. R. 1939 Sind 289

DAVIS J. C. AND TYABJI J.

Khemchand Ramdas Wadhwa — *Defendant 1* — Appellant.

v.

Mathradas Girdharidas and others — *Plaintiffs* — Respondents.

Misc. Second Appeal No. 40 of 1937, Decided on 23rd May 1939.

*** Hindu Law—Joint family—Minor coparcener cannot bring suit for accounts of ancestral property in hands of third person without joining manager as co-plaintiff — Fact that manager is joined as defendant does not avoid difficulty.**

Minor co-parceners cannot bring a suit for accounts of the joint ancestral property in the hands of a third party if their father, the manager, is not joined as co-plaintiff, but is joined as defendant and supports their claim. For, the minor plaintiff cannot give that third person a receipt or quittance on settlement of his accounts even should that person be willing to account. That can be done only by the manager, who therefore alone is entitled to call for accounts and give a quittance or receipt on settlement. It is the manager or karta who is alone competent to represent the family, to act for it and to bind it. The device of joining the manager as a defendant does not avoid the difficulty: *A I R 1937 Sind 94; 18 Mad*

33; 33 All 272 (P C) and A I R 1931 Lah 559, Rel. on; 6 Mad 27, Disting. [P 291 C 1, 2]

D. N. O'Sullivan—*for Appellant.*

Srikrishindas H. Lulla—*for Respondents.*

Davis J. C.— The suit out of which this miscellaneous second appeal arises is a peculiar one. It was brought in the Court of the Second Class Subordinate Judge at Shikarpur ostensibly in the names of three minors, the sons of Girdharidas through their grandmother Tulsibai as next friend. Tulsibai was the mother of Girdharidas who was defendant 2 and identified herself with and supported the plaintiffs' case. Girdharidas, defendant 2, and his minor sons, the plaintiffs, are members of a Hindu joint family and Girdharidas is the guardian in law of the minor plaintiffs, and he is the manager of the joint Hindu family. Some explanation as to why he did not himself as plaintiff and manager of the joint Hindu family bring the suit on behalf of himself and his minor sons is obviously called for as the suit purports to be a suit for accounts of joint family property alleged to have been in the hands of defendant 1 as trustee since 1907, long before the minor plaintiffs were born, and the minor plaintiffs had asked for their three-fourths share to be awarded them after settlement of accounts. But it is obvious that the plaintiffs as members of a joint Hindu family are not entitled to any specific share in the undivided property, and the learned advocate for the respondents in this appeal, the minor plaintiffs, dealt discreetly with that part of their claim by dropping it.

The joint Subordinate Judge who tried the suit dismissed it holding that the minor plaintiffs had no right to ask for accounts from defendant 1 who, it was found, stood in some sort of fiduciary relationship to defendant 2, but it was defendant 2 alone who was entitled to call on defendant 1 to account. The First Class Subordinate Judge in appeal however held that the minor plaintiffs as having a right independent of their father in the joint ancestral property in the hands of defendant 1 had a right to call upon defendant 1 to account, and he found that the fact that the father was joined as defendant 2 brought all necessary parties upon the record, and made the case complete. He did not refer to the fact that the minor plaintiffs, though undivided, claimed their separate share in the joint family property, apart from their father defendant 2, though the suit was not a suit for partition, nor did he refer to the fact that the minor plaintiffs could not give a receipt or quittance to defendant 1, even if he was prepared to account, and could not therefore be in a position to sue. He therefore allowed the appeal and reversed the order of the trial Judge dismissing the suit. Defendant 1 has appealed.

There is no real dispute about the facts in this case. Radhakrishindas, the father of Girdharidas, the father of the minor plaintiffs, died in 1907, and on his death Radhakrishindas' widow, the minors' present next friend, not unnaturally, approached defendant 1 Khemchand, her late husband's nephew, to look after the property and safeguard the interests of her minor son Girdharidas, the present defendant 2, then aged six years old. Khemchand agreed. Also it is not now disputed, and it is found by both the lower Courts that whether Khemchand was a trustee de son tort or not, he was bound to account for the property whatever its value, which on the death of the father of defendant 2, he, at the request of the mother of defendant 2, undertook to administer and safeguard. The only question of difference between the two lower Courts is as to whom defendant 1 should be called upon to account—defendant 2 as the trial Court finds or to the minor plaintiffs as the lower Appellate Court finds ? Our view is that he cannot be called upon to account by the minor plaintiffs in this suit.

Before us the case was argued at first broadly on the ground that the minor plaintiffs alone could not sue for accounts of the joint family property in the hands of defendant 1. Defendant 2 as manager of the joint family and the joint family property was alone entitled to sue, and he had not done so, but had put up his minor sons, with their grandmother as next friend to sue, so as to avoid that accounting between himself and defendant 1 which would take place if he, defendant 2, sued as plaintiff. There is no doubt in our minds that this explanation is the true explanation of the action of defendant 2. He supports the claim of his minor sons against defendant 1 but he will not sue himself. Reliance was placed on behalf of the appellant-defendant 1 on a case of this Court in 30 S L R 467[1] in which it was held that the manager or karta is alone competent to represent

1. Kallianeshwar Bhagwandas v. Shewaram Nandram, (1937) 24 A I R Sind 94 = 168 I C 801=30 S L R 467.

the family, to act for it and to bind it, and a mere co-parcener cannot sue or appeal alone. Reliance was also placed upon the judgment in 12 Lah 428.[2] It is true that in 30 S L R 467,[1] this Court was considering the case of an appeal by a coparcener who was not joined as a party to the suit and other considerations besides that of the right of a coparcener to oust the karta or manager from authority or interfere in his management were present ; but all the diligence of the learned advocate for the respondents has not enabled him to find one case where it has been held that minor coparceners can bring a suit with respect to joint family property in the possession of a third party without the manager or karta being himself a plaintiff. All the cases cited merely show that it was at one time considered necessary to join the other coparceners with the manager in a suit brought by the manager, which is no longer good law : 33 All 272[3] at p. 277 ; but not one case is cited to us to show that minor coparceners can therefore bring a suit such as this and do what, it would appear, the manager only is competent to do.

The case nearest to the argument of the learned advocate for the respondents was 6 Mad 27,[4] but this case merely decided that no member of an undivided family, except the manager, as such, is entitled to bring a suit to establish a right belonging to his family without making the other members of the family parties to the suit, but that case did not decide that minor coparceners could bring a suit for accounts of the joint ancestral property in the hands of a third party, their father, the manager, not being joined as co-plaintiff, but being joined as defendant 2 and supporting their claim ; nor did the case decide that adult coparceners could usurp the authority and status of the karta or manager and bring a suit in their own names separately from him. We think this case can be looked at simply and decided simply in this way : the minor plaintiffs could not give defendant 1 a receipt or quittance on settlement of his accounts, even should defendant 1 be willing to account. That could be done only by the manager, who therefore alone was entitled to call for accounts and give a quittance or receipt on settlement. If therefore the minor plaintiffs could not give defendant 1 a good quittance or receipt on settlement of accounts, obviously they had no right to sue, the truth being that, as laid down in 30 S L R 467,[1] it is the manager or karta who is alone competent to represent the family, to act for it and to bind it, and this proposition finds support in the judgments in 18 Mad 33[5] and 33 All 272,[3] which emphasize the right of the manager to sue alone ; but the coparcener has no such right. We do not think the device of joining the manager as a defendant avoids the difficulty. Reference may also be made to the case in 12 Lah 428,[2] where after quoting from the judgment of the Privy Council in 33 All 272[3] Dalip Singh, J. said (p. 432) :

> It seems to me to follow from the above that it is not the form in which the manager sues which determines his capacity to sue, on behalf of the joint family, but the fact that nobody except him has the right to interfere in the business of the joint Hindu family or to give a discharge or a receipt for a debt due to or from that joint family which confers the capacity on the manager.

And

> it is clear law that a son could not interfere with the father's management of the family business.

To hold otherwise would be to deprive the father of the right and power of management. This is much the effect of the ruling in 30 S L R 467.[1] We hold therefore the minor coparceners had no right to sue, and we allow the appeal and restore the order of the trial Judge with costs throughout.

D.S./R.K. *Appeal allowed.*

2. Ram Kishan v. Ganga Ram, (1931) 18 A I R Lah 559 = 133 I C 116 = 12 Lah 428 = 32 P L R 199.
3. Kishan Parshad v. Har Narain Singh, (1911) 33 All 272=9 I C 739=38 I A 45 = 8 A L J 256 (P C).
4. Arunachala Pillai v. Vythialinga Mudaliar, (1883) 6 Mad 27.
5. Alagappa Chetti v. Vellian Chetti, (1895) 18 Mad 33=4 M L J 283.

A. I. R. 1939 Sind 291

DAVIS J. C. AND TYABJI J.

Ramchand Virmal — Applicant.

v.

Lilaram and another — Opponents.

Revn. Appln. No. 28 of 1938, Decided on 17th May 1939, from order of First Class Sub-Judge, Hyderabad, D/- 19th March 1938.

Civil P. C. (1908), Ss. 10 and 115 — Order refusing to stay proceedings under S. 10 is not revisable.

No application in revision will lie against an order of a Judge under S. 10 refusing to stay proceedings and directing a suit to proceed : *A I R 1929 All 957; A I R 1920 All 197 and A I R 1939 Sind 241, Rel. on ; A I R 1916 Cal 318, Expl.*

[P 292 C 1, 2]

Fatehchand Assudomal—*for Applicant.*

Dipchand Chandumal—*for Opponents.*

Davis J. C. — This is an application in revision against an order of the learned First Class Subordinate Judge, Hyderabad, dated 19th March 1938 in which he refused to stay Suit No. 103 of 1936 in his Court. It was argued that S. 10, Civil P. C., prevented his proceeding with the trial of the suit before him, there being another suit prior in point of time between the same parties or parties litigating under the same title in which the same matters directly and substantially in issue, filed in the Bombay High Court. The learned Judge dealt with this objection carefully and at length, as he and other Judges have dealt carefully and at length with other objections raised in this Suit No. 103 of 1936, which to this day, 17th May 1939, has made no appreciable progress. But we think the preliminary objection taken that revision application will not lie against an order of the Judge rejecting an objection under S. 10, Civil P. C., and ordering the suit shall proceed before him must succeed, for such an order is not a case decided within the provisions of S. 115, Civil P. C. A Bench of this Court in the judgment reported in 32 S L R 703[1] have pointed out that S. 115, Civil P. C., does not in terms refer to interlocutory orders ; it refers to a case decided and it was in 32 S L R 703[1] laid down that the point whether a case is or is not decided within the provisions of S. 115, Civil P. C., must be determined upon the facts of each case. In the case of an order of a Judge refusing to stay proceedings under S. 10, Civil P. C., there is authority that such an order does not fall within the provisions of S. 115, Civil P. C., in A I R 1929 All 957,[2] while in 42 All 409,[3] it was decided that an order staying a suit on an application under S. 10, Civil P. C., was also not a case decided within the meaning of S. 115, Civil P. C.

In A I R 1933 Lah 191[4] it was also held that an order staying a suit under S. 10, Civil P. C., is not a case decided within the meaning of S. 115, Civil P. C. It is true that in 42 Cal 926[5] the Calcutta High Court set aside an order of the Subordinate Judge staying a suit under S. 10, Civil P. C., but in that case the power of the Court to interfere under S. 115, Civil P. C., was not considered at length. It merely stated that the Court had ample power to interfere with an interlocutory order, even if that power only lay under S. 15, of the Charter Act.

The view of the Madras High Court in certain cases in unauthorized law reports is to the effect that revision will lie against an order passed under S. 10, Civil P. C. There is, therefore, on this point conflict of judicial decisions; but our own view is that where a Court refuses to stay proceedings under S. 10, Civil P. C., it cannot be said to be a decided case within the meaning of S. 115, Civil P. C. Rather it might be said it did not decide a case but merely allowed the suit to proceed and to be decided in accordance with law. It is true that a Bench of this Court held in 32 S L R 703,[1] that an order setting aside a decree under O. 9, R. 13 was an order deciding a case. So did a Full Bench of the Allahabad High Court in A I R 1931 All 294[6] and yet the decision of that same High Court in cases under S. 10, Civil P. C., is that no revision will lie. So that there is, at least, an authority besides our own for the view that there is no necessary conflict between a decision that an order under S. 10, Civil P. C., allowing a suit to proceed is not a case decided within the provisions of S. 115, Civil P. C., while an order setting aside a decree under O. 9, R. 13, Civil P. C., is. This Court has recently in a Full Bench decision in R. A. No. 12 of 1937[7] held that no revision under S. 115, Civil P. C., lies against an order of the Court setting aside an award and directing the suit to proceed. That decision seems in accord with our present decision that no application in revision will lie against an order of a Judge under S. 10, Civil P. C., directing a suit to proceed. This revision application must be dismissed with costs accordingly.

D.S./R.K. *Application dismissed.*

1. Zenab Sukhio v. Muhammad Haji Allahdino, (1938) 25 A I R Sind 76=174 I C 572=32 S L R 703.
2. Bal Krishna v. Ram Kishun, (1929) 16 A I R All 957=121 I C 97=1930 A L J 235.
3. Sultanat Jhan Begam v. Sundar Lal, (1920) 7 A I R All 197=58 I C 90=42 All 409=18 A L J 431.
4. Kalwant Rai v. Fonseca & Co., (1933) 20 A I R Lah 191=141 I C 177=34 P L R 86.
5. Sivaprasad Ram v. Tricomdas Coverji Bhoja, (1916) 3 A I R Cal 318=27 I C 917=42 Cal 926.
6. Radha Mohan Datt v. Abbas Ali, (1931) 18 A I R All 294=133 I C 129=53 All 612=1931 A L J 377 (FB).
7. Kishinchand Changomal v. Takhitram Tulsidas, *Reported in* (1939) 26 AIR Sind 241 (FB).

A. I. R. 1939 Sind 293

DAVIS J. C. AND LOBO J.

Commissioner of Income-tax, Bombay Presidency, Sind and Aden—Applicant.

v.

Central Popular Assurance Co. Ltd., Karachi — *Assessees* — Opponents.

Ref. No. 17 of 1937, Decided on 27th February 1939, made by Commissioner of Income-tax, Bombay Presidency, Sind and Aden.

(a) Income-tax Act (1922), S. 66— Question of law — Question whether facts found bring assessee's business within R. 31 framed under S. 59 (3) as dividing society business is question of law—High Court can consider it even if not specifically referred to by Commissioner.

Whether the facts found do or do not bring an assessee within certain provisions of the Income-tax Act or its statutory rules is a question of law. Hence the question whether the facts found do or do not bring the assessee's business within R. 31 under S. 59 (3) as a dividing society business is a question of law. The High Court is not precluded from considering and deciding this question even if Commissioner has not specifically referred it to it because it is in his opinion a question of fact: *AIR 1933 P C 108; AIR 1934 Sind 146 and AIR 1938 P C 175, Rel. on.* [P 294 C 1]

(b) Income-tax Act (1922), S. 59 (3), Rules under, R. 31 — "Dividing Society" in R. 31 means "Dividing Insurance Society."

It is true that fiscal Acts must be construed strictly in favour of the subject, nevertheless statutory rules must be interpreted with the Section under which they are made. R. 31 is clearly made under the provisions of sub-s. (3) of S. 59. Sub-s. (2) of that Section must be read with sub-s (3). Insurance companies come under sub-s. (2) (a) (ii) of S. 59, and therefore the "Dividing Society" in R. 31 means and must be read as "Dividing Insurance Society." The definition of "Dividing Society Business" in the Rules made by the Bombay Government on 14th July 1914 under S. 24 of Act 5 of 1912 was intended only to apply to societies under that Act and was for the purpose of that Act, but it was not intended to be exhaustive in the sense that a dividing society cannot be defined in similar terms for the purposes of the Income-tax Act, and a dividing society cannot be a Dividing Insurance Society. [P 294 C 2; P 295 C 1]

(c) Income-tax Act (1922), S. 59 (3), Rules under, R. 31— Dividing society business — On facts, business of company held dividing society business within meaning of R. 31.

A rule of an Assurance Company provided for the distribution of the yearly payments among the members after the deduction of 20 per cent. for the reserve fund and 10 per cent. for the working fund. The benefits received were not fixed but varied according to the yearly collections:

Held that the business of the assessee company was dividing society business within the meaning of R. 31 and R. 31 therefore applied. [P 295 C 1]

(d) Income-tax—Mutual society — Company held not mutual society.

The assessee Assurance Company and those whose money they collected and in part retained were quite separate and distinct parties. The assessee company was not the same body as the policy-holders at all. It had directors and share-holders and a nominal share capital as something quite distinct and separate from the policy-holders and their premia. The revenue accounts of the assessee company showed a surplus:

Held that the company was not a mutual society. The fact that the company in its memorandum and articles used the term "society" and "members" loosely as meaning at one time the company and the share-holders, and another time the general body of policy-holders and the policy-holders individually was no point in its favour. The fact that the company was prepared to limit its dividends to the working fund made no difference to the principle involved or applicable: *(1900) 4 Tax Cas 147, Rel. on; (1889) 14 A C 381 and (1927) A C 827, Disting.* [P 295 C 2]

Partabrai D. Punwani, Advocate-General — *for Applicant.*

Kimatrai Bhojraj — *for Opponents.*

Davis J. C. — This is a reference under S. 66 (2), Income-tax Act 1922, to this Court in its High Court jurisdiction by the Commissioner of Income-tax for the Bombay Presidency and Sind at the instance of the assessee, the Central Popular Assurance Co. Ltd., Karachi, stating a case for our decision on certain questions of law raised thereby, with his opinion. The questions of law are:

(i) Whether the assessee can be said to be a mutual society and exempted from tax under the principle laid down by the House of Lords in (1889) 2 Tax Cas 460;[1] (ii) the finding of fact being that the assessee is doing a dividing society business, has the Income-tax Officer correctly held that R. 31 of the Income-tax Rules applies?

The opinion of the learned Commissioner given, as S. 66 (2) requires, on these two questions of law is, on the first question that the assessee is not a mutual society within (1889) 2 Tax Cas 460[1] and on the second question, that the finding of the Assistant Commissioner that the assessee is doing a dividing society business within the meaning of R. 31 of the Income-tax Rules is a finding of fact and not of law and not to be referred in consequence to the High Court. Nevertheless he has assisted us with a discussion as to what a "Dividing Society Business" is and what the term "Dividing Society Business" means, and as the learned Commissioner points out what the assessee really contests is this finding of the Assistant Commissioner that the assessee's business is a dividing society business and indeed the arguments before us were principally directed to this very point. While an assessee cannot dis-

1. New York Life Assurance Co. v. Styles, (1889) 14 A C 381=2 Tax Cas 460=59 L J Q B 291.

pute before us or the Commissioner refer to us any question of fact whether the facts found do or do not bring an assessee within certain provisions of the Income-tax Act or its statutory rules, appears, to us a question of law. Whether, for instance, the facts found do or do not bring the assessee's business within R. 31 as a dividing society business is just as much a question of law or legal inference as whether, for instance, facts found by a lower Court do or do not constitute adverse possession or whether there is a "succession" to a business within the meaning of S. 26, Income-tax Act: 41 C W N 132.[2] Indeed, it appears that the learned Commissioner in referring to us the question whether the assessee is a mutual society within (1889) 2 Tax Cas 460[1] has himself considered as a question of law the kind of business done by the society. Therefore, we think, we should consider and decide the question whether the business of the assessee is a dividing society business within the meaning of R. 31 of the Income-tax Rules. We do not think we are precluded from considering and deciding this question because the learned Commissioner has not specifically referred it to us because it is in his opinion a question of fact. It is always desirable that the Commissioner should state correctly the questions of law raised by the stated case, but we do not think that we are precluded from deciding questions of law arising from the case as stated by him though not set out specifically for our decision: 1 I T R 94,[3] 28 S L R 174[4] and 32 S L R 549.[5] And indeed in considering and deciding this first question it is necessary that we should consider and decide the second; and it is more convenient to consider the second question first; one is so involved with the other.

The learned advocate for the assessee has stressed the fact that Rule 31 of the Rules refers to a "Dividing Society Business" and not a "Dividing Society Insurance Business," and the business of the assessee is admittedly an insurance business. While however we appreciate the force of the argument that fiscal Acts must be construed strictly in favour of the subject, nevertheless statutory rules must be interpreted with the Section under which they are made. R. 31 is clearly made under the provisions of sub-s. (3) of S. 59. Sub-s. (2) of that Section must be read with sub-s. (3). Insurance Companies come under sub-s. (2) (a) (ii) of S. 59 and we think it is clear the "Dividing Society" in R. 31 means and must be read as "Dividing Insurance Society." Rr. 25 to 30 clearly relate to Life Assurance Companies incorporated in British India and other classes of insurance business (fire, marine, motor-car, burglary and so on) of companies incorporated in British India whose profits are periodically ascertained by actuarial valuation. Rule 31 reads thus:

> The income, profits and gains of companies carrying on dividing society or assessment business shall be taken at 15 per cent. of the premium income in the previous year, and in the case of non-resident companies at 15 per cent. of the Indian premium income in the previous year.

Rule 32 states:

> Notwithstanding anything contained in Rr. 25 to 31 the total income however of an insurance company carrying on more than one class of business shall be determined by its aggregate income from all classes of businesses.

It is obvious from a perusal of R. 32 that "companies" referred to in Rule 31 means Life Assurance Companies. We do not think there is any force in the argument which is not clear that as "Dividing Society Business" is defined in Rules made by the Bombay Government under Act 5 of 1912 (the Provident Insurance Societies Act), no dividing society can be an insurance business under Act 6 of 1912, and no insurance business can be a dividing society business within the meaning of R. 31 of the Income-tax Rules. It is true that S. 3 of Act 6 of 1912 (the Life Assurance Companies Act), which admittedly applies to the assessee company excludes the application of its own provisions to Provident Insurance Societies under Act 5 of 1912, but it does not therefore follow that no dividing Insurance Society can come within the provisions of Act 6 of 1912 or within the provisions of Sec. 59, Income-tax Act, and R. 31 of the Income-tax Rules. Obviously the definition of "Dividing Society Business" in the rules made by the Bombay Government on 14th July 1914 under S. 24 of Act 5 of 1912 was intended only to apply to societies under that Act and was for the purpose of that Act, but it was not in-

2. In re Messrs. G. I. M. Gregory & Co., (1937) 41 C W N 132=I L R (1937) 2 Cal 7.
3. Commissioner of Income-tax, Bihar and Orissa v. Maharajadhiraja Kameshwar Singh of Darbhanga, (1933) 20 A I R P C 108=142 IC 437 =60 I A 146=12 Pat 318=1 I T R 94 (P C).
4. Khemchand Ramdas v. Commissioner of Income-tax, (1934) 21 A I R Sind 46 = 149 I C 1204=28 S L R 174.
5. Commissioner of Income-tax, Bombay Presidency and Aden v. Khemchand Ramdas, (1938) 25 A I R P C 175=175 I C 1=65 IA 236=32 S L R 549 (P C).

tended to be exhaustive in the sense that a dividing society cannot be defined in similar terms for the purposes of the Income-tax Act, and a dividing society cannot be a dividing insurance society. R. 2 (c) made under S. 39 of Act 6 of 1912, as set out by the learned Commissioner, refers obviously to a dividing insurance society business. This definition is as follows:

> Dividing insurance business means any form of insurance business under which the policy money payable on the happening of the contingency insured against is not fixed but depends either partly or wholly on the results of the division of any portion of the premium income or funds among the policies which have become due for payment in proportion to the premiums received under each class in any specified period.

Reference to the rules of the assessee company shows that it is precisely on these lines this company works. R. 62, for instance, provides for the distribution of the yearly payments among the members after the deduction of 20 per cent. for the Reserve Fund and 10 per cent. for the Working Fund. The benefits received are not fixed but vary according to the yearly collections. It may be that the rules as properly interpreted give to the policy-holders as against the shareholders the right to the moneys in the Reserve Fund and that the benefits of the shareholders are limited to dividends declared under Art. 36 out of the profits of the Working Fund. But be that as it may, it appears that by its own rules this Society which does insurance business and is admittedly governed by the Life Assurance Companies Act 6 of 1912, is a company carrying on dividing society business, within the meaning of R. 31 of the Income-tax Rules and that the Rule applies and has been correctly applied to its business. The answer to the second question raised by the learned Commissioner is that R. 31 has been correctly applied to the business of the assessee which we find is a dividing society business within the meaning of R. 31.

We think it is also clear that the answer to the first question raised by the Commissioner must be in the negative and that it cannot be said that the assessee does not carry on business within the meaning of S. 10, Income-tax Act, and is a mutual society within the ruling in *Styles' case.*[1] Indeed, it is upon *Styles' case*, (1889) 14 A C 381,[1] that this assessee company most strongly relies, but in *Styles' case*[1] the company had no shares or shareholders entitled to dividends as distinct from the policy-holders and their right to distribution of mutual contributions. Broadly speaking, the members merely took out of the fund what they put in. There were no two separate and distinct parties contracting one with the other. But this is not the case here. The assessee company and those whose money they collect and in part retain are quite separate and distinct parties. The assessee company is not the same body as the policy-holders at all. Nor does the case in (1927) A C 827[6] help the assessee. The assessee company was registered under the Companies Act and the Life Assurance Companies Act was first called in 1933 the Sind Popular Provident Funds Society Ltd., though it is not a Provident Fund under Act 5 of 1912, and afterwards changed its name in 1935 to the Central Popular Assurance Co., Ltd. It has directors and shareholders and a nominal share capital of Rs. 2,00,000 as something quite distinct and separate from the policy-holders and their premia. The fact that the company in its memorandum and articles uses the term "society" and "members" loosely as meaning at one time the company and the shareholders, and another time the general body of policy-holders and the policy-holders individually, is no point in its favour. The fact that the company is prepared to limit its dividends to the Working Fund makes no difference to the principle involved or applicable: *see* (1900) 4 Tax Cas 147[7] at p. 159. In that case Smith L. J. said:

> It seems to me that the main distinction that they drew between *Styles' case*[1] and *Last's case*[8] was that in *Styles' case*[1] it was a case of mutual assurance pure and simple, and that there was no company, as in the present case as there was in *Last's case*[8]

The words of Rowlatt J. in (1926) 10 Tax Cas 442[9] at p. 453 are also applicable:

> But in a case of this kind, where there is a share capital with a chance of dividends, a chance of a right to dividends if declared upon the share capital, and to one side of that a dealing with people who happen to be the owners of the share capital, affording benefit to those people one by one in-

6. Jones v. South-West Lancashire Coal Owners' Association, (1927) A C 827=96 L J K B 894 =137 L T 737=43 T L R 725=71 S J 680.
7. Equitable Life Assurance Society of United States v. Bishop, (1900) 1 Q B 177 = 69 L J Q B 252 = 81 L T 693 = 48 W R 341 = 16 T L R 74=4 Tax Cas 147.
8. Last v. London Assurance Corporation, (1885) 10 A C 438=55 L J Q B 92=53 L T 634=34 W R 233=50 J P 116=2 Tax Cas 100.
9. Liverpool Corn Trade Association, Ltd. v. Monks, (1926) 2 K B 110=95 L J K B 519= 134 L T 756=10 Tax Cas 442=42 T L R 393.

dividually, for which they pay money by way of subscriptions and by way of entrance fees as a sort of overriding subscription, if I may use that word, which opens the door to subscriptions, there is no reason at all for saying that you are to neglect the incorporation or that you can regard otherwise than as profits the difference which is obtained by dealings between that corporation and people, who happen to be its members.

The revenue accounts of the assessee company ending 31st March 1935 showed a surplus of Rs. 14,708 only. The company are not therefore, as is suggested, mere social workers or philanthropists. It is true that they have been taxed upon a profit calculated at 15 per cent. of the premium income of Rs. 2,21,050 which works out at Rs. 33,157, with a net tax of Rs. 5238-5-0, but once we are satisfied that the right statutory rule is applied and the right calculations made the harshness or otherwise of this method of assessment is not for us but for the Legislature. We therefore return the reference to the Commissioner answering the first question in the negative, and the second question in the affirmative, as we have explained above. The assessee must bear the costs of these proceedings but will have liberty to argue whether the costs should include or not the Rs. 100 deposit fee.

D.S./R.K. *Answer accordingly.*

A. I. R. 1939 Sind 296

DAVIS J. C. AND LOBO J.

Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan — Applicant.

v.

Sind Central Provident Funds Society Ltd. (In liquidation) — *Assessees* — Opponents.

Reference No. 60 of 1937, Decided on 27th February 1939: Reference made by Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan.

(a) Income-tax Act (1922), Sec. 59, Rules under, R. 31—Sums payable to policy holders of insurance company not fixed beforehand but varying according to yearly collections—Business is dividing society insurance business—R. 31 applies.

Where according to the rules of an insurance company the sums payable to policy holders, subject to a certain maximum, are not fixed beforehand, but vary according to the yearly collections which is the fund out of which benefits are paid to subscribers after deduction of certain percentages for the Working Fund, Reserve Fund, Emergency Fund and Equalization Fund, the company carries on a dividing society insurance business within the meaning of R. 31 of the Income-tax Rules, and R. 31 can be applied. [P 296 C 2; P 297 C 1]

(b) Income-tax Act (1922), S. 10—Mutual society — Policy-holders and shareholders of insurance company distinct—Company is not mutual society.

Where an insurance company registered under the Companies Act has a share capital and shareholders distinct and separate from the premia of policy-holders, and the policy-holders themselves, the company is not a mutual society and is not exempt from tax on income on that account: *(1885) 2 Tax Cas 100, Applied; (1889) 2 Tax Cas 460, Not applied.* [P 297 C 1, 2]

Partabrai D. Punwani, Advocate-General — *for Applicant.*

Suganlal Hassanand — *for Opponents.*

Davis J. C.—This is a reference under S. 66 (2), Income-tax Act, to this Court in its High Court jurisdiction by the Commissioner of Income-tax for the Bombay Presidency and Sind, at the instance of the assessee, the Sind Central Provident Funds Society Ltd. (in liquidation), stating a case for our decision on two questions of law raised thereby with his opinion. The two questions are:

(i) The finding of fact being that the assessee is doing a dividing society business, has the Income-tax Officer correctly held that R. 31 of the Income-tax rules applies?

(ii) Whether the assessee can be said to be a mutual society and exempted from tax on all income on that account?

We have in effect dealt with these two questions in our order in Ref. No. 17 of 1937,[1] for the principle to be applied in each case is the same. So far as the first question is concerned, taking the facts as found by the Assistant Commissioner and regarding the question as to whether those facts do or do not show that the insurance business is a dividing society business within the meaning of R. 31 of the Income-tax Rules, it is clear that the first question put to us must be answered in the affirmative. We accept as correct in this reference, as in Ref. No. 17 of 1937,[1] and for the reasons we have there given, the definition of a "Dividing Society (Insurance) Business" as given in rules made by the Government of India under Act 6 of 1912, which governs the assessee's business. The fact that the company calls itself a Provident Fund Society does not attract the provisions of Act 5 of 1912 (the Provident Fund Insurance Societies Act).

Rules 56, 57, 70, 71 and 76 of the Rules of the Society show that the sums payable, subject to a certain maximum, are not fixed beforehand, but vary according to the

1. Commr. of Income-tax, Bombay Presidency Sind & Aden v. Central Popular Assurance Co. Ltd., *Reported in* (1939) 26 A I R Sind 293.

yearly collections which is the fund out of which benefits are paid to subscribers after deduction of certain percentages for the Working Fund, Reserve Fund, Emergency Fund and Equalization Fund: *see* R. 56 of the Rules wrongly numbered in the copy before us as R. 55. Clearly then the amount payable to a policy-holder is not a fixed sum but a variable quantity depending on the total amount of subscriptions received in the year concerned. It is not a definite fixed sum as is the case with other classes of insurance business. The fact that the rules provide that the amount payable fall within certain limits does not affect their variable and contingent nature. The payments do ultimately depend on the total amount of subscriptions divided by the total annual claims.

It is clear therefore that the assessee carries on a dividing society insurance business within the meaning of R. 31 of the Income-tax Rules, and it appears that R. 31 of the Rules has been correctly applied. On the second question as to whether the business is not a business at all, but a mutual society, it is also clear in this case, as in Ref. No. 17 of 1937,[1] that this case falls within the ruling in *Last's case*, (1885) 2 Tax Cas 100,[2] and not within the ruling in *Styles' case*, (1889) 2 Tax Cas 460.[3] The reasons we have given for our decision on this question in Ref. No. 17 of 1937[1] apply in this case also, for allowing for difference in detail the two cases are the same. In this case also the policy-holders and the shareholders are not the same persons nor do they form the same body, incorporated or otherwise, it matters not. The assessee is a company registered under the Companies Act and has a share capital and shareholders distinct and separate from the premia of policy-holders, and the policy-holders themselves. It is true that of the subscribed capital of Rs. 20,000 of 2000 shares of Rs. 10 each, Rs. 650 only have been paid. The shareholders are also entitled to dividends. The fact that the income of the company is returned at Rs. 1376 only does not affect the case once it is clear that the assessee as a company collects and distributes insurance money not among its shareholders but its customers. This is the case here, and the sum total of these collections or premium income for the year under account is Rs. 1,56,215 and R. 31 is applicable. No question of the correctness of the sum in which it has been found liable arises. The assessee clearly falls within the ruling in *Last's case*, (1885) 2 Tax Cas 100,[2] and not within the ruling in *Styles' case*, (1889) 2 Tax Cas 460.[3]

We therefore answer the second question in the negative. The assessee is not a mutual society and is therefore not exempt from tax upon its premium income. The assessee will bear the costs of these proceedings but with liberty to argue as to whether these costs shall include the deposit fee of Rupees 100.

D.S./R.K. *Answer accordingly.*

2. Last v. London Assurance Society Ltd., (1885) 10 A C 438=55 L J Q B 92=53 L T 634=34 W R 233=50 J P 116=2 Tax Cas 100.

3. New York Life Insurance Co. v. Styles, (1889) 14 A C 381=2 Tax Cas 460=59 L J Q B 291.

A. I. R. 1939 Sind 297

DAVIS J. C. AND TYABJI J.

Sugnomal Kirpaldas — Defendant 1 — Appellant.

v.

Chuhermal Lilaram, Plaintiff and another, Defendant 2 — Respondents.

Second Appeal No. 12 of 1937, Decided on 28th February 1939.

Hindu Law — Debts — Father — Father mortgaging joint family property — Debts not proved to be for illegal or immoral purpose — Property sold in execution and sale — Sons cannot challenge sale.

Where a father has mortgaged joint family property and in execution of the mortgage decree the property is auctioned and the auction sale is completed, the sons who have failed to show that father's debts were for illegal or immoral purpose, cannot successfully challenge the sale which is complete: *AIR 1930 Sind 138, Disting.; Case law discussed.* [P 299 C 2]

Dipchand Chandumal — *for Appellant.*

Thakurdas Tikamdas — *for Respondents.*

Davis J. C.—In the suit out of which this appeal arises the minor son of one Lilaram sued through his mother, as next friend, defendant 1, the holder of a mortgage decree against the property of the joint family mortgaged by his father, defendant 2, for a declaration that his share in the property was not subject to the mortgage decree, and for an injunction restraining the decree-holder from proceeding to execute his decree against it. The Subordinate Judge dismissed the plaintiff's suit holding that the son's share in the property was liable to be sold in execution as the son was under a pious duty to pay his father's debts, but in appeal the Assistant Judge granted the minor plaintiff an injunction restraining the decree-holder from execut-

ing the decree against the plaintiffs share "qua mortgage debt" as the learned Judge puts it. The principle of the learned Judge's decision appears to be that there is a difference between a secured and an unsecured debt, and that while the decree-holder can proceed against the father's share as a mortgagee or secured creditor, he can proceed against the son's share only as a simple creditor for the balance of the moneys due under the personal covenant of the father to pay. The learned Judge relies upon a decision of this Court in 24 S L R 451.[1] In that case there was a suit for partition, and the plaintiff, the son, wished to obtain his share free from all liability for the debts of his father, which were neither illegal nor immoral, incurred by his father in two mortgages. The trial Court held that as the mortgage was not for an antecedent debt, the share of the father only was liable; the first Appellate Court, however, held that the family property including the son's share could be attached and sold, not as property mortgaged but as property of the son liable to pay his father's debts, but that it could not be so attached after partition and during the father's lifetime. That Court also dismissed the appeal. In second appeal however, the Bench of this Court held that the decree-holders could in execution attach and sell the share of the son, not in enforcement of the mortgage debt but in enforcement of the personal liability of the father under his personal covenant. The learned Judges said (p. 458):

> The second ground on which the learned Assistant Judge has proceeded is likewise based on an erroneous view of the nature of the decree passed in favour of the appellants in the mortgage suit. "That decree was the usual preliminary mortgage decree and reserved liberty to them to apply for a personal decree against the father. In the event of the sale proceeds of the right, title and interest of the father in the mortgaged property proving insufficient, it was open to the appellants to apply for and enforce their claim for the balance against the father personally and in execution of an order passed in that behalf to attach the share of the son. The proceedings for enforcement of the personal liability of the father could have been taken by the appellants under the decree obtained by them had they not been restrained by an ad interim injunction from enforcing it.

In short, as the learned advocate for the respondents admits, the only difference is that if the view is taken that the mortgage decree can be executed as such against the son's share as well as the father's, one execution application only is necessary, while if the son's share can only be attached in satisfaction of the personal debt of the father, two execution applications are necessary. The final order of the Bench of this Court was (p. 462):

> We, accordingly, vary the decree of the trial Court and pass a decree in favour of the plaintiffs for partition of the share claimed by him in the property but provide therein that before that share is given to him the appellants are entitled to recover the amount due to them as a secured claim against the share of the father and are entitled to the balance due to them as an unsecured claim out of the property before such partition takes place.

In that case also, the learned Judges set out and followed two out of the five propositions, the second and the fifth, laid down by their Lordships of the Privy Council in 51 I A 129[2] at pp. 138, 139 and summed up as follows (p. 455):

> The second and the fifth propositions apply to the present case. The debts of the father were held to be neither illegal nor immoral, and whether there was a partition between the father and his son or not, it was open to the appellants to enforce payment of their debts out of the whole of the family property during the lifetime of the father, although their right to enforce it as a mortgage claim was limited to the interest of the father in the family property and nothing more.

A later case of this Court in one way nearer in point is 30 S L R 42,[3] where a Bench of this Court held that the shares of minor members of a joint Hindu family business would be liable for debts incurred in the course of that business and that their interests could be conveyed to a purchaser in an auction sale in execution of a mortgage decree even though the minors were not parties to the suit and even though the suit were not brought against the manager as manager. But the case before us is rather different. The debts incurred—though it is not proved they were incurred for immoral purposes—were not debts incurred in the course of the joint family business, and the case governing this case before us is rather the case in 51 I A 129.[2]

The question whether the second of the five propositions there laid down apply to secured as well as to unsecured debts has been the subject of much discussion and some disagreement in three cases of the Allahabad High Court: 47 All 122,[4] 51

1. Gangaram Ramdas v. Lalumal Chandumal, (1930) 17 A I R Sind 138=125 I C 39=24 S L R 451.

2. Brij Narain v. Mangla Prasad, (1924) 11 A I R P C 50=77 I C 689=51 I A 129=46 All 95 (P C).

3. Bhagwandas Jivandas v. Radhakishin Lilomal, (1936) 23 A I R Sind 87=164 I C 69=30 S L R 42.

4. Gajadhar Pande v. Jadubir Pande, (1925) 12 A I R All 180=85 I C 31=47 All 122=22 A L J 980.

All 136[5] and 57 All 357.[6] In 47 All 122,[4] the Bench held that the sons could not get a declaration that a mortgage and auction sale were not binding on them because the mortgage was not for legal necessity and they were not impleaded in the mortgage suit. They could only succeed by showing that the debt was tainted with immorality, and the Bench held that "debt" in the second of the five propositions included a secured debt and that the share of the sons could be sold in execution of the mortgage decree in satisfaction of the mortgage debt.

In 51 All 136,[5] while Sulaiman, C. J. adhered to his view that in the second of the five propositions "debt" included a secured debt the other Judges took a different view holding that a secured debt or mortgage debt was not included. But it is to be observed that in this case the auction sale had not yet taken place. In the third case, 57 All 357,[6] an auction sale had taken place and the sale had been confirmed as in this appeal now before us and Sulaiman C. J., not only reaffirmed his previously expressed opinion that "debt" in the second proposition includes secured debt but made it clear that where an auction sale had taken place and been confirmed, whether the property had or had not passed out of the possession of the family or whether the auction-purchaser was a stranger or not, the sons could not challenge the auction sale.

It would appear that the view of this Court in 24 S L R 451[1] is that "debt" in the second of the two propositions does not include secured debt but that decision does not bind us in this case for the facts are different. In the case in 24 S L R 451[1] there was no auction sale. Here there is an auction sale which has been confirmed; and the matter assumes a different aspect when the property has been sold in execution of a decree. Their Lordships of the Privy Council in 5 Cal 148,[7] quoted with approval the following view taken by them in 1 I A 321[8] :

> A purchaser under an execution is surely not bound to go back beyond the decree to ascertain whether the Court was right in giving the decree or having given it in putting up the property for sale under an execution upon it. It has already been shown that if the decree was a proper one, the interest of the sons as well as the interest of the fathers in the property although it was ancestral were liable for the payment of the father's debts. The purchaser under the execution was not bound to go further back than to see if there was a decree against the fathers, that the property was properly liable to satisfy the decree, if the decree had been given properly against them; and having inquired into that and having bona fide purchased the estate under the execution and bona fide paid a valuable consideration for the property, the plaintiffs are not entitled to come in and set aside all that has been done under the decree and execution and recover back the estate from the defendant.

We think therefore that as the plaintiff in this case, the son, has failed to prove the father's debt was for an illegal or immoral purpose, he cannot now successfully challenge the sale which is complete. We think the learned Appellate Judge did not distinguish between a case where the property had been sold in execution of the decree and a case where it has not been sold. We think therefore the trial Judge was right in dismissing the suit and we think his judgment should be restored. We allow the appeal with costs accordingly.

D.S./R.K. *Appeal allowed.*

A. I. R. 1939 Sind 299

DAVIS J. C. AND WESTON J.

Tyabi Trading Co. — Defendant — Applicants.

v.

Ghulamali T. Mandviwalla, Plaintiff, and another, Defendant— Opponents.

Civil Revn. Appln. No. 131 of 1936, Decided on 18th October 1938, to revise decree of the Judge, Small Cause Court, Karachi, D/- 27th August 1936.

Evidence Act (1872), S. 92 — Oral evidence to show that written contract is not binding is not admissible.

Where the purpose of adducing oral evidence is not merely to prove a contemporaneous oral agreement whereby the operation of the written contract is to be suspended until the happening of a particular event, but to show that the written contract is not binding at all in which case there is no agreement, oral evidence is not admissible : *A I R 1938 P C 198 ; A I R 1914 Mad 41 and A I R 1925 Cal 1007, Rel. on.* [P 300 C 1]

Fatehchand Assudomal—*for Applicants.*

Srikishendas H. Lulla—*for Opponents.*

Davis J. C. — This is an application in revision against a judgment of the Judge, Small Cause Court, Karachi, in which he decreed the plaintiff's suit for Rs. 1005-5-0 costs and interest at 6 per cent. per annum

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5. Jagdish Prasad v. Hoshyar Singh, (1928) 15 A I R All 596=115 I C 775=51 All 136=26 A L J 1289 (F B).
6. Jahan Singh v. Hardat Singh, (1935) 22 A I R All 247=152 I C 487=57 All 357=1934 A L J 1018.
7. Suraj Bansi Koer v. Sheo Persad Singh, (1880) 5 Cal 148=6 I A 88=4 Sar 1 (P C).
8. Muddun Thakoor v. Kantoo Lall, (1874) 1 I A 321=14 Beng L R 187=22 W R 56 = 3 Sar 380 (P C).

against the two defendants, based upon a document which is entitled a hundi, but which appears in fact to be a promissory-note of which defendant 1 is the promisor, defendant 2 is the promisee and the plaintiff is the endorsee, and we are asked to interfere in revision on the ground that there was an oral agreement between defendant 1 and defendant 2, of which the plaintiff had knowledge, that defendant 1 was not to be made liable under the pronote, but that the plaintiff was to look only to defendant 2. We do not think that it makes any difference to the decision of this case whether this document is regarded as a hundi or a pronote, because we think the decision in this case must depend on the provisions of S. 92, Evidence Act.

The applicants complain that the learned Judge in the lower Court did not permit them to adduce oral evidence in order to show, not that the operation of this promissory note should be suspended, but that, so far as they are concerned, the promissory note was not binding on them at all. There are however rulings which make it clear that where the purpose of adducing oral evidence is not merely to prove a contemporaneous oral agreement whereby the operation of the written contract is to be suspended until the happening of a particular event, but where the purpose is to show that the written contract is not binding at all, that there is no agreement, where the purpose of the oral evidence is, for instance, not to suspend the operation of the promissory note but to destroy it altogether, oral evidence for this purpose is not admissible. We are not here referring to cases of fraud or other cases within the provisions of S. 92, Evidence Act.

There is a very recent case of the Privy Council in 40 Bom L R 1075,[1] which in effect decides that if the oral agreement is merely to suspend the coming into force of an obligation under the promissory note, where the oral agreement is that no demand will be made on the promissory note payable on demand until a specified condition is fulfilled, that is a condition precedent, oral evidence of which is permissible under the proviso to S. 92, Evidence Act. But a collateral agreement, the effect of which is to destroy the promissory note itself, must be distinguished from an agreement that the instrument should not be an effective instrument until some condition is fulfilled, or, to put it in another way, an agreement in defeasance of the contract must be distinguished from an agreement suspending the coming into force of the contract embodied in the promissory note. An agreement coming under the latter description is within proviso 3 of S. 92, Evidence Act. But an agreement coming within the former description is not. In that judgment their Lordships of the Privy Council refer to the case in (1898) 2 Q B 487[2] where it was sought to prove an oral agreement to renew a promissory note payable at three months date, and that was held to be an agreement altering the terms of the written contract. A. L. Smith, L. J. in that case said at p. 490:

> It has been held over and over again, that evidence of a contemporaneous oral agreement is not admissible to vary the effect of such an instrument. If the evidence be to the effect that the document is only delivered as an escrow, or that it is not to take effect as a contract until some condition is fulfilled, it is admissible. But that is not this case. This document was signed and handed over as a bill of exchange, but there was an oral agreement that at maturity it should be renewed, if the defendant required it. In other words, although the written document states that the bill is to be met upon a day certain, the parol evidence is that it is not to be then met. Nothing is more clearly settled than that evidence of such an agreement is not admissible. In (1870) 5 C P 37,[3] Willes J. stated that to be the law as established by the cases in (1811) 3 Camp 57[4] and (1869) 4 C P 553.[5] It was argued by the defendant's counsel that the law as laid down in those cases is altered by the Bills of Exchange Act, 1882. I do not think that it was intended by that Act to alter the general law of evidence which renders parol evidence inadmissible for the purpose of contradicting the terms of a written document. The defendant's counsel relied on the terms of S. 21, sub-s. 2, and S. 29, sub-ss. 1 and 2, Bills of Exchange Act, 1882. He urged that the plaintiff had notice of a defect in the title of the drawers, because they knew that the bill was negotiated in breach of faith. But, assuming that S. 29 has any application to such a case as this, the only way in which a breach of faith could be shown in this case is by shewing a breach of the contemporaneous oral agreement, and by the rules of evidence that are inadmissible.

So in that case, as in this, the governing consideration in decision is a rule of evidence which, so far as this country is concerned is embodied in S. 92, Evidence Act.

1. Rowland Ady v. Administrator-General of Burma, (1938) 25 A I R P C 198=175 I C 449 =32 S L R 810 = 40 Bom L R 1075 = 1938 R L R 417 (P C).

2. New London Credit Syndicate Ltd. v. Neale, (1898) 2 Q B 487=67 L J Q B 825=79 L T 323.

3. Abrey v. Crux, (1870) 5 C P 37=39 L J C P 9 =21 L T 327=18 W R 63.

4. Hoare v. Graham, (1811) 3 Camp 57=13 R R 752.

5. Young v. Austen, (1869) 4 C P 553=38 L J C P 233=20 L T 396=17 W R 706.

However just, then, in the abstract the applicants' case may be, they cannot prove it, and that being so, they must fail in this revision application. Reference may also usefully be made to the case in 38 Mad 680,[6] where again the simple principle is laid down that S. 92, Evidence Act, precludes proof of a contemporaneous oral agreement showing that a party to a promissory note is not bound according to the tenor of the promissory note. The learned Judge in that case refers to and distinguishes a case where a promissory note is without consideration, but that is not the case here. Reference may also be made to 52 Cal 677,[7] to which case reference was made with approval by their Lordships of the Privy Council in 40 Bom L R 1075,[1] to which we first referred. The revision application therefore is dismissed with costs accordingly.

S.G./R.K. *Application dismissed.*

6. Sornalinga Mudali v. Pachi Naicken, (1914) 1 A I R Mad 41=22 I C 1=38 Mad 680 = 26 M L J 113.
7. Walter Mitchell v. A. K. Tennent, (1925) 12 A I R Cal 1007=90 I C 59=52 Cal 677.

A. I. R. 1939 Sind 301

DAVIS J. C. AND LOBO J.

Commissioner of Income-tax, Bombay Presidency, Sind and Aden — Applicant.

v.

Indian Relief and Benefit Insurance Co., Ltd., Karachi — Assessee — Opponent.

Revn. Appln. No. 103 of 1936, Decided on 27th February 1939, from reference made by Commissioner of Income-tax, Bombay Presidency, Sind and Aden.

(a) Income-tax Act (1922), Sec. 59, Rules under, R. 31—High Court can find, as question of law, whether on facts found society is dividing society.

It is open to High Court as a question of law to find whether on plain facts found by the Assistant Commissioner, the society is a dividing society within the meaning of R. 31 of the Income-tax Rules. This is a matter of legal inference, and it is just as much a question of law as to whether facts found by a subordinate Court do or do not amount to adverse possession : *A I R 1939 Sind 293, Rel. on.* [P 302 C 1]

(b) Income-tax Act (1922), Sec. 66 (2) — Another question of law arising from case stated by Commissioner—High Court can decide it.

While it is for the Commissioner to state for High Court's decision questions of law, if from the case as stated by him another question of law arises, High Court is not precluded from deciding it : *A I R 1933 P C 108 ; A I R 1934 Sind 46 and A I R 1938 P C 175, Rel. on.* [P 302 C 1]

(c) Income-tax Act (1922), S. 59, Rules under, R. 31 — R. 31 applies to business of dividing (insurance) society—Benefit payable by Benefit Insurance Company not fixed but varying according to contributions of subscribers and other members — Business of company held dividing society business.

The definition of dividing insurance business in the rules of the Government of India refers to dividing society insurance business and it is wrong to say that because the Government of Bombay in Rules made under Act 5 of 1912 have defined "dividing society" in similar terms for the purposes of that Act and S. 3, Life Assurance Companies Act, Act 6 of 1912, excludes the application of its provisions to Provident Fund Societies under Act 5 of 1912, a Life Assurance Company under Act 6 of 1912, cannot be dividing society and R. 31 of the Income-tax rules cannot apply to the business of a dividing (insurance) society. [P 302 C 2 ; P 303 C 1]

According to the rules of a Benefit Insurance Company the benefit payable was not a fixed sum but varied according to the contributions of subscribers and other members. Deductions were made from the total annual collection of subscriptions, for the working fund and for the Reserve Fund :

Held that the business of the Society fell within the definition of dividing society and R. 31 applied. [P 302 C 1, 2]

(d) Income-tax Act (1922), S. 10 — Mutual society — Shareholders of insurance company and its policy-holders different entities—Company is not mutual insurance society merely because part of policy moneys is divided among subscribers.

Where in an insurance company there is no mutuality between the shareholders of the company, the assessee, and the policy-holders but shareholders and the policy-holders are two quite different entities, merely because part of the policy money is divided among the subscribers, it cannot be said that the business of the company is no business at all within the meaning of Sec. 10, Income-tax Act, but is merely a mutual insurance society. The company is not a mutual society and the amount of the paid or unpaid capital, the value of the shares, the number of the shareholders, the limits or the particular source of the dividends does not matter, provided the dividends come from the business of the society : *(1885) 2 Tax Cas 100, Applied.* [P 303 C 1]

Partabrai D. Punwani, Advocate-General — *for the Applicant.*

Suganlal Hassanand — *for Opponent.*

Davis J. C. — This is a reference by the Income-tax Commissioner for Bombay and Sind under Sec. 66 (2), Income-tax Act, to this Court in its High Court jurisdiction for its decision on two questions of law arising in the case stated by the learned Commissioner with his opinion. The assessee is the Indian Relief and Benefit Insurance Co., Ltd., and the year of assessment is 1935-36. The income returned by the assessee was Rs. 594, and the premium income found by the Assistant Commissioner was Rs. 1,38,708, the net profit on this at 15 per cent. was Rs. 20,805, while the final

demand was Rs. 3615-11-0. Two questions were referred by the learned Commissioner as follows :

(i) The finding of fact being that the assessee company is doing dividing society business, has the Income-tax Officer correctly held that R. 31 of the Income-tax Rules applied ?

(ii) Whether the assessee can be said to be a mutual society and exempted under the principle laid down by the House of Lords in the case in (1889) 2 Tax Cas 460[1] ?

So far as the first question is concerned, we have found in our judgment in Ref. No. 17 of 1937,[2] that it is open to us as a question of law to find whether on plain facts found by the Assistant Commissioner the Society is a dividing society within the meaning of R. 31 of the Indian Income-tax Rules. This is a matter of legal inference, and it is just as much a question of law as to whether facts found by a Subordinate Court do or do not amount to adverse possession. The Income-tax case in 41 C W N 132=I L R (1937) 2 Cal 7[3] is a case in point where the Calcutta High Court held that whether there was or was not a 'succession' to a business within the meaning of S. 26, Income-tax Act, was a question of law. And while it is for the learned Commissioner to state for our decision questions of law, if from the case as stated by him another question of law arises, we are not precluded, we think, from deciding it: *see* 1 I T R 94,[4] 28 S L R 174[5] and 32 S L R 549.[6] But in truth the learned Commissioner has by implication raised and discussed and given his opinion on the quesion whether the assessee is a dividing society within the meaning of R. 31 in the second question he has raised. In fact the two questions raised by the case are so connected and involved that they can be discussed and decided together.

There is, we think, no doubt that the assessee is a dividing society within the meaning of R. 31 of the Income-tax Rules. This particular form of insurance business is actually specified as one of the objects of the Company in the Memorandum of Association. This is of course not conclusive, but reference to Rr. 43, 44, 45 and 56 of the Company Rules show quite clearly that the benefit payable is not a fixed sum but varies, it is true, within certain limits, but varies according to the contributions of subscribers and other members. Deductions are made from the total annual collection of subscriptions, for the Working Fund 5 per cent. and for the Reserve Fund 25 per cent. It may be that it was in the final distribution of the Reserve Fund that the shareholders of the Company hoped to get their chief reward, but, be that as it may, it appears clear that the business of the society falls within the definition of dividing society given either in the rules published by the Government of India in their Notification of the Commerce Department, dated 3rd May 1930, under Act 6 of 1912, which Act governs this company or in the definition of "Dividing Society" to be found in T. Dutt's Law and Practice of Life Assurance and Provident Insurance in India. The definition in Dutt's Law and Practice of Life Assurance is as follows :

'Dividing society business' means provident insurance business under which the amount payable on the policy money becoming due is not fixed but depends either partly or wholly on the results of the division of any portion of the premium, income or funds amongst the policies which have become due for payment in proportion to the premium received under each class in any specified period.

The definition in the Rules of the Government of India made under Act 6 of 1912 is as follows :

Dividing insurance business means any form of insurance business under which the policy money payable on the happening of the contingency insured against is not fixed but depends either partly or wholly on the results of the division of any portion of the premium income or funds among the policies which have become due for payment in proportion to the premium received under each class in any specified period.

Clearly, the definition in the Rules of the Government of India refers to dividing society insurance business and we can attach no importance to the argument that because the Government of Bombay in Rules made under Act 5 of 1912 have defined "dividing society" in similar terms for the purposes of that Act and S. 3, Life Assurance Companies Act, Act 6 of 1912, excludes the application of its provisions to Provident Fund Societies under Act 5 of 1912, a life assurance company under Act

1. Styles v. The New York Life Assurance Co., (1889) 14 A C 381=2 Tax Cas 460=59 L J Q B 291.
2. Commr. of Income-tax v. Central Popular Assurance Co. Ltd., *Reported in* (1939) 26 A I R Sind 293.
3. In re G. I. M. Gregory & Co., (1937) 41 C W N 132=I L R (1937) 2 Cal 7.
4. Commissioner of Income-tax, Bihar and Orissa v. Kameshwar Singh of Darbhanga, (1933) 20 A I R P C 108=142 I C 437=60 I A 146=12 Pat 318=1 I T R 94 (P C).
5. Khemchand Ramdas, a firm v. Commissioner of Income-tax, Bombay Presidency, (1934) 21 A I R Sind 46=149 I C 1204=28 S L R 174.
6. Commissioner of Income-tax, Bombay Presidency and Aden v. Khemchand Ramdas, (1938) 25 A I R P C 175=175 I C 1=65 I A 236=32 S L R 549 (P C).

6 of 1912 cannot be a dividing society and R. 31 of the Income-tax Rules cannot apply to the business of a dividing (insurance) society such as the business of the assessee. The Memorandum of Association and rules of the company itself show it to be a dividing insurance society. We do not think there is force in the argument that merely because part of the policy moneys is divided among the subscribers, the business of this company is no business at all within the meaning of Sec. 10, Income-tax Act, but is merely a mutual insurance society within the ruling in *Styles' case*.[1] We think *Last's case*, (1885) 2 Tax Cas 100[7] and not *Styles' case*[1] governs the case of the assessee. There is no mutuality between the shareholders of the company, the assessee, and the policy-holders. The shareholders and the policy-holders are two quite different entities. This is not a case where the policy-holders have appointed their own Board of Directors who act merely as the agents of the policy-holders who merely take out of their own fund money they had put in, allowing a reasonable sum for working expenses and reserve. But we have here a company duly constituted and registered under the Companies Act inviting business which is the object of the company to carry on and which it is in their interest to extend and enlarge and from which they hope to get dividends upon the capital the shareholders have subscribed. It is true there is a subscribed capital of only Rs. 3550 divided into 355 shares of Rs. 10 each of which only Rs. 5 has been paid up. But we do not think the amount of the paid or unpaid capital, the value of the shares, the number of the shareholders, the limits or the particular source of the dividends, matter, provided the dividends come from the business of the society. We do not think it matters how much or in what way the company chooses to return to the policy-holders the premium income which is collected by the company. It is the premium income of the company and assessable, we think, under R. 31 of the Income-tax Rules.

We answer the first question raised by the Income-tax Commissioner in the affirmative and the second question in the negative accordingly. Order as to costs will be the same as in Ref. No. 17 of 1937.

D.S./R.K. *Answer accordingly.*

7. Last v. London Assurance Corporation, (1885) 10 A C 438=55 L J Q B 92=2 Tax Cas 100=53 L T 634=34 W R 233.

A. I. R. 1939 Sind 303

DAVIS J. C. AND TYABJI J.

Khodromal Jeramdas — Applicant.

v.

Menghomal Jessomal and another — Opponents.

Civil Revn. Appln. No. 10 of 1936, Decided on 23rd September 1938, from decision of Dist. Judge, Sukkur, D/- 25th October 1935.

Civil P. C. (1908), O. 43, R. 1 — Order amending final decree is not in itself appealable order, but it can be treated as amending preliminary decree and appealed against.

Where a Subordinate Judge on application under S. 151, believing that he was in error when he passed a final decree, altered the same in order to correct what was believed to be a mistake, and the District Judge on appeal treated the order of the Subordinate Judge amending the final decree as a decree and appealable in itself :

Held that the order of the Subordinate Judge amending the final decree could not be treated as an appealable order in itself; but that he should be treated to have amended the preliminary decree which amended decree could be appealed against. [P 304 C 2]

Dipchand Chandumal — *for Applicant.*

Kundanmal Dayaram —*for Opponents.*

Davis J. C. — This is a revision application against an order of the District Judge of Sukkur setting aside an order of the Subordinate Judge of Jacobabad whereby he had amended his own final decree passed in Suit No. 331 of 1932 which was before him. This was a suit for settlement of partnership accounts in which one Menghomal, opponent 1 in this revision application, was the plaintiff, and one Sevomal, opponent 2, was defendant 5, and as a result Rs. 1034-1-4 was found due to defendant 5, Sevomal. But one Khodromal who was the plaintiff in another suit in which Sevomal was a defendant obtained as long ago as 1927 a decree for Rs. 3000 against Sevomal, and in execution of that decree he obtained from the Court an order of attachment of this Rs. 1034-1-4 found due to Sevomal in the suit of 1932. Sevomal though described as a simpleton was not so easily got at and in the proceedings which then commenced in the partnership suit he agreed that the Rs. 1034 odd found due to him should be paid to the plaintiff Menghomal and accounts were made up on this basis and a final decree was passed accordingly; so Khodromal found he was deprived of this Rs. 1034. He then applied to the Subordinate Court under S. 151, Civil P. C.,

so freely invoked in the mofussil Courts to correct mistakes and to right all real or supposed wrongs, and the Subordinate Judge believing that he was in error when he passed the final decree based upon accounts in which this Rs. 1034 was allotted by the Commissioner to Menghomal purported to amend his own final decree by an order dated 11th December 1934, whereby he gave effect to the attachment of Khodromal, found that the Rs. 1034 should not and could not have been allotted to Menghomal by the Commissioner, and therefore reduced the sum found due under the final decree to Menghomal by this Rs. 1034. Menghomal then appealed to the District Court, and the District Judge treated the order of the Subordinate Judge amending the final decree as a decree, and allowing the appeal, set aside the order of the Subordinate Judge of 11th December 1934, amending the final decree and restored the unamended decree dated 31st October 1934.

Now, it is argued in revision on behalf of Khodromal who has lost this Rs. 1034 to Menghomal, that the District Judge had no power to deal in appeal with this order of the Subordinate Judge amending his own decree under S. 151, Civil P. C., as the order of the Subordinate Judge amending the final decree was without jurisdiction; an application in revision under S. 115, Civil P. C., would lie to this Court, but no other remedy was available. No appeal lies against an order under S. 151, Civil P. C. To this it is contended for the opponent that the nature of an order is not determined by the Section of the law to which it may quite wrongly have been assigned; the true test is, what is the order in itself? It does not change its true nature merely because it is given a wrong name, and reference is made to the case in A I R 1927 Cal 203[1] at p. 206. This case is only one of a number of cases wherein it is laid down that a Court cannot evade the appellate jurisdiction of the Court above it by arbitrarily placing its order under a Section the orders of which are not appealable. In that case, as in this, a Judge altered a decree already signed and sealed in order to correct what was believed to be a mistake made by the Commissioners, and the Appellate Court said:

The view taken by them that the Commissioners had distributed the rent of the tenures with reference to the Record of Rights is baseless. Moreover the report of the Commissioners was considered and modified as regards the amount of rent payable by the defendants, by the Subordinate Judge in his judgment of June 1916. There was no arithmetical or clerical error in the judgment of the Subordinate Judge which might have been corrected under S. 151 or S. 152, Civil P. C. If there was any error, that error ought to have been corrected on appeal; or if there was any error apparent on the face of the record there might have been an application for review of judgment under O. 47, R. 1, Civil P. C. The Subordinate Judge after consideration of the facts came to the conclusion that the rent payable by the defendants was Rs. 129-2-0. The decree as originally drawn up was quite in accordance with the judgment and there was nothing wrong in it. Without the judgment being amended or set aside, that decree could not have been amended or set aside by an indirect attack. On behalf of the respondent it was urged that we might amend the judgment under those Sections of the Civil Procedure Code, because some wrong has been done to his client. There is nothing in the judgment which comes within the purview of S. 151 or S. 152, Civil P. C. The proper remedy, as already indicated, was by way of review or appeal against the judgment if there was anything wrong in it. The result therefore is that this appeal is allowed and the decree as amended must be set aside and it should be brought in accordance with the judgment delivered on 27th June 1916.

We think therefore that the District Judge should not have treated the order of the Subordinate Judge dated 11th December 1934, altering the final decree, as an appealable order in itself, but he should have regarded the decree of 31st October 1934, as amended by the later order. In short, it was the amended decree which was appealable. He should then have allowed the appeal, set aside the amended decree and restored the decree as first drawn up. Looked at thus, we think there is no doubt that the District Judge had jurisdiction, and this revision application must fail and we dismiss it with costs accordingly. We are not now prepared to hear the revision application as a second appeal. Order accordingly.

S.G./R.K. *Application dismissed.*

1. Syed Mahomed Maliha v. Chowdhury Mahomed Ismail Khan, (1927) 14 A I R Cal 203=100 I C 309=44 C L J 441.

A. I. R. 1939 Sind 305

DAVIS J. C. AND TYABJI J.

Sm. Kalawantibai, widow of Gobindram Raheja — Plaintiff — Appellant.

v.

Udhavdas Girdharidas and another — Defendants — Respondents.

Misc. Appeal No. 24 of 1937, Decided on 23rd February 1939, against decision of First Class Sub-Judge, Shikarpur, D/- 13th March 1937.

Jurisdiction — Administration suit — Court-fees payable determine jurisdiction of Court— Subject-matter valued for court-fees at sum below Rs. 5000—Plaint returned by First Class Subordinate Judge for presentation to proper Court—Appeal against his order lies to District Court and not to High Court.

In suit for administration the court-fees payable determine the jurisdiction of the Court and the Court to which an appeal lies depends not upon the pecuniary jurisdiction of the Subordinate Court, but on the value of the subject-matter in dispute. Hence, where the subject-matter valued for purpose of court-fee is below Rs. 5000 and First Class Sub-Judge has returned the plaint for presentation to the proper Court an appeal from his order lies to the District Court and not to the High Court : *19 Bom 198 ; A I R 1936 Bom 353 and A I R 1936 Sind 190, Rel. on.* [P 306 C 2; P 307 C 1, 2]

Pahlajsing B. Advani — *for Appellant.*

Srikishindas H. Lulla—*for Respondents.*

Davis J. C.—This is an appeal from an order of the First Class Subordinate Judge at Shikarpur, in which he returned a plaint to the appellant on the ground that jurisdiction as determined by the value put by the appellant upon her plaint was the jurisdiction of the Second Class Court and not of a First Class Court. The plaintiff-appellant is a widow and she brought this suit in the First Class Subordinate Judge's Court which was taken by all the parties concerned as a suit for administration of the estate of her deceased husband and was treated on that footing. She was the wife of one Gobindram, and defendant 1 was a brother of this Gobindram and defendant 2 was the son of this brother. She alleged in her plaint that Gobindram had separated from his brother and his brother's son, defendants 1 and 2, that the moveable and immovable property was divided, the immovable property even divided by metes and bounds and that all the relevant entries were in the books in the possession of the defendants, that after the partition her late husband Gobindram and his brother defendant 1 commenced a banking business, that they went into partnership in the banking business in the name and style of Girdharidas Udhavdas at Shikarpur, Bombay, and other places in the Madras Presidency, and this partnership continued until Girdharidas' death, and that after his death the defendants have been carrying on the partnership business and they have wrongfully possessed themselves of the business and property of her late husband Gobindram, even including her stridhan ornaments, and that they were unlawfully realizing all the outstandings collecting the rents of the property, the interest on cash and hundis and dividends on shares and generally intermeddling and administering the estate of her late husband Gobindram, she herself not being given a single pie for maintenance, and for the last three years she had been living on borrowed money. Therefore, she said that she brought, as she was entitled to, this suit for the administration of the estate, for accounts and for partition, and, what is loosely stated as a declaration. She goes on in her plaint to say that even if it be found that her late husband was not separate from the defendants even then she is entitled to have the estate administered and in the course of that administration she should have awarded her a monthly allowance of Rs. 100 for her life and also arrears of maintenance.

Subsequently she abandoned her claim for arrears of maintenance because it was the opinion of the Court that the claim for maintenance could not be granted in an administration suit. But even so, the plaintiff was not fortunate in this litigation because finally the learned Subordinate Judge after having considered the case carefully came to the conclusion that as the plaintiff had valued for the purpose of court-fees her claim at Rs. 400, so thereby she fixed the value for the purpose of jurisdiction at the same amount. This the learned Judge found in accordance with the provisions of S. 7, cl. (iv) (f), Court-fees Act, and S. 8, Suits Valuation Act, and assuming that the suit was one essentially for the administration of an estate, the Judge's finding on this point would be correct. Therefore, after having given the plaintiff an opportunity to pay the extra court-fees, which opportunity was rejected by the plaintiff, he returned the plaint for presentation to the proper Court, and it appears that when the plaintiff through her legal adviser presented the plaint to the Second Class Court, she was again unfortunate, for it appears that it was taken there, as it was taken here, that in the plaint there was an alter-

native claim for maintenance and that the claim for maintenance being properly valued would bring the suit again out of the jurisdiction of the Second Class Court into that of the First Class Court which had already returned the plaint. Thus, the unfortunate plaintiff was in a position of being told by the First Class Court to go to the Second Class Court, and being told by the Second Class Court to go to the First Class Court, and we think that blame must attach to those who drafted the plaint in such a manner as to give reasonable ground for this confusion and difficulty. We therefore, while following the provisions of the law, do not wish to add to the difficulties of this unfortunate plaintiff and will make an order which we hope will enable her to have her claim when put forward in an honest and reasonable manner adjudicated upon and finally decided.

Now, so far as the rejection of the plaint by the learned First Class Subordinate Judge is concerned on the ground that the valuation of Rs. 400 for court-fees fixed the valuation of the jurisdiction, there is ample authority to show that on the basis that the suit is one essentially for the administration of an estate the learned Subordinate Judge was right. The alternative plea for maintenance was not raised clearly. The prayer for a declaration is only loosely made and there is no prayer for a declaration in the proper sense of that word: 16 Pat 766.[1] Firstly, there is the case in 19 Bom 198.[2] In that case the plaint, though made up of several items was substantially one for the administration of the estate of certain minors, and there was included within that principal prayer other prayers for the taking of accounts, and for an order for the payment of any balance found due. But nevertheless Sargent, C. J. held that the case was essentially one for the administration of the estate and that although the value of the property in dispute was put by the plaintiff at Rs. 30,000, the plaint showed for the purpose of court-fees the value was put at Rs. 130. This the learned Chief Justice held decided the question of jurisdiction in the matter of the appeal which he held lay not to the High Court but to the District Court.

This case again was followed by a Bench of the Bombay High Court in 38 Bom L R 754.[3] In the suit out of which that appeal arose, as in this suit, a preliminary issue was raised as to whether a proper court-fee had been paid, and the question as to which Court an appeal lay from the order of the Subordinate Court on that preliminary issue was discussed at length by Broomfield, J. in his judgment. It is true that in that case the Subordinate Court had held that the suit fell within the provisions of cl. (iv) (f) of S. 7, Court-fees Act, because it was a suit for accounts, but that makes no difference in principle, and in this case the learned Subordinate Judge found that this suit as an administration suit came under S. 7, cl. (iv) (f), Court-fees Act, in the same way. It is clear from that judgment and indeed, from the relevant Sections of the relevant Acts, that in suits for accounts and administration the court-fees payable determine the jurisdiction of the Court and that the Court to which an appeal lies depends not upon the pecuniary jurisdiction of the Subordinate Court but on the value of the subject-matter in dispute.

It does not, for instance, follow that because a First Class Subordinate Court decides a dispute, gives judgment, passes a decree, an appeal lies to the High Court. An appeal lies to the High Court from the decision of the First Class Subordinate Judge if the amount or value of the subject-matter in dispute exceeds Rs. 5000, and, indeed, this simple point has been decided by this Court in A I R 1936 Sind 190.[4] There also appears no force in the argument of the learned advocate for the appellant that an appeal would lie to this Court as a High Court and not to the District Court, because the question in dispute is whether the First Class Subordinate Judge was right when he said that it was for the Second Class Court to decide questions relating to property valued at Rs. 30,000, the value of the subject-matter in dispute. Also the learned advocate is not correct when he argues that in all the decided cases which have been cited to us, the appeal was against the decree and not against an order directing the plaint to be returned to the plaintiff for presentation to the proper Court.

1. Ramkhelawan v. Surendra Sahi, (1938) 25 A I R Pat 22=172 I C 840=16 Pat 766 = 18 P L T 977 (F B).
2. Bai Amba v. Pranjivandas Dullabhram, (1895) 19 Bom 198.
3. Maganlal Chunilal v. Kanchanlal Manchharam, (1936) 23 A I R Bom 353 = 165 I C 954 =38 Bom L R 754.
4. Nathasingh Mulsingh v. Manager, Incumbered Estates in Sind, (1936) 23 A I R Sind 190 = 165 I C 742.

S. 26, Bombay Civil Courts Act, which has been applied to Sind, provides only that in all suits decided by a Sub-Judge of which the amount or value of the subject-matter exceeds five thousand rupees, the appeal shall lie direct to the High Court; and S. 8, Sind Courts Act, which corresponds to S. 8, Bombay Civil Courts Act, provides that a regular appeal shall lie from the decisions of a Judge of a subordinate Court to the District Court whenever such appeal is allowable under the Civil Procedure Code or any other law for the time being in force in the province of Sind. Therefore, as in this case, the Subordinate Judge did not decide a suit, an appeal does not lie under the provisions of S. 26, Bombay Civil Courts Act, and S. 8, Sind Courts Act, is the appropriate Section.

There appears indeed no reason why the procedure in this province should differ from the procedure in Bombay. In the case already referred to in 19 Bom 198,[2] the plaint was returned in order that it might be properly stamped and the appeal was made against that order. In the same manner in the case referred to in 38 Bom L R 754,[3] the appeal was against an order deciding a question raised as a preliminary issue; and in the case reported in 39 Bom L R 138[5] the appeal was also against an order on a preliminary issue. S. 8, Suits Valuation Act of 1887, provides that where in suits other than those referred to in the Court-fees Act, 1870, S. 7, paras. v, vi and ix and para. x, cl. (d) (and this case does not fall within any of those paragraphs), court-fees are payable ad valorem under the Court-fees Act, 1870, (and here the court-fees are payable ad valorem under Sch. 1), the value as determinable for the computation for court-fees and the value for purposes of jurisdiction shall be the same. The Bombay Civil Courts Act and the Sind Courts Act and the Suits Valuation Act must be read with the Court-fees Act. S. 7, cl. (iv) (f), Court-fees Act, provides that the amount of court-fee payable under the Act in suits for accounts which include suits for the administration of estate shall be computed according to the amount at which the relief sought is valued in the plaint.

Therefore it appears to us clear that the jurisdiction of the Court in this case was the Court of the Second Class Subordinate Judge because the relief sought was valued at Rs. 400, but that is upon the assumption that the suit is a suit for administration of the estate and that there is no such other alternative relief, sought as the learned advocate for the plaintiff contends, as will bring this case out of the ambit of the rulings we have cited and will bring the suit within the jurisdiction of the First Class Subordinate Court. But this can only be upon an amendment of the plaint which the learned advocate for the plaintiff, in order to find some means whereby she should not be sent vainly from one Court to another asks now to be allowed to do, so that it may be made clear that the plaintiff asks in the alternative for future maintenance at the rate of Rs. 100 a month which, he says, will, for the purpose of court-fee, be valued at maintenance payable for a period of ten years, and he will be prepared to pay the extra court-fee so as to enable the First Class Court to deal finally with this suit which had proceeded far before it before this question of court-fee and jurisdiction was raised. We do not think that we should here grant leave to amend the plaint so as to make clear this alternative prayer or decide that if the plaint be so amended the suit would be one for the First Class Subordinate Judge to try, for, we think that these are questions which should be dealt with by the District Court which we have held is the appropriate Court to which an appeal against the order of the First Class Subordinate Judge dated 13th March 1937 will lie.

The learned advocate for the appellant asks that the plaintiff be permitted, if she cannot find means to pay the court-fee for maintenance at Rs. 100 a month, to ask leave to amend her plaint, reducing the amount of the maintenance claim. That question is a matter for the District Judge, and we have no doubt that he will take into consideration the difficulties of a widow seeking maintenance against her relations and will, so far as the law and a proper discretion permit, give the appellant permission to amend her plaint and pay such court-fees as will enable her to get her claim heard and decided. As the case now stands, the First Class Subordinate Judge here returned her plaint because he has held on the plaint as he has interpreted it, that the case is a case of a Second Class Court, but it would appear, the Judge of the Second Class Court has taken a different view and has held that if the suit is, as it would appear to him to be, a suit for maintenance,

5. Jamnadas Vrijlal v. Chandulal Jamnadas, (1937) 24 A I R Bom 167=168 I C 449=I L R (1937) Bom 623=39 Bom L R 138.

among other things, he has no jurisdiction to hear it for the value of the maintenance the plaintiff claims takes the case out of the jurisdiction of his Court. We think therefore that the proper order we should pass is that the appeal against the order dated 13th March 1937 of the Subordinate Judge is not within our jurisdiction and that the appeal should be returned to the appellant for presentation to the District Court, where the learned Judge will, we have no doubt, give all proper consideration to the prayer that she wishes to make that her plaint may be so amended that her claim can be heard and decided.

D.S./R.K. *Order accordingly.*

A. I. R. 1939 Sind 308

DAVIS J. C. AND TYABJI J.

Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan — Applicant.

v.

Karachi Chamber of Commerce — *Assessee* — Opponent.

Reference No. 34 of 1937, Decided on 30th May 1939, made by Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan, D/- 3rd April 1937.

Income-tax Act (1922), Ss. 2 (4) and 10 — Measurement fees realized by Karachi Chamber of Commerce from its members are not profits of business within meaning of Ss. 2 (4) and 10 and are not taxable income.

Before there can be mutuality between an Association and its members, the services must be supplied by the Association to its members as such services for which the members themselves pay from which payments any surplus is saving and not profits or gains. The nature of the services or the purpose of the Association is not the test. The nature of the Association is the test. If the Association is of the nature of a club and its services are solely for the benefit of its members, or if not solely for the benefit of its members, the services for its members and the cost thereof are clearly separable from its services to non-members and the cost thereof, then there is no profit but merely a surplus or saving; if no, then there is a taxable profit or gain. There is in principle no difference between a club which provides a marker for tennis on payment by the individual club members and a Chamber of Commerce which supplies a measurer of merchandise on payment by its members. Both are employees of the Association provided at the cost of and for the benefit of its members, and if there is a surplus or saving on the year's working it is not taxable profit or gain. It may be handed back; it may be kept for some future contingency; the test is whether it is the members' money. [P 310 C 1; P 311 C 1]

The members of the Karachi Chamber of Commerce provide for themselves certain facilities in trade such as a measurer of merchandise and pay for those facilities. They combine as a Chamber and provide these facilities for themselves as members of that Chamber and they pay more than is actually necessary for the provision of these services. Hence the measurement fees and charges realized by the Karachi Chamber of Commerce from its members are not taxable income. They are not profit on trade within the meaning of S. 2 (4) and S. 10, Income-tax Act but are savings. The fact that the office of public measurer serves not only members of the Chamber but members of the public as well or that the members are incorporated as a Chamber under S. 26, Companies Act, does not destroy the mutual basis of the members dealing with the Chamber: *(1912) 2 K B 177, Rel. on; (1926) 2 K B 110, Disting.* [P 309 C 2; P 310 C 1]

Partabrai D. Punwani, Advocate-General — *for Applicant.*

D. N. O'Sullivan — *for Opponent.*

Davis J. C. — The learned Commissioner of Income-tax for Bombay and Sind has stated a case under S. 66 (2), Income-tax Act, and has referred to us the question arising in the following terms:

> Are the measurement fees and/or charges realized by the Karachi Chamber of Commerce from its members taxable income in view of the constitution of the said Chamber and/or its Memorandum and Articles of Association?

The opinion of the learned Commissioner is that such fees are taxable because they are the profits of a business or trade within the meaning of Ss. 2 (4) and 10, Income-tax Act, and that the assessee has admitted this by admitting as subject to taxation the fees collected from outsiders: and there is in the opinion of the Commissioner nothing to distinguish these fees from the fees collected from members of the Chamber for whom the Chamber performs the same service of measuring and granting measurement, certificates on merchandise to be shipped from the Port of Karachi. The learned Commissioner relies as an authority principally on the case in (1926) 2 K B 110,[1] distinguishing the well-known case in (1889) 14 A C 381,[2] as being a case merely of payments into and drawings from a common fund and (1934) 18 T C 499[3] at p. 503, as being a case of an unincorporated as distinct from an incorporated body. He also relies upon the cases in (1885) 2 T C 100[4] and (1932) 16 T C 430.[5]

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1. Liverpool Corn Trade Association, Ltd. v. Monks, (1926) 2 K B 110=95 L J K B 519=134 L T 756=10 Tax Cas 442=42 TLR 393.
2. New York Life Insurance Co. v. Styles, (1889) 14 A C 381=2 Tax Cas 460=59 L J Q B 291.
3. National Association of Local Government Officers v. Watkins, (1934) 18 Tax Cas 499.
4. Last v. London Assurance Society Ltd., (1885) 10 A C 438=55 L J Q B 92=53 L T 634=34 W R 233=50 J P 116=2 Tax Cas 100.
5. Municipal Mutual Insurance Ltd. v. Hills, (1932) 16 Tax Cas 430=147 L T 62=48 TLR 301=42 Ll L Rep 173.

For the assessee it is contended that the Commissioner has recognized the mutuality which in fact exists between the Chamber and its constituent members or firms by exempting subscriptions amounting to Rs. 13,140 and that the fact that the Chamber performs services for non-members does not destroy the mutual basis of the relations between them and its members and that there is no difference between the business or trade of insurance as in (1889) 14 A C 381[2] and the business of providing a Clearing House or the Office of Public Measurer for the purpose of facilitating the trade of the members for which facilities the members pay themselves; and it matters not that payments are not made in lump sums at one time, but in proportion to the services rendered from time to time. The case of the Liverpool Corn Trade Association is distinguished from this case by the fact that in this case there are no shares and no shareholders and no dividends and reliance is placed particularly upon the case in (1912) 2 K B 177[6] and (1934) 18 T C 499[3] at p. 503; it is further urged that it makes no difference that the Chamber is incorporated under S. 26, Companies Act, and that in the two cases last named the associations were unincorporated because even between a legal entity and its constituent members there may be complete mutuality; and that where, as in this case, the fees for the performances rendered by members and non-members can be easily separable the complete mutuality which exists between the Chamber and its members is not destroyed. In these class of cases the word "mutual" is a word to conjure with. In (1931) 16 T C 430[5] Rowlatt, J. said:

> Now I do not think that one can make cases on this point turn upon an analysis of the word 'mutual,' a word that is very much abused . . . . . But for the purposes of these decisions the point is as I have pointed out before, and I think the Solicitor-General adopted what I said, whether there is any profit, that is to say, whether you get more than this, that a certain class of people are associating together to put up money to achieve an object for each other, and divide what is not wanted among themselves in that character, namely in the character of the persons who put it up. That is what I understand is at the bottom of it. If you like to call that 'mutuality,' well, it is a convenient word.

In (1927) 1 K B 33[7] Rowlatt, J. put another aspect of the matter thus (p. 46):

> The principles laid down in *Style's case*, (1889) 14 AC 381,[2] is that no one can make a profit out of himself. That is true, but I am not sure that it does not confuse us in this case. It is true to say that a person cannot make a profit out of himself if what is meant is that he may provide himself with something at a less cost than that at which he could buy it, or if he does something for himself instead of employing some one to do it. He saves money in those circumstances, but he does not make a profit. But a company can make a profit out of its members as customers, although its range of customers is limited to its shareholders. If a railway company makes a profit by carrying its shareholders, or if any other trading company by trading with its shareholders even if it is limited to trading with them, makes a profit, that profit belongs to the shareholders in a sense, but it belongs to them qua shareholders. It does not come back to them as purchasers or customers; it comes back to them as shareholders upon their shares. Where all that a company does, is to collect money from a certain number of people, it matters not whether they are called members of the company or participating policy holders, and apply it for the benefit of those same people, not as shareholders in the company but as the people who subscribed it, then, as I understand *Style's case*,[2] there is no profit. If the people were to do the thing for themselves there would be no profit, and the fact that they incorporate a legal entity to do it for them makes no difference; there is still no profit. This is not because the entity of the company is to be disregarded; it is because there is no profit, the money being simply collected from those people and handed back to them, not in the character of shareholders, but in the character of those who have paid it. That, as I understand, is the effect of the decision in *Style's case*.[2]

If, therefore, the members of the Karachi Chamber of Commerce provide for themselves certain facilities in trade and pay for these facilities, then it matters not that they are incorporated under S. 26, Companies Act. If they combine as a Chamber and provide these facilities for themselves as members of that Chamber and they pay more than is actually necessary for the provision of these services, then the surplus, whether it is handed back or not, does not appear to me to be a profit on trade within the meaning of Ss. 2 (4) and 10, Income-tax Act. It is not a profit but it is savings; interest on these savings would indeed be income liable to taxation, and this is not denied, but the surplus or what is saved is the Chamber's own money, the member's own money paid by them to themselves, though incorporated as a Chamber, for service to be rendered to themselves by themselves though incorporated as a Chamber, not as customers of the Chamber but as members of the Chamber itself. There would be no difficulty, I think, in this interpretation of the assessee's case but for the fact that the office of the Pub-

6. Carlisle and Silloth Golf Club v. Smith, (1912) 2 K B 177=81 L J K B 581.
7. Thomas v. Evans & Co. Ltd., (1927) 1 K B 33 =95 LJKB 990=135 L T 673=42 T L R 703 =11 Tax Cas 790.

lic Measurer serves not only members of the Chamber but members of the public as well. Now, does this destroy the mutual basis of the members dealing with the Chamber ? The learned Commissioner is of the opinion that this is fatal to the assessee's case; the assessee argues that the Public Measurer is first the Chamber Measurer; it may be that according to S. 26, Companies Act, they should not perform this service to members of the public, but that does not destroy the mutuality of these services as between the Chamber and its members, the value of which in fees can be easily ascertained and separated from the fees paid by outsiders.

My own opinion is that in the particular circumstances of this case this provision of a service to the public is not fatal to the assessee's case. I do not think any importance is to be attached to the fact that the services rendered by the Chamber to its members relate to business or trade. The nature of the services is not the test. A tennis or a golf club may be owned by a company which may have shareholders and may have dividends, but it nevertheless makes a taxable profit. The test in my opinion is not the purpose of the association but its nature. Is it of the nature of a club ? Are its services solely for the benefit of its members, or, if not solely for the benefit of its members, are the services for its members and the cost thereof clearly separable from its services to non-members and the costs thereof? If yes, then there is no profit but merely a surplus or saving: if no, then there is a taxable profit or gain. There is in principle no difference between a club which provides a marker for tennis on payment by the individual club members and a Chamber of Commerce which supplies a measurer of merchandise on payment by its members. Both are employees of the Association provided at the cost of and for the benefit of its members, and if there is a surplus or saving on the year's working it is not taxable profit or gain. It may be handed back; it may be kept for some future contingency; the test is whether it is the members' money.

In (1927) 1 K B 33[7] there was a reserve fund of £200,000. Turning to the facts of this case, there can be no doubt that the Karachi Chamber of Commerce and its members are one and the same. It is true that under Sec. 26, Companies Act, the Chamber is an incorporated body, a legal entity, but it is made up of its members. Under Art. 1 of the Articles of Association the 'Chamber' means the Karachi Chamber of Commerce incorporated under Sec. 26, Companies Act, and 'Member' means a member of the Chamber. Its purpose as set out in its Memorandum of Association is to encourage the trade, commerce and manufactures of India and the interests of persons engaged therein and in particular of Sind. The Association however is not a philanthropic association but an association of businessmen; its primary purpose is clearly to advance and protect the business interests of its own members and to provide buildings, organizations and services for that purpose. No bonus or dividend is to be paid and on the dissolution of the Association the property is not then to come back to the members, but it is to go to other institutions with like objects. There is nothing in all this incompatible with the assessee's case that here is a Chamber or Association, or even it may be called a club of businessmen associated together, for the purpose of furthering and protecting their own interests. Hence, presumably, the Commissioner's exemption of subscriptions amounting to over Rs. 13,000 from taxation, but these the Commissioner finds are from members only.

The bulk of the income of the Chamber, however, a sum of Rs. 40,573, comes from Measurement Fees which the Commissioner finds as to 29 per cent. and which fact is admitted by the assessee, comes from outsiders and therefore is, in his opinion, as to the whole liable to taxation. It is perhaps unfortunate that the Chamber have given their office of measurer the title of Public Measurer. Under bye-law No. 13 a Public Measurer is to be appointed under the authority of the Chamber to measure all merchandise, freight on which is ordinarily payable on measurement. Such measurement shall be taken

II. No measurements shall be good except such as are taken by a Chamber Measurer, and with instruments bearing the stamp of the Chamber of Commerce.

* * * *

VIII. Certificates of measurement shall be issued to shipper and/or to ship agents in such form and in such manner as the Committee for the time being shall, from time to time, approve.

IX. A fee, the amount of which shall in no case exceed one anna per bale, case or package, but which may be regulated by the Chamber from time to time, shall be levied on all merchandise measured by the Public Measurer.

X. No merchandise shall be measured without the production of the Custom House Pass or a requisition in writing by the Exporter which must

detail name of shippers, name of vessel, number and marks of bales, case or packages, and destination and bearing the endorsement of the Measurement Fee Clerk to the effect that the fee has been paid. Members of the Chamber shall be permitted to run a monthly account provided they give an undertaking in writing to pay such monthly accounts on presentation.

* * * *

XIV. The Measurer shall give a certificate of measurement and furnish the Shipper with a copy thereof. The certificate shall state: Name of shipper, name of vessel, number and marks of bales, cases or packages, destination, dimensions, date, time and place of measurement.

* * * *

XVI. In cases of import cargo for which measurement is required it shall be incumbent upon the party requiring such measurement to advise the Public Measurer when the cargo is ready for measurement, to send a representative, with transport for the Measurer and the callipers, to the Public Measurer's office, and actually to conduct the Measurer to the place where the cargo awaiting measurement lies.

* * * *

XVIII. The salaries of the Measurers and all other expenses connected with this scheme of measurement shall be paid by the Chamber from the Fee Fund raised under these rules.

XIX. All matters pertaining to measurements, as defined above including the appointment of the Measurer, the fixing of fees, the payment of the same, and the doing of all things necessary for a proper and economical working of the scheme, shall be placed in the charge of the Committee of the Chamber.

Under bye-law No. 14 — Rules for the weighment of bag cargo and drawing samples:

1. The Chamber Measurer, if required, shall weigh bag cargo and other goods and issue certificates of such weights, all labour and other expenses in connexion with such weighment to be borne by the applicant. The charge for weighing 2 per cent. of bags to be Rs. 30 for each thousand tons or part thereof and such samples shall be sealed with the Chamber seal.

Now, the learned Commissioner relies by analogy on the case of a railway whose profits are nonetheless profits and taxable as such because they come in part from share-holders, and, indeed, if it were clear that the members of the Chamber had recourse to the Public Measurer on precisely the same footing as members of the public, I should find that the Chamber were giving to their members services similar to those supplied by a railway company to its ticket-holders who are also share-holders, for it appears to me that before there can be mutuality between an association and its members, the services must be supplied by the Association to its members as such, services for which the members themselves pay, from which payments any surplus is saving and not profits or gains. But looking to the realities of the case before us, it appears to me impossible to hold that members of the Chamber do not have recourse to the Public Measurer, despite his name, as members of the Association, having recourse to an officer of the Association for whom they themselves pay. If members, instead of paying for each act of measurement paid an extra subscription of, say, Rs. 100 each, irrespective of the services rendered to each particular member, it appears to me it would be difficult to say that their subscriptions were not exempt from taxation. It matters little, I think, that such payments are not made in a lump sum in advance and are proportionate to the services rendered. If the Chamber had kept two measurers, one for its members supported by the members' subscriptions, and one for the public, it would not have been difficult to show that the members' subscriptions which paid for the Members' Measurer as distinct from the Public Measurer, were exempt from taxation; it makes in practice, I think, no difference if the payments for the service of the measurers rendered to members and to non-members can be separated in the accounts. Though in Rule 1 of bye-law 13 the somewhat grandiloquent title of "Public Measurer" is used, in R. 2 the more homely and private title of Chamber Measurer is used. Primarily, I think the Measurer is a Chamber Measurer; but for the Chamber and its members there would be no Measurer. The great bulk of the work done is done for the members, and I can see in essence no difference between this case and the case in (1912) 2 K B 177.[6] I think therefore the answer to the question referred to us should be in the negative. The assessee is entitled to his costs including the fee of Rs. 100.

Tyabji J.—I concur.

D.S./R.K. *Answer in negative.*

A. I. R. 1939 Sind 311

DAVIS J. C.

In re Muhammad Alam Md. Ibrahim.

Misc. Appln. Nos. 19 and 20 of 1939, Decided on 22nd May 1939.

(a) Mahomedan Law — Conversion — Minor girl below 18 but above 15, i. e. age of minority under Mahomedan law, can become validly converted to Mahomedanism if she has done so willingly and with understanding.

If a girl willingly and with understanding embraces the Mahomedan religion, the fact that she was under 18 years of age would not invalidate the conversion and make her subsequent marriage void, if all the necessary formalities at the conversion and the subsequent nikah had been faithfully observed, because a minor girl

above 15 years, i. e., the age of minority under the Mahomedan law, can be validly converted to the Mahomedan religion if in addition to a mere repetition of the words of faith she has understood their meaning. The Court is not concerned to inquire into the motive or sincerity of religious belief or observance. [P 313 C 1; P 314 C 2]

(b) Minor—Guardian—Minor under 18 years but old enough to understand nature of his or her acts can change his or her religion in spite of father's power of general control over education — Custody of minor will be determined according to welfare and interest of minor—Father does not lose right of custody even if he or child changes religion.

A minor, provided he or she is old enough to understand the nature of his or her acts, though under 18 years of age, is able in spite of the father's power of general control over his or her education, religious and otherwise, to change his or her religion. But in this, as in all other matters under the Guardians and Wards Act, the Court in deciding who shall have the custody of the minor will consider first the welfare and interest of the minor and in so doing the Court can set aside her own preferences in her own interest and for her good : *9 Mad 391, Rel. on.* [P 313 C 2; P 314 C 1; P 315 C 2]

Further, a father does not lose the right of custody of his minor child if he becomes converted to another religion or if his child becomes so converted : *25 Cal 881; A I R 1917 Sind 76 and A I R 1918 Sind 32, Rel. on.* [P 313 C 2]

Syed Md. Aslam—*for Muhammad Alam.*

P. S. Shahani and Dingomal Narainsing — *for Ramchand Kundanmal.*

Order. — This is an application made under Ss. 7 and 10, Guardians and Wards Act, subsequently amended to S. 25 of the Act, by one Muhammad Alam, aged 22, son of the late Khan Bahadur Muhammad Ibrahim Khan, for the custody of his minor wife, the daughter of one Ramchand Kundanmal, on the ground that the minor was converted with her free consent to the Mahomedan religion on 8th May 1939, and thereafter married to him according to Mahomedan law. The applicant describes himself in his application as an educated young man of a highly respectable family of Sind ; his father was Prime Minister of Khairpur State and his uncle held the same office. The application is opposed by the father of the minor girl.

So far as the question of the age of the girl is concerned, it would appear from the evidence that this business was intended to proceed on the basis that the girl was over 18 years of age, when she would not be a minor under the Guardians and Wards Act. She herself says in her evidence that she is over 18 years of age, basing her age among other things upon the opinion of a Dr. Draper who was not called as a witness and whose opinion, if it was to the effect that the girl was over 18 years of age, was wrong. The applicant has produced copies of the entries in the Birth and Vaccination Registers of the Karachi Municipality, which were admitted by the opponent, which show quite clearly that the girl was born on 1st October 1922. The birth certificate gives no name but the vaccination certificate refers to the birth certificate and shows the name of the girl as Mohni. At one time it was sought to be shown on behalf of the opponent that the girl was not the eldest of the family and that an elder sister had died, but copies of extracts from the birth and vaccination registers show that this sister, Hardevi by name, was born on 23rd January 1924 ; ultimately the age of the girl was not disputed, and it is clear she will be 17 years of age on 1st October next. She is therefore over 16 years of age, though under 18 years of age, the material age under the Guardians and Wards Act, and her enticement from her father's house is therefore no criminal offence, however great the moral wrong. Indeed, the applicant and his associates appear more concerned with the provisions of the criminal law, as they well may be, than with the wrong done either to the father of the girl or the girl herself. The applicant himself admits that he was concerned about her age because of the fear of a criminal prosecution. One Abdul Khalik, a Municipal Councillor, who acted as the Pidar-Vakil at the marriage ceremony, says that he was solely concerned to know if the girl was below or above 16 years of age.

This case, in my opinion, shows the urgent need of the amendment of Ss. 361 and 366, I. P. C., and other relevant Sections relating to the protection of minor girls—the age under S. 366-A is already 18 years,—so as to raise the age under the criminal law to the age under the Guardians and Wards Act ; and one of the most unpleasant features of this case is the manner in which the applicant interfered and continued to interfere with the minor girl when she was under 16 years of age, for, on the admission of both the applicant and the minor girl, they knew each other for two years. It is not reasonable to suppose that the first advances were made by a schoolgirl under 15 years of age. But be that as it may, as the law now stands, it is not a criminal offence to take a minor over 16 years of age out of the custody of her lawful guardian, and the applicant appears to have acted in

this matter on legal advice. The girl Mohinibai is therefore under 18 years of age and a minor under the Guardians and Wards Act. She was a Hindu when on 8th May she met the applicant by appointment and was taken to the house of his legal adviser, Mr. Aslam.

It is suggested that the applicant yielded to the girl's entreaties who threatened suicide, and a letter dated 7th May from the girl is upon the record, but the girl was not unhappy at home. She says that she was sorry to leave her brother and sister and her grandmother. It is true her father has married again on the death of the girl's mother and that his business keeps him for the greater part of the year at Quetta, but this is not a case of a harsh step-mother. The girl admits that on her visits to Quetta she had a happy time. The only reason that she does not want to return to her house is, as she says, her love for the applicant. A more appropriate word would, in the circumstances of this case, be "infatuation," to which there is little doubt, the applicant's supposed wealth, his motor-cars, the supposed trip to England, even the mythical aeroplane, materially contributed. The girl, in some ways intelligent, appears in others to be unusually simple and immature. Nevertheless, if she willingly and with understanding embraced the Mahomedan religion, I do not think the fact that she was under 18 years of age would invalidate the conversion and make her subsequent marriage void. Even the learned advocate for the opponent could not contend that all the necessary formalities at the conversion and the subsequent nikah had not been faithfully observed.

From Mr. Aslam's house on the morning of 8th May, the girl was taken to Dr. Draper's house. Dr. Draper was not called as a witness and for that, I do not doubt, the applicant's legal adviser had good reason. From Dr. Draper's house, the girl, after X-ray examination, was taken to a Mr. Bashir's bungalow near Adam Road where the ceremonies of conversion and nikah were performed. A Mulla named Nur Muhammad attached to the Kasai Juma Musjid performed both the conversion and nikah ceremonies. There is no reason to suppose that he did not know and comply with the necessary forms. He got the minor girl to recite the kalma after ascertaining her willingness to be converted; he explained to her that she was thereafter to order her life according to one God and the Islamic law. Witnesses were present and they also asked the girl if she was willing and she replied she was. He then performed the nikah ceremony and Abdul Khalik took the place of the Pidar vakil, and there were two witnesses Moulvi Sannaullah and Master Kalander Khan; and both Sannaullah and Abdul Khalik gave evidence corroborating the evidence of the Mullah and I see no reason whatever to doubt the truth of their evidence in this matter.

Mr. Shahani for the opponent however contends that all this was in vain because the girl was not 18 years of age, and that until she was 18 years of age her father, and he alone, could decide the question of her religious faith. It is true that the Guardians and Wards Act now consolidates the law relating to minors in British India. This Act in certain matters refers specifically to the personal law of the minors, for instance, S. 17 (1), but its provisions apply to all minors generally. So far as it goes however it applies to Hindus and Mussalmans alike as does the penal law, and the Mahomedan law no more overrides the Guardians and Wards Act than it does the penal law. It does not appear however that a minor, old enough to understand the nature of his or her acts, cannot change his or her religion merely because under the Guardians and Wards Act the father is the natural guardian of the minor until he or she is 18 years of age and has a right to control the minor's upbringing in matters of religion as in other matters. The case law seems to contemplate a change of religion by a minor; it is a matter of conscience, a matter in which a minor may, in certain circumstances, be deemed *sui juris* before the legal age of majority is attained, but in this, as in all other matters under the Guardians and Wards Act, the Court in deciding who shall have the custody of the minor will consider first the welfare and interest of the minor: *see* Mulla's Hindu law, (8th Edn., para. 527, p. 568); 9 Mad 391.[1] Further, a father does not lose the right of custody of his minor child if he becomes converted to another religion or if his child becomes so converted: 25 Cal 881,[2] 11 S L R 17[3] and 12 S L R 14.[4] The Courts

1. Reade v. Krishna, (1886) 9 Mad 391.
2. Mokoond Lal Singh v. Nobodip Chunder Singha, (1898) 25 Cal 881=2 C W N 379.
3. Radhibai v. Wassanmal, (1917) 4 AIR Sind 76 =41 I C 571=11 S L R 17.
4. Sheikh Muhammad Yakub v. Mt. Radhibai, (1918) 5 AIR Sind 32=47 I C 817=12 S L R 14.

do not prefer one religion to another. It would therefore appear, that a minor provided he or she is old enough to understand the nature of his or her acts, though under 18 years of age, is able in spite of the father's power of general control over his or her education, religious and otherwise, to change his or her religion. I will not say that in this matter the minor must be shown to be able to exercise an intelligent preference because religion is more a matter of faith than of reason. But it must be shown that he or she understood the nature of his or her acts and his or her profession of faith. Religion is a matter of conscience, a matter personal to a minor of age to understand. Mr. Shahani has been unable to show me any precise authority to the contrary.

The question then arises whether, in this case, the minor has become converted to Islam according to Islamic law, knowing and understanding the nature of her act. Mr. Aslam's first contention was that a mere repetition of the kalma was sufficient for the purpose of conversion, and it is to be remarked that the commentaries on Mahomedan law to which I have been referred are silent on the question as to the age at which, for instance, a minor girl may become properly converted to Islam, and whether an understanding of the words besides their mere repetition is necessary to constitute conversion. In Syed Ameer Ali's "Mahomedan Law", Vol. 2, Edn. 5, p. 22, occurs the following passage:

> Any person who professes the religion of Islam, in other words, accepts the unity of God and the prophetic character of Mohammad is a Moslem and is subject to the Musalman law. So long as the individual pronounces the Kalma or Taubid (i. e. confession of unity) the Credo of Islam, it is not necessary for him or her to observe any of the rites and ceremonies, or to believe in particular doctrines which imply iman or belief.

In Mulla's "Mahomedan Law", Ch. 2, p. 16, Edn. 11 occurs the following passage:

> 14. *Who is a Mahomedan.* — Any person who professes the Mahomedan religion, that is, acknowledges (1) that there is but one God, and (2) that Mahomed is his prophet, is a Mahomedan. Such a person may be a Mahomedan by birth or he may be a Mahomedan by conversion. It is not necessary that he should observe any particular rites or ceremonies, or be an orthodox believer in that religion; no Court can test or gauge the sincerity of religious belief.

See also 45 Mad 986[5] at page 1001.

Both these learned authors are silent on the age at which a person may become converted to Muhammadanism. Mr. Aslam suggests that as according to Mahomedan law a girl becomes a major at fifteen or before if she has attained puberty and can give her hand in marriage so at that same age she can become converted. Further, neither of these learned authors say it is necessary for the person making the profession of faith to understand it; but it is because I was of the opinion that a mere repetition of the words or faith without understanding their meaning cannot effect conversion in the case of a minor, at least, that I recalled the girl so as to satisfy myself that she understood the meaning of the words of the new faith she professed. She was not a good witness from the point of view of those who had converted her, and my first impression was that she had merely repeated as an automaton, words recited to her. Though she stated in her evidence that she did understand by the ceremony of conversion that she was leaving her old religion of Hinduism and accepting the religion of Islam, and she was willing to do this and understood what she was doing, yet when she was asked if she knew whom Mahomedans worshipped she said she did not; and when recalled and asked if she knew the essentials of the Mahomedan religion, what they believed, she said she did not.

Her subsequent answers, however, satisfied me that she knew she was professing a belief in the unity of God against the plurality, or supposed plurality of Gods in the Hindu pantheon, and in Muhammad as the Prophet of God, though she could not repeat the Arabic words of the Kalma. And I am satisfied that when she said she did not know the essentials of the Mahomedan religion she was thinking in terms of some religious exposition. A convert cannot be expected to speak in the terms of theological discussion. It is true that she showed by her answers in some ways a strange immaturity or childishness of mind as when she said Hindu girls did not wear burqas and Mahomedan girls did, that Hindu girls went about freely and Mahomedan girls did not, yet this childishness did not, in my opinion, prevent an understanding of what she said and professed and a desire, however motived, to do so. The Court is not concerned to inquire into the motive or sincerity of religious belief or observance. I must hold, therefore, that the minor girl above the age of minority under Mahomedan law was validly

5. Narantakath Avullah v. Parakkal Mammu, (1923) 10 AIR Mad 171=71 I C 65=24 Cr L J 17=43 M L J 663=45 Mad 986.

converted to the Mahomedan religion and that the nikah which followed was between Mahomedans and was validly performed.

The question then remains as to whether the applicant is entitled to the custody of his wife under Sec. 25, Guardians and Wards Act, and in order that he should not be so entitled, he must be found to be unfit under S. 19 of the Act. I have also to read S. 19 with S. 17 of the Act, for the welfare of the minor is the governing principle in cases under this Act. There is not the least doubt in my mind that the applicant is quite unfit to be guardian of this minor girl. Far from being fit to be her guardian, my opinion is that he needs a de facto guardian himself, for rarely do I remember a case where I was so impressed by the utter irresponsibility of a young man than I have been in the case of this applicant.

He describes himself in answer to his advocate's question as a "landlord and zamindar." So far as he is a landlord, he has sold his share in his family house to one of his brothers for Rs. 2000 and he squandered this on a month's visit to Bombay. So far as he is a zamindar, he has not even known the income of his lands, is dependent upon what his brother sends him and wastes his time making a nuisance of himself to the daughters of the decent residents of the locality where he was carrying on his intrigue with this young girl. He knowingly deceived his brother Muhammad Aslam who did his best to shield him in this very matter of his marriage assuring him that the girl was a major when he well knew that she was not. In my opinion he knowingly stated to the Court what was false. When asked whether he had not been called by any police officer in connexion with complaints about his conduct in molesting young women or girls, he said that he had not. On this point I prefer the evidence of the Sub-Inspector, Hardasmal to the evidence of this son of the late Vazir of Khairpur State, and though the evidence of those witnesses who speak to the public nuisance this applicant and his companions caused is in part hearsay evidence, yet there is no doubt that residents of the locality where this young girl lived went in deputation to the Deputy Superintendent of Police, Mir Maqbul Khan, to complain about the conduct of this applicant and his companions. One witness, Nand Kishore, whom I believe, states that he was assaulted and hurt by this applicant and his companions when he protested against the annoyance caused to young girls in which the applicant and his companions found their amusement, while one Mr. Tolaram Ramdas had to send his daughters to school either by car or with a peon because of the fear, annoyance and molestation of young girls in this locality for which the misconduct of the applicant and his companions was responsible. It appears a matter of regret that in a city of the size of Karachi the authorities could do nothing really effective to save the young daughters of decent citizens from molestation and annoyance of this kind. Mr. Hardasmal said that they had not one uniformed policeman to spare for this beat, and if that is so, then it would appear the police staff is undermanned. The Deputy Superintendent of Police, Mir Maqbul Khan, could do nothing really effective to abate this unmitigated nuisance. It appears however the bounden duty of the authorities to take some more effective action in the future than in the past to deal with undesirable characters such as the applicant.

But these incidents merely illustrate the worthless and irresponsible attitude of the applicant towards life. He does no work; he earns nothing; he saves nothing; he is a spendthrift; he is, in my opinion, at present at least, a wastreal and a ne'er-do-well, and utterly unfit to be the guardian of the minor girl with whom he first interfered when she was under fifteen years of age and whom he has married under circumstances which all decent people, of whatever caste or creed, must condemn. She appears by no means robust or strong, and it is, in my opinion, contrary, and indeed, most inimical to her welfare that she should be handed over to the applicant as his wife. She should be at school as are other girls of her age and class in her community. Her own preferences in this matter must be set aside in her own interests and for her good. I therefore reject this application with costs.

D.S./R.K. *Application rejected.*

A. I. R. 1939 Sind 315

DAVIS J. C. AND LOBO J.

Mangalmal Aganmal and another — Defendants 18 and 19—Appellants.

v.

Haji Muhammad Usif Bhoro and others — Respondents.

Second Appeal No. 20 of 1936, Decided on 23rd December 1938.

(a) Cosharers — Difference between co-ownership of Mahomedans and joint ownership of joint Hindu family explained.

There is a difference between the co-ownership of Mahomedans and the joint ownership of a joint Hindu family, for, while in a joint Hindu family all the coparceners have a share in the whole property, among Mahomedans who inherit as heirs, each one has a specific share. [P 316 C 2]

(b) Adverse Possession — Cosharers — Essentials stated.

To constitute a title by adverse possession in one co-owner as against another, there must be ouster or exclusion; there must be a disclaimer by the one of the other's title by open assertion of a hostile title. It is not sufficient to show acts of possession; the possession required must be adequate in continuity or publicity and in extent to show that it is possession adverse to the competitor: *A I R 1921 Sind 177, Rel. on.* [P 317 C 1]

(c) Partition — Allotment — Alienees of co-owners should get, as far as possible, what their vendors sold or purported to sell to them — Estate not large enough for alienees to get from their vendors' share all they purported to sell to them — Same piece of land not sold twice over — Principle of priority of first purchaser over subsequent purchaser does not apply.

In a partition suit if what the co-owners sold or purported to have sold can be allotted to their alienees on partition, it should be so allotted so that the alienees on partition can get from their vendors what they sold or purported to sell to them: *AIR 1939 Bom 40, Rel. on.* [P 317 C 2]

The principle that the alienees under the first sale have priority with respect to the lands sold or purported to be sold to them over subsequent purchasers will have no application if the estate is not large enough for the alienees to get from their vendors' share all they purported to sell to them and if the vendors have not sold the same piece of land twice over: *A I R 1920 All 253, Rel. on.* [P 317 C 2; P 318 C 1]

Srikrishindas H. Lulla—*for Appellants.*

Hukumatrai M. Eidnani — *for Respondents.*

Davis J. C.—This is an appeal from the judgment of the District Judge of Larkana in which he modified the decree of the Subordinate Judge of Mehar. The Subordinate Judge in a suit for partition between Mahomedans, the heirs of one Khuda Baksh, who died some thirty years ago, dismissed the plaintiffs' suit against defendants 18 and 19, alienees of two of the joint owners Hamid and Musa, sons of Khuda Baksh, finding that the claim against them was time-barred, they having been for more than twelve years in adverse possession of the land not only against their vendors but against their sisters, the daughters of Khuda Baksh, through one of whom Amnat, as son and husband, the plaintiffs claimed. But the District Judge was of a different opinion holding that as against the female heirs and against the plaintiffs who claimed through them adverse possession was not proved and this question of adverse possession and the equities to be considered in the partition of the property are the only questions argued before us in appeal.

Now, so far as the question of adverse possession is concerned, it appears that in 1917 the two brothers Musa and Hamid sold not only their own share in the common property to defendants 18 and 19, but they sold the shares of their sisters also. They sold twelve-annas in the rupee of Survey Nos. 274, 275, 255 and 276, and four-annas in the rupee of 273 and 277. The alienees, defendants 18 and 19, can only have perfected their title against the shares of the sisters or the sisters' heirs if they can show a possession on their part having all the necessary attributes of adverse possession. The learned Subordinate Judge appears to be of the opinion that mere possession by strangers who become co-owners by a sale from some of the co-owners was necessarily adverse possession against the rest, but there is a difference between the co-ownership of Mahomedans and the joint ownership of a joint Hindu family for while in a joint Hindu family all the co-parceners have a share in the whole property, among Mahomedans who inherit as these sons and daughters did, as heirs, each one has a specific share. Therefore the ruling to which Mr. Lulla with his usual diligence has referred us relating to Hindus or Sikhs or Buddhists affords us no true guidance. Mr. Lulla however relies on 1 S L R 133[1] at p. 134 and particularly the passage:

> Now, the Court will not presume and will refuse to believe, without very clear proof, that when the sons of a Mahomedan pardanashin lady lease or mortgage family lands, they do so adversely to her, that is, in fraud of her rights, or with the intention to defeat them. The natural presumption is that they deal with the lands as managers or agents for her as well as for themselves. We must therefore date the commencement of the defendants' adverse possession from the date of the sale to their father.

We do not think that the learned Judge there laid down any general principle of law. It is, in our opinion, merely an expression of his opinion that in certain circumstances the sons of pardanashin lady who leased or mortgaged family lands did so as her agents. That case however dealt not, as here, with sale, but with ordinary

1. Dhumoomal Chandiram v. Mt. Kaim Khatu (1907) 1 S L R 133.

acts of management. Even so, we think it well that this ruling be kept to its own particular facts for we ourselves think that the Court should be alert to protect the interests of pardanashin women, cut off from the world, and should rely more upon facts than upon presumptions. To constitute a title by adverse possession in one co-owner as against another, there must be ouster or exclusion; there must be a disclaimer by the one of the other's title by open assertion of a hostile title. It is not sufficient to show acts of possession; the possession required must be adequate in continuity or publicity and in extent to show that it is possession adverse to the competitor: 16 S L R 25.[2] Mr. Lulla argued that the District Judge is wrong when he said that there must be adverse possession to the knowledge of the true owner, but in the case he referred, 66 M L J 134[3] at p. 137, their Lordships of the Privy Council said :

> As to what constitutes adverse possession, a subject which formed the topic of some discussion, in the case, their Lordships adopt the language of Lord Robertson in delivering the judgment of the Board in 27 I A 136 at p. 140=27 Cal 943,[4] where his Lordship said that 'the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor.' The classical requirement is that the possession should be *nec vi nec clam nec precario*. Mr. Dunne for the Crown appeared to desiderate that the adverse possession should be shown to have been brought to the knowledge of the Crown, but in their Lordships' opinion there is no authority for this requirement. It is sufficient that the possession be overt and without any attempt at concealment or that the person against whom time is running ought, if he exercises due vigilance, to be aware of what is happening. If the rights of the Crown have been openly usurped it cannot be heard to plead that the fact was not brought to its notice.

But there is a great difference between the opportunities of knowledge of the Crown with its officers in every district and in every village and of pardanashin women behind the purdah. Their Lordships say, it is not necessary to show that adverse possession was brought to the knowledge of the Crown. It is sufficient that the possession be adverse and without any attempt at concealment so that the person against whom time is running ought, if he exercised due vigilance, to be aware of what is happening. In this case, the pardanashin ladies did, so far as they could, exercise due diligence but they did not know what was happening. The learned District Judge held that Amnat, the sister through whom the plaintiffs claimed, lived jointly with her brothers and shared the produce of the lands. He finds the Banias, defendants 18 and 19, did not prove they were exclusively enjoying produce. On the contrary, the evidence showed that Mt. Amnat lived with Hamid and Muso and enjoyed the produce even after her marriage with Usif and that after her death he enjoyed her share. It is not suggested that the Judge was not on the evidence able to find these facts and in second appeal we will not disturb the findings on facts; therefore, from the facts no legal inference of adverse possession can be drawn in favour of the Banias, Mangalmal defendant 18, and Hundomal, defendant 19, and the District Judge's judgment on this question must be upheld.

On the question of equities in the partition of the property, Mr. Lulla argues that if what Muso and Hamid sold or purported to have sold can be allotted to their alienees on partition, it should be so allotted so that the alienees can get from Muso and Hamid what Muso and Hamid sold or purported to sell to them. He relies on 40 Bom L R 1205.[5] To this equitable application of S. 41, T. P. Act, we can see no objection. But Mr. Lulla goes further. He says that there were several sales and that his clients, the alienees under the first sale of 1917, have priority with respect to the lands sold or purported to be sold to them over subsequent purchasers. He relies on 28 Bom 201.[6] In this case however, it is clear that all the purchasers in the subsequent sales which the Court could have recognized, and these are seven in all, the alleged oral sale being excluded, will have to make some contribution, will have to give up some proportion of their supposed purchases because the estate is not large enough for the alienees of Hamid and Muso to get from Hamid and Muso's share all Hamid and Muso purported to sell them. Nor does it appear that Hamid and Muso sold the same piece of land twice over, so there will be no conflicting claims and no

2. Mt. Bhagbhari v. Mt. Khatun, (1921) 8 A I R Sind 177=80 I C 118=16 S L R 25.
3. Secretary of State v. Debendra Lal, (1934) 21 A I R P C 23=147 I C 545=61 I A 78 = 61 Cal 262=66 M L J 134 (P C).
4. Radhamoni Debi v. Collector of Khulna, (1900) 27 Cal 943=27 I A 136=7 Sar 714=4 C W N 597 (P C).
5. Gemalsingji Khumansingji v. Bai Fati, (1939) 26 A I R Bom 40=179 I C 721=40 Bom L R 1205.
6. Narayan Babaji v. Nathaji Durgaji, (1904) 28 Bom 201=5 Bom L R 945.

question of priority to the same piece of land: *see* 42 All 336[7] at p. 341. We think the equitable position will be made sufficiently clear to the revenue authorities who are carrying out the actual partition if we modify lines 364 to 374 in the judgment of the District Judge as follows:

"The shares of Hamid, Muso, Karimat and Rahmat would go to the purchasers and the purchasers will contribute equally if they have taken anything in excess of the shares of the vendors. The purchasers will, as far as possible, be kept in possession of the property sold or purported to have been sold to them to the extent of the shares of the vendors in the whole estate if this can be done, and without prejudice to any of the co-owners. The partition should be made according to these directions by the revenue authorities."

We must therefore confirm the judgment of the District Judge with this variation and dismiss the appeal with costs. There are cross-objections by the plaintiff-respondents on the order of costs in the lower Appellate Court, the order being that each party should bear his own costs, and as this order was passed in a partition suit, we think it is a proper order, and the cross-objections are dismissed with costs accordingly.

D.S./R.K. *Appeal dismissed.*

7. Din Dayal v. Gur Saran Lal, (1920) 7 A I R All 253=59 IC 67=42 All 336=18 A L J 287.

A. I. R. 1939 Sind 318

DAVIS J. C. AND TYABJI J.

Commissioner of Income-tax, Bombay Presidency, Sind and Aden — Applicant.

v.

Naraindas & Co. Ltd. (Firm) — *Assessee* — Opponents.

Reference No. 16 of 1937, Decided on 24th March 1939, made by Commissioner of Income-tax, Bombay Presidency, Sind and Aden, D/- 4th February 1937.

(a) Income-tax Act (1922), S. 26 (2)—Motor company terminating agency for sale granted to firm *A* and giving it to assessee firm from 1st January — After 21 days firm *A* selling to assessee firm all its business as going concern and assessee firm taking charge of that business — Assessee firm held could be taxed as successor.

The fact that the business transferred is an agency business cannot always be decisive to exclude the application of S. 26. [P 319 C 2]

A motor company terminated in December 1930 an agency for sale of its cars which had been granted by it to firm *A* for certain area and gave it to the assessee firm from 1st January 1931. Shortly afterwards, i. e. on 22nd January 1931 *A* sold to the assessee firm all its business as a going concern and the assessee company went into the buildings and took charge of the business as a going concern as its vendor went out. There was thus continuity and identity:

Held that in these circumstances the assessee company could be taxed as successor to the firm *A* within the meaning of S. 26 (2) of the Act: *A I R 1938 Sind 33, Disting.; A I R 1937 Mad 316 (S B) and A I R 1933 Pat 123, Ref.; (1929) 14 Tax Cas 413 and (1933) 17 Tax Cas 127, Rel. on.* [P 318 C 2; P 320 C 2]

(b) Income-tax Act (1922), S. 66 (3), (2), (6) —Costs payable by assessee need not be paid from or limited to Rs. 100 deposited under S. 66 (2)—Costs are in discretion of Court.

Under S. 66 (6), costs are in the discretion of the Court. The deposit is returnable under proviso 2 to S. 66 (2) in certain circumstances. There is however no provision in the Income-tax Act that costs payable by an assessee should be paid from or limited to the Rs. 100 deposited under S. 66 (2). Rs. 100 in S. 66 (2) is referred to as a fee. [P 320 C 2]

Partabrai D. Punwani, Advocate-General — *for Applicant.*

Srikishindas H. Lulla — *for Opponents.*

Davis J. C. — This is a statement of a case to this Court in its High Court jurisdiction under Sec. 66 (3), Income-tax Act, by the Commissioner of Income-tax for Bombay and Sind in the matter of the assessment for the financial year 1931-32, of the assessee, Messrs. Naraindas & Co., Ltd. The question of law arising is:

Whether in the circumstances of the case, the assessee company has been correctly taxed as successor to the Auto Car Sales Company of Jullunder within the meaning of S. 26 (2), Income-tax Act, 1922.

The learned Commissioner has assisted us with his opinion that the question should be answered in the affirmative. Now, the facts of the case are that the assessee company was the agent for General Motors (India) Ltd., in the Lahore area for the sale of its cars, and took over from a firm called the Auto Car Sales Company, the agency for General Motors (India) Ltd., which the Auto Car Sales Company held in the Jullunder, Ludhiana and Hoshiarpur areas. General Motors terminated Auto Car Sales' contract in December 1930, and granted the agency to the assessee company in January 1931. So far, it might be said there was no succession by the assessee company to Auto Car Sales within the meaning of S. 26 (2), Income-tax Act, and the ruling of this Court in 32 S L R 203.[1]

1. Tolaram Ramdas v. Commissioner of Income-tax, Bombay Presidency and Aden, (1938) 25 A I R Sind 33=173 I C 786=32 S L R 203.

All that happened was that Auto Car Sales ceased to be the agents for General Motors for a particular area and the assessee company became the agents of General Motors for that area. Auto Car Sales did not sell their business to the assessee company. General Motors merely transferred their agency from the one to the other. The business of Auto Car Sales merely ceased to exist or was carried on elsewhere. But this interpretation of the case leaves out of account the fact that by a deed dated 22nd January 1931 Auto Car Sales sold to the assessee company for the sum of one lac and sixty-five thousand rupees what can only be described as their business. This is a large sum of money, and obviously would not be given except for something of value. What that is, is set out in the deed in the following terms :

. . . . in consideration of the sale price of our all and single rights and ownership, lease-holders, agreement, goodwills, franchises, contracts, assets, stocks-in-trade, accessories, spare parts, tyres, oil, petrol, furniture, fixtures, tools and machinery, new motor vehicles, about 30 second hand vehicles, building material of our Jullunder and Hoshiarpur buildings along with the lessee rights and benefits pertaining to both these buildings debts due to us or our joint firm from third persons including bills for collection, petrol bills loans and pronotes, hire purchase account and outstandings at our Hoshiarpur Branch. And these have already been sold and transferred and possession delivered by us to the said Messrs. Naraindas & Co. Ltd.

All the account books, cash books, day books, ledgers, stock-books, agreements, correspondence, pronotes, hundis, and all other documents relating to the abovesaid items of sale have ere now been handed over to them with powers and rights to deal with these items and realize them as rightful transferor from us. The lists of all the debts due to us and other articles delivered have also been handed over duly signed by us.

It is true that the deed is dated 22nd January 1931, and the agency terminated on 1st January 1931, but that interval of time is too short to matter. It is also clear from the very words of the deed that there was here something more than a mere transfer of an agency from one firm to another at the volition of a third party. All the essentials of the business as a going concern were sold. The fact that the vendors held themselves liable for the due payment of debts they owed to others, appears to us in no way sufficient to alter the essential nature of the transaction which was the transference of a business as a going concern from one firm to another, their successors.

Mr. Lulla for the assessee contends that there was not here the sale of a business but the sale of the assets of a business, and that the case of this Court in 32 S L R 203[1] completely covers this case. But that case must be kept to its own particular facts. The facts that the business transferred is an agency business cannot, in our opinion, always be decisive to exclude the application of S. 26, Income-tax Act, because many businesses sell as agents the goods of others. It is a matter of common knowledge that famous makes of cars have as their selling agents certain firms who have the right to sell these special makes and the duty not to sell others, and most businessmen would, we think, be of the opinion that the advantage in business of this kind is not all on one side, the side of the makers of the cars, for as good agents want good makes of cars, so makers of good cars want good agents. One agent may by his skill, energy and enterprise build up a big business on the sale of a particular maker's car another agent in the same district with the same opportunities may fail. We do not think therefore that it can be said that in the transfer of an agency business the goodwill of the transferors must necessarily amount to nothing, that the name of the principal is everything. But where one firm merely gives up an agency which is given to another, and the matter there ends, there is of course no question of the successor to a business within the meaning of S. 26 (2) and this is, we think, how the case of Pfaff's machines was regarded in 32 S L R 203.[1] That case was regarded as a case wherein the agency was taken from one firm and given to another. In this case however the agency rights of General Motors are not specifically mentioned in the deed and are not expressly sold by Auto Car Sales as they could not sell what was not theirs. The word "franchises" may or may not be taken to include these rights, but we think it matters not. That is but one item in the sale by Auto Car Sales. What is sold is a business in motor cars as a going concern. The buildings and the lessees' rights were sold with goodwill, contracts, assets, stock-in-trade, spare parts, tyres, new and second hand vehicles, accounts, bills, pronotes, hire purchase accounts and outstandings. In short, all that of which a business of this kind could be reasonably said to exist, was sold and the assessee company went into the buildings and took charge of the business as a going concern as Auto Car Sales went out. There was continuity and identity.

This question of succession is dealt with by Rowlatt, J. in an oft-quoted passage in (1929) 14 Tax Cas 413,[2] and is referred to in a comparatively recent case by Finlay, J. in (1933) 17 Tax Cas 127,[3] where part of Rowlatt, J.'s judgment in another case, (1930) 15 Tax Cas 501[4] at pp. 523-524, is cited in the following passage:

In this case I am of opinion that I cannot interfere with the decision of the Commissioners. I should like again to advert to the consideration which I drew attention to in (1929) 14 Tax Cas 413,[2] namely that this provision as regards successors is designed merely with a view to preserve in a proper case where there is a succession a measure upon which the successor may be assessed in the first year of his proprietorship of the business, and that, as I pointed out, is at the root of the necessity for there being a real continuity of the business. You want to measure the income of the successor by the past history of the business; it is therefore essential that there should be a very close identity between the business in the former proprietorship and the business in the present proprietorship. Now, in the present case what troubled me at first was that the Commissioners in deciding the case, being of course primarily a question of fact, have stated that they hold that the company did not purchase a business formerly carried on, but only certain assets. Now, if that had meant that because they did not purchase all the assets, therefore there was no succession, I think that would be wrong in law. It is not easy to believe that the Commissioners should think that or say it. I do not think that is what they have done. What they say is: They did not purchase the business; it is true that they purchased some of the assets; but that is all they did. That is what I think the Commissioners intended. Now, is that a view to which they could properly come? That went to the Court of Appeal; the Master of the Rolls discusses the matter and he says quite definitely that, in his view, it is a question of fact for the decision of the Commissioners. Greer, L. J. gives a judgment to which I will refer, because the Solicitor-General quite naturally placed much reliance on it. He said: 'I think the question of succession involves, or may involve, the qustion as to whether there has been a long enough gap between the former business and the business which is supposed to have succeeded to it. It might well be that if there was a bankruptcy and within a week the whole of the assets were sold to the new firm, and the new firm then started to carry it on, that would not be a sufficient gap to prevent a succession happening. But, on the other hand, it might well be that in another case the bankruptcy continued for 12 months before the sale took place, and I should think if the gap was as long as 12 months then it would be quite certain that it could not be regarded as a succession in the hands of the purchaser of the assets even if it were a purchase of the whole of the assets. For intermediate periods of time the question must be a question of fact'.

That passage, I think, answers Mr. Lulla's argument that there was here only a sale of some assets of the business and not a succession and that the gap of 21 days between the transfer of the agency on 1st January and the execution of the said deed on 22nd January 1931 destroyed that continuity and identity in the business which is necessary if there is to be a succession within the meaning of S. 26 (2), Income-tax Act. In fact, it would appear from the deed itself that on 22nd January 1931 possession had been already given but though transfer of the agency was undoubtedly the cause of the transfer of the business, we hold that there was here a business, as part from or including the agency it matters not, which was succeeded to. The date of 1st January 1931 does not therefore finally conclude the case in the assessee company's favour.

We have been referred to two other cases, (1937) 1 M L J 619[5] and 12 Pat 5,[6] but neither of these cases in our opinion assists the assessee. We think therefore the question raised must be answered in the affirmative. Lastly, Mr. Lulla asks that we should make an order that the costs be limited to the Rs. 100 deposited as the assessee was bound to deposit it under S. 66 (2) of the Act. Under S. 66 (6), Income-tax Act, costs are in our discretion. The deposit is returnable under proviso 2 to S. 66 (2) in certain circumstances. There is however no provision in the Act that costs payable by an assessee should be paid from or limited to that sum. Rs. 100 in S. 66 (2) is referred to as a fee. The question of costs in proceedings of this nature is to be fully argued in another case and the assessee may have liberty to apply to the Court hereafter for an order giving directions as to costs. We therefore now make no order as to costs which order we will make hereafter.

D.S./R.K. *Answered in affirmative.*

2. Shipstone v. Morris, (1929) 14 Tax Cas 413.
3. Wild v. Madame Tussaud's (1926) Ltd., (1933) 17 Tax Cas 127.
4. Ogston v. Reynolds, (1930) 15 Tax Cas 501.
5. Kanniappa Naicker & Co. v. Commr. of Income-tax, Madras, (1937) 24 A I R Mad 316=168 I C 13=I L R (1937) Mad 814=(1937) 1 M L J 619 (S B).
6. Maharajadhiraj of Darbhanga v. Commissioner of Income-tax, (1933) 20 A I R Pat 123=144 I C 354=12 Pat 5=14 P L T 171.

A. I. R. 1939 Sind 321

DAVIS J. C. AND TYABJI J.

Emperor

v.

Muhammad Alan and another

Opponents.

Criminal Ref. No. 84 of 1939, Decided on 1st May 1939, made by Dist. Magistrate, Nawabshah, D/- 7th March 1939.

(a) Criminal P. C. (1898), S. 250—Magistrate who has called upon complainant to show cause why he should not pay compensation retiring before final order — Notice upon complainant should be discharged.

In sub-s. (1) of S. 250, at least, the only Magistrate who may call upon the complainant to show cause is the Magistrate who heard the case and who discharges or acquits all or any of the accused. The Magistrate in sub-s. (2) to S. 250 refers to the Magistrate in sub-sec. (1) and the definite article "the" does not mean the Magistrate who succeeds the Magistrate who heard the case or any other Magistrate. Hence where a Magistrate who has called upon a complainant to show cause why he should not pay compensation for having made a false and frivolous or vexatious complaint has retired in the course of proceedings before a final order was passed, the notice upon the complainant should be discharged. [P 321 C 2; P 322 1]

(b) Criminal P. C. (1898), Ss. 250, 423 and 439—High Court cannot under S. 423 read with S. 439 make order for compensation even if, when cause had been shown, High Court were of opinion that order for compensation should be made.

An order directing compensation to be paid is not a consequential or incidental order within the meaning of S. 423 (1)(d) nor can it be said that in revision High Court makes an order consequential or incidental to an order of a Magistrate calling upon a complainant to show cause why he should not pay compensation if it orders compensation to be paid. Hence High Court cannot under S. 439 read with S. 423 (1)(d) make an order for compensation even if upon the judgment and even if cause had been shown, High Court were of opinion that an order of compensation should be made. [P 322 C 1]

Partabrai D. Punwani, Advocate-General — *for the Crown.*

Dwarkadas Tekchand — *for Opponents.*

Davis J. C.—This is a reference by the District Magistrate of Nawabshah who asks this Court to pass orders in a case where a Magistrate has called upon a complainant to show cause why he should not pay compensation for having made a false and frivolous or vexatious complaint and has retired in the course of proceedings before a final order was passed. The learned District Magistrate does not therefore know what he should do. We do not think that anything else can be done in these proceedings but for us to order the notice upon the complainant to be discharged; because the words of S. 250, Criminal P. C., seem clearly to provide that it is only the Magistrate who has heard the case who can call upon the complainant to show cause why he should not pay compensation for making a false and frivolous or vexatious complaint. The words are:

Section 250 (1). If, in any case instituted upon complaint or upon information given to a police officer or to a Magistrate, one or more persons is or are accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits all or any of the accused, and is of opinion that the accusation against them or any of them was false and either frivolous or vexatious, the Magistrate may, by his order of discharge or acquittal. . . . call upon him forthwith to show cause why he should not pay compensation to such accused or to each or any of such accused when there are more than one, or if such person is not present, direct the issue of a summons to him to appear and show cause as aforesaid.

So, it is clear in sub-section (1) of S. 250, Criminal P. C., at least, the only Magistrate who may call upon the complainant to show cause is the Magistrate who heard the case and who discharges or acquits all or any of the accused; and when we go on to sub-s. (2) to S. 250, Criminal P. C., we find it enacted that "the Magistrate shall record and consider any cause which such complainant or informant may show. . . ." and we think it clear that the Magistrate in sub-s. (2) to S. 250, Criminal P. C., refers to the Magistrate in sub-s. (1) and that the definite article "the" does not mean the Magistrate who succeeds the Magistrate who heard the case or any other Magistrate. The limited application of the provisions of S. 250, Criminal P. C., has been commented on by Sulaiman, J. in 46 All 80,[1] where a District Magistrate allowing certain appeals, setting aside certain convictions and releasing the accused, in addition called upon the complainant to show cause why he should not pay compensation under S. 250, Criminal P. C., and the complainant was eventually ordered to pay Rs. 20 compensation to one accused and Rs. 10 to each of the three others. Sulaiman, J. was of opinion that the Appellate Court has no power to make such an order, but it is only the trying Magistrate who if he discharges the accused can order compensation to be paid. The learned Judge refers to the case in 39 Cal 157[2] and to another case of his own

1. Chedi v. Ram Lal, (1924) 11 A I R All 224=81 I C 615=25 Cr L J 967=46 All 80=21 A L J 834.
2. Mehi Singh v. Mangal Khanda, (1912) 39 Cal 157=12 I C 297=14 C L J 437=16 C W N 10.

Court in 28 All 625.[3] In the Calcutta case the question was discussed as to whether an order to pay compensation might be a consequential or incidental order within the meaning of S. 423 (1) (d), and the learned Judge came to the conclusion that an order directing compensation to be paid needed express authority. It is not a consequential or incidental order within the meaning of S. 423 (1) (d); nor do we think, it can be said that in revision we make an order consequential or incidental to an order of a Magistrate calling upon a complainant to show cause why he should not pay compensation if we order compensation to be paid; firstly we have not the material before us; we have not the answer of the complainant, and if we had, we do not think, we can substitute our discretion for that of the Magistrate who hears the case under the provisions of S. 250, Criminal P. C. We cannot for instance properly record and consider any cause which such complainant may show; nor can we very well be satisfied, as the Magistrate who heard the case could be satisfied, that the accusation was false and either frivolous or vexatious; for the scheme of the Section appears to be for the order of discharge or acquittal to go along with the order calling upon the complainant to show cause.

Although it is true that under sub-s. (2) of S. 250, Criminal P. C., the Magistrate must record reasons why he directs compensation to be paid, clearly the order directing compensation to be paid must arise ultimately from the evidence recorded by the Magistrate upon the complaint and from his view of that evidence results the discharge or acquittal of the accused and the issue of notice upon the complainant. We do not think therefore that we can under S. 439 read with S. 423 (1) (d) make an order for compensation even if upon the judgment and even if cause had been shown we were of opinion that an order of compensation should be made, though in this case no cause had been shown. The case did not proceed to that stage before the Magistrate retired. We think therefore that this is a case where the Magistrate who heard the case and discharged or acquitted the accused alone can make an order of compensation. In this case, the Magistrate who heard the case is now no longer in office; therefore no order of compensation can be made and we order that the notice served upon the complainant to show cause should be discharged accordingly and these proceedings be terminated.

D.S./R.K. *Order accordingly.*

3. Balli Pande v. Chittan, (1906) 28 All 625=3 Cr L J 441=3 A L J 382=1906 A W N 145.

A. I. R. 1939 Sind 322

DAVIS J. C. AND WESTON J.

Abdul Hussein Moosaji Bhaijiwala and others — Defendants 1 to 3 — Appellants.

v.

Sugranbai w/o Ibrahimji Abdul Hussain, Plaintiff, and others Defendants 4 and 5 — Respondents.

First Appeal No. 32 of 1936, Decided on 13th January 1939, against judgment and decree of Rupchand Bilaram, A. J. C., D/- 23rd March 1936.

(a) Mahomedan Law—Wakf—Validity—Reservation of interest by settlor — Interest reserved by way of remuneration as mutwalli —Remuneration how assessed—If such interest reserved as remuneration absolves excessive part of income of properties, wakf is invalid.

It is one of the essentials of the validity of a wakf that the settlor as such must not reserve for himself any interest in the wakf: If he reserves such interest the wakf is void: *A I R 1927 P C 2, Rel. on.* [P 324 C 1]

Whether a wakfnama is or is not valid by reason of a reservation by the settlor of an interest to himself in the dedicated property depends upon the words of the deed itself, and a breach by the mutwalli or trustees of the trust does not render the trust invalid: *A I R 1937 P C 127, Rel. on.* [P 325 C 1]

If the settlor reserves an interest in the dedicated properties not to himself as settlor but to himself as mutwalli his remuneration as mutwalli must be considered in relation to the value of the dedicated properties and not absolutely or in relation to needs or expenses of an individual mutwalli, because it is as manager of dedicated properties that he is to be remunerated and if this remuneration (i. e., the interest which the settlor reserves) absolves the whole or an excessive part of the income of the dedicated properties or is far in excess of his remuneration as mutwalli, the wakf is invalid. [P 324 C 2]

(b) Mahomedan Law — Wakf — Validity in part — If dedicated property is separable and settlor does not reserve interest in specific property, wakf as to that property is valid.

A wakfnama may be valid as regards some property and invalid as regards other property the subject of the same wakfnama or dedication: *AIR 1938 P C 184, Rel. on.* [P 326 C 2]

A distinction however can and should be drawn between a case where the reservation is a part of the income derived from properties as a whole and a case where the properties are dealt with separately and distinguished in the manner of their disposal in the deed itself. If the dedicated properties are distinct and separable and if the wakf

does not reserve to himself any interest in a specific property, the wakf as to that property is good even if the wakf as to other properties dedicated at the same time is bad by reason of a retention by the wakif of an interest therein. [P 327 C 2]

(c) Mahomedan Law — Wakf — Creation — Deed failing in great part as wakfnama — Whether such deed can be held good as valid testamentary disposition depends upon its construction.

A wakf can be made by will : *25 All 236 (P C), Rel. on.* [P 328 C 1]

There is no reason, why because a deed cannot operate as regards some property as wakfnama, it should not operate as regards that property as a will within the limits of the testamentary capacity of the settlor or testator. Therefore the question whether a deed, failing in great part as a wakfnama can be held good as a valid testamentary disposition by the settlor or testator of the one-third of his property which can by his personal law, without the consent of his heirs, dispose of by will, whether in charity or otherwise, depends upon whether the document failing as it does as a wakfnama can be fairly construed as a will : *AIR 1937 P C 174, Ref.* [P 327 C 2 ; P 328 C 1]

(d) Will—Disposition of property—Property not disposed by testator falls into residue of his estate.

Any property to which a testator is entitled on his death of which he has not otherwise validly disposed falls into the residue of his estate unless it is otherwise expressly provided: *4 Bom L R 555, Rel. on.* [P 328 C 1]

Dingomal Narainsing — *for Appellants.*

Pahlajsing B. Advani and Khanchand Gopaldas — *for Respondents 1 and 2 (Sugranbai and Amtulabai) respectively.*

Davis J. C.—This is an appeal from a judgment of a Judge of this Court in District Court jurisdiction in a suit brought by one Sugranbai, daughter of Tyebally Valiji Bhaijiwalla, inter alia for a declaration that the suit properties were the properties of her deceased father, that a deed of wakf executed by her deceased father is null and void, for accounts and for an injunction restraining defendants 1 to 3, who claim to be trustees under the deed, and defendant 5, the brother of the deceased, who claims a benefit under that deed, from interfering with the property, and for partition and possession of her share. Defendant 4 is the deceased's widow. The learned Judge found that the wakfnama was invalid except as to one item of property, item (d) in the schedule of properties attached to the deed, for the deceased was a Shia Muhammadan and had reserved to himself an interest in the wakf properties during his life. The learned Judge however found that as regards one-third of the property of which the deceased could under his personal law by will dispose of, he had under the wakfnama, regarded as a will, validly disposed of, and the Judge passed a preliminary decree accordingly. Thus, so far as two-thirds of the property is concerned, the plaintiff has got the relief she asks for, with the exception of the one item of property, item (d), above referred to. With regard to this item (d), a house, defendant 5 is found to be the beneficiary under the wakfnama. Against this judgment, defendants 1 to 3, the trustees under the wakfnama, have appealed, and the plaintiff has filed cross-objections contending that the wakfnama is void and contests the disposition, not only of two-thirds but of all the property including the house, item (d), which the Judge has found the subject of a valid wakf. Now, as the learned Judge remarks, this suit really puts in issue the validity of the deed of wakf, Ex. 15, executed by Tyebally Valiji Bhaijiwalla on 9th September 1932, and duly registered in his lifetime and the main issues in the suit are issues 2 and 3, issue 2 being : "Whether the said deed of wakf is invalid in law?" and issue 3 being : "Whether any part of the deed is valid and binding?" : and on these issues the Judge found that the deed was invalid as regards the items of property (a) to (c) and (e) to (i) in the schedule to the deed, but valid as regards item (d), and that as a will it was valid as regards one-third of the property. The reason of the invalidity of the deed was that the settlor reserved an interest in the property during his lifetime to himself.

This finding of the learned Judge has been strongly contested in appeal. It is argued that the settlor has done nothing more than reserve to himself a reasonable remuneration as a mutwalli or manager, but our opinion is that the settlor or his advisers did not appreciate the limitations the Shia law imposes on those who dedicate their property to charitable or religious purposes, thus avoiding the succession to property otherwise imposed by their personal law, and that the settlor or his advisers thought that there was nothing wrong in the settlor reserving to himself in his lifetime the management and the income of the dedicated property. There is no reference in the deed to the settlor as a mutwalli. Under cl. 2 of the deed, the settlor reserved to himself the surplus income of the properties after the trustees have deducted the cost of management, repairs, rates and taxes "for his mainten-

ance and other expenses" in precisely the same words as under cl. 3 the surplus income of property item (d) is to be handed over to his brother Yusifali, defendant 5, and his wife and children for "their maintenance and other expenses." It is said that under cl. 6 of the deed the settlor is to act as mutwalli or managing trustee, and the fact that he does not describe himself as mutwalli is of no account. The omission to use the word "mutwalli" is not of course of itself fatal, but it is not the scheme of the deed that the mutawali as such is to get any remuneration. Under cl. 18 the trustees are authorized to engage a mehta to recover rents and to pay him, and under cl. 22 the trustees are to select a President, but under cl. 25 the trustees are to get no remuneration. Under cl. 19 the settlor reserves to himself the right of acting as managing trustee so long as he lives. It is urged on behalf of the trustees, the appellants, that cl. 25 which debars the trustees from receiving remuneration does not affect the managing trustee appointed under cl. 19, but save as regards the settlor himself no distinction is made between trustee and managing trustee, so far as remuneration for their services is concerned. They are to get nothing. Therefore it appears to us quite clear that the wakfnama as such is void as offending against one of the four essential conditions of its validity, namely that the settlor as such must not reserve any interest in the wakf to himself. The wakif must not eat out of the wakf: A I R 1927 P C 2.[1] But even if the settlor reserves an interest in the dedicated properties not to himself as settlor but to himself as mutwalli, from this point of view also the deed is invalid because the settlor has taken an interest far in excess of his remuneration as mutwalli. Except item (d) the house reserved for his brother, he has taken all the income of the property and he has made no provision for the remuneration of the mutwallis who succeed him. On the contrary, under the deed itself any such remuneration is denied them.

Now the dedicated properties consist of immovable and moveable properties. The immovable properties are items (a), (b), (c) and (d) in the schedule to the deed, and are land and buildings. The learned Judge finds that the rent of two of these is Rs. 62. This presumably is after the deduction of rates and taxes, for the evidence of the managing trustee Abdul Hussain is that the rent of the properties is Rs. 110. The rental value of the third, reserved by the settlor for his own use, is Rs. 25 according to this same Abdul Hussain: Ex 20. The fourth building, this item (d), is given to settlor's brother and his family in the first instance. We are informed, by counsel, that Rs. 62 in the judgment was a mistake for Rs. 85, and seeing that Rs. 110 is the rent, Rs. 85 would seem a proper figure after expenses are deducted but the difference is immaterial. It is urged on behalf of the trustees that this sum of Rs. 85 is not an unreasonable or excessive remuneration within the ruling in A I R 1927 P C 2,[1] and that the settlor as mutwalli had also to collect the interest on the mortgage debts which constitute items (e) to (i) of the properties in the schedule, and that the learned Judge is in error when he finds that the settlor has also reserved the interest of these mortgages to himself. It appears to us that the remuneration of the settlor as mutwalli must be considered in relation to the value of the dedicated properties, and not absolutely or to the needs or expenses of the individual mutwalli. It is as manager of the dedicated properties that he is to be remunerated and it appears clear that where this remuneration absorbs the whole or an excessive part of the income of the dedicated properties, that dedication is illusory. Here it appears to us that the settlor has reserved to himself the rents or occupation of the three buildings without any reference to what would be a reasonable remuneration for the services of the mutwalli as such or to the value of the property. The reservation of rents and occupation of the buildings is to enable him to live as he lived before the dedication, and, in the circumstances of this case, we have no hesitation in agreeing with the learned Judge that the interest reserved by the settlor in the dedicated property is excessive and that the wakf on that ground is bad and must fail. But we also agree with the learned Judge that the settlor reserved also to himself the moveable properties, the mortgages and interest thereon. On this point the learned Judge says:

> I am afraid the contention of the plaintiff that the wakf in respect of items (e) to (i) is invalid must also prevail. The deceased reserved to himself the right to recover the mortgage debts and to appropriate such recoveries to his own use. All that he purported to do by para. 9 was to direct the remaining trustees to recover such amount as

1. Mt. Abadi Begum v. Mt. Bibi Kaniz Zainab, (1927) 14 A I R P C 2=99 I C 669=6 Pat 259=54 I A 33 (P C).

remained to be recovered at his death and to hold in trust the recoveries made by them for certain charitable objects. Whatever might be said in favour of the alleged wakf of the mortgage debts operating as a will, it was not enforceable as a valid wakf during the lifetime of the deceased.

My attention has been invited to the preamble of the deed where it is said that the deceased "had resolved to dedicate the property described in the schedule . . . . to charitable purposes," and that "in pursuance of the said resolution" he had conveyed "unto the said trustees the said property." But the preamble also recites that the said property was conveyed to the trustees "in trust for the purpose and subject to the powers and provisions" mentioned in the deed.

The preamble does not therefore carry the case of the trustees very far. In the absence of any provision contained in the deed rendering the deceased accountable for the debts or interest accruing thereon and realized by him during his lifetime, it is hardly open to argument that the deceased did not reserve the right to appropriate to himself as much of this money as he wished to do during his lifetime.

It is argued before us that cl. 11 of the deed vests these mortgages in the trustees and gives directions as to their investment on realization, but this clause following cl. 10 appears to us to relate and intended to relate to something that is to happen after the testator's death. Cl. 10 begins: "That on the death of the settlor . . . " and the preamble to the deed vests the property in the trustees "in trust for the purpose and subject to the powers and provisions hereinafter mentioned and declared." In his evidence Abdul Hussain Moosaji, one of the trustees and the cousin of the deceased, who says that he was given power by the deceased to manage the property after he became ill, says also that before the deceased entrusted recoveries of the interest to him he recovered it and kept it with himself. We bear in mind that whether a wakfnama is or is not valid by reason of a reservation by the settlor of an interest to himself in the dedicated property depends upon the words of the deed itself, and that a breach by the mutwalli or trustees of the trust does not render the trust invalid: 31 S L R 310.[2] It is true that in this case before us the settlor parted with possession of the property to the trustees of whom he was the principal, but under the terms of the trust he was to receive back in his lifetime all that he had given and when Abdul Hussain managed the property, he did not manage it by reason of a special appointment under the deed. He managed it, as he says, as attorney of the settlor. We think therefore the proper construction of the deed is that the settlor kept himself free to appropriate the interest on the mortgages and the mortgage debts themselves during his lifetime. We think therefore it is clear that under the deed the settlor reserved to himself substantially the whole interest in the dedicated properties and that the dedication is therefore null and void. The property given to the brother, item (d) in the schedule bears too small a proportion to the whole to affect the matter one way or the other. We think therefore it is clear that the appeal as such must fail.

We have then to consider the cross-objections so far as they affect property (d) and the disposition of one-third of the property, both of which dispositions the learned Judge found were valid and binding, the one as a wakf, the other as a will. Now item (d) is valued at Rs. 5000 in the schedule to the deed and is a plot of land with buildings thereon and is the subject-matter of cl. 3 of the deed which is as follows:

That the said trustees shall deduct and pay all expenses for repairs, taxes, rates and assessments and other expenses of the management of the immovable property marked (d) in the schedule out of the rents realized therefrom and hand over the surplus to Yusifali Valiji Bhaijiwala, the brother of the settlor aforesaid, and his wife and all the children that might be born hereafter to his wife for their maintenance and other expenses and such allowances may at the discretion of the trustees be decreased or increased and paid out of other moneys in their hands as the need may from time to time warrant.

With respect to this item (d) the learned Judge says:

No substantial arguments have been advanced to induce me to hold that the wakf in respect of item (d) is not valid. This is dealt with in paras. 3 to 5 and 14 of the deed. The rent of this property has been bequeathed to defendant 5 and the members of his family and after their demises to certain charitable objects. No part of this property has been reserved for the wakif himself. There is clear evidence to show that the wakf with regard to this property was acted upon. Not only does the operative part of the deed purport to convey this property to the trustees, but mutation of names was effected in the revenue records in favour of the trustees during the lifetime of the deceased and he handed over possession to them. This was shortly after the execution of the deed when he became ill. Till then he held possession as managing trustee.

And generally on the question as to whether if the wakf fails as to part it must fail as to the whole the learned Judge says:

It is argued that as the wakf in respect of a part of the property is invalid the whole deed is vitiated and should be declared as invalid. But no authority has been quoted in support of this proposition. Although the deceased has purported to create a

2. Alizamin v. Akbarali Khan, (1937) 24 A I R P C 127=167 I C 884=16 Pat 344=64 I A 158=31 S L R 310 (P C).

wakf in respect of different properties and for different objects by one deed, he may as well have executed different documents at one and the same time in respect of each item of his property or each object of his bounty. Had he done so it would have been hardly arguable that because the wakf created by one document fails the other ipso facto fails.

A wakfnama may be valid as regards some property and invalid as regards other property the subject of the same wakfnama or dedication. This is the effect of the judgment in 40 Bom L R 835,[3] where seven properties were the subject of one wakfnama or dedication. As regards five properties their Lordships held the wakf was valid; as regards two others their Lordships held the wakf or dedication was invalid, because upon a proper construction of the deed they came to the conclusion that the deed directed that the property should become wakf not on the death of the testator but on the death of some one surviving him. And as in that case the properties were regarded as separable for the purpose of determining the validity of their dedication, so it may be argued that in this case the properties may be regarded as separate for the purpose of the validity of their dedication. The settlor reserves to himself no right or interest in item (d); there is nothing in the terms of its gift which renders its dedication invalid, and as a matter of first impression it would not be difficult to hold that the wakf, as far as item (d) is concerned, is valid. The term 'wakf' literally means detention, the detention of a specific thing. Therefore if the wakif does not reserve to himself any interest in a specific property, it is arguable that the wakf as to that property is good even if the wakf as to other properties dedicated at the same time is bad by reason of a retention by the wakif of an interest therein. It may be argued that the judgment of their Lordships of the Privy Council in A I R 1927 P C 2,[1] makes it difficult, to discriminate between different properties the subject of one wakf or dedication to divide the one act of dedication into as many acts of dedication as there are properties dedicated, for, it would be possible thus to divide land into acres or survey numbers and to reserve the income from one acre or one survey number deeming it no reservation of any interest in the property of which it is part. In A I R 1927 P C 2[1] their Lordships were of the opinion, though the case was decided upon another point, and their opinion was formed on a point not decided by the High Court, that it was an entire departure from the principle that it is a condition of the validity of the wakf that the wakif should not reserve any interest in the endowed property for himself to hold that where the wakif reserves a portion of the income for himself the wakf only fails as to property sufficient to produce the reserved income and is good as to the rest. In that case the settlor reserved to himself Rs. 1500 from the income of the properties, a proportion of the income far in excess of which could be reasonably assigned to the mutwalli and on the argument that the wakf was bad only as regards property sufficient to produce Rs. 1500, the reserved interest, and good as regards the rest, their Lordships said (page 5):

> It seems clear in the present case that the settlor, under colour of fixing her salary as mutawali, was really reserving for her lifetime a portion of the income or usufruct of the property far in excess of what was assigned in the deed to future mutawalis or could reasonably have been assigned to them. It was therefore in their Lordships' opinion a clear violation of the condition.

Assuming that this is so, it has been further contended before their Lordships that the only result is that the wakf fails as to the reserved Rs. 1500, and must be supported as to the rest of the income on the authority in 4 N W P 155,[4] where it was held, a wakf in which the wakif had reserved to himself two-thirds of the income of the wakf properties for life failed only as to these two-thirds, but could be supported as to the remaining third, which, under the terms of the deed was to be devoted from the first to religious uses. It appears to their Lordships that this ruling is not in accordance with what is stated to be 'the more approved opinion' in the Suraya, on which the learned Judges rely (Baillie, Part 2, pp. 218, 219), or with the other authorities cited textually by Mr. Ameerali. As observed by that learned author, the following extract from the Jam'aa-ush-Shittat, dealing with a case where the wakif reserved the whole income to himself for life, throws considerable light on this subject.

A. This wakf is void ab initio, for the wakif reserved to himself during his lifetime the profits of the property. It is one of the conditions for the legality of a wakf that the wakif should take out the subject of the wakf from himself. Therefore when a wakf is made on his own nafs (self) it is batil (void), though there are others mentioned after himself as the beneficiaries thereof. With reference to the voidableness of the wakf as to himself there is consensus; as regards the voidableness of the remainder, the general opinion is that it is so; for the arguments in support of the validity of the wakf in favour of the others are weak.

3. Mohammad Raza v. Badr-ul-Islam Alikhan, (1938) 25 A I R P C 184=174 I C 870=I L R (1938) Lah 383 = 40 Bom L R 835 = 65 I A 198=32 S L R 749 (P C).

4. Hajee Kalub Hossein v. Mt. Mehrun Beebee, (1872) 4 N W P 155.

With this last observation their Lordships are disposed to agree. It is an entire departure from the principle that it is a condition of the validity of the wakf that the wakif should not reserve any interest in the endowed property for himself to hold that where the wakif reserves a portion of the income for himself the wakf only fails as to property sufficient to produce the reserved income and is good as to the rest.

The rule that the settlor when mutwalli can take the salary fixed for mutwallis generally is really no exception : for, in that case he takes in his capacity as mutwallis and not his capacity as settlor, just as it is laid down a little further on; (Baillie, Part 2, page 218).

But if one should make an appropriation for the poor and should himself become poor or for lawyers and himself become a lawyer, there is no objection to his participating in its benefits, that is to say, as a poor man or a lawyer, not as a settlor. There is, in fact, in all these cases no reservation at all.

As regards this part of the case, their Lordships are disposed to agree with the reasoning in the extract from the Jam'aa-ush-Shittat set out above, and are not prepared, as at present advised, to hold on the authority of the decision in 4 N W P 155,[4] that a wakf in which the wakif reserves the bulk of the income for herself as mutwalli during her own lifetime whilst fixing a modest salary for the mutwallis who succeed her can be held valid even to the extent of the unreserved income. As regards the supplementary deed of wakf of 7th December 1897, Ex. D, in which the settlor included her remaining lands stated to be worth Rs. 1500 and cancelled the salary she had fixed for herself for life in the former deed, adding 'that is, I have given up the salary and included it in the wakf' their Lordships are of opinion that if the deed had stopped there it might possibly have been treated as a fresh dedication of all the properties free from any reservation in her own favour; but after reciting her intention to go for Haj and to make Zearut (visit sacred places), the deed provides, Sec. 17:

That the said manager shall from time to time send money for expenses from the income of the wakf estate to me either at Mecca or to the place to which I shall direct him to send.

This, in their Lordships' opinion, amounts to a clear reservation of the right of the wakif to draw money for the expenses of her pilgrimage to Mecca and to other non-wakf purposes, and therefore also to involve a breach of the fourth condition. The last deed of 1907 need not be considered as it was necessitated by the death of the mutwallis, previously appointed to succeed the settlor in the office, and merely appoints other members of her husband's family in their place.

It is argued that in the case then before their Lordships, they were dealing with the reservation of a part of the income derived from all the endowed property, while in this case the properties are separable and an interest is reserved in one and not in another. On the other, it is arguable that the applicability of the principle to which their Lordships refer cannot be dependent upon the chances whether the dedicated property consists of one or more lands or one or more buildings; if the properties are made the subject of one dedication, and if the settlor reserves to himself any part of the properties dedicated, an interest greater than that which may be regarded as a fair remuneration as mutawalli the wakf fails as regards all the dedicated properties. And, in this case, in the preamble the settlor deals with the property as a whole. We think however a distinction can and should be drawn between a case, such as that before their Lordships in A I R 1927 P C 2[1] where the reservation was a part of the income derived from properties as a whole and a case such as this where the properties are dealt with separately and distinguished in the manner of their disposal in the deed itself, and we can see no difference in principles between a case such as this where separate properties are dedicated and the case in 40 Bom L R 835,[3] where their Lordships held that the dedication was good as to five properties and bad as to two because one of the four essential conditions to the validity of a wakf under the Shia law had been broken with respect to two properties. It is, of course, arguable that four conditions may be essential to the creation of a valid wakf and the consequences of the breach of one condition may not be the same as the consequences of the breach of another. But we can see no such difference between the failure to deliver possession of a property and the retention of an interest in property as would preserve the wakf in one case and destroy it in the other, and if, as in 40 Bom L R 835,[3] the wakf was bad only as regards two out of the seven properties and good as to five, we can see no good reason why in this case the wakf should not be good as regards the one separate property, item (d), which otherwise had been made the subject of a valid wakf though bad as regards the other properties. As the learned trial Judge points out the dedication of the property, item (d), if made by a separate deed would have been valid. We do not think the case in 31 S L R 379,[5] is a case against this view. We think therefore that as regards the property item (d), the cross-objections must be disallowed and we must hold that as regards the property item (d) the wakf or dedication is valid.

There remains the question whether this deed, failing in great part as a wakfnama can be held good as a valid testamentary disposition by the settlor or testator of the

5. Mahabir Prasad v. Mustafa Hussain, (1937) 24 A I R P C 174=168 I C 418 = 31 S L R 379 (P C).

one-third of his property which he can by his personal law, without the consent of his heirs, dispose of by will, whether in charity or otherwise, and this, we think, depends upon whether the document failing as it does as a wakfnama can be fairly construed as a will. There is nothing conflicting in the two ideas among Shias: a wakf can be made by will: 25 All 236.[6] It is clear the settlor intended this deed in part to take effect after his death. Indeed, so far as the bulk of the property, the most valuable part of the property, is concerned, the mortgages, our construction of the document is that he intended the wakfnama to take effect after his death as a will though he purported to divest himself of possession in his life, but the effective testamentary disposition in this document, if there be such, must be found in clause. This is as follows:

That on the death of the settlor aforesaid any other property of whatever nature left by him shall also vest in the surviving trustees and none of the heirs of the said settlor shall have any right or any interest in the said property and the income or profits realized therefrom shall be utilized by them in the manner provided for in para. 13 above.

It is argued in support of the cross-objections, that this clause cannot effect a disposition of property thought by the testator to be validly disposed of during his life. It is said the words "any other property" in cl. 20 exclude by necessary implication property thought by the testator to be validly gifted away. But any property to which a testator is entitled on his death of which he has not otherwise validly disposed falls into the residue of his estate unless it is otherwise expressly provided. In any case, it is a question of construction of the particular document: Theobald on Wills, 8th Edn. p. 247. Chandavarkar, J. in 4 Bom L R 555,[7] discussing the question of invalid bequests and gifts in connexion with a Hindu will said:

In (1880) 13 Ch D 858,[8] the rule is explained as follows by Fry, J.: 'I take the rule to be plain that in general the residuary gift carries every lapsed legacy and every legacy which on any ground fails to take effect but that is subject to this other rule, that if the testator has shown some intention with regard to the expected property inconsistent with its ever falling again into the residue, effect must be given to that intention.' Fry, J.'s decision went up in appeal. In affirming it Jessel, M. R., said: 'It appears to me very difficult to suppose that a testator should intend that a legacy which fails from being void should not go into the residue. Unless you find express words showing that the testator doubted whether a bequest in his will was void or not, it is impossible to suppose that he contemplated what would happen if the bequest was invalid.' Where a testator makes a bequest in favour of a person, and that person dies before the legacy takes effect, it is a sound rule that the bequest goes, on the testator's death, as undisposed of residue to his heirs, because the testator must be presumed to have known when he provided for the bequest that the intended legatee might die before him. If with that knowledge he did not provide by way of an alternative disposition, he must be taken to have intended that it should, in the event of a failure of the bequest, go as undisposed of. But the same knowledge cannot be imputed in the absence of express words to a testator in the case of something which is not validly given away. There, the testator thinks he is giving it away validly and the intention to treat it as part of property which he wishes to dispose of is clear.

We do not think this reasoning is limited only to the case of a Hindu will but is of general application. The property with respect to which the wakf has failed is in the same position as other property, the subject of an invalid gift falling into the estate of a deceased person on his death. In cl. 20 as in a will the testator is speaking of property from the date of his death. It is clear that he intends to dispose of it by will, and the fact that he has by the same document made certain invalid gifts does not appear to us sufficient to read into cl. 20 the exclusion of these scheduled properties from his residuary bequest. It is not disputed that this document, apart from the effect of its invalidity as a wakfnama upon its validity as a will, satisfies the requirements of the Shia law as to a will, and under the Shia law a testator can dispose of one-third of his property without the consent of his heirs: 31 S L R 379.[5] But we can see no reason, why because a deed cannot operate as regards some property as a wakfnama, it should not operate as regards that property as a will within the limits of the testamentary capacity of the settlor or testator. We think therefore the cross-objections as to the validity of the document as a will and the testamentary disposition of one-third of the estate must also fail. The order we therefore make is that the appeal be dismissed. The cross-objections must be disallowed. We make no order as to costs for the same reasons as were given in the lower Court. Costs will come out of the estate.

N.S./R.K. *Order accordingly.*

6. Baqar Alikhan v. Anjuman Ara Begum, (1903) 25 All 236=30 I A 94=8 Sar 397 (P C).
7. Jairam Narayan v. Keshowjee Dewjee, (1902) 4 Bom L R 555.
8. Blight v. Hartnoll, (1880) 13 Ch D 858 = 49 L J Ch 255=41 L T 730=28 W R 302.

*** A. I. R. 1939 Sind 329**

DAVIS J. C. AND TYABJI J.

Badaldas Jethmal Firm—Plaintiffs— Appellants.

v.

Gurdinomal Narumal Firm and others — *Defendants* — Respondents.

Second Appeal No. 3 of 1937, Decided on 14th April 1939, against decree of Assistant Judge, Nawabshah, D/- 30th September 1936.

(a) Civil P. C. (1908), S. 11 — Court trying first suit must be competent to try subsequent suit — In determining competency what has to be regarded is competency of original Courts.

Section 11 operates to exclude the jurisdiction of a Court to try a subsequent suit only if the first suit was tried by a Court which was competent to try the second or subsequent suit. The competence of a Court is to be determined irrespective of any provision as to the right of appeal from the decisions of that Court, and the competence of a Court and the finality of a decision is not dependent upon whether an appeal was or was not made. A Court may be competent and a decision final within the meaning of S. 11 even if no appeal is made. It is the competing jurisdictions of the original Courts which are to be regarded: *11 Cal 301 (P C) and 9 Cal 439 (P C), Rel. on.* [P 329 C 2; P 330 C 2]

(b) Civil P. C. (1908), S. 10 — Suit includes appeals *(Obiter).*

In S. 10, which is closely connected with S. 11, "suit" must include appeals. The Section refers to suits pending before His Majesty in Council. [P 330 C 2]

*** (c) Civil P. C. (1908), S. 11 — Rule contained in S. 11 applies to appeals also.**

The rule of res judicata contained in Sec. 11 applies to appeals as well as to trials in original Courts. Hence, where pending a suit between certain parties in certain Court another suit is instituted in another Court between the same parties and relating to same subject-matter and the decision of latter Court becomes final there being no appeal from it, an appeal from the decision of first Court is barred by res judicata : *Case law relied on.* [P 331 C 2]

Murlidhar G. Mani — *for Appellants.*

Dipchand Chandumal — *for Respondents.*

Davis J. C.—This is an appeal against a judgment of the Assistant Judge of Nawabshah who dismissed an appeal against a judgment of the Subordinate Judge at Naushahro. By this judgment, the Subordinate Judge at Naushahro dismissed the appellants' suit, Suit No. 144 of 1930, which was a suit to re-open accounts. The Court of the Subordinate Judge at Naushahro is a Second Class Subordinate Court. The Assistant Judge dismissed the appellant's appeal because he held that the subject-matter of the appeal was res judicata by reason of a decision of a First Class Subordinate Court at Sukkur in a suit between the same parties, relating to the same subject-matter which was final and binding on him when the appeal came before him for hearing. In the suit in the First Class Court at Sukkur, the appellant in the appeal before the Assistant Judge was defendant and the respondents were plaintiffs, and in the suit in the Second Class Court at Naushahro the appellant was the plaintiff and the respondents were defendants. There was no appeal against the judgment in the First Class Subordinate Court at Sukkur though the decision was against the appellant. The suit in Sukkur was instituted after the suit in the Second Class Court at Naushahro and the decision in the suit in the Sukkur Court was given after the decision in the suit in the Naushahro Court. The decision in the suit in the Naushahro Court was therefore prior in point of time to the decision in the Sukkur Court, but while there was an appeal before the Assistant Judge against the decision of the Subordinate Judge at Naushahro, there was no appeal against the decision of the Subordinate Judge in the Sukkur Court which, by reason of the lapse of time, was a final decision against which no appeal could be made when the Assistant Judge had before him for hearing and decision the appeal between the same parties relating to the subject-matter from the judgment of the Subordinate Judge at Naushahro.

It is contended before us for the appellant, the appellant in the Naushahro suit and the defendant in the Sukkur suit, that the jurisdiction of the Appellate Court, the Court of the Assistant Judge at Nawabshah, was not barred by the decision of the Subordinate Judge at Sukkur because S. 11, Civil P. C., does not operate to bar the jurisdiction of an Appellate Court by a decision of an original Court of lower jurisdiction. There could, for instance, it was argued, be no conflict between Courts of inferior and superior jurisdictions, and the Court of the First Class Subordinate Judge was a Court of inferior jurisdiction to the Court of the Assistant Judge at Nawabshah. It was further argued that the rule in S. 11 did not apply to appeals. It is true that S. 11 operates to exclude the jurisdiction of a Court to try a subsequent suit only if the first suit was tried by a Court which was competent to try the second or subsequent suit. Otherwise, as was said by their Lordships in the Privy Council case

in 11 Cal 301,[1] where, as in India, there are many grades of Courts

if this construction of the law were not adopted the lowest Court in India might determine finally and without appeal to the High Court the title to the greatest estate in the Indian Empire.

And it was argued before us that as the First Class Subordinate Court at Sukkur could not hear an appeal, so the judgment of the First Class Court at Sukkur could not bar the jurisdiction of the Appellate Court, the Court of the Assistant Judge at Nawabshah. But in a case such as this, we think what has to be regarded is the competence of the original Courts. There is no question here as to the competence of the First Class Court at Sukkur to try the suit which was instituted in the Naushahro Court. Though the suit in the First Class Court at Sukkur was subsequent in point of time to the suit in the Second Class Court at Naushahro, Sec. 10, Civil P. C., did not operate to stay the second suit at Sukkur because, on the facts before us, the Second Class Court at Naushahro had not jurisdiction to grant the relief claimed in the First Class Court at Sukkur. Moreover, the suit in the First Class Court at Sukkur was the "former suit" within the meaning of Expln. 1 to Sec. 11, Civil P. C., because it was finally decided before the suit in the Second Class Court at Naushahro which was not finally decided within the meaning of S. 11 so long as the appeal against that decision was pending. The Appellate Court, then, when it came to hear the appeal from the Naushahro Court was faced with a final decision of a competent Court between the same parties litigating under the same title with respect to the same matter in a former suit. If, for the sake of argument, there had been an appeal to the District Court at Sukkur, and that Court had finally decided the appeal before the Appellate Court of the Assistant Judge at Nawabshah had heard and decided the appeal in the Naushahro suit, it could not be said that the decision of the Sukkur District Court would not have barred the jurisdiction of the Nawabshah District Court. No question of competition between inferior and superior Courts could have arisen. So, we think, there is no difference if there is no appeal from the decision of the Sukkur Subordinate Court and no decree accordingly of the Sukkur District Court, because there was no appeal against the decision of the Sukkur Subordinate Court. The decision of the Sukkur Subordinate Court is final and whether there was an appeal or not seems to us to make no difference. As the competence of a Court is to be determined irrespective of any provision as to the right of appeal from the decisions of that Court, so the competence of a Court and the finality of a decision is not dependent upon whether an appeal was or was not made. A Court may be competent and a decision final within the meaning of S. 11 even if no appeal is made. Indeed, from the decision of their Lordships in the Privy Council case in 9 Cal 439,[2] it is the competing jurisdictions of the original Courts which are to be regarded.

It may then be argued that if it is the jurisdicton of the original Courts which is to be regarded, that is an argument in support of the contention that S. 11 does not apply to Appellate Courts, and reliance is placed upon the case in 8 Lah 384.[3] That case, however, relates to a class of cases where there is only one judgment in two suits: *see also* 16 Cal 233[4] and 33 Cal 1101,[5] and its ultimate decision is based largely upon the argument that the introduction of Expln. 2, S. 11 necessarily excludes its application to appeals, and would be inconsistent with the Section if the term "suit" includes appeals. It is arguable, however, that this Explanation was intended to remove doubts arising in a particular class of cases as to the applicability of the section, when judgment had been given in a suit against which no appeal or no second appeal lay, and the question arose whether such a judgment could operate as res judicata. It is clear that in S. 10, which is closely connected with Sec. 11, "suit" must include appeals. The Section refers to suits pending before His Majesty in Council. It is arguable however that a Court hears appeals; it does not in terms try issues. Even when an Appellate Court under O. 41, R. 24, Civil P. C., resettles issues according to the words of the rule, and finally determines the suit, it is only by implication that it tries issues, and in the following R. 25, the trial of issues is used

1. Run Bahadur Singh v. Lucho Koer, (1885) 11 Cal 301 = 12 I A 23 = 4 Sar 602 (P C).

2. Misir Raghobardial v. Sheo Baksh Singh, (1883) 9 Cal 439 = 9 I A 197 = 12 C L R 520 = 4 Sar 395 (P C).

3. Mt. Lachhmi v. Mt. Bhulli, (1927) 14 A I R Lah 289=104 I C 849=8 Lah 384=28 P L R 712 (F B).

4. Abdul Majid v. Jew Narain Mahto, (1889) 16 Cal 233.

5. Mariamnissa Bibi v. Joynab Bibi, (1906) 33 Cal 1101 = 4 C L J 149=10 C W N 934.

in relation to the trial Court and not to the Appellate Court. R. 16 also refers to the hearing of the appellant in support of the appeal and does not refer in terms to the trial of issues. Moreover, R. 2 of O. 14, Civil P. C., refers to the trial of issues though R. 3 of O. 15 refers to the determination of issues. It is difficult to say that Sec. 11 in express words applies to proceedings in Appellate Courts, but it is clear, in our opinion, that the rule embodied in that Section does apply. There is much authority in support of this view. In 11 All 148,[6] Mahmood, J., delivering the judgment of the Full Bench said :

. . . . I may say that the rule contained in S. 13 (present S. 11) is not limited to the Courts of first instance, that it applies equally to the procedure of the first and second Appellate Courts by reason of Ss. 582 and 587 respectively, (Ss. 107 and 108) and indeed even to miscellaneous proceedings by reason of the general provisions of S. 647 (S. 141) of the Code.

Again, Bhashyam Ayyangar, J., in the Full Bench case in 26 Mad 91,[7] at p. 95 said :

When an appeal is preferred from a decree of a Court of first instance, the suit is continued in the Court of Appeal and reheard either in whole or in part, according as the whole suit is litigated again in the Court of Appeal or only a part of it. The final decree in the appeal will thus be the final decree in the suit, whether that be one confirming, varying or reversing the decree of the Court of first instance.

In 24 I C 243,[8] Sir Asutosh Mookerji and Beachcroft, JJ., spoke of the rule of res judicata, and at p. 244 said :

On behalf of the respondents, reliance has been placed upon the observation in 16 Cal 233,[4] in support of the argument that the doctrine of res judicata applies only to Courts of first instance. In our opinion, this view is unsound and is not supported by the language either of S. 13 of the Code of 1882 or S. 11 of the Code of 1908. We are in full agreement with the conclusion reached by Mahmood, J. in 11 All 148[6] and are not prepared to accept the dictum in 16 Cal 233.[4] We are further of opinion that the change introduced into S. 11 of the Code of 1908 which lays down that the expression "former suit" shall denote a suit which has been decided prior to the suit in question, whether or not it was instituted prior thereto, tends to confirm the view that if the same question is in controversy between the same parties in two distinct litigations instituted one after the other, but simultaneously pending, the final decision in the later suit, if given earlier, operates as res judicata in the earlier suit whose final stage is reached later. This principle, taken along with the doctrine that the rule of res judicata is applicable to all the stages of a suit till it is finally terminated, amply justifies the view adopted in 11 All 148.[6]

Stanley, C. J., in the Full Bench case in 33 All 51,[9] refers to the rule of res judicata and at p. 59 said :

The learned Judges do not point out what would be the startling results to which they apprehended a contrary conclusion would lead. An Appellate Court is bound to apply the rule of res judicata even though the decision is the decision of an inferior Court, provided that that Court was competent to decide the case. I am of opinion, after careful consideration of the arguments which have been addressed to us by the learned vakil and advocate for the respective parties, that the case in 10 All 123[10] and the subsequent decisions of this Court which followed it were rightly decided. The decree obtained by Manphul stands unreversed and is binding upon the appellant. The time for impeaching it has expired, and I am not aware of any procedure by which this decree can now be rendered nugatory. It was suggested during the argument that if the appeal of Zaharia be heard and a decision be obtained in his favour, the appellate decree in his favour will have the effect of superseding the former decree, but this cannot be. A decree, unless it be a decree which is a nullity by reason of, for example, fraud cannot be superseded except it be upon appeal in the regular course. This being so, if we acceded to the argument addressed to us, we should have two inconsistent decrees on the files of the Court. This would be a most serious anomaly, and in execution proceedings would cause a complete impasse.

And the later case in 45 All 506,[11] cited to us as a decision overruling 33 All 51,[9] only qualified certain passages in that judgment in relation to the different facts of another case before the Court. It merely lays down the rule that a party cannot be expected to appeal against a decision in his favour. We think therefore it is clear that the rule of res judicata contained in S. 11 applies to appeals as well as to trials in original Courts, and applying that rule, we think it is clear that the subject-matter of the appeal before the Assistant Judge was as between the parties res judicata by reason of the previous decision in the First Class Subordinate Court at Sukkur. We think therefore the Assistant Judge was right when he dismissed the appeal. We accordingly dismiss the appeal against his judgment with costs.

D.S./R.K. *Appeal dismissed.*

6. Balkishen v. Kishan Lal, (1889) 11 All 148 = 1889 A W N 42 (F B).
7. Krishnama Chariar v. Mangammal, (1902) 26 Mad 91 (F B).
8. Midnapore Zemindary Co. Ltd. v. Nitya Kali Dasi, (1914) 1 A I R Cal 693=24 I C 243.
9. Zaharia v. Debi, (1911) 33 All 51=7 I C 156= 7 A L J 861 (F B).
10. Chajju v. Sheo Sahai, (1888) 10 All 123=1887 A W N 301.
11. Ghansham Singh v. Bhola Singh, (1923) 10 A I R All 490=74 I C 411=45 All 506=21 A L J 465 (F B).

A. I. R. 1939 Sind 332

DAVIS J. C. AND TYABJI J.

Lalumal Dholumal and others —
Applicants.

v.

Harumal Lalsing and others —
Opponents.

Civil Revn. Appln. No. 27 of 1937, Decided on 16th May 1939, to revise judgment and decree of Judge of Small Cause Court, Sukkur, D/- 12th December 1936.

Civil P. C. (1908), O. 32, R. 5 (2)—Application for execution by minor without guardian being appointed — Court may allow receiver appointed in proceedings to execute decree on behalf of minor.

Sub-rule (2) to R. 5 of O. 32 does not say that order on any application made by a minor where no next friend or guardian is appointed 'shall' be discharged; it says 'may' be discharged. The sub-rule cannot be so construed as to deprive the Court of its discretion to allow proceedings, which are in the interests of the minor, to go on, or to permit them to be frustrated by mere accident or technicality. Hence, where a minor has made an application for execution of rent decree and there is no guardian appointed the Court may allow the receiver appointed in the proceedings to recover rent on behalf of minor. [P 332 C 2; P 333 C 1]

Fatehchand Assudomal —
for Applicants.

Davis J. C.—This is an application in revision against the judgment of the Judge of the Small Cause Court, Sukkur, in which he granted plaintiff, who was appointed receiver in Suit No. 3 of 1924, a decree for Rs. 49 being the rent of the house in suit. Defendants 1 and 2 who were tenants some time after the suit was instituted paid the rent into Court and said they were not concerned to whom it was paid. So the dispute rested ultimately between the Receiver in Suit No. 3 of 1924 appointed in execution proceedings in Suit No. 3 of 1924 and defendants 3 to 5 in this suit. Defendants 3 to 5 in this suit were Narainibai, wife of Dholomal, and her two minor sons by Dholomal while the plaintiff in Suit No. 3 of 1924 was Sobhomal, the son of Dholomal by another wife. The learned advocate for the applicants Narainibai and her two minor sons contended that the learned Judge was wrong when he relied on S. 64, Civil P. C., to oust Narainibai and her two minor sons for, that Section applies only to a private transfer and not to any transfer made under a decree, even if the decree be an award in execution proceedings and the learned advocate relied upon the Privy Council case in 13 Lah 702.[1] The learned advocate argues that it matters not if Ex. 42 which purported to be an assignment of the suit property by Dholomal to his wife Narainibai, was not a genuine document and did not evidence a genuine assignment, because under the award decree, Ex. 37 dated 21st October 1935, Narainibai and her two minor sons had a good title to the property in suit. But Sobhomal, the plaintiff in Suit No. 3 of 1924, was not a party to the award decree of 21st October 1935 and he is not therefore in any way affected by its provisions. We cannot see, then, that it affects his title or his claim to recover rent in these execution proceedings.

The learned advocate for the applicant then however falls back on the position that the receiver was not validly appointed; he was not entitled to sue as a plaintiff, and it does appear that the learned Judge has in his judgment said that once he is satified that Narainibai and her two minor sons have no title, the question of title does not concern him. Obviously the plaintiff must succeed upon his own rights, upon the strength of his own case and not upon the weakness of the defence. But the learned Judge was bound to accept as valid the decree in Suit No. 3 of 1924. Therefore the only point he really had to consider was whether the plaintiff as receiver was entitled to execute that decree. The learned advocate for the applicant contends that he was not so entitled, because he was appointed in proceedings brought by Sobhomal, when under the law, he was still a minor. Therefore, these proceedings under O. 32, R. 5 being void ab initio, the receiver's appointment was void and he could not recover the rent for the property in suit. But O. 32, R. 5 was intended for the benefit of a minor and was not intended to enable a father to defraud his minor son of his rights; and we observe that sub.r. (2) to R. 5 does not say any order on any application made by a minor where no next friend or guardian is appointed 'shall' be discharged; it says 'may' be discharged. We cannot construe that sub-rule to deprive the Court of its discretion to allow proceedings, which are in the interests of the minor to go on, or to permit them to be frustrated by mere accident or technicality, such as in this case would deprive Sobhomal of the

1. Mohammad Afzal Khan v. Abdul Rahman, (1932) 19 A I R P C 235=139 I C 85=13 Lah 702=59 I A 405 (P C).

right to recover these rents through the receiver. The learned advocate for the applicant relies upon the fact that the execution application was brought by Sobhomal when he was over 18 years of age but under 21 years and that as a guardian had been appointed to his property, his age of majority was 21 years. We do not think however that this argument seriously concerns us in these proceedings. We see no reason why, we should hold all the proceedings in which the receiver was appointed void, because the execution application was brought by Sobhomal when he was over 18 years and not yet 21 years of age. Under O. 32, R. 5 (2) we are not compelled to do so and we do not think that justice in any way requires that we should do so; justice, in fact, requires quite the contrary.

It turns out, then, that these proceedings are really in the nature of Small Cause Court proceedings, and that if Narainibai and her two minor sons wish to prove their title to property in dispute, it is perfectly open to them to file a suit based upon title for that purpose. We therefore dismiss their revision application with costs.

D.S./R.K. *Application dismissed.*

A. I. R. 1939 Sind 333

DAVIS J. C. AND TYABJI J.

Kazi Abdulkabir Muhammad Sidik Ujan — Applicant.

v.

Emperor.

Criminal Revn. Appln. No. 19 of 1939, Decided on 27th March 1939, against judgment of the Addl. Sess. Judge, Nawabshah, D/- 12th November 1938.

Penal Code (1860), Ss. 186, 379 — Receiver appointed by Court taking possession of corn in possession of third party — Third party retaking possession peacefully and obstructing Receiver—Such act does not constitute offence under S. 379 or S. 186.

Section 186, I. P. C., contemplates that the public servant obstructed was discharging his public functions lawfully but when there was no legal basis for his acts, the Section does not apply : *13 Bom 168* and *A I R 1927 Bom 483, Rel. on.* [P 334 C 2; P 335 C 1]

Where the Receiver appointed by Court took possession of corn in possession of a third party who subsequently retook possession of it peacefully and did not allow the receiver to make batai of the corn :

Held that the party could not be punished under S. 379 because the party only retook possession peacefully of his own property and further as the Receiver was trying to do what was expressly forbidden by O. 40, R. 1 (2), Civil P. C., it could not be said that the party obstructed a public servant discharging his public functions lawfully within the meaning of S. 186, Penal Code, and hence he was not guilty under S. 186, of the Code either : *A I R 1926 Pat 237 and A I R 1932 Pat 279, Rel. on; A I R 1926 All 382, Disting.* [P 334 C 2; P 335 C 1]

Dipchand Chandumal — *for Applicant.*

Partabrai D. Punwani, Advocate-General — *for the Crown.*

Davis J. C. — This is an application in revision against the judgment of the Additional Sessions Judge at Nawabshah who reduced on appeal a sentence of four months' simple imprisonment passed on the appellant for an offence under S. 379, I. P. C., by the Sub-divisional Magistrate, Naushahro, to a fine of Rs. 100, and a fine of Rs. 200 to a fine of Rs. 100 for an offence under Sec. 186, Penal Code. Two other accused appealed against an order binding them over under S. 562, Criminal P. C., and their appeals were dismissed. The conviction of the appellant depends upon the powers of a receiver to take possession of property, the subject-matter of a suit, between two parties, from the possession of a third party. In a suit on the plaint of one Rupchand, the Subordinate Judge at Naushahro appointed one Pir Ghulam Hyder receiver on 31st May 1937, and authorized him to take possession of corn lying in the disputed survey Nos. 330 and 331 of Deh Dabhro in Kandiaro taluka. In pursuance of this order the Receiver, who is an advocate, went to the disputed land and took possession of the corn lying there on 2nd June 1937. The two haris Datardino and Sidik, who had cultivated the survey numbers were there and informed the receiver of this. The Receiver put his seal upon the corn and appointed one Ranjho as watchman, and on 8th June the Receiver went to the disputed land again to get the corn weighed and to make batai, and this time the applicant Kazi Abdul Kabir, who is described as an educated man, was there with the two haris, and he obstructed the Receiver and told him he was in possession of the land and the Receiver should not make batai. The Receiver told the appellant that he had the authority of the Court and that he had already taken possession of the corn, but the applicant would not give way and finally gave the Receiver a writing to the effect that he would not permit the Receiver to make batai, and on 22nd June the Receiver, with the permission of the Court, filed his complaint for theft and obstruction on which the applicant has been convicted.

Now, the learned Judge has decided this case against the applicant briefly on the ground that it matters not whether the order authorizing the receiver to take possession of the corn was lawful or not; it was the duty of the applicant to yield to the authority of the officer of the Court, and the learned Judge has relied principally on the case in 48 All 368.[1] Now that case depends upon the provisions and practice of the Provincial Insolvency Act, and proceeded, so far as we can see, on the ground that the possession of the receiver was a lawful possession. That being so, it would not be difficult to hold that the removal from the receiver's possession, even under a bona fide claim, was theft. There was the necessary criminal or dishonest intent which the criminal law requires; but in this case, it does not appear, so far as the facts before us stand, that it is proved that the possession of the receiver was a lawful possession, and in a criminal case, and this is a criminal case the burden of proving the guilt of the accused lies upon the prosecution, and the accused in this case, as in other cases, is entitled to the benefit of a reasonable doubt, if such exists. The general principle applicable in cases of the appointment of receivers of property in the possession of third parties is set out briefly in Halsbury's Laws of England as follows:

> As against a stranger to the action who is in actual possession, the appointment of a receiver is of no effect (Vol. 28, page 37, 2nd Edition.)

But that principle is applied in India under the Civil Procedure Code in sub-r. (2) of R. 1, O. 40, Civil P. C., and to some extent modified, because it is clear under that sub-rule the Court may remove from possession or custody a third party whom a party to the proceedings has a present right to remove. This follows by necessary implications from the words of sub-r. (2), R. 1 itself which are:

> Nothing in this rule shall authorize the Court to remove from the possession or custody of property and person whom any party to the suit has not a present right so to remove.

We are not concerned here with a dispute between the parties and possession of one of the parties and removal from that possession. That is a quite a different class of case: *see* A I R 1932 Mad 193,[2] 47 M L J 294[3] and A I R 1927 Sind 230.[4] Moreover, it would appear clear that a person in enjoyment of paramount rights is entitled to the enjoyment of those rights despite the appointment of a receiver, even if he is not in possession, but in that case he cannot take possession *vi et armis*. He must come to the Court for an order for possession to be made: A I R 1927 Pat 397[5] and (1912) 2 Ch 497.[6] It is not shown in this case that either of the parties to the suit was entitled presently to remove the third party. If so, this point had been considered, it might have been so shown; it might have been shown that the third party was acting in collusion and was put up to claim possession and to obstruct by one of the parties to the suit when clearly sub-r. (2) of R. 1, O. 40 would not have availed him. Therefore, it appears clear to us that the receiver was not entitled to take possession of the corn or appoint a watchman. But it is then argued that since the corn was sealed and the watchman appointed, the receiver was in possession, even though the possession was unlawful, and the applicant was not entitled to retake forcible possession of this corn or land. But it does not appear that he took forcible possession at all. No force was at all used. He was there when the receiver arrived, having in the meantime taken peaceful possession of that which the receiver had no right to possess, and he told the receiver he would not allow him to make batai of the corn. It appears to us, then, difficult to say that the applicant was guilty of theft when under these circumstances he took peaceful possession of his own property. It appears also difficult to hold that he was guilty of an offence under S. 186, I. P. C.: 5 Pat 216[7] and 11 Pat 493.[8] S. 186, I. P. C., we think, contemplates that the public servant obstructed was discharging his public functions lawfully, but when there was no legal

1. Emperor v. Kamla Pat, (1926) 13 A I R All 382=95 I C 940=27 Cr L J 860=48 All 368 =24 A L J 364.
2. Vythilinga Pandarasannadhi v. Board of Control, (1932) 19 A I R Mad 193=136 I C 771= 61 M L J 904.
3. Rameswar Singh v. Hitendra Singh, (1924) 11 AIR P C 206=82 I C 794=47 M L J 294 (P C).
4. Punjab National Bank, Ltd. v. Moosaji Jafferji, (1927) 14 A I R Sind 230=102 I C 353 = 23 S L R 49.
5. Bhagwandas Marwari v. Manindra Chandra Nandi, (1927) 14 AIR Pat 397=104 I C 295= 8 P L T 717.
6. Fairweather v. Metropolitan Amalgamated Estates, Ltd., (1912) 2 Ch 497 = 81 L J Ch 745=107 L T 545.
7. Badri Gope v. Emperor, (1926) 13 AIR Pat 237 =93 I C 146=27 Cr L J 418 = 5 Pat 216=7 P L T 30.
8. Nagarmal Marwari v. Emperor, (1932) 19 AIR Pat 279=1932 Cr C 723= 139 I C 834=33 Cr L J 883=11 Pat 493=13 P L T 689.

basis for his acts, it appears to us that the Section does not apply: 13 Bom 168[9] and 29 Bom L R 987=51 Bom 896.[10] What the receiver was trying to do in this case was expressly forbidden by sub-rule (2) of R. 1, O. 40, Civil P. C. We do not think therefore it can be said that the applicant obstructed a public servant, even though a receiver be a public servant within the meaning of S. 186, I. P. C. We are also not here concerned with S. 99, Penal Code.

We think therefore that on the particular facts of this case, the applicant's convictions under both the Sections should be set aside and the fines refunded and we order accordingly. It follows that the conviction of the two haris Sidik and Datardino, who have not come to this Court in revision should also be set aside, and we order accordingly.

D.B./R.K. *Revision accepted.*

9. Queen-Empress v. Tulsiram, (1889) 13 Bom 168.
10. Emperor v. Kadarbhai Usufalli, (1927) 14 AIR Bom 483 = 103 I C 593 = 28 Cr L J 705=51 Bom 896=29 Bom L R 987.

A. I. R. 1939 Sind 335

DAVIS J. C. AND TYABJI J.

Emperor

v.

Abdullah Karim — Accused.

Criminal Ref. No. 363 of 1938, Decided on 14th March 1939, made by Superintendent, Karachi District Prison, D/- 1st December 1938.

(a) Bombay Borstal Schools Act (18 of 1929), Ss. 6, 8 — Previous convictions to be evidence of criminal habits must be properly proved — Otherwise Court cannot take action under S. 6 —Standard of proof is same as that for purpose of S. 75, I. P. C.

Where the evidence of criminal habits or tendencies from which it is to appear to Court that it should take action under Sec. 6 is that of previous convictions the Court should require these previous convictions to be properly proved before it can say that there is evidence from which it can appear to the Court that the accused is of criminal habits or tendencies within the meaning of cl. (b) of S. 6. The standard of proof in such a case is the same as that required for purposes of S. 75, I. P. C.: *AIR 1916 Cal 344, Rel. on.* [P 336 C 1, 2]

Where the only evidence of previous convictions was merely the extracts from records of the Central Bureau of fingerprints and no certificate from jail officer or warrant of commitment was produced to prove it:

Held that the Court could not on such evidence take account of the previous conviction and that it could not therefore take action under Sec. 6. [P 336 C 2]

(b) Criminal P. C. (1898), S. 439 — Power is discretionary.

The exercise by the High Court of the revisional jurisdiction is a matter of discretion. [P 337 C 1]

(c) Bombay Borstal Schools Act (18 of 1929), Ss. 6 and 11 — Case should be first referred to Inspector-General under S. 11 — Only when he cannot take action, case should be referred to High Court.

Before a case is referred to the High Court under Sec. 6 a reference should be first made to the Inspector-General, and only when he is of the opinion that he cannot by reason of the particular circumstances of the case or the provisions of S. 11 transfer a young offender to Borstal School by his own order or with the previous sanction of Government, should any reference in such matters be made to High Court. [P 337 C 1]

Partabrai D. Punwani, Advocate-General — *for the Crown.*

W. D. C. Vellani — *for Pauper accused.*

Davis J. C. — The record in this case has been sent to us by Superintendent, Karachi District Prison under S. 536, Bombay Jail Manual, it being his opinion that this accused Abdullah, son of Karim, aged about 20, is a fit and proper subject for a Borstal School, and that we should under Ss. 6 and 8, Bombay Borstal Schools Act, 1929, send him to a Borstal School. But we do not think that this is a case where we should interfere. It appears the evidence on which the Superintendent relies to show that the accused is a person of criminal habits or tendencies is the fact that the judgment shows two previous convictions, one on 20th July 1937 of three months' rigorous imprisonment under Secs. 454/511, I. P. C., by Lucknow Court, and the other on 30th November 1937 also by a Lucknow Court of an offence under S. 379, I. P. C. with six months' rigorous imprisonment. But the learned advocate who appeared for the accused took the point that these two previous convictions had not been properly proved, their proof merely being extracts from the records of the Central Bureau for Finger prints and the evidence of one Ramchand, an expert of the Fingerprint Bureau at Karachi. The wisdom of the rule which requires previous convictions to be properly proved is, we think, illustrated by this very case because while the extract from the Register of Fingerprints was interpreted by the Expert as showing the accused was convicted by a First Class Magistrate on 10th July 1935, and sentenced to three years' rigorous imprisonment under S. 379, I. P. C., further inquiry apparently showed that the entry as interpreted by the Expert was incorrect,

and that the sentence was not three years' rigorous imprisonment but three years in a Reformatory School at Dharwar. There should really be no difficulty about proof of these previous convictions if the prosecutions would take the little trouble that is necessary.

The simplest thing for them to do is to obtain from the prison or from the Court a certified copy of the judgment in which the previous convictions on which they rely are recorded. S. 511, Criminal P. C., provides for this: A previous conviction or acquittal may be proved inter alia by an extract certified, under the hand of the officer having the custody of the record of the Court in which such conviction or acquittal was had, to be a copy of the sentence or order; or, in the case of a conviction, either by a certificate signed by the officer in charge of the jail, in which the punishment or any part thereof was inflicted, or by production of the warrant of commitment under which the punishment was suffered. Thus the fact of the previous conviction or acquittal, as the case may be, is satisfactorily proved. But this is not enough: in addition, there must be proof of the identity of the accused person as the person so convicted, and here comes in the use of finger prints. But the evidence of finger prints is evidence of identity and is not in itself evidence of the previous convictions. For instance, in this very case, there has been a mistake which would have been avoided if there had been a copy of the sentence or order or a certificate signed by the officer in charge of the jail or the warrant of commitment. There would not have been then this confusion as to whether the sentence was of three years' rigorous imprisonment or three years in the Reformatory School, and we think this simple illustration shows the necessity of proving the conviction and sentence in the manner set out in S. 511 (a) or (b), Criminal P. C., to which we have already referred.

The learned Advocate-General who appeared to support the reference of the Superintendent of the Jail pointed out to us that S. 6, Bombay Borstal Schools Act, merely requires that it should appear to the Court, and that these words imply something less than proof. But where the evidence of criminal habits or tendencies from which it is to appear to the Court that it should take action under Sec. 6 is that of previous convictions we think that the Court should require these previous convictions to be properly proved before it can say that there is evidence from which it can appear to the Court that the accused is of criminal habits or tendencies within the meaning of cl. (b) of S. 6. The case, of course, is quite different where the prosecution rely upon something other than previous convictions to show the accused as of criminal habits or tendencies. But we ourselves can see no difference in the standard of proof required for previous convictions, for the purpose of S. 75, I. P. C., or for the purpose of Sec. 6, Bombay Borstal Schools Act. The purpose of proof in each case is to make reasonably certain the existence of those previous convictions upon which the Court is asked to act and we do not think it was the intention of the Legislature that under S. 6, Bombay Borstal Schools Act, there should be an element of doubt as to previous convictions any more than that there should be an element of doubt as to previous convictions when the provisions of Sec. 75, I. P. C. are to be invoked. In this case we have much the same sort of thing as in 43 Cal 1128.[1] In that case the learned Judge said at p. 1137:

> The first of these witnesses was a certified expert in fingerprints, and he produced what has been marked as Ex. 4 (1) from the Central Bureau. That purports to be a register of the thumb impressions of the accused on p. 1 and on the reverse his descriptive roll and a list of his previous convictions. No evidence has been recorded as to how this paper comes to be made and lodged in the Central Bureau nor from what particulars the previous convictions on the reverse are recorded and certified. There is therefore nothing on this paper except the two certificates at the foot to show that the person convicted seven times in Bombay is the same man as was convicted at Howrah on 22nd May 1912.

There is nothing in the record before us to satisfy us that the convictions and sentences shown on the slip from the Central Fingerprint Bureau were convictions and sentences passed upon the accused person now before us. There is a gap in the evidence, there is not here the link of the certified copies of the sentences or orders or the certificate of the Jail Superintendent under S. 511, Criminal P. C., to connect satisfactorily the accused before us with the accused before the Lucknow Courts. We think, therefore, that we cannot take account of these two previous convictions for the purpose of this reference of the Superintendent of the Jail.

It was then said to us by the learned advocate for the accused that if we cannot

1. Emperor v. Sheikh Abdul, (1916) 3 A I R Cal 344=33 I C 825=43 Cal 1128=17 Cr L J 185 =20 C W N 725.

take notice of these two previous convictions for the purpose of the reference of the Superintendent of the Jail, and if it is our opinion that they were not properly proved, we should interfere and reduce the sentence of one year's rigorous imprisonment passed upon the accused, and that we should do this in exercise of our jurisdiction as a Court of Revision. But the exercise by us of the revisional jurisdiction is a matter of discretion. We see no reason whatever why we should interfere and reduce the sentence of one year's rigorous imprisonment passed upon this accused. We think under the circumstances the sentence was in no way excessive. We should also wish to point out to the Superintendent of the Jail that under S. 11, Bombay Borstal Schools Act, the Inspector-General of Prisons has certain powers of dealing with convicted persons and of transferring them from prison to a Borstal School and we think it would be far more convenient if before a case is referred to us by the Superintendent in this manner, a reference should be first made to the Inspector-General, and only when he is of the opinion that he cannot, by reason of the particular circumstances of the case or the provisions of Sec. 11, Borstal Schools Act, transfer a young offender to the Borstal School by his own order or with the previous sanction of Government, should any reference in such matters be made to us. We therefore return the reference to the Superintendent stating that we intend to take no action in this matter, and that we should be glad if those responsible for proof of previous convictions in the Courts at Karachi will carefully consider the proper procedure to be followed and see that a more satisfactory procedure than has been adopted in this case be followed in the future. Order accordingly. A copy of this order should be sent to the Inspector-General of Prisons for information.

D.B./R.K. *Reference answered.*

A. I. R. 1939 Sind 337

DAVIS J. C. AND TYABJI J.

Nebhandas Hollaram and others
Applicants

v.

Emperor.

Criminal Revn. Applns. Nos. 366, 367, 368 and 369 of 1938, Decided on 15th March 1939, from order of City Magistrate, Shikarpur, D/- 12th October 1938.

(a) Criminal Trial— Revision — Questions of facts not disputed in lower Court cannot be allowed to be introduced in revision.

In revision High Court cannot allow the applicant to introduce questions of fact which, as they were not disputed, by implication were admitted in the lower Court. [P 337 C 2]

(b) Bombay Prevention of Adulteration Act (5 of 1925), S. 4 — S. 4 applies also to sale of articles of food of which ghee is necessary ingredient.

It cannot be said that S. 4 applies only to sale of ghee simply as such and does not apply to the sale of articles of goods of which it is a necessary ingredient. The words of the Section are wide enough to include articles of food which contain ghee mixed with other substance. [P 338 C 1]

(c) Bombay Prevention of Adulteration Act (5 of 1925), S. 4 (1) (b) — Ghee alleged to be adulterated taken from shop where sweetmeats were offered for sale— Presumption is that accused manufactured and was offering for sale sweetmeats as containing pure ghee which contained impure ghee.

Where ghee alleged to be adulterated was taken from a shop where sweetmeats and pakoras were offered for sale and indeed from a frying-pan in which other sweetmeats and pakoras were being made, a presumption can be raised that the sweetmeats and pakoras in accused's shop had been manufactured for sale within the meaning of S. 4 (1) (b) of the Act and that he was manufacturing and offering for sale sweetmeats and pakoras as containing pure ghee which contained impure ghee. [P 338 C 2]

(d) Bombay Prevention of Adulteration Act (5 of 1925), S. 4 (1) (b)— Prosecution's burden to prove that article is adulterated may be discharged by admission of accused.

It is true that the burden of proof that article of food is adulterated lies upon the prosecution, but that burden may in effect be assisted or even completely discharged by the admission of the accused himself. [P 339 C 1]

H. T. Raymond — *for Applicants.*

Partabrai D. Punwani, Advocate-General — *for the Crown.*

Davis J. C. — This is an application in revision against an order of the City Magistrate of Shikarpur, convicting the applicant of an offence under S. 4, Bombay Prevention of Adulteration Act of 1925. Objections were taken to the order of this Magistrate based on questions of fact which, if they had been taken in a lower Court in the same manner in which they have been taken by the learned advocate for the applicant in this Court, might possibly have secured an acquittal for the accused. But we are sitting here in revision and we cannot allow the applicant to introduce before us in revision questions of fact which, as they were not disputed, by implication, were admitted in the lower Court. For instance, it was argued that the Health Officer of the Shi-

karpur Municipality was not an Inspector validly appointed, as required by Sec. 8 of the Act: but whether he was or was not so appointed quite clearly must turn upon questions of fact which cannot be raised before us for the first time in revision. Similarly it was objected before us that the summons did not contain the necessary particulars required by Sec. 13 of the Act, but although the case was adjourned from time to time in the lower Court and the complaint which was before the Court and a copy of which was most certainly served upon the accused contained all the necessary particulars required by Sec. 13, no objection was taken as to the summons itself. We think the proper inference to be drawn under the circumstances is that the summons was in order accompanied, as undoubtedly it was, by a copy of the complaint.

The principal objection taken, however, was that the accused did not sell ghee and that he has been convicted for the sale of adulterated ghee; while what in fact he sold were sweetmeats or pakoras and it is not proved that these pakoras or sweetmeats as sold by the accused purported to contain pure ghee, or that their nature, substance or quality was such that pure ghee was an ingredient in their manufacture. We do not accept the argument that S. 4, Adulteration Act, applies only to the sale of ghee simply as such and does not apply to the sale of articles of food of which it is a necessary ingredient. For, apart from the fact that the words of the Section are wide enough to include articles of food which contain ghee mixed with other substance, to accept this argument would be to frustrate one of the purposes of the Act which is to secure that articles of food purporting to be sold as pure and unadulterated are pure and unadulterated and that the purchaser should buy what he is led to expect he is purchasing, or what he is led to expect is sold to him. Therefore, if in this case the accused had taken the defence that while it is true he sold sweetmeats or pakoras, it was not expected, nor did he by implication suggest, that they were made of pure ghee, he might have made a good defence upon the record as it stands. But he did not take that defence at all; on the contrary, he contended that the ghee was pure and was of good quality; and that if analysis showed a certain percentage of foreign matter, that came not from the ghee but from the other substances with which it was mixed in the frying-pan from which the sample of ghee was taken. But, again, this defence has nothing to recommend it beyond its apparent ingenuity. Because in a case of pakoras and of sweetmeats there is nothing else besides ghee which could contain that percentage of foreign fat which the analysis in this case showed. Moreover the evidence will show that the sample of the ghee was taken before it was mixed or combined with the other ingredients in the frying-pan. Far then from the accused taking the defence that the sweetmeats or pakoras he sold did not purport to contain pure ghee, his case was that they did contain pure ghee and it appears clear from the evidence on the record that this case of his is false.

It is said that the learned Magistrate has wrongly relied upon Expln. 2 which appeared in S. 4 of the Act before its amendment by the amending Act of 1935. But really Expln. 2 in no way affects the prosecution case, because, while it is true the Magistrate in his judgment quotes this Explanation and says that it raises a presumption that the articles were manufactured for the purposes of sale, he goes on to say that the fact that the sweetmeats and pakoras were intended for sale is admitted by the accused also. Moreover, the fact that this ghee was taken from a shop where sweetmeats and pakoras were offered for sale, and indeed from a frying-pan in which other sweetmeats and pakoras were being made, makes it quite clear that the presumption apart, the admission of the accused himself apart, the sweetmeats and pakoras in his shop had been manufactured for sale within the meaning of S. 4 (1) (b) of the Act and that he was manufacturing and offering for sale sweetmeats and pakoras as containing pure ghee which contained impure ghee.

Lastly, a point was taken that the accused has been convicted under S. 4 generally of the Act and that Section contains many parts and reference was made to a previous judgment of this Court, where this question of the different parts of Sec. 4, Adulteration Act, was referred to; but the facts of that case were entirely different. In that case there was confusion on the part of all parties concerned, confusion as to the offence of which the accused was charged and of which he was convicted, while in this particular case from the details given in the complaint and from the evidence recorded it is perfectly clear that

the conviction is under Sec. 4 (1) (b) of the Act. There is nothing then in this question to admit of a mistake. It is true of course that the burden of proof lies upon the prosecution, but that burden may in effect be assisted or even completely discharged by the admissions of the accused himself. We think, therefore, there is no reason why we should interfere in revision in this case and we dismiss the revision application accordingly. We also have before us three other revision applications Nos. 367 of 1938, 368 of 1938 and 369 of 1938 in which the facts and the arguments are similar. The reasons and the arguments of our decision in the case with which we have just dealt apply equally effectually in the case of these three other revision applications now before us; hence we dismiss them all accordingly.

D.S./R.K. *Applications dismissed.*

A. I. R. 1939 Sind 339

DAVIS J. C. AND TYABJI J.

Emperor

v.

Miro Ghulam Hussain — Accused.

Criminal Ref. No. 385 of 1938, Decided on 14th March 1939, made by District Magistrate, Sukkur.

(a) Criminal P. C. (1898), S. 439 (6) — Accused released under S. 562, on probation of good conduct — High Court under S. 562 (3) setting aside that order passing sentence in lieu of it — High Court cannot be regarded as enhancing sentence.

The enhancement of a sentence presumes that there is a sentence to be enhanced. Under S. 562, when an accused is released on probation of good conduct, no sentence is passed by the Court. Therefore when under S. 562 (3) High Court sets aside an order and passes a sentence in lieu thereof, it cannot be said that it enhances a sentence within the meaning of S. 439 (6) of the Code. [P 339 C 2]

(b) Penal Code (1860), S. 379 — Cases of cattle theft in community depending much on cattle should not be leniently treated.

Offences of cattle theft are particularly mean and despicable offences in a community where so much depends upon cattle. They are inspired by no other motive than the ordinary motive of gain which in many other cases prompts a thief to steal, and it must be made plain to young men who steal cattle that if they are not going to prison they will have at least to pay a heavy fine: *A I R 1933 Sind 44, Rel. on.* [P 340 C 1]

Partabrai D. Punwani, Advocate-General — *for the Crown.*

Rewachand V. Thadhani — *for Accused.*

Davis J. C. — This is a reference to us by the learned District Magistrate of Sukkur, in which he asks us to pass a sentence upon one Miro who has been convicted by the First Class Magistrate of Mirpur Methelo of the theft of a bullock and released on probation of good conduct under S. 562, Criminal P. C. The learned District Magistrate states that cattle lifting is very common in his district and requires a deterrent sentence, and we might also refer him to the case of this Court in 27 S L R 34[1] at p. 35, in which two Judges of this Court set out good reasons why in cases of cattle thefts which are prevalent in a district sentences of imprisonment should be passed and why first offences of this nature should not ordinarily go unpunished. The learned advocate who appeared for this Miro, who is a young man of, as the Magistrate says, about 25 years of age, claimed to be heard on the merits of the case, because he said that under S. 439 (6), Criminal P. C., he could show, in case of enhancement of a sentence, cause against the sentence itself. But we do not see how it can be said here that we are enhancing a sentence or acting under Sec. 439 (6) because the enhancement of a sentence presumes there is a sentence to be enhanced, but under S. 562, Criminal P. C., it is clear that what is done is done in lieu of sentence. It says :

> . . . . if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond . . . .

So it is clear to us that under S. 562, Criminal P. C., when an accused is released on probation of good conduct no sentence is passed by the Court. Therefore, when, as under S. 562 (3) we are entitled to do, we set aside an order and pass a sentence in lieu thereof, it cannot be said that we enhance a sentence within the meaning of S. 439 (6), Criminal P. C., and however unfair this may appear to the learned advocate, we are here to interpret the law and not to make it. Therefore we are not prepared to hear the learned advocate upon the merits of the case, though we have heard him on all matters material to the question before us, that is the passing of a sentence of imprisonment in lieu of the order passed by the Magistrate under Section 562, Criminal P. C.

1. Emperor v. Jhanaji, (1933) 20 A I R Sind 44=1933 Cr C 190=142 I C 544=34 Cr L J 420=27 S L R 34.

The learned advocate pointed out to us that though in 27 S L R 34[1] at p. 35 the Court expressed its disapproval of leniency in cases of cattle lifting, nevertheless it did not interfere because of the time that had elapsed between the order of the Magistrate and the date on which the Court was hearing the reference. But apart from the question that the lapse of time in that case was far greater than the lapse of time in this, we do not think that we can allow offences of this nature to pass upon an order of a Magistrate of release on probation of good conduct under S. 562, Criminal P. C. Offences of cattle theft are particularly mean and despicable offences in a community where so much depends upon cattle. They are inspired by no other motive than the ordinary motive of gain which in many other cases prompts a thief to steal, and we think it must be made plain to young men who steal cattle that if they are not going to prison they will have at least to pay a heavy fine; and we are willing in this case under the circumstances to give this method of a fine a trial, though if subsequent cases show that even this leniency is misunderstood, there may be no alternative for us but to follow in practice the reasoning and conclusions in 27 S L R 34[1] to which we have referred. We do not wish to impose a fine that is too heavy to be paid. On the other hand, the fine must be such as to make it clear that cattle lifting is not profitable. The learned advocate says that the father of the accused is a poor Mulla, though he previously stated that the father had lands. But assuming that the father is poor we do not think it will be beyond the capacity of the accused or those closely interested in him to pay a fine of Rs. 150 and we think therefore that we should set aside the order of the Magistrate under S. 562, Criminal P. C., and pass upon the accused in lieu of the order a fine of Rs. 150, or direct him in default to undergo rigorous imprisonment for six months. The accused can be given a fortnight to pay the fine. The father should execute a bond for the payment of the fine or for the appearance of the accused in this Court on failure to pay the fine within the time allotted, so that sentence imposed in default of fine may be undergone. The fine may be paid in the trial Court.

D.S./R.K. *Order set aside.*

A. I. R. 1939 Sind 340

DAVIS J. C. AND TYABJI J.

Manghanmal Gianchand—Applicant

v.

Emperor.

Criminal Revn. Appln. No. 333 of 1938, Decided on 17th March 1939, to revise order of Dist. Magistrate, Hyderabad, D/. 15th October 1938.

Bombay District Police Act (4 of 1890), Sec. 39-A, Rules under, R. 17 — Order by District Magistrate under R. 17 — High Court has no jurisdiction to interfere under Sec. 435, Criminal P. C.

When the District Magistrate passes orders under R. 17 of the Rules for licensing and controlling places of public entertainment framed under S. 39-A, Bombay District Police Act, the District Magistrate or Magistrate of the District, whichever he may be called, is not acting as an inferior Court within the meaning of S. 435, Criminal P. C. He is acting as an executive officer in the exercise of powers conferred upon him under Sec. 39-A, Bombay District Police Act. High Court therefore has no jurisdiction under S. 435, Criminal P. C., to interfere with this order. [P 341 C 1, 2]

Hardasmal Vishensingh—*for Applicant.*

Partabrai D. Punwani, Advocate-General — *for the Crown.*

Davis J. C. — This is an application in revision against an order of the District Magistrate of Hyderabad asking this Court to set aside an order purporting to have been passed by the District Magistrate of Hyderabad, whereby he ordered the applicant to close a hotel for a period of six months. It is intelligible that a certain confusion attached to this order, because not only did it appear from the notice served upon the applicant that the order was not even signed by the District Magistrate, but when we called for the papers and looked at the order ourselves, we found ourselves quite unable to decipher the handwriting in which the order was written; nor was the learned Advocate-General, despite his best endeavours, more successful. We therefore returned the papers and asked the learned District Magistrate to decipher the order for us and to inform us under what Act, or Section of the Act, or statutory rule his order was made. We have now been favoured by the learned District Magistrate with a copy of the order as deciphered by him and he also informs us that the order was made by him under R. 17 of the Rules for licensing and controlling places of public entertainment, framed under S. 39-A, Bombay District Police Act. We would suggest in future not only to save himself but other

people trouble the learned District Magistrate might put at the head of his order, as is customary or should be customary, the Section of the Act and the Rule under which it is made and he might see when a copy of the order is served upon the parties who are to obey it, the copy of that order should show that the order was signed by him and not by a subordinate in his office.

These questions apart, however, the learned Advocate-General has taken a preliminary objection, and we think a quite proper preliminary objection, that this Court has no jurisdiction to deal with this order of the District Magistrate, now its nature and contents have been disclosed to us; for, it is an order passed by him as an executive officer under the Bombay District Police Act. For the applicant however, it is contended that the District Magistrate, when he passed this order, was acting as a Court and was therefore subject to our jurisdiction in revision under S. 435 and the following sections of the Criminal Procedure Code; but, though it is true that in the District Police Act under S. 3 (d) a district is defined as "territorial division constituting a district for the purposes of the Criminal Procedure Code," and a District Magistrate is nowhere specifically defined but is referred to, for instance, in S. 13 as a Magistrate of the District who is presumably the same person as a District Magistrate appointed under S. 10, Criminal P. C., nevertheless it does not appear to us to follow that every act of the Magistrate of the District under the Bombay District Police Act is the act of an inferior Criminal Court within the meaning of S. 435, Criminal P. C. S. 32, Criminal P. C., and the following relevant sections refer clearly to Courts. The District Magistrate is under S. 10, Criminal P. C., also a Magistrate of the First Class, and Ss. 32, 33 and 34 refer to the Courts of Magistrates.

It therefore appears to us clear that before we can exercise our jurisdiction in revision under S. 435, Criminal P. C., we should be satisfied that the act of the District Magistrate which we are asked to revise is an act of the Court of the District Magistrate. It appears on the face of it impossible to say that when the District Magistrate passes orders under Rule 17 of the Rules for licensing and controlling places of public entertainment framed under S. 39-A, Bombay District Police Act, the District Magistrate or Magistrate of the District whichever he may be called, is acting as an inferior Court within the meaning of S. 435, Criminal P. C.; in our opinion it is clear that he is acting as an executive officer in the exercise of powers conferred upon him under S. 39-A, Bombay District Police Act.

If his order is extra vires and is disobeyed and accused be prosecuted, convicted and punished, then doubtless this Court would have jurisdiction over the inferior Court which so convicted or punished, then doubtless the question as to whether the order of the District Magistrate was extra vires or intra vires of the powers conferred upon him under the Bombay District Police Act, could be inquired into and determined; but until that stage we do not see how we can exercise powers over the orders of the Magistrate in this matter as an inferior Criminal Court. Presumably the applicants consider themselves aggrieved by the order of the Magistrate of the District which they contend is ultra vires. They can seek an appropriate remedy in a Civil Court unless the Legislature has by its enactment barred any remedy in a Civil Court. That aspect of the matter we are not now called upon to deal with in any way. We therefore reject this revision application accordingly.

D.S./R.K. *Application rejected.*

A. I. R. 1939 Sind 341

DAVIS J. C. AND TYABJI J.

Emperor

v.

Mahanand Kherajmal and others

Accused.

Criminal Ref. No. 112 of 1939, Decided on 2nd May 1939, made by Addl. Sess. Judge, Sukkur, D/- 3rd April 1939.

Criminal P. C. (1898), S. 530 (q)—"Tries an offender summarily"— Meaning — Magistrate trying offence under S. 4, Bombay Gambling Act, summarily—S. 530 (q) applies.

The words of S. 530, Criminal P. C., are very wide. Trying an offender summarily under S. 530 (q), Criminal P. C., means trying the particular offender in a particular case, summarily, and trying that offender for that offence of which he is accused. Hence if a Magistrate tries an offence under S. 4, Bombay Gambling Act, summarily, Section 530 (q) applies. [P 342 C 1, 2]

Partabrai D. Punwani, Advocate-General — *for the Crown.*

Davis J. C. — This is a reference by the learned Additional Sessions Judge at Sukkur in which he recommends that we quash the conviction and sentence passed upon seven persons convicted of offences under Ss. 4 and 5, Bombay Gambling Act,

on the ground that the offences were tried summarily and that by a recent amendment of the Act under S. 4 an offence is made punishable with seven months' imprisonment, so that offences under S. 4 are not now triable summarily. We think the reference of the learned Additional Sessions Judge must be accepted. It was on the basis of two cases, 52 Bom 254[1] and 46 All 447,[2] that it was suggested by the learned Advocate-General that S. 530 (q), Criminal P. C., applied as we have here a case of a Magistrate not empowered by law trying an offence summarily. It is arguable that reading S. 530, Criminal P. C., as a whole that Section is designed to deal not with a case where no Magistrate can do what that Section refers to, but a case where one Magistrate may lawfully do what that Section refers to but another, the Magistrate in the particular case, cannot do, because he is not especially empowered. But we do not think that we can fairly put upon the Section so restricted a meaning. It is, of course, not a matter of much importance, for, if any Magistrate tries a case summarily which he cannot under Sec. 260, Criminal P. C., do, he acts without jurisdiction, as was the view taken in the Calcutta case reported in 29 Cal 409,[3] and an illegality of such a nature, going to the root of the trial, clearly cannot be cured under S. 537, Criminal P. C. But the words of S. 530, Criminal P. C., are very wide. The Section says :

If any Magistrate not being empowered by law in this behalf does any of the following things, namely : . . . . (q) tries an offender summarily, his proceedings shall be void.

In this case it is literally true that the Magistrate who tried this offence summarily, was not empowered by law to do so because of the provisions of S. 260, Criminal P. C. It is true that cl. (q) says "tries an offender summarily" and it may be said that as the Magistrate in this case is empowered to try an offender summarily under S. 260, Criminal P. C., Sec. 530 (q), Criminal P. C., will not apply to his proceedings. But trying an offender summarily under S. 530 (q), Criminal P. C., appears to us to mean trying the particular offender in a particular case summarily and trying that offender for that offence of which he is accused. The words "offender" and "offence" are not always used in the Criminal Procedure Code with great precision. For instance, Sec. 530 (q), Criminal P. C., refers to trying an offender summarily, and S. 260 refers to the trial of "offences". But we do not think this distinction is of any importance in the case before us. We think therefore that we must quash the conviction and sentence of the seven accused named in the order of the Subordinate Judge and First Class Magistrate, Rohri, and order their retrial. The fines, if paid, must be refunded. The order forfeiting money to Government will also be set aside. Order accordingly.

D.S./R.K. *Conviction quashed.*

1. Emperor v. Ganu Sadu, (1928) 15 A I R Bom 142=109 I C 220=29 Cr L J 492 = 52 Bom 254=30 Bom L R 371.
2. Emperor v. Atma Ram, (1924) 11 A I R All 338=81 I C 438=25 Cr L J 902=46 All 447 22 A L J 249 (F B).
3. Bishu Shaik v. Saber Mollah, (1902) 29 Cal 409=6 C W N 713.

A. I. R. 1939 Sind 342

DAVIS J. C.

Badruddin Gul Hassan Khan and others — Applicants.

v.

Balocho Bakar Chandio — Opposite Party.

Criminal Transfer Appln. No. 3 of 1939, Decided on 28th March 1939.

Criminal Trial — Summons — Case under Sec. 498, Penal Code—Accused being women — Summons should be issued in first instance instead of warrants.

In a case under S. 498, Penal Code, where the accused are women, ordinarily the Magistrate should in the first instance issue summons instead of warrants upon all the women. The Magistrate should also consider whether he should not dispense with the attendance of the women accused: *7 S L R 40, Rel. on.* [P 343 C 2]

Gopaldas N. Lalla for Kazi Khuda Baksh — *for Applicants.*

Partabrai D. Punwani, Advocate-General — *for the Crown.*

Order.—This is an application for transfer of a case under Sec. 498, Penal Code, from the Court of the Mukhtiarkar and First Class Magistrate, Sakrand, to any other Court in the district of Nawabshah on the ground that the Magistrate has so interested himself in the question in dispute between the parties that his evidence as a witness will be necessary, and that further he issued without proper justification bailable warrants against all the accused, the applicants in this case, and one Sain, the woman in this case, when there was no justification. The Magistrate has made his remarks on this application and states that he has no personal knowledge of the case and that the transfer applica-

tion is made in fact at the instigation of the pleader who came into the case at a late stage. But be this as it may, I am not satisfied that this Magistrate has dealt with this case in a way that can be expected to inspire confidence in the accused persons that they will have a fair and impartial trial, because it appears to me that this Magistrate has dealt with the case in so summary a way that the accused are justified in the apprehension that the Magistrate is looking at this Section not as a Section of the Penal Code so much as a Section whereby an aggrieved husband can obtain possession of his wife, in all probability a possession which he would not be able to obtain for good reasons from a Civil Court. For instance, it would appear, the Magistrate has issued bailable warrants against Mt. Jiandi, wife of Khairo, and Jamzadi, the mother of the girl Sain, who is said to have been enticed away by accused 1 Badruddin who is said to be her lover, and by one Hamzo Lund, maternal uncle of Badruddin. Mt. Jamzadi was married to one Shakal and apparently in exchange for Sain, his daughter, being given to Balocho, the complainant, Shakal got a girl in exchange, so that thereafter he had two wives, Jamzadi, his first wife and Balocho's sister, his second. It may be, and this is a matter of fact into which at present I do not inquire, that having his second wife he neglected the first; but it would appear that Jamzadi had three daughters, not only Sain and Jiandi, but another Pari, and it is the case of Jamzadi that trouble arose about the marriage of this daughter Pari, and it was this daughter Pari whom Shakal through Jamzadi for his own purposes wished to get. All this may or may not be true, but in a case of this sort it appears to me that a conscientious Magistrate, knowing, as he must know, how the provisions of Sec. 498, Penal Code, are so constantly abused in this province should proceed with a certain amount of circumspection. For instance, he might hesitate before he issued the bailable warrant upon the daughter Jiandi merely because she was put in as an accused, and he might consider it extremely improbable that Jiandi, the daughter, would have anything to do in the enticement of Sain by Badruddin seeing that the mother Jamzadi was also an accused. Moreover, he should have hesitated before he issued the warrant upon Sain, who is not an accused at all in the case but a witness; and if he did, as the learned Advocate-General says it is the practice of Magistrates as a matter of course to do, namely to issue summons on all the women in a case under S. 498, Penal Code, the sooner this practice is stopped the better. In future I would wish this Magistrate and other Magistrates to refer to the provisions of S. 90, Criminal P. C., which relates to the issue of warrants instead of summons. That Section requires that reasons should be recorded in writing. The Magistrate in this case appears to have treated these women merely as the chattel of men, and he should realize that ideas of this sort are now out of date. Women are regarded as having certain rights. They are not merely cattle. I can see myself no reason why the Magistrate should not in the first instance have issued summons instead of warrants upon all the women, and the Magistrate's attention is invited to a case of this Court in 7 S L R 40,[1] and the Magistrate to whom this case is sent by the District Magistrate for trial should consider whether he should not dispense with the attendance of the women accused. This case was decided so long ago as 1913, that is to say 26 years ago, but the same old custom which is there referred to with disapproval seems still to be carried on. It is time that in these matters the learned Magistrates advanced a little with the times.

This case therefore is transferred from the Court of this Magistrate and it should be sent to the District Magistrate for transfer to another Magistrate competent to try it, and the District Magistrate should see that a copy of this order is sent to the Magistrate to whom he sends this case for trial, so that the trial Magistrate may deal with this case in a little more enlightened manner than his predecessor.

D.S./R.K. *Case transferred.*

1. Emperor v. Mt. Zalikhan, (1913) 7 S L R 40 =21 I C 476=14 Cr L J 604.

*** A. I. R. 1939 Sind 343**

DAVIS J. C. AND LOBO J.

Lachhumal Morumal — Plaintiff — Appellant.

v.

Attamuhammad Khan Nabibaksh Khan and others — Defendants — Respondents.

Second Appeal No. 11 of 1937, Decided on 22nd May 1939, against decree of Asst. Judge, Sukkur, D/- 29th October 1936.

***(a) Civil P. C. (1908), O. 21, R. 2—Decree can be adjusted or extinguished by executory agreement — Such agreement unless merely varies decree within certain limits cannot be enforced in execution proceedings.**

A decree can be adjusted or extinguished by an executory agreement, if that is the intention of the parties though, unless that agreement merely varies the decree within certain limits it cannot be enforced in execution proceedings for the original decree; it must be made the subject of a separate civil suit: *A I R 1936 Sind 191, held not good law; A I R 1937 Sind 229, Expl.; Case law referred.* [P 344 C 2]

(b) Civil P. C. (1908), O. 21, R. 2 and S. 47 —Variation of decree cannot be deemed adjustment of whole decree—Compromise agreement which is total adjustment of decree cannot be enforced in execution of decree which is totally adjusted or satisfied.

A variation of a decree cannot be deemed an adjustment of the whole decree within the meaning of O. 21, R. 2. A compromise agreement varying the time or manner of enforcement of a decree may be a partial adjustment of a decree and can therefore be enforced in execution proceedings in satisfaction of that part of the decree which remains yet unsatisfied, but if the compromise agreement is a total adjustment of a decree, though that agreement may be the subject-matter of a separate suit, it cannot be enforced in execution of a decree which is totally adjusted or satisfied. [P 346 C 1]

Dipchand Chandumal — *for Appellant.*

Kimatrai Bhojraj *Amicus curiæ.*

Davis J. C. — This is an appeal from a judgment of the Assistant Judge of Sukkur, dismissing an appeal from an order of the Subordinate Judge of Sukkur who dismissed an execution application made by the appellant in this appeal on the ground that the decree had been adjusted by an agreement in which the judgment-debtor agreed to pay off the balance of the mortgage debt by instalments and on default agreed to convey one of the mortgaged properties while the judgment-creditor agreed that the other of the mortgaged properties would be released. It was argued in appeal that the order of the Subordinate Judge and the judgment of the Assistant Judge were wrong because there is a ruling of a Division Bench of this Court reported in 30 S L R 249,[1] that a decree cannot be adjusted by an executory agreement. It is true that this ruling is to that effect and followed, what was believed to be, the preponderance of judicial opinion at the time, but one of the learned Judges even then appeared to agree with the ruling in 56 Mad 198,[2] and differed from it with some doubt, but it would appear that the preponderance of judicial opinion is now in favour of the view taken by Reilly J., in that case, and though, ordinarily, we should be bound by a ruling of a Division Bench of our own Court, the view that a decree can be adjusted or extinguished by an executory agreement, if that is the intention of the parties has now the high authority of the Privy Council in its support in a recent case reported in A I R 1939 P C 80,[3] though, unless that agreement merely varies the decree within certain limits, it cannot be enforced in execution proceedings of the original decree; it must be made the subject of a separate civil suit; and this, we think, distinguishes the case in 30 S L R 249[1] from the case in 31 S L R 491,[4] where the question before the Court was whether a substituted decree could be executed in the same execution proceedings as the original decree.

It is true that in the Privy Council case in A I R 1939 P C 80[3] their Lordships were considering the operation of S. 47, Civil P. C., nevertheless the question whether a compromise agreement varying the original decree could be enforced in execution proceedings in continuation of those taken to execute the original decree was considered. It was decided that provided the compromise agreement did not attempt to bring under the decree a liability extraneous to the decree, and was intended to govern the liability of the debtor under the decree and to have effect upon the time and method of its enforcement there was nothing in O. 20, R. 10, Civil P. C., or elsewhere which prevented the parties from coming to a valid agreement for time and even for the payment of an increased rate of interest to be enforced in execution proceedings. But the passage in that judgment most material to the point before us, whether a decree can be adjusted or extinguished by an executory agreement is as follows (page 85):

The purpose of providing a limitation of six months for such applications to the Court which passed the decree is not altogether plain and the objects may be more than one; but this provision, like the rule itself, affords no sufficient ground for holding that the Code makes parties wholly incompetent to come to an arrangement for time

1. Udharam Baharmal v. Murarilal Shiamlal, (1936) 23 A I R Sind 191=167 I C 417 = 30 S L R 249.
2. Ramanarasu v. Venkata Reddi, (1933) 20 A I R Mad 28=141 I C 429=56 Mad 198=63 M L J 598.
3. Oudh Commercial Bank Ltd., Fyzabad v. Bin Basni Kuer, (1939) 26 A I R P C 80=180 I C 378=14 Luck 192=66 I A 84 = I L R (1939) Kar 136=43 C W N 501 (P C).
4. Ramibai Jethmal v. Rewachand Shantokram, (1937) 24 A I R Sind 229=171 I C 477 = 31 S L R 491.

enforceable in execution proceedings. Such bargains may take different forms and it is not possible to pre-judge the individual case. If it appears to the Court, acting under Sec. 47, that the true effect of the agreement was to discharge the decree forthwith in consideration of certain promises by the debtor, then no doubt the Court will not have occasion to enforce the agreement in execution proceedings, but will leave the creditor to bring a separate suit upon the contract. If, on the other hand, the agreement is intended to govern the liability of the debtor under the decree and to have effect upon the time or manner of its enforcement, it is a matter to be dealt with under Sec. 47. In such a case to say that the creditor may perhaps have a separate suit is to misread the Code, which by requiring all such matters to be dealt with in execution discloses a broader view of the scope and functions of an executing Court. Their Lordships are in agreement with the statement in 54 All 573[5] at p. 585, that "in numerous cases a compromise between the decree-holder and the judgment-debtor entered into in the course of execution proceedings, which was duly recorded, has been enforced," and they are not of opinion that the practice, which is both widespread and inveterate, is contrary to the Code. They are of opinion that in the present case the compromise can and should be enforced in these execution proceedings.

There are also other cases of other High Courts in support of the view taken by the Madras High Court in 56 Mad 198.[2] In 37 Bom L R 230[6] the view was taken that a decree can be adjusted by an executory agreement and can be pleaded as a bar to further execution proceedings. The same view was taken in 15 Pat 390[7] and 1938 R L R 385,[8] where the learned Judges make clear the difference between a case where the judgment-creditor is prepared to accept a mere promise of the judgment-debtor as an adjustment of the decree, and a case where the judgment-creditor is not prepared to accept a mere promise but demands performance, and a case where there may be no agreement but merely a counter-offer when there would be no adjustment of the decree and no bar to further execution proceedings.

The question was also argued before us as to how far the ruling in 31 S L R 491[4] was overruled by the Privy Council judgment in A I R 1939 P C 80,[3] and it was pointed out that that ruling follows the previous ruling in 30 S L R 249.[1] So far as it follows the ruling in 30 S L R 249,[1] it must be deemed no longer good law, and so far as it conflicts either with the Privy Council ruling in A I R 1939 P C 80[3] or the previous ruling in 32 S L R 415,[9] it must no longer be deemed good law, and this point was indeed noticed in a case of this Court reported in A I R 1939 Sind 93,[10] but the case in 32 S L R 415[9] dealt primarily with the question of the substitution of one decree for another and the enforcement of the substituted decree in the same execution proceedings as the original decree and the sentence. "In short, a decree can be adjusted within the meaning of R. 2, O. 21, Civil P. C., only by an executed agreement and not by an executory agreement" must be read with the sentence that follows, and as read alone is not a correct statement of the law. The question is also urged before us as to how far an adjustment means merely a variation of the decree, and it was argued that an adjustment cannot be an extinguishment of the decree because in the Privy Council case in A I R 1939 P C 80[3] Sir George Rankin in delivering the judgment of the Board appears to speak of a compromise as an adjustment of the decree. It is true that at one place in the judgment his Lordship says:

> The compromise of 1927 however was recorded: it was an adjustment even if it was something more, and it contained the terms upon which the adjustment was agreed to,

and it was this adjustment which their Lordships held could be enforced in execution proceedings. But we think that by "adjustment" was meant a partial adjustment, an adjustment in part and not in whole within the meaning of O. 21, R. 2, Civil P. C., for we do not see how, when a decree has been adjusted as a whole, there remains in those execution proceedings anything further to execute. In 56 Mad 198[2] at page 209, Reilly J. says:

> What the exact meaning of the expression "adjustment of a decree" as used in O. 21, R. 2, Civil P. C., is has been explained by Sadasiva Ayyar J. in (1915) M W N 225.[11] The learned Judge there stated that 'any transaction which extinguishes the decree as such in whole or in part and results in satisfaction of the whole or a portion of the decree in respect of the particular relief or reliefs

5. Gobardhandas v. Dau Dayal, (1932) 19 A I R All 273=138 I C 583=54 All 573=1932 A L J 365 (F B).
6. Kalyanji Dhana v. Dharamsi Dhana & Co., (1935) 22 A I R Bom 303= 157 I C 646 = 37 Bom L R 230.
7. Satyabadi Sahu v. Mani Sahu, (1936) 23 A I R Pat 619=165 I C 940=15 Pat 390=18 P L T 110.
8. Arunachallam Chettyar v. V. M. R. P. Firm, (1938) 25 A I R Rang 202=175 I C 498=1938 R L R 385 (F B).
9. Hetram Bodhraj, a firm v. Ayaram Tolaram a firm, (1937) 32 SLR 415=172 I C 999 (P C).
10. Kazi Alimuhammad Khairal Muhammad Sheikh v. Gangaram Chotomal, (1939) 26 AIR Sind 93=181 I C 264=ILR (1939) Kar 502.
11. Lodd Govindass v. Ramdoss Vishnadoss, (1916) 3 A I R Mad 604=28 I C 376=1915 M W N 225.

granted by the decree is an adjustment of the decree'.

That these compromise agreements are regarded as partial adjustments appears to be the view of the Bombay High Court from the case in 35 Bom L R 91.[12] A variation of a decree cannot be deemed an adjustment of the whole decree within the meaning of O. 21, R. 2, Civil P. C., and this will be at once clear if O. 21, R. 2, Civil P. C., is read substituting for the word "adjustment" in its grammatical variations the word "variation" in its grammatical variations. A compromise agreement varying the time or manner of enforcement of a decree may be a partial adjustment of a decree and can therefore be enforced in execution proceedings in satisfaction of that part of the decree which remains yet unsatisfied, but if the compromise agreement is a total adjustment of a decree, though that agreement may be the subject-matter of a separate suit, we do not see how it can be enforced in execution of a decree which is totally adjusted or satisfied.

Turning to the facts of this case, it appears that both Courts have found that there was a compromise agreement between the parties whereby the balance of the decretal amount due on the mortgage debt was to be paid off within twelve months, failing which one of the mortgaged properties was to become the property of the plaintiff who was to release the other mortgaged property, and that it was the intention of the parties that this new contract was to extinguish the rights and liabilities under the decree. There was an immediate extinguishment of the decree, not an extinguishment dependent upon some future contingency.

Quite apart then from the question whether the compromise agreement could have been enforced as a mere variation as to method and time of the satisfaction of the decretal liability within the ruling in A I R 1939 P C 80[3] it appears it was and was intended to be a total adjustment of the decree. The application to enforce the original decree on the basis of a repudiation of this agreement was rightly rejected by the executing Court which ordered the adjustment of the decree to be recorded. In my opinion therefore the appeal should be dismissed with costs.

Lobo J.—The appellant in this second appeal held a mortgage decree against the respondents for a sum of Rs. 450, the mortgage security being a residential house and some agricultural land. On 25th September 1934 he applied for execution and notice was issued to the judgment-debtors. On 3rd December 1934 the respondents, judgment-debtors, put in an application under O. 21, R. 2, Civil P. C., which reads thus:

It is prayed on behalf of the defendants that in the decree of the above suit, the plaintiff has made an adjustment on 4th September 1934 in respect of the decretal amount, viz. that he will take the balance of Rs. 350 after giving credit for Rs. 110 being the amount received by him towards the decree, and that the defendants would pay the said sum (Rs. 350) to the plaintiff within 12 months of the adjustment. If the defendants fail to pay the amount during the period, the plaintiff shall be the owner of the entire immovable property, viz. land belonging to the defendants shown as mortgaged in the decree and the defendants shall have no interest therein, but the plaintiff shall release the other immovable property, viz. (residential) house which is mortgaged by the decree and the mortgage right of the plaintiff over it will disappear. The plaintiff having arrived at this adjustment inspired confidence in the defendants but on the morrow he has come and filed an execution application.

It is therefore prayed that this Honourable Court will be pleased to get the above adjustment confirmed by the plaintiff and to sanction the same. An affidavit is herewith attached.

The Subordinate Judge held the adjustment proved, ordered it to be recorded and dismissed the appellant's execution application with costs. The appellant preferred an appeal to the District Court of Sukkur. His appeal was however dismissed, the Assistant Judge who heard the appeal holding the adjustment proved, and holding also, after a review of a number of rulings of various High Courts, that the adjustment was 'within the purview of O. 21, R. 2, Civil P. C.' This second appeal was admitted as a point of law was clearly involved and the learned advocate for the appellant pointed out that subsequent to the date of the Appellate Court's judgment there had been two decisions of our Court in 30 S L R 249[1] and 31 S L R 491[4] and in view of the former of these decisions the judgments of the lower Courts could not be maintained. When the matter came before this Bench for formal hearing it was found that the respondents were unrepresented. As the point involved was one of considerable importance and of very frequent occurrence, and as it was further represented to us that the decisions of our Court in 30 S L R 249[1] and 31 S L R 491[4] appeared to require reconsideration in the light of recent decisions of their Lordships

12. Shivappa Dandappa v. Gurpadappa Doddappa, (1933) 20 A I R Bom 100=142 I C 220=35 Bom L R 91.

of the Privy Council and decisions of several High Courts in India, we adjourned the hearing after inviting the President of the Bar Council and Karachi Bar Association to argue the matter for the respondents as *amicus curiæ*.

We have now heard the very full arguments of the learned advocate for the appellant and Mr. Kimatrai Bhojraj as *amicus curiæ* and I have arrived at three conclusions : (i) that the decision of a Bench of this Court in 30 S L R 249,[1] to which I was a party, is incorrect in so far as it relates to O. 21, R. 2, Civil P. C., and the recording of an adjustment thereunder ; (ii) that the case in 31 S L R 491[4] has been rightly decided and is good authority; and (iii) that this appeal must fail because both the lower Courts have arrived at a correct decision of the point involved. I have had the advantage of reading the judgment of my learned brother the Honourable the Judicial Commissioner and as I am in complete accord with it I would only briefly set out the reasons which I feel justify the conclusions recited above. In 30 S L R 249[1] I agreed with my learned brother, the Honourable Mr. Havelivala, in holding that a compromise such as had been alleged in that case by the judgment debtor was not an adjustment which could be recorded under O. 21, R. 2, Civil P. C., and could defeat the execution application filed by the judgment creditor. The alleged compromise was an executory contract. It contained provisions to be performed in the future and could not be treated as an adjustment so as to operate as a bar to execution. But I have made it clear in my judgment in that case that I considered that the learned Judges of the Madras High Court in 56 Mad 198[2] had taken the correct view when they held that there was no legal impediment in the way of a decree-holder accepting a mere promise that the judgment-debtor will do something at some future date as a legal and immediate adjustment in satisfaction of his decree. At page 266 of the report this passage occurs :

In my opinion the view of the learned Judge of the Madras High Court in the case referred to above appears to be sound, but in view of the fact that the majority of the High Courts in India have expressed the opinion that an executory agreement cannot be pleaded as an adjustment of decree under O. 21, R. 2, Civil P. C., and considering that the facts and nature of the agreement in the case before us are distinguishable from those in the Madras case, I think it safer to accept this opinion rather than that of the learned Judge of the Madras High Court in the case referred to in 56 Mad 198,[2] which, so far as I have been able to see, stands alone except for the single Judge ruling in 120 I C 686.[13]

But this is no longer the position, for not only has the decision in the Madras case been accepted by other High Courts in India, but recent judgments of their Lordships of the Privy Council place the correctness of the Madras view beyond all question. In 37 Bom L R 230[6] Broomfield J., in 1935 has carefully reviewed the earlier authorities and agrees with the view of the learned Judges in 56 Mad 198.[2] The judgment was reported in 1936 and was probably not available in May 1936 when the judgment in 30 S L R 249[1] was written. In 1936 the Patna High Court in 15 Pat 390[7] adopted the same view following the decisions of Madras and Bombay in 56 Mad 198[2] and 37 Bom L R 230.[6] The judgment in this case is dated in January 1936 but it was certainly not available till after May in that year. Courtney-Terrell C. J. says in his judgment in this Patna case :

In my opinion the clearest and the correct pronouncement of the law is in the judgment of the Madras High Court delivered in 1932 by Reilly and Anantakrishna Ayyar JJ. in 56 Mad 198.[2]

The case in 38 Bom L R 505=60 Bom 729[14] was cited in argument as another instance in which the Bombay High Court had accepted the Madras view; but though the point appears to have been taken, the part of the judgment dealing with it is not contained in the report of the case in 60 Bom 729.[14] All these cases have been cited with approval in the Full Bench decision of the Rangoon High Court in 1938 R L R 385,[8] where it was held that a decree can be adjusted within the meaning of O. 21, R. 2, Civil P. C., by a new contract that the judgment-debtor will do something in future, if the decree-holder is willing to take such a promise instead of the decree which he has. It is not necessary in every case that the judgment-debtor shall perform the promise which he makes to the decree-holder before adjustment can be regarded as complete. The Chief Justice in his judgment in this case makes the position clear when he says :

Now the adjustment, or new agreement, must fulfil the essentials of any other valid contract before it can be enforced as such. It may be reached by the offer of a promise for a promise and mutual acceptances ; as for instance where the

13. Bagamal v. Shib Parshad, (1930) 17 A I R Lah 334=120 I C 686.
14. Shankar Atmaram v. Keshav Govind, (1936) 23 AIR Bom 277=164 I C 9=60 Bom 729=38 Bom L R 505.

decree holder agrees to accept a mere promise by the judgment-debtor to convey certain lands to him. The fact that the contract is executory on both sides does not mean that it is any the less a valid agreement and adjustment of the decree. On the other hand the adjustment, or new agreement, may be reached by the offer of a promise for an act ; as for instance where a decree-holder agrees that upon the conveyance by the judgment-debtor of certain lands to him he will accept them in full settlement of the decree . . . .

To my mind the entire controversy on this point is set at rest by two very recent pronouncements of their Lordships of the Privy Council in which are to be found a clear exposition of the principles underlying O. 21, R. 2, Civil P. C., and the question of adjustments or compromises of decrees generally, and an equally clear indication of the limits within which adjustments or compromises are to be recognized and given effect to by Courts in execution proceedings. In 43 C W N 501[3] Sir George Rankin who delivered judgment of the Board says:

On this difficult and important question, their Lordships are not in agreement with the view taken by the Chief Court. They do not consider that it is sufficient account of the facts that the Code contains no general restriction of the parties' liberty of contract with reference to their rights and obligations under the decree and that if they do contract upon terms which have reference to and affect the execution, discharge or satisfaction of the decree, the provisions of S. 47 involve that questions relating to such terms may fall to be determined by the executing Court.

And little later his Lordship says:

Such bargains may take different forms and it is not possible to prejudge the individual case. If it appears to the Court, acting under S. 47, that the true effect of the agreement was to discharge the decree forthwith in consideration of certain promises by the debtor, then no doubt the Court will not have occasion to enforce the agreement in execution proceedings, but will leave the creditor to bring a separate suit upon the contract. If, on the other hand, the agreement is intended to govern the liability of the debtor under the decree and to have effect upon the time or manner of its enforcement, it is a matter to be dealt with under S. 47. In such a case to say that the creditor may perhaps have a separate suit is to misread the Code, which by requiring all such matters to be dealt with in execution discloses a broader view of the scope and functions of an executing Court.

The facts in the case are somewhat complicated but the 'difficult and important question' to which his Lordship refers was just this: whether an executing Court could recognize and give effect to an adjustment of a decree involving an alteration only of the instalments payable thereunder and an enhancement of the rate of interest, or whether as the learned Judges of the Chief Court of Oudh had held, the original decree had thereby been altered or varied by the parties and the alteration or variation could not be recognized and acted upon by the executing Court in execution proceedings of the original decree even though it had been recorded by the Court with the consent of the parties.

Their Lordships in this case have merely enlarged upon and elaborated a principle already enunciated by the Board in the earlier case in 32 S L R 415.[9] The facts in that case were simple. A decree of 1923 imposed upon the judgment-debtor a liability of Rs. 1,04,000 with interest at 6 per cent. and a certain *D* stood surety. There was no provision for the discharge of the liability by instalments. There was however a provision for payment of instalments making up a smaller total and at a lower rate of interest, the faithful observance of which provision would enable the judgment-debtor to escape the decretal liability. Some years later this provision was, by consent of parties, altered and duly certified and recorded by the Court. The judgment-debtor having defaulted the decree-holder applied for execution of the decree. The judgment-debtor contended in these proceedings that the compromise arrived at in 1928 created a new liability which superseded the original decree and rendered it no longer enforceable. He further contended that the compromise was not an adjustment under O. 21, R. 2, Civil P. C., and lastly contended that the executing Court possessed no authority to enforce through execution the new liability which could only be enforced by obtaining a decree in a fresh suit on the compromise. It was held by their Lordships that the compromise of 1928 affected only the provisions upon the observance of which the full decretal liability could be avoided. The decretal liability remained save of course to the extent to which it had in fact been reduced by moneys already paid. The compromise affected only the provisions upon the observance of which the full decretal liability could be avoided. In these circumstances it was immaterial to consider whether the compromise was or was not an adjustment within O. 21, R. 2, Civil P. C. If it was, it was duly recorded or certified and the Court could recognize it in executing the decree. If it was not such an adjustment there was nothing to prevent the Court from doing that which it obviously should do, viz. looking at it and taking it and the payments made under it into account in executing the decree.

It seems to me that if these two decisions of their Lordships of the Privy Council are read together the legal position laid down is this: The parties to a decree obtain certain rights and incur certain obligations thereunder. There is nothing in the Civil Procedure Code restricting their liberty of contract with reference to these rights and obligations. They may by contract alter these rights and obligations in any way they choose. If they contract to do so upon terms which have reference to and affect the execution, discharge or satisfaction of the decree, the provisions of S. 47, Civil P. C., involve the determination of questions relating to such terms in execution proceedings. If the contract between the parties leaves the liability of the judgment-debtor under the decree in substance unaffected and is confined to variation merely of subsidiary matters such as the time and mode of payment the contract between the parties whether or not it amounts to an adjustment within the meaning of O. 21, R. 2, Civil P. C., may be enforced by the Court in execution of the original decree at the instance of the judgment-creditor. If on the other hand, the contract between the parties introduces terms which are foreign to the decree and introduces into the decree a liability extraneous thereto the Court in execution proceedings at the instance of the judgment-creditor will not enforce the contract but leave the judgment-creditor to a separate suit. If in spite of such a contract the judgment-creditor seeks to execute the original decree the judgment-debtor may successfully plead the contract as a bar to such execution.

It appears to me therefore on a consideration of the law to which I have referred above that the decision in 30 S L R 249[1] is not good law and also that the case in 31 S L R 491[4] has been correctly decided and is good law. In 31 S L R 491[4] there was a decree for maintenance at the rate of Rs. 23 per month and a right of residence in the family house and a charge was created on certain property to secure the maintenance. Ramibai however alleged that subsequent to the decree she had come to an agreement with the respondents whereby certain property was released from the charge and her right to maintenance was secured as a charge upon one property only and there was a further agreement whereby in addition to Rs. 23 per month for maintenance she was to be entitled to Rs. 15 per month for residence in lieu of residence in the family house. The appellant sought the assistance of the executing Court for enforcement of her rights under the decree as varied by the agreement. It was held that her application had been rightly dismissed as what she was seeking to execute was not a decree passed by the Court but a contract containing terms extraneous to the original decree, which the parties had chosen to substitute by mutual agreement for the decree of the Court. In the words of their Lordships of the Privy Council, the appellant had attempted to bring under the decree a liability extraneous thereto and this the executing Court had no right to enforce but rightly referred the appellant to another suit. There are some passages however in the judgment in 31 S L R 491[4] which would appear to support the decision in 30 S L R 249.[1] To that extent 31 S L R 491[4] cannot be held to be good law.

Turning to the appeal before us, I see no difficulty in holding that both the lower Courts have arrived at a correct decision of the point involved and that this appeal must consequently fail. Both the lower Courts have held that the adjustment was proved and that it was the intention of the parties that the adjustment should extinguish their rights and liabilities under the original decree. Execution of the original decree could, in these circumstances, not be enforced. The case was entirely distinguishable from the ruling of our High Court in 31 S L R 491[4] and fell clearly within the decision of the Madras High Court in 56 Mad 198.[2] I therefore agree with my learned brother that this second appeal should be dismissed with costs.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Sind 349

DAVIS J. C.

Yoosaf Sagar Abdulla — Plaintiff.

v.

S. S. "Ellora," a steamship owned by British India Steam Navigation Co. Ltd., represented by Mackinnon Mackenzie & Co. — Defendants.

Suit No. 19 of 1934, Decided on 29th August 1936.

(a) Admiralty — Collision action—Burden of proof.

In collision action the burden in the first instance lies on the plaintiff and before he can succeed he must prove loss or damage due to the wrongful acts of the defendants, namely loss or damage due solely or in part to their negligence or default.

When he makes out a prima facie case of negligence on the part of the defendant, the burden of proof is shifted and the defendant will be liable unless he proves that his negligence in no way contributed to the loss. [P 352 C 2]

(b) Admiralty — Collision action — Principle of contributory negligence and what constitutes negligence stated.

In collision actions it may well be that both parties are guilty of a neglect of duty, and that, if either had used reasonable care and skill, the collission would have been avoided. In such a case the maritime law, which is followed in the Admiralty, apportions the joint damage. So far as what constitutes negligence, it may perhaps best be expressed as doing something which ought either to be done in a different way or not at all, or omitting to do something which ought to be done. In collision cases the negligence relied on is generally a failure to exercise the skill, care and nerve which are ordinarily to be found in a competent seaman, or a breach of regulation, either international or local governing navigation or equipment, or more rarely the inefficient or defective condition of the vessel or her equipment. Extraordinary skill or extraordinary diligence is not expected but that degree of skill, and that degree of diligence, which is generally to be found in persons who discharge their duty. [P 353 C 1]

(c) Admiralty — Collision action — Owner of ship not resident abroad or dead or bankrupt —Suit against ship does not lie.

It is true that the Admiralty has jurisdiction in rem and that the ship is often spoken of as the wrong-doer and that a ship may be liable in admiralty where no damages could be recovered at law against the general owners. But where the owners of the ship are not resident abroad, dead or bankrupt a suit does not lie against the ship but against the owner. [P 354 C 1]

(d) Admiralty — Collision action — Ship by carrying wrong lights misleading another ship— Latter cannot be blamed for act which is probable result of former's own negligence.

If a ship by carrying wrong lights, or by navigating in an improper or unusual manner, misleads or embarrasses another she cannot attribute as fault to the latter any act which was the probable result of her own negligence. [P 355 C 2]

(e) Admiralty — Decision of Admiralty Court restoring certificate of officer of ship is judgment in rem so far as that officer is concerned — It is not binding on person not party to that suit.

The decision of Admiralty Court restoring the certificate of an officer of ship which had been suspended is judgment in rem so far as the status and certificate of that officer is concerned. The decision is not binding on a person who was not a party to that suit. [P 356 C 1]

(f) Admiralty — Regulations for preventing collisions at sea—Art. 28—Failure to give sound signals to country craft in open sea is breach of Regulation—General practice to ignore Regulation in certain cases is no answer.

There is nothing in Art. 28 which exempts a steamer from giving sound signals to a country craft. Failure to give sound signals to country craft in the open sea is breach of the Regulation and a general practice to ignore it in certain cases is no answer to the charge that a breach of the Regulations is prima facie negligence. The burden lies upon the party failing to give signals to show that failure to give sound signals did not contribute to the collision. [P 357 C 1]

Hukumatrai M. Eidnani—*for Plaintiff.*

D. N. O'Sullivan — *for Defendants.*

Judgment. — This is a suit by the owners of the country craft, a Buglow or Dhow by name "Fateh Rahman" of registered No. 306 at Calicut and a tonnage of 107 tons against the owners of the steamship "Ellora" for damages for the loss of the Buglow and her cargo by collision in the early morning of 2nd October 1932 off Porebunder on the coast of Bombay. It is the case of the plaintiff that the Buglow was steering a course south-east south on the open sea when she sighted the Ellora one and half hour before the collision and that the officers of the watch on the Ellora sighted the "Fateh Rahman" 8½ minutes before the collision, that the tindal and the crew endeavoured to attract the attention of the Ellora so that she might change her course; but she did not do so whereas in consequence of the wilful default and negligent navigation of the officers of the watch and other officers and servants the Fateh Rahman was sunk and of her crew of fifteen one man was lost; her cargo was also lost. It is alleged in the plaint that the collision occurred eleven miles from the Navi Bunder light on the Kathiawad coast; the weather at the time was fair, the wind being north west of force 2 to 3 and the S. S. Ellora had at that time a speed of 13.8 knots per hour. It is alleged that the officers and servants in charge of the S. S. Ellora committed wilful default and were guilty of negligence and negligent navigation in that inter alia they committed breach of instructions contained in the regulations for preventing collisions at sea in the note preceding Art. 17 and Arts. 20, 23, 28, and 29, did not take compass bearings of the Buglow to ascertain her position and course, did not alter the course of S. S. Ellora or reverse or stop her engines or slacken speed to avoid collision or risk of collision, did not sound blasts and in the face of imminent danger did not act in a reasonable, necessary or proper manner to avoid the collision but went ahead and collided with the Buglow, end on, causing loss of life and property. It is further alleged that at a Marine Court of Enquiry held at Karachi on 21st to 24th November 1932, to inquire into the accident, the second

officer of the S. S. Ellora was found guilty of negligence and his second mate's certificate was ordered to be suspended for six months. The plaintiff assessed his loss at Rs. 16,600 in all Rs. 8500, the value of the Buglow, Rs. 6060 the value of the merchandise and cargo on board the Buglow at the time of the collision. Finally, it is alleged, the cause of action arose on 2nd October within the jurisdiction of this Court as the defendant ship was on the date of the presentation of the plaint within the port of Karachi.

The defendants in their written statement contend that the suit does not lie against the ship and this Court therefore has no jurisdiction; they put the plaintiff to proof of the authority of the attorney of Abdul Rahman Shahin Alghanim on behalf of the owner of the Buglow, Yoosaf Sagar Abdulla of Koweit, merchant, carrying on business at Calicut; they put the plaintiff to the proof of the facts alleged in paras. 1 and 2 of the plaint, but they admit the Ellora was running between Bombay and Karachi and was near Porebunder on the date and on or about the time specified in the plaint; they put the plaintiff to proof of the position and course of the Fateh Rahman at the material time and of the time when she sighted the Ellora; they contend that the night was dark and that the Buglow could not have been sighted from a distance; that the officer of the watch and others on duty saw one weak white light at about 2.45 A. M. but that even if the light was sighted at 2.40, this is immaterial; they deny that the Buglow sighted the Ellora or gave any warning or took any steps to avoid collision or that the Ellora was pursuing a course likely to cause collision; they deny any default or negligence or contributory negligence on the part of the second officer or any other officer or any other person on the S. S. Ellora. They admit the collision occurred at 2.48 A. M. and that the Buglow was sunk and the crew rescued. They do not deny the facts alleged in para. 9 of the plaint, but with reference to para. 10, they deny any negligence or default on behalf of any one on the Ellora; they contend that she was well found and properly manned, was keeping a good and proper look out, that at 2.45 A. M. on 2nd October a single dim white light was sighted and a bell was rung; the second officer on watch took account of the light, took compass bearings and then powerful helm action; that the Buglow showed her single white light in the forepart instead of at the stern and she came across the bow of the Ellora from starboard to port and was sunk. They contend that the action taken by the second officer in the circumstances was proper and reasonable.

With reference to the allegations that the Ellora committed breach of the Sea Regulations, it is contended (a) with regard to Art. 17, that there was no breach of Art. 17, the second officer took a sufficient compass bearing of the white light; (b) with regard to Art. 20, the Ellora took all reasonable means to avoid collision, but that the Fateh Rahman was not showing her regulation lights and gave no indication of what she was or what was her true course; (c) with regard to Art. 24, the Ellora complied with the provisions of this Article so far as it was reasonable to do so and circumstances permitted; (d) with regard to Art. 28, it was not the practice to give sound signals on the open sea to country craft and the omission to do so did not conduce or contribute to the collision; (e) with regard to Art. 29 it was denied that any proper precaution was omitted to be taken. Further, the defendants contend that the Fateh Rahmam did not carry the regulation lights, she did not carry her green and red light and the white light was carried so as to mislead. So far as the adverse finding of the Marine Court of Enquiry is concerned, it is contended that this finding had been reversed by a Divisional Court of Admiralty sitting in London, and the second officer's certificate has been restored. The defendants deny liability for loss of the Dhow or cargo, deny the alleged value of the Dhow and cargo, and deny the plaintiff's right to sue for loss of cargo or cash on board. Lastly, the defendants deny that the plaintiff has any cause of action or that the Court has jurisdiction. On 14th September 1934, 21 issues were settled by a learned Additional Judicial Commissioner. The issues are as follows:

1. Whether the owners of the S. S. Ellora can appear in the suit and raise the plea set forth in para. 1 of the written statement? 2. Whether the present suit against the ship can lie? 3. Whether this Court has jurisdiction to entertain this suit? 4. Whether the power of attorney on the strength of which the suit is filed authorized institution of suit? If not, what is the result? 5. Whether the statements in paras. 1 and 2 of the plaint are proved? If not, what is the result? 6. What time did the S. S. Ellora sight the Buglow Fateh Rahman? What did she see of the said Buglow? Whether the point of time is material in the case?

7. Where was the Buglow Fateh Rahman and what course was it steering about the time of the collision and when did she see the S. S. Ellora? 8. What was the course pursued by the S. S. Ellora about the time of the collision, and what was its speed at the time of the accident? Whether the said course was likely to cause a collision as alleged in the plaint? 9. (a) What was the cargo carried by Fateh Rahman? (b) What was the value of the said cargo and the Buglow? (c) Whether any cash was carried on board the Fateh Rahman? If so, how much? 10. What was the condition as to light, visibility and weather at the time of the collision? 11. What was the place and time of the collision? 12. What attempts were made by those on the Fateh Rahman to attract the attention of the S. S. Ellora? 13. Whether the S. S. Ellora and/or those in charge of her were guilty of the acts of negligence or any of them alleged in para. 10 of the plaint? 14. What steps, if any, were taken by the S. S. Ellora to avoid the collision? Whether the said acts were sufficient to exonerate the S. S. Ellora from liability? 15. Whether the Fateh Rahman was guilty of negligence, and if so, to what extent, and what is the consequence thereof? 16. Whether the regulations for prevention of collision at sea are not applicable to the present case? 17. Whether the Marine Court of Inquiry held at Karachi held the second officer of the S. S. Ellora guilty of negligence and suspended his certificate for six months? 18. Whether the above mentioned findings have been reversed by a competent authority? If so, what is the consequence? 19. Whether the plaintiff has any right of loss of the cargo or the cash alleged to have been lost? 20. What damages, if any, is the S. S. Ellora liable to pay. 21. General.

My findings on the issues are as follows: 1. Does not arise. 2. Does not arise. 3. Yes. 4. Yes. 5. Yes. 6. 2.40 A. M. to 2-42 A. M., a white light. Yes. 7. The Buglow was on a course "from Porbunder to Malabar side." There is no reliable evidence to show when she sighted the S. S. Ellora. 8. Coasting from Bombay to Karachi; speed 13.8 knots. The course was not likely to cause a collision. 9.(a). Does not arise. (b) Does not arise. (c) Does not arise; 10. A dark night, wind north west, force 2-3; slight sea and swell. 11. 2.48 A. M. eight miles off the Kathiawad coast and eleven miles from the Navi Bunder light. 12. No seamanlike action was taken; a white light was moved from the stern forward on the Buglow. 13. No; guilty of no negligence which contributed to the collision. 14. Sufficient helm action was taken to avoid the collision had the Buglow followed the course her white light indicated; sufficient action was taken to exonerate the S. S. Ellora from liability. 15. The Fateh Rahman was guilty of gross negligence and negligence which alone caused the collision. 16. Yes; they are applicable. 17. Yes. 18. Yes, a judgment in rem relevant only so far as the certificate and status of the second officer is concerned. 19. Does not arise. 20. None. 21. Suit dismissed with costs. It was agreed that the Court should first determine the question of liability, and thereafter, if necessary, determine the question of damages. It was also admitted that evidence before the Marine Court of Enquiry should be treated as evidence in this suit.

So far as the issues raised by the learned Additional Judicial Commissioner are concerned, some of them do not now arise, while the evidence on the record does not enable a finding to be made with any certainty upon others. For instance, so far as issue 7 is concerned, it is not possible to say with certainty when the Fateh Rahman sighted the S. S. Ellora for, in my opinion, the Fateh Rahman, was keeping no proper watch and the evidence of the Nakhuda and the seaman on the record is unreliable and cannot be relied on. The burden in the first instance lies on the plaintiff and before he can succeed he must prove loss or damage due to the wrongful acts of the defendants, namely loss or damage due solely or in part to their negligence or default. The general rule that a plaintiff in a collision action must prove affirmatively that his loss was caused by the negligence of the defendant or of some person for whose acts he is liable may be stated thus:

> The party seeking to recover compensation for damages must make out that the party against whom he complains was in the wrong. The burden of proof is clearly upon him, and he must show that the loss is to be attributed to the negligence of the opposite party. If at the end he leaves the case in even scales, and does not satisfy the Court that it was occasioned by the negligence or default of the other party he cannot succeed. So in the case then before the Court, it being proved that the plaintiff ship had no light, the inference was that, but for the absence of the light, the collision probably would not have occurred, and the plaintiff failed to recover. The plaintiff must therefore make out at least a prima facie case. The burden of proof lies so far on him, and this burden is still on the plaintiff, if the defendants admit that their vessel is also to blame for the collision. But it does not follow that it lies on him throughout the whole case. Having made out a prima facie case of negligence on the part of the defendant, the burden of proof is shifted, and the defendant will be liable unless he proves that his negligence in no way contributed to the loss. (Marsden's Collisions at Sea, (Edn. 9), pages 37-38).

And so far as the principle of contributory negligence is concerned, reference may be made to a passage in the speech of Birkenhead L. C. in (1922) 1 A C 129[1]:

1. Admiralty Commissioners v. S. S. Volute, (1922) 1 A C 129=91 L J P 38=126 L T 425=38 T L R 225=15 Asp M L C 530=66 S J 156.

Upon the whole I think that the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles, as a jury would probably deal with it. And while, no doubt, where a clear line can be drawn the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party act, that the party secondly negligent, while not free from blame under the *Bywell Castle*[2] rule, might on the other hand invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution *(ibid p. 32)*.

Lord Blackburn has stated the Admiralty Rule as follows :

It may well be that both parties are guilty of a neglect of duty, and that, if either had used reasonable care and skill, the collision would have been avoided. In such a case the maritime law, which is followed in the Admiralty, apportions the joint damage *(ibid p. 34)*.

But it is clear that there is no difference between the rules of law and of Admiralty as to what amounts to negligence causing collision; and that, before a vessel can be held to be in fault for a collision, negligence causing or contributing to the collision must be proved *(ibid p. 29)*.

So far as what constitutes negligence,

it may perhaps best be expressed as doing something which ought either to be done in a different way or not at all, or omitting to do something which ought to be done. In collision cases the negligence relied on is generally a failure to exercise the skill, care and nerve which are ordinarily to be found in a competent seaman, or a breach of regulation, either international or local, governing navigation or equipment, or more rarely the inefficient or defective condition of the vessel or her equipment. We are not to expect extraordinary skill or extraordinary diligence, but that degree of skill, and that degree of diligence, which is generally to be found in persons who discharge their duty *(ibid p. 3)*.

In (1823) 1 Hag Ad 120,[3] Lord Stowell defined negligence as

a want of that attention and vigilance which is due to the security of other vessels that are navigating the same seas and which, if so far neglected as to become however unintentionally, the cause of damage of any extent to such other vessels, the maritime law considers as dereliction of bounden duty, entitling the sufferer to a reparation in damages.

In a case before the House of Lords, it was said that the duty of a seaman is "to take reasonable care and to use reasonable skill" to prevent the ship from doing injury: per Blackburn J. (1880) 5 A C 876[4] at page 890 *(ibid p. 4)*.

To exercise ordinary skill, care and nerve is not the whole duty of seamen, but to observe the regulations and to exercise ordinary skill, care and nerve *(ibid p. 4)*.

No alleged practice of seamen of avoiding other ships by taking measures other than and inconsistent with those required by the regulations can excuse a violation of the regulations, and no suggestion of danger from not following the practice, which may arise because a great number of people follow it, can be listened to as a reason for not following the rule *(ibid p. 9)*.

It is therefore a duty to observe the regulations, and non-fulfilment of a duty without lawful excuse is negligence. But if a regulation is disobeyed, the vessel disobeying is not by this fact alone to be held to blame. The regulations are evidence of what it is the duty of a vessel to do under the circumstances, and if it should appear that a vessel, by breach of one of them has occasioned or contributed to a collision, such a breach would afford the very strongest reason for holding that a vessel had been guilty of a breach of duty and was to blame for the collision *(ibid p. 6)*.

The regulations define the steps to be taken by each vessel, and they are not complied with unless each vessel takes the steps required of her. The neglect of one to comply with the regulations is no excuse to the other, if she fails to do what is required of her, although a collision would have been avoided if either had complied with the law *(ibid p. 8)*.

As will be seen hereafter it is a positive duty to observe the regulations, and a departure from them is only justified by necessity. Non-observance is prima facie negligence, therefore it would seem that unless it can be clearly shown that the departure from the regulation either did not in fact wholly or in part cause the collision, or was in fact right under the circumstances, non-observance will involve blame. In order to avoid blame under the old law it had to be proved that a breach could not possibly have contributed to the collision; now, it is submitted, it must be proved affirmatively that it did not cause or contribute to the collision *(ibid p. 5)*.

Failure to obey a regulation is, generally speaking, a breach of duty and evidence of negligence, but by judicial decision and by express saving clauses in the regulations themselves non-observance at times becomes a duty *(ibid p. 5.)*

This briefly is the law, and as often occurs, difficulty lies not so much in its enunciation as in its application to the facts. The three essential issues appear to be issues 13, 14 and 15 and for convenience they may be restated thus : Does the plaintiff prove that the loss of the Fateh Rahman is due wholly or in part to the default or negligence of those in charge of the S. S. Ellora? My finding on that issue is in the negative. Mr. Hukumatrai for the plaintiff disarmed criticism by stating that this suit is the first of its kind and that he had gathered from the headnotes of cases that in Admiralty the suit was generally ship against ship. This Court in its District Court jurisdiction exercises Admiralty jurisdiction as reference to the Colonial Courts of Admiralty Act of 1890, S. 2 (6) will show. So far as the suit

2. (1879) 4 P D 219=41 L T 747=28 W R 293=4 Asp M C 207.
3. The Dundee, (1823) 1 Hag Ad 120.
4. Stoomvart Maatschappy Nederland v. Peninsular & Oriental Steam Navigation Co., (1880) 5 A C 876=52 L J Adm 1=42 L T 610 = 29 W R 173 =1 Asp M C 567.

against the ship is concerned, he refers to the case in 11 Bom 133,[5] Admiralty Suit No. 1 of 1886. It is true that the Admiralty has jurisdiction in rem and that the ship is often spoken of as the wrong-doer and that a ship may be liable in Admiralty where no damages could be recovered at law against the general owners, but

> in cases like the present where damages are claimed for tortious collisions, a chattel, such as a ship or carriage, may be, and frequently is, spoken of as the wrong-doer ; but it is obvious that although redress may be sometimes obtained by means of the seizure and sale of the ship or carriage, the chattel itself is only the instrument by the improper use of which the injury is inflicted by the real wrong-doer: Selwyn L. J. in (1868) L R 2 P C 193,[6] at p. 201 *(ibid p. 81)*;

and

> the process of Admiralty Courts against the ship seems clearly to have originated, not in any such idea as that involved in the law of deodand or in the noxal action of the Civil law, but simply as a ready and effectual means of compelling the wrong-doer to appear and defend the action, or to make recompense *(ibid page 80)*.

But, in this case, the owners of the ship are not resident abroad, dead or bankrupt. They have their office in the city, and Mr. Hukumatrai agreed to meet objections raised by the defendants and to save time and argument by a request to amend the plaint. Amendment was allowed and the defendants did not press the question of jurisdiction further. Mr. Hukumatrai, on behalf of the plaintiff, at an early stage in his arguments, reduced his claim to one of contributory negligence, because it is clear from the evidence that the Fateh Rahman was not carrying proper lights. Not only did she show no red and green lights, but she showed a white light to mislead. Mr. Hukumatrai relied mainly upon breach of instructions contained in the note preceding Art. 17 (risk of collisions), and in Arts. 20 (sailing ship and ship under steam) and 23 (steam vessel to slacken speed). His case briefly is that steam must give way to sail and that in this case the Ellora should have slackened her speed or stopped or reversed and that by not so doing she has been guilty of contributory negligence. He also relied upon Art. 27 (provision as to special circumstances), Art. 28 (helm signals) and Art. 29 (proper precautions are to be taken in all cases). In his plaint however in para. 10 he relied particularly on breach of instructions in the note preceding Art. 17 and Arts. 20, 23, 28 and 29. His case however for all practical purposes was that the S. S. Ellora was a steam vessel; she should have kept out of the way of the sailing vessel the Fateh Rahman, she had sufficient notice of risk of collision to slacken speed and reverse and go astern. Therefore whatever the negligence of the Fateh Rahman, the S. S. Ellora was also in fault, and therefore partly responsible for the loss and damage. So far as the facts are concerned, I must refer to the record of evidence in the Marine Enquiry of which the evidence is admitted by consent as evidence in this suit, and to evidence taken on commission.

Now, it is not disputed that the collision took place at 2-48 A. M. on the morning of October 2nd, and that the collision occurred near Porebunder off the coast of Bombay and that the Ellora was running between Bombay and Karachi. The Engineer on duty at the time was George Wight and his evidence is corroborated by the entries in the telegraph logbook. There is then no dispute about the time of the collision, that it was 2-48 A. M., nor is there any dispute as to the place, for the evidence of the Captain, Henry Alured Denne, is that the steamer was eleven miles from the Navi Bunder light and eight miles from the shore. But the evidence is not so clear as to the time when the Ellora first sighted the Buglow. In his first statement to the Principal Officer in the preliminary enquiry, the officer of the watch, Robert, Crozier, gave the time as 2-40 A. M. In the Marine Enquiry he stated that 2-40 was approximate and that 2-45 was the correct time. This later time may be the result of later and more precise recollection, but it is necessary to look to the evidence of others on the Ellora. There can be no question but that a proper watch was kept. The second officer is a man of sufficient experience and of strictly sober habits, and there is no reason to suppose that he did not take at the earliest opportunity into his consideration the light showing from the Buglow. Prima facie, there is no reason to suppose that he would not take all necessary and proper steps to avoid a collision, and whether the Buglow was first sighted at 2-40 or 2-45 A. M., appears to me in the circumstances of this case not decisive. Hunsjee Dewa was the lascar on duty as lookout man. He states that he struck the bell once as soon as he saw the white light of the Buglow on the star board side. He had no watch and his appreciation

5. Esso Bhayaji v. The Steamship "Savitri", (1887) 11 Bom 133.
6. The Halley, (1868) L R 2 P C 193 = 7 Moore P C (N S) 263=37 L J Adm 33=18 L T 879 =16 W R 998.

of time is only approximate. He says however that he saw the light ten or fifteen minutes after the ship's bell struck 2.30. The witness can only speak to time approximately but I see no reason to reject his evidence so far as it goes. He says he heard no sound from the Buglow.

Bella Deeta, an experienced Lascar of thirty years service, was at the wheel when the accident occurred. He saw the white light of the Buglow after the bell was struck. He says it was three minutes before the accident when he first saw the light but he also states in his evidence that five minutes elapsed between the first order to change the course of the steamer by five degrees to port and the second order to turn harder to port, and he states that the Buglow struck the steamer 1-2 minutes after he turned harder to port. This is the evidence of the officers and servants of the company. It would appear then that the Buglow was sighted some six to eight minutes before the collision.

The evidence of Nakhuda of the Buglow is also on the record. It is not possible to make out from his evidence when the Fateh Rahman first sighted the steamer or on what course she was steering. His evidence is vague: "From Porbander to Malabar side." He says they sighted the steamer at 1 A. M., but he had a watch and did not refer to it. He says again that it was half an hour's steamer journey when he first sighted the steamer. The collision was at 2.48 A. M; he first sighted the steamer then about 2-18 A. M. He admits he had only one white light when they left Porbander, and it is not possible to say from his confused evidence when they showed the red and green lights. In my opinion, they did not show the red and green lights at all. It would appear from his evidence that he could not change his course because there was no wind. It is stated however in the plaint that there was a wind of force 2 to 3.

The evidence of Kenneth Le Breton, Master Mariner, is that the Buglow would be sailing at 3 to 4 knots. It is also clear from the evidence of the officer of the watch that it was a dark night, the wind was north-west with a force 2 to 3. The statement of the Nakhuda that there was no wind appears incorrect. Reading through the evidence of the Nakhuda, I can see no real indication of a proper watch or seamanlike action at all. Indeed when he first sighted the steamer he states he removed the white light from the stern to the forepart of the ship where it was even more misleading. It does not appear he complied with Art. 1 or Art. 5, and it appears that the white light he moved would under Art. 10 be taken to be the stern light of an overtaken vessel.

According to the evidence of Saleh, son of Farid, taken on commission, described as a boatman of Koweit who was a member of the crew, they sighted the Ellora about ten minutes before the collision. He states there was a dead calm and it was he who seized the white light, took it to the bow and waived it. He describes the course of the Buglow as slightly across and diagonal to the course the Ellora was making. It appears to be difficult to reconcile the evidence of this boatman and the course shown in the diagram with the allegation in the plaint that the course was south-east south. It is not possible to say with precision what her course was or whether she was keeping it. The Buglow was however struck forward and broadside on so that it appears she either sailed or drifted across the bows of the Ellora. I am also of the opinion that the Fateh Rahman was not keeping a proper watch. I am satisfied that none sounded the bell on board the Fateh Rahman or did anything to attract attention until it was too late, that they showed no red and green lights and that the white light shown was misleading. In my opinion, the white light moved in panic to the bow merely added to the risks of collision and increased the difficulty of the officer of the watch. The Fateh Rahman was not only showing no proper lights; she was showing a white light which would mislead. It was the breach of Regulations 1, 5 & 10, which in my opinion, was responsible for the collision.

> If a ship by carrying wrong lights, or by navigating in an improper or unusual manner, misleads or embarrasses another, she cannot attribute as a fault to the latter any act which was the probable result of her own negligence *(ibid p. 13)*.

It remains then only to be considered whether the Ellora was guilty of contributory negligence. I am of opinion that she was not. Now, the second officer's certificate which was suspended by the Court of Marine Enquiry has been restored by an order of the Admiralty Court sitting in London. So far as the finding of the Court of Admiralty is concerned, I do not think I am, so far as this suit is concerned, bound by that finding so that I cannot find the Ellora or her owners liable in damages for the collision because of the negligence of

those of their officers and servants who were on board and in charge of the navigation of the Ellora at that time, if the evidence satisfies me that there was negligence contributing to the collision. The finding of the Court of Admiralty is, I think, a judgment in rem so far as the status and the certificate of the second officer is concerned. His certificate is restored to him, but the present plaintiff was not a party to that suit, and it appears to me that so far as this suit is concerned, it is open to the plaintiff to show, if he can, that there was such negligence or default on behalf of the Company's servants including the officer of the watch as to entitle him to damages. But, in my opinion, the plaintiff has failed to do so. He relies largely upon the evidence of the Nautical Surveyor Lt. Commander Hughes-Hallett whose opinion however is not that the second officer was negligent but that he committed an error of judgment. But, in my opinion the important words in his evidence are these:

I know that sailing vessels shall not carry a white light in the forepart of the vessel. The sailing vessels have to show only green and red sidelights except when overtaken when they shall show a white light as prescribed by Art. 10. If I were coming from Bombay and I had seen a white light I might have taken it to be anything and not necessarily a light on a Buglow at all. Amongst other things I would have been justified in assuming under the rules that it was the stern light of a Buglow. Under Regulations the stern lights must be visible over an arc of the compass at 12 points, that is 6 points on either side. If it was assumed that it was the stern light of a Buglow he would be justified in assuming that the Buglow was not crossing the steamer's bow, because he would have seen her sidelights, that is to say, he would have seen a green light if she was going to starboard and a red light if she was going to port,

and

if the officer was certain in his mind that the light was the stern light of the dhow, an alteration by 5 degrees would have been sufficient to give the dhow a clear berth.

The only reason the Nautical Surveyor could give for the officer of the watch not assuming, what under the Regulations he should have assumed, was that many dhows travel on the coast without sidelights. I am not prepared to accept this alleged general disregard of Regulation 5 by other dhows as a good reason for requiring that the officer of the watch in this case should have assumed that this dhow carried no sidelights or to accept the position that dhows are to be permitted to ignore, and to be assumed to have ignored all the regulations. The regulations as to lights are explicit. Art. 1 says:

The rules concerning lights shall be complied with in all weathers from sunset to sunrise, and during such time no other lights which may be mistaken for the prescribed lights shall be exhibited.

Article 5 says:

A sailing vessel under way, and any vessel being towed shall carry the same lights as are prescribed by Art. 2 for a steam vessel under way, with the exception of the white lights mentioned therein which they shall never carry.

Article 10 says:

A vessel which is being overtaken by another shall show from her stern to such last-mentioned vessel a white light or a flare-up light.

The white light required to be shown by this Article may be fixed and carried in a lantern, but in such case the lantern shall be constructed, fitted and screened that it shall throw an unbroken light over an arc of the horizon of 12 points of the compass, viz. for 6 points from right aft on each side of the vessel, so as to be visible at a distance of at least one mile. Such light shall be carried as nearly as practicable on the same level as the sidelights.

In this case, the Buglow offended against the regulations, but it is not as if she offended by carrying no lights. Then it might well be urged that such a state of things existed as required the steamship to slacken her speed, stop or reverse, but she showed a light which under the regulations meant one thing and one thing only, an overtaken vessel. This being so, it is difficult to see how the officer on the watch was guilty of negligence or default when he was deceived or when he took action, which on the assumption the light meant, what under the regulation it should have meant, according to the Nautical Surveyor, would have avoided collision. Art. 23 contains the qualifying words "if necessary." In this case, according to the evidence of the Nautical Surveyor, assuming the white light to have meant what it should have meant, there was no necessity to slacken speed or stop or reverse. The course taken by the Ellora would ordinarily have avoided collision. It is not necessary in coming to this conclusion to abate from the strictness of Art. 20 that the steam vessel shall keep out of the way of a sailing vessel. From the time the officer of the watch sighted the light he proceeded to comply with Art. 20 according to his best judgment in the circumstances. It is, however, argued that there was contributory negligence in terms of the note preceding Art. 17:

Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist,

and it is said that according to the evidence of the second officer himself he did not take a proper compass bearing but he took a relative bearing from his own steering compass and the starboard, Samson Post. But the answer of the Nautical Surveyor to the learned advocate, Mr. Tolasing, that "it is not possible to take bearings of Samson Post without the compass" appears based upon a misunderstanding by the learned advocate of what a Samson Post is. In my opinion, the compass bearing taken was sufficient in the circumstances. So far as the breach of Art. 28 is concerned, it is admitted that no sound signals were given, and I can find nothing in the Article which exempts a steamer from giving sound signals to a Buglow though according to the evidence of the Master of the Ellora and the Cargo Superintendent, both officers of great experience, such signals are not generally given to country craft in the open sea as such craft would not understand them. But the regulations have to be followed. A general practice to ignore them in certain cases is no answer to the charge that a breach of the regulations is prima facie negligence. So it appears to me that the burden lies upon the defendants to show that failure to give sound signals did not contribute to the collision. It may be said, of course, that the sound signals would have awakened the sleeping crew of the Buglow, but the bell was sounded, and I cannot persuade myself that the sounding by the Ellora of two short blasts indicating her change of course would have made any difference in the circumstances. I do not believe that the Nakhuda of the Buglow would have understood two blasts to mean : "I am directing my course to port." I should apply to the determination of this question of the liability of the S. S. Ellora for this breach the principle set out in (1936) 2 All E R 1221[7]:

The principles which have to be applied to facts like these are now well settled; they have been declared on numerous occasions by your Lordships and they may be very easily summarized. If the facts which are proved give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture, then, of course, the applicant fails to prove his case, because it is plain that the onus in these matters is upon the applicant. But where the known facts are not equally consistent, where there is ground for comparing and balancing probabilities as to their respective value, and where a reasonable man might hold that the more probable conclusion is that for which the applicant contends, then the arbitrator is justified in drawing an inference in his favour : (1919) 12 B W C C 400[8] at page 406.

It is for the defendants to prove that their breach of the regulations did not contribute to the collision. I cannot, however, persuade myself that in the circumstances two short blasts would have made the slightest difference in the result. This is the opinion of the Nautical Surveyor. I am satisfied that the defendants have discharged the burden which the proof of the breach of Regulation 28 imposes upon them. Lastly, it was urged that there was a breach of Art. 29. It was argued that the special circumstances of the case required that the second officer should have presumed that all country craft were always disobeying all the regulations and he should have slackened speed and reversed. I do not think that is a practical proposition. It was not in this case as if the Buglow was showing no lights. She showed a white light which misled. This I think was directly and solely responsible for the collision. I therefore dismiss the plaintiff's suit with costs.

D.S./R.K. *Suit dismissed.*

7. Whittle v. Ebbw Vale, Steel, Iron & Coal Co., Ltd., (1936) 2 All E R 1221.

8. Lancaster v. Blackwell Colliery Co. Ltd., (1919) 12 B W C C 400 = 89 L J K B 609 = 122 L T 162=64 S J 115.

A. I. R. 1939 Sind 357

WESTON J.

Kotumal Pokardas — Respondent 1.

v.

Adam Haji Pir Mahomed — Respondent 2.

Misc. No. 492 of 1938, Decided on 13th March 1939.

Arbitration Act (1899), S. 4—Printed Rules of Merchants' Association requiring members to submit differences inter se to arbitration together with written undertaking to abide by these rules signed by members at time of admission constitute written agreement to submit within meaning of S. 4.

The words of the definition of "submission" are sufficiently wide to include cases where the agreement is made without, at the time it is made, there being any differences between the parties, either in existence or in direct contemplation. Also it is not necessary, to constitute a submission that the terms of the agreement should all be contained in one document. Such an agreement may be found in correspondence consisting of a number of letters. The printed rules of Merchants' Association requiring all members in all cases of dispute or differences inter se arising from certain transactions to submit the said disputes or differences to

arbitration together with the written undertakings to abide by the rules, signed by members at the time of their admission as members are sufficient to constitute the written agreement to submit required by S. 4 : *(1915) 1 Ch 881, Rel. on.*

[P 358 C 1, 2; P 359 C 2]

Manghanmal Bhojraj — *for Respondent 1.*

Kundanmal Dayaram — *for Respondent 2.*

Order. — Several objections have been raised by respondent 2 to the award filed, but only one has been urged, namely that there was no submission to arbitration within the meaning of S. 4, Arbitration Act. The contract was for sale of 250 bags of gram, ready delivery. It is common ground that the actual contract was oral. Respondent 1 claims that there was a submission by reason of the fact, now admitted, that both respondents were and are members of the Produce Exchange Department of the Karachi Indian Merchants' Association, and had subscribed to the Printed Rules and Regulations of the Produce Exchange Department, one of which rules is that members shall refer all disputes arising from grain and seeds transactions with fellow members to arbitration. He claims that the printed rules together with the written undertakings to abide by the rules, signed by both respondents at the time of their admission as members are sufficient to constitute the written agreement to submit required by S. 4, Arbitration Act. A copy of the Memorandum and Articles of Association of the Karachi Indian Merchants' Association is Ex. 9. At page 1 the objects for which the Association has been established are set out and one of these is as follows :

To endeavour to settle disputes among members of the Association by arbitration, conciliation or otherwise; and to assist in formation, development and maintenance of boards of conciliation and arbitration.

The Produce Exchange Department is created by Articles 14 and 15 of the Articles of Association and the Rules and Regulations of this department appear as Sch. A at p. 30. R. 4 (a) of these rules is as follows :

4. (a) Every applicant for membership, shall fill in and sign an application form, to be obtained from the Secretary, inter alia, agreeing to be bound by the Rules and Regulations and Bye-Laws of the Department, declaring the name or names in which and the place or places at which he carries on his business and the name or names of his partner or partners, and furnishing such other information as the Board may require, and obtain thereon the signature of at least two members of the Department, one as the proposer and the other as the seconder, of the applicant being admitted as a member of the Department.

Rule 10 states:

Every member of the Department shall conform to and be bound by the Rules and Regulations of the Department for the time being in force, as well as the Bye-Laws that be framed, from time to time, in pursuance of the powers given under the said Rules and Regulations.

And lastly R. 52 (a) states :

All members of the Department shall in all those cases of dispute or difference inter se that arise out of any Grain and Seeds transactions and be subsisting which are not covered by any written agreement refer the said disputes or differences and all other matters or things relating thereto to arbitration.

Subsequent clauses of this R. 52 provide for the mode of appointment of arbitrators and so on. It is not disputed that the award was made in accordance with these clauses. The Secretary of the Association has been examined and has produced the original form of application for membership of the Produce Exchange Department signed by respondent 2. The form is printed in English and is as follows:

Dear Sir,

I/We, a member of the Karachi Indian Merchants' Association hereby agree, if elected, to become a Member of the Produce Exchange Department of the Karachi Indian Merchants' Association, and undertake to conform to and be bound by the Rules and Regulations and the Bye-Laws of the said Department in force from time to time and to be liable for all periodical settlements at whatever dates in respect of all contracts entered into by me/us prior to ceasing to be a member whether by resignation or otherwise.

Then follow the name, address and other details of the applicant and his business and finally there is the signature of respondent 2. A suggestion was made that as the rules are in English and respondent 2 is said not to understand English, he is not bound by them. But this contention can have no force in view of his admitted signature to the application form by which he agreed to be bound by these rules and regulations. S. 4 (b), Arbitration Act, defines 'submission' as a 'written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.' The definition is identical with the English definition and the words of it are sufficiently wide to include cases where the agreement is made without, at the time it is made, there being any differences between the parties, either in existence or in direct contemplation. Also it is well established that it is not necessary to constitute a submission, that the terms of the agreement should all be contained in one document. As held in (1911) 86 L J

K B 1444,[1] such an agreement may be found in correspondence consisting of a number of letters. In a Bombay case, 32 Bom L R 1451,[2] Blackwell J. held that in certain circumstances the signatures of the parties are not essential. At page 1459 he states:

> I am free to confess that I have felt great doubt as to whether S. 4, Arbitration Act, does not require the agreement between the parties to be in writing in the sense that both offer and acceptance must appear in a written document or documents between the parties. On the whole however having regard to the authorities to which I have referred, I am not satisfied that this is the meaning of the expression "written agreement" within S. 4 of the Act. I have come to the conclusion that, provided it appears clear from any document or documents that the parties are willing to do business upon certain terms which have been reduced to writing, the acceptance of those terms by conduct may be proved orally.

A similar conclusion was expressed in 12 S L R 55.[3] The present case is not one where the signatures of the parties are lacking, for respondent 2's signature to his application form for membership of the Produce Exchange Department has been proved and it is not disputed that respondent 1 also signed a similar application form; and the question is whether these signatures under agreements to abide by the rules, and the rules containing a very clear direction to members to submit their differences to arbitration are sufficient to bring the parties *ad idem* and amount to the agreement required by S. 4, Arbitration Act. The authority most in point is (1915) 1 Ch 881.[4] In this a member of the Association sued not another member but the Association itself for injunctions restraining the Association from employing a certain person as Secretary, from doing any acts in derogation of the plaintiff's rights as a member and so on. One of the Articles of Association provided that when any difference arose between the Association and any of the members touching the construction or incidents or consequences of the articles or of the statutes . . . . . "every such difference shall be referred to a decision of an arbitrator appointed by the parties in difference." The plaintiff in his application for membership had made a declaration, as in the present case, that he would conform to the rules and regulations of the Association. After considering the authorities, Astbury J. stated:

> The result of these decisions is, I think, that if the submission is in writing and is binding on both parties as their agreement or as the equivalent in law to an agreement between them, the statute is satisfied

and held that the Articles of Association created rights and obligations enforceable as between the members and the association, and that the article quoted above did constitute a submission to arbitration within the true meaning and intent of the Arbitration Act. His Lordship further held that the application for membership in which, in consideration of being elected a member, plaintiff contracted in writing to conform to its rules and regulations, one of which was a general submission to arbitration of all differences between the association and any of its members, apart from the effect of the articles of association as such, was also a submission in writing within the true meaning and intent of the Arbitration Act. In (1915) 1 Ch 881[4] the agreement created by the application for membership was between the applicant and the association, that is to say, between the applicant and all members collectively. In the present case the agreement is between the applicant for membership and each individual member. I see no difference of substance between these two positions. It seems to me therefore that, on the authority in (1915) 1 Ch 881,[4] the applications for membership by the two respondents coupled with the very clear and wide R. 52 (a) of the Produce and Exchange Department of the Karachi Indian Merchants' Association requiring all members in all cases of dispute or differences inter se arising from grain and seeds transactions to submit the said disputes or differences to arbitration constitute a submission within the meaning of S. 4, Arbitration Act.

I hold therefore that the award must stand filed, and the objections of respondent 2 are dismissed with costs.

D.S./R.K. *Objections dismissed.*

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1. Lobitos Oilfields v. Admiralty Commissioners, (1917) 86 L J K B 1444 = 117 L T 28 = 33 T L R 472.
2. Rambaksh Lachmandas v. Bombay Cotton Co., (1931) 18 A I R Bom 81= 128 I C 881= 32 Bom L R 1451.
3. Lyon Lord & Co. Ltd. v. Firm of Chapsi Umersi, (1919) 6 A I R Sind 101= 49 I C 135 =12 S L R 55.
4. Hickman v. Kent or Romney March Sheep-breeders' Association, (1915) 1 Ch 881=84 L J Ch 688=113 L T 159=59 S J 478.

A. I. R. 1939 Sind 360

DAVIS J. C. AND TYABJI J.

Khanchand Mayaram — Appellant.

v.

Pessumal Lakhumal and another — Respondents.

Second Appeal No. 1 of 1936, Decided on 17th August 1938, against decree of Asst. Judge, Sukkur, D/- 14th November 1935.

(a) Civil P. C. (1908), S. 102 — S. 102 also applies to orders in execution under S. 47—Appeal barred against judgment-debtor is equally barred against his surety.

Section 102, not only applies to appeals but to orders in execution under S. 47 of the Code. If an appeal against an order under S. 47 is barred under S. 102, as against judgment-debtor it is also barred against his surety. [P 360 C 2]

(b) Civil P. C. (1908), S. 115—S. 115 is not intended to provide parties with right of second appeal.

Section 115, was only intended to relate to a question of jurisdiction. S. 115 is intended only to supplement the Code in relation to matters on which the Code is silent. It is not intended to provide the parties with the right of a second appeal. [P 360 C 2]

Dipchand Chandumal — *for Appellant.*

Manghanmal Bhojraj—*for Respondents.*

Davis J. C.—This comes before us as a second appeal against an order of the Assistant Judge of Sukkur dated 14th November 1935, in which he allowed the appeal against an order dated 11th January 1932, of the Subordinate Judge of Jakobabad, in which he ordered a writ of arrest to issue against one Pessumal, a surety, who stood surety for the judgment-debtor Choithmal, who, to escape arrest for a debt, declared his intention of applying in insolvency under S. 55 (4), Civil P. C. But it appears that this judgment-debtor Choithmal afterwards changed his mind and did not wish to apply for insolvency and was produced within thirty days before the Court by his surety Pessumal who applied for his discharge. The Subordinate Judge was of the opinion that the surety Pessumal in producing Choithmal before the Court did not fulfil the terms of his bond, one of which was that this Choithmal would apply in insolvency within 30 days, and therefore this surety was liable under the terms of his bond to pay Rs. 200 the sum involved. But the lower Appellate Court took a different view and came to the conclusion that as Pessumal had produced Choithmal before the Court so that he could be re-arrested and committed to jail, the judgment-creditor could not proceed against the surety as he had proceeded against the principal. But interesting as this question may be, we do not see how under the provisions of S. 102, Civil P. C., an appeal will lie. There is ample authority for the view that Sec. 102, Civil P. C., not only applies to appeals but to orders in execution under S. 47, Civil P. C., and this appeal purports to be made under Sec. 47 Civil P. C. But, it is said, that if an appeal against an order under Sec. 47, Civil P. C., is barred under Sec. 102, Civil P. C., it is only barred against the person who is a party to the suit, and, in this case, this surety was not a party to the suit. But reference to Sec. 145, Civil P. C., will clearly show that any such argument is untenable:

> When any person has become liable as surety . . . for the payment of any money or, for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon . . . . . such person shall, for the purpose of appeal, be deemed a party within the meaning of S. 47.

This is so provided in S. 145, Civil P. C. This being so, we can see no force whatever in the argument that Sec. 102, Civil P. C., which would apply to the judgment-debtor would not apply to his surety, the present appellant Pessumal. We are then asked to treat this second appeal as a revision application. But we have constantly pointed out that Sec. 115, Civil P. C., was only intended to relate to a question of jurisdiction, and to say that because a question of law is involved or the construction of the document, and one Judge has come to the conclusion and another has come to another, that is a matter affecting jurisdiction and is sufficient ground to treat an appeal as an application under S. 115, Civil P. C., would appear to us to make Sec. 115, Civil P. C., not a Section dealing with matters for which no appeal has been provided, but to make it a Section allowing an appeal in a matter in respect of which an appeal has been expressly prohibited by law. It would be to give to parties a right of second appeal when the law says clearly that this right is not allowed. Sec. 115, Civil P. C., is intended only to supplement the Code in relation to matters on which the Code is silent. It is not intended to provide the parties with the right of a second appeal. We think therefore that this second appeal as such would not lie, and as a revision application it does not come under S. 115, Civil P. C., as no question of jurisdiction within the meaning of that Section is in-

volved. Therefore from any point of view, this appeal fails and must be dismissed with costs. Order accordingly.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Sind 361

O'SULLIVAN J.

Official Assignee, Karachi —Applicant.

v.

Dhanoomal Mohanlal — Opponent.

Misc. No. 398 of 1938, Decided on 28th July 1939.

Presidency Towns Insolvency Act (1909), S. 57—Official Assignee establishing that transaction within contemplation of Sec. 57 took place after commencement of insolvency — Onus lies on person seeking to uphold transaction to prove that it took place before adjudication and that he had no notice of presentation of petition.

Under the doctrine of "relation back" the property of an insolvent on the making of the order of adjudication vests in the Official Assignee as from the commencement of the insolvency, that is to say, from the date of the act of insolvency upon which the adjudication is made. As from that date the insolvent ceases to be owner of the property and cannot deal with it. He cannot make payments to creditors or give good and valid discharges. S. 57 of the Act however provides an exception to the doctrine by affording protection to bona fide transactions taking place between the commencement of the insolvency and the date of the order of adjudication in those cases where the person with whom such transaction takes place had no notice of the presentation of the petition by or against the debtor. When the Official Assignee has established that a transaction within the contemplation of Sec. 57 took place after the commencement of the insolvency the onus lies on the person seeking to uphold the transaction to prove that it took place before adjudication and that he had no notice of the presentation of the petition. A denial in the objections filed by him is insufficient to discharge the onus. The objections are mere pleadings : *A I R 1933 Sind 85; A I R 1932 Sind 62; A I R 1935 Rang 273; (1874) 9 Ch A 409 and (1884) 13 Q B 727, Rel. on.*

[P 361 C 2; P 362 C 1, 2]

Kundanmal Dayaram —*for Applicant.*

Khanchand Gopaldas — *for Opponent.*

Order. — This is an application by the Official Assignee under Sec. 7, Presidency Towns Insolvency Act, to adjudge a payment of Rs. 500 by the insolvent Santram Bhagwandas to the opponent firm of Dhanoomal Mohanlal, null and void and to direct the latter to refund to the Official Assignee the said sum with interest. The firm of Issardas Srigopal and one of its partners Santram Bhagwandas were adjudged insolvent on 25th August 1937 on a petition by certain creditors filed on 14th October 1936. The date of the act of insolvency on which the adjudication was based was 8th October 1936. It is stated in the Official Assignee's application that on 1st July 1937 the insolvent Santram Bhagwandas made the payment of Rs. 500 to the opponents in full satisfaction of two decrees for Rs. 437 and Rs. 408 respectively obtained against the insolvent firm at Amritsar. The dates of these decrees have not been mentioned. The opponents have not appeared in person. They have contented themselves with filing certain objections to the application of the Official Assignee and these objections are not supported by affidavit.

It is not disputed by the opponents, vide para. 2 of the objections filed by them, that the said payment to them of Rupees 500 was made on 1st of July 1937, that is to say, considerably after the filing of the insolvency petition though before the order of adjudication. The learned advocate for the opponents contended that his clients had at the time of the payment no notice of the presentation of the petition and that the transaction was a bona fide one. He therefore relied on S. 57, Presidency Towns Insolvency Act, as affording him protection. The proviso to this Section reads :

> Provided that any such transaction takes place before the date of the order of adjudication, and that the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor.

The learned advocate argued that the onus lay on the Official Assignee to establish that the opponents had notice of the presentation of the petition and that the transaction was not bona fide and unless that onus was discharged his clients were entitled to succeed. In developing this line of argument the learned advocate said that it was unreasonable, generally speaking, to expect any creditor to establish a negative, that is to say, that he had not received notice. At first sight there may appear some logical basis for this contention, but the flaw in the argument becomes apparent on a consideration of the relevant principles of bankruptcy law. It is elementary that under the doctrine of "relation back" the property of an insolvent on the making of the order of adjudication vests in the Official Assignee as from the commencement of the insolvency, that is to say, from the date of the act of insolvency upon which the adjudication is made. As from that

date the insolvent ceases to be owner of the property and cannot deal with it. He cannot make payments to creditors or give good and valid discharges. As was stated by Fletcher Moulton L. J. in *Ponsford Baker & Co.* v. *Union of London and Smiths Bank, Ltd.* :[1]

Nothing is more firmly established in bankruptcy law than that a man who has committed an act of bankruptcy is not entitled to deal with his estate. He has no right to gather it in if it is not already in his hands or to make payments to his creditors out of that which he has actually at his command.

Under the Presidency Towns Insolvency Act the doctrine of "relation back" is set forth in S. 51. S. 57 of the Act, however provides an exception to the doctrine by affording protection to bona fide transactions taking place between the commencement of the insolvency and the date of the order of adjudication in those cases where the person with whom such transaction takes place had no notice of the presentation of the petition by or against the debtor. S. 57 is of course subject always to the provisions of the Act with respect to the effect of insolvency on an execution and with respect to the avoidance of certain transfers and preferences. Under the principles laid down in the Evidence Act the burden of proving those facts, proof of which is necessary to bring a transaction within the protection afforded by S. 57 would clearly lie on the person who relied upon the protection, because in the absence of such proof the transaction would be void by reason of the doctrine of "relation back." I would say therefore that when the Official Assignee has established that a transaction within the contemplation of S. 57 took place after the commencement of the insolvency, the onus lies on the person seeking to uphold the transaction to prove that it took place before adjudication and that he had no notice of the presentation of the petition. In A I R 1933 Sind 85,[2] under the Provincial Insolvency Act it was held that 'persons claiming the benefit of the proviso must show that they had no notice of the presentation of the insolvency petition.' The decision in A I R 1932 Sind 62[3] also under the Provincial Insolvency Act was to the same effect. This latter case was followed by the Rangoon High Court in A I R 1935 Rang 273,[4] where the Crown relied upon the proviso to S. 57 to protect a mortgage in its favour. In the course of the judgment, Dunkley J. said :

The learned District Judge has rightly held that if the Crown wished to rely upon the protection given by S. 55, Provincial Insolvency Act, for bona fide transactions prior to the date of the order of adjudication it was the duty of the Crown to have pleaded the protection of that Section and further the burden was upon the Crown to show that at the time of the transaction in question it had no notice of the presentation of an insolvency petition.

The English cases in (1874) 9 Ch A 409,[5] and (1884) 13 Q B 727[6] establish the same principle. In this particular case it is admitted that the payment in question was prior to adjudication and the only point that remains is as to whether the opponents have discharged the onus of proving that they had no notice of the presentation of the insolvency petition. I am prepared to agree with the learned advocate for the opponents that sometimes it would only be possible to prove that no notice had been received by a bare denial on the point and in the absence of circumstances indicating that the denial is false, it should prevail. In this case however the opponents are not present in Court to say that they did not receive notice of the presentation of the petition and they have filed no affidavit on the point. A denial in the objections filed by them is insufficient to discharge the onus. The objections are mere pleadings. I hold therefore that the opponents have failed to establish that they had no notice of the presentation of the petition.

In view of this conclusion it is not strictly necessary to consider the matter further but having heard arguments in full I would add that taking all the circumstances into consideration I consider the opponents must have had notice of the filing of the petition and that the transaction was not bona fide. Both parties reside and carry on business as merchants at Amritsar and although the adjudication was at Karachi, it is in the highest degree unlikely that the opponents would not learn of the adjudication. The news of an insolvency rapidly circulates and there is considerable business connexion between Amritsar and Karachi.

1. (1906) 2 Ch 444=75 L J Ch 724=95 L T 333 =22 T L R 812=13 Mans 321.
2. Nanackchand Ramanand v. Official Receiver, (1933) 20 A I R Sind 85=143 I C 628.
3. Dharamdas Thawardas v. F. O. Hukumchand Mirimal, (1932) 19 AIR Sind 62=138 IC 628.
4. Secy. of State v. S. C. Niyogi, (1935) 22 A I R Rang 273=158 I C 361.
5. Ex parte Schulte; In re Matanle, (1874) 9 Ch A 409.
6. Ex parte Revell; In re Tolle Mache, (1884) 13 Q B 727=54 L J Q B 92 = 51 L T 879 = 33 W R 289.

The opponents have given no details as to the nature of the claim when the suits were filed or why claims aggregating over Rs. 800 were settled for Rs. 500. The insolvents were served with notice of the petition for adjudication on 22nd January 1937 and the payment was made on 1st July, over six months later. I hold that the payment of Rs. 500 to the opponents is void as against the Official Assignee, and I order the opponents, to refund the said sum to the Official Assignee together with interest at 6 per cent. from 1st July 1937 till date of payment, and I further direct the opponents to pay the costs of the application.

D.S./R.K. *Order accordingly.*

A. I. R. 1939 Sind 363

DAVIS J. C. AND LOBO J.

Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan — Applicant.

v.

Indian Relief & Benefit Insurance Co. Ltd., Karachi — Assessees — Opponents.

Reference No. 51 of 1938, Decided on 27th February 1939, made by Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan.

(a) Income-tax Rules, R. 31—Insurance Company doing dividing society business held came within R. 31 and could not be said to be mutual society exempted from tax.

According to the Memorandum of Association of an insurance company one of the objects of the business was to carry on the business of Indian Relief and Benefit Insurance of all kinds including Dividing Society Business. According to the company's rules after deductions of 5 per cent. for the working fund and 25 per cent. for the reserve funds of the total monthly collections for the year and after certain other deductions, the balance was payable in certain proportions and within certain limits to the policy-holders or subscribers of that year. The company and its capital and its shareholders were things distinct and apart from the members of the society or policy-holders and their premia and the premium income. There was no mutuality between the company and its shareholders and the policy-holders as such:

Held that R. 31 of the Income-tax Rules applied and the assessee could not be said to be a mutual society and exempted from tax : *(1885) 2 Tax Cas 100, Rel. on; A I R 1939 Sind 293 and A I R 1939 Sind 296, Ref.; (1883-90) 2 Tax Cas 460, Disting.* [P 363 C 2 ; P 364 C 1]

(b) Income-tax Rules, R. 31 — R. 31 is not ultra vires.

The words "which, in the opinion of the Central Board of Revenue, is unreasonable" in S. 59 (a) (3) give the Central Board of Revenue absolute discretion to decide in cases coming under cl. (a) of sub-s. (2) whether amount of trouble to the assessee is unreasonable, and in that case to estimate the income in accordance with rules prescribed. Such a rule is R. 31. R. 31 is therefore not ultra vires. [P 364 C 2]

Partabrai D. Punwani, Advocate-General — *for Applicant.*

Suganlal — *for Opponents.*

Davis J. C.— This is another reference under S. 66 (2), Income-tax Act, to this Court in its High Court jurisdiction by the Income-tax Commissioner, Bombay and Sind, stating a case for our decision at the instance of the assessee, the Indian Relief and Benefit Insurance Company, Limited, on three questions raised thereby. The three questions are stated by the learned Commissioner as follows :

(i) The finding of fact being that the assessee company is doing dividing society business, has the Income-tax Officer correctly held that R. 31 of the Income-tax Rules applied ?

(ii) Whether the assessee can be said to be a mutual society and exempted under the principle laid down by the House of Lords in (1883-90) 2 Tax Cas 460 [1] ?

(iii) Whether R. 31 of the Income-tax Rules is ultra vires ?

The first two questions are substantially the same as those raised in the two other cases with which we have dealt — the Reference Nos. 17 of 1937[2] and 60 of 1937;[3] the same principles apply, and our answer to the first two questions is in the affirmative and negative respectively for the reasons fully set out in the first of those two cases. So far as the third question is concerned, it has not been seriously argued before us that R. 31 is ultra vires, and, in our opinion, it is not. Arguments were directed chiefly against the finding of the learned Commissioner, that R. 31 applied to all the facts of this case. We consider it is open to us as a question of law to decide whether the business of the assessee is a dividing society business within the meaning of R. 31 of the Income-tax Rules, but the case against the assessee is even stronger in this case than in the two others we have decided, for, in its very memorandum of association the assessee states that one of the objects of the business is "to carry on the business of Indian Relief & Benefit Insurance of all kinds 'including Dividing

1. Styles v. New York Life Assurance Co., (1889) 14 A C 381=2 Tax Cas 460=59 L J Q B 291.
2. Commr. of Income-tax v. Central Popular Assurance Co. Ltd., Karachi, *Reported in* (1939) 26 A I R Sind 293.
3. Commr. of Income-tax v. Sind Central, Provident Funds Society Limited, *Reported in* (1939) 26 A I R Sind 296.

Society Business'." It is true, of course, that a statement of this kind in its memorandum of association in no way concludes the argument against an assessee that it is not as a mutual society liable to pay tax on the premium income and that it did not do dividing society business in the year in question, but when reference to the rules themselves show that they are rules to carry out a dividing society business, little on this point appears left to be said for the assessee.

Reference to Rr. 43, 44, 45 and 55 of the Company's rules show that after deductions of 5 per cent. for the working fund and 25 per cent. for the reserve funds of the total monthly collections for the year and after certain other deductions the balance is payable in certain proportions and within certain limits to the policy-holders or subscribers of that year. This business appears to be that kind of insurance business which falls within the definition of "Dividing Insurance Business" in the Rules of the Government of India made under Act 6 of 1912, which definition we have accepted as correct and fair in the two other cases. In this case too, as in the other two cases, the company and its capital and its shareholders are things distinct and apart from the members of the society or policy-holders and their premia and the premium income. The assessee is a company registered under the Indian Companies Act ; it has a subscribed capital of Rs. 3550 divided into 355 shares of Rs. 10 each of which 65 have been paid. It is true it collects and pays out to the subscribers or policy-holders after certain deductions money paid into the appropriate funds. But there is no mutuality between the company and its share-holders and the policy-holders as such and for the reasons we have already given in References Nos. 17[2] and 60[3] of 1937, we think there is no doubt that the assessee comes within the ruling in (1885) 2 Tax Cas 100,[4] and is not within the ruling in *Styles' case.*[1] The company was not therefore to be assessed on its declared income of Rs. 2144-9-0 but on the basis of a 15 per cent. profit on its premium income of Rs. 1,03,445, the final assessment to income-tax being Rupees 17,859 under the provisions of Rule 31 of the Income-tax Rules.

On the third question, whether R. 31 is ultra vires, the argument for the assessee was that the rule could not apply in cases where the income could be assessed as in this case. What was paid back to the subscribers could be ascertained and that, it was argued, was not income. What interest had been earned on securities could be ascertained, and that was assessable income and no more. But the words of sub-s. (3) of S. 59 (a) are wide. They are :

(3) In cases coming under cl. (a) of sub-s. (2), where the income, profits and gains liable to tax cannot be definitely ascertained, or can be ascertained only with an amount of trouble and expense to the assessee which, in the opinion of the Central Board of Revenue, is unreasonable, the rules made under that sub-section may

(a) prescribe methods by which an estimate of such income, profits and gains may be made, and

(b) in cases coming under sub-cl. (i) of cl. (a) of sub-s. (2), prescribe the proportion of the income which shall be deemed to be income, profits and gains liable to tax,

and an assessment based on such estimate or proportion shall be deemed to be duly made in accordance with the provisions of this Act.

The words "which, in the opinion of the Central Board of Revenue, is unreasonable" appear to us to give the Central Board of Revenue absolute discretion to decide in cases coming under clause (a) of sub-s. (2) whether the amount of trouble to the assessee is unreasonable, and in that case to estimate the income in accordance with rules prescribed. Such a rule is R. 31. We think therefore there is no force in the argument that R. 31 is ultra vires, and the third question is to be answered in the negative. The three questions raised by the learned Commissioner are therefore decided accordingly. Same order as to costs as in Reference No. 17 of 1937.[2]

D.S./R.K. *Answered accordingly.*

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* A. I. R. 1939 Sind 364

DAVIS J. C. AND LOBO J.

Commissioner of Income-tax, Bombay Presidency, Sind and Aden — Applicant.

v.

Central Popular Assurance Co. Ltd. — *Assessee* — Opponent.

Reference No. 17 of 1937, Decided on 22nd May 1939; reference made by Commissioner of Income-tax, Bombay Presidency, Sind and Aden.

*** Income-tax Act (1922), S. 66 (2) — Fee of Rs. 100 is part of costs of reference by assessee and part of cost of reference by Commissioner and therefore falls within terms of 'costs' as used in S. 66 (6) — Assessee unsuccessful in reference—His contentions shown to be wrong**

4. Last v. London Assurance Co. Ltd., (1885) 10 A C 438=55 L J Q B 92=2 Tax Cas 100=53 L T 634=34 W R 233.

— Taxed costs will not be set off against fee of Rs. 100 paid under S. 66 (2).

The word "fee" in sub-s. (2) does not mean a deposit or security. It is the price paid by the assessee for the reference and it is not unreasonable to assume that the word is used in its ordinary meaning, that is to say, it is a fee for payment for work done in connexion with the reference by the Commissioner. It is however part of the costs of reference by him and likewise the cost or part of the cost of the reference by the Income-tax Commissioner. Therefore as such it falls within the term "costs" as used in sub-s. (6) and it is in the discretion of the Court to pass such order in relation to it as may, in its judicial discretion, seem proper. When the assessee is successful, when it is clear that he is right in his contention, there is no reason why he should not have paid back to him as part of the costs incurred this Rs. 100 plus any taxed costs incurred by the proceedings in Court. But on the other hand, if he should fail and his contention be shown to be wrong, he should lose this Rs. 100 and pay as well the taxed costs incurred by proceedings in Court on the general principle that costs should follow the event. The taxed costs will not be set off against the fee of Rs. 100 paid under sub-s. (2) of S. 66 which the Commissioner will retain as a fee. [P 365 C 2; P 366 C 1, 2]

Partabrai D. Punwani, Advocate-General — *for Applicant.*

Suganlal Hassanand — *for Opponents.*

Davis J. C. — We have before us the question of the costs and the method of calculating the costs to be awarded to the Commissioner of Income-tax in a reference made by him under Sec. 66 (2), Income-tax Act, in which the assessee was unsuccessful. There appeared to be two extreme views taken by the learned advocate who appeared in this case on behalf of the unsuccessful assessee and the learned Advocate-General for the Income-tax Commissioner. Mr. Suganlal, for the unsuccessful assessee, takes the view that Rs. 100 which is payable under Sec. 66 (2), Income-tax Act, is, what he describes as a deposit or security for costs to be incurred in Court, and that if these taxed costs should be less than Rs. 100, as would be the case here, the unsuccessful assessee is entitled to refund of the balance. The learned Advocate-General takes the view that this Rs. 100 does not fall within the discretion of this Court under sub-s. 6 of S. 66, Income-tax Act, at all. He says that the Court cannot even when the assessee is successful direct that he should be repaid this Rs. 100 which is the price of the reference; that the Legislature did not intend this Rs. 100 to be the subject of the order of the Court at all, and he relies principally upon the fact that the proviso to sub-s. 2 of S. 66 expressly provides the circumstances under which this fee may be refunded and these circumstances relate to something which happens before the reference reaches the Court and not after. We think however that the better view lies between these two extremes. We do not think that in view of the fact the word 'fee' is used by the Legislature in sub-s. 2 it can mean, as Mr. Suganlal argues, a deposit or security; the word 'fee' in this case appears clearly to be the price paid by the assessee for the reference and it is not unreasonable to assume that the word is used in its ordinary meaning, that is to say it is a fee for payment for work done in connexion with the reference by the Commissioner.

One of the objects, of course, of fixing this fee at Rs. 100 may have been to discourage a frivolous reference and the revenue authorities have statutory powers to reduce this fee; but be that as it may, we think, that there is no reason why the word 'fee' in sub-s. 2 of S. 66, Income-tax Act, should not be given its own ordinary meaning. We see however nothing incompatible between the view that Rs. 100 is a fee and the view that this Rs. 100 is nevertheless part of the costs of the reference and therefore within the discretion of the Court under sub-s. 6. Part of the costs of reference by the assessee is undoubtedly payment of this fee of Rs. 100. It is part of the costs of reference by him and likewise the cost or part of the costs of the reference by the Income-tax Commissioner. Therefore we think as such it falls within the term 'costs' as used in sub-s. 6 and that it is in the discretion of the Court to pass such orders in relation to it as may, in its judicial discretion, seem proper.

Our attention has been drawn to a Rangoon case in 11 Rang 454,[1] the part of the judgment dealing with the question of this fee of Rs. 100 is at pp. 460 and 461. But in this Rangoon case as in the Bombay case in 38 Bom L R 929[2] the assessee was successful and we have no difficulty in holding that when the assessee is successful, when it is clear that he is right in his contention, there is no reason why he should not have paid back to him as part of the costs incurred this Rs. 100 plus any taxed costs incurred by the proceedings in Court. But on the other hand, we see no reason, if he should fail and his contentions be shown to be wrong, why he should not lose this

1. Commissioner of Income-tax, Burma, v. J. I. Milne, (1934) 21 A I R Rang 4=148 I C 98=11 Rang 454 (S B).
2. Commissioner of Income-tax, Bombay v. Gopal Vaijnath, (1936) 23 A I R Bom 385=165 I C 518=60 Bom 999=38 Bom L R 929.

Rs. 100 and pay as well the taxed costs incurred by proceedings in Court on the general principle that costs should follow the event. In the Bombay case the learned Chief Justice was dealing with a case where the assessee was successful and he said:

The Advocate-General says that in some of the decisions of the other High Courts the fee has not been treated as part of the costs, but the Court has made an order that it be refunded. In my view the Court has no jurisdiction to order the fee as such to be refunded; it can only deal with the matter in relation to costs. In my opinion, the fee is part of the assessee's costs of the reference, and consequently our order directing the Commissioner to pay the costs covers the return of the fee as being part of the out of pockets of the assessee. In cases in which the assessee is ordered to pay costs, the Court can if it considers that credit should be given to the assessee for the fee, give the Commissioner his costs less Rs. 100.

So that the learned Chief Justice was not dealing with the case of the unsuccessful assessee but merely said what, with respect, we think necessarily follows from his finding, that the fee is part of the costs. It is a matter to be dealt with by the Court in its discretion under sub-s. (6), and there is nothing in any relevant Section in that Act which deals with this fee of Rs. 100 separately as such and gives the Court power to order its refund as a fee. If it is not part of costs within the meaning of sub-sec. (6) the Court has no power to deal with it at all. But we think clearly that the Court has power to deal with it because so far the assessee is concerned it is clear that he pays Rs. 100 as the price of the reference to be made by the Commissioner, it is part of the costs of the reference with which sub-s. (6) deals and if the assessee is successful ordinarily he should be entitled to his costs which include this fee.

Our attention has been drawn to a case of this Court, 31 S L R 432[3] and the remarks at page 437 which deal with the refund of the balance of this Rs. 100 after taxed costs had been deducted because according to the scales of fees in force in this Court it must happen in many cases that the taxed costs would be less than Rs. 100, so that the unsuccessful assessee would often be entitled to a refund if we hold that this Rs. 100 was, as it were, a deposit or security against which the taxed costs incurred by him had to be set-off, and balance being repaid to him. But in this case the learned Judges did not consider this question at any length, nor indeed do we think they gave a decision which binds this Court. The learned Judge who gave the judgment went no further, we think, in that case than to express a pious hope. He said:

The assessee has already deposited Rs. 100 with the Income-tax Commissioner to meet the costs of this reference as we order that the Income-tax Commissioner should have his costs as taxed by this Court provided such sum does not exceed Rs. 100. If the costs taxed are less, the assessee will no doubt get a refund from the Income-tax Commissioner of the balance.

But even if the learned Judges had there decided that the balance should be refunded, even so under sub-sec. (6) it would appear they had discretion. But we think that in this case before us there is no reason that we should follow any other principle than that costs follow the event. The assessee in this case was unsuccessful. No circumstance has been shown which invites special sympathy on his behalf. It does not appear that the Commissioner of Income-tax did anything which was unnecessary or which would invite our disapproval or discrimination against him. It was said that in one case for instance, the Commissioner of Income-tax refused to make a reference when called upon by this Court to do so. In such a case it would be within this Court's discretion to order the fee of Rs. 100, as part of the costs, to be returned to even an unsuccessful assessee. But in this case there is no circumstance of this kind and we see no reason why, as the assessee has failed, he should be entitled to a credit of this Rs. 100 or the return of the balance merely because he had to pay it in advance as a fee to the Commissioner and as the price of the reference. It was enacted that a fee of Rs. 100 should be paid because presumably the Legislature thought this sum was a fair return for the work involved by the reference; and it being shown, as in this case, that the assessee was wrong and the Income-tax Commissioner was right on the questions raised in the case stated, we see no reason why this fee of Rs. 100 should be returned to the unsuccessful assessee, by way of cash or credit, in part or in whole. The order as to costs then will be that the unsuccessful assessee is to pay the taxed costs and these taxed costs will not be set-off against the fee of Rs. 100 paid under sub-s. (2) of S. 66, Income-tax Act, which the Commissioner will retain as a fee.

D.S./R.K. *Order accordingly.*

3. Commissioner of Income-tax, Bombay Presidency and Aden v. K. H. Katrak, (1937) 24 AIR Sind 234=171 I C 375=31 S L R 432.